MISPLACED FEAR: *TUAUA* AND THE FALSE LINK BETWEEN CITIZENSHIP AND EQUAL PROTECTION

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I. INTRODUCTION

The United States' imperialist turn in the early twentieth century resulted in difficult questions regarding the status of the new territories and those born within them. American Samoa, an island in the South Pacific, was claimed by the United States in a 1900 treaty with Germany and Great

Britain.[1] For the last 115 years, the island has been under the sole sovereignty of the United States.[2] However, the territory has traditionally been categorized as unincorporated and its natives categorized as non-citizen nationals.[3] A non-citizen national is able to serve in the military, but cannot work in the United States without restrictions, does not receive economic assistance through many national benefit programs, and cannot vote in general elections.[4] It is against this backdrop that five individuals born in American Samoa sued the United States seeking to extend birthright citizenship rights to American Samoan natives—the claim being that they are entitled to citizenship status under the Citizenship Clause of the Fourteenth Amendment.[5]

On July 10, 2012, Lene Tuaua and four other Samoan-born individuals filed suit against the United States in the District Court of the District of Columbia.[6] They argued that because American Samoa is part of the United States and so those born in the territory are granted citizenship by the Fourteenth Amendment.[7] The Government quickly filed a motion to dismiss the claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action upon which relief can be granted.[8] In their motion, the Government argued that American Samoa is an unincorporated territory and thus not part of the United States for the purposes of the Citizenship Clause.[9] On June 26, 2013, Judge Leon granted the motion to dismiss.[10] In his memorandum opinion, Judge Leon agreed with the Government that

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[1] Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D. D.C. 2013) [hereinafter Tuaua I].

[2] 48 U.S.C. § 1661(c).

[3] Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 72 ("Like citizens, nationals are part of the American polity, but they do not have all of the same rights and privileges.").

[4] National Status (Non-Citizen), Zhang & Associates, P.C., http://www.hooyou.com/citizenship/status.html (last visited March 22, 2016).

[5] Tuaua I at 90; U.S. CONST. amend. XIV, §1 ("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.").

[6] Complaint at 1, Tuaua I.

[7] *Id.*

[8] Defendant's Motion to Dismiss, Tuaua I.

[9] *Id.*

[10] Tuaua I at 94.

American Samoa is not in the United States.[11] Additionally, Judge Leon relied upon the Insular Cases and held that citizenship is not a fundamental right and so it does not apply to the unincorporated territories.[12]

In February 2015, the Circuit Court of Appeals for the District of Columbia affirmed the lower court's decision to dismiss the appellant's claim, holding that (a) the language of the Citizenship Clause does not include American Samoa, (b) citizenship is not a "fundamental right," and, (c) it would be "impractical and anomalous" to extend this right to the territory.[13] The court found that granting citizenship would be "anomalous" because the Samoan people, through their elected representatives, objected to the imposition of citizenship.[14] The representatives' objection relies in large parts on the fear that granting citizenship may expose their communal land system to equal protection challenges.[15] However, as this note aims to show, equal protection *already* applies to American Samoa. Thus, the representatives' fear that citizenship would threaten Samoan's communal land system, and the court implicit reliance on that fear, is misplaced. Further, as the Supreme Court has denied the petition for writ of certiorari filed by the *Tuaua* plaintiffs,[16] the D.C. Circuit opinion remains the primary authority on an important issue. For this reason, it is imperative that the problems with the Circuit opinion be addressed.

In this note, I aim to show that equal protection applies in American Samoa and explain why this presents a problem for the court's holding in *Tuaua*. In Part I, I outline the Insular Cases that together provide the Court's framework for applying the Constitution in the territories. Part II summarizes the facts and holding in *Tuaua* and surveys the Samoan culture and land system that the court sought to protect. Part III reveals that equal protection already applies in American Samoa. The section concludes by explaining how this reality poses a serious problem for the reasoning in *Tuaua*.

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[11] *Id* at 94.

[12] *Id.* at 97.

[13] Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) [hereinafter Tuaua].

[14] *Id.*

[15] Brief of the Honorable Eni F.H. Faleomavaega as *Amicus Curiae* In Support of Defendants at 12–18, Tuaua [hereinafter Faleomavaega Appellate Brief].

[16] Tuaua v. United States, 2016 U.S. LEXIS 3881 (June 13, 2016).

II. THE INSULAR FRAMEWORK

A. CONSTITUTIONAL APPLICABILITY IN THE TERRITORIES

By approving the Treaty of Paris in February 1898, Congress ended the Spanish-American War and claimed Spain's colonies of Puerto Rico, Guam, and the Philippines.[17] A puzzle remained as to the status of the new territories. Dozens of territories had followed the path to statehood. New Mexico, Arizona, and Oklahoma were poised follow. But racial stigmatization set the territories on a novel path marked by inferiority.[18] The United States thus entered a new paradigm of neo-imperialism. Still, legal innovation required legal justification. All eyes were on the Supreme Court.

