

The Price of Citizenship:
Would Citizenship Cost American Samoa its National
Identity?

*Ivy Yeung**

I.	INTRODUCTION	1
II.	AMERICAN SAMOA’S CULTURAL PRESERVATION	4
	A. <i>Where Traditional Culture Co-exists with Modernity</i>	4
	B. <i>The Beginnings of a U.S. Territory</i>	5
III.	TUAUA V. UNITED STATES: CASE FOR CITIZENSHIP IN THE TWENTY FIRST CENTURY	11
	A. <i>The Fourteenth Amendment’s Citizenship Clause</i>	14
	B. <i>Interpreting the Citizenship Clause</i>	15
	C. <i>The Citizenship Clause and the Insular Cases</i>	18
IV.	THE INSULAR CASES HAVE NO PLACE IN <i>TUAUA</i>	23
	A. <i>The Court of Appeals Decision and Moving Forward</i>	26
V.	APPLICATION OF THE U.S. CONSTITUTION MAY CHANGE THE CURRENT GOVERNANCE AND CULTURE IN AMERICAN SAMOA.....	26
	A. <i>Harms that Face American Samoan Non-Citizen Nationals</i>	26
	B. <i>Potential Concern to American Samoan Culture if U.S. Citizenship is Conferred</i>	28
	C. <i>The Equal Protection Clause May Not Preserve What is Uniquely American Samoan</i>	30
VI.	CONCLUSION	34

I. INTRODUCTION

“Ladies and Gentlemen, in preparation for landing, please remain seated with your seatbelt fastened. It has been a pleasure having you on board with us today,” rang the flight attendants voice over the speaker. Excitement overcame Paul Matauga. In less than fifteen minutes, his dreams of returning home and reuniting with his wife Faafetai and daughter Ellie, were to become reality.

Nestled in the Pacific Ocean and located about 2,500 miles southwest of Hawai‘i, the last leg of his journey home, a six-hour flight,¹

* J.D. candidate, 2017, William S. Richardson School of Law, University of Hawai‘i; MBA, MPA, BBA, University of Hawai‘i. Thank you to Professors Hazel Beh, Roberta Woods, and Brian Huffman for their guidance; to several judges from American Samoa who took the time to share personal views and insights; to my family and friends for their love and support; to the APLPJ team; and Ryan Akamine. The author can be contacted at yeung.ivyp@gmail.com. Any errors are the author's alone.

felt like an eternity. As the aircraft neared the open air base, warm humidity filled the cabin and reminded him of the eight years he longed for fishing and preparing the *umu*² with his cousins for lunch gatherings following Sunday church service. After serving his country in distant lands, Paul was honorably discharged³ from the U.S. military and he was ready to return to his beloved island. Paul's sacrifice is not unlike that of the many American Samoans who are deeply loyal to their country and island home. While not all stories end idyllically, all are equally powerful and construed with strength and unbridled commitment to the United States of America.

American Samoa blends two nations. On one hand, American Samoa is steeped in Samoan culture. *Fales*,⁴ serving as gathering places for casual banter or community meetings, are found in every village; women occasionally don *puletasis*⁵; the open marketplace in town often buzzes with customers picking up *palusami*⁶ or fresh Samoan pancakes. On the other hand, American Samoans are also proud Americans. The newly built Veteran's memorial located in the Daniel K. Inouye Industrial Park in the village of Tafuna honors its many sons and daughters who chose to proudly serve their country. American Samoans have a tradition of military service and are represented in the United States armed services in greater proportion to their small population.⁷ In the most recent Iraq and Afghanistan wars, the casualties from American Samoa exceeded that of the national average.⁸ American flags posted on homes and waving on

¹ Distance from Hawaii to American Samoa, DISTANCEFROMTO.NET, <http://www.distancefromto.net/distance-from/Hawaii/to/American+Samoa> (last visited Mar. 10, 2016).

² An above ground oven usually constructed using rocks and taro or banana leaves. See also American Samoa, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/American_Samoa (last visited Mar. 10, 2016).

³ "To receive an honorable discharge, a service member must have received a rating from good to excellent for their service." Military Discharge in the United States, OREGON DEPARTMENT OF VETERANS AFFAIRS, http://www.oregon.gov/odva/docs/pdfs/criminal_justice_portal/military_discharge.pdf (last visited Mar.10, 2016).

⁴ Open, hut-like structures. See also *American Samoa*, *supra* note 2.

⁵ A traditional patterned two-piece dress. See also *American Samoa*, *supra* note 2.

⁶ Samoan course made of coconut milk and wrapped in taro leaves. See also *American Samoa*, *supra* note 2.

⁷ Brief of Petitioner-Appellant at 23, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Apr. 25, 2014).

⁸ Complaint for Declaratory and Injunctive Relief at 31, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

large trucks echo unparalleled patriotism. One could not begin to doubt American Samoan's dedication to the United States or the pride the islanders feel as Americans.

The identities of two nations are reflected in the coexistence of values in American Samoa. The island is home to a population of around 54,000, most of whom speak Samoan and English.⁹ With a land mass similar to that of Washington D.C.,¹⁰ American Samoa has a population thirteen times smaller than the capital of the United States. Tucked between lush vegetation and residential homes stands a McDonald's restaurant open 24 hours a day.

American Samoans hold a unique legal status with the United States as U.S. Nationals,¹¹ rather than full U.S. Citizens.¹² American Samoa is unique among the five inhabited territories of the United States because it is the only one without the statutory rights of citizenship.¹³ Several U.S. Nationals brought suit for U.S. citizenship under the Fourteenth Amendment because they were appalled by the inferiority brought on by their noncitizen status.¹⁴ Recently, the District of Columbia Circuit Court of Appeals decided *Tuaua v. United States*.¹⁵ The *Tuaua* plaintiffs are now appealing the case to the Supreme Court of the United States.¹⁶

This article will explore whether the court in *Tuaua* correctly determined that the Insular Cases controlled in its decision that American Samoans are not entitled to birthright citizenship under the Fourteenth Amendment. The article will also explore the ramifications for American Samoa if the territory's citizens were accorded constitutional citizenship.

⁹ The World Factbook, *American Samoa*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> (last updated Mar. 10, 2016).

¹⁰ *Id.*

¹¹ "The following shall be nationals, but not citizens of the United States at birth: (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession." 8 U.S.C.A. § 1408 (West 1988). According to the Internal Revenue Service website, a U.S. National is "an individual who owes his sole allegiance to the United States" and includes U.S. citizens. For tax purposes, a national includes one born in American Samoa, while a U.S. citizen specifically includes individuals born in the territories of Guam, Puerto Rico, and the U.S. Virgin Islands. Immigration Terms and Definitions Involving Aliens, IRS.GOV, <https://www.irs.gov/Individuals/International-Taxpayers/Immigration-Terms-and-Definitions-Involving-Aliens> (last updated Mar. 3, 2016).

¹² *Id.*

¹³ *Tuaua v. United States*, 951 F. Supp. 2d 88, 98 (D.D.C. 2013).

¹⁴ *Id.*

¹⁵ *Tuaua v. United States*, 788 F.3d 300, 312 (D.C. Cir. June 5, 2015).

¹⁶ *Id.*

According to those opposed to a change in status, including those filing *Amicus Curiae* in the *Tuaua* case, the extension of citizenship would have harmful consequences for American Samoan governance, culture, customs, and traditions. Part II will provide a historical background on American Samoa including factors contributing to its evolution into a U.S. territory, the significance of Samoan culture, and the varying attitudes towards citizenship.¹⁷ Part III will discuss the *Tuaua* case in detail including arguments on both sides of the case, discussion from the amici, and the court's analysis.¹⁸ This part will also introduce the Insular Cases. Part IV will discuss whether the Insular Case construct should have applied at all.¹⁹ Part V will discuss the current harms felt by U.S. Nationals and potential consequences to American Samoa if a court determines that the Fourteenth Amendment grants citizenship to the territory.²⁰ American Samoa's traditional land system, governance structure, and cultural practices do not comfortably fit with the individual liberties that come with full citizenship.

II. AMERICAN SAMOA'S CULTURAL PRESERVATION

A. *Where Traditional Culture Co-exists with Modernity*

The Samoan islands' ability to sustain its culture and customs alongside modern influences is unique in the South Pacific, as many neighboring island nations are now largely devoid of their traditions.²¹ Over thirty years ago, cultural anthropologist Dr. Lowell Holmes²² attributed American Samoa's cultural conservatism to the democratic processes instilled in its customs.²³ This allowed for greater community participation and organization.²⁴ The observation of divine birthrights and limited ability to achieve ranking in the Polynesian societies outside of Samoa spurred the common people's willingness to adapt Western ideals, which they saw as an opportunity for greater equality and an ability to

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part V.

²¹ Lowell D. Holmes, *Factors Contributing to the Cultural Stability of Samoa*, 53 ANTHROPOLOGICAL Q. 188, 189 (1980).

²² The late Dr. Holmes devoted at least three decades of anthropological research to the Samoans beginning in 1954. "His doctoral research consisted of a methodological restudy of Margaret Mead's Samoan work." In addition, "he has worked with Samoan migrants in California in 1977 and 1992-1993." Lowell D. Holmes, WICHITA ST. U., <http://webs.wichita.edu/?u=anthro&p=/holmes/> (last visited Apr. 12, 2016).

²³ Holmes, *supra* note 21, at 189.

