Tennessee Journal of Law and Policy

Volume 9
Issue 4 *Spring 2014*

Article 6

April 2014

Some More for Samoa: The Case for Citizenship Uniformity

Benjamin S. Morrell

Spring 2014| Volume 9 | Issue 3
Tennessee Journal of Law and Policy 475

POLICY NOTE

SOME MORE FOR SAMOA: THE CASE FOR CITIZENSHIP UNIFORMITY[1]

By: Benjamin S. Morrell[2]

I. Introduction

In the late 1960s, Leneuoti Tuaua graduated from college in California and applied to several government jobs around the state, hoping to start a career in law enforcement.[3] He scored well on the entrance exams for the California Highway Patrol and the San Mateo County Sheriff's Office.[4] Tuaua had lived in the United States his entire life and had a U.S. passport, yet his applications were denied because he was not a citizen. At the top of Tuaua's passport, stamped in large type, read the words: "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."[5] Tuaua was born in American Samoa, a longtime U.S. territory in the South Pacific that consists of five volcanic islands and two coral atolls, and has a population of over fifty-five thousand.[6] Unlike Americans born in Puerto Rico, Guam, and every other U.S. territory, those born in American Samoa are

[1] SOME MORE OF SAMOA (Columbia Pictures 1941).
[2] J.D. Candidate 2016, University of Tennessee College of Law.
[3] Fili Sagapolutele, *Am. Samoans Sue for U.S. Citizenship Based On Constitution*, PACIFIC ISLANDS REPORT, July 12, 2012, *available at* http://pidp.org/pireport/2012/July/07-13-10.htm.
[4] *Id.*
[5] *DC Circuit Appeal*, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/tuaua_appealed_to_d_c_circuit (last visited Jan. 29, 2014).
[6] *Insular Area Summary for American Samoa*, U.S. DEPARTMENT OF THE INTERIOR (Apr. 2010), http://www.doi.gov/oia/islands/american-samoa.cfm.

"generally considered nationals but not as citizens of the United States."[7] This status carries with it several difficulties, limitations, and perplexities, as well as an intangible stigma of lacking citizenship rights afforded to other Americans.[8]

Tuaua, along with four other American Samoans and the Samoan Federation of America, a nonprofit organization that advocates for Samoans' rights,[9] sued the U.S. government in 2012, arguing that the Citizenship Clause of the Fourteenth Amendment guarantees full citizenship to those born in American Samoa.[10] On June 26, 2013, a federal district court judge in Washington, D.C. granted the government's motion to dismiss, disposing of the suit in its earliest stages.[11] Citing the doctrine of territorial incorporation from a hundred-year-old body of Supreme Court precedent known as the Insular Cases,[12] the court noted that, for the purposes of the Fourteenth Amendment, American Samoans are not entitled to U.S. citizenship by birth.[13] The plaintiffs have appealed the case to the U.S. Court of Appeals for the D.C. Circuit.[14] Tuaua, the lead plaintiff, asks, "[i]f we are American Samoans, then why not citizens? I believe American Samoans deserve the same rights and benefits as all other Americans."[15]

---

[7] 12 U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., USCIS POLICY MANUAL pt. A, ch. 2 (Mar. 11, 2014).
[8] *Tuaua FAQ*, WE THE PEOPLE PROJECT, http://www.equalrightsnow.org/tuaua_faq (last visited Jan. 29, 2014).
[9] *Id.*
[10] Tuaua v. United States, 951 F. Supp. 2d 88. (D.D.C. 2013).
[11] *Id.* at 90.
[12] *Id.* at 94; *see Id.* n. 9 (for a full list of the Insular Cases).
[13] *Id.* at 94.
[14] *DC Circuit Appeal*, *supra* note 5.
[15] *American Samoa Lawsuit Seeks US Citizenship*, BLOOMBERG BUSINESSWEEK NEWS (July 13, 2012), http://www.businessweek.com/ap/2012-07-13/american-samoa-lawsuit-seeks-us-citizenship.

This note will explore the territorial incorporation doctrine, a judicially created doctrine under which the Constitution applies fully only in incorporated United States territories, and the reasons why it is has no legitimate place in Twenty-First Century American jurisprudence. From the outdated and xenophobic cases that support the doctrine, to the discriminatory practices it promotes, the territorial incorporation doctrine simply fails to advance any compelling state or federal interest.

II. Development of the Law

A. Historical Background

American Samoa became a territory of the United States in 1899 after Germany and the U.S. signed the Tripartite Convention, agreeing to divide ownership of the Samoan Islands.[16] Located in the Polynesian region of the southern Pacific Ocean, American Samoa's annexation occurred soon after the Spanish–American War; this period marked the apex of America's foray into the entrenched European institutions of imperialism and colonialism.[17] During World War II, U.S. troops in the Pacific Theatre used American Samoa as a major communications hub and naval base.[18] Many Samoans voluntarily enlisted in the U.S. Marines and served on active duty until the end of the war.[19] Samoans have served in the U.S. military ever since. Per capita, soldiers from American Samoa have died in Afghanistan and Iraq at a higher rate than any other U.S.

