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

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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 an American citizen, or else 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 less rights than citizens. If they knew that it was originally created to separate undesirable races from the American public, 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 house. 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 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. The plaintiffs include five U.S. nationals born in American Samoa who have, in one way or another, been harmed due to their non-citizen status. The complaint relies 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.

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. It relied on a series of Supreme Court

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2 Id. at 4-12.
decisions from the turn of the twentieth century, collectively known as the Insular Cases. These cases, the defendants argue, specifically deny constitutional citizenship to those born in the territories. For support, the defendants also cite a series of Circuit Court decisions denying Fourteenth Amendment citizenship to those born in the Philippines during U.S. occupation. An amicus brief filed by American Samoa Congressman Eni Faleomavaega sides with the defendants against citizenship. He places heavy emphasis on the potentially destructive effects that citizenship could have on the culture of American Samoa.

The plaintiffs’ analysis suggests that the Insular Cases were wrongly decided and should not be included in the analysis of the citizenship clause of the Fourteenth Amendment. Instead, the court should only look to the old common law, and ignore or overturn the Insular Cases. Much of the substantial case law cited by the plaintiffs was from before 1900. The defendants argue that the Insular Cases absolutely bar constitutional citizenship for those born in the territories. However, the court is not stuck with this 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 the court will find that constitutional citizenship can 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 the 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.

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 begins with a discussion of the evolution of U.S. citizenship, from the revolution to the Spanish-American War. Part III reviews the Insular Cases, and the doctrine they created. Part IV outlines a framework for applying constitutional provisions to the territories. Part V 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 courts should review that designation in the future.

Part I – American Samoa

American Samoa is a series of seven islands deep in the South Pacific.\(^3\) The largest island, Tutuila, is home to about 97% of the population.\(^4\) 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.

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 broken pottery and oral myths. However, the later pre-

\(^3\) The islands are Tutuila, Aunu’u, Ofu, Olosega, Ta’u, Swains Island, and Rose Atoll.
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, who periodically fought for control of the region.5

French Explorer Jean François de Galaup de la Pérouse was the first European to land on the island of Tutuila.6 A monument still stands at the aptly named Massacre Bay where his men fought with the Samoans.7 The British came in 1791 followed by the Germans in 1824. Americans began arriving in 1839, and noted the islands for 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 took the bold move of requesting the United States to annex the islands in an attempt to protect Samoan lands from foreign alienation.8

While the U.S. barely acknowledged the request at the time, it did begin to notice Germany’s increased interest in the islands over the next few years.9 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.10 It took this disaster for the powers to “recognize that not the whole Samoan Archipelago was worth the loss in men and costly ships already suffered.”11

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.12 The powers of this king were dubious at best. The acclaimed author Robert Lewis 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

6 ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 412 (1989) [hereinafter Leibowitz, Defining Status].
7 ASHPO, supra note 5.
8 LEIBOWITZ, DEFINING STATUS, supra note 6, at 412-413.
9 Id.
10 ROBERT LEWIS STEVENSON, A FOOTNOTE TO HISTORY: EIGHT YEARS OF TROUBLE IN SAMOA 113 (Serenity Publishers, LLC 2009 (1912).
11 Id. at 120.
the chief of certain provinces...in 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.\textsuperscript{13}

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.\textsuperscript{14} Germany eventually lost Western Samoa to New Zealand after World War I.\textsuperscript{15} Western Samoa gained independence in 1962 and is today known just as Samoa.\textsuperscript{16}

With control of Eastern Samoa firmly vested in the United States, the Navy was tasked with administration of the islands.\textsuperscript{17} To bolster the legitimacy of the new order, the high Samoan chiefs signed the Instrument of Cession of Tutuila in 1900.\textsuperscript{18} The small island group of Manu’a followed with their own Instrument of Cession in 1904.\textsuperscript{19} 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 \textit{matai}. Through these provisions, the Samoans created a sort of political autonomy by protecting the \textit{matai} in their role as social and village leaders.\textsuperscript{20} The Navy imposed racially restrictive laws on property ownership to protect the Samoans’ land system, while also serving the United States in keeping out foreign settlers, especially Germans.\textsuperscript{21}

Not that the Samoans had much choice in the matter. The Instruments largely served to recognize the status quo.\textsuperscript{22} The Executive Order imposing the Navy’s control of the islands actually came two months before the first Instrument of Cession.\textsuperscript{23} Commander B.F. Tilly, the first to oversee the new territory, was

\begin{itemize}
\item \textsuperscript{13} \textit{Stevenson}, \textit{supra} note 10, at 11.
\item \textsuperscript{14} Convent\textit{ion 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 \textit{www.asbar.org} (from the “legal resources” drop-down menu, select “organic documents.” Click the hyperlink entitled “Convention of 1899”). Britain was compensated with territory elsewhere.
\item \textsuperscript{15} \textit{Ashpo}, \textit{supra} note 5.
\item \textsuperscript{16} \textit{Leibowitz}, \textit{American Samoa, supra} note 12.
\item \textsuperscript{17} Executive Order No. 125-A, \textit{Placing Certain Islands of the Samoan Group Under the Control of the Navy Department} (Feb. 19, 1900), \textit{available at en.wikisource.org/wiki/Executive_Order_125-A}.
\item \textsuperscript{18} Instrument of Cession: Chiefs of Tutuila to United States Government, Apr. 17, 1900, \textit{available at \textit{www.asbar.org}} (from the “legal resources” drop-down menu, select “organic documents.” Click the hyperlink entitled “Cession of Tutuila and Aunu’u”) [hereinafter \textit{Tutuila Cession}].
\item \textsuperscript{19} Instrument of Cession: Chiefs of Manua to United States Government, Jul. 16, 1904, \textit{available at \textit{www.asbar.org}} (from the “legal resources” drop-down menu, select “organic documents.” Click the hyperlink entitled “Cession of Manua’s Islands”) [hereinafter \textit{Manua Cession}].
\item \textsuperscript{21} \textit{Id.} at 827.
\item \textsuperscript{22} \textit{Leibowitz, Defining Status, supra} note 6, at 415.
\item \textsuperscript{23} See Executive Order No. 125-A, \textit{supra} note 17; \textit{compared to} Tutuila Cession, \textit{supra} note 18.
\end{itemize}
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.”

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 Roosevelt responded, with a “thank you” note and some gifts. While the Instruments were signed in 1900 and 1904, neither was ratified by Congress until 1929. The Navy governed the territory until 1951 when administration was transferred to the Department of Interior. In 1962, the Secretary of Interior, by executive order, granted an American Samoa Constitution, which was revised in 1967. The Constitution allowed for an elected Governor and legislature, returning de facto control to the Samoans and enshrining the cultural institutions of the people.

Samoan life is still largely defined by the fa’asamoa, or Samoan way. Generally, the fa’asamoa defines Samoan culture. Institutionally, it is a mutually dependent relationship between the aiga (family), the matai (chiefs), and communal land. The aiga holds a matai title, which is tied 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. It is this complex relationship which the Samoans sought to protect in the Instruments of Cession.

Even today, family life revolves around the aiga. Often difficult to describe in modern English, 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. Especially difficult has been the growth in population, which increased from around 5,000 in 1900 to over 55,000 today. It is difficult to maintain close ties when your family has grown over ten-fold.

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24 LEIBOWITZ, DEFINING STATUS, supra note 6, 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 should have the title Himself. So far, nobody has stepped forward to claim the title away from Jesus.


28 AM. SAMOA CONST.


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

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.32

These titles are hotly contested and serve as an important symbol of social ranking. The doctrine of fa’aloalo, or respect, controls most aspects of Samoan life and politics.33 Of course, American oversight has significantly influenced even this important institution, often inadvertently. Today, the Mauga title is considered the highest in American Samoa, though this is almost entirely due to the fact that it rests in Pago Pago and the matai acted as the go-to person for the U.S. Navy when dealing with Pago Harbor issues.34

More than 90% of the land in American Samoa is communally owned.35 Alienation of communal land is strictly regulated, to the extent that even the Governor himself must approve the sale.36 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 1900.37 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.38

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

32 Poumele, supra note 30, at 5.
33 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, Sep. 17, 2012, available at www.samoanews.com/?q=node/8833&quicktabs_3=1.
34 Lutali & Stewart, supra note 29, at 389 (citing Taufaasau v. Manuma, 4 Am. Samoa 947 (App. Div. 1967)).
35 Leibowitz, American Samoa, supra note 12. 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.
36 AM. SAMOA CODE ANN. § 37.0204
37 AM. SAMOA CODE ANN. § 37.0201. Most freehold land has, over time, been converted back to communal land.
38 AM. SAMOA CODE ANN. § 37.0204(b)
people, and a Senate chosen among high-ranking senior matai. 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. 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. 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.

**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.” 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 and explicitly stated as policy in the American Samoa Constitution.

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. 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. 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 they would otherwise be eligible for. All three pillars of the fa’asamoa – the aiga, matai, and communal land – are considered at risk.

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 beach-front property for what was for them a fortune, but was valueless to the developers. By the time the Hawaiians had integrated

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39 AM. SAMOA CONST., art. I, § 3 and 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, available at www.samoanews.com/?q=node/10651.


41 AM. SAMOA CONST., art. III, § 3.

42 AM. SAMOA CODE ANN. § 3.0240.

43 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.”)

44 Tutuila Cession, supra note 18.

45 AM. SAMOA CONST., Art. I, § 3.

46 LEIBOWITZ, DEFINING STATUS, supra note 6, at 415.
into the new system, most of their land was gone, and the culture along with it. While Hawaii is undergoing a cultural rebirth today, the last century has left behind a stern warning to other cultures facing foreign intrusion.