²⁴ *Id.* at 188.

improve their social standing.²⁵ In contrast, almost any Samoan can trace lineage to a high chief and thus be eligible to chieftainship.²⁶

Samoa culture survived western contact, which occurred in the early 1800s.²⁷ However, Holmes affirmed that similar to its Polynesian neighbors, Samoa endured its share of Western visitors and was unable to completely shield itself from outside influence.²⁸ However, Christianity fit harmoniously with Samoan customs unlike the other Polynesian societies, which experienced great changes when its people converted to outside religions and lost faith in past divinities.²⁹ Holmes' rendition of the 1960s American Samoa is closely reflected in the twenty-first century where its culture, while inevitably evolved, remains similar to how it was once described.³⁰

B. *The Beginnings of a U.S. Territory*

The Samoan islands were exposed to western nations vying for control over the South Pacific, which intensified during the late nineteenth century. It was apparent that an owner would emerge between the rivaling nations of France, Germany, Great Britain and the United States.³¹ The Berlin Act of 1889 signaled an agreement of neutrality.³² Despite a formalized document of peace, the friction between the nations could not be completely abated. In 1899, the Washington Convention divided the Samoan islands into east and west between the United States and Germany.³³ The United States had a particular interest in eastern Samoa because it saw strategic military advantages in possessing Pago Pago harbor.³⁴

A year later, on April 17, 1900, Samoan chiefs from eastern Samoa voluntarily transferred the main island of Tutuila to the United States

²⁵ *Id.* at 191.

²⁶ *Id.* at 193-95.

²⁷ Holmes, *supra* note 21, at 190.

²⁸ *Id.*

²⁹ *Id.* at 193-95.

³⁰ When Dr. Holmes described American Samoa in 1980, ninety-eight percent of land was communally held and in the current state, about ninety percent of land is still owned in the collective. *Id.* at 190.

³¹ JoAnna Poblete-Cross, *Bridging Indigenous and Immigrant Struggles: A Case Study of American Sāmoa*, 62 AM. Q. 501, 502 (2010).

³² *Id.*

³³ David A. Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920-1935*, 69 PAC. HIST. REV. 217, 222 (2000).

³⁴ Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 827 (2008).

through the Deed of Cession.³⁵ The deed “granted protective sovereignty to the United States while at the same time empowering chiefs to control their own villages and districts according to the *fa’a Samoa*.”³⁶ Roughly translated to the “Samoan way,” preservation of *fa’a Samoa* figured prominently for the Samoan chiefs during the cession negotiations.³⁷ When the chiefs voluntarily ceded their islands in 1904, U.S. Commander B.F. Tilley promised this same autonomy to the outer islands known as the Manu’a group.³⁸

Now known as American Samoa, the united eastern island group situated itself under U.S. Navy administration and Commander Tilley became the head of state.³⁹ Commander Tilley signed Regulations 4 and 5, which “applied U.S. laws to the territory, as long as they did not conflict with Samoan customs”⁴⁰ and “strictly limited land ownership in the region to either Samoans or the government.”⁴¹ These regulations were essential in the protection of Samoan interests. These regulations also protected U.S. interest in American Samoa because it created a land ownership infrastructure that discouraged Germany and other countries from gaining access that would have impinged on American Samoa.⁴²

The American Samoa-Navy relations were not always harmonious, although the new partnership appeared positive on the surface. The relationship’s rocky beginnings led to *mau* or protests in opposition of naval administration.⁴³ The differences between Naval decision-making and *fa’a Samoa* were made apparent in disagreements over the use and implementation of the copra tax,⁴⁴ perceived naval corruption,⁴⁵ and general disenchantment with the Navy’s administration of American Samoa.⁴⁶

³⁵ Chappell, *supra* note 33, at 222.

³⁶ *Id.*

³⁷ Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 81 (2013).

³⁸ Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT’L L.J. 220, 229-30 (1980).

³⁹ Poblete-Cross, *supra* note 31, at 502.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Chappell, *supra* note 33, at 222.

⁴⁴ *Id.* at 229.

⁴⁵ *Id.* at 230.

⁴⁶ *Id.* at 233.

The distrust that American Samoans felt against the Navy was not unsubstantiated. The Naval representative sent to administer the islands rotated on average about every one-and-a-half years, making it difficult to sustain relationships and consistency.⁴⁷ Moreover, American Samoans received unclear information. Many Samoan chiefs believed that when they ceded their islands, they were receiving U.S. citizenship in return,⁴⁸ but later discovered this was not the case.⁴⁹ Additionally, Commander Tilley, the main negotiator of the Deed of Cession, never signed the document himself, thus delaying⁵⁰ the formal recognition of the agreement by almost thirty years.⁵¹

The *mau* became crucial in fostering autonomy and decision making for American Samoa.⁵² Samoan chiefs demanded clarity on their position with the United States and pushed for recognition of citizenship for American Samoans throughout the *mau*.⁵³ The movement spread throughout the islands and lasted for about fifteen years.⁵⁴ Support for the *mau* increased beyond Samoan borders, ensuring improved educational and healthcare institutions, and successfully “pushed Congress to ratify the Deeds of Cession”⁵⁵ in 1929, despite not having achieved the goal of U.S. citizenship.⁵⁶ In addition, the *mau* paved way for dialogue about American Samoa’s future and options. It led to the consideration of “an organic act, [a] Federal legislation conferring U.S. citizenship,”⁵⁷ similarly found in

⁴⁷ Chappell, *supra* note 33, at 254.

⁴⁸ The American Samoan and United States had markedly different views of deeds of cession and its role. American Samoa classified the deeds as treaties, while the United States does not view them as such. These could be reasons to misunderstandings in what the deeds promised and conveyed. This also corresponds with the way the United States viewed their control over American Samoa began before these deeds were signed, while American Samoans believed they willingly ceded their sovereignty on their own accord. Edward J. Michal, *American Samoa or Eastern Samoa? The Potential for American Samoa to be Freely Associated with the United States*, THE CONTEMP. PACIFIC 137, 143-44 (1992).

⁴⁹ *Id.* See also Chappell, *supra* note 33, at 254.

⁵⁰ The United States considered the Washington Convention as justification for its control over American Samoa and didn’t consider subsequent negotiations such as the deeds of cession were unnecessary. Michal, *supra* note 48, at 145-47. This is likely the reason Tilley did not feel the need to sign these documents and formal recognition was not considered until almost thirty years later because of political pressure. *Id.* at 151.

⁵¹ Chappell, *supra* note 33, at 223.

⁵² *Id.* at 218.

⁵³ *Id.* at 249-51.

⁵⁴ *Id.* at 255.

⁵⁵ Chappell, *supra* note 33, at 255.

⁵⁶ *Id.* at 252.

⁵⁷ Leibowitz, *supra* note 38, at 257.

Guam and the Virgin Islands⁵⁸ to American Samoa, although it never materialized. A territory, without a Congressional organic act to establish a territorial government, remains unorganized.⁵⁹

The push for citizenship remained strong until about the late 1940s when islanders realized that an organic act for American Samoa may have unintended consequences on its land and *matai* systems.⁶⁰ In recognition of this new understanding, “ninety chiefs then asked that congressional bills dealing with the status of their islands be tabled”⁶¹ for ten years.⁶² American Samoa remains an unincorporated, unorganized⁶³ territory of the United States.⁶⁴

American Samoa has embraced modernity and the Western lifestyle because of its ties to the United States, but its people are committed to protecting Samoan traditions.⁶⁵ *Fa’a Samoa* has continued for generations and is intrinsic in all of American Samoa’s socio-political and cultural existence.⁶⁶

American Samoa is largely defined by its *matai* system, which is central to *fa’a Samoa*.⁶⁷ *Matai* is a difficult concept to comprehend for those not raised in the system because it embodies a way of life and a system of community governance.⁶⁸ *Matai*, loosely translated to “titled chief,”⁶⁹ is better understood as a symbiotic network between leaders and communities. Extended families known as the *aiga*⁷⁰ play an indispensable

⁵⁸ *Id.* at 259.

⁵⁹ Morrison, *supra* note 37, at 88.

⁶⁰ Chappell, *supra* note 33, at 256; *see infra* p. 9 and note 68.

⁶¹ *Id.*

⁶² Leibowitz, *supra* note 38, at 243.

⁶³ Territories with “constitutions written into federal law by the U.S. Congress” are organized. American Samoa’s constitution is not organized because it was validated by the Department of the Interior in 1967, rather than by Congress. Michal, *supra* note 48, 140 (1992).

⁶⁴ The World Factbook, *American Samoa*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> (last updated Apr. 21, 2015).

⁶⁵ Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT’L L. 35 (1999).

⁶⁶ Morrison, *supra* note 37, at 78.

⁶⁷ ‘Ie Toga (Fine Mat): Samoan Traditions of Weaving, NATIONAL PARK SERVICE, <http://www.nps.gov/npsa/learn/education/classrooms/ie-toga-samoan-traditions-of-weaving.htm> (last visited Mar. 10, 2016).

⁶⁸ Morrison, *supra* note 37, at 78.

⁶⁹ Chappell, *supra* note 33, at 223.

⁷⁰ Aiga is a familial concept that extends past the nuclear family and often

role.⁷¹ There is at least one *matai* linked to each of the *aiga* family groups.⁷² Titles are not freely given, but are established via birthright and community consensus.⁷³

Matai are expected to protect and care for their villages and communities. *Fa'aaloalo*, or respect, governs a system emphasizing service and selflessness.⁷⁴ One of the *matai*'s essential roles is ensuring the *aiga* land is maintained and allocated properly.⁷⁵ A defining part of Samoan culture, the concept of communal land, is deeply ingrained in the *matai* system. To this day, ninety percent of the land in American Samoa is owned in the collective.⁷⁶ This idea is not widely held in the United States where concepts of private property are prevalent. The significant amount of land owned by American Samoan communities is primarily attributed to laws that limit land possession. According to the American Samoa Code, property ownership or long-term lease of land is restricted to someone with at least fifty percent native blood.⁷⁷

Matai also has prominence in current governance as they are integrated in all areas of the American Samoan government.⁷⁸ Village councils and governing bodies comprised of *matai* oversee the basic needs and safety of the villages.⁷⁹ The *Fono*, American Samoa's legislature, consists of two houses, both require residency, and the Senate membership requires a *matai* title.⁸⁰ In addition, the "enactment of legislation requires the consent of both chambers."⁸¹ While there are no implied racial and ethnic limits to running for a seat in the *Fono*'s lower house, about 89

includes communities. TE'O TUVALE, AN ACCOUNT OF SAMOAN HISTORY UP TO 1918 I (1968).