In an early-twentieth-century set of cases known as the Insular Cases, [19] the Court attempted to justify the nation's imperialistic turn and clarify the Constitutional position of the newly acquired lands.[20] The justices knew that the undefined status of the recently annexed territories had left it unclear whether and how the Constitution applied to them. In the terms of the day, the question was "whether the constitution follows the flag." The Court "gave a new answer: not entirely."[21]

1. Doctrine of Territorial Incorporation

The Supreme Court attempted to define the Constitution's boundaries by asserting the Doctrine of Territorial Incorporation. Stated simply, this doctrine held that only "fundamental rights" extend to unincorporated territories. The outcome of the *Tuaua* case relied largely

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[17] Treaty of Paris of 1898, U.S.-Sp., Dec. 10, 1898, 30 Stat. 1754.

[18] The racial stigmatization was largely driven by a fear that these territories were too distant and culturally distinct to be conquered. *See* Pedro A. Malavet, *The Inconvenience of a "Constitution [that] Follows the Flag but Doesn't Quite Catch Up With It"*, 80 MISS. L.J. 181, 250 (2011) ("While recognizing the impossibility of creating an Anglo-Saxon majority on the island, the Court also constructed Puerto Ricans as 'others.' Because Puerto Ricans are so 'other,' the incorporation of the territory that they populated into the United States could not be inferred; it had to be clearly expressed by Congress. The rule of the Insular Cases, which the Court consistently mischaracterizes as 'situational' and 'transitional' vis-à-vis any one territory, has allowed Congress to maintain our island empire by constitutional default for over a century.").

[19] *See* De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

[20] Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 797, 809 (2005).

[21] Does the Constitution Follow the Flag?, Harvard Univ. Press Blog (May 13, 2015), http://harvardpress.typepad.com/hup_publicity/2015/05/reconsidering-the-insular-cases.html.

upon this doctrine. Furthermore, my argument that equal protection applies in Samoa is made under this framework. Thus, section explains the history and importance of the doctrine.

The most famous of the Insular Cases is *Downes v. Bidwell*.[22] The case arose when merchant Samuel Downes challenged a U.S. import duty on his importation of oranges from Puerto Rico to the United States.[23] According to Downes, U.S. sovereignty over Puerto Rico triggered the rule of the Uniformity Clause of the Constitution that all "[d]uties, [i]mposts and [e]xcises shall be uniform throughout the United States."[24] The Court, in a five-to-four decision, ruled that the Uniformity Clause did not extend by its own force to Puerto Rico.[25]

While five justices concurred in the judgment, they were split on how and to what extent the Constitution applied to the territories.[26] Writing just for himself, Justice Brown opined that the Constitution does not apply by its own force.[27] Congress was to decide which provisions applied and when.[28] Justice White, writing for four justices, proposed a distinction between incorporated and unincorporated territories.[29] Incorporated territories were part of the United States proper.[30] Unincorporated territories were not, even though they were under the sole *sovereignty* of the United States.[31] This theory, now referred to as the Doctrine of Territorial Incorporation,[32] holds that while the incorporated territories fully enjoy the protections of the U.S. Constitution, the unincorporated territories receive only protections that are deemed fundamental—known as "fundamental rights."[33] The doctrine gained unequivocal Supreme Court approval in the

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[22] Downes v. Bidwell, 188 U.S. 244 (1901).

[23] Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 807 (2005).

[24] U.S. CONST. art. I, §8.

[25] Downes, 188 U.S. at 287.

[26] *Id.*

[27] *Id.* at 282.

[28] *Id.*

[29] *Id.* at 287–88.

[30] *Id.*

[31] *Id.* at 299; *See* Burnett, *supra* note 23, at 800 (arguing that the distinction between incorporated and unincorporated rests on the United States' ability to de-annex territories).

[32] *See* Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. L. REV. 801, 806 (1926) (discussing the doctrine and its name change over time).

[33] Downes, 188 U.S. at 291.

unanimous case of *Balzac v. Porto Rico*.[34] Afterward, courts held numerous Constitutional provisions applicable to unincorporated territories,[35] often in reliance on Justice White's rule that rights "of so fundamental a nature . . . cannot be transgressed."[36] Notably, equal protection has repeatedly been held to be a "fundamental right" and applicable to unincorporated territories.

2. The "Impractical and Anomalous" Test

While the "fundamental rights" test is important in determining whether a provision extends to the territories, it is not the end of the analysis.[37] This section provides the background of the "impractical and anomalous" test asserted in *Reid v. Covert* and relied upon in *Tuaua*.

While the theory of Territorial Incorporation seems clear on its face—extending only "fundamental rights" to unincorporated territories—later decisions have had a less restrictive interpretation of *Downes*. In *Reid v. Covert*, the Supreme Court held that non-fundamental provisions "do not *necessarily* apply in all circumstances in every foreign place."[38] Justice Black explained that, "the basic teaching of . . . the Insular Cases is that there is no rigid and abstract rule that Congress . . . must exercise [its power] subject to all the guarantees of the Constitution."[39] Thus, while "fundamental rights" apply by their own force, other provisions *may* apply as well.

Justice Harlan, in his concurring opinion, provided a test to determine whether non-fundamental provisions apply: courts must determine whether

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[34] Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (denying Porto Rico the Sixth Amendment right to jury trials) ("[t]he opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court.").

