

# OTHER LANDS AND OTHER SKIES: BIRTHRIGHT CITIZENSHIP AND SELF-GOVERNMENT IN UNINCORPORATED TERRITORIES

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## INTRODUCTION

By denying *certiorari* in *Tuaua v. United States*,<sup>1</sup> the U.S. Supreme Court declined to resolve the question whether the Constitution confers birthright citizenship on persons born subject to the jurisdiction of the United States in its unincorporated territories.<sup>2</sup> Many believe that the question presents a fundamental conflict between individual rights and collective self-determination.<sup>3</sup> Denying birthright constitutional citizenship discriminates against those born in unincorporated territories. It leaves their nationality to the grace of Congress, which can impose conditions precedent and subsequent to their attaining and retaining U.S. nationality.<sup>4</sup> It extends the racist foundation of the *Insular Cases*<sup>5</sup> beyond their express holdings.<sup>6</sup> In particular, it discriminates against persons born in American Samoa who receive only non-citizenship nationality under federal statutory law, an intermediate status between citizens and aliens.<sup>7</sup> Even when residing in one of the fifty states, they cannot serve as Representatives or Senators; they cannot serve as officers in the armed forces or in many federal jobs, including in the federal judiciary; and in many states, they cannot vote,

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<sup>1</sup> 788 F.3d 300 (D.C. Cir. 2015) (denying birthright constitutional citizenship to persons born in American Samoa), *cert. denied*, 136 S. Ct. 2461 (2016).

<sup>2</sup> See Petition for Writ of *Certiorari* at I, 2–14, *Tuaua*, 788 F.3d at 300, No. 15-981 [hereinafter *Pet. for Cert.*]; see also *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1683, 1685–86, 1702 (2017) [hereinafter *Study*].

<sup>3</sup> *Study*, *supra* note 2, at 1685.

<sup>4</sup> See, e.g., *Rogers v. Bellei*, 401 U.S. 815 (1971) (upholding congressional authority to impose conditions subsequent on statutory citizenship conferred outside of the United States); Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1068–71 (2008) (noting Justice Blackmun’s holding in *Rogers* “that the statutory citizenship of persons born abroad to U.S. citizen parents is not fundamentally irrevocable and may be conditioned by Congress”).

<sup>5</sup> For a summary of the *Insular Cases* prepared by the Editors, see the Appendix to this Article.

<sup>6</sup> See *Study*, *supra* note 2, at 1693–94.

<sup>7</sup> See Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 (2017); see also Immigration and Nationality Act §§ 101(a)(29), 308(1) (codified as amended at 8 U.S.C. §§ 1101(a)(29), 1408(1)).

bear arms, or hold public office or public-service positions.<sup>8</sup> On the other hand, some fear that acknowledging birthright constitutional citizenship in unincorporated territories could undermine their self-determination by tightening equal protection constraints on their local governments.<sup>9</sup>

This Article argues that there is no fundamental conflict between birthright citizenship and self-government in unincorporated territories. English common law embodied in the original Constitution confers birthright citizenship and permits self-government there.<sup>10</sup> England recognized the common-law rule knowing that it applied in remote territories and to “people not only *alterius soli*, but *alterius coeli*.”<sup>11</sup> The extent to which American equal protection doctrine constrains local governments in unincorporated territories is a separate constitutional issue.

This Article also shows that shortly after the ratification of the Fourteenth Amendment, Congress recognized that the common-law rule applied in the Oregon Country during its joint occupation with Britain, when it was self-governing and unincorporated under the later-invented standards of the *Insular Cases*.<sup>12</sup> It was Oregon, not the territories acquired from Spain in 1898, that first required the United States to confront the limits of congressional authority over territories and to determine whether the nation would become a colonial power.<sup>13</sup> Congress abjured colonialism and permitted self-government in the Oregon Country only to embrace colonialism later in the insular territories. This Article concludes by suggesting that the Oregon precedent of organic self-government combined with birthright American citizenship provides a model for self-governing territories that are affiliated with the United States but are neither states nor colonies.

Part I details the common-law rule of birthright citizenship and its application in unincorporated territories. Part II responds to the principal arguments against recognizing birthright citizenship there. Parts III to V present a short history of the Oregon Country, a federal district court decision finding that the Fourteenth Amendment is merely declaratory of the common-law rule that applied in Oregon in 1824, and Congress’s 1872 confirmation that the rule applied there during its joint occupation from 1818 to 1846. Parts VI and VII show that the Oregon Country was unincorporated and explain why it, rather than the insular territories, first required Congress to confront the limits of its territorial authority and whether to become a colonial power. This Article concludes that the Oregon experience and the American application of

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<sup>8</sup> See *Pet. for Cert.*, *supra* note 2, at 10–11.

<sup>9</sup> See *Study*, *supra* note 2, at 1685.

<sup>10</sup> *Id.* at 1696, 1698–99.

<sup>11</sup> 15 FRANCIS BACON, *THE WORKS OF FRANCIS BACON* 218 (James Spedding et al., eds., 1864).

<sup>12</sup> See Appendix.

<sup>13</sup> See *Oregon History: Territorial Government*, OR. SEC’Y ST., <https://sos.oregon.gov/blue-book/Pages/facts/history/pre-territorial.aspx> [<https://perma.cc/U6PX-HDRP>] (last visited Nov. 29, 2018).

the common-law rule of birthright citizenship allow a flexible combination of organic self-government and birthright American citizenship in U.S. territories.

### I. THE COMMON LAW AND *CALVIN'S CASE*

The English common law provides the constitutional rule of birthright citizenship.<sup>14</sup> The common-law rule is the *jus soli* (right of soil): natural-born subjects were those born within the dominions and ligeance of the King, consistent with the 1608 English decision in *Calvin's Case*.<sup>15</sup> Only two classes of persons born within the King's dominions were born without his ligeance: those of foreign ambassadors, and those of hostile foreign occupying forces.<sup>16</sup> Only one class of persons born without the King's dominions were his natural born subjects: those of English ambassadors.<sup>17</sup> The background, arguments and decision in *Calvin's Case* are useful for understanding why the right of soil applies in unincorporated territories.

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<sup>14</sup> See *Weedin v. Chin Bow*, 274 U.S. 657, 660 (1927); *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898); *Minor v. Happersett*, 88 U.S. 162, 167–68 (1875).

<sup>15</sup> *Calvin's Case* (1608), 77 Eng. Rep. 377; 7 Co. Rep. 1a. See also 1 WILLIAM BLACKSTONE, COMMENTARIES \*357; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997).

<sup>16</sup> See *Wong Kim Ark*, 169 U.S. at 657; U.K. GOV'T, *British Nationality: Summary* § 1.3.1, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/267913/britnatsummary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267913/britnatsummary.pdf) [<https://perma.cc/F7A3-MYCD>]. The U.K. government website does not identify the author of the summary, but the U.K. Home Office confirmed to the author that the summary reflects its understanding of the law.

<sup>17</sup> See 12 Journal of the House of Lords: 1666–1675, at 86 (London, 1767–1830), <http://www.british-history.ac.uk/lords-jrnl/vol12/pp86-87> [<https://perma.cc/BY2C-R8CF>]; BLACKSTONE, *supra* note 15, at 361; LAURIE FRANSMAN, FRANSMAN'S BRITISH NATIONALITY LAW 131 (3d ed. 2011). Foreign-born children of English parents in other crown service, such as serving soldiers, were not natural born. See *De Geer v. Stone* (1882) 22 Ch. D. 243 (Eng.) (rejecting arguments that the ambassador rule applied to serving soldiers and that British derivative nationality statutes were declaratory of the common law); FRANSMAN, *supra*, at 132–33. Cf. An Act for the making free and to putt in the nature of mere Englisshmen certayne children begotten and born byyonde the Sea, (1541) 33 Hen. 8 c.25 (naturalizing, among others, the foreign-born child of an aide to Henry VIII who had gone beyond the sea “about the Kyng's affayres”). The scope of the ambassador rule is uncertain. John Adams interpreted it to include children of the ambassador, of his family, and of any of his country men and women attached to the embassy. See Letter from John Adams to William Steuben Smith, NAT'L ARCHIVES (May 30, 1815), <http://founders.archives.gov/documents/Adams/99-03-02-2874> [<https://perma.cc/PU75-TMQM>]. This Article refers to the ambassador generally without taking a position on the exception's scope. Some consider children born on British ships to be natural born at common law. See FRANSMAN, *supra*, at 131. It is generally assumed that foreign-born children of the English monarch were also natural born subjects, likely because of a fourteenth-century statute declaring that they could inherit at common law. See U.K. GOV'T, *British Nationality: Summary*, *supra* note 16, at § 1.4.1; De natis ultra mare [Status of Children Born Abroad Act], 1350, 25 Edw. 3 stat. 2, cl. 3.

In 1603, the English crown descended to James VI of Scotland upon the death of Elizabeth.<sup>18</sup> The descent united the crowns of England and Scotland in the natural person of James without uniting the two kingdoms.<sup>19</sup> Each retained its political independence, laws and parliament.<sup>20</sup> The union of the crowns raised an important question decided in 1608 by all the judges of England in *Calvin's Case*: whether those born in Scotland after the descent were natural born subjects in England at common law because they owed allegiance to the natural body of James, the King of both kingdoms, or instead were aliens because they owed allegiance to the politic body of James VI, King of Scotland, rather than the politic body of James I, King of England.<sup>21</sup>

All agreed that any person born within the English King's dominions and ligeance was a natural born subject in all of those dominions if the King had acquired them by conquest or discovery.<sup>22</sup> This included dominions acquired by conquest and governed by separate laws, such as Ireland.<sup>23</sup> Even "while the realm of England and that of Ireland were governed by several laws, any that was born in Ireland was no alien to the realm of England."<sup>24</sup>

*Calvin's Case* was only contentious because England had not acquired Scotland by conquest or discovery.<sup>25</sup> Scotland remained an independent kingdom united with England only through their peoples' shared natural allegiance to King James.<sup>26</sup> Therefore, the case required the judges to address the distinction between the monarch's acquisition of a politically independent dominion by descent, and England's acquisition of a subordinate dominion by conquest or discovery.<sup>27</sup>

Many English objected to interpreting the common-law rule broadly to make anyone born in a dominion acquired by descent a natural-born subject in all of the King's dominions.<sup>28</sup> Some objected because the interpretation could not be restricted to Scots, a "people of the same island and language,"<sup>29</sup> but would necessarily apply throughout the world "to persons every way more estranged from us than they

<sup>18</sup> See Price, *supra* note 15, at 80.

