GRANTING SAMOANS AMERICAN CITIZENSHIP WHILE PROTECTING SAMOAN LAND AND CULTURE

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ABSTRACT

American Samoa is the only inhabited U.S. territory that does not have birthright American citizenship. Having birthright American citizenship is an important privilege because it bestows upon individuals the full protections of the U.S. Constitution, as well as many other benefits to which U.S. citizens are entitled. Despite the fact that American Samoa has been part of the United States for approximately 118 years, and the fact that American citizenship is granted automatically at birth in every other inhabited U.S. territory, American Samoans are designated the inferior quasi-status of U.S. National.

In 2013, several native Samoans brought suit in federal court arguing for official recognition of birthright American citizenship in American Samoa. In Tuaua v. United States*, the U.S. Court of Appeals for the D.C. Circuit affirmed a district court decision that denied Samoans recognition as American citizens. In its opinion, the court cited the Territorial Incorporation Doctrine from the* Insular Cases *and held that implementation of citizenship status in Samoa would be "impractical and anomalous" based on the lack of consensus among the Samoan people and the democratically elected government. In its reasoning, the court also cited the possible threat that citizenship status could pose to Samoan culture, specifically the territory's communal land system. In June 2016, the Supreme Court denied certiorari, thereby allowing the D.C. Circuit's decision to stand as legal precedent.*

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Despite the D.C. Circuit's conclusion, application of American citizenship status in American Samoa neither would be "impractical and anomalous," nor would the grant of birthright citizenship pose a threat to the territory's culture or communal land system. Furthermore, based on relevant legal precedent and policy considerations, any reliance on the Insular Cases *or the Territorial Incorporation Doctrine as reliable legal precedent is incorrect and misguided. Those born in American Samoa should, and deserve to, be recognized as U.S. citizens at birth.*

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INTRODUCTION

Fanuatanu Mamea was born in the U.S. Territory of American Samoa and is a decorated Vietnam War veteran who faithfully served in the U.S. Army from 1964 until being honorably discharged in 1984.[1] Despite his courageous service in the U.S. army, Mr. Mamea is not considered a U.S. citizen; instead, he is designated a non-citizen U.S. National.[2] Early in his military career, Mr. Mamea was denied admission to the U.S. Special Forces due to his status as a "non-citizen."[3] In later years while stationed on the U.S. mainland, Mr. Mamea was also denied the right to vote in federal and state elections.[4] Although Mr.

1. *Meet the Plaintiffs*, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/plaintiffs (last visited Mar. 9, 2018) [hereinafter *Meet the Plaintiffs*].

2. *Id.*

3. *Id.*

4. *Id.*

Mamea currently lives in American Samoa, he needs to travel to Hawaii to a U.S. Veterans hospital to receive treatment for combat injuries sustained during his military service in the Vietnam War.[5] Given his status as a non-citizen U.S. National, however, U.S. immigration law makes it very difficult for him to sponsor his wife, so that she can join him on these medical visits.[6] Mr. Mamea hopes that one day his three young children will have the same opportunities as other American children, and that they will not have to face his struggles as a U.S. National.[7]

In 2012, as a result of these concerns, Mr. Mamea and other Samoans seeking recognition as U.S. citizens, brought suit against the U.S. government, under the Citizenship Clause of the Fourteenth Amendment and the doctrine of *jus soli*, claiming that they were entitled to automatic citizenship by virtue of their birth in a U.S. territory.[8] Under the common law, *jus soli* stands for the principle that anyone born within the territory of the nation is automatically a citizen of that nation.[9] The plaintiffs' complaint alleged similar hardships as Mr. Mamea, including ineligibility for federal financial aid for college education, ineligibility for federal employment, and the deprivation of the right to keep and bear arms.[10] Despite the fact that those born in every other inhabited U.S. territory are automatically granted American citizenship at birth,[11] as well as the fact that

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5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff'd*, 788 F.3d 300, 303–04 (D.C. Cir. 2015).

9. *See* Rogers v. Bellei, 401 U.S. 815, 828 (1971) ("We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status . . . ."); *see also* Tuaua, 788 F.3d at 304 (recognizing the doctrine of *jus soli*, but refraining from applying it to U.S. territories); Lisa Maria Perez, Note, *Citizenship Denied: The* Insular Cases *and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1029 (2008) ("[J]us soli . . . provides that all persons born on U.S. territory and not subject to the jurisdiction of another sovereign are native-born citizens.").

10. Brief of Plaintiffs-Appellants at 59, Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272); *see also Meet the Plaintiffs*, *supra* note 1.

11. Benjamin S. Morrell, *Some More for Samoa: The Case for Citizenship Uniformity*, 9 TENN. J.L. & POL'Y 475, 475–76 (2014); *see Citizenship Status in Territories of the United States*, BALLOTPEDIA, https://ballotpedia.org/Citizenship_status_in_territories_of_the_United_States (last visited

Samoa has been part of the United States for 118 years, and that Samoans enlist in the military at one of the highest rates of any jurisdiction, Samoans such as Mr. Mamea are required to naturalize like any other immigrant before they can be recognized as U.S. citizens.[12]

American citizenship is an important privilege and has been referred to as the "right to have rights."[13] It bestows upon individuals important "rights and protections under the U.S. legal framework."[14] Unlike those born in American Samoa, all individuals born in other populated U.S. territories and states are entitled to this privilege by virtue of their birth in a U.S. jurisdiction. Samoans, however, are not afforded this same privilege because they are not recognized as citizens, and instead are designated the inferior status of U.S. National.[15] Samoans are, therefore, deprived of the same constitutional protections and federal government aid to which all U.S. citizens are entitled.[16] As a quasi-class of U.S. citizens, Samoans are prohibited from voting in state and federal elections, owning guns, serving on juries, and holding public office.[17] Despite enlisting and excelling in the U.S. military, many Samoans, like Mr. Mamea, are prevented from becoming officers and considered ineligible for certain military promotions unless they naturalize.[18]

While many Samoans desire the institution of automatic,

Mar. 9, 2018).

12. *See About Tuaua v. United States*, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/case_overview (last visited Jan. 27, 2018).

13. *See* Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) ("Citizenship is man's basic right for it is nothing less than the right to have rights."), *overruled by* Afroyim v. Rusk, 387 U.S. 253, 268 (1967); *see also* Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi's Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131, 134 (2007); Jon B. Hultman, *Administrative Denaturalization: Is There "Nothing You Can Do That Can't Be (Un)done"?*, 34 LOY. L.A. L. REV. 895, 900 (2001) ("[W]hatever significance or lack thereof U.S. citizenship may have held at the time of the framing of the Constitution, it is clear that the distinction has acquired critical importance through successive acts of Congress and Supreme Court rulings in the twentieth century.").

14. Claire Benoit, *Force and Effect: A Look at the Passport in the Context of Citizenship*, 82 FORDHAM L. REV. 3307, 3311–12 (2014); *see also* Hultman, s*upra* note 13, at 900 n.21.

15. Morrell, *supra* note 11, at 479.

16. *Id.* at 479–80.

17. *Id.* at 480.

18. *Id.* at 479–80.

birthright citizenship in American Samoa, a significant number of Samoans do not desire citizenship status.[19] This stems from the fear that granting U.S. citizenship in Samoa may lead to a broad application of the U.S. Constitution and cause an erosion of fundamental Samoan cultural values, ultimately leading to the downfall of the territory's communal land system.[20] In fact, Mr. Mamea faced significant backlash from the Samoan community after filing his suit, *Tuaua v. United States*, without first consulting or seeking the support of the wider Samoan community.[21] The main source of this backlash stemmed from the fear that if the U.S. Constitution were to apply in American Samoa, specifically the Due Process and Equal Protection Clauses, it might be found that the cultural communal land system that has existed in the country for hundreds of years would be declared unconstitutional.[22] Such fears, however, are a significant misconception. While giving American Samoans recognition as citizens may lead to the possible application of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the application of these provisions is unlikely to lead to the downfall of the Samoan communal land system or valuable Samoan culture.[23]

This Note will demonstrate that the people of American Samoa are entitled to birthright American citizenship, and as citizens are entitled to the same constitutional protections that apply to any other U.S. citizen.[24] Part I of this Note will provide a

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19. *Id.*

20. *See* Tuaua v. United States, 788 F.3d 300, 310 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); Reply of the Honorable Eni F.H. Faleomavaega as Amicus Curiae in Support of Defendants at 6, *Tuaua*, 788 F.3d 300 (No. 12-1143-RJL.) [hereinafter Faleomavaega I]; Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 138 (2013).