Many Samoans believe that increased federal presence in 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. In 2006, Rep. Faleomavaega introduced legislation in the House to create a Federal District Court for American Samoa. 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. Despite popular support, the Fono passed resolutions in opposition, and Rep. Faleomavaega let the bill die in committee.

Presently, there is a large backlash against the plaintiffs in the Tuaua v. United States case for bringing this suit without community engagement and support. Ironically, this movement is largely led by Rep. Faleomavaega himself, who has taken it upon himself to file amicus briefs in opposition to the plaintiffs.

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 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. Similarly, a person must have at least one-half Samoan blood to obtain a matai title, which is required to hold public office in the American Samoa Senate. In fact, the American Samoa Constitution mandates such racial preferences in everything from family organization to Samoan-owned businesses. The Equal Protection clause, it is feared, would put these laws in jeopardy through heightened judicial scrutiny.

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 make a challenge to

49 Weaver, supra note 47, at 362.
50 Id.
52 Am. Samoa Code Ann. § 37.0204(b).
54 Am. Samoa Const., art. I, § 3.
55 See the Policy Protective Clause, Am. Samoa Const., art. I, § 3.
these laws a little bit easier should be stopped, even if it would bring significant benefits to the Territory. Thus, a District Court was unacceptable because better access to justice could also bring a cheaper opportunity to challenge aspects of the fa’asamoa protections.\textsuperscript{57} It is on this basis that those arguing against the Tuaua plaintiffs’ claim that citizenship would somehow embolden challenges against various aspects of Samoan culture.\textsuperscript{58} Tellingly, this is not an argument that the rights do not apply to American Samoa or that the laws in question are constitutional, just 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.\textsuperscript{59} Such a holding would certainly challenge the 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 law known as the Insular Cases would be suddenly overturned.\textsuperscript{60} Were that to be true, then the potential fallout could be a threat to the fa’asamoa. However, it is unlikely any court will overturn the Insular Cases, which were upheld by the Supreme Court as recently as 2008.\textsuperscript{61} 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.

**Citizen vs. National – Why it is 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.\textsuperscript{62} However, Congress did not define the term until 1940.\textsuperscript{63} Today, the status only applies to those born in American Samoa.\textsuperscript{64}

Why does this distinction matter at 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 non-voting member of Congress; and they are eligible for most federal benefits. For all intents and purposes, nationals are supposed to be

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\textsuperscript{57} 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 47, at 358.

\textsuperscript{58} Eni Reply, supra note 51, at 7-8.


\textsuperscript{60} Eni Reply, supra note 51, at 17.


\textsuperscript{63} 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”).

\textsuperscript{64} 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 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.”).
treated like citizens.\textsuperscript{65} While nationals from American Samoa do enjoy many of the rights of citizens, they also suffer some problems due to their confusing status.

The complaint in \textit{Tuaua v. United States} presents an exhaustive list of such grievances.\textsuperscript{66} For example, nationals and all those coming from American Samoa must pass through federal immigration, as if they had landed from a foreign country.\textsuperscript{67} Nationals may become citizens, but only through the same naturalization process that aliens are subjected to. The 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 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 by themselves total $680.\textsuperscript{68} For a land where the per capita income is only about $8,000,\textsuperscript{69} these costs alone can be prohibitive.

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.\textsuperscript{71} Others deny nationals the right to bear arms.\textsuperscript{72} Many state and federal jobs require U.S. citizenship, which prohibits nationals from taking those jobs.\textsuperscript{73} And the U.S. armed forces require citizenship to be an officer,\textsuperscript{74} even though American Samoans provide more than their fair share

\textsuperscript{65} Gonzales v. Williams, 192 U.S. 1 (1904).
\textsuperscript{67} Complaint for Declaratory and Injunctive Relief, Tuaua v. United States, No. 12-1143 (D.C. Cir. July 10, 2012). In fact, prior to 1952, nationals were prohibited from naturalizing. \textit{Id}.
\textsuperscript{68} Complaint for Declaratory and Injunctive Relief, Tuaua v. United States, No. 12-1143 (D.C. Cir. July 10, 2012).
\textsuperscript{70} LEIBOWITZ, DEFINING STATUS, supra note 6, at 450.
\textsuperscript{71} 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)).
\textsuperscript{72} Tuaua Complaint, supra note 1, at 23 (citing HAW. REV. STAT. § 134-2(d)).
\textsuperscript{73} \textit{Id}. at 22 (citing CAL. GOV’T CODE § 1031 (public safety officers); WASH. REV. CODE §§ 41.08.060 & 41.08.070 (firefighters and civil service); HAW. REV. STAT. § 121-14 (Hawaii National Guard officers); and 24 PA. CONS. STAT. § 11-1109 (public school teachers)).
\textsuperscript{74} \textit{Id}. \textit{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”).
of soldiers.\textsuperscript{75} These complaints are not new, as U.S. nationals from American Samoa have long complained about this type of discrimination.\textsuperscript{76}

The plaintiffs in \textit{Tuaua} also emphasize the fact that a national’s passport has a special Endorsement Code 09 which expressly states that the individual is not a U.S. citizen.\textsuperscript{77} The plaintiffs claim that this is an example of nationals being treated “inferior and subordinate” to citizens.\textsuperscript{78} Tellingly, the U.S. acknowledges all of these facts in its responses and motions.\textsuperscript{79}

\textbf{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 did not even realize they were not citizens until Lt. Cmdr. C.H. Boucher arrived and informed them in the 1920’s.\textsuperscript{80}

This realization, among other thing, helped propel the \textit{Mau} (opposition) movement of the 1920’s. The \textit{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 \textit{Mau} argued that Samoans should have citizenship beginning when the President signed the papers acknowledging annexation of the islands.\textsuperscript{81} The Samoans organized a campaign for citizenship with overwhelming support from the people and the \textit{matai}.\textsuperscript{82}

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 \textit{fa'asamoa}.\textsuperscript{83} The Commission believed that citizenship could be granted without affecting the unincorporated status of the territory. While the Senate twice adopted the recommendations, the

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\textsuperscript{75} See e.g. Kirsten Scharnberg, \textit{Young Samoans have little choice but to enlist}, HONOLULU ADVERTISER, March 21, 2007. During the second Iraq war, American Samoa suffered more deaths per capita than any other U.S. jurisdiction. "Iraqi War Casualties (per capita) by state", Iraq Coalition Casualty Count, icasualties.org; 06/08/2006, \texttt{www.StateMaster.com/graph/mil_ira_war_cas_percap-iraqi-war-casualties-per-capita} (last visited Apr. 14, 2013)
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\textsuperscript{76} See e.g., Study Mission to Eastern \textit{[American]} Samoa, Report of Senators Long and Gruening to the Senate Committee on Interior and Insular Affairs, S. Doc. No. 38, 87\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (1961) at 126 [hereinafter 1961 Study Mission].
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\textsuperscript{77} Tuaua Complaint, \textit{supra} note 1, at 23.
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\textsuperscript{78} Id. at 21.
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\textsuperscript{79} Defendants’ Motion to Dismiss Plaintiffs’ Complaint, Tuaua v. United States, No. 12-1143 (D.C. Cir. Nov. 7, 2012) [hereinafter \textit{Tuaua Motion to Dismiss}] and Defendants’ Reply in Support of Their Motion to Dismiss, Tuaua v. United States, No. 12-1143 (D.C. Cir. Dec. 12, 2012).
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\textsuperscript{80} 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, 1930, Oct. 1-4, 1930 in American Samoa (U.S. G.P.O. 1931) at 229 [hereinafter \textit{1930 Hearings}]. Boucher was court martialed for “promoting unrest” among the Samoans to start the \textit{Mau} movement. \textit{Id.} at 351-352.
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\textsuperscript{81} Statement of Alex T. Willis, \textit{Id.} at 207.
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\textsuperscript{82} See generally, \textit{Id.}
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\textsuperscript{83} Decision of Commission, \textit{Id.} at 268-270.
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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. Having heard the list of possible deleterious effects from the 1931 report, Samoans now had an aversion to a closer connection with the U.S. In 1948 more than ninety matai petitioned Congress to table any legislation dealing with citizenship or an organic act for ten years. 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 were citizens they would not be able to prevent other U.S. citizens from coming and taking their land. To avoid losing the Samoan culture, any organic act would have to first address two questions: (1) whether the act would protect the fa’a Samoa; and (2) whether such an act would be constitutional. 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.

Constitutional vs. Statutory citizenship.
American Samoa is the only U.S. territory without citizenship primarily because it remains 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. This citizenship granted by Congress is referred to as “statutory citizenship,” as opposed to citizenship granted by the Fourteenth Amendment, or “Constitutional citizenship.”

The difference is important because the political status of American Samoa, and all the territories, is perpetually in question. Most do not realize that a move away from the United States would 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 then Congress would automatically revoke the U.S. citizenship of Puerto Ricans. A suit for declaratory relief regarding the

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85 Leibowitz, American Samoa, supra note 12, at 242.
87 Id. at 129.
88 Leibowitz, Defining Status, supra note 6, at 461.
citizenship question was dismissed as unripe.\textsuperscript{91} However, in 2005, the President’s Task Force on Puerto Rico’s Status confirmed that independence would cause those born in Puerto Rico to automatically lose citizenship.\textsuperscript{92}

Constitutional citizenship, on the other hand, cannot be revoked by Congress. In \textit{Afroyim v. Rusk},\textsuperscript{93} 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.”\textsuperscript{94} However, in \textit{Rogers v. Bellei}, the Court explained that this protection from forced denaturalization does not apply to statutory citizens.\textsuperscript{95} In fact, those granted citizenship by statute can actually have their citizenship revoked.\textsuperscript{96}

\textbf{Natural born status}

Constitutional citizenship also suggests that one granted birthright citizenship under the Fourteenth Amendment is also a “natural born citizen,” a prerequisite to become President of the United States.\textsuperscript{97} This is more than a mere 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 reannexation into the Union after the Civil War.\textsuperscript{98} 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 was unchallenged, but scholars noted that he was born in the Panama Canal Zone when it was a U.S. possession.\textsuperscript{99} 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 “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 could never be president.