[16] GEORGE HERBERT RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA 574 (1933).
[17] Joe Waldo Ellison, *The Partition of Samoa: A Study in Imperialism and Diplomacy*, 8 PAC. HIST. REV. 259, 288 (1939).
[18] JACK C. HUDSON & KATE G. HUDSON, AMERICAN SAMOA IN WORLD WAR II 18 (1994), *available at* http://ashpo.com/downloads/library/7500319.pdf.
[19] *Id.* at 25–27.

state or territory.[20] Three of the plaintiffs in *Tuaua v. United States* are veterans.[21]

New Zealand wrested control of Western Samoa from Germany during the First World War. Following World War II, it became a "trust territory" of the United Nations before declaring independence in 1962.[22] Today, the Independent State of Samoa comprises the majority of the island chain, with a population of nearly two hundred thousand.[23] By contrast, American Samoa has seen very little political change over the last century and today "continues its status as an unorganized, unincorporated United States territory."[24]

B. "National" vs. "Citizen"

The Citizenship Clause of the Fourteenth Amendment to the Constitution provides that "[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."[25] The concept of citizenship by birth has its roots in the ancient Greco–Roman concept of *jus soli*: "the law of the soil," which granted citizenship

[20] Kirsten Scharnberg, *Where the U.S. Military is the Family Business*, CHICAGO TRIBUNE, Mar. 11, 2007, *available at* http://articles.chicagotribune.com/2007-03-11/news/0703110486_1_military-recruiters-american-samoans-boot-camp.
[21] *Tuaua FAQ, supra* note 8.
[22] Stanley K. Laughlin, Jr., *United States Government Policy and Social Stratification in American Samoa*, 53 OCEANIA 29, 29–30 (1982).
[23] Central Intelligence Agency, *Samoa*, THE WORLD FACTBOOK (Jan. 30, 2014), https://www.cia.gov/library/publications/the-world-factbook/geos/ws.html.
[24] Laughlin, *supra* note 22, at 30.
[25] U.S. CONST. amend. XIV, § 1.

by birth within the territory of a state or city.[26] English common law adopted the doctrine following the decline of medieval feudalism, and the U.S. kept it at common law until the passage of the Fourteenth Amendment codified *jus soli* in the Constitution.[27]

Congress has defined a "national of the United States" as "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[28] All citizens, then, are nationals, but not all nationals are citizens. A "person born in an outlying possession of the United States on or after the date of formal acquisition of such possession" is a national, but not a citizen.[29] Presently, "[t]he term 'outlying possessions of the United States' means American Samoa and Swains Island."[30] The only Americans who become noncitizen nationals by birth are those born in American Samoa.

American Samoans are not citizens of any country, though they still have obligations and some rights under American law. Compared to other Americans, and even those living in other territories, Samoans often have fewer rights and more hardships with no apparent rhyme or reason. Although nationals can generally work and reside anywhere in the U.S,[31] like U.S. citizens in other territories, they cannot vote in federal elections and do not pay many

---

[26] *Citizenship*, ENCYCLOPAEDIA BRITANNICA ONLINE ACADEMIC EDITION, http://www.britannica.com/EBchecked/topic/118828/citizenship?anchor=ref22254 (last visited Jan. 29, 2014).
[27] *Id.*
[28] 8 U.S.C. § 1101(a)(22) (2012).
[29] 8 U.S.C. § 1408(1) (1988).
[30] 8 U.S.C. § 1101(a)(29) (2012). In 1925, Congress declared U.S. sovereignty over Swain's Island and made it a part of American Samoa. *See* 48 U.S.C. § 1662.
[31] *U.S. National*, IMMIHELP (2014), http://www.immihelp.com/immigration/us-national.html.

federal taxes.[32] Nationals may apply for U.S. citizenship, but under the same rules as other permanent residents,[33] which requires living in a U.S. state for three months,[34] paying nearly seven hundred dollars in fees, and passing a civics exam and an English literacy test.[35] Despite the high rate of military enlistment, American Samoans cannot become military officers unless they successfully apply for citizenship.[36] Different states treat nationals inconsistently. Among other restrictions, many states prohibit nationals from owning guns, serving on juries, and holding public office.[37]

C. The Insular Cases and Territorial Incorporation

After the American annexation of several overseas territories at the turn of the century, individuals who found themselves suddenly under the authority of the United States attempted to invoke the rights and freedoms of the Constitution through the American courts. The U.S. Supreme Court handled these challenges in a series of decisions known as the Insular Cases.[38] Whereas previous administrations had sought to create new states out of freshly acquired land, President McKinley established a new trend of colonialism with the intention of keeping these new "colonies" at arm's length, using them primarily