21. Morrison, *supra* note 20, at 82.

22. Brief for Intervenors or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 27, *Tuaua*, 788 F.3d 300 (No. 13-5272) [hereinafter Faleomavaega II]; Morrison, *supra* note 20 ("[C]itizenship could act as the first domino, leading to application of the entire Fourteenth Amendment including Equal Protection, and through the Due Process Clause incorporate the entire Bill of Rights, which would wipe away Samoa's unique culture.").

23. *See infra* Sections IV.B., IV.C.

24. *See generally* Reid v. Covert, 354 U.S. 1, 74 (1957) (White, J., concurring) ("[T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over

brief history of the status of American Samoa as a U.S. territory, as well as explain how Samoan culture is strongly intertwined in the everyday lives and identities of modern Samoans.

Part II will explain how citizenship currently functions within U.S. territories, including American Samoa, and examine some of the challenges Samoans presently face with U.S. National status. This Part will also provide an overview of case law relating to U.S. territories, specifically focusing on what has come to be known as the Territorial Incorporation Doctrine, and how courts decide whether the U.S. Constitution, or a particular provision of it, will apply to a specific territory.

Part III will explain, based upon relevant legal precedent and sound policy considerations, that the Territorial Incorporation Doctrine should no longer apply in American jurisprudence, but that the "impractical and anomalous" test should be retained as the sole basis for determining whether a constitutional provision should apply in Samoa and other territories.

Part IV will explain how granting Samoans U.S. citizenship would not be impractical and anomalous to the territory's culture or communal land system. This Part will also analyze the territory's communal land system under both the Due Process Clause and the Equal Protection Clause, thereby addressing concerns that application of either constitutional provision would lead to the decline of territory's communal land system or culture. In doing so, this Note will provide insight as to how the U.S. courts can grant Samoans the U.S. citizenship that Fanuatanu Mamea and many other Samoans desperately desire while upholding and protecting core Samoan cultural values and the territory's communal land system.

Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.").

I. HISTORY AND CULTURE OF AMERICAN SAMOA

A. Historical Backdrop of American Samoa and the Creation of the Territory

The Samoan islands were first inhabited by groups of Polynesian settlers, which controlled the island for many years until the arrival of the first European explorers and settlers.[25] The first European settlers to arrive on the island were French explorers, followed by the British in 1791, the Germans in 1824, and finally the Americans in 1839.[26] The primary motivation for U.S. involvement in Samoa centered on the islands' strategic value in the southern Pacific Ocean, particularly Pago Harbor, which functioned as an important coaling station.[27] In the years that followed, the United States and various European powers, including Germany and Britain fought to assert their rights over the islands.[28] Eventually, the three major parties—the United States, Germany, and Britain—hesitantly set aside their differences and agreed to divide administrative control over Samoa.[29] With the Tripartite Convention in 1899, the United States and Britain received control over Eastern Samoa, while Germany retained control of Western Samoa.[30] Germany lost control of Western Samoa in the aftermath of World War I, with the territory gaining its independence in 1962.[31] Unlike Germany, however, the United States would further solidify its control over Eastern Samoa, which remains under American control.[32]

The first, and perhaps most important, component of asserting U.S. control was the Instruments of Cession ("Instru-

25. Morrison, *supra* note 20, at 75.

26. *Id.*

27. *Id.* 74–75.

28. *Id.* at 75–76.

29. *Id.* at 76.

30. Morrison, *supra* note 20, at 76; Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 497 (2002).

31. Morrison, *supra* note 20, at 76.

32. *See id.* at 77–78.

ments"), which were signed by the U.S. government and the Samoan high chiefs in 1900 and 1904, and later ratified by Congress in 1929.[33] These Instruments granted the United States sovereignty and control over the islands of Eastern Samoa, but specifically protected the Samoan culture and communal land system, which existed for many years prior to U.S. involvement.[34] The agreement also preserved the power of the Samoan chiefs, known as the "matai."[35] After the Instruments' signing, the U.S. Navy assumed control over the island and protected the Samoan institutions and culture, but gave Samoans an inconsequential voice in the implementation of the Instruments.[36] This system of administration existed until 1951, when this administrative power was then transferred to the U.S. Department of the Interior.[37] By executive order, the Secretary of the Interior granted American Samoa a constitution, which gave the Samoan people much more control over the territory by permitting the election of a governor and the appointment of a legislature.[38]

B. Samoan Culture, the "Fa'asamoa," and the Samoan Way

Understanding Samoan culture is equally important as understanding U.S. involvement in American Samoa to recognize why some Samoans have concerns regarding the application of the Equal Protection Clause and Due Process Clause of the U.S. Constitution to their cultural practices. For hundreds of years, Samoan life has largely been defined by the "fa'asamoa"—the

33. *See Samoa, American*, ENCYCLOPEDIA.COM, http://www.encyclopedia.com/places/australia-and-oceania/pacific-islands-political-geography/american-samoa (last visited Jan. 26, 2018); *Treaties, Cessions, and Federal Laws*, THE AM. SAM. B. ASS'N, http://www.asbar.org/archive/Newcode/treaties.htm (last visited Mar. 7, 2018) [hereinafter *Treaties*].

34. *See* Morrison, *supra* note 20, at 77; Uilisone Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 ASIAN-PAC. L. & POL'Y J. 246, 263 (2009).

35. *See* Tua, *supra* note 34; Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325, 341 (2008) ("A matai must be at least one-half Samoan blood and have been born either in American Samoa or, if his parents temporarily resided outside of American Samoa, on American soil.").

36. Morrison, *supra* note 20, at 77.

37. *Id.* at 78; *Samoa, American*, *supra* note 33.

38. Morrison, *supra* note 20, at 78.

Samoan way.[39] The Samoan way functions mainly as a mutually dependent relationship between the "aiga" (family) and the "matai" (chief).[40] As part of the communal land system the aiga selects a matai, whose duties include holding title to communal land and assigning communal land to family members.[41] The Samoan High Court has described "the 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.[42]

As such, the role of the matai is widely recognized as the foundation of the communal land system, in which 90% of Samoan land is currently held.[43] The success and preservation of the system rests in the ability of the aiga and matai to be able to exercise their control over the land.[44] Presently, the law in Samoa requires that to obtain the title of matai, an individual "must have at least one-half Samoan blood," and no land can be owned under the communal land system by anyone with less

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39. *Id.*; Tua, *supra* note 34, at 267.

40. Morrison, *supra* note 20, at 78; Tua, *supra* note 34, at 268.

41. Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea – and Constitutional*, 27 U. HAW. L. REV. 331, 338 (2005) ("Modern matai functions include: (1) allocation of 'aiga land to members for house sites and cultivation . . . ."); Morrison, *supra* note 20, at 78.

42. Morrison, *supra* note 20, at 79 (quoting Poumele v. Ma'ae, 2 Am. Samoa 2d 4, 5 (App. Div. 1984)).

43. *Id.* at 80; *see also* Weaver, *supra* note 35, at 343.

