Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals

by SEAN MORRISON*

Introduction

Birthright citizenship in America is largely taken for granted. When discussions of citizenship do arise, they are invariably in the context of immigration—either granting or denying this exclusive status to aliens. The general assumption is that one is either an American citizen or a foreign alien. But what about those who are neither foreign nor domestic? Most Americans would hardly believe that the United States maintains an old immigration status of U.S. "national" that provides fewer rights than to citizens. If Americans knew that the distinction between an American "citizen" and a "national" originally distinguished desirable races from undesirable ones, they would be outraged. Yet, this second-class status continues to exist for a small group of Americans. American Samoans are the only people left with the U.S. national status, despite being Americans for over a century.

American Samoa is the last unorganized, unincorporated territory of the United States. It is also one of the great guardians of Polynesian culture. The territory is truly both American and Samoan. Modern homes and cars surround traditional *fales*, or Samoan meeting houses. One house of the legislature consists of elected representatives, the other of traditional elders. An American judicial system settles disputes over the succession of chief titles. Government officials wear a jacket and tie along with a *lavalava* (sarong) with sandals, while making deals in both English and Samoan. However, being a part of two worlds can lead to legal grey

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areas. Since the annexation of the territory in 1900, the people of American Samoa have been denied U.S. citizenship. Instead, they remain the last to be classified as U.S. nationals. Like citizens, nationals are part of the American polity, but they do not have all of the same rights and privileges.

On July 10, 2012, the Constitutional Accountability Center filed the case of *Tuaua v. United States* in the U.S. District Court for the District of Columbia. The complaint sought recognition from the State Department that persons born in American Samoa are citizens by virtue of the citizenship clause of the Fourteenth Amendment.[1] The plaintiffs included five U.S. nationals born in American Samoa who had, in one way or another, been harmed due to their noncitizen status.[2] The complaint relied almost exclusively on the doctrine of *jus soli*, which is the common law proposition that individuals born in the territory of a nation are automatically citizens of that nation.[3]

The United States, as defendants, moved to dismiss the complaint, arguing that the citizenship clause of the Fourteenth Amendment does not apply to the territories.[4] It relied on a series of Supreme Court decisions from the turn of the twentieth century, collectively known as the *Insular Cases*.[5] These cases, the defendants argued, specifically deny constitutional citizenship to those born in the territories.[6] For support, the defendants cited a series of circuit court decisions denying Fourteenth Amendment citizenship to those born in the Philippines during U.S. occupation.[7] An amicus brief filed by American Samoa Congressman Eni Faleomavaega sided with the defendants against citizenship.[8] He placed heavy emphasis on the potentially destructive effects that citizenship could have on the culture of American Samoa.[9]

1. Complaint for Declaratory and Injunctive Relief at 25–26, Tuaua v. United States, No. 12-1143-RJL (D.D.C. July 10, 2012) [hereinafter Tuaua Complaint].

2. *Id.* at 4–12.

3. *Id.*

4. Defendants' Motion to Dismiss Plaintiff's Complaint at 11–17, Tuaua v. United States, No. 12-1143-RJL (D.D.C. Nov. 7, 2012) [hereinafter Defendants' Motion to Dismiss].

5. *Id.* at 14–17.

6. *Id.*

7. *Id.*

8. Brief of the Honorable Eni F.H. Faleomavaega, Tuaua v. United States, No. 12-1143-RJL (D.D.C. Nov. 15, 2012) [hereinafter Faleomavaega Amicus].

9. *Id.* at 12–18.

On June 26, 2013, U.S. District Judge Richard J. Leon dismissed the case for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). In his opinion, Judge Leon largely followed the defendants' arguments and relied on past cases suggesting that the *Insular Cases* denied constitutional citizenship.[10]

The plaintiffs' analysis suggested that the *Insular Cases* were wrongly decided and should not be included in the analysis of the citizenship clause of the Fourteenth Amendment.[11] They argued that one should only look to the old common law, and ignore or overturn the *Insular Cases*.[12] Much of the substantial case law cited by the plaintiffs was from before 1900.[13] The defendants argued, and the District Court agreed, that the *Insular Cases* absolutely bar constitutional citizenship for those born in the territories.[14] However, this is a false all-or-nothing choice. Neither side is correct about the impact of the *Insular Cases* on a provision like citizenship. In fact, it is likely that constitutional citizenship could be granted to American Samoans precisely because of the *Insular Cases*' incorporation doctrine—not despite it. A better understanding of these cases reveals a wide avenue for a court to grant citizenship without threatening Samoan culture. By keeping within the doctrine of the *Insular Cases* and their successors, there would be no need to reinterpret or change existing Supreme Court precedent, and the territories would maintain the significant cultural protections that these cases provide.

The fact that the *Tuaua* case has been dismissed without full analysis of the constitutional question means it is more important than ever to fully consider the citizenship issue. Judge Leon's opinion upheld the *Insular Cases*, but failed to truly analyze their effects on citizenship. Instead, he relied on past practices to avoid the question and simply denied citizenship outright. However, the *Insular Cases* do not bar judicial application of citizenship. This matter is of vital importance to the people of American Samoa and goes to the heart of

10. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *6–7 (D.D.C. June 26, 2013).

11. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 25–33, Tuaua v. United States, No. 12-1143-RJL (D.D.C. Dec. 7, 2012) [hereinafter Plaintiff's Memorandum in Opposition].

12. *Id.* at 12–24.

13. *Id.*

14. *Tuaua*, 2013 WL 3214961, at *6–7.

what it means to be an American. It lies dormant for future cases or appeals of this decision. Further, even without further litigation, a proposed referendum of the issue may soon go before the people of American Samoa,[15] and they will need to have a thorough analysis of the issues it raises. To date, most reports on citizenship in American Samoa have kicked the analysis of issues down the road, for another report or another study. This issue, however, is too important to continue delaying.

This article examines the issue of constitutional citizenship as it relates to American Samoa. Part I presents a history of American Samoa and its status within the United States. Part II looks at the difference between a citizen and a national, and explores why it matters. Part III reviews the evolution of U.S. citizenship, from the revolution to the Spanish-American War. Part IV reviews the *Insular Cases*, and the doctrine they created. Part V outlines a framework for applying constitutional provisions to the territories. Part VI discusses some of the issues concerning American Samoa citizenship, and the arguments used in *Tuaua*. Part VII uses the framework to analyze constitutional citizenship as provided by the Fourteenth Amendment, concluding that it can be applied to American Samoa without overturning the *Insular Cases*. Finally, the conclusion discusses the U.S. national status and provides a suggestion on how the government should treat that designation in the future.

I. American Samoa

American Samoa is a series of seven islands deep in the South Pacific.[16] The largest island, Tutuila, is home to about 97% of the population.[17] Its Pago Pago Harbor is one of the finest natural harbors in the world. American Samoa is part of the larger Samoan Archipelago, which also includes the larger islands of Upolu and Savaii that make up the Independent Nation of Samoa.

15. Congressman Supports Local Referendum (KHJ radio broadcast Oct. 15, 2013), *available at* http://www.talanei.com/Congressman-supports-local-referendum/17532050.

16. The islands are Tutuila, Aunu'u, Ofu, Olosega, Ta'u, Swains Island, and Rose Atoll.

17. Population Map of American Samoa, U.S. CENSUS, 2010, www.census.gov /schools/pdf/materials/cis_map_58AS.pdf (last visited Aug. 2013).

A. Brief History of Samoa

The Samoan islands were originally settled around 3,000 years ago by Polynesian settlers. Little is known about the early history of the islands beyond what is derived from broken pottery and oral myths. However, the later pre-European contact history is replete with evidence of significant trade and warfare throughout the Pacific region. The ruins of defensive fortifications can be found throughout the South Pacific, from Fiji to Samoa to Tonga, which periodically fought for control of the region.[18]

French Explorer Jean François de Galaup de la Pérouse was the first European to land on the island of Tutuila.[19] A monument still stands at the aptly named Massacre Bay where his men fought with the Samoans.[20] The British came in 1791, followed by the Germans in 1824. Americans began arriving in 1839, noting the strategic value of Pago Harbor as a Pacific coaling station and the growing landed gentry, who bought land cheaply with weapons to fuel the ongoing civil wars of the Samoans. In 1872, the United States won exclusive control of Pago Harbor in exchange for protection of the people of Pago Pago from the civil wars and foreign intrusions occurring throughout the islands. Two years later, the Samoan chiefs boldly requested that the United States annex the islands in an attempt to protect Samoan lands from foreign alienation.[21]

While the United States barely acknowledged the request at the time, it did begin to notice Germany's increased interest in the islands over the next few years.[22] By 1889, Germany's maneuvering to become sovereign over Samoa led to enough American and British unease to push the three countries towards war. While the Samoans fought their own civil war on land, the United States and Britain lined up their warships against those of Germany in Apia Harbor on the island of Upolu. The final showdown came that March, just in time for a large cyclone, which sunk or severely damaged almost all of the ships.[23] It took this disaster for the powers to "recognize that not the

18. American Samoa Historic Preservation Office, *Cultural History of American Samoa*, http://www.ashpo.org/index.php/history.html (last visited Apr. 21, 2013) [hereinafter *ASHPO*].

19. ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 412 (1989).

20. *ASHPO*, *supra* note 18.

21. LEIBOWITZ, *supra* note 19, at 412–13.

22. *Id.*

23. ROBERT LOUIS STEVENSON, A FOOTNOTE TO HISTORY: EIGHT YEARS OF TROUBLE IN SAMOA 113 (Serenity Publishers, 2009) (1912).

whole Samoan Archipelago was worth the loss in men and costly ships already suffered."[24]

No longer having ships to fight, the parties grudgingly sat down and signed the Treaty of Berlin, which divided administrative control over the islands between the three great powers, while establishing a formal king of Samoa that all parties would recognize.[25] The powers of this king were dubious at best. The acclaimed author Robert Louis Stevenson, who lived in the Samoan town of Apia during this time, described the king as follows:

> He can so sign himself on proclamations, which it does not follow that any one will heed. He can summon parliaments; it does not follow that they will assemble. If he be too flagrantly disobeyed, he can go to war. But so could he before, when he was only the chief of certain provinces . . . [I]n so far as he is king of Samoa, I cannot find but what the president of a college debating society is a far more formidable officer.[26]

The new system and new king did nothing to relieve tensions, either between the great powers or the Samoans. Finally, a new agreement was reached with the Tripartite Convention of 1899, in which the United States and Britain gave up rights to the western islands, and Germany gave up rights to the eastern islands, dividing the archipelago forever.[27] Germany eventually lost Western Samoa to New Zealand after World War I.[28] Western Samoa gained independence in 1962 and is today known just as Samoa.[29]

With control of Eastern Samoa firmly vested in the United States, the Navy was tasked with administration of the islands.[30] To

24. *Id.* at 120.

25. Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT'L L.J. 220, 229 (1980) (citing General Act Providing for the Neutrality and Autonomous Government of the Samoan Islands, June 14, 1889, 26 Stat. 1497, T.S. No. 313).

26. STEVENSON, *supra* note 23, at 11.

27. Convention between the United States, Germany, and Great Britain Governments in Respect to Samoa, Dec. 2, 1899, 31 Stat. 1878, T.S. No. 314, *available at* www.asbar.org (from the "legal resources" drop-down menu, select "organic documents;" click the hyperlink entitled "Convention of 1899").

28. *ASHPO*, *supra* note 18.

29. Leibowitz, *American Samoa, supra* note 25, at 220.

30. Exec. Order No. 125-A, Placing Certain Islands of the Samoan Group Under the Control of the Navy Department (Feb. 19, 1900).

bolster the legitimacy of the new order, the high Samoan chiefs signed the Instrument of Cession of Tutuila in 1900.[31] The small island group of Manu'a followed with their own Instrument of Cession in 1904.[32] The Instruments of Cession granted sovereignty to the United States, but protected the communal land and the power of the Samoan chiefs, generally known as *matai*. Through these provisions, the Samoans created a sort of political autonomy by protecting the *matai* in their role as social and village leaders.[33] The Navy imposed racially restrictive laws on property ownership to protect the Samoans' land system, while also serving the United States by keeping out foreign settlers, especially Germans.[34]

While the Navy protected the Samoan institutions, the Samoans themselves were given very little say in the matter. The Instruments largely served to recognize the status quo.[35] The Executive Order imposing the Navy's control of the islands actually came two months before the first Instrument of Cession.[36] Commander B. F. Tilly, the first to oversee the new territory, was reported to have told the King of Manu'a before their cession, "whether you come or not, the authority of the United States is already proclaimed over this island."[37]

Pago Pago is more than 2,500 miles from Hawaii, the nearest U.S. neighbor, which may explain the federal government's tendency to overlook American Samoa. It took two years after the Cession of Tutuila and Aunu'u before President Theodore Roosevelt responded

31. Instrument of Cession: Chiefs of Tutuila to United States Government, Apr. 17, 1900, *available at* www.asbar.org (from the "legal resources" drop-down menu, select "organic documents;" click the hyperlink entitled "Cession of Tutuila and Aunu'u") [hereinafter Tutuila Cession].

32. Instrument of Cession: Chiefs of Manua to United States Government, Jul. 16, 1904, *available at* www.asbar.org (from the "legal resources" drop-down menu, select "organic documents;" click the hyperlink entitled "Cession of Manu'a Islands") [hereinafter Manua Cession].

33. Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 828 (2008).

34. *Id.* at 827.

35. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 415.

36. *Compare* Executive Order No. 125-A, *supra* note 30, *with* Tutuila Cession, *supra* note 31.

37. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 415. There is no longer a *Tuimanua*, or King of Manu'a, because the last *Tuimanua* proclaimed that Jesus Christ was the highest king in the land, so Jesus should have the title Himself. So far, nobody has stepped forward to claim the title away from Jesus.

with a "thank you" note and some gifts.[38] While the Instruments were signed in 1900 and 1904, Congress ratified neither until 1929.[39] The Navy governed the territory until 1951 when administrative power was transferred to the Department of Interior.[40] In 1962, the Secretary of Interior, by executive order, granted an American Samoa Constitution, which was revised in 1967.[41] The Constitution allowed for an elected governor and legislature, returning de facto control to the Samoans and enshrining the cultural institutions of the people.

B. Samoan Life and Culture

Samoan life is still largely defined by the *fa'asamoa*, or Samoan way.[42] Institutionally, it is a mutually dependent relationship between the *aiga* (family), the *matai* (chiefs), and communally held land. Each *aiga* is tied to a *matai* title, which corresponds to an area of land. The *aiga* selects a *matai* to hold that title, whose primary duty is to assign the communal land to family members. The *matai*'s power rests in control over the land, without which he would have no authority. That is the basis of the *fa'asamoa*.[43] It is this complex relationship that the Samoans sought to protect in the Instruments of Cession.

Even today, family life revolves around the *aiga*. Often difficult to describe in English,[44] it is similar to an extended family system with a very tight connection to the village and land. People identify very closely with their *aiga*, which collectively control the life of the village. It has been commonly noted that the strength of the *aiga* system has suffered over the century-plus since coming under U.S. administration.[45] Especially difficult has been the growth in population, which increased from around 5,000 in 1900 to over 55,000

38. Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases,* 97 IOWA L. REV. 101, 169 (Nov. 2011).

39. 1929 Ratification Act, 45 Stat. 1253 (1929) (codified at 48 U.S.C. § 1661).

40. Exec. Order No. 10264, 16 C.F.R. 6417 (2013).

41. AM. SAM. CONST.

42. A.P. Lutali & William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the* Matai *System in the Territory of American Samoa,* 4 GA. J. INT'L & COMP. L. 387, 388 (1974).

43. *Id.* at 388–94 (detailing the law of the *matai*).

44. One researcher attempted to describe the *aiga* as a "non-exogamous cognatic descent group identified by the title of its eponymous founder." See Poumele v. Ma'ae, 2 Am. Samoa 2d 4, 5 n.2 (App. Div. 1984).

45. King v. Andrus, 452 F. Supp. 11, 13–14 (D.C. Cir. 1977).

today.[46] It is difficult to maintain close ties when your family has grown over tenfold.

The *aiga* is overseen by a hierarchy of chiefs known as *matai*. A *matai*'s title is directly connected with a specific plot of land dedicated to the *aiga*. The *aiga* owes *tautua*, or service, to the *matai*, who in turn manages the family and its land as a sort of trustee. The High Court of American Samoa described the *fa'amatai*, or "way of the *matai*" as follows:

> The duties and responsibilities of a *matai* defy common law labels. They are more than chiefs who are merely leaders. They are more than trustees who merely protect property. A *matai* has an awesome responsibility to his family. He must protect it and its lands. He acts for the family in its relations with others. He gives individual family members advice, direction and help. He administers the family affairs, designates which members of the family will work particular portions of the family land, and determines where families will live. His relationship to his family is a relationship not known to the common law.[47]

These titles are hotly contested and serve as an important symbol of social ranking. The doctrine of *fa'aloalo* (showing respect), controls most aspects of Samoan life and politics.[48] Of course, American oversight has significantly influenced even this important institution, often inadvertently. Today, the Mauga title is considered the highest *matai* in American Samoa, though this is almost entirely due to the fact that it rests in Pago Pago and thus acted as the go-to person for the U.S. Navy when dealing with Pago Harbor issues.[49]

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46. The 2010 population was 55,519. Press Release, U.S. Census Bureau, *U.S. Census Bureau Releases 2010 Census Population Counts for American Samoa* (Aug. 24, 2011), *available at* www.census.gov/2010census/news/releases/operations/cb11-cn177.html.

47. *Poumele*, 2 Am. Samoa 2d at 5.

48. This was recently displayed during a political dispute when former Governor Togiola Tulafono told Senators to show him more respect because his *matai* title was higher than any of theirs. Fili Sagapolutele, *Gov Says Let Voters Decide How Senators are Selected*, SAMOA NEWS (Sept. 17, 2012), www.samoanews.com/?q=node/8833&quicktabs_3=1.

49. Lutali & Stewart, *supra* note 42, at 389 (citing Taufaasau v. Manuma, 4 Am. Samoa 947 (App. Div. 1967)).

More than 90% of the land in American Samoa is communally owned.[50] Alienation of communal land is strictly regulated, to the extent that the Governor himself must approve the sale.[51] Fee simple, or "freehold land," is extremely rare, especially as its very definition in American Samoa requires it to have been freehold prior to the Instruments of 1900.[52] American Samoa does have a unique, judicially created freehold called "individually owned land," ownership of which is limited to those with at least one-half Samoan blood.[53]

The cultural institutions have been integrated into the political system as well. The Samoan legislature—the *Fono*—is bicameral, with a lower House of Representatives, known as *faipule*, directly elected by the people, and a Senate chosen among high-ranking senior *matai*.[54] The High Court of American Samoa was originally founded by the first administrator of the new coaling station at Pago Harbor in 1900, Navy Commander B. F. Tilly, who was also the first Chief Justice.[55] Today, the High Court retains its political independence by being administered directly from the Department of Interior. It is comprised of justices appointed by the Secretary of Interior, as well as Associate Judges, who are not trained in law, but are prominent *matai*.[56] Their role as liaisons between Samoan custom and the law is especially important in the Lands and Titles division of the court, which adjudicates property and *matai* succession disputes.[57]

50. Leibowitz, *American Samoa, supra* note 25. Similar numbers are reported on a regular basis, but appear to be mostly speculation. Especially over the last few decades, large amounts of land have been changed to the uniquely Samoan status of individually owned land, which is similar to freehold, but has racial restrictions on ownership. No study has been done recently to measure how much land has been turned into individually owned land versus communal land. Part of the problem is that very few *matai* have registered the land that they oversee, thus there is almost no data beyond oral (and often disputed) histories about what areas constitute communal land.

51. AM. SAM. CODE ANN. § 37.0204.

52. AM. SAM. CODE ANN. § 37.0201. Most freehold land has, over time, been converted back to communal land.

53. AM. SAM. CODE ANN. § 37.0204(b).

54. AM. SAM. CONST. art. I, § 3, art. II, §§ 3–4. The Senate has come under much criticism recently for being undemocratic, with even the Governor calling for popular elections. *See* Fili Sagapolutele, *Governor States His Case Regarding Election of Senators*, SAMOA NEWS (Oct. 3 2012), www.samoanews.com/?q=node/10651.

55. Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: the Case of American Samoa*, 13 U. HAW. L. REV. 379, 385 (1991) [hereinafter Laughlin, *Constitutional Structure*].

56. AM. SAM. CONST. art. III, § 3.

57. AM. SAM. CODE ANN. § 3.0240.

C. Protecting the *Fa'asamoa*

The communal land and *matai* systems are such pillars of the cultural system that there is a widespread fear that any change to the political structure may affect their durability. Once the system of land ownership is put in jeopardy, "the whole fiber, the whole pattern of the Samoan way of life will be forever destroyed."[58] Similarly, a threat to the *matai* hierarchy would undermine the very social fabric of the nation, which would in turn dissolve the *aiga*. This is why the protection of the *matai* and the land tenure system was a condition of the Instrument of Cession[59] and explicitly stated as policy in the American Samoa Constitution.[60]

Arnold Leibowitz, a leading scholar on the territories, has pointed out that in the century prior to U.S. administration, an undisturbed culture was confronted with a new religion and moral standards, a new legal system, modern weapons, land speculators, and great power politics.[61] Add to that the twentieth century's influx of political changes, the introduction of American-style capitalism, individualism, junk food, technology, etc. and it is easy to see the threats facing the *fa'asamoa*. All three pillars of the *fa'asamoa*—the *aiga*, *matai*, and communal land—are considered at risk. The culture is so important to the people of American Samoa that they have fought hard to shield it from foreign erosion. In so doing, they have potentially given up many rights and benefits for which they would otherwise be eligible.

This fear did not arise in a vacuum. Samoans have learned the lessons of the native Hawaiians. When the United States came to Hawaii and imposed laws and values based on individual land ownership, the Hawaiian cultural system quickly broke down. Native Hawaiians gave up highly valued beachfront property for next to nothing. By the time the Hawaiians had integrated into the new system, most of their land was gone—and their culture along with it. While Hawaii is undergoing a cultural rebirth today, the last century

58. Haleck v. Lee, 4 Am. Samoa 519, 551 (1964). *See also* Corp. of Presiding Bishop v. Hodel, 637 F. Supp. 1398, 1402 n.2 (D.D.C. 1986) *aff'd*, 830 F.2d 374 (D.C. Cir. 1987) ("Every Western power that has entered the Samoan islands, not just the United States, in their official documents and treaties, has recognized what anyone who has ever visited Samoa or knows anything about Samoa knows, that the culture is integrally involved in communal ownership of land, and to upset or destroy that feature of Samoan society would ultimately destroy the society.").

59. Tutuila Cession, *supra* note 31.

60. AM. SAM. CONST. art. I, § 3.

61. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 415.

has left behind a stern warning to other cultures facing foreign intrusion.

Many Samoans believe that increased federal presence on the islands will challenge the laws protecting the cultural system. American Samoans have fought against an organic act for the territory, even after promises that their institutions and laws would remain protected.[62] In 2006, Representative Faleomavaega introduced legislation in the House to create a Federal District Court for American Samoa.[63] The court would have had jurisdiction only to the extent that the Constitution applied to American Samoa, would be seated under the Ninth Circuit, and would have explicitly denied federal jurisdiction over any matters dealing with communal land or *matai* titles.[64] Despite popular support, the Samoan legislature—the *Fono*—passed resolutions in opposition, and Representative Faleomavaega let the bill die in committee.[65]

Presently, there is a large backlash against the plaintiffs in *Tuaua v. United States* for bringing this suit without community engagement and support. Ironically, this movement is largely led by Representative Faleomavaega, who took it upon himself to file *amicus* briefs in opposition to the plaintiffs.[66] Just before the court's dismissal, Representative Faleomavaega put forward legislation in Congress to provide a federally authorized referendum in American Samoa regarding citizenship.[67] Whether this influenced the court's decision is unclear.

The fear of federal intrusion is overwhelmingly focused on the Equal Protection Clause of the Fourteenth Amendment. Much of the *fa'asamoa* is legally protected within American Samoa through

62. Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 347 (2008). An organic act is legislation that formally creates a governing body to manage federal lands. In the territories, this generally means creating a territorial government. The American Samoa Government was not sanctioned by legislation, but was created with an Executive Order of the Secretary of Interior.

63. Federal District Court of American Samoa Act of 2006, H.R. 4711, 109th Cong. (2006).

64. Weaver, *supra* note 62, at 362.

65. *Id.*

66. *See* Faleomavaega Amicus, *supra* note 8; Reply of the Honorable Eni F.H. Faleomavaega as *Amicus Curiae* in Support of Defendants, Tuaua v. United States, No. 12-1143-RJL (D.D.C. Dec. 12, 2012) [hereinafter Faleomavaega Reply].

67. Press Release, Rep. Eni F.H. Faleomavaega, *Faleomavaega Announces Draft Bill for Citizenship Plebiscite for American Samoa* (June 4, 2013), *available at* http://www.house.gov/list/press/as00_faleomavaega/draftbillforcitizenship.html.

different types of racial restrictions. For example, the law prohibits ownership of any land to those with less than half "native blood," with "native" defined as a Samoan from American Samoa.[68] Similarly, a person must have at least one-half Samoan blood to obtain the title of *matai*,[69] which is required to hold public office in the American Samoa Senate.[70] In fact, the American Samoa Constitution mandates such racial preferences in everything from family organization to Samoan-owned businesses.[71] The Equal Protection clause, it is feared, would put these laws in jeopardy through heightened judicial scrutiny.[72]

With such a heavy emphasis on race-based classifications and an overwhelming belief that these rules are essential to protecting the Samoan culture, it is easy to see why many American Samoans would worry about the Equal Protection Clause. Some argue that anything that could facilitate a challenge to these Samoan laws should be stopped, even if it brings significant benefits to the Territory. Thus, a district court was unacceptable because improved access to justice could present an inexpensive opportunity to challenge aspects of the *fa'asamoa* protections.[73] It is on this basis that those who opposed the *Tuaua* plaintiffs claimed that citizenship would somehow embolden challenges against various aspects of Samoan culture.[74] Tellingly, this is not an argument that the rights do not apply to American Samoa, nor that the laws in question are constitutional, rather that it *should* be too difficult and expensive for anyone to ever bring it to court.

It is further claimed that if the Equal Protection Clause applies to American Samoa, then the entire U.S. Constitution would apply as well, through the Due Process Clause of the Fourteenth Amendment.[75] Such a holding would certainly challenge the

68. AM. SAM. CODE ANN. § 37.0204(b).

69. AM. SAM. CODE ANN. § 1.0403.

70. AM. SAM. CONST. art. II, § 3.

71. *See* AM. SAM. CONST. art. I, § 3 (setting forth the Policy Protective Clause).

72. Press Release, Rep. Eni F.H. Faleomavaega, *Faleomavaega to file Amicus Curiae brief against the Tuaua lawsuit* (Nov. 2, 2012), *available at* http://www.manuatele.net/eni/eni-4q12.html.

73. *See* WILLIAM O. JENKINS, JR., U.S. GOV'T ACCOUNTABILITY OFFICE, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 23–25, GAO-08-1124T (2008); *see also* Weaver, *supra* note 62, at 358.

74. Faleomavaega Reply, *supra* note 66, at 7–8.

75. Press Release, Rep. Eni F.H. Faleomavaega, *Faleomavaega responds to Charles V. Alailima claims about citizenship lawsuit* (Nov. 16, 2012), *available at* http://www.manuatele.net/eni/eni-4q12.html.

constitutionality of laws in American Samoa from unelected *matai* senators to the prohibition on abortion. However, these issues have never been properly analyzed. In fact, these arguments are mostly speculation that over a century of Supreme Court jurisprudence known as the *Insular Cases* would be suddenly overturned.[76] Were that to be true, the potential fallout could be a threat to the *fa'asamoa*. It is unlikely, however, that any court will overturn the *Insular Cases*, which were upheld by the Supreme Court as recently as 2008.[77] Instead, these cases actually provide an opportunity to grant birthright citizenship to the people of American Samoa, without threatening the *fa'asamoa* or the existing legal structure.

II. Citizen vs. National: Why is it Important?

All U.S. citizens are nationals, but not all nationals are citizens. The designation of "national" was originally used to describe those who were born within the United States territories, but who were not granted full citizenship.[78] However, Congress did not define the term until 1940.[79] Today, the status only applies to those born in American Samoa.[80]

Why does this distinction matter at all? After all, U.S. nationals still have the ability to travel freely throughout the United States; they may serve in the armed forces; they have a nonvoting member of Congress; and they are eligible for most federal benefits. For all intents and purposes, nationals are supposed to be treated like citizens.[81] While nationals from American Samoa do enjoy many of the rights of citizens, they also suffer some problems due to their confusing status.

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76. Faleomavaega Reply, *supra* note 66, at 8–11.

77. Boumediene v. Bush, 553 U.S. 723 (2008).

78. Rabang v. Immigration & Naturalization Serv., 35 F.3d 1449, 1452 n.5 (9th Cir. 1994), *cert. denied*, 515 U.S. 1130 (1995).

79. *Id.*; *see also* Nationality Act of 1940, 8 U.S.C. § 1101(22) (1940) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

80. 8 U.S.C. § 1408 states that persons "shall be nationals, but not citizens, of the United States at birth" if they are "born in an outlying possession of the United States." "Outlying possession of the United States" is defined as American Samoa in 8 U.S.C. § 1101(a)(29). This was more clearly articulated by Justice Ruth Bader Ginsberg in Miller v. Albright, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting) ("[T]he only remaining noncitizen nationals are residents of American Samoa and Swains Island.").

81. Gonzales v. Williams, 192 U.S. 1, 15–16 (1904).

The complaint in *Tuaua v. United States* presented an exhaustive list of such grievances.[82] For example, nationals and all those coming from American Samoa must pass through federal immigration, as if they had landed from a foreign country.[83] Nationals may become citizens, but only through the same naturalization process that aliens are subjected to. This process prohibits minors and remains lengthy and expensive, sometimes taking up to a year with no guarantee of success. Like aliens, nationals must pass the U.S. Citizenship and Immigration Service ("USCIS") English and civics test (American Samoa schools are taught in English and are funded by the U.S. Department of Education), receive a determination of good moral character through fingerprinting and interviews, and take the Oath of Allegiance required from aliens (the Instruments of Cession already declared territory-wide allegiance to the United States). The immigration processing fees alone total $680.[84] For a land where the per capita income is only about $8,000,[85] these costs can be prohibitive. Until 1986, the law was so bizarre that it actually left those who were born outside of American Samoa, but with only one American Samoan parent, completely stateless.[86]

Since American Samoa is primarily made up of nationals, having such a status in the territory does not carry much hardship. However, a national living in the mainland United States may face a number of obstacles to basic rights and opportunities. Some states deny nationals the right to vote, hold public office, or serve on a jury.[87] Others deny nationals the right to bear arms.[88] Many state and federal jobs require U.S. citizenship, which prohibits nationals from taking those jobs.[89] Citizenship is also required to be an officer in the

82. Tuaua Complaint, *supra* note 1.

83. *Id.* (stating that prior to 1952, nationals were prohibited from naturalizing).

84. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *2 (D.D.C. June 26, 2013).

85. CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK: AMERICAN SAMOA (Apr. 8, 2013), www.cia.gov/library/publications/the-world-factbook/geos/aq.html.

86. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 450.

87. Tuaua Complaint, *supra* note 1, at 22 (citing HAW. CONST. art. II, § 1 (right to vote); WASH. CONST. art. III, § 25 (right to hold office); WASH. REV. CODE § 2.36.070 (right to serve as juror)).

88. Tuaua Complaint, *supra* note 1, at 23 (citing HAW. REV. STAT. § 134-2(d)).

89. *Id.* at 22 (citing CAL. GOV'T CODE § 1031 (public safety officers); WASH. REV. CODE §§ 41.08.060–70 (firefighters and civil service); HAW. REV. STAT. § 121-14 (Hawaii National Guard officers); and 24 PA. CONS. STAT. § 11-1109 (public school teachers)).

U.S. armed forces,[90] even though American Samoans provide more than their fair share of soldiers.[91] These complaints are not new, as U.S. nationals from American Samoa have long complained about this type of discrimination.[92]

The plaintiffs in *Tuaua* also emphasized the fact that a national's passport has a special Endorsement Code 09 that expressly states that the individual is not a U.S. citizen.[93] The plaintiffs claimed that this was an example of nationals being treated "inferior and subordinate" to citizens.[94] Tellingly, the United States acknowledged all of these facts in its responses and motions.[95] The court did not discuss these facts other than as background.[96]

A. American Samoa Citizenship

While today many in American Samoa are concerned about the side effects of citizenship, this was not the case when American Samoa first joined the United States. When the original chiefs ceded their land to the United States in 1900, they believed that citizenship was part of the bargain. They learned they were not citizens only when Lt. Cmdr. C. H. Boucher informed them in the 1920s.[97]

90. *Id. See, e.g.*, U.S. DEP'T OF ARMY, Reg. 601-100, Appointment of Commissioned and Warrant Officers in the Regular Army, § II(1-5)(a), (Dec. 21, 2006) ("An original appointment as a commissioned officer in the RA may be given only to a person who is a citizen of the United States.").

91. *See e.g.*, Kirsten Scharnberg, *Young Samoans have little choice but to enlist*, HONOLULU ADVERTISER (Mar. 21, 2007), http://the.honoluluadvertiser.com/article/2007/Mar/21/ln/FP703210396.html (during the second Iraq war, American Samoa suffered more deaths per capita than any other U.S. jurisdiction); STATEMASTER.COM, "Iraqi War Casualties (per capita) (most recent) by state," www.StateMaster.com/graph/mil_ira_war_cas_percap-iraqi-war-casualties-per-capita (last visited Oct. 12, 2013); IRAQ COALITION CASUALTY COUNT, icasualties.org (last visited Oct. 12, 2013).

92. *See, e.g.*, Study Mission to Eastern [American] Samoa, Report of Senators Long and Gruening to the Senate Committee on Interior and Insular Affairs, S. DOC. NO. 38, 87th Cong., 1st Sess. at 126 (1961) [hereinafter 1961 Study Mission].

93. Tuaua Complaint, *supra* note 1, at 23.

94. *Id.* at 21.

95. Defendants' Motion to Dismiss, *supra* note 4; Defendants' Reply in Support of Their Motion to Dismiss, Tuaua v. United States, No. 12-1143 (D.D.C. Dec. 12, 2012).

96. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *2 (D.D.C. June 26, 2013).

97. *See* Statement of Chief Liu, Hearings Before the Commission Appointed by the President of the United States (American Samoa Commission), Sept. 18–20, 1930 in Honolulu, Sept. 26–30, 2013, Oct. 1–4, 1930, in American Samoa (U.S. G.P.O. 1931) at 229 (hereinafter *1930 Hearings*). Chief Liu stated that Boucher was court martialed for "promoting unrest" among the Samoans to start the *Mau* movement. *Id*. at 351–52.

The Samoans' realization that they were not U.S. citizens helped propel the *Mau* (opposition) movement of the 1920s. The *Mau* organizers demanded a larger role for Samoan governance, but also a stronger relationship with the United States, which would include an organic act passed by Congress formally organizing the territory and full U.S. citizenship. The *Mau* argued that Samoans should have had citizenship since the President signed the papers acknowledging annexation of the islands.[98] They organized a campaign for citizenship with overwhelming support from the people and the *matai*.[99]

A U.S. Senate Commission, which included American Samoan Chief Mauga—one of the original signers of the Instrument of Cession—studied the matter. In its 1931 report, the Commission recommended an organic act with citizenship for American Samoans, but also protections for the land system and *fa'asamoa*.[100] It believed that citizenship could be granted without affecting the unincorporated status of the territory. While the Senate twice adopted the recommendations, the measure failed in the House due to opposition from the Navy.[101] Thus, American Samoans remained as nationals, despite overwhelming support from the people of American Samoa and the U.S. Senate.

After World War II, the American Samoan desire for U.S. citizenship turned into a fear of the U.S. Constitution. The 1931 report listed a number of potential deleterious effects to the culture that the Samoans were previously unaware of. Having learned them, many Samoans now had an aversion to a closer connection with the U.S. In 1948, more than ninety *matai* petitioned Congress to table for ten years any legislation dealing with citizenship or an organic act.[102] Thus, no changes were made when the Department of Interior took control of the administration in 1951.

Another Senate study in 1961 noted that Samoans desired U.S. citizenship, but feared that if they became citizens they would not be able to prevent other U.S. citizens from coming and taking their land.[103] To avoid losing the Samoan culture, any organic act would

98. Statement of Alex T. Willis, *id.* at 207.

99. *See generally*, *id.*

100. Decision of Commission, *id.* at 268–70.

101. Dudley O. McGovney, *Our Non-Citizen Nationals, Who Are They?*, 22 CALIF. L. REV. 593, 630 (1934).

102. Leibowitz, *American Samoa, supra* note 25, at 242.

103. 1961 Study Mission, *supra* note 92, at 9.

have to first address two questions: (1) whether the act would protect the *fa'asamoa*; and (2) whether such an act would be constitutional.[104] This conflict between culture and political status reared its head again in the 1969 American Samoa Political Status Commission, which recommended that the territory remain unorganized and unincorporated.[105]

B. Constitutional vs. Statutory Citizenship

American Samoa is the only U.S. territory without citizenship, primarily because it is the only remaining unorganized territory. Organization occurs when Congress passes an organic act, formally establishing a government for the territory. In the past, organic acts for territories have included citizenship, though this is not a requirement for organization.[106] This citizenship granted by Congress is referred to as "statutory citizenship," distinct from "constitutional citizenship" that is guaranteed by the Fourteenth Amendment.

The difference between statutory and constitutional citizenship is important because the political status of American Samoa, and all the territories, is perpetually in question. Most American Samoan nationals do not realize that severing the territory's ties to the United States could put their current "citizen" or "national" status in jeopardy. In 1998 Congress debated the Young Bill, which would have forced Puerto Rico to come to a final decision as to whether it should be a state or an independent nation. The Bill included a provision that if Puerto Rico chose to be independent, Congress would automatically revoke the U.S. citizenship of Puerto Ricans.[107] A suit for declaratory relief regarding the citizenship question was dismissed as unripe.[108] However, in 2005, the President's Task Force

104. *Id.* at 129.

105. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 461.

106. Guam Organic Act of 1950, 48 U.S.C. § 1421l (1950) (*repealed and re-enacted by* Immigration and Nationality Act of 1952, 8 U.S.C. § 1407 (1952)); Approval of Covenant to Establish a Commonwealth of the Northern Mariana Islands, 48 U.S.C. § 1801, art. III (1976); Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541 (1954). Puerto Rico was organized by the Organic Act of 1900 (Foraker Act), 48 U.S.C. §§ 733, 736, 738–40, 744 (1994) (original version at ch. 191, 31 Stat. 77 (1900), but citizenship was not granted until the amendments of the Jones-Shafroth Act (Jones Act), ch. 145, 39 Stat. 951 (1917).

107. Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1031 (2008) (citing H.R. 856, 105th Congress, § 4(a)(B)(4) (1997)). *See also* Efron v. United States, 1 F. Supp. 2d 1468 (S.D. Fla. 1998). Although the Young Bill passed the House of Representatives by a one-vote margin of 209-208, it ultimately died after failing to reach a vote in the Senate.