[35] Burnett, *supra* note 23, at 811.

[36] Downes, 188 U.S. at 312.

[37] It is not perfectly clear how the "fundamental rights" test and the "impractical and anomalous" test interact. However, a common sense reading of *Reid*, and one accepted by some academics, is that *Reid* narrows the Doctrine of Territorial Incorporation. That is, under *Downes*, the rule was that only fundamental rights applied ex proprio vigore -- the presumption being that non-fundamental rights cannot be extended absent congressional action. However, *Reid* seems to hold that non-fundamental rights are still presumed to apply to the territories unless it would be "impractical and anomalous" to do so. *See* Morrison, *supra* note 3, at 118–19 (providing a flowchart to guide the analysis of when the constitution follows the flag).

[38] Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (emphasis added).

[39] *Id.*

applying the provision "would be impractical and anomalous."[40] Once a court decides the descriptive question of whether the provision is a "fundamental right," it then must answer the prescriptive question of whether the provision *should* apply.[41] The impractical prong requires courts to determine the feasibility of applying the given right to the territory.[42] The anomalous prong requires courts to determine the congruity of a given right with the unique circumstances of the territory.[43] Therefore, under *Reid*'s "impractical and anomalous" tests, courts must consider "the particular local setting, the practical necessities, and the possible alternatives" to determine whether to apply the right to an unincorporated territory.[44] Courts have relied on this test to require jury trials in American Samoa,[45] extend habeas rights to Guantanamo Bay detainees,[46] and, most relevant here, deny the extension of the citizenship clause to American Samoans.[47]

In the wake of *Reid*, the Supreme Court has continued to interpret the Insular framework pragmatically, rather than formalistically. Most notably; in *Boumediene v. Bush*, the Court extended the right of habeas corpus to non-citizen detainees in Guantanamo Bay, Cuba—reasoning that increased United States sovereignty, not any formal category or delineation, triggers extension of Constitutional rights.[48] *Boumediene* is a significant because for the first time it extended a Constitutional provision to a foreign territory. The Court reasoned that, while Guantanamo is not under *de-jure* American sovereignty, the United States maintains *de-facto* sovereignty given its control over the base.[49] Thus, relying on the Insular Cases—and Justice Harlan's pragmatic reading of them in *Reid*—*Boumediene* held that Constitutional provisions may be extended merely by strengthening ties

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[40] *Id.* It is worth noting that the "impractical and anomalous" test cannot alone determine whether a provision *should* apply. In other words, if extension of a right is *not* "impractical and anomalous," it does not necessarily follow that the provision *should* extend. Rather, the test serves as a bottom-line parameter. That is, if the extension *is* "impractical and anomalous," the provision *should not* extend.

[41] *Id.* at 74–75.

[42] Morrison, *supra* note 3, at 123.

[43] *Id.* at 125.

[44] Reid, 354 U.S. at 75.

[45] King v. Andrus, 452 F.Supp. 11, 17 (D. D.C. 1977).

[46] Boumediene v. Bush, 553 U.S. 723, 793 (2008).

[47] Tuaua at 309. It would be tough to show that applying citizenship is sufficiently impractical. Thus, the court relied predominately on the proposition that extending citizenship is "anomalous" because it threatens Samoan culture.

[48] Boumediene, 553 U.S. at 793.

[49] *Id.* at 755.

with the United States.[50] It is an open question, however, where citizenship falls on this sovereignty continuum, and what additional Constitutional rights, if any, are implicated with this shift.

III. *TUAUA V. UNITED STATES*

In *Tuaua I*, five non-citizen U.S. nationals born in American Samoa brought a claim seeking declaratory relief against the United States in U.S. District Court for the District of Columbia. Plaintiffs asserted that the Fourteenth Amendment's Citizenship Clause made them U.S. citizens at birth.[51] Specifically, they relied on the Citizenship Clause's guarantee of citizenship to all people "born . . . in the United States."[52] They also argued that citizenship is a "fundamental right" and thus applicable under the Insular framework.[53] The District Court disagreed and dismissed their complaint.[54]

The U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's decision.[55] It relied on three conclusions. First, the court held that the Citizenship Clause does not include individuals born in American Samoa.[56] So, the Constitution's plain language does not grant citizenship to American Samoa. Second, the Court then held that citizenship is *not* a "fundamental right."[57] As such, the right to citizenship does not extend by its own force per the doctrine of territorial incorporation.[58] Third, extending the Citizenship Clause to American Samoa would be "impractical and anomalous,"[59] and thus citizenship should not extend under the standard set forth in *Reid v. Covert*. While some academics have criticized the first two conclusions, this note focuses on the court's impractical and anomalous finding.[60]

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[50] *Id.* at 758, 764.

[51] Tuaua I at 89.

[52] U.S. CONST. amend. XIV, § 1.

[53] Tuaua I at 95, n.11.

[54] *Id.* at 94.

[55] Tuaua at 302.

[56] *Id.*

[57] *Id.* at 308.

[58] *Id.* at 306, 308.