44. Morrison, *supra* note 20, at 81; Weaver, *supra* note 35, at 343.

than half "native blood."[45] The Samoan people sought to protect this integral part of Samoan culture by instituting the Instruments in the early 1900s.[46]

II. APPLICATION OF THE U.S. CONSTITUTION AND CITIZENSHIP TO AMERICAN SAMOA AND OTHER U.S. TERRITORIES

A. The Problems with U.S. National Status and the Challenges Samoans Face

As of this writing, "American Samoa is the only U.S. territory without U.S. citizenship, primarily because it is the only remaining unorganized territory."[47] Congress must pass an organic act that establishes a government in that location before a territory is considered "organized."[48] Usually, such acts will grant a territory "statutory citizenship," which is separate and distinct from "constitutional citizenship" guaranteed by the Fourteenth Amendment.[49] This distinction is important because any U.S. territory can have their "statutory citizenship" revoked by Congress at any time, whereas Congress cannot revoke constitutional citizenship because it is guaranteed under the Fourteenth Amendment.[50]

The term U.S. National was first used to describe those who were born within U.S. territories, but not granted full citizenship status. Today, however, the term exclusively applies to those born in American Samoa, which is the only inhabited U.S. territory without birthright U.S. citizenship.[51] As U.S. Nationals,

45. Morrison, *supra* note 20, at 83.

46. *See* Tua, *supra* note 34.

47. Morrison, *supra* note 20, at 88; *see also* James R. Thornbury, *A Time for Change in the South Pacific?*, 67 REV. JUR. U.P.R. 1099, 1100 (1998).

48. Morrison, *supra* note 20, at 88.

49. *Id.* at 89; *see also* Perez, *supra* note 9, at 1067.

50. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("[A]side from the Fourteenth Amendment, Congress [does not have] any general power, express or implied, to take away an American citizen's citizenship without his assent."); Perez, *supra* note 9, at 1067 ("[T]he Supreme Court has determined that the Fourteenth Amendment does not always protect statutory citizens from denaturalization. In fact, statutory citizenship has long been subject to revocation under certain conditions.").

51. Morrison, *supra* note 20, at 84.

Samoans are granted some of the same privileges as U.S. citizens, including the rights to travel throughout the United States, serve in the U.S. armed forces, and have representation in the U.S. House of Representatives.[52]

Samoans face numerous challenges as U.S. Nationals. For immigration purposes, for instance, they are treated as if they have emigrated from a foreign country and must undergo a lengthy and expensive naturalization process to become recognized as U.S. citizens.[53] In addition, while Samoa is granted representation in Congress, it only receives one representative with no voting power.[54] Samoans living on the U.S. mainland may face challenges to basic rights and privileges, with some states denying them the right to vote, hold public office, serve on juries, or bear arms.[55] As U.S Nationals, Samoans are also excluded from many job opportunities requiring U.S. citizenship, including numerous federal, state, and municipal jobs.[56] Perhaps the most shocking denial of all is that—despite their immense dedication to U.S. military service—Samoans are denied the right to become officers and serve in the U.S. Special Forces, unless they successfully apply for U.S. citizenship.[57] As such, the only way Samoans and others living in U.S. territories can become permanently secure in their connection to the United States and alleviate any challenges they face as U.S. Nationals is by requesting the U.S. government and courts to grant them constitutional citizenship by virtue of their birth in a U.S. territory.

B. Application of Citizenship to U.S. Territories: From United States v. Wong Kim Ark *to the* Insular Cases

Traditionally, citizenship in the United States was based on the English common law doctrine of *jus soli*.[58] *Jus soli* provides

52. Morrell, *supra* note 11, at 479; Morrison, *supra* note 20, at 89.
53. Morrell, *supra* note 11, at 480; Morrison, *supra* note 20, at 85.
54. Morrison, *supra* note 20, at 84.
55. *Id.*
56. *Id.*
57. *Id.* at 85; Morrell, *supra* note 11, at 480.
58. Morrell, *supra* note 11, at 478; Morrison, *supra* note 20, at 91.

that anyone born within the territorial domain of the sovereign nation, and not subject to the exclusive jurisdiction of another state, is a citizen of that sovereign nation.[59] This doctrine was reinforced when Congress passed, and the states ratified, the Fourteenth Amendment, which declared, "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."[60] The Fourteenth Amendment was bolstered by the Supreme Court's opinion in *United States v. Wong Kim Ark*.[61] In *Wong Kim Ark*, the Supreme Court held that citizenship by birth and principles of *jus soli* were affirmed "in the most explicit and comprehensive terms."[62] The relatively straightforward doctrine of *jus soli* regarding citizenship status and the application of the U.S. Constitution to territories, however, became more complex when the Supreme Court decided a series of cases in 1901 known as the *Insular Cases*.[63]

In the months and years leading up to these decisions, the United States had been expanding its influences abroad to various island territories including American Samoa, as well as other islands in the Pacific.[64] The legal problem that the courts faced arose mainly from suspicions from a portion of U.S. expansionists who believed that the racial and ethnic inferiority of the alien races inhabiting these islands made them unfit for U.S. citizenship.[65] As such, this led some Americans to believe that the United States should not annex these new territories for fear that the uncivilized inhabitants would automatically become citizens.[66]

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59. Rogers v. Bellei, 401 U.S. 815, 828 (1971); *see also* Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); Morrell, *supra* note 11, at 478; Morrison, *supra* note 20, at 91; Perez, *supra* note 9, at 1029.

60. U.S. CONST. amend. XIV § 1.

61. 169 U.S. 649 (1898).

62. *Id.* at 675; *see also* Morrison, *supra* note 20, at 95–96.

63. *See* Morrell, *supra* note 11, at 480; Morrison, *supra* note 20, at 98.

64. *See* Morrison, *supra* note 20, at 96–98.

65. *See id.* at 97.

66. *See id.* at 97–98.

C. Application of the U.S. Constitution to the Territories, Including American Samoa, and How Downes v. Bidwell *Developed into* Tuaua v. United States

The U.S. Supreme Court responded to these concerns when it granted certiorari to the historic case of *Downes v. Bidwell*—known as one of the *Insular Cases*.[67] This case called for the Court to decide whether the U.S. Constitution applies in territories in the same manner that it applies to the states, and squarely addressed the application of citizenship through the Fourteenth Amendment.[68] Justice Henry Billings Brown, the tie-breaking vote and author of the Court's plurality opinion, indicated that the Constitution should only apply to the territories to the extent that Congress allows, with the caveat that once Congress applies a particular provision it cannot later revoke its application.[69] Justice Brown alluded that this power of Congress should not necessarily act as a permanent bar to application of the U.S. Constitution in the territories, and should not be deemed a permanent solution to constitutional issues arising in U.S. territories, stating:

> If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.[70]

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67. *Id.* at 98–99.

68. S*ee* Downes v. Bidwell, 182 U.S. 244, 251 (1901); *see also* Morrell, *supra* note 11, at 482; Morrison, *supra* note 20, at 99–100.

69. *See Downes*, 182 U.S. at 286–87; Morrison, *supra* note 20, at 100.

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

Notably, no other Justice joined Justice Brown's plurality opinion, as the relevant precedent came from Justice Edward D. White's concurring opinion, which two other Justices joined.[71]

In his concurrence, Justice White announced the Territorial Incorporation Doctrine, which stated that whether the Constitution fully applies to a particular territory depends upon the territory's status as "incorporated" or "unincorporated."[72] According to White's reasoning, if the territory was incorporated and destined for U.S. statehood, then the U.S. Constitution should apply in full force to that particular territory.[73] If the territory in question was unincorporated and not destined for statehood, however, then only those constitutional protections that are "fundamental rights" should apply to the territory.[74]

The Territorial Incorporation Doctrine became the cornerstone for determining whether and to what extent constitutional provisions should apply to a particular U.S. territory, including American Samoa.[75] The *New York Herald* described the decision as follows: "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."[76] Further casting doubt upon Justice White's rationale for the Territorial Incorporation Doctrine, was his, as well as the Court's, apparent personal bias toward foreign—and what he termed

71. Morrison, *supra* note 20, at 103–04.

72. *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 806–07 (2005); Laughlin, *supra* note 41, at 343; Pedro A. Malavet, *The Inconvenience of a "Constitution (That) Follows the Flag . . . but Doesn't Quite Catch Up with It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 MISS. L.J. 181, 228–29 (2010); Morrison, *supra* note 20, at 103.

73. Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 158 (2006).

74. Laughlin, *supra* note 41, at 343; Morrison, *supra* note 20, at 103; Tauber, *supra* note 73 ("Simply stated, the TID holds that the Constitution has full force and effect in incorporated territories; while in unincorporated territories, the Constitution does not fully apply.").