Adam Clanton, a former clerk to the High Court of American Samoa, argued that the common law doctrine of \textit{jus soli} – that anyone born on soil under the sovereignty of the United States is a citizen –

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\item \textsuperscript{91} Perez, \textit{supra} note 90, at 1032 (citing Efron v. United States, 1 F. Supp. 2d 1468 (S.D. Fla. 1998)).
\item \textsuperscript{92} \textit{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)).
\item \textsuperscript{93} \textit{Afroyim v. Rusk}, 387 U.S. 253 (1967).
\item \textsuperscript{94} \textit{Id.} at 257.
\item \textsuperscript{95} \textit{Rogers v. Bellei}, 401 U.S. 815 (1971).
\item \textsuperscript{96} \textit{Id.} at 836.
\item \textsuperscript{97} U.S. CONST. art. II, § 1, cl. 5.
\item \textsuperscript{99} \textit{Id.} at 425-426. \textit{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 \textit{jus soli} applies, but never considered the Insular Cases. If one were to follow the \textit{Tuaua} defendants’ reading of the incorporation doctrine, then the Panama Canal zone would not have been part of the United States, and as such, Sen. McCain would not be a natural born citizen.
\end{itemize}
would overcome any challenge to an American Samoan candidate.\textsuperscript{100} The problem with this approach is that it may result the absurd outcome that an American Samoan could be a “natural born citizen” under \textit{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 in the immigration law.

\textbf{Part II – Citizenship in America}

\textbf{The Common Law Doctrine of Jus Soli}

Citizenship in the United States was traditionally based on the English common law doctrine of \textit{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.\textsuperscript{101} The doctrine was first detailed by Sir Edward Coke in \textit{Calvin’s Case}, which involved an individual born in Scotland after James I of England had taken over the Scottish throne.\textsuperscript{102} 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.\textsuperscript{103} Blackstone later defined the requirements for subjectship as birth within the territory of the empire and allegiance to the King.\textsuperscript{104}

The English common law did not consider race or location, so long as the individual was born in an area within the British Empire.\textsuperscript{105} Further, there was only one type of subject, which was an important distinction from the Roman law’s various degrees of citizenship.\textsuperscript{106}

As part of the British Empire, those born in the American colonies were automatic British subjects with all the rights and privileges of such.\textsuperscript{107} After independence, the English common law was adopted into the American law, including the doctrine of \textit{jus soli}.\textsuperscript{108} 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 subject to a monarchy, and one who is a sovereign in a republic.\textsuperscript{109} It also reflected a philosophical difference in that the new nation believed that a citizen was bound in contract to the nation; with the citizen pledging allegiance to the country, and the country protecting the rights

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\item\textsuperscript{100} Adam Clanton, \textit{Born to Run: Can an American Samoan Become President?}, 29 UCLA PAC. BASIN L.J. 135 (2011).
\item\textsuperscript{101} Perez, \textit{supra} note 90, at 1031. It is also sometimes based on \textit{jus sanguinis}, or citizenship which follows the parents’ status, but that is not important for this paper.
\item\textsuperscript{102} Calvin’s Case, 77 Eng. Rep. 377 (K.B. 1608).
\item\textsuperscript{103} \textit{Id.} at 406-407.
\item\textsuperscript{104} William Blackstone, 1 Commentaries *366.
\item\textsuperscript{105} Perez, \textit{supra} note 90, at 1048.
\item\textsuperscript{106} \textit{Id.} at 1047.
\item\textsuperscript{107} 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.”).
\item\textsuperscript{108} \textit{Id.}
\item\textsuperscript{109} 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.”).
\end{itemize}
of the citizen. It is a word that made its membership equals to all those under the flag. 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.”

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. The new Constitution referred to “natural born citizens,” which had the same meaning as the English, “natural born subjects.” For example, Supreme Court Justice Swayne, sitting in a circuit court, stated that “[a]ll 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...[w]e find no warrant for the opinion that this great principle of the common law has ever been changed in the United States.”

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.” More specifically, Justice Story, sitting on circuit court, stated that “[a] citizen of one of our territories is a citizen of the United States.” 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.

**Dred Scott and the Non-Citizen**

While citizenship in America was well understood as it related to white land-owners, 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. 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. 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.

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113 Kerber, *supra* note 111, at 834.

114 Clanton, *supra* note 100, at 143-144.

115 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, 662-663 (1898)).


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

119 *Id.* at 404-405.
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. 120 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 Constitutions. 121 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.” 122 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.

The Adoption of the Fourteenth Amendment
After the Civil War, the Dred Scott decision was foremost in the minds of the drafters of the Civil War Amendments. 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. 123

The new Fourteenth Amendment used broad language to declare that, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” 124 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.” 125 It would accomplish this by prohibiting future legislators or judges from changing the meaning of citizenship. 126 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 first section [citizenship clause] refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia.” 127

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120 Id. at 446-448.
121 Id. at 449-450.
122 Laughlin, Constitutional Structure, supra note 40, at 423.
124 U.S. CONST. amend. XIV, § 1.
126 Perez, supra note 90, at 10354. See also Afroyim v. Rusk, 387 U.S. 253, 262 (1967) ("[the amendment] provides its own constitutional rule in language calculated completely to control the status of citizenship.")
127 Tuaua Complaint, supra note 1, at 17.
Fourteenth Amendment Citizenship

For the remainder of the century, with the exception of Native Americans, the common law principle of *jus soli* as stated by the Fourteenth Amendment remained uniformly upheld throughout the United States. In the *Slaughter House Cases*, 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. As such, it was specifically framed to eliminate the old argument that those who had not been born in the states, but born in “the District of Columbia or in the Territories, though within the United States, were not citizens.”

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*. 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 21, he visited China. Upon his return, the Immigration Service declared that he was not a U.S. citizen, and 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.

The Supreme Court relied on the Fourteenth Amendment and recognized that the citizenship clause “could not be understood without reference to the common law.” The Court declared that the Fourteenth Amendment reaffirmed the principles of *jus soli* “in the most explicit and comprehensive terms.” While Congress could regulate naturalization, the Amendment forbade restrictions on natural born citizens. 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). The Court also reaffirmed the *Slaughter-House Cases*’ distinction between jurisdiction of a state and jurisdiction of the United States. One could be subject to the United States without being within the jurisdiction of a particular, or any, state within the Union.

Today, the *Tuaua* defendants claim that *Wong Kim Ark* is irrelevant because the plaintiff was 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

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129 Perez, *supra* note 90, at 1054.
130 *Slaughter-House Cases*, 83 U.S. 36 (1872).
131 *Id.* at 73.
132 *Id.* at 72-73.
134 *Id.* at 652-653.
135 *Id.* at 654.
136 *Id.* at 675.
137 *Id.* at 702.
138 *Id.* at 655, 680-682 (citing Elk v. Wilkins, 112 U.S. 94 (1884)).
139 *Id.* at 688.
here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States." 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.

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. In August, the Spanish-American War ended after just four months, prompting Secretary of State John Hay to describe it as a “splendid little war.” The United States originally entered the war with the proclaimed purpose of helping Cuba gain independence from Spain. 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 nation-wide 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 completely; (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.

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.” The argument was less about expansion, but more about what happened to the new territories when annexed as both sides believed that the United States had the power to expand its boundaries. Racial concerns were central to the arguments. Both sides worried that these “alien and

140 Id. at 693.
141 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (Newlands Resolution), Res. No. 55, 55th Cong., 30 Stat. 750 (1898).
145 Id.
146 Id. at 2-3.
savage races” were not fit for citizenship. 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. The anti-imperialists believed that the Constitution applied ex proprio vigore. Thus, the U.S. should not annex new territories for fear that the “semi-civilized” inhabitants would automatically become citizens.

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. However, before the newly re-elected McKinley made a decision on these questions, the Supreme Court stepped in and came to its own conclusions.

Part III – 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. These closely-watched cases gave blessing to the expansionist policies of the McKinley administration and created a new set of rules for governing territories. 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 they 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, “[N]o matter whether th’ Constitution follows th’ flag or not, th’ Supreme Coort follows th’ iliction returns.”

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147 Id. at 2 (quoting Rep. Jonathan P. Dolliver from Iowa).
148 Id.
149 Id. at 5.
152 The seven cases settled on May 27, 1901 were 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. New York & Porto Rico Steamship 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 the 1922 case of Balzac v. Porto Rico, 258 U.S. 298 (1922).
153 Vignaraja, supra note 151, at 783.
For example, *De Lima v. Bidwell* held that the territories were not foreign.\(^{155}\) *Downes v. Bidwell* held that neither were they domestic.\(^{156}\) Thus Puerto Rico was part of the United States for purposes of the Uniformity Clause,\(^{157}\) but not for the Revenue Clause.\(^{158}\) Justice Edward White stumbled to explain this by saying that Puerto Rico was “foreign to the United States in a domestic sense.”\(^{159}\) 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.”\(^{160}\)

**Downes v. Bidwell**

The central decision of the Insular Cases was *Downes v. Bidwell*.\(^{161}\) 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.\(^{162}\) 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.”\(^{163}\) 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 up with a decision, the answer was hardly clear or concrete. The case was decided by a 5-4 vote with five separate opinions and no majority.\(^{164}\) This kind of fractionalism 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.\(^{165}\)

**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

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\(^{156}\) *Downes v. Bidwell*, 182 U.S. 244 (1901). 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.

