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Remedying the Insular Cases: Providing Tribal Sovereignty to Unincorporated Territories to Ensure Constitutional Rights for All U.S. Nationals and Citizens

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REMEDYING THE *INSULAR CASES*: PROVIDING TRIBAL SOVEREIGNTY TO UNINCORPORATED TERRITORIES TO ENSURE CONSTITUTIONAL RIGHTS FOR *ALL* U.S. NATIONALS AND CITIZENS

Allison Ripple*

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INTRODUCTION

Rights granted by the U.S. Constitution are not equally provided to U.S. nationals or citizens born in unincorporated territories. The Fourteenth Amendment states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹ The ratification of the Fourteenth Amendment in 1868 was in part a response to the Supreme Court’s 1857 decision in *Dred Scott v. Sandford*, which denied an escaped slave citizenship due to his African descent.² The Fourteenth Amendment was meant to provide *jus soli*—right of the soil—citizenship to anyone born within the United States and not subject to a foreign power, regardless of race or ethnicity.³ In *United States v. Wong Kim Ark*, the Supreme Court upheld this understanding of the right when it declared that: “The Amendment, in clear words and in manifest intent, includes the children born[] within the territory of the United States.”⁴ The Jones Act of 1917 furthered the Court’s decision in *Wong Kim Ark* by granting individuals born in U.S. unincorporated territories, such as Puerto Rico, Guam, and American Samoa, status as U.S. nationals or citizens.⁵ Despite the Fourteenth Amendment’s explicit inclusion of “all persons born in the United States,” the Court’s explicit inclusion of U.S. territories in its interpretation of the Fourteenth Amendment in *Wong Kim Ark*,⁶ and the Jones Act’s explicit grant of

¹ U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added).

² Congress enacted the Civil Rights Act of 1866 two years prior to the ratification of the Fourteenth Amendment to nullify the decision made in *Dred Scott* and mitigate its effects for Black people in the South. See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1548 (2022) (Thomas, J., concurring). The Act included a strikingly similar citizenship clause to that of the Fourteenth Amendment and specified that it be applied to all citizens that it described “in every State and Territory in the United States.” *Id.* (discussing the Civil Rights Act of 1866, 14 Stat. 27). Indicative that the Fourteenth Amendment was meant to constitutionalize the Act and its meaning, the Citizenship Clause of the Fourteenth Amendment was described as “declaratory” of existing law passed in 1866. *Id.* at 1549 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statements of Sen. Howard)).

³ *Supra* note 2 and accompanying text.

⁴ 169 U.S. 649, 693 (1898) (emphasis added). See *Regan v. King*, 49 F. Supp. 222 (N.D. Cal. 1942), for a decision reaffirming the Supreme Court’s definitive declaration that a person born within the United States is a citizen. The Ninth Circuit Court of Appeals affirmed the lower federal court’s decision and the Supreme Court denied certiorari, further confirming *jus soli* citizenship for those born within the territory of the United States.

⁵ Inhabitants born in unincorporated territories are considered American citizens or nationals depending on the territory. See Jones Act, Pub. L. No. 64-368, H.R. 9533, 64th Cong. (2d Sess. 1917) (granting Puerto Ricans citizenship). However, even “citizens” in unincorporated territories are denied constitutional rights despite the Citizenship Clause of the Fourteenth Amendment. *E.g.*, *Balzac v. Puerto Rico*, 258 U.S. 298, 309 (1922) (denying Puerto Ricans the right to a jury trial, despite being citizens of the United States); *Vaello Madero*, 142 S. Ct. at 1541 (denying Puerto Ricans the right to receive Supplemental Security Income benefits, despite being citizens of the United States).

⁶ *Wong Kim Ark*, 169 U.S. at 692; see also *Loughborough v. Blake*, 18 U.S. 317, 319

U.S. national or citizen status to those born in unincorporated territories, the Supreme Court denied their right to the Fourteenth Amendment's Citizenship Clause and effectively denied them *jus soli* birthright citizenship through its decisions in the *Insular Cases*.⁷

Since the time of the decisions, the *Insular Cases* have been used to deny constitutional rights to U.S. nationals and citizens born in unincorporated territories.⁸ The denial of *jus soli* citizenship and the arbitrary granting of constitutional rights has left those born in unincorporated territories hanging in the balance and subject to U.S. colonial rule for far too long. The status of the U.S. territories and those residing within them is an ongoing discussion with increasing relevance.⁹ In recent years, the courts and Congress have used the *Insular Cases* as a framework to deny constitutional rights to U.S. nationals and citizens, against the purpose and will of the Fourteenth Amendment¹⁰ and in violation of the Fifth Amendment.¹¹ Recent events have shown how easy it is for the Court to strip fundamental rights from Americans,¹² giving many an understanding of the harsh reality faced by those born in unincorporated territories as subjects of government rule without a voice.¹³ At a time when constitutional rights for all are at risk and the democratic process is under attack, ensuring the Fifth and Fourteenth Amendments are upheld to protect "all persons born . . . in the United States"¹⁴ and to provide a voice in the democratic process as intended is of the essence.

This Note will focus on the Supreme Court's decisions in the *Insular Cases* to demonstrate the origins of denying *jus soli* citizenship to those born in unincorporated territories and to analyze its direct contradiction to the Fourteenth Amendment and other Supreme Court decisions. It will argue that the Court's decisions in the *Insular Cases* were influenced by colonial rule and rooted in racism. Furthermore, this Note will argue that because of these influences, the continued application of

(1820) (stating the United States "is the name given to our great republic, which is composed of States and territories") (emphasis added).

⁷ See, e.g., *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244, 244–45 (1901); *Goetze v. United States*, 182 U.S. 221 (1901). For further discussion of the *Insular Cases* see *infra* Part I.

⁸ See generally *Vaello Madero*, 142 S. Ct. at 1359; *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

⁹ *Infra* Parts I and II.

¹⁰ *Supra* notes 1–4 and accompanying text.

¹¹ In *Carolene Products Co.*, the Supreme Court indicated substantive due process protected the right to participate in the political process, including the right to vote. 304 U.S. 144, 153 n.4 (1938). *But see Fitisemanu*, 426 F. Supp. 3d 1155 (denying the right to vote for a U.S. national born in American Samoa).

¹² See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (reversing *Roe v. Wade* and revoking the fundamental right to abortion).

¹³ *Infra* note 19 and accompanying text.

¹⁴ U.S. CONST. amends. V, XIV.

the *Insular Cases* by Congress and the Supreme Court to deny constitutional rights for U.S. nationals and citizens born in unincorporated territories violates the Due Process Clause of the Fifth Amendment.¹⁵

This Note will argue that the *Insular Cases* have resulted in the arbitrary granting and denial of constitutional rights for U.S. nationals and citizens born in unincorporated territories, perpetuating colonial rule by the United States, contradicting the Fourteenth Amendment, and violating Fifth Amendment substantive due process rights.¹⁶ To ensure the Fourteenth Amendment and Fifth Amendment are upheld and equally applied as they are written and intended, this Note will argue that a concrete granting of constitutional rights to those born in unincorporated territories must replace the current arbitrary process. To grant nationals and citizens born in unincorporated territories constitutional rights, they should be recognized as citizens within the context of the Fourteenth Amendment and the concept of *jus soli* citizenship. The Supreme Court had an opportunity to do so and overrule the *Insular Cases* once and for all. In April of 2022, the Court received a writ of certiorari to review *Fitisemanu v. United States*¹⁷—a case depicting the blatant denial of constitutional rights for those born in unincorporated territories¹⁸—that expressly requested the Court to overturn the *Insular Cases*;¹⁹ the Court denied certiorari. Since a refusal to overturn the *Insular Cases* and recognize U.S. nationals and citizens born in unincorporated territories as citizens within the meaning of the Fourteenth Amendment remains, this Note argues that those born in unincorporated territories should be granted “tribal sovereignty” so as to no longer be subjects of U.S. colonial rule without a voice in the democratic process. “Tribal sovereignty” will allow those born in unincorporated territories to assume fundamental rights while simultaneously protecting the culture and resources of individuals who have long been subjected to U.S. colonial rule.²⁰

Part I of this Note will provide historical and legal background through a discussion of the context surrounding the *Insular Cases* and the colonization of American Samoa. Part II will discuss recent applications of the *Insular Cases* and argue that the decisions made in the *Insular Cases* have been consistently applied to deny the constitutional rights of U.S. nationals and citizens born in unincorporated

¹⁵ The Fifth Amendment of the Constitution prohibits the Federal government from discriminatorily depriving an individual of constitutionally guaranteed rights. U.S. CONST. amend. V.