75. Malavet, *supra* note 72, at 238 ("[T]he Jones Act and in the process turned Justice White's concurrence in *Downes v. Bidwell* into normative constitutional doctrine, and still quite applicable precedent . . .").

76. *See* Morrison, *supra* note 20, at 100.

"alien"—cultures.[77] At one point, Justice White proclaimed, "I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution."[78] Even with the questions surrounding Justice White's reasoning, however, his opinion would become the foundational precedent for determining whether and to what extent the Constitution should apply in U.S. territories.[79]

Following *Downes*, the Supreme Court remained silent on the Territorial Incorporation Doctrine until 1957 when the Court granted certiorari in *Reid v. Covert*.[80] In *Reid*, the Court was confronted with the issue of whether a civilian living on a U.S. military base could be tried by a military tribunal without the privilege of a jury guaranteed to her under the U.S. Constitution.[81] In its decision, the Court seemed to chastise *Downes*, but did not overturn the Territorial Incorporation Doctrine.[82] Justice Hugo Black, as part of the plurality decision, did, however, express his aversion for the doctrine, calling it a "dangerous doctrine" that threatens to "destroy the benefit of a written Constitution and undermine the basis of our government."[83] Additionally, he criticized the doctrine for distinguishing between rights within the Constitution that he claimed were always intended by the framers to apply to all parts of the American jurisdiction. Specifically, he stated that "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

77. *See* Tauber, *supra* note 73, at 168 ("In addition to the faulty distinction between fundamental and procedural rights, the *Insular Cases* are plagued by racist discourse used by the Justices to justify the denial of rights to inhabitants of unincorporated territories.").

78. Downes v. Bidwell, 182 U.S. 244, 344 (1901).

79. *See* Morrison, *supra* note 20, at 103.

80. 354 U.S. 1 (1957).

81. *See id.* at 3; *see also* Tauber, *supra* note 73, at 172.

82. Morrison, *supra* note 20, at 109; *see also* Tauber, *supra* note 73, at 170 ("*Reid* is the closest the Court has ever come to overruling the *Insular Cases*, and with them, the TID.").

83. *Reid*, 354 U.S. at 14.

Federal Government by the Constitution and its Amendments."[84]

While Justice Black was particularly critical of the Territorial Incorporation Doctrine, the applicable precedent emerged from Justice Harlan's concurring opinion in which he endorsed the *Insular Cases* and *Downes* as good law.[85] In doing so, he also announced the impractical and anomalous test, stating:

> *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances . . . . [T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution . . . if the circumstances are such that trial by jury would be impractical and anomalous. In other words, what *Ross* and the *Insular Cases* hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas.[86]

In his concurring opinion, Justice John Marshall Harlan II laid out a framework in which fundamental rights applied automatically to all unincorporated U.S. territories consistent with the

84. *Id.* at 9.

85. *Id.* at 67 (Harlan, J., concurring) (refraining from discarding *Ross* and the *Insular Cases* as "historical anomalies").

86. *Id.* at 74–75.

Territorial Incorporation Doctrine.[87] Justice Harlan, however, added an additional prong, declaring that even if a right is not deemed fundamental, a court must still further examine the right and determine whether its application to the unincorporated territory would be impractical and anomalous.[88] If, after examining the "particular local setting, the practical necessities, and the possible alternatives," the answer was no, then the right in question should automatically apply to a given territory.[89] Given the divided opinion and the lack of consensus from the Court in *Reid*, the Territorial Incorporation Doctrine continued to survive in American jurisprudence.[90]

The first case to squarely address the application of constitutional provisions as they apply to American Samoa was *King v. Morton*.[91] In 1972, Jake King, a U.S. citizen that had been living in American Samoa for a number of years, was put on trial for failing to pay Samoan income taxes and was subsequently denied a request for a jury trial.[92] Mr. King appealed this denial to the U.S. Court of Appeals for the D.C. Circuit, asserting that as a U.S. citizen he was guaranteed a jury trial under the U.S. Constitution.[93] In its decision the court's opinion did not depend on its interpretation of the Territorial Incorporation Doctrine or its discussion of fundamental rights, but rather centered its analysis simply upon whether imposition of jury trials in Samoa would be "impracticable and anomalous."[94] The court did not reach the issue, but instead held that further evidentiary review of Samoan laws and customs was required by the trial court.[95] The D.C. Circuit remanded the case for further evidentiary presentation by the parties to determine whether application of the right to a trial by jury would be impractical and anomalous

87. Morrison, *supra* note 20, at 109.
88. *Id.*
89. *Id.* (quoting *Reid*, 354 U.S. 1, 75 (Harlan, J., concurring)).
90. Morrison, *supra* note 20, at 109.
91. 520 F.2d 1140, 1142 (D.C. Cir. 1975).
92. *Id.*
93. *Id.*
94. *Id.* at 1148; *see also* Morrison, *supra* note 20, at 111.
95. *King*, 520 F.2d at 1148.

to Samoan laws and customs.[96]

After further review, the trial court held that the evidence did not indicate that implementation of the right to a trial by jury in American Samoa would be "impracticable and anomalous" and held that King was entitled to the right to a trial by jury as a U.S. citizen living in American Samoa.[97] The key to the court's decision, however, was that it did not base its decision on the Territorial Incorporation Doctrine, lending further support for the idea that the court thought the principles of the doctrine should be abandoned.[98]

Following the trial court's decision in *King*, the Ninth Circuit applied the impractical and anomalous test in *Wabol v. Villacruisis*.[99] In *Wabol*, the court also indirectly addressed some concerns regarding the legality of the Samoan communal land system under the U.S. Constitution by ruling on the constitutionality of a similar land system that existed in the Commonwealth of the Northern Mariana Islands.[100] The Commonwealth government of the Northern Marianas regulated the alienation of local land to restrict the acquisition of long-term interests to persons of Northern Mariana Island descent.[101] In *Wabol*, the court considered "the validity under the federal constitution of the land alienation restrictions set forth in the Commonwealth constitution."[102] The Commonwealth Constitution, in effect, provides that "if a person sells land to a person who is not of Northern Marianas descent, that transaction never takes effect . . . ."[103] Considering both the Territorial Incorporation Doctrine and the impractical and anomalous test, the court defined the right at issue in the case as being "equal access to long-term interests in Commonwealth real estate," and asked whether this

96. *Id.*; *see also* Morrison, *supra* note 20, at 111.

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

98. *Id.*; *see also* Morrison, *supra* note 20, at 111 (explaining that the court only applied the impractical and anomalous test without reference to the principles of "fundamental" and "unincorporated territory").

99. 958 F.2d 1450, 1461 (9th Cir. 1990).

100. *Id.* at 1461–62.

101. *Id.* at 1451.

102. *Id.* at 1454–55.

103. *Id.* at 1463.

right was "a fundamental one which is beyond Congress' power to exclude from operation in the territory . . . ."[104] In analyzing the right, the court acknowledged the "vital role native ownership of land plays in the preservation of NMI social and cultural stability . . . ."[105] Similar to the communal land system in American Samoa, "the avowed motive of the drafters was 'to protect [the people] against exploitation and to promote their economic advancement and self-sufficiency' and to preserve the islanders' culture and traditions, which are uniquely tied to the land."[106]

In its decision, the court found that it would be impractical and anomalous to impose the Equal Protection Clause upon the Commonwealth of the Northern Mariana Islands to abolish its racial restrictions on the land because these land restrictions were terms of the covenant that led to the territory's annexation into the United States.[107] The court stated that "[i]t 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."[108]

Consistent with its approach in *Wabol*, the Ninth Circuit again in *Commonwealth of the Northern Mariana Islands v. Atalig*,[109] indicated willingness to defer to the cultural practices of a specific territory when enforcing constitutional provisions.[110] In *Atalig*, the court examined whether the right to a trial by jury set forth in the Sixth Amendment should be afforded to citizens of the Commonwealth of Northern Marianas.[111] The specific issue under review was whether a statute in the Northern Marianas, which confined the right to trial by jury to criminal cases punishable by "more than 5 years imprisonment or a $2,000 fine," violated the Sixth Amendment, absent independent action by

104. *Id.* at 1460.
105. *Id.* at 1461.
106. *Id.* at 1452.
107. *Id.* at 1461.
108. *Id.* at 1462.
109. 723 F.2d 682 (9th Cir. 1984).
110. *Id.* at 690.
111. *Id.* at 683.