<sup>19</sup> See *Calvin's Case* (1608), 77 Eng. Rep. 394; 7 Co. Rep. 15a; Price, *supra* note 15, at 80 n.28 ("It was a strictly dynastic, regal, and personal union, not an incorporating union of the two kingdoms." (quoting BRIAN LEVACK, *THE FORMATION OF THE BRITISH STATE, 1603–1707* 1 (1987))).

<sup>20</sup> *Calvin's Case* (1608), 77 Eng. Rep. 394; 7 Co. Rep. 15a. See also Price, *supra* note 15, at 80.

<sup>21</sup> See Price, *supra* note 15, at 103.

<sup>22</sup> See BACON, *supra* note 11, at 219 (Lord Bacon arguing as counsel for Calvin).

<sup>23</sup> See *id.* at 220–21.

<sup>24</sup> *Calvin's Case* (1608), 77 Eng. Rep. 377, 398; 7 Co. Rep. 1a, 17b.

<sup>25</sup> See Price, *supra* note 15, at 80–86 (discussing the *Calvin* and *Colville* cases as a means of discussing, in the English courts, what Parliament had fully debated in 1604—whether Scots were aliens or subjects in England).

<sup>26</sup> See *id.* at 80, 80 n.28, 82.

<sup>27</sup> See BACON, *supra* note 11, at 219.

<sup>28</sup> *Id.* at 218.

<sup>29</sup> *Id.*

are;”<sup>30</sup> so that, for example, “if in future time, in the king’s descendants, there should be a match with Spain, and the dominions of Spain should be united with the crown of England,”<sup>31</sup> those born afterward in the West Indies would be natural born subjects in England even though they “are people not only *alterius soli*, but *alterius coeli*.”<sup>32</sup> Lord Bacon argued in response that this objection was political, not legal.<sup>33</sup> If descent united the English and Spanish crowns, West Indian *post-nati* would be natural-born subjects in England.<sup>34</sup> If that were to become a political problem, England could readily solve it “when the case comes; for we can make an act of parliament of separation if we like not their consort.”<sup>35</sup>

Others stated a variety of objections that were also political rather than legal. Some objected that the broad interpretation would lead to an influx of Scots and “the impoverishing of this realm of England in wealth.”<sup>36</sup> Others objected that the interpretation would disrupt the governments of each of the separate dominions. Sir Edwyn Sandes, for example, warned that “[t]his case may give a dangerous example for . . . all nations that hereafter may fall into the subjection of the king, although they be very remote, in that their mutual commonality of privileges may disorder the settled government of every of the particulars[.]”<sup>37</sup> Although he denied that *post-nati* Scots were natural-born subjects in England at common law, Sandes nevertheless believed that they should hold an intermediate position because of their joint subjection to a single King: “the Scots should not be accounted nor deal[t] withall by our lawes, as aliens, although not enabled to the full rights of Englishmen born amongst us.”<sup>38</sup> Finally, others objected because territory united by descent could easily separate by descent if the King’s line failed, unlike territory acquired by conquest.<sup>39</sup>

The judges in *Calvin’s Case* rejected all of these objections and held that anyone born under the ligeance of the King in any of his dominions was natural-born in all of them.<sup>40</sup> Lord Ellesmere explained that the laws of each dominion differed,<sup>41</sup> and the King was required to govern each according to its own laws, yet a subject born in any dominion was entitled to the same rights and privileges in any other as were subjects born there:

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 218–19.

<sup>34</sup> *See id.* at 218.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Case of the Union of the Realm of Scotland with England (1608), 2 How. St. Tr. 560, 564. Sandes made this objection when Parliament debated a proposal to declare the common law on point. *See id.* at 562–63.

<sup>38</sup> *Id.* at 564.

<sup>39</sup> BACON, *supra* note 11, at 222–23.

<sup>40</sup> *See Calvin’s Case* (1608), 77 Eng. Rep. 377, 399–400; 7 Co. Rep. 1a, 18a–18b.

<sup>41</sup> *See Case of the Union of the Realm of Scotland with England* (1608), 2 How. St. Tr. 560, 684.

[W]here there is but one sovereign, all his subjects born in all his dominions be born *ad fidem regis*; and are bound to him by one bond of faith and allegiance: and in that, one is not greater nor lesser than another: nor one to be preferred before another, but all to be obedient alike; and to be ruled alike; yet under several laws and customs.<sup>42</sup>

The United States inherited *Calvin's Case* and the common-law rule.<sup>43</sup> The Founders understood and relied on the common-law rule and *Calvin's Case* both to define alienage and to justify colonial independence from Parliament's authority.<sup>44</sup> Further, they recognized that the rule gave anyone born a subject in one dominion the rights of a natural-born subject in all of the others. As John Adams quoted from Coke's report of the case in 1775, "the allegiance of the King extending to both, his birthright shall extend to both"<sup>45</sup> and as "his kingly power extendeth to diverse nations and kingdoms, . . . any one of the people coming into the other, is to have the benefit of the laws, wheresoever he cometh[.]"<sup>46</sup> Thomas Jefferson likewise wrote in 1779 that "during the connection which subsisted between the now United states of America and the other parts of the British empire, and their subjection to one common prince the inhabitants of either part had all the rights of natural born subjects in the other[.]"<sup>47</sup> Adams even pointed out the reciprocal operation of the

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<sup>42</sup> *Id.* (Lord Ellesmere) (spelling modernized).

<sup>43</sup> Price, *supra* note 15, at 74. *See also* Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (explaining the common-law rule in both England and the United States); United States v. Wong Kim Ark, 169 U.S. 649, 659 (1898) (noting the English rule of "citizenship by birth" under colonial law (citing *Inglis v. Trs. of the Sailor's Snug Harbour*, 28 U.S. 99, 126 (1830))); *Inglis*, 28 U.S. at 126 (applying the common-law rule to birth during the Revolutionary War); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 119–20 (1804) (explaining that a person born in Connecticut before the Revolution who moved abroad after Independence was a United States citizen absent an expatriating event).

<sup>44</sup> *See, e.g.*, John Adams, *VII. To the Inhabitants of the Colony of Massachusetts-Bay*, NAT'L ARCHIVES (Mar. 6, 1775), <http://founders.archives.gov/documents/Adams/06-02-02-0072-0008> [<https://perma.cc/637T-BSL5>] [hereinafter Adams, *VII*] (arguing, based on *Calvin's Case*, that Parliament did not have "supreme power" over America); Alexander Hamilton, *The Farmer Refuted, &c.*, NAT'L ARCHIVES (Feb. 23, 1775), <http://founders.archives.gov/documents/Hamilton/01-01-02-0057> (explaining that *Calvin's Case* justifies American colonies' independence from Parliament's authority); Thomas Jefferson, *Notes on British and American Alienage*, NAT'L ARCHIVES (1783), <http://founders.archives.gov/documents/Jefferson/01-06-02-0346> [<https://perma.cc/633D-KG55>] (citing to Coke's report of *Calvin's Case*).

<sup>45</sup> John Adams, *IX. To the Inhabitants of the Colony of Massachusetts-Bay*, NAT'L ARCHIVES (Mar. 27, 1775), <http://founders.archives.gov/documents/Adams/06-02-02-0072-0011> [hereinafter Adams, *IX*].

<sup>46</sup> *Id.*

<sup>47</sup> Thomas Jefferson, *Bill concerning Escheats and Forfeitures from British Subjects*,

common-law rule for the Founders' own English forbears: "our ancestors, most of whom were *post nati*, born after the union of the two crowns, and consequently, as was adjudged in Calvin's case, free natural subjects of Scotland, as well as England[.]"<sup>48</sup>

Consequently, anyone born within the dominions and under the allegiance of the United States is a natural-born citizen under the original Constitution.<sup>49</sup> The Fourteenth Amendment's citizenship clause is merely declaratory of the common-law rule.<sup>50</sup> Its qualifier "subject to the jurisdiction thereof" means "within the allegiance" thereof;<sup>51</sup> it merely "exclude[s], by the fewest and fittest words" the three classes of children born in the United States who do not receive natural-born citizenship: two from the common law ("children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State")<sup>52</sup> and one from American law ("children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law")<sup>53</sup> who are considered to owe primary allegiance to their own sovereigns rather than to the United States.<sup>54</sup> The qualifier does not use "jurisdiction" to refer to the reach of general federal law.<sup>55</sup>

Unincorporated territories are sovereign territory of, and only of, the United States.<sup>56</sup> They, like the fifty states, are within the dominions of the United States.

NAT'L ARCHIVES (June 4, 1779), <http://founders.archives.gov/documents/Jefferson/01-02-02-0115> [<https://perma.cc/FB7H-89R5>]. Whether the colonists were natural born subjects at common law or acquired their status by other means such as charters was a matter of dispute. See John Vlahoplus, *On the Meaning of "Considered as Natural Born,"* WAKE FOREST L. REV. ONLINE (Apr. 5, 2017), <http://wakeforestlawreview.com/2017/04/on-the-meaning-of-considered-as-natural-born/> [<https://perma.cc/2YPU-PVAC>].

<sup>48</sup> Adams, *VII*, *supra* note 44.

<sup>49</sup> See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898) (explaining that the Fourteenth Amendment is declaratory of original constitutional law); Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U.L. REV. 317, 331 (2015) (noting the interpretation of James Kent, nineteenth-century Chancellor of New York, of the Natural Born Citizen Clause of Article II).

<sup>50</sup> See *Wong Kim Ark*, 169 U.S. at 676.

<sup>51</sup> *Id.* at 655 ("[W]ithin the allegiance . . . or, as would be said at this day, within the jurisdiction . . .").

<sup>52</sup> *Id.* at 682.

<sup>53</sup> *Id.* The Court was interpreting the Fourteenth Amendment, which it recognized was declaratory of the common law. See *id.* at 676.