108. Perez, *supra* note 107, at 1032 (citing *Efron*, 1 F. Supp. 2d 1468).

on Puerto Rico's Status confirmed that independence would cause those born in Puerto Rico to automatically lose citizenship.[109]

On the other hand, Congress cannot revoke constitutional citizenship. In *Afroyim v. Rusk*,[110] the Supreme Court stated that, "in our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[111] However, in *Rogers v. Bellei*, the Court explained that this protection from forced denaturalization does not apply to statutory citizens.[112] In fact, those granted citizenship by statute could actually have their citizenship revoked.[113]

C. Natural Born Status

Constitutional citizenship also suggests that one who is granted birthright citizenship under the Fourteenth Amendment is also a "natural born citizen"—a prerequisite to become President of the United States.[114] This is more than a merely academic question. There have been many examples of this issue arising: John Nance Garner was Vice President under President Franklin Roosevelt's first two terms, but he was born in Texas before its re-annexation into the Union after the Civil War.[115] Barry Goldwater ran for president in 1964, but was born in the Arizona territory three years prior to statehood; his eligibility was not challenged. George Romney ran in 1968, but pulled out of the election when critics pointed out that he was born in Mexico to American missionaries. In 2008, John McCain's candidacy went unchallenged, but scholars noted that he was born in the Panama Canal Zone when it was a U.S. possession.[116]

109. *Id.* at 1033 (citing President's Task Force on Puerto Rico's Status, Report by the President's Task Force on Puerto Rico's Status (2005)).

110. Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

111. *Id.*

112. Rogers v. Bellei, 401 U.S. 815, 836 (1971).

113. *Id.*

114. U.S. CONST. art. II, § 1, cl. 5.

115. John R. Hein, Comment, *Born in the U.S.A., but Not Natural Born: How Congressional Territorial Policy Bars Native-Born Puerto Ricans From the Presidency*, 11 U. PA. J. CONST. L. 423, 435 (2009).

116. *Id.* at 425–26. *See also* James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575, 579 (2000) (arguing that although McCain was born in the Canal Zone, he is a natural born citizen under the common law). Ho's argument assumed that a pure form of *jus soli* applies, since Panama was under U.S. jurisdiction at the time, but never considered the *Insular Cases*. *Id.* If one were to follow Judge Leon's reading of the incorporation doctrine, then the Panama Canal zone would not have been

Just recently, potential presidential candidate Senator Ted Cruz was forced to renounce his Canadian citizenship when it was discovered that he was born in Calgary.[117] What if an American Samoan ran for president?

The presidential clause is the only section of the Constitution that identifies "natural born" rather than just "citizens." This suggests that being "natural born" is an additional requirement for the presidency. It also suggests a stark contrast between a natural born citizen and a naturalized citizen. If naturalized citizens are prohibited from the presidency, and American Samoans may only become citizens through naturalization, then one born as a U.S. national can never be president.

Adam Clanton, a former clerk to the High Court of American Samoa, argued that the common law doctrine of *jus soli*—that anyone born on soil under the sovereignty of the United States is a citizen—would overcome any challenge to an American Samoan candidate.[118] Problematically, this approach leads to the absurd result that an American Samoan could be a "natural born citizen" under *jus soli*, yet not a citizen under the immigration law. The only way for an American Samoan to be accepted as natural born would be through birthright constitutional citizenship, or a change to the immigration law.

III. History of Citizenship in America

In order to understand citizenship for American Samoa, it is important to first understand the broader concepts of citizenship within the United States. This section will explore the history of citizenship in America, from its doctrines in English common law to the *Dred Scott* case. Then it will examine the creation of the Fourteenth Amendment and how courts interpreted its citizenship clause up to the twentieth century. Finally, it will review citizenship questions raised by the expansion into the insular territories, leading up to the Supreme Court's holdings in the *Insular Cases*.

part of the United States, and as such, Senator McCain would not be a natural born citizen.

117. Todd J. Gillman, *Dual Citizenship May Pose Problem if Ted Cruz Seeks Presidency*, DALLAS NEWS (Aug. 18, 2013), http://www.dallasnews.com/news/politics/headlines/20130818-dual-citizenship-may-pose-problem-if-ted-cruz-seeks-presidency.ece.

118. Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA PAC. BASIN L.J. 135, 147–48 (2011).

A. The Common Law Doctrine of *Jus Soli*

Citizenship in the United States was traditionally based on the English common law doctrine of *jus soli*, which holds that anyone born within the territorial domain of the sovereign and not subject to the exclusive jurisdiction of another state is a citizen.[119] Sir Edward Coke first detailed the doctrine in *Calvin's Case*, which involved an individual born in Scotland after James I of England had taken over the Scottish throne.[120] The bench found that anyone born within any territory ruled by the King of England was a subject of the King and entitled to full English benefits.[121] Blackstone later defined the requirements for subjectship as birth within the territory of the empire and allegiance to the King.[122]

The English common law did not consider race or location, so long as the individual was born in an area within the British Empire.[123] Further, there was only one type of subject, which was an important distinction from the Roman law's various degrees of citizenship.[124]

As part of the British Empire, those born in the American colonies were automatic British subjects with all the rights and privileges of such.[125] After independence, American law adopted English common law, including the doctrine of *jus soli*.[126] The new United States shed the use of the word "subject" in exchange for "citizen." While the new Constitution never defined citizenship, the change in phrase distinguished one who is subject to a monarchy, and one who is a sovereign in a republic.[127] This change also reflects a philosophical difference in that the new nation believed that a citizen was bound in contract to the nation—with the citizen pledging

119. Perez, *supra* note 107, at 1031 (explaining citizenship is also sometimes based on *jus sanguinis*, or citizenship which follows the parents' status, but that is not important for this article).

120. Calvin's Case, 77 Eng. Rep. 377 (K.B. 1608).

121. *Id.* at 406–07.

122. 1 WILLIAM BLACKSTONE, COMMENTARIES *366.

123. Perez, *supra* note 107, at 1048.

124. *Id.* at 1047.

125. *See* Inglis v. Sailor's Snug Harbor, 28 U.S. 99, 120–21 (1830) ("It is universally admitted both in the English courts and in those of our own country that all persons born within the colonies of North America whilst subject to the Crown of Great Britain were natural born British subjects.").

126. *Id.*

127. Minor v. Happersett, 88 U.S. 162, 166 (1875) ("Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government.").

allegiance to the country, and the country protecting the rights of the citizen.[128] It is a word that made its membership equal to all those under the flag.[129] In 1793, Chief Justice John Jay described the new citizenship as such: "[A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty."[130]

While the word changed, the core concepts of "citizenship" did not. Like the English, there were no separate classes or categories of citizenship in the United States.[131] The new Constitution referred to "natural born citizens," which had the same meaning as the English "natural born subjects."[132] For example, Supreme Court Justice Swayne, sitting in a circuit court, stated that:

> All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens . . . .
> . . . .
> . . . We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States.[133]

This understanding of jurisdiction and allegiance did not distinguish between the political statuses of the territories throughout the United States. While there were states, territories, and districts, they all constituted the United States. Chief Justice Marshall explained in *Loughborough v. Blake* that the United States was "composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania."[134] More specifically, Justice Joseph Story,

128. James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 221 (1974).

129. Linda K. Kerber, *The Meanings of Citizenship*, 84 J. AM. HIST. 833, 834 (1997).

130. Chisholm v. Ga., 2 U.S. 419, 471–72 (1793) (Jay, J., concurring).

131. Kerber, *supra* note 129, at 834.

132. Clanton, *supra* note 118, at 143–44.

133. United States v. Rhodes, 27 F. Cas. 785, 789 (C.C. Ky. 1866) (quoted by United States v. Wong Kim Ark, 169 U.S. 649, 662–63 (1898)).

134. Loughborough v. Blake, 18 U.S. 317, 319 (1820).

sitting on the circuit court, stated that "[a] citizen of one of our territories is a citizen of the United States."[135] The United States carried on the English common law tradition as it related to citizenship. Since anyone born in a colony of Great Britain was an English subject, then anyone born in a colony or territory of the United States was a U.S. citizen.

B. *Dred Scott* and the Non-Citizen

While citizenship in America was well understood as it related to white landowners, it was less certain for the rest of the country. In 1856 the Supreme Court, in the now infamous *Dred Scott* case, held that the natural-born descendants of slaves could not be U.S. citizens under the Constitution.[136] Chief Justice Taney related how African slaves and freemen constituted an "inferior class" that could not be part of the citizenship unless the "dominant race" granted such rights to them.[137] Despite being both born within the United States and owing allegiance, African Americans were not considered citizens. The decision challenged the common law doctrine of *jus soli* by adding a racial element.

Dred Scott also had an important holding regarding American expansion: "[T]here is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance" except to be treated as temporary territories until such time as the people there were ready to become a state.[138] While the court recognized the power of the federal government to govern these territories as it chose, Congress was still subject to all the restrictions of the Constitution.[139] In other words, the territorial clause in Article IV did not convey powers to Congress beyond the Constitution's controls. This expressed the doctrine of *ex proprio vigore*, commonly described as "the Constitution follows the flag."[140] American jurisprudence had always recognized that the Constitution applied equally in all places under the nation's jurisdiction. While the concept was obvious to jurists at the time, it would be challenged by the end of the century.

135. Picquet v. Swan, 19 F.Cas. 609, 616 (No. 11,134) (C.C.D. Mass. 1828).

136. Scott v. Sandford, 60 U.S. 393, 406 (1856).

137. *Id.* at 404–05.

138. *Id.* at 446–48.

139. *Id.* at 449–50.

140. Laughlin, *Constitutional Structure*, *supra* note 55, at 423.

C. The Adoption of the Fourteenth Amendment

After the Civil War, the *Dred Scott* decision was foremost in the minds of the Civil War Amendments' drafters. To overturn the decision, the nation first adopted the Thirteenth Amendment prohibiting slavery. However, many Southern states implemented "Black Laws" which stripped the newly freed slaves of the basic rights of citizenship, such as voting, speech, movement, and bearing arms. The Civil Rights Act of 1866 attempted to grant citizenship through statute, but was not enough to overcome *Dred Scott*. For that, a constitutional amendment was required.[141]

The new Fourteenth Amendment used broad language to declare: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[142] Through the amendment, the common law doctrine of *jus soli* citizenship, as expounded by Blackstone, was restored. Specifically, the Fourteenth Amendment's citizenship clause was designed to remove the caste system and "pestilent doctrines of the *Dred Scott* case."[143] It would accomplish this by prohibiting future legislators or judges from changing the meaning of citizenship.[144] The amendment was written broadly to encompass all people throughout the entire United States. Senator Lyman Trumball, who was part of the drafting team, explained that section two of the Amendment referred to "no persons except those in the States of the union; but the [citizenship clause] refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia."[145]

141. Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 447–48 (2008).

142. U.S. CONST. amend. XIV, § 1.

143. Plaintiff's Memorandum in Opposition, *supra* note 11, at 16 (citing Cong. Globe, 39th Cong., 1st Sess. 2890, 2896 at 1116 (1866) (statement of Sen. Howard)). *See also* Newman, *supra* note 141, at 448 (discussing how the Fourteenth Amendment meant "to eliminate racial caste systems in southern states").

144. Perez, *supra* note 107, at 1035. *See also* Afroyim v. Rusk, 387 U.S. 253, 262 (1967) (reasoning that "[the amendment] provides its own constitutional rule in language calculated completely to control the status of citizenship").

145. Tuaua Complaint, *supra* note 1, at 17.

D. Fourteenth Amendment Citizenship in the Courts

For the remainder of the century, with the exception of Native Americans,[146] the common law principle of *jus soli* as stated by the Fourteenth Amendment was uniformly upheld throughout the United States.[147] In the *Slaughter-House Cases*,[148] the Supreme Court understood the citizenship clause in the same way as Senator Trumball. The opinion recognized that the Fourteenth Amendment distinguished between citizens of the United States, and citizens of a particular state.[149] As such, it was specifically framed to eliminate the old argument that those not born in the states, but born in "the District of Columbia or in the Territories, though within the United States, were not citizens."[150]

In 1898, just a couple of years before American Samoa was annexed to the United States, the Supreme Court decided *United States v. Wong Kim Ark*.[151] Wong Kim Ark had been born in California to Chinese nationals working as laborers. Having lived his whole life in the United States, he always believed himself to be a citizen. When he was about twenty-one years old, he visited China. Upon his return to the United States, the Immigration Service declared that he was not a U.S. citizen and, thus, denied him permission to land due to the Chinese Exclusion Act, which prohibited those of Chinese origin from entering the country unless they were citizens.[152]

The Supreme Court held that he was a U.S. citizen by virtue of his birth on American soil. First relying on the Fourteenth Amendment and recognizing that the citizenship clause "could not be understood without reference to the common law,"[153] the Court then declared that the Fourteenth Amendment reaffirmed the principles of *jus soli* "in the most explicit and comprehensive terms."[154] While Congress could regulate naturalization, the Amendment forbade

146. Native Americans born in the U.S. still did not become citizens due to the sovereignty of the tribes. Elk v. Wilkins, 112 U.S. 94, 109 (1884). Instead, the principle of *jus sanguinis*, that the child followed the status of the parent, applied. *See* McGovney, *supra* note 101.

147. Perez, *supra* note 107, at 1054.

148. Slaughter-House Cases, 83 U.S. 36 (1872).

149. *Id.* at 73.

150. *Id.* at 72–73.

151. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

152. *Id.* at 652–53.

153. *Id.* at 654.

154. *Id.* at 675.

restrictions on natural born citizens.[155] The only exceptions were for the children born to foreign ambassadors or officials in the country, the children of alien enemies during a hostile occupation, and Native Americans (who were sovereign).[156] The Court also reaffirmed the *Slaughter-House Cases*' distinction between jurisdiction of a state and jurisdiction of the United States.[157] One could be subject to the United States' jurisdiction without being within the jurisdiction of a particular (or any) state within the Union.

The *Tuaua* defendants claimed that *Wong Kim Ark* was irrelevant because the plaintiff had been born in California, which is indisputably part of the United States, whereas American Samoa is not. However, *Wong Kim Ark* stood for the proposition that the common law notion of *jus soli* was the law of the Fourteenth Amendment. In including even the children of aliens who resided in the United States temporarily, the Supreme Court stated: "Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."[158] Therefore, a child born under the jurisdiction of the United States, and owing allegiance and protection to the United States, has met both requirements of the Fourteenth Amendment.

E. What to Do with the Islands?

When *Wong Kim Ark* was decided in March 1898, the territorial boundaries of the United States were growing, but with the understanding that all new territory would eventually become a state. There were states, the District of Columbia—which was carved out of states, and there were territories that would someday be states. When determining the reach of the Constitution, the Supreme Court had always followed the doctrine of *ex proprio vigore* and applied the Constitution's provisions across the entire United States.

However, that same year brought about calls for changes to those commonly understood categories. That July, Congress officially annexed Hawaii as a territory of the United States.[159] In August, the Spanish-American War ended after just four months, prompting

155. *Id.* at 702.

156. *Id.* at 655, 680–82 (citing Elk v. Wilkins, 112 U.S. 94 (1884)).

157. *Id.* at 688.

158. *Id.* at 693.

159. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (Newlands Resolution), H.R.J. Res. 259, 55th Cong. (1898) (enacted).

Ambassador John Hay to describe it as a "splendid little war."[160] The United States originally entered the war with the proclaimed purpose of helping Cuba gain independence from Spain.[161] Instead, with the end of the war, the United States found itself with temporary possession of Cuba as well as three new territories: Puerto Rico, Guam, and the Philippines. A new nationwide debate over the merits—and practicalities—of American expansion began.

Now that the United States had these territories, what would it do with them? Supreme Court Justice Brewer drafted a pamphlet outlining the options: (1) leave the new territories; (2) stay until the inhabitants have organized into a stable government; (3) create a protectorate leaving the inhabitants some internal autonomy; (4) sell the islands for whatever we can get; (5) create colonies; or (6) incorporate the inhabitants as American citizens.[162]

Some spoke excitedly about an American empire, while others opposed the concept on principle. The supporters of continued growth were called the "expansionists" while those opposed were called the "anti-imperialists."[163] The argument was less about expansion, but more about what would happen to the new territories when annexed, as both sides believed that the United States had the power to expand its boundaries.[164] Racial concerns were central to the arguments. Both sides worried that these "alien and savage races" were not fit for citizenship.[165] The expansionists believed that the Constitution, and citizenship, only applied to the extent that Congress decreed, so it did not matter if expansion continued to the islands.[166] The anti-imperialists believed that the Constitution applied *ex proprio vigore*.[167] Thus, the U.S. should not annex new territories

160. Michael Richman, *A 'Splendid Little War' Built America's Empire*, WASH. POST, April 8, 1998, at H01, *available at* http://www.latinamericanstudies.org/1898/WP-9-11-1998.htm.

161. Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 806 (2005).

162. Frank E. Guerra Pujol, The Pamphlet Wars: the Original Debate Over Citizenship in the Insular Territories, 38 REV. DER. P.R. 221, 221 (1999) (quoting DAVID J. BREWER, THE SPANISH-AMERICAN WAR: A PROPHECY OR AN EXCEPTION? 13–14 (1899)).

163. *Id.*

164. *Id.* at 2–3.

165. *Id.* at 2 (quoting Rep. Jonathan P. Dolliver from Iowa).

166. *Id.*

167. *Id.* at 5.

for fear that the "semi-civilized" inhabitants would automatically become citizens.[168]

The country was split as to what to do with the territories, and the 1900 presidential election was largely considered a referendum on McKinley's expansionist policies.[169] However, before the newly reelected McKinley made a decision on these questions, the Supreme Court stepped in and came to its own conclusions.

IV. The *Insular Cases* and the Incorporation Doctrine

In 1901 the Supreme Court released a series of decisions regarding the new island territories that came to be known as the *Insular Cases*.[170] These closely watched cases gave blessing to the expansionist policies of the McKinley administration and created a new set of rules for governing territories.[171] The importance of the cases was obvious at the time, but despite their significance, they are hardly known today.

Essentially, the *Insular Cases* granted the McKinley administration the leeway it needed to continue expansion and govern as it saw fit, while also attempting to keep some semblance of *jus soli* and *ex proprio vigore* intact. The Court described the territories as neither foreign nor domestic, and as part of the United States for some clauses of the Constitution, but not others. Such a legal balancing act led humorist Finley Dunne's comic strip character Mr. Dooley to comment that, "no matter whether th' Constitution follows th' flag or not, th' Supreme Coort follows th' iliction returns."[172]

168. Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 412, 415 (1899).

169. Krishanti Vignaraja, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 782 (2010).

170. The seven cases settled on May 27, 1901, included: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Crossman v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901). Later cases concerning the territories have also been included under the umbrella term of "*Insular Cases*," though most scholars and courts do not include cases decided after Balzac v. Porto Rico, 258 U.S. 298 (1922).

171. Vignaraja, *supra* note 169, at 783.

172. Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 346 (1980) [hereinafter Laughlin, *Application of the Constitution*] (quoting F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (E. Bander ed. 1963)).

For example, *De Lima v. Bidwell* held that the territories were not foreign.[173] *Downes v. Bidwell* held that they were also not domestic.[174] Thus, Puerto Rico was part of the United States for purposes of the Uniformity Clause,[175] but not for the Revenue Clause.[176] Justice Edward White stumbled to explain this by saying that Puerto Rico was "foreign to the United States in a domestic sense."[177] At their heart, the *Insular Cases* recognized a new class of "unincorporated" territories who enjoyed the protection of the Constitution, but only for the most "fundamental rights."[178]

The *Insular Cases* ended the era of Manifest Destiny, in which the United States took new territory for the sake of expansion and settlement. In its place was a new doctrine of political and military control over lands never destined to become part of the union of states.[179]

A. *Downes v. Bidwell*: The Seminal Case

The central decision of the *Insular Cases* was *Downes v. Bidwell*.[180] The controversy was whether merchandise brought to New York from the new territory of Puerto Rico was exempt from duty despite the Foraker Act, which required levies on articles imported from foreign countries.[181] The answer depended on the interpretation of the Uniformity Clause of the Constitution, which stated that, "all duties, imposts and excises shall be uniform throughout the United States."[182] Did the Uniformity Clause extend *ex proprio vigore* to Puerto Rico? Were the territories part of the United States? If so, then the Foraker Act's duties would be unconstitutional.

Unfortunately, while the Court did come to a decision, the answer was hardly clear or concrete. The case was decided by a 5-4

173. *De Lima*, 182 U.S. at 219.