Congress affording that right.[112] The court declined to apply a broad definition of "fundamental rights" to unincorporated U.S. territories because doing so would "deprive Congress of that flexibility" and instead "immediately . . . extend almost the entire Bill of Rights to such territories."[113] The court opined, "a cautious approach is also appropriate in restricting the power of Congress to administer overseas territories."[114]

The court noted that the "negotiated agreement defining the political relationship between the NMI and the United States"[115] specifically provided for circumvention of the right to trial by jury in certain circumstances.[116] Applying this reasoning, the court stated that the Northern Mariana Islands statute did not violate either the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment.[117] Unlike the court in *King*, which held that a U.S. citizen living in American Samoa had the right to a trial by jury, the *Atalig* court held that the right to a trial by jury was not afforded to citizens of the Northern Mariana Islands due to conflict with the territory's culture and the terms of the negotiated agreement, which defined the political relationship between the territory and the United States.

Notably, the court's opinion did not apply the Territorial Incorporation Doctrine or the impractical and anomalous test. Similar to the Ninth Circuit's decision in *Wabol*, however, the *Atalig* court indicated that it would take a cautious approach to determining whether certain constitutional protections apply in a U.S. territory, and would strongly consider whether application of a provision would be contrary to the cultural practices of the region or the terms of agreement which define "the political relationship" between the United States and the territory.[118] In short, the court's opinion examined the practicality of

112. *Id.* at 688.
113. *Id.* at 690.
114. *Id.*
115. *Id.* at 688.
116. *Id.* at 685–86.
117. *Id.* at 690–91.
118. *Id.* at 688.

enforcing certain constitutional rights in a territory in a strikingly similar fashion to how those rights would be examined under the impractical and anomalous test.[119]

D. Tuaua v. United States *and the Denial of Birthright American Citizenship for American Samoans*

Tuaua v. United States was the most recent case to address the application of the Constitution to a U.S. territory, specifically addressing whether constitutional birthright U.S. citizenship should be applied to the island of American Samoa through the Fourteenth Amendment's Citizenship Clause.[120] The district court decision relied heavily upon the Territorial Incorporation Doctrine and similar principles from *Downes v. Bidwell*.[121] The U.S. Court of Appeals for the D.C. Circuit held that while the Territorial Incorporation Doctrine applied to American Samoa, the application of the impractical and anomalous test was necessary to determine whether birthright U.S. citizenship should apply in American Samoa stating:

> "The decision in the present case does not depend on key words such as 'fundamental' or 'unincorporated territory [,]' . . . but can be reached only by applying the principles of the [Insular] [C]ases, as controlled by their respective contexts, to the situation as it exists in American Samoa today." . . . In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship would prove "impracticable and anomalous," as applied to contemporary American Samoa.[122]

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119. *See id.* at 688–89 (quoting Duncan v. Louisiana, 391 U.S. 145, 150 n.14 (1968)) (relying on the *Insular Cases* to hold that although trial by jury is a fundamental right, "a criminal process which was fair and equitable but used no juries is easy to imagine").

120. Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015).

121. *Id.* at 94–96.

122. Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015) (quoting Reid v. Covert, 354

In its decision, the court examined "the particular circumstances, the practical necessities and the possible alternatives" regarding the application of birthright U.S. citizenship in American Samoa.[123] Unfortunately for the plaintiffs, and for those Samoans desiring birthright citizenship, the court did not hold that birthright citizenship was a fundamental right under the Territorial Incorporation Doctrine and determined that it would be anomalous to "impose citizenship on the American Samoan territory."[124] The court reasoned that application of the right of citizenship through the Fourteenth Amendment would be impractical and anomalous in Samoa, citing the lack of consensus among the Samoan people on the issue, the threat that such application could pose to the Samoan communal land system, and, most importantly, the opposition of the democratically elected Samoan government to the application of citizenship.[125] As a result, the D.C. Circuit rejected the Samoan plaintiffs' pleas for U.S. citizenship.[126] In June 2016, the U.S. Supreme Court denied certiorari in the appeal of the D.C. Circuit's decision,[127] effectively ending Fanuatanu Mamea's and the other Samoans' quest for citizenship through the U.S. court system.

III. THE TERRITORIAL INCORPORATION DOCTRINE

A. The Territorial Incorporation Doctrine Should Be Overruled

The Territorial Incorporation Doctrine should be eliminated from American jurisprudence because it is grounded in stereotypical views of foreign cultures,[128] and the doctrine was never

U.S. 1, 74 (1957) (Harlan, J., concurring)), *cert. denied*, 136 S. Ct. 2461 (2016).

123. *Id.*

124. *Id.* at 310.

125. *Id.*; *see also* Faleomavaega II, *supra* note 22; Faleomavaega I, *supra* note 20.

126. *Tuaua*, 788 F.3d at 310.

127. *Id.*

128. *See* Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 831–32 (2010).

meant to act as a permanent bar to application of the Constitution in U.S. territories.[129] The doctrine counters the intent of the framers of the Constitution, who likely intended that the Constitution apply in all U.S. jurisdictions regardless of whether a jurisdiction was a territory or a state.[130] Furthermore, and perhaps most importantly, newer and more practical precedent in the form of the impractical and anomalous test has eroded the Territorial Incorporation Doctrine.[131]

When the Territorial Incorporation Doctrine was created, many members of American society and Supreme Court Justices viewed foreigners and "alien races" with great suspicion—some even believed that the people of these territories were unfit to take part in the "American system of law and mode of government."[132] Recently, scholars have criticized the *Downes* opinion for its unfounded and racist rationale, which suggested that members of these foreign territories were incapable of engaging in "self-government" in accordance with American principles.[133] Such reasoning led some members of the public to conclude that denizens of these territories were not just unable to become U.S. citizens under the Constitution, but were also unfit to be recognized as citizens because they did not conform to the paradigm of how Supreme Court Justices and the American public believed American citizens should appear.[134]

In its pronouncement of the Territorial Incorporation Doc-

129. *See* PAUL BREST ET. AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (6th ed. 2015); *see also* Vignarajah, *supra* note 128, at 815.

130. *See* Reid v. Covert, 354 U.S. 1, 9–10 (1957) ("[Fundamental rights] are embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience."); *see also* Robert R. Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551, 569, 572–73 (1998) (citation omitted) (noting that incorporation of the Establishment Clause is consistent with the framers' intent "to give individuals federally enforceable rights against the states").

131. *See Reid*, 354 U.S. at 74–75 (Harlan, J., concurring).

132. *See* BREST ET AL., *supra* note 129; Vignarajah, *supra* note 128, at 832.

133. Vignarajah, *supra* note 128, at 833.

134. *See* Tauber, *supra* note 73, at 169 (citation omitted) ("This overt racism . . . has been acknowledged as reflecting the spirit [o]f the times . . . . [S]ome people of the time 'argued that [territorial] inhabitants were either unprepared or undeserving of certain Anglo-Saxon rights guaranteed by the Constitution.'").

trine, the Supreme Court acknowledged the troubling racial stereotypes implicated by the doctrine, as well as its temporary nature.[135] Specifically, the Court stated that it "may for a time be impossible" to apply certain constitutional provisions in certain territories.[136] Justice Black expressed a similar belief that application of the Territorial Incorporation Doctrine should not permanently bar enforcement of the Constitution in the territories, stating specifically that "'Insular Cases' can be distinguished from the present cases [related to U.S. citizenship] in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions . . . ."[137]

It appears that when the Court first endorsed the application of the Territorial Incorporation Doctrine in *Downes*—and even in subsequent precedent in *Reid*—it never intended the doctrine to function as an absolute bar to the application of the Constitution within certain U.S. territories. Rather, the Court likely envisioned the doctrine to serve as a temporary measure until such time came when it would be appropriate to apply certain constitutional standards in full force in a given territory.[138] Given how far society has advanced since the Territorial Incorporation Doctrine was first announced, it is likely that the time to which the Court alluded has arrived. Presently, it seems the only justifiable reason not to apply the Constitution in modern day U.S. territories would be if implementation of a particular provision would be "impracticable and anomalous"[139] for those living in the territory.