<sup>54</sup> See *id.* at 681–82. The Court was interpreting the Fourteenth Amendment, which it recognized was declaratory of the common law. See *id.* at 676.

<sup>55</sup> See *id.* (referring to Justice Matthew's interpretation that the common law of England was adopted, applied, and altered by the State (citing *Smith v. Alabama*, 124 U.S. 478, 478 (1885))).

<sup>56</sup> See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016) ("U.S. territories . . . are not sovereigns distinct from the United States."). The former rulers of the islands of American Samoa expressly ceded sovereignty to the United States. See *Cession of Tutuila and Aunu'u*, AM. BAR ASS'N SAMOA (Apr. 17, 1900), [http://www.asbar.org/index.php?option=com\\_con](http://www.asbar.org/index.php?option=com_con)

Therefore, everyone born within them is a birthright citizen under the common-law rule incorporated in the original Constitution, except those born to foreign ambassadors, to hostile foreign occupiers, or under Native American allegiance.<sup>57</sup>

Natural-born American citizenship shares one feature with common-law natural-born English nationality: it is unconditional.<sup>58</sup> However, natural-born American citizenship differs in an important respect. The common-law rule granted natural born subjects the equivalent of broad equal protection rights in all of the King's dominions.<sup>59</sup> As Adams wrote, "any one of the people coming into the other, is to have the benefit of the laws, wheresoever he cometh[.]"<sup>60</sup> The U.S. Constitution, on the other hand, imposes a narrower obligation of equal protection on states (through the Fourteenth Amendment) and the federal government (through the Fifth Amendment's incorporation of the Fourteenth Amendment).<sup>61</sup> States and the federal government must provide this narrower equal protection of the laws to American citizens born in unincorporated territories.

However, the Constitution does not expressly impose the same obligation on territorial governments.<sup>62</sup> If unincorporated territories govern by their own right rather than through a delegation of authority from the federal government, their obligation to provide equal protection to citizens from other parts of the United States or to follow other constitutional limitations is open to debate.<sup>63</sup> As discussed further below, the Oregon Country governed itself without any delegation of authority from Congress, and there is no evidence that Congress or the courts demanded its compliance with constitutional requirements.

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tent&view=article&id=1950&Itemid=184 [https://perma.cc/8HVE-QT35]; *Cession of Manu'a Islands*, AM. BAR ASS'N SAMOA (July 14, 1904), [http://www.asbar.org/index.php?option=com\\_content&view=article&id=1951&Itemid=185](http://www.asbar.org/index.php?option=com_content&view=article&id=1951&Itemid=185) [https://perma.cc/69S8-2TR9].

<sup>57</sup> See *Wong Kim Ark*, 169 U.S. at 655, 664–65, 676, 680–81.

<sup>58</sup> See, e.g., *Rogers v. Bellei*, 401 U.S. 815, 834–35 (1971) (citizenship from birth within the United States is unconditional); 1 EDW. COKE, *INSTITUTES OF THE LAWE OF ENGLAND* 129 (1628) (explaining naturalization makes one like a natural born subject, and naturalization on a condition is inconsistent with "the absolutenesse, puritie, and indelibilitie of naturall Allegiance"), <https://hdl.handle.net/2027/osu.32437121663617>.

<sup>59</sup> See Adams, *IX*, *supra* note 45.

<sup>60</sup> See Adams, *VII*, *supra* note 44.

<sup>61</sup> See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PENN. L. REV. 261, 276–77 (1987).

<sup>62</sup> Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 158 (2006) ("Simply stated, the [Territorial Incorporation Doctrine] holds that the Constitution has full force and effect in incorporated territories; while in unincorporated territories, the Constitution does not fully apply."). See also Neuman, *supra* note 61, at 261 ("The Supreme Court disposed of many claims of discrimination by flatly denying that territorial classifications are subject to equal protection scrutiny at all.")

<sup>63</sup> See Tauber, *supra* note 62, at 158 (arguing that if the full Constitution does not apply to U.S. territories, the full protection of the Bill of Rights does not apply either).

## II. ARGUMENTS AGAINST BIRTHRIGHT CITIZENSHIP IN UNINCORPORATED TERRITORIES

Despite the breadth of the common-law rule, many argue that the Constitution does not confer birthright citizenship in unincorporated territories.<sup>64</sup> Most of the principal arguments were raised in England and rejected by the judges in *Calvin's Case*.<sup>65</sup> The remainder are inconsistent with either the common-law rule or American legal precedent.<sup>66</sup>

The first argument is that the common-law rule cannot apply in unincorporated territories because it would grant citizenship to unfit and uncivilized *post-nati* in territories acquired from Spain in 1898.<sup>67</sup> Besides being racist,<sup>68</sup> this objection fails because it is political, not legal. The English judges decided *Calvin's Case* knowing that their interpretation of the common-law rule applied to “people not only *alterius soli*, but *alterius coeli*.”<sup>69</sup> If this becomes an insurmountable political problem for the United States and its territories (such as the former Spanish West Indies territory of Puerto Rico), the solution is simple: separation.<sup>70</sup>

The second argument is that the power to conquer or to discover and occupy territories implies congressional authority to deny their *post-nati* natural-born citizenship in order to protect the birthright of existing American citizens.<sup>71</sup> This argument fails because the common-law rule applied in conquered territories even before the decision in *Calvin's Case*, and because the judges in that case rejected the argument that the rule should be interpreted more narrowly to protect the English against an influx of Scots.<sup>72</sup>

The third argument is that common birthright citizenship could adversely affect a territory's exercise of self-government.<sup>73</sup> This fails because the judges in *Calvin's*

<sup>64</sup> *Study, supra* note 2, at 1689 (“[I]n a century of case law since the *Insular Cases*, ‘no federal court ha[d] recognized birthright citizenship as a guarantee in unincorporated territories’” (quoting *Tuaua v. United States*, 951 F. Supp. 2d 88, 95 (D.D.C. 2013), *aff'd* 788 F.3d 300)).

<sup>65</sup> *See Calvin's Case* (1608), 77 Eng. Rep. 377, 398; 7 Co. Rep. 1a, 18a.

<sup>66</sup> *See infra* notes 80–116 and accompanying text.

<sup>67</sup> *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J., concurring, *dictum*) (“Can it be denied that . . . the consequence would be . . . the immediate bestowal of citizenship on those absolutely unfit to receive it?”).

<sup>68</sup> *See, e.g., Juan R. Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007) (“[The *Insular Cases*'s] skewed outcome was strongly influenced by racially motivated biases[.]”).

<sup>69</sup> BACON, *supra* note 11, at 218.

<sup>70</sup> *See id.* (noting that Parliament can separate England from *alterius* dominions by statute “if we like not their consort”).

<sup>71</sup> *See, e.g., Dorr v. United States*, 195 U.S. 138, 140 (1904) (remarking, in a case concerning the right to trial by jury in criminal cases in the Philippines, that Congress has expansive power to enact “needful rules” in newly acquired territories); *Downes*, 182 U.S. at 306.

<sup>72</sup> *See* BACON, *supra* note 11, at 218–19.

<sup>73</sup> *See, e.g., Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

*Case* rejected the same objection when Sandes made it.<sup>74</sup> Although Sandes proposed granting Scots an intermediate status like the statutory status of American Samoans, the judges ruled that the common law makes anyone born within the King's dominions and ligeance natural-born in all of those dominions.<sup>75</sup>

The fourth objection is that the Founders would not have intended "to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty—even where . . . ultimate governance remains statutorily vested with the United States Government."<sup>76</sup> This argument fails because the Founders recognized that the rule applied that way throughout the King's dominions.<sup>77</sup> Two of the most important reasons for the Revolution were the colonists' objections to Parliament asserting ultimate sovereignty over them despite their independent legislatures, and denying them the rights of natural-born subjects despite their common allegiance to the same King.<sup>78</sup>

The fifth argument is that unincorporated territories might gain independence with impractical consequences.<sup>79</sup> This fails because the judges in *Calvin's Case* disregarded English objections that dominions united by descent could easily separate by descent upon a failure of the King's line.<sup>80</sup> Separation does not create practical difficulties.<sup>81</sup> If a territory separates, an individual's nationality also separates following place of birth, absent an agreement for retention or election;<sup>82</sup> both the United States and Britain have rejected contrary dicta in Coke's report of *Calvin's Case*.<sup>83</sup>

<sup>74</sup> See *Calvin's Case*, 7 How. St. Tr. at 563–64.

<sup>75</sup> See *id.* at 614–15.

<sup>76</sup> *Tuaua*, 788 F.3d at 306.

<sup>77</sup> See Adams, IX, *supra* note 45.

<sup>78</sup> See Resolutions of the Stamp Act Congress (Oct. 19, 1765), reprinted in DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606–1898, \*136–39 (William MacDonald ed., 1914).

<sup>79</sup> See *Tuaua*, 788 F.3d at 302, 305 n.6.

<sup>80</sup> See, e.g., *Calvin's Case*, 2 How. St. Tr. at 593–94.

<sup>81</sup> See, e.g., *Inglis v. Trs. of the Sailor's Snug Harbour*, 28 U.S. 99, 120–21 (1830).

<sup>82</sup> See, e.g., *Doe v. Acklam* (1824), 107 Eng. Rep. 572, 578–79.