\(^{157}\) *De Lima*, 182 U.S. 1.

\(^{158}\) *Downes*, 182 U.S. 244.

\(^{159}\) *Id.* at 341-342 (White, J., concurring).


\(^{161}\) *Downes v. Bidwell*, 182 U.S. 244 (1901).

\(^{162}\) *Id.* at 247-248.

\(^{163}\) U.S. CONST. art. I, § 8.

\(^{164}\) Vignaraja, *supra* note 151, at 790.

the extent that Congress allowed it, but that once it applied, Congress could not revoke it.\textsuperscript{166} He believed that the United States could only be composed of States, so territories were never included in the definition.\textsuperscript{167}

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.”\textsuperscript{168} To Justice Brown, the latter part of the phrase suggested that there may be places subject to the jurisdiction of the U.S. without being part of the Union.\textsuperscript{169} Meanwhile, the Fourteenth Amendment merely conferred citizenship to “persons born or naturalized in the United States...and of the State wherein they reside.”\textsuperscript{170} This wording did not extend to persons born in those areas subject to U.S. jurisdiction but not part of a state.\textsuperscript{171} Under this theory, statehood was required to be part of the “United States.” This was a change from the opinions in the \textit{Slaughter-House Cases} and \textit{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.\textsuperscript{172} He also argued that the power to acquire territory also 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.\textsuperscript{173}

Justice Brown’s arguments on citizenship are hardly persuasive. Aside from the racial fears 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.”\textsuperscript{174}

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


\textsuperscript{167} \textit{Downes}, 182 U.S. at 250-251. He did find an exception for the District of Columbia, which he included in the United States.

\textsuperscript{168} U.S. CONST. amend. XIII.

\textsuperscript{169} \textit{Downes}, 182 U.S. at 251.

\textsuperscript{170} U.S. CONST. amend. XIV, § 1.

\textsuperscript{171} \textit{Downes}, 182 U.S. at 251.

\textsuperscript{172} \textit{Id.} at 250-251.

\textsuperscript{173} \textit{Id.} at 279-280.

\textsuperscript{174} \textit{Id.} at 358 (Fuller, J., dissenting). Despite the clear wording of the Thirteenth Amendment, Samoans have actually challenged whether it applies in American Samoa, the fear being that a prohibition of involuntary servitude would hurt the \textit{matai’s} ability to control his family. \textit{Leibowitz, Defining Status}, \textit{supra} note 6, at 426.
even extend to places outside the territory, but under American jurisdiction like ships, or military bases like Guantanamo Bay in Cuba. 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.” Even so, Justice Brown’s opinion is very important because scholars, the federal district courts, and even the defendants in Tuaua, keep citing it as if it were good law. In fact, Justice Brown’s extension doctrine has been completely repudiated, even recently. The controlling opinion of Downes, and that which withstood the test of time, was Justice White’s concurrence.

**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 a thorough 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. 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 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 destined for statehood, and the Constitution applied in full. 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.”

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175 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”).
177 McGovney, supra note 84, at 617.
178 Clanton, supra note 100, at 152-153.
180 Tuaua Motion to Dismiss, supra note 79, at 13-14 (adopting the Rabang court’s analysis of Downes).
181 Boumediene v. Bush, 128 S. Ct. 2229, 2254 (2008) (Rejecting the extension doctrine: “[T]he Constitution has independent force in these territories, a force not contingent upon acts of legislative grace” (emphasis added)).
183 Id. at 311-312 (White, J., concurring).
184 Id. at 287 (White, J., concurring).
To determine whether a specific provision of the Constitution applied to an unincorporated territory, the court must determine whether the restrictions on Congress’ power are “so fundamental a nature that they cannot be transgressed.” This would eventually be clarified as a test of whether the provision is a “fundamental right” that follows the flag to the territories. The creation of unincorporated territories and the holding that only fundamental constitutional rights applied came to be known as the Incorporation Doctrine.

The Incorporation Doctrine
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 didn’t. Citizenship was still subject to the doctrine of *jus soli*, except when it wasn’t. 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, while formulated as a mere plurality opinion, by 1922 it was firmly established as the law.

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. It was simply taken for granted that the islands gained from the Spanish-American War were unincorporated. In fact, islands like Guam were considered mere military bases without any Constitutional rights.

Incorporation was determined on a case-by-case basis. 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.” 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. This was true even though the resolution prohibited laws “contrary to the Constitution of the United States.” While the Court conceded that reading the resolution literally would suggest the U.S. Constitution did apply, it determined that Congress must surely have had a different intent. Instead, the resolution did not intend to make any change to the laws that would imperil “the peace and good

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185 Id. at 371 (White, J., concurring).
186 See *Dorr* v. United States, 195 U.S. 138, 147-148 (1904) (holding that jury trials in the Philippines are not a “fundamental right”).
189 *Downes*, 182 U.S. at 344 (1901) (White, J., concurring) (Puerto Rico was unincorporated); *Dorr* v. United States, 195 U.S. 138, 144-145 (1904) (the Philippines were unincorporated).
191 *Dorr*, 195 U.S. at 143.
193 Id. at 209.
194 Id. at 212.
order of the islands.”\textsuperscript{195} Thus the Constitution did not apply and Hawaii remained unincorporated until express language was used in 1900 that the islands became incorporated.\textsuperscript{196}

On the other hand, Alaska was deemed incorporated in \textit{Rassmussen v. United States}, even though Congress did not make such incorporation explicit.\textsuperscript{197} 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.”\textsuperscript{198} The Court found this sufficient, especially since it could not find any evidence of a contrary intention.\textsuperscript{199} It also acknowledged that Congress had by statute extended a number of laws to the territory that inferred incorporation, and that \textit{Downes} had identified Alaska, along with Florida and Louisiana, as examples of incorporated territories.\textsuperscript{200} It remained unclear, though, what was to become of the “uncivilized tribes” of Alaska who were specifically excluded from the rights, advantages and immunities of the United States.\textsuperscript{201}

By 1922, the implicit reading of Congress’ intent was replaced with a strict requirement of express incorporation. The Supreme Court in \textit{Balzac v. Porto Rico} \textsuperscript{202} used the same criteria it had used in \textit{Rassmussen}, but determined that Puerto Rico was not incorporated.\textsuperscript{202} 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. \textit{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.”\textsuperscript{203} The Jones Act did not use the word “incorporate,” so Puerto Rico was not incorporated even though its inhabitants had obtained citizenship.\textsuperscript{204}

Though never explicitly stated by the courts, many commenters have noted that race plays a large part in the incorporation determination.\textsuperscript{205} Alaska was considered easy to reach from the U.S. and would

\textsuperscript{195} \textit{Id.} at 214.

\textsuperscript{196} \textit{Id.} at 210-211.

\textsuperscript{197} \textit{Rassmussen v. United States}, 197 U.S. 516 (1905).

\textsuperscript{198} \textit{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).

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.} (citing \textit{Downes v. Bidwell}, 182 U.S. 244, 355 (1901) (White, J., concurring)).

\textsuperscript{201} 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.

\textsuperscript{202} \textit{Balzac v. Porto Rico}, 258 U.S. 298 (1922).

\textsuperscript{203} \textit{Id.} at 306.

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} See \textit{e.g.}, Marybeth Herald, \textit{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, \textit{supra} note 154, at 346; \textit{Leibowitz, Defining Status, supra} note 6, at 17-26; Frederic R. Coudert, \textit{The Evolution of the Doctrine of Territorial Incorporation}, 26 COLUM. L. REV. 823, 827 (1926).
probably be inhabited by Caucasians.\textsuperscript{206} The other territories, “peopled by savages,” would stay unincorporated.\textsuperscript{207}

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, \textit{Downes} held that the Uniformity Clause did not apply to Puerto Rico because it was an unincorporated territory.\textsuperscript{208} But three years later the same court held that the same constitutional provision did not apply to Alaska either, even though it was incorporated.\textsuperscript{209}

The second distinction the Incorporation Doctrine created was between fundamental and non-fundamental rights as they applied to unincorporated territories. Justice White had described these fundamental rights as “principles which are the basis of all free government which cannot be with impunity transcended.”\textsuperscript{210} Beyond that there was very little guidance as to what was fundamental, except for the other cases’ decisions.