¹⁶ U.S. CONST. amend. V.

¹⁷ Petition for Writ of Certiorari, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1294).

¹⁸ See generally *Fitisemanu*, 426 F. Supp. 3d 1155 (denying the right to vote for a U.S. national born in American Samoa).

¹⁹ This case differs from recent cases heard by the Court in which it declined to address and overturn the *Insular Cases*. The lawsuit brought in *Fitisemanu* specifically sought to overturn the *Insular Cases* and extend constitutional protections for Americans born in unincorporated territories. See *id.*

²⁰ See *infra* Part III.

territories in a manner that violates the Constitution and effectively perpetuates U.S. colonial rule in the twenty-first century. Part III will argue that to end the arbitrary denial of constitutional rights and U.S. colonial rule over unincorporated territories, unincorporated territories should be granted a degree of “tribal sovereignty.” Part IV will address counterarguments arising from the arguments made throughout this Note and its proposed solution.

I. HISTORY AND LEGAL BACKGROUND

The period and context surrounding the decisions made by the Supreme Court in the *Insular Cases* are instrumental for understanding how the decisions were reached, how they have been applied since, and the overall effect of their continued application. By understanding the factors influencing the Court and its reasoning when it determined that the Constitution does not broadly apply to those born in unincorporated territories, it is clear that the decisions and their continued application contradict and violate the Fourteenth and Fifth Amendments of the Constitution. Through an analysis of the time period, influencing factors, outcomes, and the reasoning of both Congress and the Court, Section I.A of this Note sets forth the deeply racist undertones of the *Insular Cases*, depicts why the decisions and their continued application violate the Constitution, and why there must be an alternative method to the racist and colonialist process established by the Supreme Court in the 1900s to provide U.S. nationals and citizens born in unincorporated territories constitutional rights.

Additionally, this Note will discuss the colonization of American Samoa and its relationship with the United States as an unincorporated territory, along with aspects of American Samoan culture and tradition. As American Samoa is the relevant territory in *Fitisemanu*, it is vital to address the colonialistic relationship between it and the United States. The relationship between the two will provide context to Part II’s argued implications of applying the framework of the *Insular Cases* in *Fitisemanu*. Furthermore, the culture and traditions of American Samoa are central to the case, the findings of the lower courts, and the argument made for “tribal sovereignty” in Part III.

A. *The Insular Cases, Their Roots in Racism, and the Creation of the “Unincorporated Territory”*

1. Preceding the Cases: Congress and the Foraker Act

In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain when it signed the Treaty of Paris to end the Spanish-American War.²¹

²¹ *World of 1889: International Perspectives on the Spanish American War*, LIBR. CONG., <https://loc.gov/rr/hispanic/1898/treaty.html> [<https://perma.cc/GFF9-UM7G>] (last updated Feb. 28, 2023).

With this acquisition, questions arose regarding the application of the Constitution, and the extent to which the United States could control the territories and their people.²² Due to imperialist ambition and racist sentiment, the hope was to exert control over the territories without fully incorporating them into the United States.²³ This aim made the question and its answer more complicated, requiring Congress and the Supreme Court to interpret the Constitution in a manner that contradicted its core tenets.²⁴ To achieve its goal, Congress devised the Foraker Act of 1900 and substituted it for the previously applied Northwest Ordinance.²⁵ The Foraker Act's stated purpose, to apply Territorial government to Puerto Rico, differed minimally from that of the Northwest Ordinance, calling into question why the Act was needed in the first place.²⁶ In the Congressional Record, Senator Bacon of Georgia called attention to the differences between the proposed Act and the Northwest Ordinance, questioning why such changes were necessary if they were both meant to establish a Territorial government.²⁷ In recognizing the similarity in the purported purpose of both the Northwest Ordinance and the Foraker Act, it can be derived that Congress did not require the Foraker Act to establish a Territorial government but rather required the Foraker Act so that it may treat those within the acquired territories differently. The Congressional Record further substantiates this claim. Throughout the Record, members of Congress—through expressions of racist beliefs and assumptions—distinguished those in previously acquired territories and those presently in focus.²⁸ These beliefs justified Congress's conclusion that the United

²² See *infra* notes 24–25 and accompanying text.

²³ *Id.*

²⁴ Prior to the signing of the Treaty of Paris and the rise in support for American imperialism, the Northwest Ordinance of 1787 governed the acquisition of territories and their path to admission into the United States. BILL HOWELL, *THE FORGOTTEN LINCHPIN IN THE CASE FOR STATEHOOD EQUALITY 1* (Am. Lands Council Found., 2d ed. 2019). The Northwest Ordinance was to be applied in the same manner, regardless of how the territory was acquired. *Id.* at 24 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)). This indicates the question had already been answered, but Congress's desire to exert colonial rule required a different answer than the one that had previously been applied.

²⁵ See generally Foraker Act, Pub. L. 56-191, 31 Stat. 77 (1900) (establishing civilian government in Puerto Rico while simultaneously refusing full citizenship to individuals in the territory).

²⁶ *Id.*

²⁷ 33 CONG. REC. S3084 (daily ed. Mar. 20, 1900) (remarks of Sen. Bacon) (“There was no very radical difference in principle between the Territorial government which was therein proposed for Puerto Rico and the Territorial governments which have heretofore been erected by Congress for Territories The amendments which are proposed . . . show that the purpose is to make an entire change in this scheme.”).

²⁸ See *id.* at 3080 (remarks of Sen. Morgan) (explaining Congress could not promise Puerto Rico admission into the Union as it had for previously acquired territories because Puerto Rico did not have “organized parties” that were “competent to contract”); 33 CONG. REC. S3686 (daily ed. Apr. 3, 1900) (remarks of Sen. Bacon) (questioning why the acquisition of Puerto Rico was being treated differently by the legislators).

States would not “incorporate the alien races, and civilized, semicivilized, barbarous, and savage peoples of these islands into our body politic as States of our Union.”²⁹ To ensure the territory and those living within it would not be “incorporated” into the United States and require constitutional rights, the Foraker Act deemed that Puerto Ricans would not be citizens of the United States but rather would remain citizens of Puerto Rico under the protection of the United States.³⁰ Effectively, the Act denied those living in Puerto Rico full constitutional rights and protections while granting the government of the United States the ability to levy and collect duties on goods imported into the territory.³¹ Furthermore, the Act allowed the federal government of the United States to supersede Puerto Rican law whenever it so decided.³² The Congressional Record and the effects of the Foraker Act are indicative of Congress’s imperialist motivations and intent to exert control over Puerto Rico without having to grant full citizenship and constitutional rights to its people.³³ The Foraker Act, therefore, granted Congress plenary power over unincorporated territories and enabled the colonialist policies and the Supreme Court’s decisions in the *Insular Cases* to come.³⁴

2. The Court’s Role: The *Insular Cases*

The Foraker Act’s subjugation of unincorporated territories and those residing within them required a determination of constitutionality by the Supreme Court.³⁵ In *Downes v. Bidwell*, the Supreme Court was tasked to determine whether Congress had the constitutional authority to define Puerto Rico as an unincorporated territory and subsequently treat it differently than the territories preceding it.³⁶ The issue presented to the Court was whether duties could be levied on Puerto Rican imports and whether the Constitution must follow the flag of the United States.³⁷ In the Court’s decision, it determined Puerto Rico was a territory of the United States, but not in regard to taxation.³⁸ Furthermore, the Court decided Congress had plenary

²⁹ See 33 CONG. REC. S3622 (daily ed. Apr. 2, 1900) (remarks of Sen. Depew).

³⁰ José A. Cabranes, *Citizenship and American Empire*, 127 U. PA. L. REV. 391, 432–33 (1978).

³¹ *Id.* at 433; Foraker Act § 2.

³² See Foraker Act § 8 (stating Puerto Rican laws would be in effect until “altered, amended, or repealed by legislative authority . . . or by Act of Congress of the United States”).

³³ See 33 CONG. REC. S3080 (daily ed. Mar. 20, 1900) (remarks of Sen. Morgan) (“Our Government was planned with a view to the enlargement of its territorial limits and the expansion of its influence No bounds are set to the United States; no restraint limits our growth.”).

³⁴ See Cabranes, *supra* note 30, at 435.

³⁵ See *Downes v. Bidwell*, 182 U.S. 244, 247–48 (1901).

³⁶ See *id.* at 249 (discussing the implications of considering Puerto Rico a state regarding the Uniformity Clause and addressing the determination of constitutionality of the Foraker Act).

³⁷ *Id.* at 247–49.