<sup>83</sup> See, e.g., *Inglis*, 28 U.S. at 120–21 (separation of American colonies); *Doe*, 107 Eng. Rep. at 578–79 (separation of American colonies); *In re Stepney Election Petition* (Isaacson v. Durant), (1886) 17 Q.B.D. 54, 59 (separation of the crown of Hanover, specifically rejecting the dicta in Coke's report); *Letter from Thomas Jefferson to John Adams*, NAT'L ARCHIVES (Feb. 7, 1786), <http://founders.archives.gov/documents/Jefferson/01-09-02-0221> [<https://perma.cc/7WH6-SNE9>] (separation of American colonies, specifically rejecting the dicta in Coke's report). See generally GEORGE CHALMERS, OPINIONS ON INTERESTING SUBJECTS OF PUBLIC LAW AND COMMERCIAL POLICY; ARISING FROM AMERICAN INDEPENDENCE 11–13 (1784) (concerning separation of American colonies, citing loss of subject status in prior territorial separations). The Fourteenth Amendment, being merely declaratory of the common law, should not alter the common law consequences of territorial separation. The effect of separation on previously acquired statutory derivative citizenship is less clear. The *Stepney* court did not reach the issue because all of the alleged statutory subjects had been born abroad to Hanoverian parents after the separation of the crown of Hanover. It is unlikely that American

The sixth argument is that a textual difference in the Thirteenth Amendment's use of "jurisdiction" proves that some places (presumably unincorporated territories) are outside of the United States but subject to its jurisdiction for purposes of birthright citizenship.<sup>84</sup> The Thirteenth Amendment forbids slavery "within the United States, or any place subject to their jurisdiction,"<sup>85</sup> whereas the Fourteenth Amendment's citizenship clause applies to persons "born . . . in the United States, and subject to the jurisdiction thereof."<sup>86</sup> This argument mischaracterizes the qualifier "and subject to the jurisdiction thereof" in the citizenship clause. The qualifier means "within the allegiance" thereof.<sup>87</sup> Consequently, this argument must be read to claim that persons born in unincorporated territories are born outside of the United States and within its allegiance. That is impossible. The citizenship clause is merely declaratory of the common-law rule under which the only persons born outside of the United States and within its allegiance are children of ambassadors. The qualifier only applies to persons born in the United States, and it functions only to exclude by the fewest and fittest words children born to foreign ambassadors, to hostile foreign occupiers, or under Native American allegiance.<sup>88</sup>

The words "any place" in the Thirteenth Amendment and "within its jurisdiction" in the equal protection clause of the Fourteenth Amendment invoke a different meaning of "jurisdiction"—the specific geographic reach of governmental authority, including its extraterritorial reach.<sup>89</sup> Recognizing *jus soli* in unincorporated territories would not affect the Thirteenth Amendment or the equal protection clause of the Fourteenth Amendment. Their applicability depends on the separate determination of which express constitutional restrictions on state and federal governments should apply against territorial governments, discussed further below.

The seventh argument is that the *Insular Cases* preclude birthright citizenship in unincorporated territories because they are not destined for statehood.<sup>90</sup> This argument fails because natural-born citizenship is beyond the ambit of the *Insular Cases*. Those cases involve specific limitations on powers that the Constitution

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statutes in effect before Philippine independence would apply to previously foreign-born children of parents born there even if courts acknowledge that *jus soli* applied there, given Congress's belief upon enacting those statutes that it did not. If the Supreme Court recognizes that *jus soli* applies in the remaining unincorporated territories then a child's derivative citizenship might survive the parent's loss of nationality from their separation. Alternatively, it might follow the parent's loss given that derivative citizenship is secondary. In any event the United States and the separating territory could permit retention or an election.

<sup>84</sup> See *Tuaua*, 788 F.3d at 303–04.

<sup>85</sup> U.S. CONST. amend. XIII.

<sup>86</sup> *Id.* amend. XIV, § 1.

<sup>87</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898).

<sup>88</sup> See *id.* at 664–65.

<sup>89</sup> See Pet. for Cert., *supra* note 2, at 22 (Thirteenth Amendment and extraterritorial jurisdiction).

<sup>90</sup> See *Tuaua v. United States*, 788 F.3d 300, 306 (D.C. Cir. 2015).

grants to Congress (and, by extension, to powers that Congress delegates to territories).<sup>91</sup> However, the Constitution does not grant Congress any power over natural-born citizenship; it only gives Congress the authority to naturalize aliens.<sup>92</sup> The common-law rule of natural-born citizenship is not a limitation on congressional power but rather an organic rule of law imposing a political status that carries with it obligations as well as rights. It predates the *Insular Cases*,<sup>93</sup> the Civil War amendments,<sup>94</sup> the Bill of Rights,<sup>95</sup> the adoption of the Constitution,<sup>96</sup> and Independence.<sup>97</sup> Moreover, as explained below, Congress recognized shortly after the ratification of the Fourteenth Amendment that the common-law rule applied in the Oregon Country during its joint occupation with Britain,<sup>98</sup> even though it was unincorporated under the later-invented standards of the *Insular Cases*.

### III. A BRIEF HISTORY OF THE OREGON COUNTRY

The Oregon Country was the American name for the disputed lands north of the forty-second parallel and west of the Rocky Mountains<sup>99</sup> that Britain, Russia, Spain and the United States all claimed. Disputes over the area nearly led to war among the powers.<sup>100</sup> The United States ultimately secured almost all of the territory by diplomatic means after threats of war.<sup>101</sup> Among the most important diplomatic measures were two treaties with Great Britain.

In 1818 Britain and the United States signed a convention (the “Treaty of 1818”)<sup>102</sup> that provided for joint access to (or occupation of) the Oregon Country in order to prevent a third war between them:

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<sup>91</sup> See Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 2–11 (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>92</sup> See, e.g., 4 Annals of Cong. 1027 (1794) (statement of James Madison) (noting the Constitution only grants Congress the power “to admit aliens”).

<sup>93</sup> See Appendix.

<sup>94</sup> See U.S. CONST. amends. XIII–XV (ratified 1866–70).

<sup>95</sup> See *id.* amends I–X (ratified 1791).

<sup>96</sup> See *id.* (ratified 1787).

<sup>97</sup> See Perez, *supra* note 4, at 1051; see also THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>98</sup> See, e.g., McKay v. Campbell, 16 F. Cas. 161, 165 (D. Or. 1871).

<sup>99</sup> For a series of maps depicting the areas and extent of American and British claims in the Oregon Country, see J. Neilson Barry, *Oregon Boundaries*, 33 OR. HIST. Q. 259, 261, 263, 265, 267 (1932).

<sup>100</sup> See CHARLES H. CAREY, A GENERAL HISTORY OF OREGON PRIOR TO 1861, at 52, 56, 66 (1935).

<sup>101</sup> See *id.* at 68 (explaining the treaties with Spain in 1819 and Russia in 1824).

<sup>102</sup> See generally Convention with Great Britain, Gr. Brit.-U.S., Oct. 20, 1818.

It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open . . . to the vessels, citizens, and subjects of the two Powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, . . . the only object of the high contracting parties, in that respect, being to prevent disputes and differences among themselves.<sup>103</sup>

The two nations did not occupy the Oregon Country with military forces.<sup>104</sup> However, Britain projected its influence through commercial fur trading companies and their settlements.<sup>105</sup> It extended the laws of Upper Canada to the disputed country and gave the Hudson's Bay Company a commercial monopoly and the authority to administer justice there as well as the power to make war and peace with any non-Christian rulers or peoples.<sup>106</sup> As a result, some considered the company's employees to be *de facto* British troops.<sup>107</sup> The territory that the company occupied was effectively a semi-feudal state administered by its local head.<sup>108</sup>

Despite repeated requests by American settlers and resulting proposals in Congress,<sup>109</sup> however, the United States did not extend any municipal, civil or criminal laws to the Oregon Country, not even to the American-occupied areas south of the Columbia River.<sup>110</sup> American settlers relied on frontier justice, Methodist missionaries acting as magistrates, and the occasional intercession of the Hudson's Bay Company to govern the American-occupied area.<sup>111</sup> Finally, a combination of American and French-Canadian settlers established a short-lived government in the American-occupied area in 1841 that led to a provisional government in 1843.<sup>112</sup> The provisional government

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<sup>103</sup> See, e.g., *id.* at art. III (with a ten-year limited term). A subsequent treaty extended the original indefinitely with the right to abrogate on twelve months' notice. See Convention with Great Britain, Gr. Brit.-U.S., Aug. 6, 1827, arts. I, II.

<sup>104</sup> See WILLIAM LAMBERS, *THE ROAD TO PEACE: FROM THE DISARMING OF THE GREAT LAKES TO THE NUCLEAR TEST BAN TREATY* 21–25 (2004).

<sup>105</sup> See CAREY, *supra* note 100, at 231–32, 237, 375.

<sup>106</sup> See *id.* at 151, 161, 317; HUDSON'S BAY CO., *THE ROYAL CHARTER FOR INCORPORATING THE HUDSON'S BAY COMPANY* 15–17 (1816).

<sup>107</sup> See, e.g., UNITED STATES, *ABRIDGEMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856* 286 (D. Appleton et al. eds., Vol. X 1859) (December 1828 statement of Rep. Drayton).

<sup>108</sup> See CAREY, *supra* note 100, at 243.

<sup>109</sup> See *id.* at 266, 318.

<sup>110</sup> See *id.* at 317–18 (explaining a petition in 1840, addressed to Congress and from residents of Willamette Valley, asking for protection against crime, which highlighted the need for civil and criminal law and the protection of private rights as a more urgent issue).

<sup>111</sup> See *id.* at 317–18.

<sup>112</sup> See *id.* at 318–21, 329–31.

established its own postal service,<sup>113</sup> militia,<sup>114</sup> and legal tender<sup>115</sup> (which the Constitution forbids to states).<sup>116</sup> Its legitimacy derived from the consent of the governed—it was created by popular vote, its members were elected by popular vote, and the only initial consequences of failing to pay its taxes were the loss of suffrage and of the benefit of its laws.<sup>117</sup>

The government evolved consensually to encompass British subjects in the area occupied by the Hudson's Bay Company.<sup>118</sup> Its officials swore to support its laws to the extent consistent with their duties as U.S. citizens or British subjects.<sup>119</sup> Its 1843 organic law<sup>120</sup> and 1845 constitution<sup>121</sup> expressly provided that they would only remain in force “until such time as the United States of America extend their jurisdiction over us.”<sup>122</sup>

The United States and Britain settled their differences in June 1846, in a convention that fixed the border “between the territories of the United States and those of Her Britannic Majesty” along the forty-ninth parallel from the Rocky Mountains to the coast.<sup>123</sup> This conceded to the United States the area between the Columbia River and the forty-ninth parallel that the Hudson's Bay Company had previously occupied.<sup>124</sup> Congress continued to leave the Oregon Country alone even after settling the border dispute.<sup>125</sup> The provisional government continued to operate, including organizing a militia in 1847 to respond to a Native American attack on a local mission.<sup>126</sup> After the attack, the provisional government again petitioned Congress to make territorial appointments and to provide assistance.<sup>127</sup>

In response, Congress finally organized the Territory of Oregon and a territorial government for it in August of 1848.<sup>128</sup> The legislation extended federal law to the territory, conferred the rights and obligations of the original Northwest Ordinance on its residents, and ratified the provisional government's existing laws other than

<sup>113</sup> *Id.* at 355.