174. *Downes*, 182 U.S. at 341–42, 346. Justice Brown wrote the opinion of the Court in both *De Lima* and *Downes*, but came to different conclusions as to whether Puerto Rico was part of the United States depending on the circumstances.

175. *De Lima*, 182 U.S. at 219.

176. *Downes*, 182 U.S. at 287.

177. *Id.* at 341–42 (White, J., concurring).

178. Laughlin, *Application of the Constitution*, *supra* note 172, at 346.

179. Pedro A. Malavet, *The Inconvenience of a Constitution that Follows the Flag*, 80 MISS. L.J. 181, 204 (2010).

180. *Downes*, 182 U.S. 244.

181. *Id.* at 247–48.

182. U.S. CONST. art. I, § 8.

vote with five separate opinions and no majority.[183] This kind of factionalism in the Supreme Court is common today, but was a rare occurrence at the time. When the decision was issued, the *New York Herald* described it as such:

> No decision of more far reaching consequence has ever been rendered by the United States Supreme Court than that in the *Downes* case, and no great constitutional opinion of that tribunal has rested on a basis more insecure. It is not only opposed by the largest minority of which the Court is capable, who declare through the Chief Justice that it "overthrows the basis of our constitutional law," but even the majority, while coinciding in the conclusion, could not agree in the reasoning by which it was reached.[184]

1. Justice Brown's Opinion of the Court

As the tie-breaking vote, Justice Brown wrote the "opinion of the court," which no other justice joined. Justice Brown espoused the Expansionists' view that the Constitution only applied to a new territory to the extent that Congress allowed it, but that once it applied, Congress could not revoke it.[185] He believed that the United States could only be composed of States, so territories were never included in the definition.[186]

As part of the analysis, he compared the text of the Civil War Amendments. The Thirteenth Amendment prohibited slavery "within the United States or any place subject to their jurisdiction."[187] To Justice Brown, the latter part of the phrase suggested that there might be places subject to the jurisdiction of the U.S. without being part of the Union.[188] Meanwhile, the Fourteenth Amendment merely

183. Vignaraja, *supra* note 169, at 790.

184. Bartholomew H. Sparrow, *The Public Response to Controversial Supreme Court Decisions: The Insular Cases*, 30 J. SUP. CT. HIST. 197, 204 (2005) (quoting NEW YORK HERALD, 29 May 1901).

185. Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 343 (2004) [hereinafter Laughlin, *Cultural Preservation*].

186. *Downes*, 182 U.S. at 250–51. Justice Brown did find an exception for the District of Columbia, which he included in the United States.

187. U.S. CONST. amend. XIII.

188. *Downes*, 182 U.S. at 251.

conferred citizenship to "persons born or naturalized in the United States . . . and of the State wherein they reside."[189] This wording did not extend to persons born in those areas subject to U.S. jurisdiction but not part of a state.[190] Under this theory, statehood was required to be part of the "United States." This was a change from the opinions in the *Slaughter-House Cases* and *Wong Kim Ark*, which recognized a difference between the United States and the individual states.

Taking his analysis beyond the confines of the issue at question, Justice Brown declared that the territories were not part of the "United States" under the Fourteenth Amendment, so those born in the territories were, therefore, not birthright citizens.[191] He also argued that the power to acquire territory entailed the power to prescribe the terms of that acquisition. From a policy perspective, it would be unlikely that Congress would ever annex territory if the inhabitants, "whether savages or civilized," automatically became citizens of the United States.[192]

Justice Brown's arguments on citizenship are hardly persuasive. Aside from the ominous echoes of *Dred Scott*'s racial caste system inherent in his opinion, he draws a line between the Thirteenth and Fourteenth Amendments, but does not justify why it was drawn where it was. The text of the Thirteenth Amendment was purposefully broad to completely eradicate slavery wherever the U.S. could claim jurisdiction. As Justice Fuller stated in his dissent: "Clearly this prohibition [on slavery] would have operated in the territories if the concluding words had not been added."[193]

The use of the jurisdiction test in the Thirteenth Amendment would clearly apply to the territories, but would equally apply to the District of Columbia and the various possessions and protectorates. It would even extend to places outside the territory—but under American jurisdiction—like ships[194] or military bases like

189. U.S. CONST. amend. XIV, § 1.

190. *Downes*, 182 U.S. at 251.

191. *Id.* at 250–51.

192. *Id.* at 279–80.

193. *Id.* at 358 (Fuller, J., dissenting). Despite the clear wording of the Thirteenth Amendment, Samoans have actually challenged whether it applies in American Samoa, fearing that a prohibition of involuntary servitude would hurt the *matai*'s ability to control his family. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 426.

194. *See In re* Chung Fat, 96 F. 202, 203–04 (D. Wash. 1899) ("[I]f . . . the petitioners are being coerced to labor on board an American vessel against their will, . . . they are being subjected to involuntary servitude within the United States, in violation of the thirteenth amendment.").

Guantanamo Bay in Cuba.[195] Justice Brown did not explain why the Fourteenth Amendment stopped at the territories, instead of protectorates or ocean vessels.

The most overlooked point about Justice Brown's opinion is that it was never good law. Due to the split opinions of the justices, Justice Brown wrote the "opinion of the court" because he was the tie-breaking vote. However, not one other justice joined in his opinion, prompting the humorist Finley Dunne to remark, "Mr. Justice Brown delivered the opinion of the Court, eight justices dissenting."[196] Even so, Justice Brown's opinion is very important because scholars,[197] the federal district courts,[198] and even the defendants in *Tuaua*,[199] keep citing it as if it were good law. In fact, Justice Brown's extension doctrine has been completely repudiated, even recently.[200] The controlling opinion of *Downes*, and that which withstood the test of time, was Justice White's concurrence.

2. Justice White's Concurring Opinion

Justice Edward White, with two other justices joining, developed a new test for applying the Constitution to the island territories. To begin, he undertook an exhaustive analysis of the international laws and nations' ability to conquer territory. Based on this law of conquest, he determined that when a nation overtakes new territory, inherent in its treaty-making powers, it has the ability to impose restrictions as it sees fit.[201] This initially seemed like a victory for the extension theory espoused by Justice Brown.

However, Justice White also recognized that the United States government received its powers strictly from the Constitution, so the Constitution must still operate over Congress' power in the

195. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

196. McGovney, *supra* note 101, at 617.

197. Clanton, *supra* note 118, at 152–53.

198. Rabang v. Immigration & Naturalization Serv., 515 U.S. 1130, 1133 n.5 (9th Cir. 1994), *cert. denied*, 515 U.S. 1130 (1995). The Ninth Circuit's decision in *Rabang* has been followed by the Second (Valmonte v. Immigration & Naturalization Serv., 136 F.3d 914 (2d Cir. 1998); Third (Lacap v. Immigration & Naturalization Serv., 138 F.3d 518 (3d Cir. 1998)); Fifth (Nolos v. Holder, 611 F.3d 279 (5th Cir. 2010)); and D.C. Circuit Courts (Licudine v. Winter, 603 F. Supp. 2d 129, 132–34 (D.D.C. 2009)).

199. Defendants' Motion to Dismiss, *supra* note 4, at 13–14 (adopting the *Rabang* court's analysis of *Downes*).

200. *Boumediene*, 553 U.S. at 727 (rejecting the extension doctrine: "[T]he Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.").

201. Downes v. Bidwell, 182 U.S. 244, 312–13 (1901) (White, J., concurring).

territories. But while the Constitution did indeed follow the flag, it did not necessarily do so in full. Justice White created a distinction between incorporated and unincorporated territories. An incorporated territory was one destined for statehood, and the Constitution applied in full.[202] But where a territory was not on track to become a state, it was unincorporated and the "question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."[203]

To determine whether a specific provision of the Constitution applied to an unincorporated territory, the court must determine whether the restrictions on Congress's power are "so fundamental a nature that they cannot be transgressed."[204] This would eventually be clarified as a test of whether the provision is a "fundamental right" that follows the flag to the territories.[205] The creation of unincorporated territories and the holding that only fundamental constitutional rights applied came to be known as the Incorporation Doctrine.

B. The Incorporation Doctrine Applied

The Incorporation Doctrine represented a significant change in the law. It stated that the Constitution still followed the flag, *ex proprio vigore*, except when it did not. Citizenship was still subject to the doctrine of *jus soli*, except when it was not. Incorporation was determined on a case-by-case basis. Neither *Downes* nor the rest of the *Insular Cases* provided much guidance as to whether a territory was incorporated or unincorporated, or how to determine a fundamental right. Nevertheless, although it was a mere plurality opinion, by 1922 the Incorporation Doctrine became firmly established as the law.[206]

1. Incorporated vs. Unincorporated Territories

It was simply taken for granted that the islands gained from the Spanish-American War were unincorporated.[207] In fact, islands like

202. *Id.* at 311–12.

203. *Id.*

204. *Id.* at 371.

205. *See* Dorr v. United States, 195 U.S. 138, 147–48 (1904) (holding that jury trials in the Philippines are not a "fundamental right").

206. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922).

207. *Downes*, 182 U.S. at 344 (White, J., concurring) (Puerto Rico was unincorporated); *Dorr*, 195 U.S. 138, 144–45 (the Philippines were unincorporated).

Guam were considered mere military bases without any constitutional rights.[208] The Philippines were unincorporated because the treaty with Spain specifically stated that the civil rights and the political status of the inhabitants "shall be determined by Congress."[209] In the 1903 case of *Hawaii v. Mankichi*, the Court held that the language of the resolution annexing Hawaii in 1898 did not serve to incorporate the territory.[210] This was true even though the resolution prohibited laws "contrary to the Constitution of the United States."[211] While the Court conceded that reading the resolution literally would suggest that the U.S. Constitution did apply, it determined that Congress must surely have had a different intent.[212] Instead, the resolution did not intend to make any change to the laws that would imperil "the peace and good order of the islands."[213] Thus, the Constitution did not apply and Hawaii remained unincorporated until express language was used in 1900 to incorporate the islands.[214]

On the other hand, Alaska was deemed incorporated in *Rassmussen v. United States*, even though Congress did not make such incorporation explicit.[215] Unlike the Philippines, the treaty with Russia that purchased Alaska granted the inhabitants the "enjoyment of all the rights, advantage and immunities of citizens of the United States."[216] The Court found this sufficient, especially since it could not find any evidence of a contrary intention.[217] It also acknowledged that Congress had by statute extended a number of laws to the territory that inferred incorporation, and that *Downes* had identified Alaska, along with Florida and Louisiana, as examples of incorporated territories.[218] It remained unclear, though, what was to become of the

208. Kent, *supra* note 38, at 170 (citing Guam–Spanish Law–Condemnation of Property, 25 Op. Att'y Gen. 59, 61 (1903)).

209. *Dorr*, 195 U.S. at 143.

210. Hawaii v. Mankichi, 190 U.S. 197, 216 (1903).

211. *Id.* at 209.

212. *Id.* at 212.

213. *Id.* at 214.

214. *Id.* at 210–11.

215. Rassmussen v. United States, 197 U.S. 516, 525 (1905).

216. *Id.* at 522 (quoting the Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America (Alaska Purchase), U.S.-Russ., art. 3, Mar. 30, 1876, 15 Stat. 539).

217. *Id.*

218. *Id.* (citing Downes v. Bidwell, 182 U.S. 244, 355 (1901) (White, J., concurring)).

"uncivilized tribes" of Alaska who were specifically excluded from the rights, advantages and immunities of the United States.[219]

By 1922, the implicit reading of Congress' intent was replaced with a strict requirement of express incorporation. The Supreme Court in *Balzac v. Porto Rico* used the same criteria it had used in *Rassmussen*, but determined that Puerto Rico was not incorporated.[220] Puerto Rico had been organized through the Jones Act of 1917, which also conferred U.S. citizenship. While citizenship implied incorporation for Alaska, it would not do so for Puerto Rico. *Balzac* held that the days of determining incorporation by inference were over. Since the Incorporation Doctrine had been around for some time, "incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view."[221] The Jones Act did not use the word "incorporate," so Puerto Rico was not incorporated even though its inhabitants had obtained citizenship.[222]

Though never explicitly stated by the courts, many commentators have noted that race plays a large part in the incorporation determination.[223] Alaska was considered easy to reach from the United States and would probably be inhabited by Caucasians.[224] The other territories, "peopled by savages," would stay unincorporated.[225]

It still remains unclear just how treatment of incorporated territories differs from unincorporated territories. While the right to a jury trial only applied to incorporated territories, other provisions had mixed results. For example, *Downes* held that the Uniformity Clause did not apply to Puerto Rico because it was an unincorporated

219. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America (Alaska Purchase), U.S.-Russ., art. 3, Mar. 30, 1876, 15 Stat. 539.

220. Balzac v. Porto Rico, 258 U.S. 298, 313 (1922).

221. *Id.* at 306.

222. *Id.*

223. *See, e.g.*, Marybeth Herald, *Does the Constitution Follow the Flag Into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707 (1994); Laughlin, *Application of the Constitution*, *supra* note 172, at 346; LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 17–26; Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 827 (1926).

224. Laughlin, *Application of the Constitution*, *supra* note 172, at 354; Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. 147 (2006); Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779 (1992).

225. Dorr v. United States, 195 U.S. 138, 148 (1904)

territory.[226] But three years later, the same Court held that the same constitutional provision did not apply to Alaska either, even though it was incorporated.[227]

2. Fundamental vs. Procedural Rights

The second distinction the Incorporation Doctrine created was between fundamental and non-fundamental rights as they applied to unincorporated territories. Justice White described these fundamental rights as "principles which are the basis of all free government which cannot be with impunity transcended."[228] Beyond that there was very little guidance as to what was fundamental.

In 1904, the Court in *Dorr v. United States* held that the right to jury trial did not apply to the Philippines.[229] The first case to actually use the phrase "fundamental right," it held that it would be absurd to force a procedural system on a population not ready to receive it where "the result may be to work injustice and provoke disturbance rather than to aid in the orderly administration of justice."[230] In other words, if the right is procedural and its implementation would disturb, or be disturbed by, the local culture, then the Constitution does not force that right upon the people. Such a right might be said to be *impractical*. The right to jury trial was also denied to pre-1900 Hawaii on the same basis.[231]

Another procedural right, the right to a grand jury indictment, was denied to the Philippines in *Ocampo v. United States*.[232] The Court determined that grand jury indictments were not inherent in the fundamental right of Due Process, and so they did not apply to the islands.[233] That a jury trial was nonfundamental was reaffirmed for Puerto Rico in *Balzac v. Porto Rico* in 1922.[234] *Balzac* also represented the first time a solid majority of the Supreme Court agreed on the Incorporation Doctrine, officially becoming the law of the land.

226. Downes v. Bidwell, 182 U.S. 244, 287 (1901).
227. Binns v. United States, 194 U.S. 486, 495–96 (1904).
228. *Downes*, 182 U.S. at 290–91 (White, J., concurring).
229. *Dorr*, 195 U.S. at 149.
230. *Id.* at 148.
231. Hawaii v. Mankichi, 190 U.S. 197, 218 (1903).
232. Ocampo v. United States, 234 U.S. 91, 98–99 (1914).
233. *Id.* at 98.
234. Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

Over the last century, the *Insular Cases* and the Incorporation Doctrine have been widely criticized by scholars. In articles with titles like, "The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism,"[235] "The *Insular Cases*: The Establishment of a Regime of Political Apartheid,"[236] and "The Land that Democratic Theory Forgot,"[237] commentators from across the spectrum have decried the Doctrine for the way in which it creates a second class of citizens. However, this disdain in academia has not swayed the Supreme Court, which upheld the Incorporation Doctrine as recently as 2008.[238]

C. *Reid v. Covert*: New Life in the Old Incorporation Doctrine

For the next 35 years, the Supreme Court remained silent on the Incorporation Doctrine. When finally reviewed, the *Insular Cases* were not even cited for a case involving the territories. Instead, in 1957, the Supreme Court in *Reid v. Covert* considered the issue of whether a civilian at a U.S. military base overseas could be tried by a military tribunal.[239] Mrs. Covert was the civilian spouse of a U.S. Air Force Sergeant stationed in England.[240] While there, she killed her husband and was found guilty by a military tribunal without a jury.[241] The question was whether she could be tried by a military tribunal, or must be afforded a civilian jury trial.

Justice Black wrote the plurality opinion of the court, with three justices joining. He started with the *ex proprio vigore* premise that the United States only derives its powers from the Constitution. "The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution."[242] This language echoed the *Downes* dissent of Chief

235. Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1 (2001).

236. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007).

237. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525 (2008).

238. Boumediene v. Bush, 553 U.S. 723 (2008).

239. Reid v. Covert, 354 U.S. 1, 3 (1957).

240. *Id.*

241. *Id.* at 4–5 (noting that the case was consolidated with another similar case involving Mrs. Dorothy Smith, who killed her Army husband at a base in Japan).

242. *Id.* at 5–6.

Justice Fuller more than half a century earlier: "The government of the United States is the government ordained by the Constitution, and possess the powers conferred by the Constitution . . . those limits may not be mistaken or forgotten."[243] Stemming from this proposition, Justice Black attacked the *Insular Cases* and the Incorporation Doctrine:

> While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.[244]

He argued that the "very dangerous doctrine" of the *Insular Cases* threatened the very basis of American government and should not be expanded.[245] He further admonished that if foreign affairs are of such a nature that the U.S. cannot act within the confines of the Constitution, then the Constitution should be amended rather than ignored.[246] Justice Black was forced to distinguish the *Insular Cases* rather than overturn them because four justices were not enough to overturn the *Insular Cases*' precedent.[247] In fact, without a majority, the law of the case is "that position taken by those Members who concurred in the judgment on the narrowest grounds."[248] While Justice Black had four justices join his opinion, Justice Harlan's concurrence was the narrower opinion.[249]

Justice Harlan agreed with the plurality that the Constitution generally applied abroad, but recognized that not all provisions "necessarily apply in all circumstances in every foreign place."[250] While there was no rule that a provision of the Constitution could never apply abroad, there was also no rule that a provision must

243. Downes v. Bidwell, 182 U.S. 244, 358 (1901) (Fuller, J., dissenting).

244. *Reid*, 354 U.S. at 9.

245. *Id.* at 14.

246. *Id.*

247. Laughlin, *Cultural Preservation*, *supra* note 185, at 347.

248. *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).

249. *Reid*, 354 U.S. at 348.

250. *Id.* at 74 (Harlan, J., concurring).

always apply abroad, if execution would be "impractical and anomalous."[251]

For Justice Harlan, the *Insular Cases* still had vitality and remained the law of the land.[252] Unlike Justice Black who would constrain (or even overturn, if he had a majority) the Incorporation Doctrine, Justice Harlan actually sought to expand and further define it. Even for those rights deemed nonfundamental, the Court still had to continue the analysis to determine whether the right *should* apply. The "impractical and anomalous" test became the basis of determining which provisions applied abroad by considering the "particular local setting, the practical necessities, and the possible alternatives."[253] Having bolstered the *Insular Cases*, Justice Harlan then applied this test to the facts of *Reid*, and determined that as a capital offense, it was not impractical or anomalous to grant the defendant a jury trial, though a lesser offense may have reached a different conclusion.[254]

As the narrowest opinion, Justice Harlan's "impractical and anomalous" test became the standard applied to the Territories for judging which rights apply. The constitutional issues surrounding the *Insular Cases* have consistently left the courts divided. Every significant case failed to find a majority, or has split circuits. The Incorporation Doctrine was created by the narrowest of margins in a plurality opinion from *Downes*, and was upheld and expanded by the even narrower margin of just one man in *Reid*.

D. Interpreting *Reid*: A Split Between Circuits

Rather than clarify the Incorporation Doctrine, Justice Harlan's new test only served to cause more confusion. The courts have struggled since *Reid* to make sense of the myriad concurrences, pluralities, and vague tests created for the territories. The fight over jury trials served as the basis for many of the *Insular Cases*, and continued to guide post-*Reid* decisions.

For example, in *Torres v. Delgado*, the District Court of Puerto Rico held that the jury trial was a fundamental right that was not

251. *Id.* at 74–75 (Harlan, J., concurring).

