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Who Really is a Noble?: The Constitutionality of American Samoa's Matai System

Ian Falefuafua Tapu

About the Author

University of Hawai'i William S. Richardson School of Law, J.D. 2020 candidate, Dartmouth College, A.B. 2008. *Fa'afetai tele lava* to Professors Susan Serrano and Julian Aguon for their mentorship and guidance. I would also like to thank the dedicated members of the Asian Pacific American Law Journal for their meticulous feedback and the Asian Pacific American Bar Association Educational Fund for this generous opportunity. This piece is dedicated to my late grandparents, Falepogisa and Falefuafua Tapu. It is because of their sacrifices and love that I was able to graduate from college and now be the first lawyer in the family. *Alofa ia te oe*—I am forever in your debt.

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Introduction

There are a few memories I can immediately recall of when my grandmother was completely in her element—sitting at our dining room table in the crispness of Sunday morning meticulously stringing each flower into leis; her hands and knees happily muddied as she pulled out *kalo* (taro) from the earth;

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and floating in the lagoon of her home village in American Samoa,[1] which was both her school and refuge and where she learned how to be a fisherwoman.

Every few years as a child I would accompany my grandmother from the only home I knew, Hawai'i, to Poloa,[2] American Samoa. During these visits, I hoped I would feel the same sense of belonging and ease so plainly evident in my grandmother's face as her eyes wrinkled into smiles. Unfortunately, I was quickly reminded that I was cut from a slightly different cloth from those around me. I would hear young children call me "*palagi* (white)" because of how I dressed or how I annunciated my words. Other times I would catch family members sigh "*kalofae* (poor thing)" with exasperation over my failure in knowing the intricacies of *fa'a Samoa*.[3] Although I self-identify as Samoan-American, in this cultural dissonance I was viewed as a Samoan in Hawai'i and yet simply as an American in Samoa.

This conflict between how I identify and how others perceive me directly reflect the internal tug-of-war that is at the center of the Samoan politic. According to the United States, Samoa exists as "one of the distant possessions,"[4] a legal fiction that is both the political intent and byproduct of the deafening principle of Manifest Destiny.[5] In the midst of the western expan-

1. While there is no universal agreement as to the meaning of "Samoa" there have been multiple interpretations. In one definition, "*sa*" has been interpreted to mean "tribe of" with "*moa*" being the family name of the early Tui Manu'a. Joseph C. Finney, *The Meaning of the Name Samoa*, 82 J. Polynesian Soc'y 301, 301 (1973). Another interpretation has translated "*sa*" to mean sacred and "*moa*" meaning "center", and therefore in collective "Samoa" is to mean "Holy Center." *The World Factbook: American Samoa*, CIA, https://www.cia.gov/library/publications/resources/the-world-factbook/geos/aq.html (last visited Dec. 17, 2019) [hereinafter *Factbook*]. Alternatively, it can also be interpreted to mean "place of the sacred moa bird." *Id.* Samoa is separated into two distinct government entities. American Samoa is a territory of the United States, and Samoa, formerly known as Western Samoa, is an independent nation. *Id.* Unless otherwise noted, this Comment will use "American Samoa" and "Samoa" to only refer to the United States territory and not the independent nation.

2. Poloa is a fishing village and is the western most village of Tutuila, the largest island in American Samoa. *Residents of Poloa Enjoy the View—And Their New Honor on the Global Map*, Samoa News (Jan. 3, 2012), http://www.samoanews.com/residents-poloa-enjoy-view-%E2%80%94-and-their-new-honor-global-map; *see Factbook supra* note 1.

3. *See* discussion *infra* Part I.

4. Downes v. Bidwell, 182 U.S. 244, 282 (1901).

5. The term "manifest destiny" was originally used to describe the "expectation that the U.S., thanks to the superior qualities of the Anglo-Saxons as such and to their democratic institutions, would inevitably absorb their neighbors. Hugh Thomas, Cuba or the Pursuit of Freedom 201 (1971). Although the concept of Manifest Destiny originally encompassed the continental expansion to the Pacific Ocean and was considered a tactic for increasing the number of pro-slavery States, after the Civil War similar themes were adopted by the Republican expansionists as a slogan for overseas conquests. Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol'y Rev. 57, 60 n.12 (2013) [hereinafter Torruella, *Ruling America's Colonies*]. *See* Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 287 (2007) ("When placed in their historic context, the Insular Cases represent a constitutional law extension of the debate over the Spanish-American War of 1898 and the imperialist/manifest destiny causes which that conflict promoted."); Stanley K. Laughlin,

sionism prevalent throughout the nineteenth and twentieth centuries, the Supreme Court announced a series of decisions known as the *Insular Cases*,[6] which developed an unprecedented colonial regime that boxed Samoa and the other U.S. Territories into the legal gray area known as an "unincorporated territory."[7] In addition to occupying a unique status as a U.S. territory, Samoa is wholly distinct from other U.S. territories—the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam, and Puerto Rico—in that its people are deemed "U.S. nationals" instead of U.S. citizens,[8] another term with no historical or constitutional roots.[9] Additionally, with

Jr., The Law of United States Territories and Affiliated Jurisdictions § 10.10 at 181 ("Ironically, the incorporation doctrine which originally legitimated popular desire to fulfill America's manifest destiny now provides the theoretical basis for assuring a large measure of territorial self-determination.").