<sup>114</sup> *Id.* at 354.

<sup>115</sup> *Id.*

<sup>116</sup> See U.S. CONST. art. I, § 10.

<sup>117</sup> See CAREY, *supra* note 100, at 320, 331, 344. Voting was restricted, however, to free males descended of white males. *Id.* at 336.

<sup>118</sup> See *id.* at 347–48.

<sup>119</sup> See *id.* at 349.

<sup>120</sup> *Id.* at 336.

<sup>121</sup> *Stansbery v. First Methodist Episcopal Church*, 154 P. 887, 890–91 (Ore. 1916).

<sup>122</sup> *Id.* at 890.

<sup>123</sup> See Treaty with Great Britain in Regard to Limits Westward of the Rocky Mountains, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869.

<sup>124</sup> See *id.* art III–IV.

<sup>125</sup> See *Oregon History: Territorial Government*, *supra* note 13.

<sup>126</sup> See CAREY, *supra* note 100, at 358–59.

<sup>127</sup> See *id.* at 359, 466.

<sup>128</sup> An Act to Establish the Territorial Government of Oregon, ch.177 § 1, 9 Stat. 323, 323 (1848).

those inconsistent with the Constitution or granting or encumbering land.<sup>129</sup> The provisional government continued to operate until a territorial governor appointed by President Polk arrived in 1849.<sup>130</sup>

#### IV. *MCKAY V. CAMPBELL*

In 1871, a federal district court adjudicated the citizenship claim of William C. McKay,<sup>131</sup> who was born in 1824 to a British father and a Native American mother at a Hudson's Bay Company trading post on the Columbia River.<sup>132</sup> A British naval commander had claimed the post for the crown during the War of 1812<sup>133</sup> shortly after its builder and former owner, an American fur trading company, had sold it to a predecessor of the Hudson's Bay Company in anticipation of its imminent capture.<sup>134</sup> The Treaty of Ghent restored the post to the United States after the war,<sup>135</sup> and an American official took ceremonial possession of it in 1818 while the British company continued to operate within it.<sup>136</sup> Britain later claimed that it had agreed in the treaty to cede only the post, not sovereignty over the land.<sup>137</sup>

In the 1871 decision, District Judge Matthew P. Deady found that the Fourteenth Amendment "is nothing more than declaratory of the rule of the common-law" in *Calvin's Case*<sup>138</sup> and that the common-law rule applied in Oregon at McKay's birth.<sup>139</sup> He then applied *Calvin's Case* in two different ways to determine McKay's status.

The first assumed the validity of the American claim to sovereignty over the entire Oregon Country.<sup>140</sup> Under that rationale Deady found that McKay was born within the United States but not under its jurisdiction.<sup>141</sup> "Of course it matters not whether the exclusive jurisdiction of the United States was excluded from the place

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<sup>129</sup> *Id.* § 14, 9 Stat. 323, 329.

<sup>130</sup> See CAREY, *supra* note 100, at 360.

<sup>131</sup> 16 F. Cas. 161 (D. Or. 1871).

<sup>132</sup> See *id.* at 162. The court dated McKay's birth in 1823. See *id.* Historical sources, however, routinely date it in 1824. See, e.g., JOHN B. HORNER, OREGON: HER HISTORY, HER GREAT MEN, HER LITERATURE 260 (1919).

<sup>133</sup> See CAREY, *supra* note 100, at 179–80.

<sup>134</sup> See *id.* at 214–15.

<sup>135</sup> See *id.* at 215.

<sup>136</sup> See *id.* at 216.

<sup>137</sup> *Id.* at 217.

<sup>138</sup> *Id.*

<sup>139</sup> *McKay v. Campbell*, 16 F. Cas. 161, 161, 164–65 (D. Or. 1871). The Supreme Court later agreed that the Fourteenth Amendment was merely declaratory of original constitutional law. See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898).

<sup>140</sup> See *MacKay*, 16 F. Cas. at 161, 164–65.

<sup>141</sup> See *id.* at 164–65.

of birth of this plaintiff by force of arms or by treaty with Great Britain. The result is the same in each case.”<sup>142</sup>

Under this rationale the entire Oregon Country was within the United States for purposes of birthright citizenship, and the common-law rule from *Calvin’s Case* applied throughout.<sup>143</sup> Even in the British-occupied area any children born to parents adhering to the United States would have received birthright American citizenship either immediately or upon the United States’ occupation in 1846.<sup>144</sup> However, it appears that there were no such children because the Hudson’s Bay Company exclusively occupied the area that it controlled until eight Americans moved north of the Columbia River in 1845.<sup>145</sup>

Deady’s second application of *Calvin’s Case* focused on the unique language of the Treaty of 1818 to find that the treaty divided Oregon’s soil by parentage. “As to the British subject and his children born here, the country was for the time being British soil, while to the American citizen and his offspring it was in the same sense American soil.”<sup>146</sup> McKay was not a citizen under this rationale either, because the soil followed the father and his father was British.<sup>147</sup> He would not have been a citizen if the soil followed the mother, because his mother was Native American.<sup>148</sup>

Although McKay lost his case,<sup>149</sup> the decision confirmed that the common-law rule applied to confer birthright American citizenship in some or all of Oregon from 1818 to 1846.<sup>150</sup> Judge Deady acknowledged that the law left many Oregon residents as aliens because of their births to British fathers and Native American mothers.<sup>151</sup> But he insisted that “[t]he remedy, if any is deemed necessary, is with the legislature, and not the courts.”<sup>152</sup> Congress accepted the challenge in 1872 and reversed the result of the case.<sup>153</sup> The legislative history and the terms of the resulting statute confirm that the entire Oregon Country was American soil within the United States for purposes of birthright citizenship during its joint occupation.<sup>154</sup>

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<sup>142</sup> *Id.* at 165.

<sup>143</sup> *See id.* at 162.

<sup>144</sup> *See Wong Kim Ark*, 169 U.S. at 682 (excluding only children of the occupying force from birthright citizenship); *Inglis v. Trs. of Sailor’s Snug Harbour*, 28 U.S. 99, 156 (1830) (Story, J., dissenting) (receipt by a kind of “*postliminy*” upon subsequent reoccupation).

<sup>145</sup> *See Henry Commager, England and Oregon Treaty of 1846*, 28 OR. HIST. Q. 18, 20 (1927).

<sup>146</sup> *McKay*, 16 F. Cas. at 164.

<sup>147</sup> *See id.* at 165.

<sup>148</sup> *See id.* at 166.

<sup>149</sup> *See id.* at 167.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See* CONG. GLOBE, 42ND CONG., 2nd Sess., 1177 (1872).

<sup>154</sup> *See id.* at 2640.

## V. CONGRESSIONAL RESPONSE

Oregon Senator Corbett introduced a naturalization bill in 1872.<sup>155</sup> The reported debates are from the Senate. Every Senator who discussed the bill agreed that persons born within the Oregon Country and subject to U.S. jurisdiction during the joint occupation were birthright citizens.<sup>156</sup> The Constitution requires nothing more than U.S. title to territory and birth there, other than to foreign ambassadors, to hostile foreign occupiers, or under Native American allegiance.

An example is the exchange between two Senators who were well-aware of Oregon,<sup>157</sup> Allen G. Thurman (former Chief Justice of the Ohio Supreme Court)<sup>158</sup> and Lyman Trumbull (chair of the Senate Judiciary Committee, co-author of the Thirteenth Amendment, and former Justice of the Illinois Supreme Court)<sup>159</sup>:

Mr. THURMAN. I should like to inquire how it is that persons born in what is now the State of Oregon, and who were subject to the jurisdiction of the United States when born, are not citizens of the United States without any act of Congress?

Mr. TRUMBULL. I think they are, and I cannot see the necessity for this bill, except that we are informed by the Senator from Oregon that the courts in Oregon have decided that persons born upon that strip of country which was in dispute between the United States and Great Britain prior to the treaty which settled the boundary line which we claimed, and which was afterward awarded to us, are not citizens of the United States.<sup>160</sup>

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<sup>155</sup> See *id.* at 1177.

<sup>156</sup> See *id.* at 1175–76.

<sup>157</sup> See, e.g., Rep. Allen G. Thurman, Speech of Mr. Allen G. Thurman, of Ohio, on the Oregon Question (Jan. 28, 1846) (transcript of speech by then-Representative Thurman concerning separation of powers and power to annul a treaty with Great Britain over the status of the Oregon Country); THE LINCOLN-DOUGLAS DEBATES: REPRESENTATIVE SELECTIONS 17 (Paul M. Angle ed., 1958) (describing Trumbull's views on opposing statehood for Oregon due to insufficient population). Senator Thurman's speech shows that by the time the United States was willing to press for a final border settlement in 1846 there was significant congressional support for extending U.S. law and protection to Oregon but also continuing fear that doing so would lead to ruinous war with Britain. See Thurman, *supra*, at 9–10.

<sup>158</sup> See Thurman, Allen Granberry (1813–1895), *Biographical Directory of the United States Congress (1774–Present)*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=t000251> (last visited Nov. 29, 2018).

<sup>159</sup> See David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 LOY. U. CHI. L.J. 1117, 1119 (2016); Trumbull, Lyman (1813–1896), *Biographical Directory of the United States Congress (1774–Present)*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=t000392>.