⁷¹ Leibowitz, *supra* note 38, at 223-24.

⁷² Norman Meller, *Ethnic and Racial Cleavages in Pacific Island Constitutions*, 32 J. OF PAC. HIST. 203, 203-08 (1997).

⁷³ Leibowitz, *supra* note 38, at 223.

⁷⁴ Chappell, *supra* note 33, at 226.

⁷⁵ Villazor, *supra* note 34, at 826.

⁷⁶ *Id.*

⁷⁷ Am. Samoa Code Ann. § 37.0204(b) (2004), AM. SAMOA B. ASS'N, http://www.asbar.org/index.php?option=com_content&view=category&id=672&Itemid=172 (last visited Apr. 12, 2016. *See also* Villazor, *supra* note 34, at 825.

⁷⁸ Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 77 (2001).

⁷⁹ *Id.* at 74-75.

⁸⁰ Leibowitz, *supra* note 38, at 252.

⁸¹ Meller, *supra* note 72, at 205.

percent of American Samoa's people are ethnically Samoan,⁸² which naturally leads to continued representation by the majority ethnic group. In order to keep a foothold on traditional values⁸³ in American Samoa's judicial system, some judges are chosen from the *matai* and employed for their understanding of Samoan customs and culture, despite their lack of a legal education.⁸⁴ However, all judges report to and can be dismissed by the U.S. government's Department of the Interior ("DOI").⁸⁵

After more than half a century of naval administration, the DOI gained control of American Samoa in 1951 under Executive Order 10264.⁸⁶ The DOI's paternalistic attitude towards the territory is reflected in the first American Samoa Constitution of 1960.⁸⁷ Arnold Leibowitz, a frequently cited commentator, described the strained relationship between the DOI and American Samoa as the dominant federal department exercising its authority over a "passive populace."⁸⁸ The imbalance of power could no longer be tolerated and in 1966, under a Constitutional Convention, the Samoan people revised the original Constitution that "reactivat[ed] the locally selected legislature and limit[ed] the powers of the federally appointed governor."⁸⁹ In 1967, the Secretary of the Interior⁹⁰ approved the new Constitution and established "a tripartite government with a popularly elected bicameral legislature, an appointed governor, and an independent judiciary appointed by the Secretary."⁹¹

⁸² The World Factbook, *American Samoa*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html> (last updated July 9, 2015).

⁸³ Traditional values encompass the interrelated system where the aiga family groups owe a duty to the matai that governs and protects the family system as well as the communal land ownership. William O. Jenkins, Jr., *American Samoa: Issues Associated with Some Federal Court Options*, U.S. GOV'T ACCOUNTABILITY OFF. 6-7 (Sept. 18 2008), <http://www.gao.gov/assets/130/121189.pdf>.

⁸⁴ Michal, *supra* note 48, at 138 (1992). See also Morrison, *supra* note 37, at 80.

⁸⁵ Stanley K. Laughlin Jr., *Application of the Constitution in United States Territories: American Samoa, a Case Study*, *The*, 2 U. HAW. L. REV. 388, 434 (1979).

⁸⁶ Poblete-Cross, *supra* note 31, at 505.

⁸⁷ Leibowitz, *supra* note 38, at 254.

⁸⁸ *Id.*

⁸⁹ *Id.* at 254-55.

⁹⁰ Stewart L. Udall served as Secretary of the Interior from 1961 to 1969. Stewart Lee Udall, U.S. DEPARTMENT OF INTERIOR, https://www.doi.gov/whoware/past_secretaries/#udall (last visited Mar. 10, 2016).

⁹¹ Complaint for Declaratory and Injunctive Relief at 27, *Tuaua v. United States*, No. 12-1143 (2012).

Around this time, Congress created the Eastern Samoa Study Mission,⁹² a committee tasked to review American Samoa's current state.⁹³ The committee expressed concern over citizenship for the territory since it would disrupt the "Samoa way of life."⁹⁴ As a result, they requested suspension on any citizenship decisions for American Samoa until promises to protect current cultural norms were obtained.⁹⁵ While American Samoans remained generally interested in citizenship, like the committee, they continued to be hesitant because of the uncertainty of the effect it would have on their current governance and culture.⁹⁶ The debate for and against U.S. citizenship status for American Samoans is as alive today as it was almost five decades ago.⁹⁷

III. TUAUA V. UNITED STATES: CASE FOR CITIZENSHIP IN THE TWENTY FIRST CENTURY

In 2013, the federal courts in the District of Columbia ("D.C.") considered whether American Samoan U.S. nationals are entitled to full U.S. citizenship on the basis of the Fourteenth Amendment. *Tuaua v. United States* revived the historical discussion of citizenship for American Samoans.⁹⁸

The plaintiffs included five U.S. Nationals born in American Samoa and an advocacy organization based in California.⁹⁹ The plaintiffs were Va'aleama Fosi, Fanuatanu Mamea, Emy Afalava, Leneutoi Tuaua,

⁹² In 1960, the U.S. Senate approved a committee to visit American Samoa and investigate ways to improve its economy and autonomy. Overseeing this special subcommittee of the Committee of Interior and Insular Affairs were Oren E. Long and Ernest Gruening, Senators from Hawaii and Alaska, respectively. Members of the committee, specialists, and staff visited the islands and produced both individual and combined reports. ERNEST GRUENING AND OREN E. LONG, STUDY MISSION TO EASTERN (AMERICAN) SAMOA: REPORT OF SENATORS OREN E. LONG, OF HAWAII, AND ERNEST GRUENING, OF ALASKA, TO THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, S. MISC. Doc. No. 81-528 at Forward VII (1961).

⁹³ Leibowitz, *supra* note 38, at 258.

⁹⁴ *Id.* at 257.

⁹⁵ *Id.*

⁹⁶ *Id.* at 258.

⁹⁷ See Charles V. Alailima, OP ED: US Citizenship from a Historical Perspective and Who Decides, SAMOA NEWS, (Apr. 17, 2015), available at <http://samoanews.com/content/en/op-ed-“us-citizenship-historical-perspective-and-who-decides”>; but see Sam Erman & Nathan Perl-Rosenthal, OP ED: Not another Dred Scott case, please, SAMOA NEWS, (Mar. 10, 2016), available at <http://www.samoanews.com/content/en/op-ed-not-another-dred-scott-case-please>.

⁹⁸ *Tuaua v. United States*, 951 F. Supp. 2d 88, 89 (D.D.C. 2013).

⁹⁹ Brief of Plaintiffs-Appellants at 2, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Apr. 25, 2014).

and Taffy-lei Maene, and the Samoan Federation of America.¹⁰⁰ Recruited out of high school, Va'aleama Tovia Fosi served in the U.S. military for over ten years before being “honorably discharged as a First Lieutenant” in the U.S. Army Reserve.¹⁰¹ Fanuatanu F.L. Mamea sustained critical injuries after his service in the Vietnam War and became a decorated veteran despite preclusion from joining the U.S. Special Forces due to his non-citizen national status.¹⁰² Emy Fiatala Afalava served several missions in Kuwait and continued serving overseas before honorable discharge.¹⁰³ Leneuoti FiaFia Tuaua enlisted in the U.S. military and devoted thirty years to law enforcement in American Samoa.¹⁰⁴ Taffy-lei T. Maene has no military background, but she lost her position at the Washington State Department of Licensing and suffered similar harms as the other plaintiffs because she did not hold U.S. citizenship.¹⁰⁵ The Samoan Federation, an organization devoted to social services, recognized the challenges faced by the U.S. Nationals in the process of naturalization.¹⁰⁶

The *Tuaua* plaintiffs sued the U.S. Government for U.S. citizenship under the U.S. Constitution.¹⁰⁷ Three substantive and informed amici were filed, weighing in favor of the plaintiffs and urging reversal of the district court's decision.¹⁰⁸ The thirteen citizenship law scholars (“Citizenship Amici”), faculty from various American universities, weighed-in with their combined expertise and interests in the areas of citizenship, the Fourteenth Amendment, immigration, noncitizen national status, territories, sovereignty, political theory, and international law.¹⁰⁹

¹⁰⁰ *Id.* at 4.

¹⁰¹ Complaint for Declaratory and Injunctive Relief at 11, *Tuaua v. United States*, No. 12-1143 (2012).

¹⁰² *Id.*

¹⁰³ *Id.* at 14.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ Complaint for Declaratory and Injunctive Relief at 13, *Tuaua v. United States*, No. 12-1143 (2012).

¹⁰⁶ *Id.* at 15.

¹⁰⁷ *Id.* at 16-19. Defendants are the United States, U.S. Department of State, Hilary Rodham Clinton in her official capacity as Secretary of State, and Janice Jacobs in her official capacity as the Assistant Secretary for Consular Affairs.

¹⁰⁸ Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 14, 2014); Brief of Amicus Curiae David B. Cohen in Support of Plaintiffs-Appellants and Reversal of the Decision Below, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014); Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiffs-Appellants and in Support of Reversal, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

¹⁰⁹ Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal at 38-44, *Tuaua v. United States*, No. 13-5272 (D.C. Cir.