³⁸ *Id.* at 391.

power over unincorporated territories.³⁹ The Court's decision effectively answered the question as to whether unincorporated territories were constitutional.⁴⁰ The Court's decision in *Downes* approved Congress's colonialist policy in the Foraker Act and effectively repealed the Northwest Ordinance.⁴¹ In approving the Foraker Act and repealing the Northwest Ordinance, the Court's decision set the precedent for unincorporated territories, constitutionalizing Congress's approach in the Foraker Act. As a result, the doctrine of territorial incorporation arose, and solidified the distinction between "incorporated" and "unincorporated" territories.⁴² The former being on the path to statehood, the Court deemed it sufficient to grant it full application of the Constitution, while the latter was subject to indeterminate colonial rule and was only granted constitutional guarantees Congress deemed "fundamental."⁴³ The Court was faced with similar cases and questions in the proceeding years and consistently permitted the colonization and subjugation of newly acquired unincorporated territories and those living within them. These cases are collectively known as the *Insular Cases*.⁴⁴

Much like Congress's rationale in passing the Foraker Act, the Supreme Court's decisions in the *Insular Cases* were heavily influenced by the notions of American Empire and Imperialism and were often rooted in racist beliefs.⁴⁵ Through the Court's reasoning and decision-making, one can glean the true motivations behind the Court's determination of what the law was in the *Insular Cases*. Understanding these motivations, it is clear that the continued application of these cases and the colonialist interpretation of the law they project violate the Fourteenth and Fifth Amendments of the Constitution and so must cease.⁴⁶ In refusing to address and overturn the *Insular Cases*, the Supreme Court not only permits but perpetuates the violation of the Fourteenth and Fifth Amendments of the very Constitution it is meant to uphold.⁴⁷ For these reasons, the Court made a mistake when it did not take

³⁹ *Id.* at 249.

⁴⁰ *Id.* at 299 (stating the question was "whether the particular tax in question was levied . . . to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, [h]ad Porto Rico . . . been incorporated into . . . the United States?").

⁴¹ Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, THE FED. LAW., Mar.–Apr. 2011, at 22–23.

⁴² *Fitisemanu v. United States*, 1 F.4th 862, 865 n.1 (10th Cir. 2021).

⁴³ Gary Lawson & Guy Seidman, *Are People in Federal Territories Part of "We the People of the United States"?*, 9 TEX. A&M L. REV. 655, 659 n.14 (2022).

⁴⁴ Gelpí, *supra* note 41, at 22.

⁴⁵ *See, e.g., Downes v. Bidwell*, 182 U.S. 244, 282 (1901) ("[G]rave questions will arise from differences of race, habits, laws and customs of the people . . . which may require action . . . [from] Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race.") (justifying Congress's treatment of Puerto Rico by explaining the difference between contiguous territories and more distant territories).

⁴⁶ *See supra* note 45 and accompanying text.

⁴⁷ *See United States v. Vaello Madero*, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring).

the opportunity to end the imperialist effects of the *Insular Cases* it was granted in *Fitisemanu*.⁴⁸

II. *FITISEMANU V. UNITED STATES*, EFFECTIVELY DENYING CONSTITUTIONAL RIGHTS AND PERPETUATING COLONIZATION IN THE TWENTY-FIRST CENTURY

Despite recognition of the premise and reasoning behind the unincorporated territories and the *Insular Cases*,⁴⁹ the cases have not been overturned and continue to provide the framework to deny constitutional rights for those living in unincorporated territories in the twenty-first century.⁵⁰

The Supreme Court has continuously avoided the question of the *Insular Cases* and ignored the implications of their colonialist roots and impact. The Court's refusal to answer questions regarding the constitutionality of the Foraker Act and the *Insular Cases* enables the enactment of federal policy to deny constitutional rights for those born in unincorporated territories and perpetuates imperialistic policy that violates the Constitution.⁵¹ Although the Court has recognized the racist and colonialist roots of the *Insular Cases*, it has justified its refusal to resolve the *Insular Cases* by claiming the question has not arisen as a direct issue or legal question in any of the cases presented before it.⁵² Despite this reasoning—and in contradiction

⁴⁸ See *id.* at 1552 (“The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”).

⁴⁹ See, e.g., *Insular Cases Resolution: Hearing on H.R. 279 Before the H. Comm. on Nat. Res.*, 117th Cong. (2021) (“[T]he United States Supreme Court’s decisions in the *Insular Cases* and the ‘territorial incorporation doctrine’ are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes . . . and should be rejected as having no place in United States constitutional law.”); *Vaello Madero*, 142 S. Ct. at 1522 (Gorsuch, J., concurring) (“The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”); see also *Boumediene v. Bush*, 553 U.S. 723, 799 (2008) (stating the Constitution grants Congress authority regarding governance of territory, but Congress does not have the power to determine when the Constitution applies in reference to the *Insular Cases* and unincorporated territories) (Souter, J., concurring); *Resolution 404*, ABA (Aug. 8–9, 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/404-annual-2022.pdf> [<https://perma.cc/KL8Q-4PJQ>] (opposing the territorial incorporation doctrine of the *Insular Cases* and urging that those in unincorporated territories be given the same rights as those living in the United States).

⁵⁰ See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO/OGC-98-5, THE U.S. CONSTITUTION AND *INSULAR CASES* (1997) [hereinafter GAO] (discussing the constitutional provisions and rights that do not apply to the unincorporated territories); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020) (addressing uncertainty regarding the applicability of the Appointments Clause in unincorporated territories); *Vaello Madero*, 142 S. Ct. 1539 (denying American citizens living in Puerto Rico the right to tax benefit programs provided to other American citizens); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (denying an American national born in American Samoa the right to vote).

⁵¹ See *supra* note 50 and accompanying text.

⁵² See *Vaello Madero*, 142 S. Ct. at 1556 (Gorsuch, J., concurring) (stating although the Plaintiffs did not ask the Court to overturn the *Insular Cases*, the reckoning is overdue).

to it—the Court has refused to grant certiorari to hear the case, *Fitisemanu*,⁵³ its most recent and best opportunity to address and remedy the Foraker Act and the decisions made in the *Insular Cases*.⁵⁴

A. Fitisemanu v. United States, Evidence of the Problem, and the Court's Refusal to Remedy It

In *Fitisemanu*, three American Samoa born plaintiffs argued that classifying American Samoans as American nationals rather than American citizens violates the Fourteenth Amendment of the Constitution.⁵⁵ In their claim, the plaintiffs argued that American Samoa was part of the United States and is subject to its jurisdiction, therefore the Citizenship Clause of the Fourteenth Amendment should be in effect.⁵⁶ This claim directly challenged the constitutionality of the Foraker Act and the *Insular Cases*.⁵⁷ Despite this direct challenge⁵⁸ and the Court's previous assurances,⁵⁹ the Court denied certiorari and again refused to address the *Insular Cases*.⁶⁰

In *Fitisemanu*, the three plaintiffs were born in American Samoa—on American soil—and are therefore American nationals who owe allegiance to the United States.⁶¹ Furthermore, each plaintiff now resides within the contiguous United States in Utah, and most have been granted valid United States passports.⁶² Despite these facts, each plaintiff has been denied what should be their constitutional rights. John Fitisemanu was denied the right to vote.⁶³ One plaintiff was denied the right to run for elected office.⁶⁴ The third plaintiff was denied the right to serve on a jury.⁶⁵

⁵³ See 143 S. Ct. 362 (2022).

⁵⁴ See *infra* Section II.A.

⁵⁵ *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021).

⁵⁶ *Id.*

⁵⁷ The Foraker Act and the *Insular Cases* determined the Constitution was not applicable to unincorporated territories and established the framework to deny citizenship for those born in unincorporated territories. See *supra* Part I.

⁵⁸ The plaintiffs directly argued the Citizenship Clause of the Fourteenth Amendment applied to American Samoans, making them citizens of the United States. *Fitisemanu*, 426 F. Supp. 3d at 1157; Petition for Writ of Certiorari, *supra* note 17 (“The question presented is: Whether persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment’s Citizenship Clause, including whether the *Insular Cases* should be overruled.”).

⁵⁹ See *supra* note 50 and accompanying text.

⁶⁰ *Court Rejects Appeal to Give American Samoans Citizenship*, VOA (Oct. 18, 2022, 6:48 AM), <https://www.voanews.com/a/court-rejects-appeal-to-give-american-samoans-citizenship-/6794467.html> [<https://perma.cc/U6RA-L2S3>].

⁶¹ *Fitisemanu*, 426 F. Supp. 3d at 1159–60.