<sup>160</sup> CONG. GLOBE, 42nd Cong., 2nd Sess., 2640 (1872). Notably, neither the act organizing the Territory of Oregon nor the act admitting Oregon to statehood naturalized persons

Senator Corbett clarified that the decision was by a federal district court and applied to those born in the British-occupied area between the Columbia River and the forty-ninth parallel.<sup>161</sup> Before Corbett could explain the judge's technical reasoning, Thurman derided the decision as "absurd"<sup>162</sup> because he could only imagine that the judge had based his decision on the theory that the United States did not own that area:

As long as it depends upon the decision of some judge who does not understand what he is about, it is a trifling matter; but for the Congress of the United States to say that we did not own that territory between the Columbia river and the forty-ninth parallel, and that we have to naturalize the people who were born upon it and were subject to our jurisdiction, for the Congress of the United States to say that, is a pretty serious matter.<sup>163</sup>

Senator Casserly, a lawyer and former corporation counsel for the City of New York,<sup>164</sup> objected for the same reason:

I do not wish, unless it is unavoidable, to object to a bill which is desired by the Senator from Oregon, and which respects that State; but the question involved here is whether or not the United States for a series of years set up a false and unfounded title to territory, and whether it shall now be declared by acts of Congress to have been false and unfounded. I would rather have it laid over until some time when the question can be fully discussed.<sup>165</sup>

Senator Kelly then explained the common-law grounds of the District Court decision:

Both held the territory in common; it was a joint occupation, and in order to be a citizen of the United States he must have

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previously born there even though Americans had lived in Oregon for decades prior to admission. *See id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *See Casserly, Eugene (1820–1883), Biographical Directory of the United States Congress (1774–Present)*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000236> [<https://perma.cc/6E33-WXC7>] (last visited Nov. 29, 2018).

<sup>165</sup> CONG. GLOBE, 42nd Cong., 2nd Sess., 2796 (1872).

been not only born within the United States, but born within the allegiance of the United States. The child of a British minister born in this city . . . is born in the United States, but he is born without the allegiance of the United States; and so it was there in Oregon.<sup>166</sup>

He further explained that “[t]here is no question that those who were born of American parents were American citizens; but the class to which this bill refers are the children of British subjects, born after the treaty of 1818 and before the treaty of 1846.”<sup>167</sup> Senator Corbett also advised that the only purpose of the bill was to make those born in the occupied area conceded to the United States in 1846 “citizens the same as other persons born in that territory[.]”<sup>168</sup> He avoided further debate on whether the proposal was necessary by using a procedural device while Senator Casserly was off the Senate floor.<sup>169</sup>

Senator Trumbull, who did not consider the bill necessary, supported it as a favor to his Oregon colleague. Eliciting laughter from the Senate, he said “I thought that the enactment of the law could do no great harm, and it seemed to be a great gratification to the Senator from Oregon.”<sup>170</sup> Trumbull apparently did ensure that the final statute expressed Congress’s understanding that the British-occupied area was within the United States for purposes of birthright citizenship.<sup>171</sup> The original bill did not so provide.<sup>172</sup> The Senate Judiciary Committee (which Trumbull chaired) amended the bill to confirm that those who were born in the British-occupied area and remained in the United States were citizens “in the same manner as if born elsewhere in the United States” (rather than in that foreign-occupied part of the United States).<sup>173</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 2816.

<sup>170</sup> *Id.* at 2640.

<sup>171</sup> Act of May 18, 1872, 17 Stat. Ch. 172, § 3, 42nd Cong., 2nd Sess., in *THE STATUTES AT LARGE OF THE U.S.A.* 134 (George P. Sanger ed., 1872).

<sup>172</sup> For the original bill’s preamble and operative provision, see *CONG. GLOBE*, 42nd Cong., 2nd Sess., 2639 (1872).

<sup>173</sup> *Id.* The terms of the final statute were generic and did not refer to the British-occupied area. They read: “That all persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States at this time, are citizens of the United States in the same manner as if born elsewhere in the United States.” Act of May 18, 1872, 17 Stat. Ch. 172, § 3, 42nd Cong., 2nd Sess., in *THE STATUTES AT LARGE OF THE U.S.A.* 134 (George P. Sanger ed., 1872). The generic language has led one scholar to conclude that the statute extended the Fourteenth Amendment to Oregon by treating birth there as “tantamount to birth in the United States.” CHARLES R. VENATOR-SANTIAGO, *PUERTO RICO AND THE ORIGINS OF US GLOBAL EMPIRE: THE DISEMBODIED SHADE* 36 (2015). As the legislative history demonstrates, however, the common-law rule as declared in the Fourteenth Amendment

All of the Senators who discussed the bill agreed that birth within the Oregon Country and subject to the jurisdiction of the United States conferred birthright citizenship,<sup>174</sup> and Congress enacted a statute recognizing that the entire Oregon Country was within the United States for that purpose.<sup>175</sup> This occurred only four years after the ratification of the Fourteenth Amendment<sup>176</sup> and demonstrates what that declaratory amendment and the original Constitution recognize as being within the United States and subject to its jurisdiction for purposes of birthright citizenship.<sup>177</sup>

Whether the statute was necessary is an interesting but academic question. Perhaps the Hudson's Bay Company was a *de facto* hostile occupying force. Or perhaps the hostile occupation rule extends to commercial occupation permitted to avoid war. Regardless, the Oregon precedent demonstrates that the Fourteenth Amendment is merely declaratory of the common-law rule, which conferred birthright citizenship in the Oregon Country from 1818 to 1846.

## VI. THE UNINCORPORATED OREGON COUNTRY

The Supreme Court has identified several standards to determine whether a territory is incorporated, including the extension of federal laws and the Northwest Ordinance to it,<sup>178</sup> treaty provisions requiring incorporation,<sup>179</sup> and express declarations of Congress.<sup>180</sup> The Oregon Country did not meet any of these standards at McKay's birth.<sup>181</sup> Congress did not extend federal law or the Northwest Ordinance to Oregon

already applied in Oregon at McKay's birth. The statute merely naturalized those like him who had been born in the British-occupied area to British fathers, a fact that earlier writers had observed. *See, e.g.*, W. L. Hill, *The Doctrine of Natural Allegiance*, 21 AM. L. REG. 69, 79 (Mitchell, et al. eds., 1873); B. C. MOON, *THE REMOVAL OF CAUSES FROM THE COURTS OF THE SEVERAL STATES TO THE CIRCUIT COURTS OF THE UNITED STATES* 302–03 (1901). Judge Deady noted but rejected “a vague public opinion” in Oregon that persons like McKay had received elective American citizenship “by remaining south of the forty-ninth parallel after the treaty of 1846[.]” *McKay v. Campbell*, 16 F. Cas. 161, 167 (D. Ore. 1871).

<sup>174</sup> *See* CONG. GLOBE, 42nd Cong., 2nd Sess., 2639–40 (1872).

<sup>175</sup> Act of May 18, 1872, 17 Stat. Ch. 172, § 3, 42nd Cong., 2nd Sess., in *THE STATUTES AT LARGE OF THE U.S.A.* 134 (George P. Sanger ed., 1872).

<sup>176</sup> *See id.*; *see also* U.S. CONST. amend. XIV (enacted July 9, 1868).

<sup>177</sup> Judge Deady's interpretation of the Treaty of 1818 was certainly wrong. The United States claimed exclusive title to the entire Oregon Country. *See, e.g.*, Thurman, *supra* note 157, at 3. The treaty expressly disclaimed any prejudice to either party's claims to any part of the country. *See supra* note 103 and accompanying text. Therefore the treaty could not have affected *jus soli* citizenship under U.S. law.

<sup>178</sup> *See Downes v. Bidwell*, 182 U.S. 244, 269 (1901).

<sup>179</sup> *See Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

<sup>180</sup> *See Balzac*, 258 U.S. at 309; *Downes*, 182 U.S. at 269.

<sup>181</sup> *See McKay v. Campbell*, 16 F. Cas. 161, 162–63 (D. Ore. 1871). In fact, at the time of McKay's birth, some considered the Oregon Country to be a “desert waste,” “unsettled

until 1848; the Treaty of 1818 did not require incorporation;<sup>182</sup> and Congress did not declare before 1824 that Oregon was incorporated or would become a state.

The Court has also distinguished sparsely populated and easily accessible territories that offer American citizens the opportunity for immigration and settlement, which are more likely to be considered incorporated by implication, from those like Puerto Rico that are less accessible and are already populated.<sup>183</sup> This factor does not support the incorporation of the Oregon Country either. At the time of McKay's birth "there was no public demand for further territorial expansion" into Oregon, which was remote, almost uncharted, and located beyond an intervening territory that had not yet been settled.<sup>184</sup> Congress believed that Oregon was too far away and too likely to separate into its own republic to become or remain a state.<sup>185</sup> Moreover, Congress discouraged American emigration to Oregon by refusing to provide land grants or to promise statehood.<sup>186</sup>

Finally, one of the most important reasons that Congress originally refused to extend federal law to Oregon was that the territory was not destined for statehood.<sup>187</sup> Many members of Congress expected Oregon to become an independent republic,<sup>188</sup> a commercial and military base or colony,<sup>189</sup> or a district reserved for non-whites to

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and obscure," and not worth fighting over. *Id.* at 163.

<sup>182</sup> See *Oregon History: Territorial Government*, *supra* note 13; *supra* note 103 and accompanying text.

<sup>183</sup> See *Balzac*, 258 U.S. at 309–10.

<sup>184</sup> See *CAREY*, *supra* note 100, at 431.

<sup>185</sup> See, e.g., 1 REGISTER OF THE DEBATES IN CONGRESS, COMPRISING THE LEADING DEBATES AND INCIDENTS OF THE SECOND SESSION OF THE EIGHTEENTH CONGRESS 14 (Gale & Seaton eds., 1825) [hereinafter REGISTER] (statement of Rep. John Floyd) (voicing the "generally adopted" opinion in Congress, with which Rep. Floyd disagreed) (Dec. 20, 1824); *id.* at 38 (statement of Rep. Alexander Smyth) ("If we open, on the western coast, a fertile country, offering temptations to emigrants from among us—it will carry off many of our enterprising [sic] and valuable people . . . until it will drop off and become a separate nation."); *id.* at 692 (statement of Sen. Mahlon Dickerson) (complaining of distance, inaccessibility, and, supposing with certainty that "when it shall obtain the strength and importance of a state, [it] will fall off from the Union by its own weight.") (Feb. 26, 1825). *But see, e.g., id.* at 14–18 (statement of Rep. John Floyd) (offering counter-arguments and willingness to allow separation into an independent nation).