[32] *Insular Area Summary for American Samoa*, *supra* note 6.
[33] *Id.*
[34] *American Samoa Lawsuit Seeks US Citizenship*, *supra* note 15.
[35] *DC Circuit Appeal*, *supra* note 5.
[36] Sean Morrison, *Foreign in a Domestic Sense*, 41 HASTINGS CONST. L.Q. 71, 85–86 (2013).
[37] *Id.*
[38] Adriel Cepeda Derieux, *A Most Insular Minority,* 110 COLUM. L. REV. 797 (2010).

for military purposes and posturing before the international community.[39]

Following the lead of the Executive Branch, the Supreme Court relegated the new territories to a legal periphery analogous to their geographic relation to the American mainland by conjuring up the doctrine of territorial incorporation and applying it throughout the Insular Cases:

> This doctrine divided domestic territory -- that is, territory within the internationally recognized boundaries of the United States and subject to its sovereignty -- into two categories: those places "incorporated" into the United States and forming an integral part thereof (including the states, the District of Columbia, and the "incorporated territories"); and those places not incorporated into the United States, but merely "belonging" to it (which came to be known as the "unincorporated territories").[40]

Beginning in 1901, the Insular Cases held that the full weight of the Constitution did not "follow[] the [American]

[39] Christina Duffy Burnett, *Untied States*, 72 U. CHI. L. REV. 797, 799 (2005).
[40] *Id.* at 800.

flag"[41] to these new, unincorporated territories, and that only the most basic Constitutional rights apply there.[42] Justifying the invention of this wholly new doctrine, the Court noted that one "false step at this time might be fatal to the development of . . . the American Empire."[43] The Court provided little guidance on how to evaluate whether a constitutional right is "fundamental."[44]

The Supreme Court specifically addressed the issue of citizenship regarding inhabitants of the territories in *Downes v. Bidwell*. The Supreme Court interpreted the Citizenship Clause of the Fourteenth Amendment as a "limitation to persons born or naturalized in the United States which is not extended to persons born in any place 'subject to their jurisdiction.'"[45] Citizenship, the most fundamental and seminal of rights, was not fundamental enough for the Court to apply to the territories. Residents of the territories lived in a state of uncertainty as to which rights they had and which remained out of their grasp, nestled away in the incorporated and purportedly more civilized regions of the "American Empire."

Eventually, as the country shifted away from its imperialistic gaze, Congress began to concretely define the legal and political relationships between the U.S. and its territories through legislation on an individual basis. Over the years, Congress granted full citizenship rights to residents of Guam,[46] Puerto Rico,[47] the U.S. Virgin Islands,[48] and the Northern Mariana Islands,[49] while

[41] *Id.* at 805.
[42] Downes v. Bidwell, 182 U.S. 244 (1901).
[43] *Id.* at 286.
[44] Morrison, *supra* note 36, at 105.
[45] Downes, 182 U.S. at 251.
[46] Guam Organic Act of 1950, 48 U.S.C. § 1421 (1950).
[47] Jones–Shafroth Act, Pub. L. No. 64–36, 39 Stat. 951 (1917).
[48] 8 U.S.C. § 1406 (1952).
[49] 48 U.S.C. § 1801 (1976) (The Northern Mariana Islands gained full U.S. citizenship for its citizens contemporaneously with its political

relinquishing control of the Philippines[50] and the Panama Canal Zone.[51] Among the inhabited territories of the U.S., only American Samoa remained unincorporated. Congress eventually passed the Immigration and Naturalization Act,[52] which codified the old distinction between incorporated territories and unincorporated territories. As the last unincorporated territory, American Samoa was the only place to experience a unique handicap of its residents' rights as Americans through the now legislated and codified territorial incorporation doctrine.[53]

III. Analysis

The Insular Cases were decided by many of the same justices who endorsed racial segregation in *Plessy v. Ferguson* only a few years before.[54] They have invited comparison to *Plessy* ever since establishing a "doctrine of separate and unequal."[55] The high percentage of native, nonwhite populations in the American territories, especially at the turn of the century, invite these ugly associations.[56] As the Court in *Downes* put it, the territories were "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of

union with the U.S. in 1976.). *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 1801 (1975), *available at* http://www.cnmilaw.org/section1801.html.

[50] Treaty of General Relations and Protocol with the Republic of the Philippines, U.S.-Phil., July 4, 1946, 61 Stat. 1174.

[51] Panama Canal Treaty of 1977, U.S.-Pan., July 22, 1977, TIAS 10030.

[52] *See generally* 8 U.S.C. § 1101 (2012).

[53] 8 U.S.C. § 1101(a)(22) (2012).