⁶² *Id.*

⁶³ *Id.* at 1160.

⁶⁴ *Id.*

⁶⁵ *Id.*

At trial, the District Court of Utah justly determined that the Citizenship Clause of the Fourteenth Amendment applies to American Samoans⁶⁶ and therefore, ruled that each of the three incidents unlawfully denied constitutionally granted rights. In coming to its decision, the District Court considered the applicability of the *Insular Cases*,⁶⁷ the circumstances surrounding the cession of American Samoa to the United States,⁶⁸ and the Supreme Court's historical approach to the Citizenship Clause in *Wong Kim Ark*.⁶⁹ When discussing *Wong Kim Ark*, the District Court stated "[t]he holding of *Wong Kim Ark* was that the Fourteenth Amendment adopted the English common-law rule for citizenship."⁷⁰ The District Court further explained the English common-law rule "required birth within the dominion and allegiance of the sovereign" and thus, "if American Samoa is within the 'dominion' of the United States . . . it is 'within the United States' under the Fourteenth Amendment."⁷¹ Abiding by the precedent set by the Supreme Court and with this understanding, the District Court held "American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States."⁷²

Despite the District Court's reasoned analysis and despite recognizing the denial of constitutional rights,⁷³ the Court of Appeals for the Tenth Circuit reversed the District Court's decision, deciding that the Citizenship Clause of the Fourteenth Amendment does not apply to American Samoans.⁷⁴ The Court of Appeals rooted its decision in recognizing that "Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands."⁷⁵ Furthermore, the Court of Appeals disagreed with the District Court's understanding of *Wong Kim Ark* as controlling precedent that required the Citizenship Clause be construed in the light of English common law.⁷⁶ Rather, the Court of Appeals rooted its decision in whether the unincorporated territory was "within the dominion" of the United States, and not whether American Samoans owed allegiance to the United States as the District Court had decided, differentiating *Fitisemanu* from *Wong Kim Ark*.⁷⁷ In

⁶⁶ *Id.* at 1196.

⁶⁷ *Id.* at 1191–95 ("To summarize, because *Downes* did not construe the Citizenship Clause, and because the controlling opinion's statements in *Downes* related to citizenship are not binding on this court, *Downes* does not control the outcome of this case.").

⁶⁸ *See id.* at 1170–73.

⁶⁹ *Id.* at 1190.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1191.

⁷³ *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021) ("American Samoans are denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries.").

⁷⁴ *Id.*

⁷⁵ *Id.* at 864.

⁷⁶ *Id.* at 871.

⁷⁷ *Id.*

differentiating *Fitisemanu* from *Wong Kim Ark*, the Court of Appeals opted to rely on the *Insular Cases*, claiming “the *Insular Cases* provide the more relevant, workable, and . . . just standard.”⁷⁸ In doing so, the Court of Appeals argued that the *Insular Cases* were better aligned with the wishes of American Samoans, ignoring the racist origins of the cases.⁷⁹ Furthermore, the Court of Appeals’ reasoning directly contradicted the Supreme Court’s declaration that the decisions in the *Insular Cases* “should not be expanded.”⁸⁰ Not only did the Court of Appeals ignore the origins of the *Insular Cases*, it ignored the desires of many American Samoans to be recognized as citizens of the United States.⁸¹

After the Court of Appeals of the Tenth Circuit reversed the decision of the District Court, the plaintiffs in *Fitisemanu* petitioned the Supreme Court for certiorari.⁸² In their petition, the plaintiffs disputed the application of the *Insular Cases* and again relied on *Wong Kim Ark* to argue that the Citizenship Clause of the Fourteenth Amendment included territories of the United States and those born within them.⁸³ Despite the petitioners’ pleas and the supporting amici,⁸⁴ the Supreme Court denied certiorari on October 17, 2022.⁸⁵

⁷⁸ *Id.* at 873.

⁷⁹ *Id.* at 874 (“The *Insular Cases*, despite their origins, allow us to respect the wishes of the American Samoan people.”).

⁸⁰ *Resolution 404*, *supra* note 49, at 5 (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957)).

⁸¹ The desire of American Samoans to be recognized as citizens of the United States is depicted by the plaintiffs’ request to be recognized as so in *Fitisemanu*. 426 F. Supp. 3d at 1157. Additionally, at the time American Samoans realized they were not recognized as citizens, many formed a new political movement seeking recognition as such. *Id.* at 1171. In the following years the American Samoan Commission was created to address this very issue. “According to the Samoan Federation of America, ‘throughout the hearings, American Samoans repeatedly and uniformly stated their desire to be recognized as U.S. citizens.’” *Id.* at 1172 (quoting *American Samoa: Hearings Before the Comm’n Appointed by the President of the United States* (1931), ECF No. 55, at 17). The Commission produced a report representing the true wishes of the people of American Samoa and requested they be given full American citizenship. *Id.* at 1172–73. The report stated: “These people owed no allegiance to any foreign government. They were autonomous. For generations they had successfully governed themselves. . . . Their loyalty to the United States and their intense longings to have made certain national status demand recognition.” *Id.* (quoting ECF No. 55-2, at 162).

⁸² *See generally* Petition for Writ of Certiorari, *supra* note 17.

⁸³ *See id.* at 20–26; *see supra* notes 69–72 and accompanying text.

⁸⁴ *See, e.g.*, Brief for Amici Curiae ACLU et al. in Support of Petitioners at 7, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394); Brief for Scholars of Constitutional Law and Legal History as Amici Curiae in Support of Petitioners at 2, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394); Brief of The Descendants of Dred Scott and Isabel Gonzalez as Amici Curiae in Support of Petitioners at 4, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394); Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners at 4, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394); Brief of Amicus Curiae Virgin Islands Bar Ass’n in Support of Petition for Writ of Certiorari at 4, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394).

⁸⁵ *Fitisemanu*, 143 S. Ct. 362, *denying cert. to* 1 F.4th 62 (10th Cir. 2021).

B. The Court Leaving It to Congress to Decide What the Law Is: Congress's Arbitrary Granting of "Fundamental Rights"

The Court's denial of certiorari not only permits the *Insular Cases* to continue to stand, but it also allows for the arbitrary deprivation of constitutional rights that enables the subjugation of those living in American Samoa and other unincorporated territories to the colonial rule of the United States. Through the Court's invention of "territorial incorporation" and the "unincorporated territory" in *Downes*,⁸⁶ the Court effectively prevented the territories from automatically assuming all rights and protections provided in the Constitution.⁸⁷ In the *Insular Cases*, the Court left to Congress the determination of which rights were applicable to the newly defined "unincorporated territories."⁸⁸ The Court required only that Congress provide rights that Congress deemed "fundamental," but did not delineate which rights should be considered fundamental, nor proscribe a methodology to make this determination.⁸⁹ The ambiguity in the Court's mandate immediately produced confusion and disagreement in defining and determining "fundamental rights."⁹⁰ Justices frequently disagreed about which rights were fundamental, while some argued that the notion of "fundamental rights" itself was violative of the Constitution.⁹¹ Despite the skepticism surrounding the approach, the Court continued its application and even furthered its ambiguity.⁹² In *Reid v. Covert*, Justice Harlan's concurrence set a standard for determining fundamental rights on a "case-by-case" basis.⁹³ This standard allows Congress to base its decisions on circumstances and does not require tangible criteria or evidence to support the denial of constitutional rights for unincorporated territories.⁹⁴ Furthermore, the Court will uphold a congressional determination that a right is *not* fundamental so long as Congress provides a rational basis for its

⁸⁶ See *supra* note 45 and accompanying text.

⁸⁷ See Developments in the Law, *U.S. Territories Introduction*, 130 HARV. L. REV. 1617, 1620 (2017).

⁸⁸ *Id.*

⁸⁹ See Developments in the Law, *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1682 (2017) [hereinafter *American Samoa and the Citizenship Clause*]. Congress was left to make its decisions based on what would be "impracticable and anomalous." See generally Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171 (2012).

⁹⁰ See *American Samoa and the Citizenship Clause*, *supra* note 89, at 1682.

⁹¹ See *id.* (discussing Justice Black's disdain for the fundamental rights framework set out in the *Insular Cases*) (citing *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion)).

⁹² *Id.*

⁹³ *Id.* (stating the Court should analyze Congress's determination of whether something is a fundamental right "in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it"). This circumstantial standard is still applied today. *Id.* at 1683 (citing *Boumediene v. Bush*, 553 U.S. 723 (2008)).