In 1904, the court in \textit{Dorr v. United States} held that the right to jury trial did not apply to the Philippines.\textsuperscript{211} 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.”\textsuperscript{212} 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.\textsuperscript{213}

Another procedural right, the right to a grand jury indictment, was denied to the Philippines in \textit{Ocampo v. United States}.\textsuperscript{214} The court determined that grand jury indictments were not inherent in the fundamental right of Due Process, so did not apply to the islands.\textsuperscript{215} That a jury trial was non-fundamental was reaffirmed for Puerto Rico in \textit{Balzac v. Porto Rico} in 1922.\textsuperscript{216} \textit{Balzac} also represented the first time a solid majority of the Supreme Court agreed on the Incorporation Doctrine, which was now officially the law of the land.\textsuperscript{217}

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\item[208] Downes v. Bidwell, 182 U.S. 244, 287 (1901).
\item[209] Binns v. United States, 194 US 486 (1904).
\item[210] \textit{Downes}, 182 U.S. at 290-291 (White, J., concurring).
\item[211] Dorr v. United States, 195 U.S. 138, 149 (1904).
\item[212] Id. at 148.
\item[213] Hawaii v. Mankichi, 190 U.S. 197 (1903).
\item[214] Ocampo v. United States, 234 U.S. 91 (1914).
\item[215] Id. at 98.
\item[217] Id.
\end{enumerate}
\end{footnotesize}
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,”218 “The Insular Cases: The Establishment of a Regime of Political Apartheid,”219 and “The Land that Democratic Theory Forgot,”220 commenters from across the spectrum have decried the Doctrine for the way in which it creates a second class of citizenship. However, this disdain in academia has not swayed the Supreme Court, which upheld the incorporation doctrine as recently as 2008.221

Reid v. Covert
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.222 Mrs. Covert was the civilian spouse of a U.S. Air Force Sergeant stationed in England.223 While there, she killed her husband and was found guilty by a military tribunal without a jury.224 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.”225 This language echoed the Downes dissent of Chief 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.”226 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.227

222 Reid v. Covert, 354 U.S. 1 (1957).
223 Id. at 3.
224 Id. at 4-5. The case was actually consolidated with another similar case involving Mrs. Dorothy Smith, who killed her Army husband at a base in Japan.
225 Id. at 5-6.
226 Downes v. Bidwell, 182 U.S. 244, 358 (1901) (Fuller, J., dissenting).
227 Reid, 354 U.S. at 9.
He argued that the “very dangerous doctrine” of the Insular Cases threatened the very basis of American government and should not be expanded.\textsuperscript{228} 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.\textsuperscript{229} 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.\textsuperscript{230} 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.”\textsuperscript{231} While Justice Black had four justices join his opinion, Justice Harlan’s concurrence was the narrower opinion.\textsuperscript{232}

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.”\textsuperscript{233} While there was no rule that a provision of the Constitution could never apply abroad, there was also no rule that a provision must always apply abroad, if execution would be “impractical and anomalous.”\textsuperscript{234} For Justice Harlan, the Insular Cases still had vitality and remained the law of the land.\textsuperscript{235} 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 non-fundamental, 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.”\textsuperscript{236} 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 Mrs. Covert a jury trial, though a lesser offense may have reached a different conclusion.\textsuperscript{237}

As the narrowest opinion, Justice Harlan’s “impractical and anomalous” test became the standard by which rights are judged to apply to the Territories. 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.

**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,

\begin{itemize}
  \item \textsuperscript{228} Id. at 14.
  \item \textsuperscript{229} Id.
  \item \textsuperscript{230} Laughlin, Cultural Preservation, surpa note 166, at 347.
  \item \textsuperscript{231} Id. (quoting Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).
  \item \textsuperscript{232} Id. at 348.
  \item \textsuperscript{233} Reid, 354 U.S. at 74 (Harlan, J., concurring).
  \item \textsuperscript{234} Id. at 74-75 (Harlan, J., concurring).
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} 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).
  \item \textsuperscript{237} Reid, 354 U.S. at 77-78 (Harlan, J., concurring).
\end{itemize}
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 for the District of Puerto Rico held that the jury trial was a fundamental right that was not impractical and anomalous, and was thus applicable in Puerto Rico.\(^{238}\) 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.\(^{239}\) 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.\(^{240}\) The conflict between the D.C. Circuit and the Ninth Circuit Courts of Appeals has raised issues that are important to resolve for the *Tuaua* case.

**The D.C. Circuit**

In 1972 Jake King, a U.S. citizen living in American Samoa, was tried for failure to pay Samoan income tax. His request for a jury trial was denied by the High Court of American Samoa who cited *Balzac v. Porto Rico* for the proposition that jury trials were not afforded to the territories.\(^{241}\) Even before he went 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.\(^{242}\) 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*.\(^{243}\) 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.\(^{244}\) 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.\(^{245}\) In effect, there were now two different definitions of “fundamental rights” depending on whether a court was considering the states or the territories.

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*.\(^{246}\) Determining whether jury trials would be impractical and anomalous in American Samoa was

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\(^{238}\) *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.


\(^{240}\) *N. Mar. I. v. Atalig*, 723 F. 2d 682 (9th Cir. 1984).


\(^{242}\) *Id.* at 1143.

\(^{243}\) *Id.* at 1147.

\(^{244}\) *Duncan v. Louisiana*, 391 US 145, 149-150 (1968).

\(^{245}\) *King v. Morton*, 520 F. 2d at 1147.

\(^{246}\) *Id.*
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. 247

The District Court in King v. Andrus held an extensive trial on the question of holding jury trials in American Samoa. 248 The American Samoa government argued against jury trials on the grounds that the Samoan people were too closely knit by family, chiefs, and culture to ever convict another for fear of offending somebody they knew. The government even had acclaimed anthropologist Margaret Meade testify, whose book, Coming of Age in Samoa, was the definitive text on Samoan culture at the time. 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. 249

Reviewing each of these concerns, the District Court found that the cultural obstacles had been eroded by “western world encroachment.” 250 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. 251 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. 252

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 maintaining their Samoan traditions. The Court felt that under the present circumstances, there was nothing preventing jury trials in American Samoa. 253 Jury trials were no longer too impractical and anomalous to be applied to the territory.

King represented an incredibly important doctrine – that the practicality of a right can change over time. In 1911, the High Court of American Samoa, then 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.” 254 King now stood for the proposition that circumstances over the last 60 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. 255 This is a belief widely shared in American Samoa. While

247 Id. at 1148.
248 King v. Andrus, 452 F. Supp. 11 (D.C. Circ. 1977), remanded from 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 paper will refer to the cases collectively as King, or the King cases.
249 Id. at 12-13.
250 Id. at 14.
251 Id.
252 Id. at 15.
253 Id. at 15-17.
254 American Samoa Gov’t v. Willis, 1 A.S.R. 635, 646 (App. Div. 1911)
255 Eni Reply, supra note 51, at 4.
the 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.\textsuperscript{256} It would be improper to deny rights to individuals who should enjoy them while they wait for American Samoa to come to a decision.

\textit{The Ninth Circuit}

\textbf{Atalig}

In 1984, jury trials were again the center of dispute in \textit{Commonwealth of the Northern Mariana Islands v. Atalig}, but the Ninth Circuit Court of Appeals used a different approach than the D.C. Circuit.\textsuperscript{257} \textit{Atalig} did not even 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.”\textsuperscript{258} 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 (hereinafter “CNMI”).\textsuperscript{259}

\textbf{Wabol}

Five years later, the Ninth Circuit returned to the CNMI in \textit{Wabol v. Villacruisis}.\textsuperscript{260} The case considered an equal protection challenge to racial prohibitions on the sale of land to those not of CNMI descent.\textsuperscript{261} 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.\textsuperscript{262} It 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.”\textsuperscript{263}

\textit{Wabol} also considered the \textit{Reid} “impractical and anomalous” test, citing the D.C. Circuit in \textit{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 mechanism the Court sought to find the “delicate balance between local diversity and constitutional command.”\textsuperscript{264}

The Court first distinguished between procedural rights and substantial rights. Substantial rights were personal and fundamental. Procedural rights were simply a means through which to ensure substantial rights. For example, a jury trial was a procedure utilized to ensure Due Process – the former right being procedural and the latter being substantial.\textsuperscript{265} However, when analyzing rights, the Court must balance them against the preservation of Congress’ power to administer the territory in order to protect the

\begin{footnotesize}
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\item[256] \textit{King v. Andrus}, 452 F. Supp. at 17.
\item[257] N. Mar. I. v. Atalig, 723 F. 2d 682 (9th Cir. 1984).
\item[258] \textit{id.} at 690 (fragmentally quoting Dorr v. United States, 195 U.S. 138, 147 (1904)).
\item[259] \textit{id.} at 690-691.
\item[260] Wabol v. Villacruisis, 958 F. 2d 1450.
\item[261] \textit{id.} at 1451.
\item[262] \textit{id.} at 1460.
\item[263] \textit{id.}.
\item[264] \textit{id.} at 1461.
\item[265] \textit{id.} at 1460.
\end{itemize}
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unique cultural and social conditions of the territory. The Court would remain cautious about undermining Congress.266

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.267 The Court rephrased the issue to ask whether there was a right to access to long-term 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.268

Of course, the reframing of the right in question 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.269 One commenter 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 their race.270

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 is a test for determining the application of the Constitution to the territories.

Part IV – 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 this attempt, I join a long line of legal scholars who have tried to divine a framework that unifies these competing holdings.271

266 Id.
267 Id. at 1462.
268 Id.
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 while the latter in Atalig relied solely on “fundamental rights.” While this dichotomy has been analyzed exhaustively by others, the most likely explanation is that the differences resulted merely from a matter of taste. So how to choose between the two tests?

The Insular Cases created the “fundamental rights” test. This formula, originally described in Downes v. Bidwell, has been used in almost every major case concerning the Constitution’s application in the territories since. Downes also indicated a strong presumption, though rebuttable, that the Constitution does apply in a territory.

However, since Reid, many courts have utilized Justice Harlan’s “impractical and anomalous” test. 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 substantial 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. Interestingly, the Court also noted that because it was “impractical and anomalous,” it was therefore not fundamental in the international sense.

Some have read this as meaning that Wabol defined “fundamental right” as one which is not “impractical and anomalous,” and that the new test throws out the international understanding of fundamentalness in favor of a reflection of just the local cultural settings. 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.” If “impractical and anomalous” is not a definition of a fundamental right, then what is it?


Katz, supra note 206, at 791.


Id. at 292 (White, J., concurring) (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 Reid v. Covert, 354 U.S. 1, 5-6 (1957) (“The 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.”); Boumediene v. Bush, 128 S. Ct. 2229, 2259 (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.”).


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

Id. at 1462.