252. *Id.*

253. *Id.* at 75 (Harlan, J., concurring). Interestingly, Justice Harlan's grandfather wrote a dissenting opinion in *Downes* that more closely aligned with Justice Black's position. "In my opinion, Congress has no existence and can exercise no authority outside of the Constitution." Downes v. Bidwell, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting).

254. *Reid*, 354 U.S. at 77–78 (Harlan, J., concurring).

impractical and anomalous, and was thus applicable in Puerto Rico.[255] The District Court for the District of Columbia held that jury trials were applicable to American Samoa, but used only the "impractical and anomalous" test to reach that conclusion.[256] Then, the Court of Appeals for the Ninth Circuit considered just the "fundamental rights" tests to determine that jury trials did not apply to the Northern Marianas.[257] The conflict between the D.C. Circuit and the Ninth Circuit has raised issues that are important to resolve for the *Tuaua* case.

1. The D.C. Circuit: Putting "Impractical and Anomalous" into Practice

In 1972, Jake King, a U.S. citizen living in American Samoa, was tried for failure to pay Samoan income tax. The High Court of American Samoa denied his request for a jury trial, citing *Balzac v. Porto Rico* for the proposition that jury trials were not afforded to the territories.[258] Even before going to trial, King filed against the Secretary of the Interior as administrator of American Samoa to declare that the denial of a jury trial was unconstitutional.[259] The District Court for the District of Columbia dismissed the action for lack of jurisdiction, but it was heard by the Court of Appeals.

Both sides conceded that only "fundamental rights" applied to the territory. However, King argued that the recent decision in *Duncan v. Louisiana* had overturned the old Insular decisions like *Balzac v. Porto Rico*.[260] In 1968, *Duncan* had held that jury trials were a fundamental right for purposes of applying the Sixth Amendment to the states via the Due Process clause of the Fourteenth Amendment.[261] The D.C. Circuit Court rejected this argument, stating that *Duncan* only applied to States, and reaffirmed that the *Insular Cases* still controlled in the territories.[262] In effect, there were now two different definitions of "fundamental rights" depending on whether a court was considering the states or the territories.

255. Torres v. Delgado, 391 F. Supp. 379, 381 (D.P.R. 1974). The court went on to hold that unanimity by those juries was not fundamental, and thus not applicable. *Id*. at 383.

256. King v. Andrus, 452 F. Supp. 11, 12 (D.C. Cir. 1977).

257. Northern Mariana Islands v. Atalig, 723 F.2d 682, 689 (9th Cir. 1984).

258. King v. Morton, 520 F.2d 1140, 1142 (D.C. Circ. 1975).

259. *Id.* at 1143.

260. *Id.* at 1146–47.

261. Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

262. *King v. Morton*, 520 F.2d at 1147.

Interestingly, concepts like "fundamental" and "unincorporated territory" were not controlling on the court's decision. Instead, the court held that a decision could only be reached by reviewing how a jury trial would apply to American Samoa today using the "impractical and anomalous" test of Justice Harlan in *Reid*.[263] Determining whether jury trials would be impractical and anomalous in American Samoa was largely a question of fact that required an evidentiary review of the American Samoa laws and customs, so the Court remanded the case back to the district court to make a decision.[264]

The district court in *King v. Andrus* held an extensive trial on the question of holding jury trials in American Samoa.[265] The American Samoa government argued against jury trials on the grounds that family, chiefs, and culture knit the Samoan people too closely and, thus, they would never convict one another for fear of offending somebody they knew. The other concern raised was the *ifoga* ceremony, in which an offender's family offers apologies to the victim's families. The government feared that no jury would convict a defendant whose family had conducted an *ifoga* ceremony.[266]

Reviewing each of these concerns, the district court found that the cultural obstacles had been eroded by "western world encroachment."[267] Population explosions diluted the close relationships of the *aiga*, and Samoans already ran a complex justice system with Samoans arresting and prosecuting Samoan defendants before Samoan judges.[268] It also found that the *ifoga* was rarely practiced anymore, and had no effect on the prosecution of individual offenders either in American Samoa or Western Samoa.[269]

The court then proceeded to note the significant advancements to the education system, the structure of government, the judicial system, and how Americanized the Samoans had become, while still

263. *Id.*

264. *Id.* at 1148.

265. King v. Andrus, 452 F. Supp. 11 (D.C. Circ. 1977), *remanded from sub nom.* King v. Morton, 520 F. 2d 1140 (D.C. Circ. 1975). Interior Secretary Rogers Morton left office in 1975. Interior Secretary Cecil Andrus took the office in 1977 and became the new defendant in this case. This article will refer to the cases collectively as *King*, or the *King* cases.

266. *Id.* at 12–13.

267. *Id.* at 14.

268. *Id.* at 13–14.

269. *Id.* at 15.

maintaining their Samoan traditions.[270] The court felt that under the present circumstances, there was nothing preventing jury trials in American Samoa.[271] Jury trials were no longer too impractical and anomalous to be applied to the territory.

King represented an incredibly important doctrine: The practicality of a right can change over time. In 1911, the High Court of American Samoa, while under the exclusive control of the U.S. Navy, held that jury trials "would not be practicable" in American Samoa because the "natives are uncivilized and incapable of self-government."[272] *King* now stood for the proposition that circumstances over the last sixty years had changed, and without the racism of the past, there was no more reason to believe jury trials were impractical. Even if a right is denied in the past, it can be granted later if it is no longer impractical.

Many of the witnesses in *King* regarded this new right as desirable, but something that the American Samoans should do on their own. Similarly, the critics of the *Tuaua* plaintiffs have made the self-determination plea central to their argument.[273] This is a belief widely shared in American Samoa. While the *King* Court sympathized with this view, it did make clear that the desires of the Samoans could not play a part in the determination of whether a right was impractical or anomalous.[274] It would be improper to deny rights to individuals who should enjoy them while they wait for American Samoa to come to a decision.

In *Tuaua*, Judge Leon dismissed the relevance of *King* because the defendant was a U.S. citizen, so it did not affect nationals.[275] However, Judge Leon did not seem to recognize the full extent of *King* in making such a conclusion. The *King* case was not in any way limited to U.S. citizens. The evidentiary hearing asked whether a jury trial could be held in American Samoa, not whether it could be held there just for U.S. citizens. Tellingly, the holding provided jury trials across the territory, to citizens and nationals alike. To claim that

270. *Id.* at 15–17.

271. *Id.*

272. Am. Sam. Gov't v. Willis, 1 Am. Samoa 635, 646 (App. Div. 1911).

273. Faleomavaega Reply, *supra* note 66, at 4.

274. King v. Andrus, 452 F. Supp. 11, 17 (D.C. Circ. 1977), *remanded from* King v. Morton, 520 F. 2d 1140 (D.C. Circ. 1975).

275. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *6 (D.D.C. June 26, 2013).

King was limited to citizens is a drastic misreading of the case, and fundamentally underestimates its importance to the jurisprudence.

2. The Ninth Circuit: Relying on the "Fundamental Rights" Test

a. *CNMI v. Atalig*

In 1984, jury trials were again the center of dispute in *Commonwealth of the Northern Mariana Islands v. Atalig*, but the Ninth Circuit Court of Appeals used a different approach than the D.C. Circuit.[276] *Atalig* did not mention the "impractical and anomalous test" or the D.C. Circuit's reasoning. Instead, it referred back to the original *Insular Cases* to review the "fundamental rights" test. The Court sought to determine whether the right is one of "those fundamental limitations in favor of personal rights which are the basis of all free government."[277] It very quickly determined, considering the long history of this very question, that jury trials were not fundamental, and thus did not apply to the Commonwealth of the Northern Mariana Islands ("CNMI").[278]

b. *Wabol v. Villacruisis*

Five years later, the Ninth Circuit returned to the CNMI in *Wabol v. Villacruisis*.[279] The case considered an equal protection challenge to racial prohibitions on the sale of land to those not of CNMI descent.[280] The court again considered whether the right, in this case Equal Protection under the Fourteenth Amendment, was fundamental and was the basis for all free government.[281] In doing so, the court added to the definition of fundamental right, describing it as one which incorporates the "shared beliefs of diverse cultures" to be viewed in an "international sense."[282]

Wabol also considered the *Reid* "impractical and anomalous" test, citing the D.C. Circuit in *King*. For the Ninth Circuit, though, "impractical and anomalous" was a way of determining whether a right was fundamental, not necessarily a test of its own. Through this

276. Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984).

277. *Id.* at 690 (quoting, in part, Dorr v. United States, 195 U.S. 138, 147 (1904)).

278. *Id.* at 690–91.

279. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

280. *Id.* at 1451.

281. *Id.* at 1460.

282. *Id.*

mechanism the court sought to find the "delicate balance between local diversity and constitutional command."[283]

The court first distinguished between procedural rights and substantive rights. Substantive rights were personal and fundamental. Procedural rights were simply a means through which to ensure substantive rights. For example, a jury trial was a procedure utilized to ensure Due Process—the former right being procedural and the latter being substantive.[284] However, when analyzing rights, the court must balance them against the preservation of Congress' power to administer the territory in order to protect the unique cultural and social conditions of the territory. The court would remain cautious about undermining Congress.[285]

Applying this test, the Ninth Circuit held that it would be impractical to rid the CNMI of the racial restrictions on land because it was a substantial piece of the Covenant that led to the CNMI's annexation to the United States. It would also be anomalous for the Equal Protection Clause to force the U.S. to break its pledge to protect and preserve the CNMI culture.[286] The court rephrased the issue to ask whether there was a right to long-term access to Commonwealth real estate, and due to the unique qualities of CNMI land scarcity and culture, it found that this right was not fundamental in the international sense.[287]

Of course, the reframing of the right at issue in *Wabol* was certainly suspect. Questioning whether there is a right to long-term access to Commonwealth real estate downplays the infringement. The real question should have been whether there is an Equal Protection right to be free of racial discrimination in buying land, which had already been answered.[288] One commentator suggested a telling analogy: while there may be no fundamental right to eat at a particular lunch counter, the government cannot restrict anyone from being served due to his or her race.[289]

283. *Id.* at 1461.

284. *Id.* at 1460.

285. *Id.*

286. *Id.* at 1462.

287. *Id.*

288. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that racial restrictions on property violates the Equal Protection Clause).

289. Herald, *supra* note 223, at 727 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 151–52 (1970)).

Regardless, the Ninth Circuit in *Wabol* indicated that the "fundamental rights" test and the "impractical and anomalous" test should both be used in determining whether a constitutional right applied to a territory. *Wabol*'s focus on the particular characteristics of the territory in question also echoed the evidentiary trial in *King* regarding the ability of American Samoa to hold a jury trial. Somewhere between the D.C. Circuit in *King* and the Ninth Circuit in *Wabol* there lies a test for determining the application of the Constitution to the territories.

V. A Framework for Applying the Constitution to Territories

Despite this labyrinth of conflicting opinions, tests, and competing priorities, there exists a sustainable framework through which to analyze the application of constitutional rights to the territories. In attempting to create a framework for applying the Constitution to the territories, I join a long line of legal scholars who have tried to unify these competing holdings.[290]

A. Unifying the Tests

The difficulty in arriving at a simple framework is that the D.C. Circuit and the Ninth Circuit have used very different tests to reach their conflicting conclusions. The former relied entirely on the "impractical and anomalous" test and the latter relied solely on "fundamental rights." While others have analyzed this dichotomy exhaustively, the most likely explanation is that the differences resulted merely from a matter of taste.[291] So then: how to choose between the two tests?

The *Insular Cases* created the "fundamental rights" test. This formula, originally described in *Downes v. Bidwell*,[292] has been used in almost every major case concerning the Constitution's application in

290. *See, e.g.,* U.S. GENERAL ACCOUNTING OFFICE, OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (2007), *available at* http://www.gao.gov/archive/1998/og98005.pdf; Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69 (2001); Katz, *supra* note 224; Laughlin, *Constitutional Structure, supra* note 53, at 385; Maurice H. McBride, *The Application of the American Constitution to American Samoa*, 9 J. INT'L L. & ECON. 325 (1974); James R. Thornbury, *Sumario: A Time for Change in the South Pacific?*, 67 REV. JUR. U.P.R. 1099 (1998).

291. Katz, *supra* note 224, at 791.

292. Downes v. Bidwell, 182 U.S. 244, 290–91 (1901) (White, J., concurring).

the territories. *Downes* also indicated a strong presumption, though rebuttable, that the Constitution does apply in a territory.[293]

However, since *Reid*, many courts have utilized Justice Harlan's "impractical and anomalous" test.[294] The Ninth Circuit in *Wabol* appears to be the first court to attempt to bring these two tests together. The court first determined that the issue at question was separate from the substantive right of Equal Protection. It then held that overturning the racial restrictions on land would be impractical and anomalous because it would undermine the Covenant and threaten CNMI culture.[295] Interestingly, the court also noted that because it was "impractical and anomalous," it was therefore not fundamental in the international sense.[296]

Some have interpreted *Wabol*'s definition of "fundamental right" as one that is not "impractical and anomalous," suggesting that the new test throws out the international understanding of fundamentalness in favor of a reflection of just the local cultural settings.[297] While *Wabol* certainly focused on the local situation in determining whether the right at question was impractical or anomalous, it had already determined that the right was not the same as the fundamental right of Equal Protection. In fact, *Wabol* was the first modern case to truly emphasize and highlight that a fundamental right should be in the "international sense."[298] If "impractical and anomalous" is not a definition of a fundamental right, then what is?

It is well settled that fundamental rights, those most personal rights and privileges arising from the Constitution, which are the basis of all free government, must apply to the territories. For those rights that are not obviously fundamental, the default has been to assume that they could never apply to the territories absent congressional

293. *Id.* at 292 (noting that where a territory is unincorporated, the "question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable"). *See also* Boumediene v. Bush, 553 U.S. 723, 765 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."); Reid v. Covert, 354 U.S. 1, 5–6 (1957) (stating that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

294. *See, e.g.*, King v. Morton, 520 F.2d 1140 (D.C. Circ. 1975).

295. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

296. *Id.* at 1462.

297. Laughlin, *Cultural Preservation*, *supra* note 185, at 361.

298. *Wabol*, 958 F.2d at 1460.

action.[299] However, Justice Harlan in *Reid* changed that assumption. For those rights that would otherwise not be fundamental, he then asks whether in that particular case they "*should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives . . ."[300] This view allowed the analysis to adhere to the presumption that the Constitution applies to the territories, unless it would be impractical and anomalous for a non-fundamental right to be instituted. This balancing test is even bolstered by the *Insular Cases*, which often considered the practicality of bringing new institutions to inexperienced populations in the territories.[301] Thus the D.C. Circuit in *King* did not ask whether a jury trial was a fundamental right, because the question had already been answered in past cases.[302] Instead, the court considered whether a jury trial *should* apply based on a local application of the "impractical and anomalous" test.[303] The test can be restated as follows: where a right is not fundamental, it is still presumed to apply to the territories unless it would be impractical or anomalous to do so.

Recent Supreme Court cases seem to favor the "impractical and anomalous" test for determining how to apply nonfundamental constitutional provisions abroad. In *United States v. Verdugo-Urquidez*, Justice Kennedy's concurring opinion relied on the test to determine that it would be impractical and anomalous to apply the warrant provision of the Fourth Amendment to an alien abroad.[304] The Court in *Boumediene v. Bush* used the test to hold that it would not be impractical and anomalous to provide the writ of *habeas corpus* to detainees in Guantanamo Bay Prison because the United States had complete sovereign control over the territory of the base.[305] These Supreme Court decisions do not undermine the "fundamental rights" analysis. Instead, they distinguish between substantive rights

299. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922); Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984).

300. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (emphasis in original).

301. Dorr v. United States, 195 U.S. 138, 148–49 (1904) (outlining the practical difficulties of forcing jury trials upon "savages" who already have an established system of justice).

302. *See, e.g.,* Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984); *Balzac*, 258 U.S. at 298; *Dorr*, 195 U.S. at 147–48; Hawaii v. Mankichi, 190 U.S. 197 (1903).

303. King v. Morton, 520 F.2d 1140 (D.C. Circ. 1975).

304. United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

305. Boumediene v. Bush, 553 U.S. 723, 770 (2008).

deemed fundamental, which will always apply, and those procedural rights that apply only if it would not be impractical and anomalous to do so.

B. Determining a Standard of Review

As constitutional questions, the courts must determine the appropriate standard of review. The Supreme Court in *Harris v. Rosario* required Congress to have a rational basis for treating territories differently than states when enacting laws.[306] However, constitutional rights are typically reviewed under higher scrutiny. The trial court in *Wabol* used rational basis,[307] but the Ninth Circuit seemed to review the case with a hybrid that was somewhat less demanding than strict scrutiny. To survive strict scrutiny, a law must be narrowly tailored to achieve a "compelling state interest."[308] The Ninth Circuit in *Wabol* concluded that the government had a "compelling justification" for the land laws, but stated that such a law need not be "precisely tailored" for the territories.[309]

While not expressing a standard, the D.C. Circuit in *King* reviewed the case on something more than rational basis, as it brushed off the overwhelming testimony presented at trial of various government interests in denying jury trials.[310] If the standard for reviewing constitutional application to the territories is more than rational basis—but not quite strict scrutiny—then what is it? Well-noted territorial scholar Professor Stanley Laughlin suggested that intermediate scrutiny is the appropriate course and affirmative action cases can act as a guide.[311] This may be appropriate. However, no courts have explicitly adopted this course of action.

C. Outline of a Framework

The case history creates a hybrid framework through which to analyze whether a particular constitutional provision, such as the citizenship clause of the Fourteenth Amendment, will apply to a territory. First, since it is settled that the full Constitution applies to incorporated territories, the court must determine whether the territory is incorporated or unincorporated. If unincorporated, the

306. Harris v. Rosario, 446 U.S. 651, 651–52 (1980).

307. Wabol v. Villacrusis, 958 F.2d 1450, 1453 (9th Cir. 1990).

308. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

309. *Wabol*, 958 F.2d at 1461–62.

310. Laughlin, *Application of the Constitution*, *supra* note 172, at 378.

311. *Id.*

court must then ask whether the right in question is "fundamental." If the right is fundamental, then it must apply to the territory, and all territories, since the fundamental nature of the right does not change at different locations. If not fundamental, then the court asks whether it should apply. The presumption is that a constitutional provision does apply unless it is impractical or anomalous to that particular territory. Therefore, the court must ask whether it is impractical to apply the provision, and then ask whether it would be anomalous to do so. If it would be neither impractical nor anomalous to implement, then the provision does apply to the territory in question.

This is rephrased in the flow chart below:

I. Is the territory incorporated or unincorporated?
    A. If incorporated, then the Constitution does apply.
    B. If unincorporated, then must rely on the Incorporation Doctrine.
II. Is the provision in question a fundamental right?
    A. If yes, then the right does apply, and it applies to all territories.
    B. If no, then *should* it apply?
III. Would implementation of the provision be impractical in that particular territory?
    A. If yes, then the provision will not apply to that territory.
    B. If no, then continue with analysis.
IV. Would implementation of the provision be anomalous in that particular territory?
    A. If yes, then the provision will not apply to that territory.
    B. If no, then the provision does apply, but only to that territory.

At the end of this analysis, there should be an answer as to whether the constitutional provision applies to the territory in question. Each of these questions will be explored in the following sections.

D. Analyzing the Framework

This section analyzes the questions presented in the framework in greater detail.

1. Is the Territory Incorporated?

Before asking whether a constitutional provision applies, it must first be determined whether the territory is incorporated. Constitutional provisions apply to incorporated territories, but not necessarily to unincorporated territories.[312] The definition of an unincorporated territory was never fully defined, leaving Justice Harlan's dissent in *Downes* claiming that the "idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[313] However, an "incorporated" territory is most often described as one that Congress intends to make a state at some point in the future.[314]

Annexation by the United States alone is not enough to incorporate a territory.[315] Nor is the mere granting of citizenship.[316] The determination today is mostly a political question. If incorporation is intended, then Congress, the annexing treaty, or organic documents must make it explicit; it is not to be determined by "inference or construction."[317] Only a significant, and expressed, change in status will serve to incorporate a territory.