⁹⁴ See *id.* at 1682–83.

decision.⁹⁵ By invoking this standard and limiting judicial review, the Court has consistently allowed Congress to deny constitutional rights to U.S. nationals and citizens born in unincorporated territories.⁹⁶ Therefore, because of the Court's refusal to overturn the *Insular Cases* in *Fitisemanu* and absent an application of substantive judicial review, unincorporated territories are beholden to arbitrary congressional determinations of which rights are "fundamental."⁹⁷ Without additional protections or action, Congress may continue denying rights—including those expressly granted in the Constitution—to U.S. nationals and citizens born in unincorporated territories.⁹⁸ For this reason, there must be an alternative solution, external to the Court.

III. SOLUTIONS TO THE *INSULAR CASES* EXTERNAL TO THE SUPREME COURT

As the Supreme Court has refused to address the *Insular Cases* and denied certiorari to an explicit appeal to overturn the cases, solutions to the consequences arising from the *Insular Cases* must be found elsewhere. Throughout Part III, this Note will argue that tribal sovereignty should be granted to the unincorporated territories. As the United States is unlikely to grant independence to unincorporated territories and has no intention to admit them as states, this Note argues that tribal sovereignty is the next best solution to effectively end the colonial rule of unincorporated territories and the denial of constitutional rights to the U.S. nationals and citizens born within them. Granting tribal sovereignty to the unincorporated territories would permit each territory's continued self-governance and preservation of its cultural practices and resources. Part III will describe the parallelism between tribal sovereignty for Native Americans and those in unincorporated territories, explain tribal sovereignty as a solution to the *Insular Cases*, and provide an example

⁹⁵ See *U.S. Territories Introduction*, *supra* note 87, at 1620–21 (discussing the Court's decision in *Harris v. Rosario*, determining that discriminatorily providing less aid to Puerto Ricans was constitutionally permissible because Congress had a "rational basis"); U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory.").

⁹⁶ See generally GAO, *supra* note 50 (discussing the constitutional provisions and rights that do not apply to the unincorporated territories); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1658 (2020) (addressing uncertainty regarding the applicability of the Appointments Clause in unincorporated territories); *United States v. Vaello Madero*, 142 S. Ct. 1539 (2022) (denying American citizens living in Puerto Rico the right to tax benefit programs provided to other American citizens); *Fitisemanu v. United States*, 1 F.4th 62 (10th Cir. 2021).

⁹⁷ See GAO, *supra* note 50, at 23 (stating it depends on "whether the right in question is considered to be 'fundamental' or not" and "whether Congress has taken legislative action to extend the Constitution to the territory.").

⁹⁸ *Id.* at 24 ("[R]ights . . . even though they be stated in the Constitution, do not apply to the territories . . . unless the Congress makes them applicable by legislation.").

through comparative analysis to provisions in Chile's proposed constitution which would provide tribal sovereignty to its Native and Indigenous inhabitants.

A. Parallelism: Historical and Cultural Similarities and Analogies Between Native Americans and the Unincorporated Territories

The U.S. Constitution recognizes the Indigenous tribes of Native Americans as distinct governments residing within the territory of the fifty states.⁹⁹ Tribal sovereignty is further recognized and supported by legislation and Supreme Court decisions.¹⁰⁰ Tribal sovereignty permits the Indigenous tribes to exercise self-rule despite being subject to the federal government.¹⁰¹ The foundation of sovereignty for Indigenous tribes lay in the principles that Indigenous tribes governed themselves and were present in the United States prior to the arrival of European settlers.¹⁰² In signing treaties with the United States, Indigenous tribes did not relinquish the right to govern themselves but rather retained the right to remain sovereign, even as subjects of the federal government.¹⁰³ Not only does tribal sovereignty grant Indigenous tribes the right to self-govern but also the right to preserve and protect their culture.¹⁰⁴

The foundation and principles that resulted in the grant of tribal sovereignty to Indigenous tribes also exist in the unincorporated territories. Therefore, the same reasoning can be used to argue and justify a grant of tribal sovereignty to the unincorporated territories. Just as the Native Americans were present in the United States prior to the arrival of European settlers, so too were those living in American Samoa.¹⁰⁵ Just as the Native Americans had their own form of government, so too do the American Samoans.¹⁰⁶ Just as the Native Americans have their own culture

⁹⁹ *Cf.* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (“The [C]onstitution, by declaring treaties already made, . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations.”).

¹⁰⁰ *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831) (“The acts of our government plainly recognize the Cherokee nation as a state; and the courts are bound by those acts.”); *Worcester*, 31 U.S. at 519 (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states.”).

¹⁰¹ *Tribal Sovereignty: History and the Law*, CA. DEMOCRATIC PARTY'S NATIVE AM. CAUCUS [hereinafter *Tribal Sovereignty*], <https://nativeamericancaucus.org/resources/tribal-sovereignty-history-and-the-law/> [https://perma.cc/8F6M-RYEL] (last visited Dec. 4, 2023).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Understanding Tribal Sovereignty*, FED. BAR ASS'N BLOG (Mar. 1, 2017), <https://www.fedbar.org/blog/understanding-tribal-sovereignty/> [https://perma.cc/FH28-26Q4].

¹⁰⁵ People inhabited the Samoan islands as early as 3,000 years ago. *History*, NAT'L MARINE SANCTUARY OF AM. SAM., <https://americansamoa.noaa.gov/learn/history.html> [https://perma.cc/B369-H2AC] (last visited Dec. 4, 2023). The first Europeans reached the islands in 1722, and American Samoa was acquired by the United States, Germany, and Great Britain in 1889 through the Treaty of Berlin. *Id.*

¹⁰⁶ This statement refers to the governments now established in each of the unincorporated

that required preservation and protection from the imposition of Western culture, so too does American Samoa.¹⁰⁷ Therefore, these general principles lay the foundation for granting tribal sovereignty to American Samoa and other unincorporated territories. With such similarity between the Indigenous tribes and the unincorporated territories, it can be argued that the sole reason to deny the unincorporated territories of tribal sovereignty is so the United States may retain the unincorporated territories and those born within them as subjects of its colonial rule.

Not only do the analogies between Native Americans and the unincorporated territories suggest that similar treatment of the two is logical, but there is also evidence that the United States recognized this and could have treated them as such all along.¹⁰⁸ When discussing the Foraker Act and its treatment of the unincorporated territories and those born within them, many senators compared the situation and relationship to the Indigenous tribes.¹⁰⁹ Some senators asked why tribal sovereignty and the approach taken with the Indigenous tribes was not prescribed to the relationship with the unincorporated territories¹¹⁰—and even recommended that it should be.¹¹¹ Additionally, the question of whether newly acquired territories could self-govern had already been asked and answered—in the affirmative—more than fifty years *before* Congress and the Court arrived at the opposite conclusion in the

territories, rather than the existing governments at the time of their colonization. A government separate and distinct from that of the United States already exists in each of the unincorporated territories. *See, e.g.,* AM. SAM. CONST. Therefore, much like the Native American tribes, the unincorporated territories have the capacity to govern themselves and do not require the subjugation of the United States for survival.

¹⁰⁷ In American Samoa, preservation of Samoan culture and way of life is of the utmost importance. *See* Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata at 6–7, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394). American Samoan’s practice *fa’a Samoa*, meaning “the Samoan way,” that is a “unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race.” Guy C. Charlton & Tim Fadgen, Case Note, *Fitisemanu v. United States: U.S. Citizenship in American Samoa and the Insular Cases*, 39 UCLA PAC. BASIN LAW J. 25, 30 n.17 (2022) (quoting Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT’L L. 35, 41–42 (2000)).

¹⁰⁸ *Supra* notes 63–64 and accompanying text.

¹⁰⁹ As Senator Morgan remarked: “Congress can assign to these people the character of inhabitants, *like our Indians* There is no prohibition in the Constitution or in the treaty of Paris.” CONG. REC. S3079 (daily ed. 1900) (remarks of Sen. Morgan) (emphasis added).

¹¹⁰ *See id.* at 3081 (“I would suggest the inquiry whether we can not make treaties with them as we formerly made treaties with the Indian tribes. . . . This is another feature that is expressly provided for in our original and peculiar system of Territorial governments, which may be convenient now.”).

¹¹¹ *See id.* (“Sixty tribes, on as many islands, many of whom are unfit for our plan of civil government, may be governed somewhat as we have governed the Indians. . . . I . . . suggest it as being worthy of consideration by Congress.”).