[59] *Id.* at 310.

[60] While this note focuses solely on the merits of the court's second holding, an equally interesting question concerns the validity of the court's reading of the Citizenship Clause. The plaintiffs have argued in both their trial and appellate briefs that American Samoa is part of the United States and thus the plain language of the Citizenship Clause includes the territory. Others have taken issue

A. *TUAUA'S* APPLICATION OF THE "IMPRACTICAL AND ANOMALOUS" TEST

After deciding that citizenship is not a "fundamental right," the court considered whether extending citizenship to Samoa would be "impractical and anomalous." The court, upon considering the "particular circumstances, the practical necessities, and the possible alternatives which Congress had before it,"[61] held it "anomalous to impose citizenship over . . . the American Samoan people."[62] Specifically, the court found that extending citizenship would be "anomalous" because the democratically elected representatives of American Samoa oppose the extension of birthright citizenship.[63]

The Samoan representatives oppose extending citizenship largely because they that granting citizenship could expose the American Samoan land system to Equal Protection challenges. For example, the amicus brief filed by the Honorable Eni F.H. Faleomavaega—American Samoa's former Congressional delegate—focuses largely on the threats posed by citizenship to the American Samoan culture. The brief argues that extending citizenship might expose the American Samoa's communal land system to Equal Protection challenges, and thus pose a risk to the traditional American Samoan culture.[64] The representatives based their opposition on the above Equal Protection argument. Although court explicitly based its holding on the representatives' opposition, it tacitly accepted this argument and used it to hold that the imposition of citizenship would be "anomalous."[65]

To analyze the court's decision, some basic background about American Samoa's culture and land alienation rules is helpful. United States sovereignty over American Samoa dates to a 1900 treaty with Great Britain

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with the fundamental rights analysis taken by the court. Joseph Sung argues that the Insular Cases are an inappropriate framework to rely on altogether. Joseph Sung, Note, *Redressing the Legal Stigmatization of American Samoans*, 89 S. CAL. L. REV. 1313 (2016). This view has also been taken by numerous academics who collectively filed an amicus brief with the D.C. Circuit. In the brief, the scholars argued that the Insular cases rely on "antiquated notions of racial inferiority" and so should not be extended here. Brief of Amici Curiae Scholars of Constitutional Law and Legal History In Support Of Neither Party, Tuaua. Sean Morrison, on the other hand, argues that the Insular Cases *should* apply. Morrison asserts that the Insular Cases provide a much needed protection for the territory. However, Morrison suggests that citizenship may be a fundamental right and thus it should extend even under the Insular framework. Morrison, *supra* note 3 at 146.

[61] Tuaua at 309.

[62] *Id.* at 310.

[63] *Id.*

[64] Faleomavaega Appellate Brief at 12–18.

[65] Tuaua at 310.

and Germany.[66] Nonetheless, American Samoa has tried to maintain its "traditional way of life known as fa'a Samoa."[67] Article V Section 3 of The American Samoan Constitution protects the language, culture, and overall sociopolitical structure that is integral to this way of life.[68] The Samoan society is made up of large, structured families of "hundreds of members," who "communally own more than 90% of the land in American Samoa."[69] Under this societal system, a chief, or "matai," heads each extended family and controls the family's portion of the land.[70] The matai from each family join together to form a village council and collectively supervise the sharing of communal land.[71] Because "communal ownership of land is the cornerstone of the traditional Samoan way of life," its preservation is imperative to the Samoan Government.[72]

Many Samoans believe that the restriction on land alienation is all that stands between them and other foreign territories that traded their traditional culture and real estate for short-term economic gain.[73] Thus, the Samoan government has placed tight boundaries on alienability. For instance, the Samoan government "restrict[s] the sale of communal land to individuals with less than fifty percent Samoan ancestry."[74] Although these restrictions have been successful in preserving the communal land system—with "most of the usable land in American Samoa . . . still native[ly] owned as communal property"—many question whether the restrictions are vulnerable to Equal Protection challenges.[75] Under an Equal Protection challenge, to uphold a law that makes a racial classification, as the Samoan land rule arguably does, the government must show the law is "narrowly tailored" to a "compelling government interest."[76] And although the High

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[66] Tuaua I at 90.

[67] *Id.*

[68] *Id.*

[69] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 377 (D.C. Cir. 1987).

[70] *Id.*

[71] Brief of the Honorable Eni F.H. Faleomavaega as *Amicus Curiae* In Support of Defendants at 14, Tuaua.

[72] *Id.*

[73] *Id.* at 15 ("Without the restrictions on alienation, many American Samoans fear that they too will soon find themselves a dispossessed people in their own native land, and become, as the common saying goes, 'another Hawaii.'") (citing Stanley K. Laughlin, Jr., *The Application of the Constitution in the United States Territories*, 2 U. HAW. L. REV. 337, 369 (1981)).

[74] *Id.* (explaining the result of Am. Samoa Code Ann. § 37.0204(a) (1992)).

[75] *Id.* at 16; *see* Rice v. Cayetano, 528 U.S. 495, 512 (2000) (holding Hawaii's voting restrictions based on heritage unconstitutional).