Laughlin, Cultural Preservation, supra note 166, at 361.

Wabol v. Villacrusis, 958 F. 2d 1450, 1460 (9th Cir. 1990).
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 which are not obviously fundamental, the default had been to assume that they could never apply to the territories absent Congressional action.\textsuperscript{280} However, Justice Harlan in \textit{Reid} changed that assumption. For those rights that would otherwise not be fundamental, he then asks whether they “\textit{should} apply in view of the particular circumstances, the practical necessities, and the possible alternatives.”\textsuperscript{281} 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.\textsuperscript{282} Thus the D.C. Circuit in \textit{King} did not ask whether a jury trial was a fundamental right, because the question had already been answered in past cases.\textsuperscript{283} Instead, the court considered whether a jury trial \textit{should} apply based on the “impractical and anomalous” test.\textsuperscript{284} 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 non-fundamental Constitutional provisions abroad. In \textit{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.\textsuperscript{285} The Court in \textit{Boumediene v. Bush} used the test to hold that it would not be impractical and anomalous to provide the writ of \textit{habeas corpus} to detainees in Guantanamo Bay Prison, because the U.S. had complete sovereign control over the territory of the base.\textsuperscript{286} These Supreme Court decisions do not undermine the “fundamental rights” analysis. Instead, they distinguish between substantial rights deemed fundamental which will always apply, and those procedural rights that apply only if it would not be impractical and anomalous to do so.

As Constitutional questions, the courts must determine the appropriate standard of review. The Supreme Court in \textit{Harris v. Rosario} required Congress to have a rational basis for treating territories differently than states when enacting laws.\textsuperscript{287} However, Constitutional rights are typically reviewed under higher scrutiny. The Ninth Circuit trial court in \textit{Wabol} used rational basis,\textsuperscript{288} but the Appellate Court seemed to review the case with some hybrid that was less than strict scrutiny. To survive strict scrutiny, a law must show a “compelling state interest” that is narrowly tailored to achieve that

\textsuperscript{280} See e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922) and N. Mar. I. v. Atalig, 723 F. 2d 682 (9th Cir. 1984).
\textsuperscript{281} Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).
\textsuperscript{282} Dorr v. United States, 195 U.S. 138, 148-149 (1904) (outlining the practical difficulties of forcing jury trials upon “savages” who already have an established system of justice).
\textsuperscript{283} See e.g., \textit{Balzac}, 258 U.S. 298; N. Mar. I. v. Atalig, 723 F. 2d 682 (9th Cir. 1984); \textit{Hawaii v. Mankichi}, 190 U.S. 197 (1903); Dorr, 195 U.S. at 147-148.
\textsuperscript{287} \textit{Harris v. Rosario}, 446 U.S. 651, 651-652 (1980).
\textsuperscript{288} \textit{Wabol v. Villacrusis}, 958 F. 2d 1450, 1453 (9th Cir. 1990).
interest. The Appellate Court 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.

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. 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 that affirmative action cases can act as a guide. This may be appropriate. However, no courts have explicitly adopted this course of action.

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 Constitution does apply to incorporated territories, the court must determine whether the territory is incorporated or unincorporated. If unincorporated, the court must then ask whether the right in question is a fundamental right. If the right is fundamental, then it must apply to the territory, and all territories. If not, 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 first ask whether it is impractical to apply the provision, then must 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:

1. Is the territory incorporated or unincorporated?
   a. If incorporated, then the Constitution does apply.
   b. If unincorporated, then must rely on the incorporation doctrine.
2. 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?
3. 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.
4. 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.

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290 Wabol, 958 F. 2d at 1461-1462.
291 Laughlin, Application of the Constitution, supra note 154, at 378.
292 Id.
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.

1. Is the Territory Incorporated?
Before asking whether a Constitutional provision applies, it must first be determined whether the territory is incorporated or not. A Constitutional provision does apply to incorporated territories, but not necessarily to unincorporated territories.\(^{293}\) 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.”\(^{294}\) However, an “incorporated” territory is most often described as one which Congress intends to make a state at some point in the future.\(^{295}\)

Annexation by the U.S. alone is not enough to incorporate a territory.\(^{296}\) Nor is the mere granting of citizenship.\(^{297}\) 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.”\(^{298}\) 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, from the case law four important points can be discerned. First, fundamental rights are natural rights more than merely Constitutional rights. They are alternately described as the “basis of all free government,”\(^{299}\) “limitations in favor of personal rights,”\(^{300}\) and fundamental in the “international sense” based on the shared beliefs across cultures.\(^{301}\) These rights may be explicitly stated in the Constitution, or may exist independent of it.\(^{302}\) However, just because a right is stated in the Constitution, 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 stuck with a “cautious approach” to overturning Congress’ rules.\(^{303}\) While there is a presumption that the Constitution does apply, it is not a presumption that a right is fundamental.

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\(^{293}\) *See generally* *Downes v. Bidwell*, 182 U.S. 244 (1901) (White, J., concurring).

\(^{294}\) *Id.* at 391 (1901) (Harlan, J., dissenting).

\(^{295}\) *See Id.* at 311-312 (White, J., concurring). *See also* *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (“Incorporation has always been a step, and an important one, leading to statehood.”).

\(^{296}\) *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

\(^{297}\) *Balzac*, 258 U.S. at 311.

\(^{298}\) *Id.* at 312.

\(^{299}\) *Downes*, 182 U.S. at 291 (White, J., concurring).

\(^{300}\) *Dorr v. United States*, 195 U.S. 138, 146 (1904).

\(^{301}\) *Wabol v. Villacrurus*, 958 F. 2d 1450, 1460 (9th Cir. 1990).

\(^{302}\) *Downes*, 182 U.S. at 290-291 (White, J., concurring).

\(^{303}\) *See N. Mar. I. v. Atalig*, 723 F. 2d 682, 690 (9th Cir. 1984).
Third, rights within the Constitution are to be determined independently. 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, whereas, the Fifth Amendment’s right to a grand jury indictment is not. While the Sixth Amendment right to a jury trial has been repeatedly denied, there have been no serious challenges to the Sixth Amendment rights to confront witnesses or the right to an attorney.

Fourth, a non-fundamental right is generally a procedural right rather than a substantive right. Procedural rights are a means to obtain a substantial right, but are particular to our Anglo-Saxon system of government. Fundamental rights, on the other hand, are typically personal rights and liberties.

Many rights have been held to be fundamental, including free speech, the protection from ex post facto laws and bills of attainder, the protection from unreasonable searches and seizures, the right to privacy (in the context of abortions), the right to travel, the protections of the takings clause, Due Process, and Equal Protection. 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.” Other courts have included the right to trial by jury and the right to an indictment by Grand Jury as non-fundamental rights.

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305 Ocampo v. United States, 234 U.S. 91, 98 (1914).
306 See e.g., Atalig, 723 F. 2d 682; Hawaii v. Mankichi, 190 U.S. 197 (1903); Balzac, 258 U.S. 298; Dorr v. United States, 195 U.S. 138 (1904).
307 See U.S. CONST. amend. VI.
308 Wabol v. Villacrusis, 958 F. 2d 1450, 1460 (9th Cir. 1990).
309 Balzac, 258 U.S. at 310 (1922). See also Soto v. United States, 273 F. 628, (3d Cir. 1921).
312 Dorr, 195 U.S. at 142.
314 Guam Soc. 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. Title 46, Chapter 39. It simply has not been challenged in American Samoa.
315 Califano v. Torres, 435 U.S. 1, 4 n.6 (1978).
318 Id.
319 Downes v. Bidwell, 182 U.S. 244, 282-283 (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.
The question is whether the Constitutional provision relates to substantial personal liberties, or 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,” 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.

3. The Impractical Prong of the Test.
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.” The court failed to find sufficient evidence from the government that offering a jury trial would be impractical or anomalous.

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.” 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 in question with the “particular local setting, the practical necessities, and the possible alternatives.”

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, if the local conditions and/or culture are such that it cannot be effectively implemented, then it is sufficiently impractical. The

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322 Dorr, 195 U.S. at 147 (1904).
325 Dorr, 195 U.S. at 148.
326 Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).
327 Id. at 110.
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.”

Such impracticality must be unique to the particular circumstances of the territory in question. The territory cannot argue that a right would be impractical if it would be equally impractical to a state. The territory must have special circumstances that would make it uniquely impractical. One commenter 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, but also applies equally to the states.

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. 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 U.S. and the CNMI people.

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.” 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.

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. The Anomalous Prong of the Test.
Justice Harlan sought to evaluate whether a right was “impractical and anomalous.” His analysis weighed the practical difficulties of implementation against the seriousness of the right in question. 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

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329 See King v. Andrus, 452 F. Supp. 11; Wabol v. Villacrusis, 958 F. 2d 1450 (9th Cir. 1990).
330 See Laughlin, Cultural Preservation, surpa note 166, at 353.
331 Id.
332 King v. Andrus, 452 F. Supp. 11.
333 Wabol, 958 F. 2d 1450.
335 King v. Andrus, 452 F. Supp. at 17.
336 Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).
337 Id. at 77-78 (Harlan, J., concurring).
that it would not.\textsuperscript{338} \textit{King} used the terms “impractical and anomalous” as if they were synonymous, and then tested for impracticality.\textsuperscript{339} The Ninth Circuit in \textit{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.\textsuperscript{340}

“Anomalous” is defined as incongruous or contradictory; inconsistent with the circumstances.\textsuperscript{341} Where 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.\textsuperscript{342} Thus the Ninth Circuit determined that implementing the right to equal access to land would threaten the CNMI culture, which was meant to be protected under the Covenant:

\begin{quote}
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.\textsuperscript{343}
\end{quote}

In its evaluation, \textit{Wabol} asked whether the right would be “impractical or anomalous” (emphasis added) and found it to be both.\textsuperscript{344} This “and/or” distinction is very important.\textsuperscript{345} One commenter suggested using the Ninth Circuit test when the right in question is addressed by the territory’s organic documents and the D.C. test where it is not addressed.\textsuperscript{346} 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 image 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.