2. Is the Constitutional Provision a Fundamental Right?

Fundamental rights for purposes of a territory have never been clearly defined. However, four important points can be discerned from case law. First, fundamental rights are natural rights that are more than constitutional rights. They are alternately described as the "basis of all free government,"[318] "limitations in favor of personal rights,"[319] and fundamental in the "international sense" based on the shared beliefs across cultures.[320] These rights may be explicitly stated in the Constitution, or may exist independently.[321] However, just

312. *See generally* Downes v. Bidwell, 182 U.S. 244, 287–344 (1901) (White, J., concurring).

313. *Id.* at 391 (1901) (Harlan, J., dissenting).

314. *See id.* at 311–12 (White, J., concurring). *See also* Balzac v. Porto Rico, 258 U.S. 298, 311 (1922) ("Incorporation has always been a step, and an important one, leading to statehood.").

315. Hawaii v. Mankichi, 190 U.S. 197, 217–18 (1903).

316. *Balzac*, 258 U.S. at 311.

317. *Id.*

318. *Downes*, 182 U.S. at 291 (White, J., concurring).

319. Dorr v. United States, 195 U.S. 138, 146 (1904).

320. Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990).

321. *Downes*, 182 U.S. at 290–91 (White, J., concurring).

because a right is stated in the Constitution, it does not mean it is fundamental.

Second, the burden is on the party requesting the right to show that it is fundamental. Every major decision reviewing fundamental rights for the territories has placed the burden on the party seeking the right. Moreover, the courts have generally taken a "cautious approach" when overturning Congress's rules.[322] While there is a presumption that the Constitution does apply, it is not a presumption that a right is fundamental.

Third, rights within the Constitution are to be determined independent from one another. The Court will not simply apply an entire constitutional amendment to the territory, but will dissect each provision to determine whether it is applicable to the territory. For example, the Fifth Amendment's general right of Due Process is fundamental;[323] but, the Fifth Amendment's right to a grand jury indictment is not.[324] While the Sixth Amendment right to a jury trial has been repeatedly denied,[325] there have been no serious challenges to the Sixth Amendment right to confront witnesses or the right to an attorney.[326]

Fourth, a nonfundamental right is generally a procedural right rather than a substantive right. Procedural rights are a means to obtain a substantive right,[327] but are particular to our Anglo-Saxon system of government.[328] Fundamental rights, on the other hand, are typically personal rights and liberties.[329]

Many rights have been held to be fundamental, including free speech,[330] the protection from *ex post facto* laws and bills of attainder,[331] the protection from unreasonable searches and seizures,[332]

322. *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984).

323. Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

324. Ocampo v. United States, 234 U.S. 91, 98 (1914).

325. *See, e.g.*, *Atalig*, 723 F.2d at 682; *Balzac*, 258 U.S. at 298; Dorr v. United States, 195 U.S. at 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

326. *See* U.S. CONST. amend. VI.

327. Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990).

328. *Balzac*, 258 U.S. at 310. *See also* Soto v. United States, 273 F. 628 (3d Cir. 1921).

329. Dorr v. United States, 195 U.S. 138, 146 (1904).

330. El Vocero de P.R. v. P.R., 508 U.S. 147, 148 n.1 (1993) (noting that the First Amendment's Free Speech Clause "fully applies to Puerto Rico"); Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 331 n.1 (1986) (same). In 1922, the Court in *Balzac* had already assumed that First Amendment free speech protections applied to Puerto Rico. *Balzac*, 258 U.S. at 314.

331. *Dorr*, 195 U.S. at 142.

the right to privacy (in the context of abortions),[333] the right to travel,[334] the protections of the takings clause,[335] Due Process,[336] and Equal Protection.[337]

Justice Black in *Downes* listed non-fundamental "remedial" rights to include citizenship, suffrage, and those procedural methods detailed in the Constitution "which are peculiar to Anglo-Saxon jurisprudence."[338] Other courts have included the right to trial by jury[339] and the right to an indictment by Grand Jury[340] as nonfundamental rights.

The question is whether the constitutional provision relates to substantive personal liberties, or whether it is a procedural safeguard meant to enforce a separate right. If the Court determines that the right is fundamental, then it applies to the territory. Since fundamental rights are by their very nature the "basis of all free government,"[341] the conclusion is the same regardless of the territory, so fundamental rights apply to all territories of the United States. No independent analysis is required for each territory. If the right applies, then the law in question is subject to normal constitutional review. If the right is not fundamental, then the right does not necessarily apply. However, now the Court must ask whether it *should* apply, considering the presumption that the Constitution applies to the territories unless it would be impractical or anomalous.

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332. Torres v. P.R., 442 U.S. 465, 470 (1979).

333. Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366, 1370 (9th Cir. 1992); Montalvo v. Colon, 377 F. Supp. 1332, 1341–42 (D.P.R. 1974). It should be noted that despite these decisions, American Samoa still completely prohibits abortions, making it a felony to conduct one unless the health or life of the mother is at stake. *See generally* AM. SAMOA CODE ANN. tit. 46, ch. 39. It simply has not been challenged in American Samoa.

334. Califano v. Torres, 435 U.S. 1, 4 n.6 (1978).

335. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

336. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976).

337. *See id.*

338. Downes v. Bidwell, 182 U.S. 244, 282–83 (1901). It is important to remember that Justice Black's list does not necessarily state the law. After all, no other justices joined his opinion.

339. *See, e.g.*, Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984); Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903).

340. Ocampo v. United States, 234 U.S. 91, 98 (1914).

341. *Dorr*, 195 U.S. at 147.

3. Would it be Impractical to Apply to the Territory?

When the analysis has reached the "impractical and anomalous" test, the burden shifts. While the burden in the "fundamental rights" test was on the party seeking the constitutional right, the party seeking to keep the provision out of the territory carries the burden for the "impractical and anomalous" test. This is in keeping with the presumption that the Constitution does apply, unless it would be impractical or anomalous. For example, the D.C. Circuit in *King* required the American Samoa Government, who was trying to avoid jury trials, to show that "circumstances are such that trial by jury would be impractical and anomalous."[342] The court failed to find sufficient evidence from the government that offering a jury trial would be impractical or anomalous.[343]

Like most of the terms, "impractical" in the sense of the territories has never been clearly defined. The *Insular Cases* referenced the impossibility of bringing a right to practice where the right would ignore the "established customs" and be "unsuited to their needs."[344] The actual use of the phrase "impractical and anomalous" arose from Justice Harlan's concurring opinion in *Reid*. He used it as a test to balance the right at issue with the "particular local setting, the practical necessities, and the possible alternatives."[345]

The impractical prong of the test primarily relies on the logistics of implementing the right. While a constitutional right cannot be withheld by mere inconvenience or expediency,[346] if the local conditions and/or culture are such that it cannot be effectively implemented, then it is sufficiently impractical. The U.S. Government Accountability Office has described the analysis not as focusing on cost effectiveness, but on policy considerations such as "equity, justice, and cultural preservation."[347]

Such impracticality must be unique to the particular circumstances of the territory in question.[348] The territory cannot argue that a right would be impractical if it would be equally

342. King v. Morton, 520 F.2d 1140, 1147 (D.C. Circ. 1975).

343. King v. Andrus, 452 F. Supp. 11, 16–17 (D.C. Circ. 1977), *remanded from* King v. Morton, 520 F.2d 1140 (D.C. Circ. 1975).

344. *Dorr*, 195 U.S. at 148.

345. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

346. *Id.* at 110.

347. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1124T, AMERICAN SAMOA: ISSUES ASSOCIATED WITH SOME FEDERAL COURT OPTIONS 34 (2008).

348. *See King*, 452 F. Supp. 11; Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990).

impractical to a state.[349] The territory must have special circumstances that would make it uniquely impractical. One commentator provided the example of the Fourth Amendment: The protections it provides may let guilty men go free, but that would not be uniquely impractical to the territory (or the states).[350]

The D.C. Circuit in *King* relied heavily on whether the cultural setting would prevent the right to a jury trial from being implemented. Ultimately, it found that the culture had evolved to such an extent that it would no longer be impractical to implement jury trials.[351] The Ninth Circuit in *Wabol* focused on the political and diplomatic concerns of overriding the Covenant between the territory and the United States, which formed the political union. The court believed it would be extremely impractical to force a right in direct contrast to a condition of the agreement between the United States and the CNMI people.[352]

It is important to remember that in determining practicality one must consider the changing circumstances over time. It is not enough to simply cite an older case. Instead, an analysis of the present situation is required. As the Supreme Court has stated: "It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[353] It was this recognition of a changing relationship that led the D.C. Circuit in *King* to conduct a full evidentiary hearing to review American Samoa's ability to implement jury trials.[354]

In short, impracticality in the modern sense refers to whether the local culture and conditions today are such that it would be impractical to implement the right. In other words, do the circumstances hurt implementation of the constitutional provision? If so, then the provision will not be implemented in the territory.

4. Would it be Anomalous to Apply to the Territory?

Justice Harlan sought to evaluate whether a right was "impractical and anomalous."[355] His analysis weighed the practical

349. *See* Laughlin, *Cultural Preservation*, *supra* note 185, at 353.

350. *Id.*

351. *See King*, 452 F. Supp. 11.

352. *Wabol*, 958 F.2d at 1461.

353. Boumediene v. Bush, 555 U.S. 723, 758 (2008).

354. *King*, 452 F. Supp. at 17.

355. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

difficulties of implementation against the seriousness of the right in question.[356] The D.C. Circuit in *King* reviewed the case similarly, attempting to determine whether the culture of American Samoa would prevent the practical implementation of jury trials, and ultimately determined that it would not.[357] *King* used the terms "impractical and anomalous" as if they were synonymous, and then tested for impracticality.[358] The Ninth Circuit in *Wabol* used a different approach. While concluding that a right to CNMI property would be impractical, it also asked a separate question of whether it would be anomalous.[359]

"Anomalous" is defined as incongruous, contradictory, or inconsistent with the circumstances.[360] Whereas the "impractical test" asks whether the culture would inhibit implementation of the right, the "anomalous test" asks whether the right would threaten the culture. Such an interpretation of anomalous has been generally accepted in the scholarship.[361] Thus, the Ninth Circuit determined that implementing the right to equal access to land would threaten the CNMI culture, which the Covenant was meant to protect:

> It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.[362]

In its evaluation, *Wabol* asked whether the right would be "impractical *or* anomalous" and found it to be both.[363] This "and/or" distinction is very important.[364] One commentator suggested using the

356. *Id.* at 77–78.

357. King v. Morton, 520 F.2d 1140, 1147 (D.C. Circ. 1975.

358. *King*, 452 F. Supp. at 17.

359. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

360. *Anomalous*, MERRIAM-WEBSTER, http://www.merriam-webster.com./dictionary/anomalous (last visited Sept. 23, 2013).

361. *See, e.g.*, Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U. L. REV. 429, 439–40 (2011).

362. *Wabol*, 958 F.2d at 1462.

363. *Id.* at 1461 (emphasis added).

364. *See* Katz, *supra* note 224, at 789; Hall, *supra* note 290, at 94.

Ninth Circuit test when the right at issue is addressed by the territory's organic documents, and using the D.C. test when it is not addressed.[365] This may be a useful distinction at times, and is helpful especially when considering the organic documents' promises, but a right that is not prohibited in a founding document could still be dangerous to a local culture. Questioning whether a provision is impractical *or* anomalous makes more sense. It is easy to imagine a right that is impractical but not anomalous, or anomalous but not impractical. Either one should be sufficient. It would be absurd to conclude that a right must apply because it is not anomalous, but still completely impractical to actually implement. Either impracticality or anomaly would be enough to prevent the provision's application to the territory.

VI. The Citizenship Clause in American Samoa

Since its annexation in 1900, U.S. citizenship has not been conferred to the people of American Samoa. The United States took it for granted that the people of American Samoa were not citizens even before the term "national" was ever defined. While citizenship has long been denied to the territory, the government's interest in maintaining Samoans' status as nationals is not clear. In *Tuaua*, the court held that birthright citizenship is absolutely barred in unincorporated territories absent congressional action, so presumably the government's intent was irrelevant.[366]

The general presumption that citizenship does not apply has never been seriously considered. In the past, the courts looked to the annexing documents to find Congress' intent with regard to citizenship. In *Rassmussen v. United States*, the Court reviewed the treaty with Russia ceding Alaska to the United States, stating that all inhabitants (except the native tribes) would be granted the "enjoyment of all the rights, advantages and immunities of citizens of the United States."[367] The Court read this to mean that the people of Alaska became U.S. citizens once the treaty was signed.

365. Katz, *supra* note 224, at 804 ("[E]very personal right guaranteed by the Constitution must be extended to such territories, unless a right's application proves to be both impractical and anomalous.").

366. Defendants' Motion to Dismiss, *supra* note 4, at 14.

367. Rassmussen v. United States, 197 U.S. 516, 522 (1905) (quoting Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America (Alaska Purchase), U.S.-Russ., art. 3, Mar. 30, 1876, 15 Stat. 539).

The Alaska Treaty can be compared with the Instrument of Cession of Manu'a, which stated, "[T]here shall be no discrimination in the suffrages and political privileges between the present residents of [Manu'a] and citizens of the United States."[368] Like the Alaska Treaty, this language suggested that there was no difference in the rights of American Samoans and the rights of U.S. citizens.[369] This may help explain why the people of American Samoa believed they were, in fact, U.S. citizens when they signed the Instruments of Cession, and were utterly surprised twenty years later to learn that the United States never granted them citizenship status.[370]

Even so, the Incorporation Doctrine provides significant room for changing circumstances. In the same way that modern American Samoa was prepared for jury trials, it may also be prepared for citizenship. Analyzing the citizenship clause of the Fourteenth Amendment through the Incorporation Doctrine framework developed above will help determine whether it applies to American Samoa. The first line of section one of the Fourteenth Amendment reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[371]

In the *Tuaua* case, the defendants' argument hinged on the phrase "in the United States," arguing that American Samoa is not part of the United States for purposes of the Constitution.[372] Judge Leon agreed.[373] However, the definition of "United States" is not as clear as the opinion made it. Congress has defined "United States" to include the "continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."[374] The latter three are unincorporated territories that are not included in Judge Leon's definition of United States. While they have statutory citizenship, they do not enjoy Fourteenth Amendment constitutional citizenship. Prior to the *Insular Cases*, it was well settled that the "United States" included all possessions, including districts and

368. Manua Cession, *supra* note 32.

369. At least was true for the people of Manua. The Cession of Tutuila and Aunuu does not contain such language.

370. *See* Statement of Chief Liu, *1930 Hearings*, *supra* note 97, at 229.

371. U.S. CONST. amend. XIV, § 1.

372. Defendants' Motion to Dismiss, *supra* note 4, at 13–15.

373. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *9 (D.D.C. June 26, 2013).

374. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(38) (2006).

territories.[375] The *Insular Cases* identified a new category of unincorporated territories that Justice White described as "foreign to the United States in a domestic sense."[376]

Citing Justice Brown's opinion in *Downes* and a series of cases concerning the Philippines, the *Tuaua* defendants claimed that the language differences between the Thirteenth and Fourteenth Amendments stand for the proposition that the citizenship clause was never meant to apply to the territories.[377] In *Rabang v. Immigration and Naturalization Service*, the Ninth Circuit determined that the citizenship clause of the Fourteenth Amendment only applied to the *states* of the Union, not territories like the Philippines.[378] To come to this conclusion, *Rabang* relied entirely on Justice Brown's analysis in *Downes*, in which the Fourteenth Amendment's failure to add the phrase "or any place subject to their jurisdiction" suggested a territorial limitation on the citizenship clause.[379]

The *Tuaua* defendants and Judge Leon heavily emphasized that *Rabang*'s conclusion had been repeated in many other circuits. While it had been repeated, it had not been thoroughly vetted. The Second and Fifth Circuits cited *Rabang* and Justice Brown's analysis in *Downes* to come to the same conclusion that the Philippines were not part of the United States.[380] The Third Circuit did not bother to do any analysis at all, and simply cited *Rabang* to issue its opinion.[381] The D.C. Circuit cited these prior cases to reach the same conclusion.[382] And *Tuaua* cited them all to bolster its argument.[383] Judge Leon also made much of the Ninth Circuit's recent holding in *Eche v. Holder*, which concluded that the Naturalization Clause of the Constitution did not apply to the CNMI.[384] However, *Eche* relied entirely on *Rabang* and Justice Brown's arguments.[385]

375. Loughborough v. Blake, 18 U.S. 317, 319 (1820).

376. Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

377. Defendants' Motion to Dismiss, *supra* note 4, at 13–15.

378. Rabang v. Immigration & Naturalization Serv., 35 F.3d 1449, 1452–53 (9th Cir. 1994), *cert. denied*, 515 U.S. 130 (1995).

379. *Id.*

380. Nolos v. Holder, 611 F.3d 279, 282–84 (5th Cir. 2010); Valmonte v. Immigration & Naturalization Serv., 136 F.3d 914, 918–19 (2d Cir. 1998).

381. Lacap v. Immigration & Naturalization Serv., 138 F.3d 518, 519 (3d Cir. 1998).

382. Licudine v. Winter, 603 F. Supp. 2d 129, 134–35 (D.D.C. 2009).

383. Defendants' Motion to Dismiss, *supra* note 4, at 13–15.

384. Eche v. Holder, 694 F.3d 1026, 1031 (9th Cir. 2012).

385. *Id.* at 1031.

The problem, of course, is that all of these cases rested on the premise that Justice Brown's opinion in *Downes* was good law. While Justice Brown did indeed discuss the territorial limits of the United States for purposes of the Fourteenth Amendment, *no other justice joined in his opinion*. Justice White's plurality Incorporation Doctrine, which did not discuss the Fourteenth Amendment, became the law of the land—not Justice Brown's. This has been discussed earlier in this article, but it bears repetition and emphasis since his opinion is repeatedly cited as the law of *Downes*.[386] Even Judge Leon, who recognized that Justice Brown's opinion was not controlling, still believed that the Philippines cases arose from the proper decision from *Downes* and based his decision on theirs.[387]

Outside of Justice Brown's opinion, the *Insular Cases* do not provide much guidance as to a definition of "United States" for purposes of the citizenship clause. While the territories were within the United States for the Uniformity Clause,[388] they were not for the Revenue Clause.[389] The one thing that is clear from the *Insular Cases* is that they tended to work on an issue-by-issue basis and did not rely on a definition of "United States." Even the court in *Rabang* admitted that no other court had addressed the meaning of "United States" within the Fourteenth Amendment.[390]

The text of the Fourteenth Amendment does not provide many answers either. The citizenship clause distinguishes between the "United States" and individual "States."[391] Most of the prohibitions found in the Amendment relate specifically to the States, so that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."[392]

386. Justice White's opinion in *Downes* begins on page 287, which is useful to keep in mind when reading claims about the "holding" of the case. Downes v. Bidwell, 182 U.S. 244, 287 (1901) (White, J., concurring). Many citations, in the case law and the scholarship, attributed to Justice White are actually from Justice Brown's opinion.

387. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *13 (D.D.C. June 26, 2013) ("These courts relied extensively upon *Downes* to assist with their interpretation of the Citizenship Clause.").

388. *See* De Lima v. Bidwell, 182 U.S. 1 (1901).

389. *See Downes*, 182 U.S. 244.

390. Rabang v. Immigration & Naturalization Serv., 35 F.3d 1449, 1452 (9th Cir. 1994), *cert. denied*, 515 U.S. 130 (1995).