David Cohen, former Deputy Assistant Secretary of the Interior for Insular Affairs and who is of Samoan ancestry,¹¹⁰ shared relevant perspectives from both his close ties to the territory and his understanding of the U.S. government.¹¹¹ Six current and former government officials (“Members Amici”) representing most of the other U.S. territories and the former Assistant Secretary of the Interior for Insular Affairs shared another distinct perspective.¹¹² The Members Amici consisted of current Congresswomen and former Governors from the Territory of Guam and the Territory of the U.S. Virgin Islands, a former Governor of Puerto Rico, and the former Assistant Secretary of the Interior for Insular Areas.¹¹³ Their combined experiences of representing territories with birthright citizenship allowed the Members Amici to speak with authority on the value derived for both the U.S. government and the territory because of the existence of citizenship.¹¹⁴

The single amici in favor of the U.S. government’s position came from former American Samoa Congressman Eni Faleomavaega and the government of American Samoa.¹¹⁵

Constitutional law experts (“Constitutional Amici”) sent in an amicus brief in support of neither party and provided a critical analysis of the application of the Insular Cases to *Tuaua*.¹¹⁶ Seven professors from various American universities with an expansive knowledge in the area of territories and the Insular Cases collectively, offered an unbiased discussion.¹¹⁷

The plaintiffs filed a complaint in the U.S. Court of Appeals for the District of Columbia pursuant to “the opinion and order granting defendants’ motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), issued by the United States District Court for the District of

May 14, 2014).

¹¹⁰ Brief of Amicus Curiae David B. Cohen in Support of Plaintiffs-Appellants and Reversal of the Decision Below, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

¹¹¹ *Id.*

¹¹² Brief of Amici Curiae Certain Members of Congress and Former Governmental

Officials in Support of Plaintiffs-Appellants and in Support of Reversal, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

¹¹³ *Id.*

¹¹⁴ *Id.* at 5.

¹¹⁵ Brief for Christina Duffy Ponsa et al. as Amici Curiae Neutral Parties at 1, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 12.

Columbia, Judge Richard J. Leon, on June 26, 2013.”¹¹⁸ The trial court granted the petitioners’ motion to dismiss for failure to state a claim because it determined that the Fourteenth Amendment’s Citizenship Clause did not grant birthright citizenship to noncitizen nationals born in American Samoa.¹¹⁹ The D.C. Court’s three-judge panel consisting of Judges Brown, Silberman, and Sentelle, affirmed the trial court’s decision.¹²⁰

A. *The Fourteenth Amendment’s Citizenship Clause*

Most Americans can trace their U.S. citizenship to the Fourteenth Amendment’s Citizenship Clause. In contrast to the people of the states, the people of most U.S. territories have citizenship from congressional statutes.¹²¹ Other unincorporated and inhabited U.S. territories with granted statutory citizenship¹²² include Puerto Rico, Guam, Northern Marianas, and the U.S. Virgin Islands.¹²³ However, the *Tuaua* plaintiffs sought constitutional citizenship,¹²⁴ which is derived from the Fourteenth Amendment.¹²⁵ The difference between these two forms of citizenship is that Congress can revoke congressionally granted citizenship in the other territories when it so chooses,¹²⁶ but Congress cannot reverse a constitutional right once it is established.

The Fourteenth Amendment’s Citizenship Clause states, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹²⁷ The main contentions in *Tuaua* are on the interpretation of the Citizenship Clause, the analysis of citizenship under the Insular Cases, and whether the Insular Cases should apply to the decision of this case.

¹¹⁸ Brief of Plaintiffs-Appellants at 3, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Apr. 25, 2014).

¹¹⁹ *Tuaua*, 951 F. Supp. 2d at 98.

¹²⁰ *Tuaua v. United States*, 788 F.3d 300, 312 (D.C. Cir. June 5, 2015).

¹²¹ Morrison, *supra* note 37, at 88.

¹²² Morrison, *supra* note 37, at 88-89.

¹²³ Joseph E. Fallon, *Federal Policy and U.S. Territories: The Political Restructuring of the United States of America*, 64 PAC. AFF. 25 (1991).

¹²⁴ Complaint for Declaratory and Injunctive Relief at 9, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

¹²⁵ Morrison, *supra* note 37, at 88.

¹²⁶ *Id.* at 88-89.

¹²⁷ *Tuaua*, 951 F. Supp. 2d at 95.

B. *Interpreting the Citizenship Clause*

The *Tuaua* plaintiffs asserted that American Samoans are entitled to constitutional citizenship under the plain meaning of the Fourteenth Amendment's Citizenship Clause because the clause should be read to encompass the territories.¹²⁸ The next two sections will examine those aspects of the clause as understood by the litigants.

The *Tuaua* plaintiffs explained that "all persons born or naturalized in the United States"¹²⁹ was the geographic scope of the clause, and "subject to the jurisdiction thereof" meant allegiance to the United States.¹³⁰ Fulfillment of both should grant constitutional citizenship.¹³¹

The *Tuaua* plaintiffs claimed that the geographic scope of "United States" in the Citizenship Clause included territories such as American Samoa.¹³² The plaintiffs posited that the Fourteenth Amendment's plain text must be based on the lay understanding of 'United States' during the amendment's ratification period in 1868.¹³³ According to the plaintiffs, the period of ratification recognized that the United States is comprised of states and territories.¹³⁴ The debates from the 1866 U.S. Senate enhance the plaintiffs' argument on the geographic scope of United States.¹³⁵ During the drafting of the Fourteenth Amendment, Senator Lyman Trumbull confirmed that "United States" included all possessions such as territories and that the clause is correctly read in its entirety when the first section is contrasted with section two of the entire amendment.¹³⁶ "In Section 1, the Citizenship Clause uses the broad phrase *the United States*, while Section 2 speaks more narrowly of congressional representation *among the several States*."¹³⁷

¹²⁸ *Id.* at 90.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Tuaua*, 951 F. Supp. 2d at 90.

¹³² *Id.*

¹³³ Reply Brief of Plaintiffs-Appellants at 4, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Oct. 8, 2014).

¹³⁴ *Id.*

¹³⁵ Complaint for Declaratory and Injunctive Relief at 40, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

¹³⁶ Brief of Petitioner-Appellant at 36, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Apr. 25, 2014).

¹³⁷ Senator Trumbull discussed the entire Fourteenth Amendment, which consists of five sections. The Citizenship Clause is only the first sentence of the first section. Unlike the Citizenship Clause, the second section describes representation by election and according to Trumbull is specific to the States and doesn't encompass territories. See Reply Brief of Plaintiffs-Appellants at 4, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Oct. 8, 2014) (quoting U.S. Const. amend. XIV, § 2, internal quotes

On the other hand, the United States asserted that the Citizenship Clause is limited to the fifty states and does not encompass the territories.¹³⁸ It looked to authority that held, “where Congress has not specifically enumerated that the outlying territory is subject to the territorial scope of the Citizenship Clause, the clause does not apply to those territories.”¹³⁹ Congress’ silence on the application of the Citizenship Clause to American Samoa along with an already established path for naturalization, confirmed the clause’s non-application to American Samoa.¹⁴⁰ The United States emphasized Congress’ authority on citizenship and reiterated that naturalization is the recognized path for citizenship in the territory.¹⁴¹

The United States argued that *Eche v. Holder*, a Ninth Circuit opinion that limited the geographic scope of the Naturalization Clause to the fifty states should be applied in *Tuaua*.¹⁴² However, the *Eche* opinion concerned only the Naturalization Clause and made no mention of the Citizenship Clause.¹⁴³

Neither side convinced the *Tuaua* court that the Fourteenth Amendment’s plain text was clear and unambiguous as to whether or not the Citizenship Clause extended to the U.S. territories.¹⁴⁴ Neither argument is dispositive on whether “within” the United States included American Samoa thus, the court found the text ambiguous and that it required further inquiry.¹⁴⁵

The *Tuaua* plaintiffs asserted that American Samoa is “subject to the jurisdiction” of the United States because of its allegiance to the U.S. government as demonstrated by the *jus soli* doctrine.¹⁴⁶ *Jus soli* or “the right of the soil”¹⁴⁷ originated in England where subjects of the Kingdom included those loyal to and born where the King ruled, despite the

omitted).

¹³⁸ Defendants' Motion to Dismiss Plaintiffs' Complaint at 11-12, *Tuaua v. United States*, No. 12-1143 (D.D.C. Nov. 7, 2012).

¹³⁹ *Id.* at 39-40.

¹⁴⁰ *Id.* at 40.

¹⁴¹ Brief for Appellees at 25-26, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Aug. 11, 2014).

¹⁴² *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012).

¹⁴³ *Id.*

¹⁴⁴ *Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. June 5, 2015).

¹⁴⁵ *Id.*

¹⁴⁶ Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal at 11, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 14, 2014).

¹⁴⁷ *Id.* at 2.

possession falling outside the sovereign.¹⁴⁸ U.S. common law adopted this concept of jus soli such that ‘citizen’ replaced ‘subject.’¹⁴⁹ The main purpose of the Citizenship Clause, as posited by the Citizenship Amici, centered on systematizing jus soli and nullifying *Dred Scott v. Sanford*,¹⁵⁰ a case that denied citizenship to “American-born descendants of African slaves.”¹⁵¹ In *United States v. Wong Kim Ark*, the Supreme Court confirmed this codification¹⁵² when it acknowledged that jus soli is crucial in application of the Fourth Amendment.¹⁵³ The *Wong Kim Ark* court determined that Wong’s birth on U.S. soil gave him U.S. citizenship despite his parent’s nationality.¹⁵⁴ The Citizenship Amici pointed out that the non-citizen national status was created under racial guise and violated jus soli.¹⁵⁵

The United States argued that *Rogers v. Bellei* confirmed that jus soli is not applicable when “modified by statute.”¹⁵⁶ “Even if Plaintiffs were correct that their interpretation of the Fourteenth Amendment should [] confer birthright citizenship pursuant to jus soli on non-citizen American Samoans, Congress’ direct modification of that status by statute trumps that interpretation under Supreme Court interpretation.”¹⁵⁷

The *Tuaua* court found the Fourteenth Amendment did not implicate the use of jus soli.¹⁵⁸ The court explained that *Wong Kim Ark* did not codify “the common law rule as applied to outlying territories”¹⁵⁹ and even if the Citizenship Clause codified jus soli, there remain exceptions to

¹⁴⁸ Lisa Maria Perez, *Citizenship Denied: The “Insular Cases” and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1046-47 (2008).