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{338} \textit{King} v. Morton, 520 F. 2d 1140, 1147 (D.C. Cir. 1975), \textit{remanded sub nom.} \textit{King} v. Andrus, 452 F. Supp. 11 (D.C. Cir. 1977); \textit{King} v. \textit{Andrus}, 452 F. Supp. 11.
    \item \textsuperscript{339} \textit{King} v. \textit{Andrus}, 452 F. Supp. at 17.
    \item \textsuperscript{340} \textit{Wabol} v. Villacrusis, 958 F. 2d 1450, 1462 (9th Cir. 1990).
    \item \textsuperscript{343} \textit{Wabol}, 958 F. 2d at 1462.
    \item \textsuperscript{344} \textit{Id.} at 1461.
    \item \textsuperscript{345} See Katz, \textit{supra} note 206, at 789; Hall, \textit{supra} note 271, at 94.
    \item \textsuperscript{346} Katz, \textit{supra} note 206, 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.”).
\end{itemize}
\end{footnotesize}
Part V – The Citizenship Clause in American Samoa

U.S. citizenship has not been conferred to the people of American Samoa since its annexation in 1900. 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 keeping Samoans as nationals is not clear. The Tuaua defendants argue that birthright citizenship is absolutely barred in unincorporated territories absent Congressional action, so presumably the intent is irrelevant.\(^\text{347}\)

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 \textit{Rasmussen v. United States}, the court reviewed the treaty with Russia ceding Alaska to the United States, which stated 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.”\(^\text{348}\) The Court read this to mean that the people of Alaska became U.S. citizens upon signing of the treaty.

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.”\(^\text{349}\) 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.\(^\text{350}\) 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 U.S. never granted them that status.\(^\text{351}\)

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.”\(^\text{352}\)

\(^{347}\) Tuaua Motion to Dismiss, \textit{supra} note 79, at 14.


\(^{349}\) Manua Cession, \textit{supra} note 19.

\(^{350}\) At least for the people of Manua. The Cession of Tutuila and Aunuu does not contain such language.

\(^{351}\) See \textit{Statement of Chief Liu}, 1930 Hearings, \textit{supra} note 80, at 229.

\(^{352}\) U.S. CONST. amend. XIV, § 1.
In the *Tuaua* case, the defendants’ argument hinges on the phrase “in the United States,” arguing that American Samoa is not part of the United States for purposes of the Constitution. However, the definition of “United States” is not as clear as the defendants would make 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.” Prior to the Insular Cases, it was well settled that the “United States” included all possessions, including districts and territories. The Insular Cases described a new category of unincorporated territories that Justice White described as “foreign to the United States in a domestic sense.”

Citing Justice Brown’s opinion in *Downes* and a series cases concerning the Philippines, the *Tuaua* defendants claim 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. 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. 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.

The *Tuaua* defendants heavily emphasize that *Rabang*’s conclusion has been repeated in many other circuits. 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. The Third Circuit did not bother to do any analysis at all, and simply cited *Rabang* to issue its opinion. The D.C. Circuit cited these prior cases to reach the same conclusion. And the *Tuaua* defendants now cite them all to bolster their argument. They also cite 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. *Eche* relied entirely on *Rabang* and Justice Brown’s arguments.

The problem, of course, is that these cases and the defendants’ argument in *Tuaua*, all rest on the premise that Justice Brown’s opinion in *Downes* is 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

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359 *Id.*
360 Valmonte v. Immigration & Naturalization Service, 136 F.3d 914, 918-919 (2d Cir. 1998); Nolos v. Holder, 611 F.3d 279, 282-284 (5th Cir. 2010).
364 *Eche v. Holder*, 694 F. 3d 1026 (9th Cir. 2012).
365 *Id.* at 1031.
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 paper, but it bears repetition and emphasis since his opinion is repeatedly cited as the law of Downes.366

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,367 they were not for the Revenue Clause.368 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.369

The text of the Fourteenth Amendment does not provide many answers either. The citizenship clause distinguishes between the “United States” and individual “States.”370 Most of the prohibitions found in the Amendment relate specifically to the States, so that “No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States.”371 Similarly, Due Process and Equal Protection are not to be infringed by “any State.”372

It is clear that the term “State” only refers to states, not other entities under U.S. sovereignty like territories.373 That there is a difference between the Constitution’s references to “States” versus “United States” has long been recognized.374 Yet the courts have also held that Due Process and Equal Protection do apply to the territories, even though they are not states.375 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,376 and the right to habeas corpus to a military base in Cuba.377

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

366 J. 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. Many citations, in the case law and the scholarship, attributed to Justice White are actually from Justice Brown’s opinion.
370 U.S. CONST. amend. XIV, § 1.
371 Id.
372 Id.
375 See e.g., Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 600 (1976); Wabol v. Villacrusis, 958 F. 2d 1450 (9th Cir. 1990); Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10 (App. Div. 1980).
376 Reid v. Covert, 354 U.S. 1 (1957).
be relevant to whether the citizenship clause applies to the territories. The boundaries of the United States for purposes of citizenship will 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.

1. Is American Samoa Incorporated?
American Samoa is generally recognized as unincorporated. None of the parties in the Tuaua case are arguing that American Samoa has become incorporated, or that any change in the political status has occurred, or is desired. The United States government recognizes the unincorporated status of the territory 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 organized act coupled with citizenship will suffice for incorporation. None of the federal laws concerning American Samoa even hint at an intent to incorporate. What is less clear is 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 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. The chiefs of Tutuila and Aunu’u signed the Instrument of Cession in April 1900, and the chiefs of Manu’a signed their Instrument in 1904. Congress ratified the Instruments of Cession in 1929. The Navy retained absolute control over the territory until it was transferred to the administration of the Department of Interior in 1951.

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 organized act in 1950. Cuba was under a U.S. military government from 1898 until independence in 1902. 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

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381 Kent, supra note 25, at 169.
382 Tutuila Cession, supra note 18.
383 Manua Cession, supra note 19.
384 Ratification Act, supra note 26.
385 Exec. Order No. 10,264, supra note 27.
386 Kent, supra note 25, at 167-168.
387 Id. at 121.
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. This type of distinction sounded very similar Justice White’s opinion in Downes, but with a very important exception. Because Cuba was run by a military government, 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.

Similar discussions were had 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. 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.

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. American Samoa’s federal laws do not mention incorporation at all. However, as early as 1975, it was described as unincorporated by the courts. 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.

2. 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 non-fundamental, remedial right. However, since his opinion was not controlling, the question may still be reviewed.

389 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, 128 S. Ct. 2229 (2008).
391 Id. at 172.
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.” 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 described citizenship as a “fundamental right” that is not subject to control by the general powers of the U.S. Government. 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 another group of citizens their citizenship.” The Court explained that the Fourteenth Amendment was specifically designed to take that power from Congress. 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. Importantly, citizenship for the Greeks contained both the membership in the polity, but also the possibility of some public action, such as voting or holding office. 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. Occasionally, Rome would even grant foreigners Roman citizenship or confer it upon conquered territory, but created a series of lower class citizenship classifications for these groups. Medieval Europe’s citizenship was broken down according to the kings, lords, parishes, and even guilds to which an individual was subject.

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. A person born in France to non-French parents may only be citizens when they reach 18, have lived in France for five years, and committed no crimes. 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

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399 *Id.*
401 *Id.* at 9-10.
402 *Id.* at 8 (The classes were the potestas (the people), the imperium (magistrates) and the auctoritas (the Senators)).
403 *Id.* at 21 (statuses included civis, Latinus, civis sine suffragio, and socius iniquo foedu).
404 *Id.* at 36-37.
406 Kerber, *supra* note 111, at 834.
changed in 1999 to permit birthright citizenship if at least one parent was a legal resident of Germany and in the country for at least eight years.  

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

Today, all free governments understand civil rights within the framework of citizenship. As one commenter put it, “citizenship is the right to have rights.” 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. The 1948 Universal Declaration of Human Rights declared that “everyone has the right to a nationality.” The U.N. Convention Relating to the Status of Stateless Persons provided a framework of protection for those without a nationality. The international community widely 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. The distinction between a citizen and a national is procedural, not substantial. The Tuaua defendants 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.

407 Staatsangehörigkeitsgesetz [StAG] [Nationality Act] May 21, 1999 § 4 (Germany). 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
408 William Blackstone, 1 Commentaries *366.
409 Inglis v. Sailor’s Snug Harbor, 28 U.S. 99 (1830).
411 Pujol, supra note 144, at 8.
Of course, the plaintiffs could counter that a multi-tiered system of citizenship is anathema to the American concept that “all men are created equal.” 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. While a U.S. national status may technically qualify as fulfilling the “fundamental rights” test in an international sense, a court may decide that it is just too contrary to the values of this country to continue.

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

Even if the court determines 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 – in this case the Tuaua defendants. The presumption is that the Constitution 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. The Tuaua defendants would need to argue 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 Tuaua defendants 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 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. Instead, the court may 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 have so far declined to argue under the “impractical and anomalous” test. Similarly, Rep. Faleomavaega does not make any impracticality claims. His arguments rest almost entirely on the fear of anomalous effects to the culture.