Foraker Act and the *Insular Cases*.¹¹² The question first arose at the time of the occupation of the Oregon Country in 1846.¹¹³ During this occupation, Congress had to decide whether the United States would become a colonial ruler, or permit self-governance of the Oregon Country.¹¹⁴ In this instance, “Congress abjured colonialism and permitted self-government.”¹¹⁵ The senators’ recommendations that the unincorporated territories be treated the same as the Indigenous tribes and Congress’s previous permittance of self-governance in newly acquired territories demonstrate that the Foraker Act and the *Insular Cases* were never required, and that Congress could have permitted self-governance of the unincorporated territories all along. This provides further justification to combine self-governance with birthright citizenship to make the territories “affiliate[s] with the United States but . . . neither states nor colonies” through a grant of tribal sovereignty.¹¹⁶

B. Granting Tribal Sovereignty: How It Would Remedy the Insular Cases and End Colonial Rule of the Unincorporated Territories

Much like the national and citizenship status of American Samoans and those born in unincorporated territories, the status of Native Americans was just as ambiguous. After the Fourteenth Amendment was added to the Constitution to remedy the decision in *Dred Scott*, the question remained as to whether Native Americans were considered “citizens of the United States.”¹¹⁷ After years of uncertainty, the Indian Citizenship Act granted citizenship to all Native Americans.¹¹⁸ Even still, Native Americans were denied certain constitutional rights, including the right to vote, again much like American Samoans.¹¹⁹ Due to these similarities, and others discussed above, it is not difficult to argue American Samoans and others born in unincorporated territories can and should be recognized as citizens, even if not within the meaning of the Citizenship Clause of the Fourteenth Amendment as construed by the courts. The courts and Congress cannot argue that the refusal to do so is due to impracticability and anomaly,¹²⁰ but rather to perpetuate colonial rule. Often, courts and legislators have denied constitutional rights to those in unincorporated

¹¹² See John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 402 (2018).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ NCC Staff, *On This Day, All American Indians Made United States Citizens*, NAT’L CONST. CTR. (June 2, 2023), <https://constitutioncenter.org/blog/on-this-day-in-1924-all-indians-made-united-states-citizens> [<https://perma.cc/DNX4-ECJN>].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Merriam, *supra* note 89, at 174.

territories under the guise of “impracticab[ility] and anomal[y].”¹²¹ Meaning, the granting and maintaining of the right would prove too difficult (“impracticable”) and if not too difficult, violative of the traditions and culture held by those the rights would be granted to (“anomalous”).¹²² This impracticable and anomalous argument was frequently used to deny Native Americans’ constitutional rights and citizenship.¹²³ While both the Native Americans and the American Samoans remain anomalous to the United States,¹²⁴ the eventual granting of constitutional rights and citizenship to Native Americans negates the assertion that doing so would be impracticable.¹²⁵ Furthermore, the granting of rights and citizenship to Native Americans was executed in a manner that preserved their traditions and culture, nullifying the use of anomaly to deny American Samoans constitutional rights and citizenship.¹²⁶ Therefore, a similar grant, or even the same grant, of tribal sovereignty to American Samoans as has been granted to Native Americans would endow American Samoans with the constitutional rights they so deserve while protecting the perceived desires of American Samoans and their culture of fa’a Samoa of which the Tenth Circuit and the Government were so concerned in *Fitisemanu*.¹²⁷

Not only would the granting of tribal sovereignty to American Samoans and other unincorporated territories sufficiently grant constitutional rights and preserve culture, it would permit the relationship between the federal government of the United States and American Samoa to remain relatively the same.¹²⁸ Just as unincorporated territories are able to establish their own form of government and self-rule,¹²⁹ the

¹²¹ *Id.*

¹²² *Id.* at 187.

¹²³ *Id.*

¹²⁴ Angela R. Riley, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173 (2017) (“Tribes’ motivations for safeguarding their differentness are multifaceted, but history shows that commitments to protecting and defending Indian lands, as well as the fight for continued cultural survival, were and remain central motivations.”).

¹²⁵ See *supra* notes 97–99 and accompanying text.

¹²⁶ This desire for separation has been called “measured separatism” and permits tribes to remain in the United States as “domestic dependent nations” while simultaneously avoiding assimilation and expropriation. Riley, *supra* note 124, at 174. Considering the concerns and desired status of many American Samoans, along with the necessity of ending imperialistic and colonial rule that produces the denial of rights, tribal sovereignty can arguably make unincorporated territories “domestic dependent nations” while achieving “measured separatism.”

¹²⁷ See *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *rev’d*, 1 F.4th 862 (10th Cir. 2021); *Fitisemanu*, 1 F.4th at 880; see also Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 107, at 27–28 (requesting the Citizenship Clause not be applied to American Samoans in order to protect their culture and basic right to self-determination).

¹²⁸ See *supra* notes 105–07 and accompanying text.

¹²⁹ See *supra* note 112 and accompanying text.

granting of tribal sovereignty recognizes tribes as distinct governments with similar powers to that of federal and state governments.¹³⁰ Tribal sovereignty includes “the right to establish their own form of government, determine membership requirements, enact legislation and establish law enforcement and court systems,” all while permitting the federal government to intervene when it deems necessary.¹³¹ Furthermore, this can be viewed as a form of federalism in itself,¹³² which reserves sovereignty for the tribe but permits the federal government to retain certain powers and the right to intervene in certain tribal affairs.¹³³ Despite this idea of “territorial federalism,” Congress is still able to exercise its plenary power and supersede the established government of unincorporated territories.¹³⁴ As discussed above, this is similar to the acting governments already present in many of the unincorporated territories and the relationship between them and the federal government of the United States.¹³⁵

C. Application, at Work, and Why Tribal Sovereignty Specifically

1. How to Grant Tribal Sovereignty to American Samoa

There are various ways in which American Samoa could be granted tribal sovereignty. First, American Samoa could receive federal recognition as a tribe, which would effectively confer tribal sovereignty.¹³⁶ Additionally, there are various

¹³⁰ See *An Issue of Sovereignty*, NAT’L CONF. OF STATE LEGIS. (Jan. 13, 2013), <https://www.ncsl.org/quad-caucus/an-issue-of-sovereignty> [<https://perma.cc/G39X-R2YJ>]; *Tribal Governance*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance> [<https://perma.cc/FRG7-TJCE>] (last visited Dec. 4, 2023) (“Tribal governments maintain the power to determine their own governance structures, pass law, and enforce laws.”).

¹³¹ See *An Issue of Sovereignty*, *supra* note 130.

¹³² See Developments in the Law, *Territorial Federalism*, 130 HARV. L. REV. 1617, 1621–22, 1624, 1627 (2017) (discussing Congress relinquishing complete control over Puerto Rico that granted the territory a degree of autonomy and resulted in a similar relationship to that of the federal government and the states).

¹³³ See *Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE: A PROJECT OF THE TRIBAL L. & POL’Y INST., <https://www.tribal-institute.org/lists/icra.htm> [<https://perma.cc/BSX3-X7EB>] (last visited Dec. 4, 2023) (discussing the Indian Civil Rights Act and the federal government’s ability to intervene in certain Indian affairs); The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–04 (amended by Public Law 117-103) (current version at 136 Stat. § 898); *Tribal Governance*, *supra* note 130.

¹³⁴ See *Territorial Federalism*, *supra* note 132, at 1637 (describing the effect of Congress’s enactment of PROMESA in undermining the idea of territorial federalism).

¹³⁵ See GAO, *supra* note 50, at 8 (discussing the internal-governance of insular territories under the authorization of Congress); *Tribal Sovereignty*, *supra* note 101 and accompanying text.

¹³⁶ See *Why Tribes Exist Today in the United States—What Is a Federally Recognized Tribe?*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFS., <https://www.bia.gov/frequently-asked-questions#:~:text=Historically%2C> [<https://perma.cc/3BVL-TNGE>] (last

paths to be federally recognized as a tribe.¹³⁷ This includes treaties, acts of Congress, executive orders, administrative actions, and court decisions.¹³⁸ Furthermore, the Federally Recognized Indian Tribe List Act established three ways in which a group may become recognized, including: an Act of Congress, administrative procedure under 25 C.F.R. Part 83, or a decision of a U.S. court.¹³⁹

Once a tribe receives federal recognition, it has more autonomy and protection from congressional interference.¹⁴⁰ Federally recognized tribes have inherent power to make their own government, subject to limitations from treaties, Congress, and courts.¹⁴¹ Through congressional enactment of the Indian Self-Determination and Education Assistance Act of 1975¹⁴² and the Tribal Self-Governance Act of 1994,¹⁴³ Congress has codified a degree of deference to federally recognized tribes when it comes to administering services to tribal citizens and taking federal action that may directly affect the tribes.¹⁴⁴

To be recognized as an Indigenous Tribe and receive the additional autonomy and sovereignty Indigenous Tribes have, American Samoa can petition the Office of Federal Acknowledgment (OFA) for official federal “acknowledgment.”¹⁴⁵ The OFA applies “anthropological, genealogical, and historical research methods” to evaluate the petition and make a recommendation to the Assistant Secretary of Indian Affairs (AS-IS).¹⁴⁶ The OFA and AS-IS’s reviews and final determinations are made in adherence with Part 83 of Title 25 of the Code of Federal Regulations (25 C.F.R. Part 83), *Procedures for Federal Acknowledgment of Indian Tribes*.¹⁴⁷ Section 83.11 of the Code sets out criteria required to be acknowledged as a federally recognized tribe.¹⁴⁸ This criteria includes being a distinct community,¹⁴⁹ having

visited Dec. 4, 2023) (stating federally recognized tribes have a government-to-government relationship with the United States).