¹⁴⁹ *Id.* at 1050.

¹⁵⁰ Brief of Plaintiffs-Appellants at 1, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Apr. 25, 2014).

¹⁵¹ *Id.* at 11.

¹⁵² Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal at 15, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 14, 2014).

¹⁵³ Morrison, *supra* note 37, at 95-96.

¹⁵⁴ *Id.*

¹⁵⁵ Corrected Brief of Citizenship Scholars as Amici Curiae in Support of Appellants and Urging Reversal at 26-27, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 14, 2014).

¹⁵⁶ Brief for Appellees at 26, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Aug. 11, 2014) (quoting *Rogers v. Bellei*, 401 U.S. 815, 828 (2009)).

¹⁵⁷ *Id.* (referencing 8 U.S.C. § 1408(1), which categorizes U.S. National as one born in an outlying possession of the United States).

¹⁵⁸ *Tuaua*, 788 F.3d at 304.

¹⁵⁹ *Id.*

the doctrine.¹⁶⁰ “The Supreme Court declined to extend constitutional birthright citizenship to Native American¹⁶¹ tribes”¹⁶² because the “requirement of allegiance to the sovereign” would subject them to the full undivided authority of the United States.¹⁶³ American Samoa is similar. As a territory, it already owes permanent allegiance to the United States, but not complete allegiance via relinquishing its political autonomy.¹⁶⁴ As the court noted, “we are skeptical the framers plainly intended to extend the birthright citizenship to distinct, significantly self-governing political territories within the United States’ sphere of sovereignty.”¹⁶⁵

C. *The Citizenship Clause and the Insular Cases*

The *Tuaua* appellate court determined that the application of the Citizenship Clause to American Samoa required further inquiry and invoked the “sometimes contentious” Insular Cases.¹⁶⁶ The court concluded, “the scope of the Citizenship Clause, as applied to territories, may not be readily discerned from the plain text or other indicia of the framers’ intent, absent resort to the Insular Cases’ analytical framework.”¹⁶⁷ The case required analysis through the lens of the Insular Cases and its precedent.

The Insular Cases addressed the legal status, specifically the application of provisions of the U.S. Constitution to newly acquired possessions in a period of expansion at the turn of the twentieth century. Spain’s relinquishment of Guam, Puerto Rico, and the Philippines to the United States after the Spanish-American Wars spurred a string of cases that tried to determine application of constitutional provisions to the new acquisitions.¹⁶⁸

Two approaches that applied the constitution to the U.S. territories existed prior to the Insular Cases.¹⁶⁹ The first approach, *ex proprio*

¹⁶⁰ *Id.*

¹⁶¹ The Indian Citizenship Act of 1924 conferred U.S. citizenship to all United States-born Native American Indians. Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 127 (2004).

¹⁶² *Tuaua*, 788 F.3d at 306.

¹⁶³ *Id.* at 305.

¹⁶⁴ *Id.* at 306.

¹⁶⁵ *Id.*

¹⁶⁶ *Tuaua*, 788 F.3d at 306.

¹⁶⁷ *Id.*

¹⁶⁸ 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 (1997).

¹⁶⁹ *Id.* at 241.

vigore,¹⁷⁰ applied the entire Constitution to any place under the jurisdiction of the United States, which included territories.¹⁷¹ *Ex proprio vigore* placed the will of the Constitution above the authority of Congress and the Executive.¹⁷² A second approach touted that Congress is not limited by the Constitution, but has sole discretion to govern the territories.¹⁷³ Yet a third approach emerged out of the Insular Cases – the incorporation doctrine.¹⁷⁴

The courts used the incorporation doctrine to determine which constitutional rights are applicable to U.S. territories. *Downes v. Bidwell* first introduced the doctrine, which became fundamental to the Insular Cases.¹⁷⁵ *Downes*, a seminal case, held that the Revenue Clause did not apply to Puerto Rico.¹⁷⁶ Justice White’s concurring opinion in *Downes* formed the basis of the doctrine, which the entire Supreme Court adopted around two decades later.¹⁷⁷ Under the doctrine, the U.S. territories that Congress regarded as potentially eligible for statehood were *incorporated*, while territories not on the path were *unincorporated*.¹⁷⁸ Only certain fundamental rights from the constitution applied to unincorporated territories.¹⁷⁹ Currently, no U.S. territory is incorporated.¹⁸⁰

Determining which fundamental rights apply to the unincorporated U.S. territories has proved challenging for the courts. In particular, “[Justice] White urged invocation of a natural rights philosophy” to determine fundamental rights.¹⁸¹ White envisioned fundamental rights to include rights essential to “all free government,” which if missing, would impede on one’s autonomy.¹⁸² However, that definition did not offer

¹⁷⁰ Of its own force; by its own force; automatically. *Ex proprio vigore*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

¹⁷¹ Laughlin, *supra* note 85, at 423.

¹⁷² Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 242 (1996).

¹⁷³ *Id.* at 241.

¹⁷⁴ *Id.*

¹⁷⁵ Laughlin, *supra* note 85, at 423-24.

¹⁷⁶ Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283 (2007).

¹⁷⁷ Laughlin, *supra* note 85, at 424.

¹⁷⁸ Perez, *supra* note 148, at 1040.

¹⁷⁹ *Id.* at 1039.

¹⁸⁰ Laughlin, *supra* note 85, at 424.

¹⁸¹ Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 782 (1992).

¹⁸² *Id.*

enough guidance. Fundamental rights are still largely defined by previous court decisions¹⁸³ and thus far, the courts found fundamental rights include “due Process and the writ of habeas corpus.”¹⁸⁴ In contrast, “the right to trial by jury, the right to presentment by grand jury, and the right to confront witnesses,” are not fundamental rights.¹⁸⁵ Deciphering a fundamental right is not the only ambiguity in the Insular Cases.

Critics have pointed out that *Downes* began the inconsistent holdings, which introduced confusion in the Insular Cases.¹⁸⁶ A different majority decided several of the Insular Cases pre-*Downes*.¹⁸⁷ When Justice Brown changed his position in *Downes* and joined the dissenting judges from previous cases, he created a new majority.¹⁸⁸ Since then, the holdings in the following Insular Cases were difficult to reconcile.¹⁸⁹ *Downes* represents the confusion created by the Insular Cases in court decisions. Its sporadic patchwork of opinions led to the misapplication of holdings and precedent.¹⁹⁰ Although Brown penned the main opinion in *Downes*, the majority only affirmed the decision and therefore, the remainder of the opinion is “precedential only as to its precise facts.”¹⁹¹ This undermines the United States’ argument that citizenship is not a fundamental right under the Insular Cases’ incorporation doctrine.¹⁹² The United States failure to recognize Brown’s dictum in *Downes* was without precedent.¹⁹³

The *Tuaua* court closely followed Justice Brown’s dictum in *Downes* to determine birthright citizenship is not a fundamental right. The court recognized that “although some aspects of the Insular Cases’ analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use.”¹⁹⁴ The court rejected the notion that birthright citizenship is essential to “free government” by interpreting

¹⁸³ Laughlin, *supra* note 85, at 424.

¹⁸⁴ Andrew Petrey, *Constitutional Confines: Determining the Applicability of the Citizenship Clause to American Samoa*, 25 FLA. J. INT’L L. 483, 488 (2013).

¹⁸⁵ Katz, *supra* note 181, at 783.

¹⁸⁶ Ramos, *supra* note 172, at 242-46.

¹⁸⁷ *Id.* at 245-46.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Torruella, *supra* note 176, at 300-12. See also Ramos, *supra* note 172, at 254.

¹⁹¹ *Id.*

¹⁹² Defendants’ Motion to Dismiss Plaintiffs’ Complaint at 13, *Tuaua v. United States* No. 12-1143 (D.D.C. Nov. 7, 2012).

¹⁹³ *Id.*

¹⁹⁴ *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. June 5, 2015).

fundamental rights narrowly as to only include “those rights so basic as to be integral to free and fair society.”¹⁹⁵ The *Tuaua* court acknowledged that birthright citizenship is principally followed in Anglo-American common law, yet it adopted Justice Brown’s conclusion in *Downes* that many “free and democratic societies principally follow *jus sanguinis* . . . where birthright citizenship is based upon nationality of a child’s parents.”¹⁹⁶ According to the *jus sanguinis* doctrine, the location where one is born is irrelevant to citizenship.¹⁹⁷ Based on this understanding, the *Tuaua* court concluded that birthright citizenship is not a fundamental right under the Insular Case analysis.¹⁹⁸

The *Tuaua* court noted that the Insular Case framework required further inquiry into whether birthright citizenship should be applied to modern day American Samoa based on the impractical and anomalous test.¹⁹⁹ The Members Amici explained that if a court decides a constitutional right is not fundamental under the incorporation doctrine, the court could assess whether the right should still apply by reviewing the effect of the application of the right to the territory under the impractical and anomalous framework established in *Reid v. Covert*.²⁰⁰

The first inquiry of the framework examines the impracticality of allowing the right in the territory based on its ease of logistical applicability²⁰¹ and the second part explores whether the right would be anomalous as applied to territory’s culture.²⁰² A constitutional right would be anomalous as applied to the territory if it would deteriorate the local culture and customs of the territory. If a constitutional right is found to be either impractical or anomalous when applied to a territory, it will fail the test and be inapplicable.

The Members Amici argued that the Citizenship Clause would not be impractical or anomalous as applied to American Samoa based on the experiences of their own territories.²⁰³ The educational system, judicial branch and form of government are some of the institutions in the

¹⁹⁵ *Id.* at 308.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. June 5, 2015).

¹⁹⁹ *Id.*

²⁰⁰ Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiff-Appellants and in Support of Reversal at 11, *Tuaua v. United States* (D.C. Cir. May 12, 2014).