[76] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

Court of Samoa upheld the land system against an Equal Protection challenge, the fear of further challenges to the system lingers.[77] This fear is multiplied by the fact that no Article III court has addressed the question of whether American Samoan's race-restrictive land rules violate the Equal Protection Clause.[78]

In sum, the Samoan culture relies strongly on its land exclusion system. Additionally, the United States' relationship with Samoa is a delicate balancing act. Samoan representatives are understandably worried that any increased ties with the United States may tilt the scale and threaten their culture. Though these fears are understandable, as this note explains later, they have no place in a debate over citizenship and thus are suspect justifications to deny citizenship to American Samoans.

IV. THE INCONSISTENCY IN *TUAUA'S* APPLICATION OF THE "IMPRACTICAL AND ANOMALOUS" TEST

This section lays out the problems with the D.C. Circuit Court's reasoning for deeming the extension of citizenship "impractical and anomalous." This section's argument can be summarized as follows: under the Insular framework, "fundamental rights" apply by their own force to unincorporated territories. The right to equal protection is "fundamental" and has previously been applied, with full force, in the unincorporated territories. Because equal protection *already applies* in American Samoa, extending citizenship would not threaten Samoa's communal land system. The primary reason Samoans oppose the extension of citizenship is because they fear it may endanger their land system. Because citizenship does not add any new threat, however, their fear, and the court's implicit reliance on the fear, is largely unfounded.[79] Further,most constitutional protections, and particularly birthright citizenship, aim to protect minority populations

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[77] Craddick v. Territorial Registrar, 1 Am. Samoa 2d. 10, 14 (1980), http://www.asbar.org/index.php?option=com_content&view=article&id=641:craddick-v-territorial-registrar&catid=50&Itemid=254.

[78] *See, e.g.,* http://www.gao.gov/assets/130/121193.html. Although the issue has been raised on appeal to the secretary of interior and later the D.C. circuit courts, they refused to decide the issue. *See, e.g.,* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 377 (D.C. Cir. 1987).

[79] The court implicitly relied on these fears by citing the representative's opposition without analyzing the underlying reasoning. The court, instead, found that extending citizenship is impractical and anomalous *solely* because the Samoan representative objected to it. By not engaging with the representative's reasoning, the court allowed the Samoans' misplaced fears about the ramifications of citizenship on their way of life to have Constitutional implications.

from political majorities.[80] That a majority seeks to deprive some of its people of such rights would be all the more reason to enforce them. For these reasons, the D.C. Circuit's holding that the extension of citizenship is anomalous because Samoan representatives reject it is questionable.

Section A demonstrates that equal protection already applies in unincorporated territories. Section B argues that the D.C. Circuit holding is flawed because it implicitly relies on a false assumption about the relationship between citizenship and equal protection and uses a majority opinion to justify not extending a minority-protecting right. Finally, Section C addresses the counterargument that strengthening ties with American Samoa may nudge the United States Supreme Court to strike down the Samoan land laws.

A. APPLYING THE INSULAR FRAMEWORK: EQUAL PROTECTION IN THE TERRITORIES

The theory of territorial incorporation holds that, while the entirety of the Constitution applies within the United States proper, only "fundamental" rights apply by their own force to unincorporated territories. Furthermore, "under the Insular framework the designation of fundamental extends only to . . . principles which are the basis of *all* free government."[81] Following this framework, and despite its seemingly stringent language, courts have applied numerous provisions to unincorporated territories; "for instance, the courts have held that the First Amendment protects freedom of speech in the unincorporated territories, and that the protection against unreasonable searches and seizures . . . and the rights of privacy and travel apply in these territories."[82]

Importantly, in 1976 in *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, the Supreme Court held that equal protection and due process rights, from either the Fifth or Fourteenth Amendments, are "fundamental" and thus apply to unincorporated territories like Puerto Rico

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[80] *See* Rodriguez, Christina M., "The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment" (2009), Faculty Scholarship Series Paper 4335 at 1365–66. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5340&context=fss_papers.

[81] Tuaua at 308 (emphasis added).

[82] Burnett, *supra* note 23, at 811 (citing El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 n.1 (1993); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 n.1 (1986); Torres v. Puerto Rico, 442 U.S. 465, 470 (1979); Montalvo v. Colon, 377 F. Supp. 1332, 1341–42 (D. P.R. 1974); Califano v. Torres, 435 U.S. 1, 4 n. 6 (1978)).

under the Insular framework.[83] *Examining Board* arose when a group of engineers challenged a provision of Puerto Rican law that restricted engineer licenses to United States citizens.[84] The plaintiffs argued the law violated both the Equal Protection Clause and the Due Process Clause of the United States Constitution.[85] While the Court agreed and struck down the law, the majority failed to decide whether these protections applied under the Fourteenth or Fifth Amendment.[86] As Justice Blackmun wrote, "[t]he Court . . . thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection" because "irrespective of which Amendment applies, the statutory restriction . . . is plainly unconstitutional."[87] Though the court only explicitly applied equal protection in Puerto Rico, its holding relied heavily on the Insular Cases and it can be inferred that equal protection should apply with the same force to *all* the unincorporated territories. In other words, because the Supreme Court relies on the framework from *Downes*—which applies to all unincorporated territories—to extend equal protection to Puerto Rico, it would be inconsistent to argue that equal protection does not likewise extend to American Samoa.