¹³⁷ *See id.* (discussing the various ways federal recognition status can be conferred).

¹³⁸ *Id.*

¹³⁹ *Id.*; Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, 4792.

¹⁴⁰ *See Tribal Government: Powers, Rights, and Authorities*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/WAY6-9KTW>] (last visited Dec. 4, 2023).

¹⁴¹ *Id.*

¹⁴² Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1975) (current version at 25 U.S.C. § 5301(c)(1)–(3)).

¹⁴³ Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4271.

¹⁴⁴ *Id.*

¹⁴⁵ *Office of Federal Acknowledgment (OFA)*, U.S. DEP’T OF THE INTERIOR BUREAU OF INDIAN AFFS., <https://www.bia.gov/as-ia/ofa> [<https://perma.cc/F8A7-HEUH>] (last visited Dec. 4, 2023).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; Federal Acknowledgment of American Indian Tribes, 25 C.F.R. pt. 83 (2023).

¹⁴⁸ 25 C.F.R. § 83.11.

¹⁴⁹ *Id.* § 83.11(b).

autonomous political influence,¹⁵⁰ and providing a governing document,¹⁵¹ among other requirements.¹⁵²

With these requirements and in understanding the status of American Samoa, it seems reasonable that American Samoa could qualify for federal recognition as an Indigenous tribe. As previously discussed, and as recognized by American Samoans,¹⁵³ the Court in the *Insular Cases*,¹⁵⁴ and the Tenth Circuit in *Fitisemanu*,¹⁵⁵ American Samoa satisfies the requirement that it have its own distinct culture from that of the United States.¹⁵⁶ Additionally, American Samoa's established government¹⁵⁷ can easily be argued to constitute "a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence" in order to satisfy the political influence requirement set out in Section 83.11(c).¹⁵⁸ Lastly, American Samoa has its own constitution, which satisfies the governing document requirement of Section 83.11(d).¹⁵⁹ The remaining criteria set out in Section 83.11 require additional historical evidence establishing that the group identifies as a tribe.¹⁶⁰ Because of American Samoa's history and culture, a petition for federal recognition as a tribe would likely be granted. With federal recognition, American Samoa, and other unincorporated territories, would receive the citizenship status and constitutional rights given to federally recognized Indigenous Tribes. This recognition would be a grant of increased sovereignty and autonomy from the federal government of the United States, less reliance on arbitrary congressional determinations of applicable fundamental rights, and an important step toward ending the United States colonial rule and subjugation of those born

¹⁵⁰ *Id.* § 83.11(c).

¹⁵¹ *Id.* § 83.11(d).

¹⁵² *Id.* § 83.11.

¹⁵³ *See supra* note 105 and accompanying text; Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 107, at 1–3 (Government of American Samoa petitioning the court to deny granting citizenship to American Samoan's out of concern of protecting its culture).

¹⁵⁴ *See supra* Section I.A.2 (arguing the Supreme Court's reasoning in the *Insular Cases* was rooted in racism and othering of American Samoans and those born in the unincorporated territories).

¹⁵⁵ *See supra* text accompanying notes 73–77 (discussing the Tenth Circuit Court of Appeals' decision to overturn the lower court's determination that the Citizenship Clause applied to American Samoans).

¹⁵⁶ *See supra* note 107.

¹⁵⁷ GAO, *supra* note 50, at 8 (stating American Samoa has its own internal government).

¹⁵⁸ Federal Acknowledgment of American Indian Tribes, 25 C.F.R. § 83.11(c) (2023).

¹⁵⁹ AM. SAM. CONST.; *see also* GAO, *supra* note 50, at 8 (explaining some insular territories have adopted their own constitutions with the authorization of Congress).

¹⁶⁰ *See* 25 C.F.R. § 83.11.

in unincorporated territories. For example, granting tribal sovereignty through federal recognition of American Samoa as an Indigenous Tribe would necessarily resolve the issue in *Fitisemanu* by instilling upon John Fitisemanu the right to vote and would simultaneously right the wrong of American citizens and nationals born in unincorporated territories being subject to the Federal Government without representation or a voice in the democratic process.

2. Example: Chile's Proposed Constitution and Its Attempt to Grant Tribal Sovereignty

With a change in Chile's government in 2022, the new government has worked to create equality for all populations. In this attempt, the government has recognized the importance of granting indigenous and tribal people sovereignty.¹⁶¹ The proposed tribal sovereignty is much like that of the sovereignty of the Indigenous tribes recognized by the United States.¹⁶² The proposed Chilean Constitution's grant of tribal sovereignty would allow Indigenous people to "govern their own territories, have their own courts, and be recognized as distinct nations within Chile."¹⁶³ This would provide the Indigenous people of Chile their own autonomous territories and protection over their lands and natural resources.¹⁶⁴ Not only would Chile's proposed constitution grant Indigenous populations control over their land and resources, it would establish a distinct justice system for cases arising within Indigenous populations.¹⁶⁵ Additionally, the Chilean Constitution proposes Chile be recognized as a "plurinational" state.¹⁶⁶ This means Chile would recognize multiple nations within its own borders,¹⁶⁷ much like the United States does with Indigenous Tribes and can do with a grant of tribal sovereignty to the unincorporated territories. Furthermore, the proposed constitution ensures the Chilean government satisfies the requirements of the United Nations Declaration on the Rights of Indigenous People.¹⁶⁸

¹⁶¹ See Constitución Política de la República de Chile [C.P.] art. 5 (draft, 2022) (unratified).

¹⁶² See *id.*; see also Ana Lankes, *The Contentious Vote in Chile That Could Transform Indigenous Rights*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/world/americas/chile-constitution-vote-indigenous.html> [https://perma.cc/ZQR9-BR5P].

¹⁶³ Lankes, *supra* note 162.

¹⁶⁴ *Id.*

¹⁶⁵ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 34; *id.* art. 309. Establishing a separate court system for indigenous populations aligns with the already existing courts in unincorporated territories and similar systems present in Native American Tribes. See GAO, *supra* note 50, at 21. Furthermore, the Indigenous justice system suggested by the proposed Chilean Constitution is limited and requires certain cases be heard by the country's justice system so as not to impede upon the sovereignty of the Chilean government. Lankes, *supra* note 162.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ The United Declaration on the Rights of Indigenous People provides the right to

Despite the efforts made by the constitutional assembly to rewrite the Chilean Constitution to be more inclusive and respectful of Indigenous populations and their autonomy and culture, the proposed constitution failed to pass.¹⁶⁹ Many argue it was not the sentiment that inhibited approval of the constitution but rather both the extent to which the constitution went on Indigenous rights, and arguably interference by the government of the United States.¹⁷⁰ Although the proposal did not pass, it is still an example of a grant of tribal sovereignty to the Indigenous populations born in unincorporated territories and beholden to the government of the United States.

Much like the similarities between the Indigenous tribes in the United States and the individuals living in the unincorporated territories,¹⁷¹ the proposed Chilean constitution recognizes these issues for its own people and has attempted to address them. The United States could recognize the approach Chile has attempted to take and follow suit so that it may end its colonial rule and subjugation of those born in unincorporated territories. When asked what the proposed constitution would mean for Chile and its Indigenous populations, Elisa Loncón, the first president of Chile's constitutional assembly tasked with rewriting Chile's Constitution,¹⁷² stated: "It means that a Chile without racism is possible, that an inclusive democracy is possible, and that having a different identity doesn't harm the unity of this country, but rather enriches it."¹⁷³ If the United States were to follow suit and grant unincorporated territories tribal sovereignty and the recognition suggested by the proposed Chilean constitution, the same effect can be felt by those born in unincorporated territories that have for far too long endured the colonialist rule of the United States.

self-determination and persuades governments to receive consent from Indigenous populations prior to enacting laws that may affect them. *Id.* Despite having a vast indigenous population and having granted tribal sovereignty to tribes, the United States voted against the United Nations Declaration, another indication of the United States' desire to persist in its colonial rule. *United Nations Declaration on the Rights of Indigenous Peoples*, U.N.: DEP'T OF ECON. & SOC. AFFS.: SOC. INCLUSION, <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples> [<https://perma.cc/B74V-ESY7>] (last visited Dec. 4, 2023).