²⁰¹ *Id.* at 12.

²⁰² *Id.* at 18.

²⁰³ *Id.* at 1.

Members Amici's own territories²⁰⁴ that are similar to that of the United States and facilitated the seamless transition to citizenship, which overcame the impractical concern.²⁰⁵ These foundational factors supported the necessary logistics for birthright citizenship and are similarly found in American Samoa.²⁰⁶ Additionally, the Members Amici claim that in their territories, "their culture and traditions have not just survived but thrived with birthright citizenship in place."²⁰⁷ One of the amici representing Guam, Congresswoman Madeleine Z. Bordallo, shared that citizenship both inspires confidence in the Guamanian people and allows them to feel closer to the United States.²⁰⁸ This positive effect of citizenship dispels the concern that birthright citizenship was anomalous in the other territories and it is likely that birthright citizenship similarly would be found not to be anomalous if applied to American Samoa.

Former Congressman Faleomavaega and the American Samoan government, however, cautioned that extending citizenship to American Samoa would diminish the culture, laws, and customs currently maintained in the territory.²⁰⁹ He explained that if birthright citizenship were granted to American Samoa under the Fourteenth Amendment, it could lead to the full application of the U.S. Constitution on the territory and the destruction of the traditional systems.²¹⁰

The *Tuaua* court found the Citizenship Clause both impractical and anomalous as applied to American Samoa because of the perceived political consensus that American Samoans do not favor of citizenship.²¹¹ It gave little consideration to the impracticality prong, but cited the concerns of Faleomavaega and the American Samoa government in its decision.²¹² The *Tuaua* court explained, "we can envision little that if more

²⁰⁴ While the territories represented by the Members Amici are conferred citizenship through Congressional intent, they support American Samoa's path to citizenship even if it is not the same as theirs and they similarly are able to share their experiences in having citizenship. Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiff-Appellants and in Support of Reversal, *Tuaua v. United States* (D.C. Cir. May 12, 2014).

²⁰⁵ *Id.* at 17

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 18.

²⁰⁸ Brief of Amici Curiae Certain Members of Congress and Former Governmental Officials in Support of Plaintiff-Appellants and in Support of Reversal at 5-6, *Tuaua v. United States* (D.C. Cir. May 12, 2014).

²⁰⁹ Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 37-38, *Tuaua*, No. 13-5272 (D.C. Cir. Aug. 25, 2014).

²¹⁰ *Id.* at 37-38.

²¹¹ *Tuaua*, 788 F.3d at 310.

²¹² *Id.* at 311.

anomalous . . . than the forcible imposition of citizenship against the majoritarian will.”²¹³

IV. THE INSULAR CASES HAVE NO PLACE IN *TUAUA*

This section discusses the inconsistencies in the *Tuaua* court’s decision. Briefly, the court incorrectly held that the Insular Cases was controlling on the matter of citizenship, while at the same time acknowledging an ambiguity exists in the Insular Cases because “none of the cases directly addressed the Citizenship Clause.”²¹⁴ Second, the court departed from its own precedent when it applied the impractical and anomalous test.

The Constitutional Amici contend that the Insular Cases are inapplicable to *Tuaua* because the cases do not address nor provide guidance on the application of the Citizenship Clause to the territories.²¹⁵ “None of the Insular Cases resolved a claim under the Citizenship Clause.”²¹⁶ *Downes* was only pertinent when applied to the Uniformity Clause and did not discuss territories or possessions beyond the States.²¹⁷ The Uniformity Clause and the Citizenship Clause are completely unrelated²¹⁸ and were created at different times and for different purposes.²¹⁹ Other decisions from the Insular Cases are less applicable because the cases mainly involve criminal issues and “unlike the Citizenship Clause, do not specify their own geographic reach.”²²⁰

The century-old cases do not carry the same significance and purpose they once did. Courts have acknowledged this and refused to

²¹³ *Id.*

²¹⁴ *Tuaua*, 951 F. Supp. 2d at 95.

²¹⁵ Brief for Christina Duffy Ponsa et al. as Amici Curiae Neutral Parties at 13; *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

²¹⁶ *Id.* at 13.

²¹⁷ *Id.* at 6.

²¹⁸ According to the scholars, the Uniformity Clause and Citizenship Clause were passed nearly a century apart, serve distinct purposes, and operate differently. *Id.* at 18-20. Under “the Uniformity Clause . . . the phrase ‘United States’ was generally understood as a collective of individual States, whereas after the Civil War, when the Citizenship Clause was enacted, the phrase tended to be used to denote the nation as a unitary entity—including ‘territories subject to its sovereignty’” (some quotation marks omitted) *Id.* at 19. In addition, the Citizenship Clause was a response to *Dred Scott v. Sanford*. *Id.* at 19-20. Furthermore, “the Citizenship Clause guarantees birthright citizenship to individuals.” *Id.* at 20. By contrast, the Uniformity Clause seeks to protect States from Congress’ power over commerce. *Id.* at 20.

²¹⁹ Brief for Christina Duffy Ponsa et al. as Amici Curiae Neutral Parties at 18-20; *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

²²⁰ *Id.* at 13.

extend the holdings of the Insular Cases.²²¹ The Constitutional Amici described the Insular Cases as a “by-gone era” that reflected the racial biases and expansionist mindset of the time.²²² Several opinions from the Insular Cases are steeped in imperialistic biases that described the “uncivilized and savage inhabitants” of the newly obtained overseas possessions as unworthy of American ideals.²²³ A relatively more progressive court that decided one of the Insular Cases hinted at a need for foresight and flexibility in viewing the incorporation doctrine as it may change based on the evolution of the relationship between the United States and its territories.²²⁴

The Constitutional Amici suggested the Supreme Court’s favors a case-by-case review of the territorial incorporation doctrine.²²⁵ The Constitutional Amici further explained that the territorial incorporation doctrine is flawed because it “depart[s] substantially from the Supreme Court’s [earlier] precedent,²²⁶ it is not authorized in “the Constitution’s text or structure,” and it permits Congress to replace constitutional commands with its own decisions as to whether a territory is or isn’t incorporated.²²⁷

While the *Tuaua* court followed the case-by-case review by including an application of the impractical and anomalous test in its analysis, the result should be different based on previous D.C. Circuit decisions. Former U.S. Supreme Court Justice, John Marshall Harlan described the test as one that balances governmental control and individual rights.²²⁸ Harlan believed it was imperative to review each territory’s own unique factors including its “local setting, [] practical necessities, and” potential substitutes to strict application,²²⁹ to determine whether under the circumstances, it would be impractical and anomalous to “afford[] the native population the right.”²³⁰

Previous D.C. Circuit cases would not have entertained the locality’s request in review of the impractical and anomalous test.

²²¹ *Id.* at 14-16.

²²² *Id.* at 24-25.

²²³ Brief for Christina Duffy Ponsa et al. as Amici Curiae Neutral Parties at 25-26; *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

²²⁴ *Id.* at 15.

²²⁵ *Id.* at 14-16.

²²⁶ *Id.* at 22.

²²⁷ Brief for Christina Duffy Ponsa et al. as Amici Curiae Neutral Parties at 23-24; *Tuaua v. United States*, No. 13-5272 (D.C. Cir. May 12, 2014).

²²⁸ Katz, *supra* note 181, at 784.

²²⁹ Katz, *supra* note 181, at 784 (quoting *Reid v. Covert*, 354 U.S. 1, 64 (1957)).

²³⁰ *Id.*

Commentator Robert Katz explained that the “D.C. courts . . . compel[] stricter enforcement of constitutional rights, and reject[] local demands to set aside constitutional commands.”²³¹ In *King v. Morton*, the D.C. Circuit court examined the effect of a jury trial in American Samoa under the impractical and anomalous test.²³² The *King* court declined to consider the effect of a jury trial on American Samoan culture under the impractical and anomalous test,²³³ and instead, primarily focused on the effect of the constitutional implications to the territory in making its decision.²³⁴ Contrasted with *King*, in which “the D.C. circuit refused to let local wishes influence whether the Constitution required jury trials in American Samoa,”²³⁵ the *Tuaua* court did just that — it heeded to what it believed represented the voice of the American Samoan people.

The United States’ belief that American Samoans overwhelmingly are “against citizenship” is unsupported.²³⁶ The islanders are divided and despite the public statements of officials that denounce U.S. citizenship for its people, many are more subdued in their opinions and desires for citizenship.²³⁷ Some want citizenship because they view citizenship as recognition of their people’s value and service.²³⁸

American Samoa’s Congresswoman Aumua Amata is very vocal about her opposition to extending constitutional birthright citizenship to the territory. Amata noted her satisfaction with the recent appellate decision in *Tuaua*.²³⁹ She has since announced plans to submit The American Samoa Freedom of Choice Act, which may offer an accelerated path towards citizenship.²⁴⁰

²³¹ *Id.* at 799.

²³² *Id.* at 786.

²³³ Katz, *supra* note 181, at 786.

²³⁴ *Id.*

²³⁵ *Id.* at 799.

²³⁶ In general discussions with lawmakers, community leaders, and judges, the impression was that the federal government’s assumed position is not as clear. *See e.g.*, Alailima, *supra*, note 97; Erman & Perl-Rosenthal, *supra*, note 97.

²³⁷ *Id.*

²³⁸ Alailima, *supra*, note 97; Erman, *supra*, note 97.

²³⁹ Aumua Pleased with U.S. Court Decision in Tuaua v. United States, but Wants Expedited Path for U.S. Nationals Who Seek Citizenship, June 5, 2015, UNITED STATES CONGRESSWOMAN AUMUA AMATA COLEMAN RADEWAGEN, <https://radewagen.house.gov/media-center/press-releases/aumua-pleased-us-court-decision-tuaua-v-united-states-wants-expedited> (last visited Mar. 10, 2016).