391. U.S. CONST. amend. XIV, § 1.

392. *Id.*

Similarly, Due Process and Equal Protection are not to be infringed by "any State."[393]

It is clear that the term "State" only refers to states, not other entities under U.S. sovereignty like territories.[394] That there is a difference between the Constitution's references to "States" versus "United States" has long been recognized.[395] Yet the courts have also held that Due Process and Equal Protection do apply to the territories, even though they are not states.[396] In so doing, the courts placed these fundamental rights above any supposed territorial limitation implied by a reading of "United States" as only comprising states. Would any court deny a U.S. jurisdiction the protection of a fundamental right, one that is the basis of all free government, on the belief that the Constitution was somehow limited to the states of the union? Such a conclusion is doubtful when the courts have applied even the procedural right to jury trial all the way to England,[397] and the right to *habeas corpus* to a military base in Cuba.[398]

Therefore, a determination of whether "United States," for the purposes of the Fourteenth Amendment, means just the states of the union or includes all U.S. jurisdictions is not dispositive, and may not even be relevant to whether the citizenship clause applies to the territories. The boundaries of the United States for purposes of citizenship should depend more upon jurisdiction and allegiance than on textual differences between various amendments. If the right is fundamental, then it must apply, even if the area is just an unorganized, unincorporated territorial possession of the United States. Further, if a non-fundamental right is not too impractical or anomalous to apply, then it must be carried to the territory. The Incorporation Doctrine holds that Congress must comply regardless of how "United States" is defined.

393. *Id.*

394. Ferstle v. Am. Sam. Gov't, 4 Am. Samoa 2d 160, 162 (1987) (citing District of Columbia v. Carter, 409 U.S. 418, 424 (1973) ("[T]he District of Columbia is not a "State" within the meaning of the Fourteenth Amendment.")).

395. *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898); Slaughter-House Cases, 83 U.S. 36, 73 (1872).

396. *See, e.g.*, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976); Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (App. Div. 1980).

397. *See* Reid v. Covert, 354 U.S. 1 (1957).

398. *See* Boumediene v. Bush, 553 U.S. 723 (2008).

VII. Applying the Framework to Citizenship in American Samoa

The framework developed in Part V can help determine whether a right, such as constitutional citizenship, applies to a territory. This Part will analyze the application of the citizenship clause of the Fourteenth Amendment to the territory of American Samoa using the framework outlined above.

A. Is American Samoa Incorporated?

American Samoa is generally recognized as unincorporated. None of the parties in the *Tuaua* case argued that American Samoa had become incorporated, or that any change in the political status had occurred, or was desired. The United States government recognized the unincorporated status of the territory,[399] and American Samoa has not made any significant efforts to change that status. Incorporation requires a clear congressional intent to make a territory a state—not even an organic act coupled with citizenship will suffice for incorporation.[400] None of the federal laws concerning American Samoa even hint at an intent to incorporate.[401] What is less clear is the time when American Samoa became an unincorporated territory. This question may be important if birthright citizenship is granted retroactively.

The United States first exercised sovereignty over American Samoa (then known as "Eastern Samoa") in 1899 with the closing of the Spanish-American War. At the time, President McKinley announced that Samoa would be placed under a military government controlled by the Navy.[402] The chiefs of Tutuila and Aunu'u signed the Instrument of Cession in April 1900,[403] and the chiefs of Manu'a signed their Instrument in 1904.[404] Congress ratified the Instruments of Cession in 1929.[405] The Navy retained absolute control over the

399. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-655, ISSUES ASSOCIATED WITH POTENTIAL CHANGES TO THE CURRENT SYSTEM FOR ADJUDICATING MATTERS OF FEDERAL LAW 11–12 (2008).

400. Balzac v. Porto Rico, 258 U.S. 298 (1922).

401. *See generally* 48 U.S.C. ch. 13 ("Eastern Samoa").

402. Kent, *supra* note 38, at 169.

403. Tutuila Cession, *supra* note 31.

404. Manua Cession, *supra* note 32.

405. Ratification Act, *supra* note 39.

territory until it was transferred to the administration of the Department of Interior in 1951.[406]

American Samoa was under military government, unsupervised by Congress, until 1929, and a congressionally sanctioned military government until 1951. This was not a unique situation. Guam was also under a military government run by the Navy from its annexation in 1898 until its organic act in 1950.[407] Cuba was under a U.S. military government from 1898 until its independence in 1902.[408] These areas controlled solely by the military were not even considered unincorporated territories, and it was generally assumed that none of the Constitution applied. In one of the lesser known *Insular Cases* concerning Cuba—*Neely v. Henkel*—the Supreme Court recognized that, in an international sense, Cuba was conquered territory and thus domestic; but, since it was on the path to independence, it remained a foreign nation for purposes of its relationship with the United States.[409] This type of distinction sounded very similar to Justice White's opinion in *Downes*, but with a very important exception. Because a military government ran Cuba, it remained a foreign country. As such, even though it was completely under the sovereignty of the United States, none of the constitutional rights applied. The rights denied included the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury, and the fundamental guarantees of life, liberty, and property.[410]

Similar discussions took place concerning the military government of Guam, though the courts did not weigh in. In 1903, the U.S. Attorney General wrote that the Constitution did not extend to Guam or Samoa because their governments were under the complete authority of the Executive as Commander in Chief.[411] In 1946, the Navy insisted that the Constitution did not apply to American Samoa, and as late as 1949, a congressional committee reported that it did not apply to Guam.[412]

406. Exec. Order No. 10264, *supra* note 40.

407. Kent, *supra* note 38, at 167–68.

408. *Id.* at 121.

409. Neely v. Henkel, 180 U.S. 109, 120 (1901).

410. *Id.* at 122. The Supreme Court took a very different view in its recent decision that the right of *habeas corpus* applied to prisoners in Guantanamo Bay, Cuba. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

411. Kent, *supra* note 38, at 170 (citing Guam–Spanish Law–Condemnation of Property, 25 Op. Att'y Gen. 59, 61 (1903)).

412. *Id.* at 172.

The U.S. Government did not recognize Guam as an unincorporated territory until 1950, when it was declared as such in the Guam Organic Act.[413] American Samoa's federal laws do not mention incorporation at all.[414] However, as early as 1975, it was described as unincorporated by the courts.[415] With the transfer of authority from the Navy to the Secretary of Interior, the territory ceased to be under a military government, and became more akin to Puerto Rico or the Philippines during the era of the *Insular Cases*. Therefore, American Samoa most likely became an unincorporated territory in 1951, and any retroactive application of a right like citizenship would begin at that date.

B. Is Birthright Citizenship a Fundamental Right?

When applying the Constitution to unincorporated territories, the first question is whether the provision represents a fundamental right. A fundamental right is a personal right that is considered the basis of all free government, and is shared across cultures in the international sense. It should be substantive rather than procedural, and the burden rests with the party seeking to implement the right in the territory. Justice Brown's opinion in *Downes* specifically listed citizenship as a nonfundamental, remedial right.[416] However, since his opinion was not controlling, the question may still be reviewed.

Before the *Insular Cases*, the Supreme Court in *Wong Kim Ark* held that the "Fourteenth Amendment affirms the *ancient and fundamental rule* of citizenship by birth within the territory."[417] More recently, the Supreme Court has taken a stronger position that citizenship is a right, rather than just a procedural privilege. In *Trop v. Dulles*, Chief Justice Warren's plurality opinion described citizenship as a "fundamental right" that is not subject to control by the general powers of the U.S. Government.[418] In *Afroyim v. Rusk*, the Supreme Court used stronger language: "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive

413. Guam Organic Act of 1950, 48 U.S.C. § 1421a (1950) ("Guam is declared to be an unincorporated territory of the United States.").

414. *See generally* 48 U.S.C. ch. 13 ("Eastern Samoa").

415. King v. Morton, 520 F.2d 1140, 1142 (D.C. Circ. 1975) (stating that "American Samoa is an unincorporated territory of the United States").

416. Downes v. Bidwell, 182 U.S. 244, 283 (1901).

417. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) (emphasis added).

418. Trop v. Dulles, 356 U.S. 86, 91–92 (1958).

another group of citizens their citizenship."[419] The Court explained that the Fourteenth Amendment was specifically designed to take that power from Congress.[420] While these cases dealt with the revocation of citizenship to one who already obtained it—whether by birth or naturalization (the Court did not believe that it mattered)—the arguments were strongly in favor of protecting citizenship as a right.

However, when considering whether a right is fundamental for the territories, one must consider the international understanding of the right, and consider how the right applies across all free governments. A review of the history of citizenship presents a much broader picture of the doctrine.

The concept of citizenship goes back to the ancient Greeks, who understood it as an outline of the political body, and a way to define the relationship between the people and the state.[421] Importantly, citizenship for the Greeks contained not only membership in the polity, but also the possibility of some public action, such as voting or holding office.[422] The Romans relied heavily on the concept of citizenship and used it as a tool. Within Roman citizenship, the law recognized different classes, each with its own rights and privileges.[423] Occasionally, Rome would even grant foreigners Roman citizenship or confer it upon conquered territory, but Rome created a series of lower-class citizenship classifications for these groups.[424] Medieval Europe's citizenship was broken down according to the kings, lords, parishes, and even guilds to which an individual was subject.[425]

Citizenship is often defined by nationality or ethnicity, rather than just location. Israel gives priority to Jews and France retains its unique "Frenchness" even as it grants citizenship to others.[426] A person born in France to non-French parents may only be a citizen when he reaches the age of eighteen, has lived in France for five

419. Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

420. *Id.*

421. PAUL MAGNETTE, CITIZENSHIP: THE HISTORY OF AN IDEA 7 (ECPR Press, 2005) (2001).

422. *Id.* at 9–10.

423. *Id.* at 8 (The classes were the *potestas* (the people), the *imperium* (magistrates) and the *auctoritas* (the Senators)).

424. *Id.* at 21 (statuses included *civis*, *Latinus*, *civis sine suffragio*, and *socius iniquo foedu*).

425. *Id.* at 36–37.

426. CITIZENSHIP, IDENTITY, AND SOCIAL HISTORY 10 (Charles Tilly ed., Cambridge Univ. Press 1996).

years, and has committed no crimes.[427] Until recently, Germany functioned on the doctrine of *jus sanguinis*, or citizenship by blood. Citizenship was based on the parents' status, not place of birth. The law was changed in 1999 to permit birthright citizenship if at least one parent was a legal resident of Germany and living in the country for at least eight years.[428]

The English common law did not distinguish by race, but only considered whether the individual was born within the sovereignty and owed allegiance to the British crown.[429] The United States, after independence, adopted the English common law concepts, but changed the word from "subject" to "citizen."[430] Until the twentieth century, there was only one type of citizen in the U.S. The term "national" was not used by Congress until 1940.[431]

Today, all free governments understand civil rights within the framework of citizenship. As one commentator put it, "citizenship is the right to have rights."[432] The converse helps underscore the rule. Statelessness—in which a person is not a citizen or national of any state—is a cause of international concern.[433] The 1948 Universal Declaration of Human Rights declared that "everyone has the right to a nationality."[434] The U.N. Convention Relating to the Status of Stateless Persons provided a framework of protection for those without a nationality.[435] The international community widely

427. Kerber, *supra* note 129, at 834.

428. Staatsangehörigkeitsgesetz [StAG] [Nationality Act] Jan. 1, 2000, § 4 (Ger.). The Nazi Reich revoked German citizenship from Jews and created a second-class status for them called Staatsangehörige (state affiliates). *See* Reich Citizenship Law, English translation at the University of the West of England, *available at* ess.uwe.ac.uk/documents/citizen.htm.

429. 1 WILLIAM BLACKSTONE, COMMENTARIES *366.

430. Inglis v. Sailor's Snug Harbor, 28 U.S. 99, 136 (1830).

431. Nationality Act of 1940, 8 U.S.C. § 1101(22) (1940).

432. Pujol, *supra* note 162, at 230.

433. *See, e.g.*, Hugh Massey, *Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) (Apr. 2010), http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4bc2ddeb9&query=statelessness.

434. Universal Declaration of Human Rights, GAOR Res. 217(III), U.N. Doc. A/810 at 71 (1948), *available at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement.

435. Convention Relating to the Status of Stateless Persons, June 6, 1960, 360 U.N.T.S. 117, *available at http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en*. The United States is not a signatory to the Convention, as Mikhail Sebastian learned when he was stranded in American Samoa. Sebastian had lived in the U.S. as a stateless refugee. When touring

considers membership of a nation to be a fundamental right, enshrined in the Universal Declaration of Human Rights. However, there is no such consensus that a single type of citizenship is required. Many countries retain varying tiers of citizenship and the methods for determining these classes are largely procedural.

U.S. nationals are afforded most of the protections of the United States and are certainly not stateless. At its core, citizenship is a legal status.[436] The distinction between a citizen and a national is procedural, not substantive. Unfortunately, the *Tuaua* opinion did not address these questions, instead relying on Justice Brown's interpretation via the Philippines cases. But, the question still remains as to whether citizenship is truly fundamental.

Those against granting citizenship could persuasively argue that the national status does satisfy the international, fundamental right to membership of a nation, so denying birthright citizenship would not be a violation of a fundamental right. Of course, those in favor could counter that a multi-tiered system of citizenship is anathema to the American concept that "all men are created equal."[437] The doctrine of equal citizenship would prohibit the government from treating members of the polity as a lower class due to the stigmas a caste-system creates.[438] While a U.S. national status may technically qualify as fulfilling the "fundamental rights" test in an international sense, it may be just too contrary to the values of this country to continue.

C. Would the Provision be Impractical to Apply to American Samoa?

Even if a court determined that the citizen status is not a fundamental right that must be granted to the territories, it must still inquire whether it *should* apply to American Samoa. This change in tests shifts the burden to the party arguing against the right's application to the territory. The presumption is that the Constitution

American Samoa, he took a brief trip to independent Samoa, thus violating the conditions of U.S. residency. He was denied reentry to Hawaii until the U.S. Citizenship Immigration Service relented to public pressure and granted him "humanitarian parole" and let him return to the mainland. Audio: *Stateless and Stranded on American Samoa*, NPR (Oct. 7, 2012), *available at* www.npr.org/2012/10/07/162445840/stateless-and-stranded-on-american-samoa. Moises Mendoza, *Back From Samoa: Stateless man allowed entry into U.S.*, GLOBALPOST (Feb. 16, 2013), *available at* http://www.globalpost.com/dispatch/news/regions/ americas/united-states/130215/samoa-stateless-us.

436. Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977).

437. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

438. Karst, *supra* note 436, at 6–7.

does apply to territories, unless it would be impractical or anomalous to do so.

Impracticality must be more than simple inconvenience or expediency, and must be unique to the cultural and social situation in American Samoa. It would need to be argued that Samoan culture would somehow hinder the ability of the United States to offer birthright citizens to the inhabitants of American Samoa.

For example, the United States would need evidence that American Samoa culture would make it impractical to allow citizenship absent an English and civics test, or a moral character review, which are currently required for naturalization. They may even have to show that it would be impractical to allow those born in American Samoa the right to vote when located in a state, or hold public office, or serve on a jury. The latter being particularly difficult as the D.C. Circuit has already determined that American Samoa itself can sustain jury trials.[439] Instead, a court could decide that it is more impractical to keep the plaintiffs as nationals and continue to deny those rights than it would be to simply grant citizenship.

Impracticality is a politically dangerous argument to make, which may explain why the defendants and the court declined to make arguments regarding the "impractical and anomalous" test. Similarly, Representative Faleomavaega did not make any impracticality claims. His arguments rested almost entirely on the fear of anomalous effects to the culture.

It is unlikely that anyone would find it impractical to grant citizenship to American Samoans. Quite the contrary, American Samoans would be welcomed members of this nation's citizenry. Most American Samoans have strong allegiances to the United States, and have family and friends throughout the country. They have a proud tradition of serving in the American military. During the second Iraq War, more American Samoans died per capita than from any other U.S. jurisdiction.[440] Samoa's culture has not prevented an American education system, a republican system of government modeled on the United States, or a judiciary completely controlled by the U.S. Department of Interior. Indeed, the culture has embraced many aspects of America and would not hinder citizenship. While the *fa'asamoa* may leave some constitutional provisions impractical to apply to American Samoa, there is no evidence that birthright

439. King v. Andrus, 452 F. Supp. 11, 17 (D.C. Circ. 1977).

440. Mark Potter, *Eager to Serve in American Samoa*, NBCNEWS.COM (Mar. 5, 2006), www.nbcnews.com/id/11537737.

citizenship is one of them. The key aspects of the *fa'asamoa* include the *aiga*, the *matai* system, and the communal land tenure. None of these would have any foreseeable effects on birthright citizenship in the United States. There being no evidence that American Samoa's culture would make birthright citizenship impractical, the court must then ask whether it would somehow be anomalous to American Samoa.

D. Would the Provision be Anomalous to Samoan Culture?

An anomalous effect would be one that forced the United States to break its pledge to preserve the Samoan culture.[441] This pledge was codified in the Instruments of Cession, in which the United States agreed to allow the local *matai* to retain power over the villages,[442] and the right to keep their property according to Samoan custom.[443] To be anomalous, citizenship would need to threaten the foundations of the *fa'asamoa*.

Of course, no analysis can foresee the potential consequences to a culture. Ultimately, such foresight is impossible. There is a Samoan saying, "'*aua le gagaua le laau a o mata*," loosely translated to "don't break the tree branch while it is still green."[444] Change always brings uncertainty, and so long as Samoans feel their culture could even theoretically be threatened, they will fight against any change. However, it is possible to analyze the arguments of those who claim anomalous results to determine whether such fears are justified.

The *Tuaua* case did not make much of an anomalous argument, but Representative Faleomavaega's amicus briefs very strongly warned that citizenship could act as the first domino, leading to application of the entire Fourteenth Amendment including Equal Protection, and through the Due Process Clause incorporate the entire Bill of Rights, which would wipe away Samoa's unique culture.[445]

First, it is important to note that this argument is not that citizenship is somehow anomalous to Samoan culture, but rather that citizenship will lead to the application of other constitutional

441. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

442. Tutuila Cession, *supra* note 31, § 3.

443. Manua Cession, *supra* note 32.

444. Eni F.H. Faleomavaega, *An Unincorporated and Unorganized U.S. Territory: Is This What American Samoa Wants?*, SAMOA NEWS (May 25, 2012), http://www.samoanews.com/?q=node/5511.

445. Faleomavaega Amicus, *supra* note 8, at 13.

provisions, which may be anomalous. While a constitutional provision may contain many rights, each one must be evaluated independently. The Fifth Amendment's fundamental right of Due Process applies to the territories,[446] as do the *Miranda* rules,[447] even if the Fifth Amendment's nonfundamental right to a grand jury indictment does not.[448] Therefore, application of the citizenship clause of the Fourteenth Amendment will not automatically apply the other provisions of the Amendment.

Second, Due Process does not apply constitutional provisions to the territories, only to the states. In *Duncan v. Louisiana* the Supreme Court changed the meaning of "fundamental rights" as they applied to the states through the Due Process Clause of the Fourteenth Amendment to include provisions like jury trials.[449] While *Duncan* and the *Insular Cases* both refer to "fundamental rights," both the Ninth Circuit in *Atalig* and the D.C. Circuit in *King* have stated firmly that *Duncan* does not apply to the territories, and that the incorporation doctrine remains the law.[450]

Citizenship would not cause the domino effect of constitutional application that Representative Faleomavaega fears. However, these arguments have been so pervasive that some of the concerns should be analyzed further. Especially since the stakes—the survival of an entire cultural system—are so high. This article will consider two of the main arguments made by Representative Faleomavaega as to why citizenship would erode the *fa'asamoa*.

1. Granting Citizenship Would Change the Political Status of the Territory

Representative Faleomavaega argued that granting citizenship to the people of American Samoa would be equivalent to shifting the political status to an incorporated territory.[451] He fears that such a drastic change in the political status would cause the U.S. Constitution to take "full force and effect" and overwhelm the

446. Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

447. *See* Am. Sam. Gov't v. Pino, 1 Am. Samoa 3d 186 (1997).

448. Ocampo v. United States, 234 U.S. 91, 98 (1914).

449. Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

450. *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (Applying *Duncan* to the territories "would repudiate the *Insular Cases.* We are not prepared to do so nor do we think we are required to do so."); *see also* King v. Morton, 520 F.2d 1140, 1158 (D.C. Cir. 1975).

451. Faleomavaega Reply, *supra* note 66, at 5–6.

fa'asamoa.[452] Fundamentally, he posited that citizenship is akin to organization and incorporation.