¹⁶⁹ Jack Nicas, *Chile Says 'No' to Left-Leaning Constitution After 3 Years of Debate*, N.Y. TIMES (Sept. 6, 2022), <https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html> [<https://perma.cc/9HLQ-YNQF>].

¹⁷⁰ See Lankes, *supra* note 162 (stating many Chileans took issue with the term pluri-national, preferring "multicultural" or no distinction, in addition to concerns over the creation of two distinct justice systems and the possibility of an "Indigenous monarchy").

¹⁷¹ See *supra* text accompanying notes 60–62.

¹⁷² *Chile's Constitutional Process: An Historical Opportunity to Enshrine Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (June 8, 2022), <https://www.ohchr.org/en/stories/2022/06/chiles-constitutional-process-historic-opportunity-enshrine-human-rights> [<https://perma.cc/SNT2-UAZZ>].

¹⁷³ Lankes, *supra* note 162.

IV. ADDRESSING COUNTERARGUMENTS

In recognition of the many issues attached to tribal sovereignty and the granting of such to American Samoa and the unincorporated territories, it is important to address concerns regarding this solution. While this proposed solution to ending the colonial rule and subjugation of those born in unincorporated territories does have its flaws, it cannot be said to be without merit. This Note understands the issues facing Indigenous Tribes in the United States and does not intend to argue that those issues do not exist. However, this Note does argue that the complete and total subjugation of unincorporated territories to the whims of Congress in receiving constitutional rights and protections may be improved through tribal sovereignty, despite the remaining congressional control and interference in Indigenous tribal sovereignty and affairs. This is argued because although the issue of congressional plenary power remains, the granting of tribal sovereignty includes the granting of constitutional rights.¹⁷⁴ While congressional plenary power over unincorporated territories remains problematic, it can be argued that plenary power with the addition of constitutional rights and protections is better than plenary power without. For this reason, rooting Congress's plenary power over unincorporated territories in the Commerce Clause like it does for Indigenous tribes¹⁷⁵ would invoke more benefits and prevent more harm than continuing to root plenary power in the Territorial Clause.¹⁷⁶ Therefore, those in unincorporated territories will no longer be dependent on Congress's arbitrary determinations, but rather will be assured of their constitutional rights, including the right to vote.

Furthermore, while the solution has its flaws, other solutions to the problems faced by those in unincorporated territories have been insufficient in ending the United States' colonial rule. One such proposed solution or remedy is the idea of "territorial federalism." This idea is intended to act similarly to the proposal of tribal sovereignty by treating unincorporated territories as their own sovereign with their own internal governance.¹⁷⁷ However, while territorial federalism is a good idea in theory, it has failed to address the problem at hand due to the extent of Congress's

¹⁷⁴ *Tribal Sovereignty: History and the Law*, CA. DEMOCRATIC PARTY'S NATIVE AM. CAUCUS, <https://nativeamericancaucus.org/resources/tribal-sovereignty-history-and-the-law/> [<https://perma.cc/E7G4-9AEB>] (last visited Dec. 4, 2023).

¹⁷⁵ The Commerce Clause is often cited as the source of Congress's plenary power over Indigenous Tribes. See *Native American Rights: Federal Power over Native Americans*, JRANK, <https://law.jrank.org/pages/8749/Native-American-Rights-Federal-Power-over-Native-American-Rights.html> [<https://perma.cc/5DQ2-B8U8>] (last visited Dec. 4, 2023); U.S. CONST. art. I, § 8, cl. 3.

¹⁷⁶ U.S. CONST. art. IV, § 3, cl. 2.

¹⁷⁷ See generally *Territorial Federalism*, *supra* note 132 (discussing the idea of autonomy for unincorporated territories acting as a form of federalism between the Federal Government and the territories).

plenary power over the unincorporated territories.¹⁷⁸ Without a limitation on plenary power, Congress can supersede and intervene in the supposedly autonomous functioning of the unincorporated territories' internal governance; and furthermore, does not address the territories' subjugation to Congress's arbitrary determinations.¹⁷⁹ Without a limitation on Congress, it is left to the Court to effectively apply judicial review to protect those in unincorporated territories and their constitutional rights.¹⁸⁰ As clearly indicated by the Court in its denial of certiorari to hear *Fitisemanu*, the Court has refused to effectuate its role in challenging reprehensible and unconstitutional acts of Congress, therefore invalidating the idea of territorial federalism and leaving only the solution of tribal sovereignty.¹⁸¹ Additionally, another proposed, yet unachievable solution is statehood or independence for unincorporated territories.¹⁸² Becoming a state requires congressional legislation admitting the territory to statehood.¹⁸³ Recognizing and understanding Congress's inaction regarding the unincorporated territories and its desire to maintain its plenary power, it is obvious Congress will not take action to admit the territories as states.

CONCLUSION

With a foundation in racist and imperialist reasoning, the *Insular Cases* have been applied inconsistent with and in violation of the Fourteenth and Fifth Amendments of the Constitution. The *Insular Cases* have been used to continuously deny constitutional rights to U.S. nationals and citizens born in unincorporated territories. This denial of rights through continued application of the decisions is made obvious in cases such as *Balzac v. Puerto Rico*, *Vaello Madero*, and *Fitisemanu*. In each, a

¹⁷⁸ See *supra* notes 131–33 and accompanying text.

¹⁷⁹ See *Territorial Federalism*, *supra* note 132, at 1637 (describing the effect of Congress's enactment of PROMESA in undermining the idea of territorial federalism).

¹⁸⁰ See *supra* notes 93–97 and accompanying text (discussing the role of the courts in congressional determinations of constitutional rights for those in unincorporated territories).

¹⁸¹ *Id.*; see, e.g., *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *rev'd*, 1 F.4th 862, 864–65 (10th Cir. 2021), *cert denied*, 143 S. Ct. 362 (2022) (refusing to grant certiorari, subsequently permitting Congress to deny the right to vote for U.S. nationals); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1542 (2022) (sustaining Congress's determination that supplemental benefit programs do not extend to Puerto Ricans, despite being U.S. citizens); *Downes v. Bidwell*, 182 U.S. 244, 267–68 (1901) (holding Congress has plenary power over the unincorporated territories).

¹⁸² See Walter Otto Weyrauch, *Island Law*, 44 AM. J. COMP. L. 675 (1996) (reviewing STANLEY LAUGHLIN, *THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* (1995)) (rejecting the argument that unincorporated territories can achieve autonomy and sovereignty through statehood).

¹⁸³ See Raquel Reichard, *Why Isn't Puerto Rico a State?*, HIST. (July 12, 2023), <https://www.history.com/news/puerto-rico-statehood> [<https://perma.cc/9TNF-LG3H>] (explaining the process of becoming a state).

citizen or national of the United States was prohibited from receiving basic rights granted by the Constitution, including the right to federal benefit programs, the right to a jury trial, and the right to vote.

Despite recognition of the issues arising from the *Insular Cases* and their continued application, the Supreme Court has refused to right the wrong it created a century ago. While multiple Justices have expressed disagreement with the *Insular Cases* and argued they should be overturned, the Court denied certiorari for *Fitisemanu*, a case explicitly requesting the cases be overturned. This denial of certiorari indicates an alternative solution is required to remedy the *Insular Cases*.

By granting tribal sovereignty to American Samoans and other unincorporated territories, the *Insular Cases* would be null and void without requiring Court action. Constitutional rights for those born in unincorporated territories would no longer be based solely on Congress's arbitrary determinations of "fundamental" rights. Through a grant of tribal sovereignty, nationals and citizens born in unincorporated territories would effectively be granted constitutional rights and protections. Furthermore, in granting tribal sovereignty, the culture and resources of unincorporated territories will remain protected. While a grant of tribal sovereignty has its issues, unincorporated territories would no longer be subject to colonial rule and would have more autonomy and greater ability to achieve self-determination. Therefore, granting tribal sovereignty to unincorporated territories would remedy the *Insular Cases* by providing constitutional rights, protecting culture and resources, and ending the perpetuation of colonial rule.