[54] Plessy v. Ferguson, 163 U.S. 537 (1896).

[55] Juan R. Torruella, *The Insular Cases*, 29 U. PA. J. INT'L L. 283, 291 (2007).

[56] *Id.* at 289.

thought."[57] Tellingly, the opinion in *Downes* heavily quotes *Dred Scott v. Sandford*.[58] Through this unflattering historical lens, it becomes clearer how the Supreme Court could have found that citizenship is not a fundamental right under the Constitution. Fundamentality, they may have privately reasoned, depending on factors more transparent than the content of one's character. McKinley's original goal of colonial exploitation rang true. The U.S. was not interested in the people, only the land.

Rather than being actively based on institutional racism today, the anomaly of American Samoa's status as the last unincorporated territory without citizenship by birthright appears to have no specific justification. A rule this obscure, perplexing, and technical should require a compelling reason for its existence. Neither the court in *Tuaua* nor Congress managed to pinpoint any distinct characteristics of American Samoa that would vindicate or even attempt to explain the arbitrary nature of its unique, unincorporated status today. With no governmental interest replacing the original imperialistic one, the incorporation doctrine has no purpose yet still exists. It is at best a vestigial reminder of America's imperialistic past and at worst the last surviving mechanism of a systematic "regime of political apartheid."[59]

The landscape of the Constitution has changed drastically over the last century, due more to its interpretation by the Supreme Court than its subsequent amendments. In the early Twentieth Century, the Fourteenth Amendment condoned racial segregation,[60] but would not tolerate maximum hours regulations for bakers

[57] Downes, 182 U.S. at 287.
[58] *Id.* at 250, 271, 274–76 (citing Dred Scott v. Sandford, 60 U.S. 393 (1857)).
[59] Downes, 182 U.S. at 283.
[60] Plessy, 163 U.S. at 537.

and factory workers.[61] Many state court verdicts could be retried, trumped, and reversed by federal common law at a defendant's whim.[62] The Bill of Rights largely did not apply to the states, even regarding crucial liberties like protection against double jeopardy[63] and confessions obtained through torture.[64] The Supreme Court has no qualms with overturning old precedent where a fundamental right is being infringed,[65] where years of experience have simply shown continuous and systematic unfairness,[66] or even where the Court finds a new right to read into the Constitution[67] or decides to delete a previously valid one.[68] Considering these modern trends in constitutional law, and the rotting, cobwebbed foundation of the territorial incorporation doctrine, the ruling in *Tuaua* makes sense only by remembering that it was decided at the trial level.[69] Trial judges typically leave the trendsetting to the appellate courts and often feel it beyond their authority to make new policy. Whether the Circuit Court of Appeals for the D.C. Circuit will take on this challenge remains to be seen, but given the shaky ground on which the territorial incorporation doctrine stands, it would not be surprising to see it fall.

[61] Lochner v. New York, 198 U.S. 45 (1905).
[62] Swift v. Tyson, 41 U.S. 1 (1842).
[63] Palko v. Connecticut, 302 U.S. 319 (1937).
[64] Brown v. Mississippi, 297 U.S. 278 (1936).
[65] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).
[66] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Sweatt v. Painter, 339 U.S. 629 (1950).
[67] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
[68] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[69] Tuaua, 951 F. Supp. 2d at 88.

IV. Conclusion

The Insular Cases' doctrine of territorial incorporation provides a spectacularly poor justification for preserving the modern distinction between U.S. citizens and nationals by birth. Considering the Court's woefully antiquated approach to constitutional interpretation, especially regarding the Fourteenth Amendment, and the fact that the underlying original goal of facilitating American colonial ambition is long gone, these cases offer little persuasive support once put in context. The difference now only applies to the residents of one tiny island chain in the Southern Hemisphere, following a protracted period of arbitrary congressional cherry picking of rights for other territories, evidences the perennial dearth of common sense surrounding this issue. Under the current dichotomy one might need to amend the Declaration of Independence to read "all men are created equal unless they are created in American Samoa."[70] Without a legitimate state interest this construction moves from the troubling to the absurd. Uniformity of American citizenship by itself would make practical sense on its face, eliminating the second-class stigma associated with hailing from one particular U.S. territory while simplifying a needlessly complex issue. Accomplishing this goal through the mechanism of the Fourteenth Amendment, by way of the courts, would offer more consistency, not only with the application of the law, but also with its interpretation.

The simple answer is, in this case, the correct one. Being in the United States should mean just that, with no need for an asterisk. `As a vestige from a cavalier and discriminatory part of the nation's past, the doctrine of territorial incorporation squarely belongs in the dustbin of

[70] Morrison, *supra* note 36, at 146.

history, not in the pages of Twenty-First Century court opinions.[71]

[71] Tuaua, 951 F. Supp. 2d at 88.