The counterargument could be made that equal protection applies only in Puerto Rico, and not necessarily American Samoa, because Puerto Rico is "state-like" and has statutory citizenship. This argument is unconvincing for several reasons. First, *Examining Board* is a fundamental rights case. That is, the Court decided that equal protection applies because it is fundamental, and thus did not reach the "impractical and anomalous" test. [88] Because equal protection was extended as a fundamental right, the characteristics of the territory were irrelevant. Further, given *Examining Board* was decided prior to *Boumediene*, it would be anachronistic to ascribe *Boumediene's* "strengthening-ties" reasoning to the Court's decision in *Examining Board.* In other words, the "strengthening-ties" rule could not be the basis for the decision in *Examining Board* because the court had not yet asserted that doctrine. Finally, *Examining Board* did not mention citizenship as a reason to extend equal protection. Thus, it is

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[83] Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 600 (1976).

[84] *Id.* at 575–76.

[85] *Id.* at 579.

[86] *Id.* at 601.

[87] *Id.* at 599–601.

[88] *See id.* at 600.

unlikely that statutory citizenship played any role in extending equal protection.

The High Court of American Samoa,[89] in *Craddick v. Territorial Registrar*, explicitly applied equal protection to American Samoa.[90] The court was faced with the very issue the *Tuaua* court feared might arise—namely whether American Samoa's land alienation restrictions violate equal protection. Douglas Craddick, a non-Samoan American citizen, and Magdalene Craddick, a native Samoan, brought this action when the Territorial Registrar refused to register a deed conveying a parcel of land to them.[91] The Registrar asserted that there was no "duty to register any grant or certificate of title presented to him," pursuant to American Samoa Code § 204(b), which states "[i]t is prohibited to alienate any lands . . . to any person who has less than one half native blood."[92] The Craddicks challenged the provision, arguing it violated their Due Process and Equal Protection rights. Though the court upheld the law, finding that preservation of Samoan culture is a compelling government interest, the decision made clear that due process and equal protection *do* apply by their own force.[93] As Justice Schwartz wrote, "we note that the constitutional guarantees of due process and equal protection *are fundamental rights which do apply* in the Territory of American Samoa."[94]

Even absent the language in the *Examining Board* and *Craddick*, it is relatively straightforward to see how equal protection rights extend to American Samoa. The Equal Protection Clause, along with the Due Process Clause, is the primary vehicle used to protect "fundamental" rights.[95] A "fundamental" right is a right that is the "basis of *all* free government."[96] Thus, if "fundamental" rights are the basis of free government, it must be

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[89] The High Court of American Samoa is an Article IV court appealable to the Secretary of the Interior, and has no binding authority over an Article III court. *Cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel 830 F.2d 374, 376 (D.C. Cir. 1987).

[90] Craddick, 1 Am. Samoa 2d 10, 12. Equal protection's application in the territories is also clear given that due process is included in the constitution of American Samoa, and furthermore, the Samoan courts regularly apply equal protection analysis. Const. of American Samoa Art. I. §2; *See, e.g.,* Macomber v. Am. Samoa Gov't., 12 Am. Samoa 2d 29, 30 (1989), http://www.asbar.org/index.php?option=com_content&view=article&id=997:12asr2d29&catid=61:12asr2d.

[91] Craddick, 1 Am. Samoa 2d 10, 12.

[92] *Id.*

[93] *Id.*

[94] *Id.* (emphasis added).

[95] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

[96] Tuaua at 308.

the case that the legal vehicle used to assert these rights, equal protection, is also a basis of free government, and therefore a "fundamental right." To hold equal protection to be non-fundamental would be deeply inconsistent—comparable to claiming oxygen as necessary but breathing as not.[97] This is not a new intuition, given Justice Brown's opinion in *Downes* suggesting that equal protection is a "natural right."[98] Therefore, as equal protection is intuitively a "fundamental right," it must already apply in American Samoa under the doctrine of territorial incorporation.

The proposition that equal protection already applies in American Samoa is by no means novel. The *Tuaua* petitioners, in their reply brief, argued that The High Court of American Samoa, in *Craddick v. Territorial Registrar*, already recognized that equal protection applies in the territory.[99] However, despite *Craddick* being cited by both the petitioners and Judge Leon in his memorandum opinion,[100] the D.C. Circuit did not address the case or its holdings. This argument was raised in greater depth by Sean Morrison in his article *Foreign in a Domestic Sense*. Morrison argues that extending citizenship would not be "anomalous" because (1) citizenship would not change the political status of the territory;[101] (2) Samoa's land system would survive equal protection's strict scrutiny analysis;[102] and (3) equal protection already applies under *Examining Board* and *Craddick*.[103]

In sum, given the language of the U.S. Supreme Court and the High Court of American Samoa, as well as the logical extension of the Insular

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[97] A possible objection to this argument is that it is overbroad to categorize all equal protection as fundamental. Equal protection analysis is applied when a law makes a classification or infringes upon a right. However, not all classifications trigger strict scrutiny. Similarly, not every right is a fundamental one. Thus, a more nuanced position may be appropriate. A better position may be to treat equal protection analysis as fundamental only when strict scrutiny would be applied. In other words, the fundamental right is the right not to be classified by race or have a fundamental right infringed upon without a compelling government interest. Therefore, with regards to the Samoan land laws--which make a racial classification--the relevant portion of equal protection *is* fundamental. Thus, although the above analysis is clearly not a complete answer to the question of whether equal protection is fundamental, it is sufficient for the purposes of this note.