It is unlikely that the defendants will make any arguments regarding impracticality. Quite the contrary, American Samoans would be welcome 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 any other U.S. jurisdiction. Samoa’s culture has not prevented an American education system, a republican system of government modeled on the United States, or a

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416 The Declaration of Independence para. 2 (U.S. 1776).
417 Karst, supra note 415, at 6-7.
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 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.

4. 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. 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, and the right to keep their property according to Samoan custom. The Tuaua defendants would have to argue that birthright citizenship would be anomalous to American Samoa, and 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.” Change always brings with it 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 defendants did not make much of an anomalous argument, but Rep. Faleomavaega’s amicus briefs very strongly warn 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 will wipe away Samoa’s unique culture.

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 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, as do the Miranda rules, even if the Fifth Amendment’s non-fundamental right to a grand jury indictment does not. Therefore, application of the citizenship clause of the Fourteenth Amendment will not automatically apply the other provisions of the Amendment.

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420 See Wabol v. Villacrusis, 958 F. 2d 1450, 1462 (9th Cir. 1990).
421 Tutuila Cession, supra note 18, at § 3.
422 Manua Cession, supra note 19.
424 Eni Amicus, supra note 51, at 13.
426 Am. Samoa Gov’t v. Pino, 1 Am. Samoa 3d 186 (1997).
427 Ocampo v. United States, 234 U.S. 91, 98 (1914).
Second, Due Process does not apply Constitutional provisions to the territories, only 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. 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.

Citizenship would not cause the domino effect of Constitutional application that Rep. 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 paper will consider two of the main arguments made by Rep. Faleomavaega as to why citizenship would erode the *fa'asamoa*.

**Granting Citizenship Would Change the Political Status of the Territory**

Rep. Faleomavaega argues that granting citizenship to the people of American Samoa would be equivalent to shifting the political status to an incorporated territory. 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 *fa'asamoa*. Fundamentally, he posits 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. While this was a change in political status, it was the cause of citizenship, not the result. Citizenship without an organic act would not suddenly organize the territory since organization by its very definition is 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. 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

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429 See *N. Mar. I. 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.”); and *King v. Morton*, 520 F. 2d 1140, 1158 (D.C. Cir. 1975), remanded sub nom. *King v. Andrus*, 452 F. Supp. 11 (D.C. Cir. 1977).
431 *Id.*
433 *Balzac v. Porto Rico*, 258 U.S. 298, 311-313 (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.”)
anomalous for the court to overturn the United States’ promise of cultural protections. 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.

Citizenship Implies Equal Protection, Which the Fa’asamoa Cannot Survive

Rep. Faleomavaega also argues that equal protection is implicit in citizenship, a belief he no doubt adopted from the conclusions of a 1961 Senate study mission. 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, so the argument goes, will automatically strip the territory of its cultural traditions, since many of them are couched in terms of race. 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; Oyama v. California prohibited ancestry-based property ownership rules; and Shelley v. Kraemer prohibited racially restrictive covenants in private sales of property.

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. 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.

The first assumption, that Equal Protection does not already apply, is incorrect. In Examining Board of Engineers v. Flores de Otero, the Supreme Court held that equal protection is a fundamental right that does apply to the territories. 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

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434 See Wabol v. Villacrusis, 958 F. 2d 1450 (9th Cir. 1990).
435 Eni Reply, supra note 51, at 4.
436 1961 Study Mission, supra note 76, 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.”).
437 Eni Amicus, supra note 51; and Eni Reply, supra note 51, at 4-8.
438 Buchanan v. Warley, 245 U.S. 60 (1917).
442 Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 600 (1976).
clauses, but declined to make a determination about which was the source.\textsuperscript{443} Instead, the Court held that it did not matter, since they could both be applied to the territories.\textsuperscript{444} American Samoa has already determined itself to be subject to Equal Protection. In \textit{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.\textsuperscript{445} Specifically, the court was reviewing the law prohibiting those who have less than one-half Samoan blood from land ownership.\textsuperscript{446} 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.\textsuperscript{447}

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.”\textsuperscript{448} 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 no.”\textsuperscript{449} 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 concerned.\textsuperscript{450} Though not citing it, the High Court mirrored the \textit{Flores} decision in not recognizing a difference between Fifth Amendment and Fourteenth Amendment guarantees of equal protection beyond review standards.\textsuperscript{451}

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.\textsuperscript{452} Similar to \textit{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.\textsuperscript{453} 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.\textsuperscript{454}

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\textsuperscript{443} Id. at 601.
\textsuperscript{444} Id.
\textsuperscript{445} 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.
\textsuperscript{446} Id. at 11 (citing 27 ASC 204(b). The statute was amended and moved to AM. SAMOA CODE ANN. § 37.0204(b)).
\textsuperscript{447} Moon v. Falemalama, 4 Am. Samoa 836 (1975).
\textsuperscript{448} Craddick, 1 Am. Samoa 2d at 12.
\textsuperscript{449} Id. at 12.
\textsuperscript{450} Id. at 13 (citing Loving v. Virginia, 388 U.S. 1 (1967)).
\textsuperscript{451} See Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 601 (1976).
\textsuperscript{452} Craddick, 1 Am. Samoa 2d at 12.
\textsuperscript{453} Id. at 13.
\textsuperscript{454} Id. at 14.
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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. The appellants argued that they were denied equal protection because American Samoa did not have an Article III court. 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.

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 substantial right they fall under. So the procedural right to a jury trial did not extend to the territories along with the fundamental right of Due Process. And the procedural right to purchasing land did not extend to the territories along with the fundamental right of Equal Protection.

Thus, the assumption that Equal Protection does not already apply to the territories is incorrect. So is the second assumption that the fa’asamo 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.

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’asamo. Professor Stanley Laughlin concluded that territorial cultures can sustain many Constitutional challenges. Daniel Hall comes to a similar conclusion, specifically determining that the Samoan curfew, or sa, would survive. 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. Even Rep. 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.

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

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456 Id. at 384-385.
457 Id. at 385-386.
458 Wabol v. Villacrusis, 958 F. 2d 1450, 1460 n.19 (9th Cir. 1990).
459 Id. (9th Cir. 1990) (citing N. Mar. I. v. Atalig, 723 F. 2d 682, 689 (9th Cir. 1984)).
460 Id. at 1462.
462 Laughlin, Cultural Preservation, supra note 166.
463 Hall, supra note 271.
465 Eni Amicus, supra note 51, at 7; and Eni Reply, supra note 51 (“While Congressman Faleomavaega believes strongly that the preservation of fa’a Samoa 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”).

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the conditions of cultural protection found in the Covenant with CNMI.\textsuperscript{466} \textit{Hodel} agreed that the Instruments of Cession in American Samoa evidenced a legitimate government policy in protecting the \textit{fa’asamo}.\textsuperscript{467} 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.\textsuperscript{468} 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.\textsuperscript{469} 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 backward to ensure that the pillars of the \textit{fa’asamo} 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.

\textbf{Conclusion}

The D.C. Circuit is going to be forced to consider the Incorporation Doctrine in deciding the \textit{Tuaua} case. The plaintiffs’ argument that \textit{jus soli} should trump over a century of the Incorporation Doctrine, with no regard for the cultural protections within the territories, is potentially harmful to the territories. While the Insular Cases were originally a colonial denial of rights, 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 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 \textit{Downes} is unacceptable in this day and age. The defendants’ argument is entirely based on the premise that if the United States is not constitutionally forced to provide citizenship, it cannot. The court should push them to explain the government’s interest in keeping American Samoans in their second class status.

\textsuperscript{466} Wabol v. Villacrusis, 958 F. 2d 1450, 1462 (9th Cir. 1990).
\textsuperscript{467} Corp. of Presiding Bishop v. Hodel, 830 F. 2d 374, 386 (D.C. 1987).
\textsuperscript{468} \textit{Downes} v. \textit{Bidwell}, 182 U.S. 244, 332 (1901) (White, J., concurring).
\textsuperscript{469} LEIBOWITZ, DEFINING STATUS, supra note 6, at 437.
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 Black’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 ever 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 court can still question 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 court can use 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 court should order an evidentiary hearing as to the potential impracticalities and anomalies of applying citizenship to American Samoa. Likely, it will find that there is no impracticality that has been or can be cited that would make citizenship for American Samoans difficult to carry out. Neither 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’asamo* 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, so the court should do.

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 court can and should utilize the Incorporation Doctrine to hold that the citizenship clause of the Fourteenth Amendment applies to American Samoa, and that those born in American Samoa are U.S. citizens.

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* defendants’ 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.\(^{470}\) 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.\(^{471}\) This insurgency, which lasted until 1902, actually killed more Americans than the entire Spanish-American War.\(^{472}\) 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.\(^{473}\) In 1916, Congress passed the Autonomy Act, the preamble of which stated, “[I]t 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.”\(^{474}\) This was followed up in 1934 with the Philippine Independence Act which set forth the procedures that would lead to an independent government, which was accomplished with the President’s relinquishment of all claims of sovereignty in 1946.\(^{475}\)

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.\(^{476}\)

American Samoa, on the other hand, is not on a temporary transitional path towards independence or statehood.\(^{477}\) 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.

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

\(^{470}\) 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 25, at 118-119.

\(^{471}\) Id. at 120.


\(^{473}\) Kent, supra note 25, at 120.

\(^{474}\) Cabebe v. Acheson, 183 F. 2d 795, 798-799 (9th Cir. 1950) (citing the Jones-Shafroth Act (Jones Act), ch. 145, 39 Stat. 951 (1917)).

\(^{475}\) Id. at 799.

\(^{476}\) 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”).

\(^{477}\) Nor are Guam, CNMI, the USVI, or Puerto Rico.
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 trial court should find in favor of the plaintiffs in the Tuaua case; not by 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.