Furthermore, as stated by Justice Black in *Reid*, it is unlikely that the framers of the Constitution ever intended any provision

135. *See* Downes v. Bidwell, 182 U.S. 244, 346 (Gray, J., concurring) (emphasis added) ("If Congress is not ready to construct a complete government for the conquered territory, it may establish a *temporary* government which is not subject to all the restrictions of the Constitution.").

136. *Id.* at 287.

137. Reid v. Covert, 354 U.S. 1, 14 (1957).

138. *See Downes*, 182 U.S. at 287 ("[T]he question at once arises whether large concessions ought not to be made for a time, that ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.").

139. *See Reid*, 354 U.S. at 74 (Harlan, J., concurring).

of the Constitution to be only partially binding in certain U.S. jurisdictions.[140] It is almost an insult to the Framers, as well as to all recognized U.S. citizens living in territories, including American Samoa, to say that these citizens may only be protected by certain "fundamental" constitutional provisions. This is especially true when considering the wholesale constitutional protection offered to citizens on the U.S. mainland.[141]

Although residents of U.S. territories have not explicitly requested the complete constitutional protections that come with full statehood, it is difficult to imagine why any person or territorial government would desire to be a part of the United States if they did not also desire the full protection of the country's laws and Constitution. Under the present Territorial Incorporation Doctrine, our courts and government create a caste system which subordinates the rights of people born in U.S. territories compared to those born on the U.S. mainland.[142] The more sensible approach would start with the assumption that the Constitution applies in all U.S. territories unless the application of a specific provision would be impractical and anomalous in the territory.

The Territorial Incorporation Doctrine has also been eroded by newer and more readily applicable precedent in the form of

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140. In *Reid*, Justice Black indicated that "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." *Reid*, 354 U.S. at 9; *see also* Tauber, *supra* note 73, at 168 ("This, it seems, is the proper view of the Constitution. Every provision was viewed as fundamental by those who framed that great document. It seems quite arbitrary to privilege certain rights over others.").

141. *See* Baugh, *supra* note 130, at 569 ("Through what has become known as the incorporation doctrine, the Supreme Court has read the Due Process Clause of the Fourteenth Amendment as requiring states to comply with the majority of the Bill of Rights.").

142. *See* Malavet, *supra* note 72, at 243 ("The most enduring effect of *Downes v. Bidwell* and the Insular Cases is the effective definition of a lesser level of citizenship for territorial subjects of the United States."); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 35–36 (2001) ("The issue of race relations goes to the very essence of the TID since the colonial inhabitants['] . . . constitutional rights have traditionally been devalued, and correspondingly there has been less concern about self-government by those 'people' in those 'places.' Even citizenship in the territories is devalued and 'second-class,' since 'aliens' in the United States . . . have more rights than citizens in the territories . . . .").

the impractical and anomalous test, announced by Justice Harlan in *Reid*.[143] Using such a test to determine whether constitutional provisions apply in a U.S. territory would be more democratic than the present use of the Territorial Incorporation Doctrine. By basing its determination on whether a right or provision would be impractical and anomalous to apply in a territory, a court is forced to examine practical considerations, necessities, and reasonable alternatives within the territory.[144] The impractical and anomalous test accounts for what people of the territory desire because it encompasses their considerations along with other "practical necessities."[145] Furthermore, unlike the Territorial Incorporation Doctrine, the test does not force a constitutional right or provision upon a territory simply because a U.S. court believes that right to be fundamental.[146]

Under the Territorial Incorporation Doctrine, the court retains discretion in determining what rights apply in U.S. territories.[147] If the court determines that a provision or right is fundamental, the court has no choice but to make that provision binding in the U.S. territory.[148] If a right or provision is found to be fundamental, the court must enforce the right or provision regardless of the "practical necessities," or considerations of the people, and regardless of whether enforcing the right or provision would be impractical and anomalous.[149] On the other hand, if a court were to apply the impractical and anomalous test alone, and not employ the Territorial Incorporation Doctrine,

143. *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring) (noting that "the particular local setting, the practical necessities, and the possible alternatives" are considered in determining whether a right or constitutional provision applies in a particular territory).

144. *See id.*

145. *Id.* at 75.

146. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 291 (1901) (White, J., concurring) ("There may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.").

147. *See* Tauber, *supra* note 73, at 166–68; Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 91 (1997).

148. *See Downes*, 182 U.S. at 291; Laughlin, *supra* note 41, at 343; Morrison, *supra* note 20, at 103.

149. *See* King v. Morton, 520 F.2d 1140, 1148 (D.C. Cir. 1975).

the court would then only have to consider the "practical necessities" within the territory and would not be required to apply a specific constitutional provision. Applying the impractical and anomalous test in this way, without consideration of the Territorial Incorporation Doctrine, would help protect people living in U.S. territories from unwanted outside interference in their territorial affairs.

By discarding the Territorial Incorporation Doctrine and using only the impractical and anomalous test, a court would be less likely to foist an unwanted right upon the people of a particular territory simply because the right has been determined to be fundamental.[150] The impractical and anomalous test is more equitable, democratic, and feasible because it forces courts to consider the individual needs, desires, and practical necessities of each territory. This rule allows the people of these territories some say about whether a certain constitutional provision should apply as opposed to leaving the issue solely to a court's discretion.[151]

Moving forward, courts should no longer apply or adhere to the legal principals of the Territorial Incorporation Doctrine.[152] Instead, courts should simply apply the impractical and anomalous test when determining whether citizenship, or other rights, should apply in a given territory.[153] Such a test would operate similarly to its present application as a supplemental consideration in the Territorial Incorporation Doctrine.[154] Instead of applying it as a supplementary test, however, a court should use it as the determinative test to determine whether a provision of the Constitution should apply in a given territory. Under such legal analysis the court should only consider

150. *See* Burnett, *supra* note 72, at 809.

151. *See* Tauber, *supra* note 73, at 166–68 (discussing the discretion courts have in determining which constitutional provisions should apply); Terrasa, *supra* note 147.

152. *See* Burnett, *supra* note 72; Laughlin, *supra* note 41, at 343; Malavet, *supra* note 72; Morrison, *supra* note 20, at 103; Terrasa, *supra* note 147, at 92 ("The Territorial Incorporation Doctrine is an obsolete vestige of a racist, imperialist era of our Country which serves no purpose other than to differentiate between continental and non-continental American citizens.").

153. *See* Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring).

154. *See id.*; Morrison, *supra* note 20, at 109.

whether the constitutional provision or right at issue is impractical and anomalous in the territory based on the "particular circumstances, the practical necessities and reasonable alternatives."[155] If the answer to this question is in the affirmative, the court should not proceed with applying that right, even if such a right has been deemed fundamental under the former Territorial Incorporation Doctrine. If, however, applying the provision or right is not impractical or anomalous, as in the case of American Samoa, a court should extend the right to that territory and allow all of the territory's inhabitants to enjoy it.

IV. APPLICATION OF THE CONSTITUTIONAL RIGHT OF CITIZENSHIP UNDER THE FOURTEENTH AMENDMENT'S CITIZENSHIP CLAUSE WOULD NOT BE "IMPRACTICAL AND ANOMALOUS"

A. Samoans Deserved to Be Recognized as U.S. Citizens at Birth, and the Application of Citizenship Status Would Be Beneficial to American Samoans

American Samoa has been part of the United States as a recognized territory since the early 1900s.[156] Those born in American Samoa are not currently recognized as U.S. citizens, but are granted the status of U.S. National.[157] As a direct consequence of this categorization, in some U.S. states, Samoans are prohibited from voting in state and federal elections, owning guns, serving on juries, and holding public office.[158] In addition, many Samoans also serve in the U.S. military, with American Samoa actually serving at a higher rate than any other U.S. jurisdiction.[159] Despite their strong American identification, however, Samoans are denied recognition as U.S. citizens at birth. Recognition as U.S. citizens at birth would help remedy many of the

155. Morrison, *supra* note 20, at 117.

156. *See Treaties*, *supra* note 33.