<sup>186</sup> *Cf. id.* at 38 (statement of Rep. Alexander Smyth) ("[L]et not our citizens be invited to that country by grants of land, or the expectation of a state government being established there"); *id.* at 26–27 (statement of Rep. Daniel P. Cook) (deriding proposal to grant land to settlers as "calculated to delude the people of this country, enterprising [sic] as they are . . . from their present peaceful abodes"). Late in the joint occupation and in anticipation of war, British officers scouting land routes for troops to invade Oregon reported that American soldiers accompanied a group of emigrants on their way to Oregon, ostensibly to protect them from Native Americans, but by implication to scout troop routes instead.

<sup>187</sup> See REGISTER, *supra* note 185, at 690.

<sup>188</sup> See *id.* at 213 (statement of Rep. James B. Reynolds).

<sup>189</sup> See *id.* at 713 (statement of Sen. Thomas H. Benton).

“live under governments of their own, suited to their circumstances,”<sup>190</sup> perhaps allied with the United States or under its protection but in no way part of a homogeneous white confederacy in the east.<sup>191</sup>

Senator Dickerson, for example, denied in 1825 that Oregon was destined for statehood: “But is this territory of Oregon ever to become a state, a member of this Union? Never. The Union is already too extensive—and we must make three or four new states from the territories already formed.”<sup>192</sup> For Dickerson, the consequences of that fact were significant.

First, acquiring the territory imposed no affirmative obligations on the United States.<sup>193</sup> “It is true, that, by the operation of certain causes, we have acquired this territory; but that circumstance surely imposes upon Congress no obligation to provide for its occupation or population, unless the interests of the United States should require it. To that country we owe nothing.”<sup>194</sup> Second, the acquisition imposed a negative obligation—the obligation not to extend federal law to the territory so as to make it a colony.<sup>195</sup> Senator Dickerson firmly resisted colonialism in opposing a proposal to erect military fortifications in the territory and to extend U.S. revenue laws there:

As yet, we have extended our laws to no territories, but such as were or are to become states of the Union. We have not adopted a system of colonization, and it is to be hoped we never shall. Oregon can never be one of the United States. If we extend our laws to it, we must consider it as a colony.<sup>196</sup>

Senator Benton also denied that Oregon would ever become a state,<sup>197</sup> but he supported the proposal for strategic military and commercial purposes.<sup>198</sup> He did not care what use the nation made of Oregon besides statehood—“whether we shall hold it as a military post and naval station, settle it as a colony, or found a new Republic upon it”<sup>199</sup>—as long as the United States prevented further growth of Britain’s monarchical power there.<sup>200</sup> Senator Dickerson’s impassioned opposition to colonialism and a fear of provoking Britain carried the day; the Senate rejected the proposal.<sup>201</sup> Despite continuing requests from American settlers,<sup>202</sup> Congress did not extend federal law

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<sup>190</sup> *Id.* at 37–38 (statement of Rep. Alexander Smyth).

<sup>191</sup> *See id.*

<sup>192</sup> *Id.* at 691.

<sup>193</sup> *See id.* at 689.

<sup>194</sup> *Id.*

<sup>195</sup> *See id.* at 690.

<sup>196</sup> *Id.* at 689–90.

<sup>197</sup> *See id.* at 711–12.

<sup>198</sup> *See id.* at 709–11 (reciting five specified advantages).

<sup>199</sup> *Id.* at 713.

<sup>200</sup> *See id.*

<sup>201</sup> *See CAREY, supra* note 100, at 258.

<sup>202</sup> *See id.* at 318.

to the Oregon Country until 1848 when it also promised statehood by conferring the rights and obligations of the original Northwest Ordinance on its residents.<sup>203</sup>

The non-incorporation of Oregon illustrates a fundamental problem with inferring territorial incorporation from treaty provisions.<sup>204</sup> Treaties of cession referred to the incorporation of inhabitants, not territories.<sup>205</sup> Spain ceded its Oregon claim to the United States in the same treaty in which it ceded Florida in 1819.<sup>206</sup> The treaty required that “[t]he Inhabitants of the territories which His Catholic Majesty cedes to the United-States . . . shall be incorporated in the Union of the United-States[.]”<sup>207</sup> The provision applied only to inhabitants, not the territory, and it was bilateral; it did not require the United States to incorporate Oregon into the Union contrary to its standstill obligations to Britain under the Treaty of 1818,<sup>208</sup> let alone to incorporate British inhabitants into the Union.<sup>209</sup>

The Oregon precedent demonstrates that the declaratory Fourteenth Amendment and the original Constitution recognize birthright citizenship in unincorporated territories even if the United States does not exercise its jurisdiction there.

## VII. OREGON AND THE INSULAR TERRITORIES

The commonly accepted narrative of the *Insular Cases*<sup>210</sup> is that the territories acquired in 1898 differed radically from the nation’s earlier continental territories.<sup>211</sup> Earlier territories were close, easily accessible, coveted for the growth and settlement of the white American population, and destined for statehood.<sup>212</sup> The

<sup>203</sup> See 30th Cong., 1st Sess., ch. 177.

<sup>204</sup> See *Downes v. Bidwell*, 182 U.S. 244, 339 (1901) (White, J., concurring) (“[T]he treaty-making power cannot incorporate territory into the United States without the express or implied consent of Congress”).

<sup>205</sup> See, e.g., Treaty for the Cession of Louisiana, U.S.-Fr., art. III Apr. 30, 1803, 8 Stat. 200 (“The inhabitants of the ceded territory shall be incorporated in the Union of the United States.”).

<sup>206</sup> See Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252.

<sup>207</sup> *Id.* at art. VI.

<sup>208</sup> See *id.*

<sup>209</sup> Nor could the Treaty of Amity have required the incorporation of Oregon and its Russian inhabitants. The United States and Russia did not settle their conflicting claims until 1824. See CAREY, *supra* note 100, at 258. The foregoing is not intended to acknowledge the validity of the territorial incorporation doctrine or the *Insular Cases*’s appropriation of the term “incorporation.” Instead it suggests that the treaty record indicates that any doctrine of incorporation is properly limited to the personal incorporation of *ante-nati*, with organic U.S. law governing the status of *post-nati*.

<sup>210</sup> See Appendix.

<sup>211</sup> See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922).

<sup>212</sup> See, e.g., *id.*; Sanford Levinson, *Installing the Insular Cases Into the Canon of Constitutional Law*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 126 (Christina Duffy Burnett & Burke Marshall eds., 2001).

United States only acquired territories with the intent to grant statehood to them and citizenship to their people.<sup>213</sup>

By 1898, however, the nation had grown enough.<sup>214</sup> The territories acquired from Spain were too far away to be part of the United States proper.<sup>215</sup> Further expansion served the purpose of power, not growth;<sup>216</sup> Puerto Rico was coveted for its strategic commercial and military advantages, not for whites' living space.<sup>217</sup> It is not even clear that America owes those territories protection and a republican form of government.<sup>218</sup> The doctrine of territorial incorporation accommodated this difference and made American colonialism possible.<sup>219</sup>

The Oregon precedent belies this narrative.<sup>220</sup> The United States acquired Oregon without congressional intent to make it a state.<sup>221</sup> Many in Congress considered it to be too distant and inaccessible to become a state.<sup>222</sup> Some thought that the United States had already grown enough by the time of McKay's birth, and Congress discouraged American emigration there.<sup>223</sup> Senator Benton coveted Oregon for its strategic commercial and military value, and Senator Dickerson denied that the United States owed anything to it.<sup>224</sup> Rep. Smyth asked a fundamental question

<sup>213</sup> Tauber, *supra* note 62, at 147.

<sup>214</sup> See Burnett & Marshall, *supra* note 91, at 27.

<sup>215</sup> See Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 158* (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>216</sup> See E. Robert Statham, Jr., *U.S. Territorial Expansion: Extended Republicanism versus Hyperextended Expansionism*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 175* (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>217</sup> See Perea, *supra* note 215, at 163.

<sup>218</sup> See Levinson, *supra* note 212, at 125 (asking a series of unanswered questions left open by Puerto Rico's legal status).

<sup>219</sup> See José A. Cabranes, *Some Common Ground*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 43* (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>220</sup> See *supra* Part III.

<sup>221</sup> Nor are the insular territories distinguishable because acquired by war. *Cf.* *Dorr v. United States*, 195 U.S. 138, 140 (1904) (“[T]he United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations.”). Spain ceded its significantly older Oregon claim after the United States invaded Spanish Florida and captured Spanish forts there. See ROBERT P. WETTEMAN, JR., *PRIVILEGE VS. EQUALITY: CIVIL-MILITARY RELATIONS IN THE JACKSONIAN ERA, 1815–1845*, xvi (2009) (offering chronology of the U.S. invasion); Treaty of Amity, *supra* note 206, Art. III (ceding Spanish claim to Oregon). The United States relied on the Spanish cession to defend its title against the competing British and Russian claims. See REGISTER, *supra* note 185, at 38 (statement of Rep. Alexander Smyth) (“We have succeeded to the claim of Spain, who held by the right of first discovery.”); *id.* at 688 (statement of Sen. James Barbour) (“Spain, under whom we claim, has . . . the best title.”).

<sup>222</sup> See REGISTER, *supra* note 185, at 689–90.

<sup>223</sup> See Burnett & Marshall, *supra* note 91, at 27.

<sup>224</sup> REGISTER, *supra* note 185, at 689.

in 1824 that Congress has continued to grapple with since 1898: “Where shall the . . . limits of the United States be fixed? I do not mean the limits of their territory, or the extent of their power. We may have establishments on distant shores; but where shall the limits of *the states*, the members of this confederacy, be fixed?”<sup>225</sup>

American colonialism was possible at McKay’s birth without a doctrine of territorial incorporation. The United States might have colonized Oregon absent Dickerson’s impassioned opposition—the House of Representatives had already approved a version of the bill that he defeated.<sup>226</sup> The narrative that the United States had never acquired a territory without intending to make it a state is incorrect.<sup>227</sup> Rather, the United States did not *extend its laws* to Oregon until it was to become a state.<sup>228</sup> What remains of the *Insular Cases* is their barely covert narrative of racism in general<sup>229</sup> and Anglo-Saxon juridical ethnocentrism in particular,<sup>230</sup> which cannot support the continuing colonization of unincorporated territories.<sup>231</sup>

#### CONCLUSION

The Constitution confers natural-born citizenship in unincorporated territories even if the United States does not actually exercise its jurisdiction there. The Fourteenth Amendment’s qualifier “and subject to the jurisdiction thereof”<sup>232</sup> merely “exclude[s], by the fewest and fittest words”<sup>233</sup> the three classes of children who do not receive citizenship by birth: those born to foreign diplomats, to hostile foreign occupiers, or under Native American allegiance. This conclusion is a matter of law, not politics. It follows from centuries of English and American precedents that allow both shared birthright citizenship and independent, organic self-government.