[98] Downes v. Bidwell, 188 U.S. 244, 282 (1901) (enumerating, in dicta, "certain natural rights" such as "right to one's own religious opinion," "right to personal liberty and individual property," "to freedom of speech and of the press," "to due process of law and to *an equal protection of the laws*" (emphasis added)).

[99] Reply Brief of Plaintiffs-Appellants at 28–29, Tuaua.

[100] Tuaua I at 91.

[101] *Id.* at 139–40.

[102] *Id.* at 144–45.

[103] *Id.* at 142–44.

Framework, it is clear that the right to equal protection is "fundamental" and thus applies by its own force in American Samoa.

B. THE FLAWS IN THE D.C. CIRCUIT'S ARGUMENT

The D.C. Circuit's finding that extending citizenship is "anomalous" relies on the representatives' demonstrably false assumption that citizenship will threaten Samoa's communal land laws. Additionally, the court's reliance on the wish of the majority of Samoan people expressed through their elected representatives is troubling given that the citizenship clause, like most rights, was adopted to protect a political minority.[104] In this section I will summarize these two problems.

In the D.C. Circuit opinion, the court bases its holding on the representatives' opposition to citizenship. The representatives' opposition, however, is largely based on the argument that citizenship is necessary to avoid the extension of equal protection. This argument, and thus the Court's implicit reliance on it, is incorrect for two reasons. First, as discussed above, equal protection already applies in Samoa. Second, equal protection has no causal tie to citizenship so the fear of one triggering the other is baseless. In sum, by relying on the flawed argument posed by the representatives, the court denies American Samoans the right to citizenship unnecessarily.

Finally, it is worth noting the potential problems with the *Tuaua* court's reliance on majority opinion in its application of the "impractical and anomalous" test. The majority of our "fundamental rights" are designed to protect political minorities. In particular, the Citizenship Clause was implemented to protect free blacks from a political majority and a Supreme Court that deemed them non-citizens.[105] Using a political majority opinion as a reason to withhold the Citizenship Clause runs counter to the very purpose of the provision. The Supreme Court has recognized that the purpose of a provision matters in determining whether that provision extends to other situations. In *Boumediene v. Bush*, for example, the Court reasoned that the writ of habeas was intended to constrain the Executive and Legislative branches so these branches should not have the power to switch the writ on and off.[106] Similarly here, the original purpose of the Citizenship Clause is relevant and that the D.C. Circuit's reasoning cuts against this purpose is significant. Furthermore, giving weight to the majority's

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[104] *See* Rodriguez, *supra* note 88 at 1365–66.

[105] *See id.*

[106] Boumediene v. Bush, 553 U.S. 732, 795–98 (2008).

opposition potentially endangers the protection of minority classes.[107] For instance, imagine a tyrannical majority class in one of the unincorporated territories. The majority may object to rights being extended that benefit the minority class. Therefore, under the logic in *Tuaua,* the court may find it "anomalous" to protect the minority from oppression given the majority's objection. Thus, allowing the majority to direct whether rights are extended "devalues the importance of constitutional *rights* in the territories–where the rights that *aren't* supported by a majority are perhaps the *most* in need of judicial incorporation."[108]

In conclusion, the court's finding that the application of citizenship is "impractical and anomalous" is flawed for two reasons. First, the court relies on the representatives' false assumption that citizenship and equal protection are tied and as a result, unnecessarily denies American Samoans the right to citizenship. Second, reliance on a political-majority opinion in deciding whether to extend rights runs counter to the purpose of the Citizenship Clause and may have troubling effects on the protection of minorities.

C. ADDRESSING THE "STRENGTHENED TIES" COUNTER ARGUMENT

As the above section states, equal protection already applies in American Samoa and thus the imposition of citizenship does not affect its extension. But one could argue that extending citizenship may still increase the chance the land system will be struck down. In other words, once citizenship is extended, the Supreme Court may have a harder time ignoring the American Samoa's racially-based land system and its prima facie unconstitutionality. This argument is persuasive because it follows an intuitive principle: the more a territory falls under United States sovereignty, the less the Supreme Court can ignore potential injustices.[109] Under this principle, by extending citizenship, American Samoa would be *more a part* of the United States and thus the Supreme Court may feel compelled to weigh in on its land alienation rules. In *Tuaua*, the D.C. Circuit leaves open the possibility that the land rules violate equal protection.[110]

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[107] *See* Steve Vladeck, *Three Problems With Justice Brown's Opinion in Tuaua*, JUST SECURITY (June 7, 2015), https://www.justsecurity.org/23572/three-problems-tuaua/.