157. *See* Morrell, *supra* note 11, at 475.

158. *Id*. at 480; *see also* Gary Arndt, *Everything You Need to Know About the Territories in the United States*, EVERYTHING EVERYWHERE (June 27, 2013), http://everything-everywhere.com/everything-you-need-to-know-about-the-territories-of-the-united-states/.

159. *See* Morrell, *supra* note 11, at 475; *About* Tuaua v. United States, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/case_overview (last visited Jan. 30, 2018).

disadvantages that Samoans currently face as U.S. Nationals, because doing so would entitle them to all same privileges and protections as ordinary U.S. citizens.[160]

Granting Samoans recognition as U.S. citizens at birth would put them on equal footing with all other populated U.S. territories. Presently, American Samoa is the only inhabited U.S. territory where the citizens of the territory are not recognized as U.S. citizens at birth.[161] Inhabitants of U.S. territories such as Puerto Rico, Guam, and the Northern Marianas already possess birthright U.S. citizenship status.[162] Therefore, granting Samoans birthright U.S citizenship would not only help alleviate the burdens Samoans face with U.S. National status, but also put them on an equal playing field with all other inhabited U.S. territories where birthright citizenship is all but a legal formality.

B. Even if the Courts Decide to Apply Equal Protection to American Samoa, the Samoan Culture and Communal Land System Would be Sufficiently Protected

A significant consideration of the D.C. Circuit in its *Tuaua* opinion, in which it found that application of birthright U.S. citizenship would be impractical and anomalous in American Samoa, was the prospect that "forcibly impos[ing] a compact of citizenship" would interfere with the country's cultural identity,[163] specifically its communal land system. In a brief submitted to the D.C. Circuit, the Samoan government asserted similar concerns, most importantly that if birthright U.S. citizenship were implemented in Samoa, the territory's communal land system could be held unconstitutional under both the Equal

160. *See* Benoit, *supra* note 14; Hultman, s*upra* note 13.

161. Morrison, *supra* note 20, at 88.

162. *See* Charles R. Venator-Santiago et al., *Citizens and Nationals: A Note on the Federal Citizenship Legislation for the United States Pacific Island Territories, 1898 to the Present*, 10 CHARLESTON L. REV. 251, 252 (2016) ("Presently, whereas persons born in the other unincorporated territories can acquire a United States citizenship at birth, persons born in American Samoa acquire a non-alien or non-citizenship nationality at birth and can only acquire a United States citizenship through an individual naturalization process.").

163. Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); Faleomavaega I, *supra* note 20.

Protection and Due Process Clauses of the Fourteenth Amendment.[164] A closer examination of relevant case law, however, reveals this is not the case. Rather, there is significant legal precedent that supports preservation of the Samoan culture and communal land system under both the Equal Protection and Due Process Clauses.

In *Wabol v. Villacrusis*, for example, the Ninth Circuit held that "land alienation restrictions of . . . the Commonwealth Constitution" were not "subject to equal protection analysis."[165] Rather, the *Wabol* court preserved restrictions on the sale of land to individuals who were not descendants of the Northern Mariana Islands.[166] The court reasoned the "application of the constitutional right could ultimately frustrate the mutual interests that led to the Island's covenant," and thus the annexation into the United States.[167]

Examining the land restrictions in American Samoa, one would similarly find in the original founding documents that led to the island's creation, the Instruments of Cession, include specific provisions protecting of the Samoan culture and the country's communal land system.[168] In fact, these provisions of the agreements played such a pivotal role in the island's creation as a U.S. territory[169] that America Samoa may have never become a U.S. territory but for the United States' willingness to respect Samoa's communal land system and culture.[170] Furthermore, both the Samoan communal land system and the alienation restrictions in *Wabol*, which were not subject to analysis under the Equal Protection Clause, have an identical purpose—to preserve each territory's "social and cultural stability."[171]

For purposes of Equal Protection analysis, the situation in American Samoa is analogous to the situation that was

164. Faleomavaega I, *supra* note 20, at 4–5; *see also* Morrison, *supra* note 20.
165. 958 F.2d 1450, 1463 (9th Cir. 1990).
166. *Id.* at 1462.
167. *Id.*
168. *See Treaties, supra* note 33.
169. Morrison, *supra* note 20, at 81.
170. *See* Tua, *supra* note 34, at 290–91.
171. *See Wabol*, 958 F.2d at 1461.

presented in *Wabol*. Similar to the Northern Marianas, Samoa also has racial restrictions on land that are narrowly circumscribed to keep island real estate holdings within the possession of those with original island ancestry.[172] If these same restrictions pass constitutional muster in the Commonwealth of the Northern Marianas under Equal Protection, however, there is no logical or apparent reason why the Samoan government could also not choose to have similar restrictions upon land, and still be in harmony with the Equal Protection doctrine in American Samoa.

While the Equal Protection Clause strictly prohibits racial- or ethnic-based land restrictions on the U.S. mainland,[173] *Wabol* evidences the courts' hesitancy in applying the same strict Equal Protection analysis to U.S. territories. Therefore, even if Samoans were recognized as U.S. citizens at birth and the Equal Protection Clause did apply in the territory, it does not appear that such constitutional scrutiny would automatically lead to an invalidation of the island's communal land system or culture.

C. Even if the Courts Decided to Apply Due Process to American Samoa, the Samoan Culture and Communal Land System Would Be Sufficiently Protected

Concerns that American Samoa's communal land system might be held unconstitutional under the Due Process Clause are unfounded. In *Atalig*, for instance, the Ninth Circuit held that the right to trial by jury did not automatically apply in the Commonwealth of the Northern Mariana Islands through the Fourteenth Amendment, noting that the "negotiated agreement defining the political relationship between the NMI and the United States"[174] specifically provided for circumvention of the right to trial by jury in certain circumstances.[175]

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172. *See* Tua, *supra* note 34, 290–91.

173. *See* Isaac N. Groner & David M. Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426, 434–35 (1948); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 739 (1989).

174. Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984).

175. *Id.* at 690.

Based on the precedential reasoning in *Atalig*, it is likely that land restrictions in American Samoa limiting the passage of land to those of Samoan descent—which are authorized by the Instruments of Cession[176]—would also likely pass constitutional muster under Due Process Clause analysis because they are a significant component of the original negotiated agreement that led to the creation of the territory of American Samoa.[177]

Additionally, the reasoning in *Atalig* lends significant support to the proposition that recognizing a right as fundamental for Due Process purposes in the United States does not necessarily mean that same right would be recognized as a fundamental right in U.S. territories. This is especially true in situations where implementation of a right would lead to a violation of the terms of the original founding agreement that led to the territory's creation.

Therefore, while racial or ethnic restrictions on land similar to those in American Samoa could violate the Due Process Clause if they were administered in a U.S. state, it is far from certain that the same Due Process standards would govern in American Samoa. Given the fact that these racial restrictions on land passage were and continue to be a significant component of the negotiated agreement that defines the political relationship between the United States and American Samoa, it is likely these racial restrictions on land would also survive legal scrutiny.[178]

An examination of relevant precedent demonstrates that courts defer to the original founding agreement if either the Equal Protection or Due Process Clauses conflict with the agreed-upon terms that led to a territory's creation.[179] As such, since the protection of the Samoan land system and culture is

176. *See* Morrison, *supra* note 20, at 77.

177. *See* Tua, *supra* note 34, at 282–83; *Treaties, supra* note 33.

178. Morrison, *supra* note 20, at 77.

179. *See, e.g.*, Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) ("Absent the alienation restriction, the political union would not be possible. Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the covenant"); *Atalig*, 723 F.2d at 690 (finding that NMI's laws dictating jury trials provided enough procedural safeguards to satisfy the Sixth and Fourteenth Amendments of the U.S. Constitution).

specifically provided for in the territory's founding document,[180] Samoan fears that their land system or culture might be eroded by either the Due Process or Equal Protection Clauses are unfounded.[181] Courts are likely to look favorably upon their land system and culture and to uphold both since they are secured by the terms of the negotiated agreement that led to the island's creation as a U.S. territory in the early 1900s.[182] These concerns, therefore, should not be considered in a court's determination that application of birthright American citizenship in Samoa would be impractical and anomalous because such concerns have not been concretely demonstrated.