It is important to note that citizenship has been granted to all of the other territories, albeit by organic act rather than the Constitution.[453] While the organic acts did change the political status, they were the cause of citizenship, not the result. Citizenship without an organic act would not suddenly organize the territory since organization by its very definition requires a statute enacted by Congress.

Neither would it cause incorporation. While all of the other territories have citizenship, none of them have become incorporated. The Supreme Court in *Balzac* clearly stated that citizenship, by itself, does not lead to incorporation of a territory; incorporation must be explicitly stated by Congress.[454] In *Tuaua*, Judge Leon specifically rejected the defendants' argument that citizenship was a way of forcing statehood.[455] The incorporation doctrine has continued to apply to the territories even as the inhabitants enjoyed birthright citizenship. Most importantly, vital cultural interests such as the preservation of native lands have been preserved even though the people were citizens, partially on the basis that it would be anomalous for the court to overturn the United States' promise of cultural protections.[456] Since organization and incorporation both require explicit congressional action, no court's application of a single constitutional provision, especially citizenship, could cause such a change in political status.

452. *Id.*

453. Puerto Rico was organized by the Organic Act of 1900 (Foraker Act), 48 U.S.C. §§ 733, 736, 738–40, 744 (1994) (original version at ch. 191, 31 Stat. 77 (1900). But citizenship was not granted until the amendments of the Jones-Shafroth Act (Jones Act), ch. 145, 39 Stat. 951 (1917)); Approval of Covenant to Establish a Commonwealth of the Northern Mariana Islands, 48 U.S.C. § 1801, art. III (1976); Revised Organic Act of the Virgin Islands, 48 U.S.C. § 1541 (1954); Guam Organic Act of 1950, 48 U.S.C. § 1421 (1950) (*repealed and re-enacted by* Immigration and Nationality Act of 1952, 8 U.S.C. § 1407 (1952)).

454. Balzac v. Porto Rico, 258 U.S. 298, 311–13 (1922) (Incorporation must be "taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.").

455. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *7–8 (D.D.C. June 26, 2013).

456. *See* Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1990).

2. *Citizenship Implies Equal Protection, Which the* Fa'asamoa *Cannot Survive*

Representative Faleomavaega also argued that equal protection is implicit in citizenship,[457] a belief he no doubt adopted from the conclusions of a 1961 Senate study mission.[458] The introduction of the Equal Protection clause of the Fourteenth Amendment is usually cited as the single largest constitutional threat to the *fa'asamoa*. Equal Protection, the argument goes, will automatically strip the territory of its cultural traditions, since many of them are couched in terms of race.[459] Racial restrictions on real property have been roundly rejected by the Supreme Court over the last century. *Buchanan v. Warley* prohibited states' racial restrictive zoning;[460] *Oyama v. California* prohibited ancestry-based property ownership rules;[461] and *Shelley v. Kraemer* prohibited racially restrictive covenants in private sales of property.[462]

More recently, and close to home for Samoans, was *Rice v. Cayetano*, in which the Supreme Court held that Hawaii's laws granting special voting rights in the Office of Hawaiian Affairs to native Hawaiians was unconstitutional.[463] The Court used the Fifteenth Amendment instead of the Fourteenth in its decision, but still subjected the law to a strict scrutiny analysis of the racial restriction. To American Samoans, this was yet another warning of the risks of federal judicial review.

The argument that Equal Protection is a threat to the culture rests on two assumptions: (1) that the Equal Protection clause does not already apply to American Samoa; and (2) that no cultural protections could survive Equal Protection analysis. If these assumptions were not sustained, then Equal Protection would not be anomalous to the territory.

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457. Faleomavaega Reply, *supra* note 66, at 4.

458. 1961 Study Mission, *supra* note 92, at 9 ("It is highly probable that a majority of the American Samoans desire citizenship, yet many are gravely troubled as to whether the 'equal protection of laws' doctrine implicit in citizenship would not conflict with the 'Samoan lands for Samoans' doctrine and the matai system.").

459. Faleomavaega Amicus, *supra* note 8; Faleomavaega Reply, *supra* note 66, at 4–8.

460. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

461. Oyama v. California, 332 U.S. 633, 646–47 (1948).

462. Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

463. Rice v. Cayetano, 528 U.S. 495, 524 (2000).

a. The Equal Protection Clause Already Applies to American Samoa

The first assumption, that Equal Protection does not already apply, is incorrect. In *Examining Board of Engineers v. Flores*, the Supreme Court held that Equal Protection is a fundamental right that does apply to the territories.[464] The Court recognized that the protections were derived either from the Fifth Amendment's Due Process Clause, or the Fourteenth Amendment's Due Process and Equal Protection clauses, but declined to make a determination about which was the source.[465] Instead, the Court held that it did not matter, since they could both be applied to the territories.[466]

American Samoa has already determined itself to be subject to Equal Protection. In *Craddick v. Territorial Registrar*, the Appellate Division of the High Court (the territory's highest court) determined the constitutionality of the territory's racial restrictions on land ownership.[467] Specifically, the court was reviewing the law prohibiting those who have less than one half Samoan blood from land ownership.[468] The racial restriction was clear to the court—especially as it had already been held that the statute referred to anyone with Samoan blood, not just American Samoans—so no political distinction could be made.[469]

The court began its discussion with the clear and unequivocal holding that "the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa."[470] The court discussed the Fifth Amendment's "explicit assurance of the equal protection of the laws" to hold that equal protection was "so basic to our system of law that it is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing the territories, whether 'organized,' 'incorporated,' or not."[471] While initially relying on the Fifth Amendment, the court also cited the Fourteenth Amendment, making no distinction between the two as far as equal protection was

464. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 600 (1976).

465. *Id.* at 601.

466. *Id.*

467. Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (App. Div. 1980). The Appellate Division of the High Court is the highest level of appeal for American Samoa.

468. *Id.* at 11 (citing 27 ASC 204(b), which was amended and moved to AM. SAM. CODE ANN. § 37.0204(b)).

469. Moon v. Falemalama, 4 Am. Samoa 836 (1975).

470. *Craddick*, 1 Am. Samoa 2d at 12.

471. *Id.* at 12.

concerned.[472] Though not citing it, the High Court mirrored the *Flores* decision in not recognizing a difference between Fifth Amendment and Fourteenth Amendment guarantees of equal protection beyond review standards.[473]

Since the High Court determined equal protection to be a fundamental right, it was unnecessary to do an "impractical and anomalous" analysis. Instead, the court conducted a strict scrutiny review of the racially restrictive statute.[474] Similar to *Wabol*, the High Court relied heavily on the organic documents and the cultural importance of land. Going back to the original raising of the American Flag, the court noted that it was always the policy of those governing American Samoa to protect the communal land for the benefit of Samoans.[475] Recognizing that the "whole fiber of the social, economic, traditional, and political patter in American Samoa is woven fully by the strong thread which American Samoans place in the ownership of land," the court found that the state's "compelling state need to preserve an entire culture and way of life" survived a strict scrutiny review.[476]

The D.C. Circuit seemed to agree that Equal Protection applied to the territories as well. In *Bishop v. Hodel*, the court reviewed a land dispute arising from American Samoa.[477] In the case, the appellants argued that they were denied equal protection because American Samoa did not have an Article III court.[478] The Court agreed that Equal Protection did apply to American Samoa, but held that Congress had a rational basis for treating American Samoa's judiciary differently.[479]

The fact that Equal Protection is a fundamental right that applies to the territories is not dispositive of how it will be reviewed. *Wabol* stood for the proposition that procedural rights cannot ride on the coattails of the substantive rights under which they fall.[480] So, the procedural right to a jury trial did not extend to the territories along

472. *Id.* at 13 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

473. *See* Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 601 (1976).

474. *Craddick*, 1 Am. Samoa 2d at 12.

475. *Id.* at 13.

476. *Id.* at 14.

477. Corp. of Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987).

478. *Id.* at 384–85.

479. *Id.* at 385–86.

480. Wabol v. Villacrusis, 958 F.2d 1450, 1460 n.19 (9th Cir. 1990).

with the fundamental right of Due Process.[481] And, the procedural right to purchasing land did not extend to the territories along with the fundamental right of Equal Protection.[482]

Thus, the assumption that Equal Protection does not already apply to the territories is incorrect. So is the second assumption that the *fa'asamoa* could not survive Equal Protection. Cases across the country, from American Samoa in *Craddick*, to the D.C. Circuit in *Bishop*, to the Ninth Circuit in *Wabol*, have consistently upheld the cultural systems from attacks based on Equal Protection.

b. Samoan Culture Would Survive Application of Equal Protection

While there have not been many cases challenging Samoan culture, most scholars agree that the culture would continue to survive. Many have agreed that a federal district court would not erode the *fa'asamoa*.[483] Professor Stanley Laughlin concluded that territorial cultures can sustain many constitutional challenges.[484] Daniel Hall comes to a similar conclusion, specifically determining that the Samoan curfew, or *sa*, would survive.[485] Jeffrey Teichert argued that the terms of the Instruments of Cession, which he believes is a treaty between sovereigns, controls the terms of the social contract between American Samoa and the United States.[486] Even Representative Faleomavaega agrees that the culture can survive the Constitution, but believes that it is safer to eliminate the opportunity to even bring such a challenge.[487]

Importantly, the courts have been especially protective of cultural institutions that are enshrined in the original organic documents, like treaties and instruments of cession. *Wabol* placed heavy emphasis on the conditions of cultural protection found in the

481. *Id.* (citing Northern Mariana Islands v. Atalig, 723 F.2d 682, 689 (9th Cir. 1984)).

482. *Id.* at 1462.

483. Weaver, *supra* note 62. *See* Uilisone Falemanu Tua, Note, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246 (2001).

484. Laughlin, *Cultural Preservation*, *supra* note 185.

485. Hall, *supra* note 290.

486. 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 (1999).

487. Faleomavaega Amicus, *supra* note 8, at 7; Faleomavaega Reply, *supra* note 66 ("While Congressman Faleomavaega believes strongly that the preservation of *fa'asamoa* would justify upholding [the *matai* requirement for Senators] under even strict-scrutiny review, it is foreseeable that a change in the status of United States nationals in American Samoa might make litigation challenging the requirement more likely.").

Covenant with CNMI.[488] *Hodel* agreed that the Instruments of Cession in American Samoa evidenced a legitimate government policy in protecting the *fa'asamoa*.[489] Many interests enshrined in a treaty survive regardless of whether the territory was incorporated or not. For example, the Treaty with France that annexed the Louisiana Purchase kept provisions providing special treatment to French and Spanish traders. Those provisions continued to apply to the incorporated territory of Orleans, despite the Uniformity Clause.[490] If treaty provisions continue for incorporated territories that are subject to the full control of the Constitution, then they would be even more effective for unincorporated territories.

Equal Protection certainly applies to the territories, even while it remains unclear as to what extent. Further, Congress has been granted surprising leeway to avoid Equal Protection when dealing with the territories, which suggests that so long as Samoan discrimination is approved by federal statute, it can avoid challenge.[491] For more than a century all levels of government have stood behind the Instruments of Cession and the policies towards protecting Samoan culture. The courts have practically bent over backwards to ensure that the pillars of the *fa'asamoa* are protected. Equal Protection does not ride the citizenship clause's coattails, but even if it did, it would not be anomalous to American Samoa.

The fears that citizenship would erode Samoan culture do not bear out. When viewed through the Incorporation Doctrine, the citizenship clause does not bring other constitutional provisions to bear on the territories. Nor does it automatically change the political status of the territory. As such, the citizenship clause is not anomalous to American Samoa.

Conclusion

Tuaua presented a false choice. The parties and Court believed that the whole question relied on whether the *Insular Cases* could be upheld. Nobody considered whether the *Insular Cases* themselves required an additional level of analysis. In the end, the D.C. Circuit avoided a full analysis by simply stating that the *Insular Cases* automatically meant denying citizenship. Such a conclusion was

488. Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990).

489. Corp. of Presiding Bishop v. Hodel, 830 F.2d 374, 386 (D.C. Cir. 1987).

490. Downes v Bidwell, 182 U.S. 244, 332 (1901) (White, J., concurring).

491. LEIBOWITZ, DEFINING STATUS, *supra* note 19, at 437.

unnecessary and wrong. The question is not whether the Insular Case do or do not apply, it is whether citizenship should be granted within their rules.

A. Final Thoughts on Citizenship in American Samoa

The plaintiffs' argument that *jus soli* should trump over a century of the Incorporation Doctrine, with no regard for the cultural protections within the territories, was potentially harmful to the territories. While the *Insular Cases* were originally a denial of rights by a foreign power, their legacy has evolved to permit important protections that help keep the territories' cultural institutions alive. Without these protections, vibrant cultures would erode away and the foundation of the United States' agreements with the people would be undermined.

On the other hand, the defendants' argument and Judge Leon's opinion that the *Insular Cases* stand for an absolute prohibition on citizenship is just as harmful. Denying a territory the basic rights of citizenship based on nothing more than a misreading of the strength of Justice Brown's opinion in *Downes* is unacceptable in this day and age. This argument is entirely based on the premise that if the United States is not constitutionally forced to provide citizenship, it cannot. The U.S. government should be pushed to explain its interest in keeping American Samoans in their second-class status.

Whether the phrase "United States" includes more than just states is not dispositive of whether the citizenship clause of the Fourteenth Amendment applies to American Samoa, despite Justice Brown's one-man opinion in *Downes*. American Samoa is clearly within the jurisdiction of the United States. Justice White's controlling plurality opinion, and the test used by every subsequent court since, has been to determine whether the right in question is "fundamental." That is the question the court should ask rather than devolve into a dispute over how to define "United States."

While membership within a nation is certainly a fundamental right, the U.S. national status may be a sufficient procedural means of complying with that right. Thus, constitutional birthright citizenship, as opposed to a national status, may not be fundamental in the international sense. Of course, the question remains whether "all men are created equal unless they are created in American Samoa" is a viable rule domestically. Under the presumption that the Constitution does apply to the territories, the analysis should continue to Justice Harlan's balancing test in *Reid* to determine whether application of the right to American Samoa would be

impractical or anomalous. Even if birthright citizenship is not a fundamental right, it is surely one that should apply.

The D.C. Circuit should have ordered an evidentiary hearing as to the potential impracticalities and anomalies of applying citizenship to American Samoa. Likely, it would have found that there is no impracticality that has been (or can be) cited that would make citizenship for American Samoans difficult to carry out. Nor is it anomalous. Citizenship does not change the political status of American Samoa, or suddenly import the full force of the Constitution on the territory. The *fa'asamoa* would survive citizenship unscathed, but American Samoans would finally become full members of the American polity. It would not be impractical or anomalous to apply the citizenship clause to American Samoa.

The Incorporation Doctrine provides a complex framework through which a basic right, like citizenship, can be reviewed. It is not necessary to force the entire Constitution on the territories, or absolutely prohibit any of its provisions. The path through the Incorporation Doctrine is the best way to provide the people of American Samoa with constitutional birthright citizenship without threatening the *fa'asamoa* or changing the political status. Overturning these cases is unnecessary and potentially harmful to the territories. Ultimately, the Incorporation Doctrine can and should be utilized to find that the citizenship clause of the Fourteenth Amendment applies to American Samoa, and that those born in American Samoa are U.S. citizens.

B. A Proposed Policy for the National Status

Such a conclusion raises an interesting question about what to do with the U.S. national status. Would such a status ever survive the Incorporation Doctrine review? Is there a situation where a U.S. national status would not be impractical or anomalous? The answer may be found in the *Tuaua* court's heavy reliance on *Rabang*, and the circuit court cases concerning the Philippines. Even though these cases relied entirely on Justice Brown's opinion in *Downes*, that does not mean their eventual outcome was incorrect.

United States policy has always treated new territories differently. Alaska was incorporated upon annexation, whereas Hawaii was not. Congress declined to organize American Samoa, while around the same time granting Puerto Rico citizenship. American Samoa, Guam, and Cuba all started under military

governments. From the beginning, it was determined that Cuba and the Philippines were always destined for independence.[492] The Philippines were the only unincorporated territory to gain eventual independence, and may provide guidance as to the purpose of the national status.

There was strong opposition to annexation of the Philippines by the American public, especially when Filipino insurgents attacked U.S. forces in 1899. [493] This insurgency, which lasted until 1902, actually killed more Americans than the entire Spanish-American War.[494] Due to the unpopularity, the Senate only ratified the Treaty of Paris with the clarification that it would not be a "permanent annexation" of the Philippines.[495] In 1916, Congress passed the Autonomy Act, the preamble of which stated: "it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein."[496] This was followed up in 1934 with the Philippine Independence Act, which set forth the procedures that would lead to an independent government, and was accomplished with the President's relinquishment of all claims of sovereignty in 1946.[497]

Using the Incorporation Doctrine, there is a strong argument that applying a right such as citizenship to the people of the Philippines during that time would be very impractical, considering the clearly stated policy of the United States to return the Philippines to independence. As such, a court could very easily hold that such a right did not extend to the Philippines due to the local setting, the necessities of the situation, and the available alternative—a temporary U.S. national status.[498]

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492. Congress conditioned President McKinley's intervention in Cuba with a requirement that Cuba be left independent, and disclaiming any U.S. claim over the island. The Treaty of Paris mirrored this by relinquishing Spain's control over Cuba, but only granting the U.S. temporary occupation. *See* Kent, *supra* note 38, at 118–19.

493. *Id.* at 120.

494. Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 297 (2007).

495. Kent, *supra* note 38, at 120.

496. Cabebe v. Acheson, 183 F.2d 795, 798–99 (9th Cir. 1950) (citing the Jones-Shafroth Act (Jones Act), ch. 145, 39 Stat. 951 (1917)).

497. *Id.* at 799.

498. *See* Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (The right is balanced against the "particular local setting, the practical necessities, and the possible alternatives.").

American Samoa, on the other hand, is not on a temporary transitional path towards independence or statehood.[499] The Instruments of Cession granted full sovereignty to the United States, with no indication then, or since, that independence or incorporation would follow. American Samoa has been under the U.S. flag for over a century, and has developed extremely close ties with the country. The old fears of racial and cultural clashes are no longer justifiable today. The very permanence of American Samoa makes it extremely difficult to justify denying citizenship to its people.

In *Tuaua*, Judge Leon specifically rejected the argument that temporariness was relevant to whether citizenship applied to American Samoa.[500] From a constitutional perspective, he's probably right. However, it does bear great weight on the matter of U.S. policy regarding territories.

Denial of a right like citizenship should only be permitted as a temporary measure, where it would be too impractical to carry out. The United States should consider this as it determines what to do with the U.S. national status. A new policy would need to follow three important rules: (1) the U.S. national status is acceptable as a temporary provision after the U.S. takes sovereignty over a territory; (2) if circumstances appear that the territory is on the path to independence, then the national status may remain until independence is granted; and (3) if the territory is not on the path to independence, then citizenship must be afforded to the people when it is no longer impractical to do so.

Such a rule would have to be determined on a case-by-case basis, but would not accept an indefinite national status. This rule would also not rely on the political status of the territory—whether it is organized or incorporated. American Samoa has remained unorganized and unincorporated, but is clearly a permanent part of United States sovereignty. The United States should adopt this more just policy and avoid permanent second-class citizens.

Whatever the United States decides to do with the national status in the future, it should certainly agree that American Samoans are worthy to be citizens of this country. There is plenty of room within the Constitution to add a few more citizens without any harm to U.S. interests, foreign or domestic. The D.C. Circuit should have taken the full question of citizenship into consideration—not by

499. Nor are Guam, CNMI, the United States Virgin Islands, or Puerto Rico.

500. Tuaua v. United States, No. 12-1143-RJL, 2013 WL 3214961, at *14 (D.D.C. June 26, 2013).

disregarding over a century of precedent, but by using the Incorporation Doctrine to find that the citizenship clause of the Fourteenth Amendment can, should, and does extend to the people of American Samoa. There is no need to continue to have second class Americans, and American Samoans deserve the full rights and privileges of constitutional citizenship.