[108] *Id.*

[109] *See* Boumediene v. Bush, 553 U.S. 723, 768–69 (2008).

[110] Tuaua at 310 ("The resolution of this dispute would likely require delving into the particulars of American Samoa's present legal and cultural structures to an extent ill-suited to the limited factual record before us. . . . We need not rest on such issues or otherwise speculate on the relative merits of the American Samoan Government's Equal Protection concerns.").

Thus, the Supreme Court could decide to strike down the land rules if American Samoans were citizens, even though the High Court of American Samoa upheld the system.

Though this argument has its appeal, it is flawed for two reasons. First, there is no correlation between birthright citizenship and the force of equal protection. For instance, in the Northern Mariana Islands, where individuals *have* birthright citizenship,[111] the Ninth Circuit upheld a land restriction law similar to the Samoan law.[112] The land rule, which prohibited alienating land to non-natives for more than forty years, was challenged on equal protection grounds.[113] The court held that equal access to long-term interest in property is not a "fundamental right" and thus does not extend to the unincorporated territory.[114] If the Ninth Circuit is willing to leave these laws untouched despite citizenship applying, it is unclear why American Samoa's land rules would be at risk. Second, the argument presumes that the Supreme Court is currently avoiding what could be a constitutional violation—a troubling proposition for obvious reasons. If the land rules *do* violate equal protection, the Supreme Court should not be turning a blind eye to this. Issues of citizenship should not be necessary to prompt the Supreme Court to address constitutional violations. Moreover, the fear that constitutional violations will be remedied is not a valid reason for a federal court to stay its hand. For these reasons, the counterargument asserted above—that courts will not be able to ignore the land laws once citizenship extends—is unpersuasive.

V. CONCLUSION

On June 13, 2016, the U.S. Supreme Court denied the plaintiff's petition for writ of certiorari.[115] In their petition, the appellants argued that the Insular framework is one needing further review and the issue of citizenship is one of utmost importance.[116] They are surely correct that the framework is in need of clarification. Earlier this year, for instance, the District Court of Puerto Rico ruled that the right to same-sex marriage,

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[111] Covenant To Establish the Commonwealth of The Northern Mariana Islands, Section 301 http://www.cnmilaw.org/article3.html.

[112] Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1992) (abrogating 908 F.2d 411 (9th Cir. 1990)).

[113] *Id.* at 1451.

[114] *Id.* at 1452.

[115] Tuaua v. United States, 136 S. Ct. 2461 (June 13, 2016) (denying certiorari).

[116] Petition for Writ of Certiorari, Tuaua, No. 15-981.

recognized by the U.S. Supreme Court in *Obergefell v. Hodges*,[117] did not extend to the territory.[118] The District Court relied on a misinterpretation of the Insular cases to support its decision.[119] While the First Circuit promptly overturned the District Court,[120] the litigation showed that issues will continue to rise out of the confused, and consistently misapplied, framework. Furthermore, because the Supreme Court denied the *Tuaua* petition, the need for clarification remains. Citizenship is an issue of utmost importance and when the issue is raised again, it is imperative that the problems with the D.C. Circuit's opinions are recognized so as not to repeat them. As Steve Vladeck wrote in his essay on the *Tuaua* opinion, "[t]his is not to say that there aren't *other* reasons why it might be 'impractical or anomalous' to apply *jus soli* citizenship to American Samoa; only that these aren't they."[121]

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[117] Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015).

[118] Vidal v. Garcia-Padilla, 167 F. Supp. 3d 279 (D. P.R. 2016), http://www.scotusblog.com/wp-content/uploads/2016/03/PRico-same-sex-marriage-denial-3-8-16.pdf.

[119] This decision appears to be a clear misapplication of the Insular framework. As discussed above, the doctrine of territorial framework holds that "fundamental rights" apply by their own force in the territories. In *Obergefell*, however, the Court explicitly held that "marriage is fundamental under the Constitution [and] appl[ies] with equal force to same-sex couples." *Obergefell*, 135 S. Ct. 2584, 2589.

[120] In re Conde-Vidal, 818 F.3d 765 (1st Cir. 2016).

[121] Vladeck, *supra* note 107. It is not completely clear what other reasons, if any, the court could rely on to deny citizenship to American Samoans. One possible route would be for the court to throw out the Insular Framework altogether and merely deny citizenship based on the plain language of the Fourteenth Amendment. Additionally, the court could find that imposing citizenship would be "impractical." This holding would likely have to be supported by findings that the unique circumstances of Samoa make it extremely difficult to extend citizenship. As this finding is difficult to show, however, this route is likely foreclosed to the court. Finally, the court may be able to dodge the issue altogether by claiming that the citizenship question with regards to the territories is a political one. The court may have a plausible claim the "anomalous" standard is not judicially discoverable. In other words, because the relationship between the United States and the territory is a political one, determining the effects on the relationship may be a political question. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (providing factors for determining whether an issue is a political question).