D. Why American Courts Should Not Simply Defer to the Samoan Government's Opposition to the Implementation of Citizenship Status

In addition to Equal Protection and Due Process concerns, other major concerns expressed in the D.C. Circuit's finding that enforcement of birthright American citizenship would be impractical and anomalous were the Samoan government's opposition to the application of citizenship in the territory and the lack of consensus from the Samoan people.[183] While both are reasonable concerns, they do not make the imposition of citizenship in the territory impractical and anomalous.

In fact, there have been numerous instances where U.S. courts have been called upon to secure personal rights for the populace in the face of adversity and opposition from democratically elected state governments, as well as significant portions of the American electorate.[184] Take, for example, the issue of same-sex marriage. At the time of the Supreme Court's decision in *Obergefell v. Hodges*,[185] upholding same-sex marriage ran contrary to

180. Tua, *supra* note 34.

181. *See id.*

182. *Treaties*, *supra* note 33.

183. Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

184. *See, e.g.*, JACK M. BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 15–16 (2002).

185. 135 S. Ct. 2584 (2015).

the opinion of a significant portion of the American electorate, and prior to its decision, many state governments openly opposed same-sex marriage and implemented same-sex marriage bans to express their disapproval.[186] Similarly, in *Roe v. Wade*,[187] the Court seized upon the opportunity to protect the personal rights of Americans to choose to have an abortion in the face of significant backlash from a section of the American electorate, and against the clear desires of many state governments.[188]

Perhaps the most characteristic example of the courts protecting personal rights—rather than simply deferring to the other branches of government or the electorate—occurred in *Brown v. Board of Education*.[189] At the time of *Brown,* both before the decision and in its aftermath, there was widespread opposition to the desegregation of the U.S. school system by state governments and portions of the American public.[190] This opposition manifested itself not just in the form of political and peaceful opposition to the decision but in the form of graphic brutal violence and widespread civil unrest.[191]

While none of these cases stand as legal precedent for legality of citizenship in American Samoa, they do stand for one major principle in the U.S. court system: when pivotal personal rights are at stake, courts should not simply defer to the legislative process or an electorate, because those in need cannot always rely on the political process to assert and protect important personal rights.[192]

Similar to the cases discussed above, there are many people living in American Samoa who desire to be recognized as U.S.

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186. *See Obergefell*, 135 S. Ct. at 2588; *Changing Attitudes On Gay Marriage*, PEW RES. CTR., (June 26, 2017), http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/.

187. 410 U.S. 113, 154 (1973), *modified*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

188. *See* BALKIN, *supra* note 184, at 175.

189. *See* 347 U.S. 483, 495 (1954), *supplemented sub nom.* Brown v. Bd. of Ed., 349 U.S. 294 (1955).

190. *See* BALKIN, *supra* note 184.

191. *See* Brown v. Board *at Fifty "with an Even Hand"*, LIBR. CONGRESS, https://www.loc.gov/exhibits/brown/brown-aftermath.html (last visited Jan. 17, 2018).

192. *See* BALKIN, *supra* note 184.

citizens. While there is no clear consensus among the general population of Samoa, it is clear that a significant portion of the population desires to be recognized as U.S. citizens and has been unable to effectively assert their rights to citizenship in any meaningful way through the Samoan political process.[193] In addition, while there has been some backlash to the prospect of a U.S. court implementing citizenship in American Samoa, the backlash to citizenship in Samoa has not manifested itself to the degree of civil or political unrest that has been witnessed in some of the more controversial and historic Supreme Court decisions to protect and extend personal rights.[194]

Because Samoans have not been able to effectively assert their rights to citizenship through the Samoan political process, it is inequitable for a court to determine that citizenship is impractical and anomalous in the territory without political consensus from either the Samoan government or people.[195] The impractical and anomalous test does not call for courts to consider backlash from the electorate and government opposition as dispositive factors; rather, it calls for a "totality of the circumstances" approach that embraces the "local setting, the practical necessities, and the possible alternatives."[196] The court is asked not to simply defer to the government of a territory, nor a portion of its electorate, when examining whether a particular constitutional provision is applicable. Instead, the court is required to determine whether the application of the specific constitutional provision would be workable in that territory. The test should not fail merely because there may be potential backlash to the implementation of a specific constitutional provision. Rather, the test should only fail when it is demonstrated that application of the provision would be unworkable or impractical in the territory. As demonstrated by *Wabol* and *Atalig*, the main concerns about practicality and workability should be whether the

193. *See* Faleomavaega I, *supra* note 20, at 5; *see also Meet the Plaintiffs*, *supra* note 1.

194. *See* Morrison, *supra* note 20, at 82.

195. *See* Tuaua v. United States, 788 F.3d 300, 309 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

196. Reid v. Covert, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring).

application could lead to a violation of prior diplomatic agreements or covenants made between the United States government and the territory.[197]

While application of birthright American citizenship may not be popular in the territory, it would not lead to violation of any prior covenants made between the United States and Samoa. It also would not lead to an erosion of the territory's fundamental cultural values or communal land system. In fact, a portion of the Samoan population feel that birthright U.S. citizenship would actually be beneficial.[198] Contrary to the opinion of the D.C. Circuit, birthright U.S. citizenship would not be impractical and anomalous in American Samoa.

CONCLUSION

Birthright American citizenship would greatly benefit American Samoans currently struggling with their quasi-legal status as U.S. Nationals.[199] Moreover, based on examination of relevant legal precedent, the application of birthright U.S. citizenship threatens neither the territory's culture nor communal land system.[200] The most important personal rights cannot simply be left to the political process.[201] Just because birthright U.S. citizenship is not overwhelmingly popular in American Samoa or because Samoans overestimate the threat that citizenship poses to their indigenous culture, the implementation of the right should not be rendered impractical and anomalous in the territory.

Furthermore, the key question that courts should concern themselves with when determining whether citizenship should apply in American Samoa is whether implementation of that right would be impractical and anomalous.[202] No court should

197. *See* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992); North Mariana Islands v. Atalig, 723 F.2d 682, 688–89 (9th Cir. 1984).

198. *See Tuaua*, 788 F.3d at 304.

199. *See supra* Section IV.A.

200. *See supra* Sections IV.B, IV.C.

201. *See* BALKIN, *supra* note 184.

202. *See* Reid v. Covert, 354 U.S. 1, 14 (1957).

take into account the Territorial Incorporation Doctrine as part of its legal analysis. The Territorial Incorporation Doctrine has been heavily criticized by scholars and judges alike throughout the years for its arbitrary and seemingly unfair nature.[203] Aside from the doctrine's questionable basis in stereo-typical views about foreign cultures,[204] the doctrine has outlived its usefulness and has been supplanted by the more readily applicable precedent in the form of the impractical and anomalous test.[205] Only by proper application of this test can Samoans such as Fanuatanu Mamea and others achieve U.S. citizenship. If properly applied and administered by the courts, the impractical and anomalous test could provide Samoans with all the benefits of the U.S. citizenship that they desire, while preserving their vitally important culture and communal land system.[206]

203. *See, e.g.*, Morrison, supra note 20, at 103 (suggesting the arbitrary nature of the Incorporation Doctrine); Soltero, *supra* note 142, at 36 (arguing for universal and consistent application of the Constitution); Terrasa, *supra* note 146, at 56 (noting that the decision in the *Insular Cases* was based on "racial animus" and "commercial protectionism").

204. *See* Terrasa, *supra* note 147, at 56.

205. *See Reid*, 354 U.S. at 74–75.

206. *See* Tua, *supra* note 34, at 291 (arguing that "[i]t is both 'impractical and anomalous' to apply the Equal Protection Clause to the communal land and matai system of American Samoa").