²⁴⁰ *Id.*

A. *The Court of Appeals Decision and Moving Forward*

Ultimately, the *Tuaua* appellate court affirmed the district court's decision and declared that birthright citizenship does not apply to American Samoa.²⁴¹ Its decision rested on the textual ambiguity of the Fourteenth Amendment's Citizenship Clause, *jus soli* as nonfundamental, and most importantly, the Insular Cases.²⁴²

The *Tuaua* plaintiffs did not give up after the decision from the appellate court. They filed a petition for an *en banc*, which would allow the case to be reheard by all eleven of the judges on the appellate court.²⁴³ However, the *en banc* was denied in October 2015.²⁴⁴ Chief Loa Pele Faletofo from the Samoan Federation previously stated, "We're going to take it all the way . . . take it to the Supreme Court if necessary because we believe in this."²⁴⁵ With the denial of the *en banc* hearing, prominent attorney Theodore B. Olson joined as counsel for the plaintiffs and petitioned for certiorari to have the case heard before the U.S. Supreme Court.²⁴⁶ A certiorari petition was filed on February 1, 2016.²⁴⁷ Olson has extensive experience arguing before the Supreme Court including in *Bush v. Gore*.²⁴⁸

V. APPLICATION OF THE U.S. CONSTITUTION MAY CHANGE THE CURRENT GOVERNANCE AND CULTURE IN AMERICAN SAMOA

A. *Harms that Face American Samoan Non-Citizen Nationals*

The *Tuaua* plaintiffs hope to right the wrongs they face by advocating for equal treatment, which they believe will greatly benefit the next generation.²⁴⁹ Leneutoi Tuaua, Va'aleama Fosi, Fanuatanu Mamea,

²⁴¹ *Tuaua v. United States*, 788 F.3d 300, 312 (D.C. Cir. June 5, 2015).

²⁴² *Id.*

²⁴³ *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *petition for en banc filed*, 1563371 (D.C. Cir. July 20, 2015) (No. 13-5272).

²⁴⁴ *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *petition for en banc denied*, 1576286 (D.C. Cir. Oct. 2, 2015) (No. 13-5272).

²⁴⁵ Michael Lozano, How Local American Samoans Are Being Short-Changed Over Citizenship, VOICEWAVES LONG BEACH, (Mar. 11, 2015) available at <http://voicewaves.org/2015/03/how-local-american-samoans-are-being-shortchanged-for-citizenship/#sthash.h6T4lcca.dpuf>

²⁴⁶ Fili Sagapolutele, Update: Citizenship Lawsuit, Dec. 16, 2015, SAMOANEWS, <http://www.samoanews.com/content/en/update-citizenship-lawsuit> (last visited Mar. 10, 2016).

²⁴⁷ *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3434 (U.S. Feb. 1, 2016) (No. 15-981).

²⁴⁸ Sagapolutele, *supra* note 246.

²⁴⁹ Complaint for Declaratory and Injunctive Relief at 61, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

Taffy-lei Maene, and Emy Afalava alleged they suffered unequal treatment and deprivation of rights because of their non-citizen status.²⁵⁰ Four of the five plaintiffs devoted their careers to serving in the U.S. military and they did not achieve higher ranks and certain positions solely because of their non-citizen status when residing in the continental United States.²⁵¹ As U.S. Nationals, the *Tuaua* plaintiffs were harmed when they were deprived certain employment positions; disqualified from carrying firearms; ineligible to vote for U.S. President and for state or local government leaders; severely limited in access to immigration and visas for themselves and their spouses; and unable to serve on a jury.²⁵² Lead Plaintiff Tuaua emphasized that the push for citizenship reaches beyond himself.²⁵³ He also filed the complaint on behalf of his minor children and said citizenship will help future generations.²⁵⁴

American Samoans are limited by their U.S. National status and encounter more adversity in the naturalization process than U.S. Nationals in the states. American Samoans are deprived of voting rights in the U.S. Presidential General Election;²⁵⁵ a conveniently located and accessible federal court system in the territory;²⁵⁶ and full-fledged representation in the U.S. House of Representatives.²⁵⁷ It was not until 1978 that Congress authorized one delegate with limited voting rights to represent American Samoa.²⁵⁸ In order to change their status from U.S. National to U.S. Citizen, American Samoans are required to face the same time consuming and expensive naturalization process required of all other noncitizens.²⁵⁹ This process is not only frustrating, but also humiliating to the residents of the only territory not conferred citizenship.²⁶⁰ Those that do not have the means to go through naturalization are reminded by their passports that they are not citizens.²⁶¹

²⁵⁰ *Id.* at 8-14.

²⁵¹ *Id.* at 10-14.

²⁵² *Id.* at 60-66.

²⁵³ Complaint for Declaratory and Injunctive Relief at 10, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

²⁵⁴ *Id.*

²⁵⁵ Benjamin S. Morrell, *Some More for Samoa: The Case for Citizenship Uniformity*, 9 TENN. J.L. & POL'Y 475, 479 (2014).

²⁵⁶ Laughlin, *supra* note 85, at 385.

²⁵⁷ *Tuaua*, 951 F. Supp. 2d at 90.

²⁵⁸ *Id.*

²⁵⁹ Morrison, *supra* note 37, at 85.

²⁶⁰ Complaint for Declaratory and Injunctive Relief at 8, *Tuaua v. United States*, No. 12-1143 (D.D.C. July 10, 2012).

²⁶¹ *Id.* at 13b.

B. *Potential Concern to American Samoan Culture if U.S. Citizenship is Conferred*

American Samoans opposed to full U.S. citizenship express concern that conferral of citizenship to the territory may deteriorate the very fabric of Samoan society. The maintenance of the traditional land systems is an underlying reason for the continuation of the status quo.

Land protection is of utmost importance and is often done at any cost. An American Samoan colleague once shared that she would only agree to marriage on the condition her husband moved with her to American Samoa.²⁶² She and her husband met in California where they both attended college.²⁶³ Her husband, a local boy from Hawai'i, expressed a desire to return.²⁶⁴ In contrast, her goal, centered on returning to American Samoa and staking claim to the land apportioned to her nuclear family.²⁶⁵ As the only child, if she did not return, the *matai* in her village would reassign the land to another family.²⁶⁶

Land in American Samoa has an inherently deeper value than merely providing shelter for the living because it also serves as a memorial to ancestors. The deceased are buried on the property and usually in front of the main entrance.²⁶⁷ It would be difficult for American Samoans to part with land that serves as a sanctuary for former family members.

The concerns that the application of the U.S. constitution and the conferral of constitutional rights will erode the communal aspects of Samoan culture are not unfounded. For example, with a current non-Samoan population of 11 percent,²⁶⁸ communal land ownership may be replaced by the private land ownership by non-Samoans. Some feel that land issues will become more problematic if the non-Samoan population continues to grow because they will be given the same rights as American Samoans.²⁶⁹ This may shift the Samoan command of governance and reduce the lands under community control.

²⁶² Interview with Afuvai Maluia, American Samoa (Dec. 20, 2011) (name has been changed).

²⁶³ Maluia, *supra* note 262.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Schamberg, Kirsten, *Where the U.S. Military is the Family Business*, CHI. TRIB., http://articles.chicagotribune.com/2007-03-11/news/0703110486_1_military-recruiters-american-samoans-boot-camp (last visited Apr. 12, 2016).

²⁶⁸ *American Samoa*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/American_Samoa (last visited Mar. 10, 2016).

²⁶⁹ Maluia, *supra* note 262.

American Samoa is able to retain control over business decisions by managing licenses to nonresidents.²⁷⁰ In accordance with American Samoan Code §27.0207 (b)(5), a Commission reviews applications for business licenses for those who are neither American Samoan nor permanent residents.²⁷¹ This evaluation is based on factors including the potential “effect on Samoan customs, culture, and traditions.”²⁷² Currently, these procedures protect both Samoan business and the communal land in the face of increasing taking of lands or “land grabbing” by global entities. “Land grabbing [is] defined as a global enclosure movement in which large areas of arable land change hands through deals.”²⁷³ American Samoa’s abundance of vegetation and undeveloped land could make the territory vulnerable to land grabbing, which has occurred in other areas.²⁷⁴ Communal land may add to the ease of land grabbing since it is sometimes difficult to confirm true legal ownership of community-owned property.²⁷⁵

The deterioration of the communal land system would have a profound and corresponding effect on the *matai* system. “The aiga . . . own[s] the land in common for the benefit of the group, and the property is managed via the matai.”²⁷⁶ “The matai . . . supervise the economic activity of the common land and meet with each other . . . to organize larger projects.”²⁷⁷ The longstanding codependent relationship between the land and people are difficult to separate since the *matai* and land system ensures everyone is cared for. Evidence of this is American Samoa’s absence of homelessness and high commitment to family. In American Samoa, it is difficult to find any homeless population because American Samoans traditionally are committed to caring for their extended families.²⁷⁸ If the land entrusted to the *matai* decreases, it is possible that more people may be without land, homes, and nourishment.

²⁷⁰ AM. SAMOA CODE ANN. §27.0207 (b)(5) (2015).

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ Elizabeth R. Gorman, *When the Poor Have Nothing Left to Eat: The United States' Obligation to Regulate American Investment in the African Land Grab*, 75 OHIO ST. L.J. 199, 200 (2014).

²⁷⁴ Saturnino M. Borras, Jr. et al, *Towards a better understanding of global land grabbing: an editorial introduction*, J. OF PEASANT STUD. 209 (March 24, 2011), <http://www.tandfonline.com/doi/full/10.1080/03066150.2011.559005#abstract>.

²⁷⁵ *Id.*

²⁷⁶ Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 35, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Aug. 25, 2014).

²⁷⁷ *Id.* at 36-37.

²⁷⁸ Maluia, *supra* note 262.