Whether the United States should colonize unincorporated territories by extending its laws to them is a separate question. It is a matter of politics, not law.<sup>234</sup> To answer that question we must rely on the nation’s founding principles, which utterly reject

<sup>225</sup> *Id.* at 37.

<sup>226</sup> See REGISTER, *supra* note 185, at 58–59.

<sup>227</sup> *Contra* Cabranes, *supra* note 219, at 43.

<sup>228</sup> See REGISTER, *supra* note 185, at 690 (statement of Senator Dickerson on withholding of federal law when Oregon was not destined for statehood); *supra* note 204 and accompanying text (joint extension of federal law and the Northwest Ordinance to Oregon).

<sup>229</sup> See Perea, *supra* note 215, at 155–62.

<sup>230</sup> See Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>231</sup> See *id.*

<sup>232</sup> U.S. CONST. amend. XIV, § 1.

<sup>233</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898) (interpreting the Fourteenth Amendment, which the Court recognized was declaratory of the common law).

<sup>234</sup> See Cabranes, *supra* note 219, at 41–43 (noting Puerto Rico’s desire for political autonomy and self-government).

treating U.S. territories as Britain treated the American colonies.<sup>235</sup> If territories are not destined for statehood, Congress should repeal statutes that extend federal law to them, including organic acts that delegate federal governmental powers. The territories could then constitute (or reconstitute) their own organic governments. Those governments would derive their legitimacy from the consent of the governed, not from Congress or from any connection to prior sovereigns.

The territories would not be states, so they would not be subject to constitutional restrictions on states. They would not operate under a delegation of authority from Congress, so they would not be subject to constitutional limitations on the federal government.<sup>236</sup> What constitutional restrictions might be incorporated against them and under what interpretive theory remains to be determined (and may differ from those that the *Insular Cases* identify). Some restrictions like the Thirteenth Amendment's prohibition on slavery would certainly apply.<sup>237</sup> Others would not, or would not apply with the same rigor as they do against states.

The Supreme Court recently claimed in *dicta* that territories cannot organize their own governments without congressional permission.<sup>238</sup> However, the authority that the Court relies on does not support the claim, and the Oregon precedent contradicts it.<sup>239</sup> Congress tolerated Oregon's self-government during the joint occupation and

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<sup>235</sup> Cf. DECLARATION OF INDEPENDENCE (U.S. 1776); Thomas Jefferson's Reply to the Representations of Affairs in America by British Newspapers (Before Nov. 20, 1784) ("It would be difficult to find one man among [American soldiers] who would not consider a return under the dominion of Gr[eat] Br[itain] as the greatest of all possible miseries.").

<sup>236</sup> The Supreme Court's jurisprudence applying equal protection limitations to unincorporated territories' governments is not coherent. It sometimes relies on federal statutory law, interpreting statutory restrictions on states to apply to unincorporated territories. See, e.g., *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976). It cannot determine whether the Fifth or the Fourteenth Amendments impose equal protection obligations on them. See *id.* Given that unincorporated territories are neither states for constitutional purposes nor destined for statehood, the Fourteenth Amendment's Equal Protection Clause should not apply to them. The Fifth Amendment should apply only to the extent Congress exercises or delegates its power to them. Cf. *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) ("The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted.").

<sup>237</sup> See *Balzac*, 258 U.S. at 312 (recognizing that the Constitution protects fundamental personal rights in unincorporated territories).

<sup>238</sup> See *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (citing *Simms v. Simms*, 175 U.S. 162, 168 (1899)).

<sup>239</sup> The cited portion of *Simms* held that Congress has sovereignty over territories and applied a statute in which Congress had exercised its authority. See *Simms*, 175 U.S. at 168. The *Simms* Court did not consider whether a territory could create its own organic law if Congress declined to exercise its jurisdiction there. See also Walt Crowley, *American Settlers in Oregon Declare a Provisional Government on May 2, 1843* (Feb. 19, 2003), <http://www.historylink.org/File/5248> [<https://perma.cc/JE3Z-MBAC>] (explaining that Oregon's first convening of its legislature occurred in 1844, the British ceded its claims in 1846, and in 1848, Oregon became a Territory of the United States).

for two years afterward, and when it organized the Territory of Oregon it ratified all of the provisional government's laws that were consistent with the Constitution and did not grant or encumber land.<sup>240</sup>

The Constitution authorizes but does not require Congress to govern territories,<sup>241</sup> and America's founding principles forbid Congress to exercise its jurisdiction over those that are not destined for statehood.<sup>242</sup> If Congress does not exercise its jurisdiction then the people of the territories have the right to form their own governments. Congress and those governments could then determine the future relationship between the states and the territories. It might be a confederation. It might be permanent or ultimately lead to statehood or independence. But in the meantime it would not be colonialism, and persons born in any state or territory would be bound together by shared birthright American citizenship.

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<sup>240</sup> See State of Oregon Law Library, *Oregon Courts Under the Territorial Government*, <https://soll.libguides.com/c.php?g=519356> [<https://perma.cc/59ZB-SQ2Y>].

<sup>241</sup> See U.S. CONST. art. IV, § 3, cl. 2.

<sup>242</sup> See REGISTER, *supra* note 185, at 690.

## APPENDIX

The classification and interpretation of the *Insular Cases* is somewhat controversial. What follows is a summary of the *Insular Cases* prepared by the Editors of the *Journal*. The author does not endorse the views expressed in it.

The *Insular Cases* are a set of cases decided between 1901 and 1922 that set out the constitutional posture of Puerto Rico, the Philippines, Hawaii, Alaska, and other territories. See Perez, *supra* note 4, at 1034 n.13. There is no fixed definition of the *Insular Cases*. See, e.g., Hon. Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico's American Century*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 243 (Christina Duffy Burnett & Burke Marshall eds., 2001) (defining the *Insular Cases* as eight cases relating to the 1898 Treaty of Paris); Hon. José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 239 (Christina Duffy Burnett & Burke Marshall eds., 2001) (naming ten cases the author defines as comprising the *Insular Cases*); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REVISTA JURÍDICA U.P.R. 225 (1996) (describing the import and impact of about twenty “*Insular Cases*” from 1901 to 1922). A broad definition of the *Insular Cases* generally includes: *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding unanimously that, although Puerto Rican persons were U.S. citizens, they were not entitled to the full ambit of the Sixth Amendment guarantee to a jury trial in criminal prosecutions); *Ocampo v. United States*, 234 U.S. 91 (1914) (upholding a Manila city ordinance that denied accused arrestees a “preliminary investigation” for a finding of probable cause for arrest, despite the ordinance apparently violating the Philippines Declaration of Rights); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913) (holding that the military governor of Puerto Rico violated the Due Process rights of property owners when he retroactively reduced the period for adverse possession of real property from twenty years to six years); *Dowdell v. United States*, 221 U.S. 325 (1911) (holding, among other things, that the Fifth Amendment requirement that capital and “infamous” crimes be presented by indictment has no effect in the Philippines); *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909) (holding that the governor of Puerto Rico had the authority to demand extradition from New York of an accused fugitive); *Kent v. Porto Rico*, 207 U.S. 113 (1907) (holding the U.S. Supreme Court lacked jurisdiction to hear a challenge to a Puerto Rico embezzlement conviction where the defendant alleged the island’s judicial districts were illegally organized and where defendant alleged a supposed confession was neither authenticated nor shown to be taken voluntarily); *Grafton v. United States*, 206 U.S. 333 (1907) (reversing a U.S. Army Private’s conviction for homicide in Philippines civil court in a case where

the defendant had admitted to the killing, where defendant had already been acquitted by a court martial); *Trono v. United States*, 199 U.S. 521 (1905) (upholding Philippines Supreme Court summarily enhancing defendant's conviction for assault to homicide, even when defendant had at trial been acquitted of premeditated murder); *Rasmussen v. United States*, 197 U.S. 516 (1905) (reversing an Alaska Territory defendant's conviction for "keeping of a disreputable house" because a six-person jury was constitutionally deficient, and, after lengthy discussion, concluding that the Sixth Amendment applied to the Alaska Territory), abrogated by *Williams v. Florida*, 399 U.S. 78 (1970); *Mendezona y Mendezona v. United States*, 195 U.S. 158 (1904) (reversing a criminal conviction on double jeopardy grounds where defendant had been acquitted at trial but then summarily held guilty by the Philippines Supreme Court); *Kepner v. United States*, 195 U.S. 100 (1904) (reversing an embezzlement conviction on double jeopardy grounds, which are discussed at length, where defendant had been acquitted at trial but summarily convicted by the Philippines Supreme Court); *Gonzalez v. Williams*, 192 U.S. 1 (1904) (ordering the release of a Puerto Rican woman from immigration detention because, as a Puerto Rican person, she was not an "immigrant"); *Dorr v. United States*, 195 U.S. 138 (1904) (holding, among other things, that the constitutional right to trial by jury did not extend to the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (upholding a Hawaii Territory defendant's conviction for manslaughter where the grand jury could not agree on an indictment and the trial jury could not reach a unanimous verdict, because the Sixth Amendment was not "fundamental" and the process conformed to earlier practices in Hawaii); *Pepke v. United States (The Diamond Rings Case)*, 183 U.S. 176 (1901) (reversing seizure of diamond rings shipped from Philippines to Chicago because the Philippines was a U.S. territory and therefore import duties did not apply); *Dooley v. United States*, 182 U.S. 222 (1901) (finding Congress had taken no action to incorporate Puerto Rico); *Armstrong v. United States*, 182 U.S. 243 (1901) (upholding tariffs imposed by the U.S. military governor on goods shipped from states to Puerto Rico prior to the signing of the peace treaty with Spain). *See also* Efrén Rivera Ramos, *Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 104, 105 n.4 (Christina Duffy Burnett & Burke Marshall eds., 2001).