American Samoans believe that when the Native Hawaiians lost their sovereignty and rights, they also lost their culture.²⁷⁹ They are cognizant not to repeat this in American Samoa because changes to Hawai'i's land rights altered the landscape of Hawai'i.²⁸⁰ Previously, all land in the Hawaiian Islands belonged to the ruling monarchy.²⁸¹

Although there are a lot of important historical events that shaped the Hawai'i we have today, one of particular significance was the *Great Mahele*. The *Mahele* allowed Native Hawaiian commoners the opportunity to attain lands, but most were ineligible, thus much of the land was ceded to the Government.²⁸² Furthermore, it allowed foreigners to purchase property, which accounted for another large reduction of the Hawaiian monarchy's lands.²⁸³ The events of the *Mahele* and other events that displaced the Native Hawaiian people from their land, contributed to the cultural loss of the Native Hawaiian people.²⁸⁴

To avoid devastating loss of Samoan culture, there may be room for exceptions within the law for American Samoa based on its territorial status.²⁸⁵ However, these exceptions may be contested if the Insular Cases are found not applicable to *Tuaua*, thus changing the current status.

C. *The Equal Protection Clause May Not Preserve What is Uniquely American Samoan*

Opponents of citizenship worry that application of the Fourteenth Amendment's Equal Protection Clause will undermine the promises made to American Samoa.²⁸⁶ During the negotiation of its territorial status, the United States agreed to honor its commitment to protect Samoan autonomy through its land and culture.²⁸⁷ The Equal Protection clause might undercut this.

The Equal Protection Clause reads, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."²⁸⁸ Limiting ownership of land and property based on one's ethnicity is *prima facie* unconstitutional under the Equal Protection Clause because it

²⁷⁹ Villazor, *supra* note 34, at 820-21.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 820.

²⁸² *Id.*

²⁸³ Villazor, *supra* note 34, at 820-21.

²⁸⁴ *Id.* at 821.

²⁸⁵ Laughlin, *supra* note 85, at 413.

²⁸⁶ Villazor, *supra* note 34, at 826.

²⁸⁷ *Id.*

²⁸⁸ U.S. Const. amend. XIV

deprives one of both liberty and property based on unequal standards.²⁸⁹ The clause allows groups or individuals to invoke their Constitutional rights if denied the right to property ownership.

Rice v. Cayetano sheds some light on how Samoan claims to preserve their distinct land system might be met in federal courts. In *Rice*, a law limiting the voting of the Office of Hawaiian Affairs (“OHA”) trustees to Native Hawaiians was struck down²⁹⁰ on the basis of racial discrimination under the Fifteenth Amendment.²⁹¹ The State of Hawai‘i argued that limiting the vote for representatives of OHA, an organization benefitting Hawaiians, was not racially charged.²⁹² Instead, the restriction entailed a political purpose.²⁹³ In *Morton v. Mancari*, “the Supreme Court held that laws that privileged individuals with one-fourth American Indian blood did not constitute racial discrimination because the preference had the political purpose of furthering the right of self-government of federally recognized tribes.”²⁹⁴ The *Rice* court distinguished *Mancari* because there, the restrictions affected a federally recognized Indian tribe, which Hawaiians are not classified as.²⁹⁵ The court in *Rice* rejected the State’s arguments for OHA, an organization central to the culture and autonomy of Native Hawaiians. Thus, an American Samoan governance system tied to land tenure may be vulnerable under *Rice*.

Using native blood as a measure for attaining property in American Samoa may be problematic under *Rice*.²⁹⁶ *Mancari* is grounded in “political sovereignty” and not on racial classification.²⁹⁷ In that circumstance, the blood quantum policy is reviewed using the rational basis standard rather than the higher standard of strict scrutiny, which is “normally applied in questions of equal treatment protection.”²⁹⁸ Rose Cuison Villazor, a professor at the School of Law at the University of California, Davis, noted that American Samoa is not considered a federally recognized tribe and likely will never gain that status.²⁹⁹ Native Hawaiians

²⁸⁹ *Id.*

²⁹⁰ Villazor, *supra* note 34, at 803.

²⁹¹ *Id.* at 813.

²⁹² *Id.* at 803.

²⁹³ *Id.*

²⁹⁴ Villazor, *supra* note 34, at 803.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 805.

²⁹⁷ *Id.* at 811.

²⁹⁸ Villazor, *supra* note 34, at 811.

²⁹⁹ *Id.* at 805.

have tried unsuccessfully to invoke this status.³⁰⁰ Strict scrutiny will likely be used for future cases in American Samoa, unless it becomes a federally recognized tribe.³⁰¹

American Samoa has been able to fend off equal protection challenges to its land ownership restrictions because its courts have identified a governmental interest in preserving the Samoan heritage. In *Craddick v. Territorial Registrar of American Samoa*, the petitioner tried to register land in his name, but was denied due to his non-Samoan heritage.³⁰² The *Craddick* court determined the limitation as non-discriminatory in nature because “racial classification” is essential in “preserving the land and culture of the Samoan people.”³⁰³

However, if constitutional citizenship is extended to American Samoans, they may have to adhere to the equal protection doctrine and subject to the strict scrutiny standard.³⁰⁴ The evolution of equal protection in real property laws has confirmed the decreased tolerance for race or ancestry based preferences in land ownership.³⁰⁵ In particular, “a compelling government interest in promoting the self-determination rights of” American Samoans is required for blood quantum land laws to survive strict scrutiny.³⁰⁶ The case for governmental exception may not be as compelling if American Samoans become citizens.

The Insular Cases may be the dam holding up the current land and community structure. For example, in *Wabol v. Villacrusis*, the Ninth Circuit relied on the territorial incorporation doctrine to shield the restricted land laws in the Northern Mariana Islands from an equal protection claim.³⁰⁷ The *Wabol* court found the equal protection doctrine was not a fundamental right in the Commonwealth of the Northern Mariana Islands (“CNMI”) because “its application . . . would be impractical and anomalous.”³⁰⁸ Also, the *Craddick* court used the compelling political sovereignty interest to uphold the constitutionality of blood quantum land laws in American Samoa.³⁰⁹

³⁰⁰ *Id.* at 806.

³⁰¹ *Id.*

³⁰² *Craddick v. Territorial Registrar of American Samoa*, 1 A.S.R.2d 10 (App. Div. 1980).

³⁰³ *Id.*

³⁰⁴ Villazor, *supra* note 34, at 822-23.

³⁰⁵ *Id.* at 823.

³⁰⁶ *Id.* at 824.

³⁰⁷ *Id.* at 832-33.

³⁰⁸ Villazor, *supra* note 34, at 832-33.

³⁰⁹ *Id.* at 833.

Of the incorporated territories, CNMI's similar land protection laws and status provides an analogous example of what citizenship would look like in American Samoa. In the CNMI "only those who are of one-fourth Northern Marianas descent may purchase property."³¹⁰ This limits landownership to two groups of native inhabitants, the Chamorros and the Carolinians.³¹¹ Preserving the customs and culture in the CNMI was important throughout the negotiation of CNMI's Commonwealth status.³¹² The CNMI and the United States regarded special care to native rights,³¹³ and the Commonwealth's Constitution has provisions in place to ensure representation of its native people.³¹⁴ A native descent requirement is mandatory to be a director of the Marianas Public Land Corporation and one member of the governor's cabinet must be chosen amongst and supported by the Carolinian community.³¹⁵ The CNMI's model balances cultural preservation with citizenship rights.

However, unlike American Samoa, CNMI was granted statutory citizenship and Congress agreed to preserve CNMI's culture.³¹⁶ This difference may be significant in constitutional application of the doctrines of equal protection and due process in contrast to constitutional citizenship. Faleomavaega warned, "Once the Insular Cases no longer govern the relationship between the United States and American Samoa, new challenges to aspects of the *fa'a Samoa* will be subject to new analysis consistent with newly articulated constitutional principles."³¹⁷

However, *Davis v. Commonwealth Election Commission* is illustrative that equal protection is still a strong consideration despite the cultural protections guaranteed to CNMI.³¹⁸ The *Davis* court held that "laws restricting voting in constitutional referenda to the indigenous people of CNMI" are unconstitutional.³¹⁹ The limits created by the CNMI government on voting "were put in place to safeguard CNMI's racial land-alienation provisions."³²⁰ *Davis* indicates that American Samoa may be

³¹⁰ *Id.* at 806.

³¹¹ Meller, *supra* note 72, at 203.

³¹² Villazor, *supra* note 34, at 829.

³¹³ *Id.* at 830.

³¹⁴ Meller, *supra* note 72, at 207.

³¹⁵ *Id.*

³¹⁶ Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega at 31, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Aug. 25, 2014).

³¹⁷ *Id.* at 30.

³¹⁸ *Id.* at 27-28.

³¹⁹ *Id.* at 27.

³²⁰ Brief for Intervenors or, in the Alternative, *Amici Curiae* the American

more vulnerable without the Congressional commitment in protecting indigenous rights that are found in CNMI to upholding the distinctions in the commonwealth.

If American Samoa's land laws are challenged again under the equal protection doctrine and constitutional citizenship is conferred, both *Wabol* and *Craddick* suggest equal protection would win over the current land system. As Faleomavaega pointed out, "the entire point of this lawsuit is that prior determinations of constitutionality do not control."³²¹

VI. CONCLUSION

American Samoa has followed the U.S. flag for over a century. There is no doubt its people embody all that is American and all that is Samoan, but the hybrid nature of the U.S. National should reflect and embrace the best of both worlds and not leave American Samoans in a limbo of diminished rights or the fear of losing one's identity. Perhaps the work of the former Eastern Samoa Study Mission can continue in conjunction with American Samoa to create permanent solutions that will benefit the people and recognize the importance of the current government and cultural system.

Samoa Government and Congressman Eni F.H. Faleomavaega at 28, *Tuaua v. United States*, No. 13-5272 (D.C. Cir. Aug. 25, 2014).

³²¹ *Id.* at 29.