6. *See* discussion *infra* Part II.

7. The Department of Interior defines an unincorporated territory as "[a] United States insular area in which the United States Congress has determined that only selected parts of the United States constitution apply." An incorporated territory, on the other hand, is a "United States insular area, of which only one territory exists currently, Palmyra Atoll, in which the United States Congress has applied the full *corpus* of the United States Constitution as it applies in the several States. Incorporation is interpreted as a perpetual state. Once incorporated, the Territory can no longer be de-incorporated." *Definitions of Insular Area Political Organizations*, Department of Interior, https://www.doi.gov/oia/islands/politicatypes (last visited Jan. 1, 2020). Dorr v. United States, 195 U.S. 138, 142–43 (1904) ("Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and such constitutional restrictions upon the powers of that body as are applicable to the situation."); Ediberto Roman, *Empire Forgotten: The United States' Colonization of Puerto Rico*, 42 Vill. L. Rev. 1119, 1148 (1997) (arguing creation of "unincorporated territory" label allowed "the United States . . . to deceptively change traditional colonial doctrinal parlance."); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853, 864 (1990) ("It is also well-settled that territorial governments like Guam's are 'entirely the creation of Congress,' which has 'general and plenary' authority over the territories. Congress has passed statutes granting Guam substantial powers of self-government, but that is purely a matter of legislative grace; the territory 'has no inherent right to govern itself.' Given this dependence on congressional authorization, the Supreme Court has characterized territorial governments as 'agencies of the federal government.'").

8. According to the Internal Revenue Service, a "U.S. National" is defined as "[a]n individual who owes his sole allegiance to the United States." *Immigration Terms and Definitions Involving Aliens*, Internal Review Service, https://www.irs.gov/individuals/international-taxpayers/immigration-terms-and-definitions-involving-aliens (Dec. 20, 2019). "The following shall be nationals, but not citizens of the United States at birth: 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). U.S. Nationals cannot hold public office or vote in the United States. *See* Tuaua v. United States, 951 F. Supp. 2d 88, 91 (D.D.C. 2013) ("The State Department's Foreign Affairs Manual accordingly categorizes American Samoa as an unincorporated territory and states that 'the provisions of the Constitution do not apply to persons born there.' . . . Several plaintiffs, despite long careers in the military or law enforcement, remain unable to vote or to work jobs that require citizenship status."). For an in-depth analysis of citizenship in Samoa, *see generally* Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013).

9. *See* 8 U.S.C. § 1408 (2012) (those born in outlying possessions "shall be nationals,

no Congressional organic act to establish a territorial government, American Samoa is categorized as an "unorganized territory."[10]

The underlying legal framework and its historical roots comprise the foundation of American Samoa. It provided fertile grounds for the Samoan people to create a "hybrid system of law . . . unique in the world today."[11] This system marries Western law and concepts with traditional Samoan custom. Even with the colonial influences of the West, the tenets of *fa'a Samoa*[12]—"'*aiga* (family unit), *matai* system (system of chiefs and leaders), and communal lands"—remain central to the Samoan experience and identity.[13] In fact, Samoa is arguably distinguishable from other nonfederally recognized Indigenous[14] groups in the United States such that "[o]ver ninety percent of all land is communally owned [in Samoa], and attempts to return privately held lands to communal status continue today."[15] Additionally, the territory maintains a "political structure of chiefly titles."[16] While American Samoa's culturally

but not citizens, of the United States at birth"); 8 U.S.C. § 1101 (a)(29) (outlying possessions are defined as "American Samoa and Swains Island"); 48 U.S.C. § 1662 (2006) (defining American Samoa to include Swains Island); Elizabeth K. Watson, *Citizens Nowhere: The Anomaly of American Samoans' Citizenship Status After* Tuaua v. United States, 42 U. Dayton L. Rev. 411, 412 (2017) ("While all others born on American soil have a constitutional birth right to citizenship, American Samoans are not similarly privileged. The United States singly categorizes American Samoans as the country's only non-citizen nationals. To the world, American Samoans are citizens nowhere. Although the United States extends the right of citizenship to those born within its other island territories, Congressional action has explicitly excluded American Samoans.").

10. Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 Hastings Const. L.Q. 71, 88 (2013). An "organized territory" is one that is established through an organic act passed by Congress. American Samoa is considered an 'unincorporated," "unorganized" because it has an elected governor and legislature, but the civil government is not a result of an organic act. Jon M. Van Dyke, *The Evolving Legal Relationship Between the United States and its Affiliated U.S.-Flag Islands*, 14 U. Haw. L. Rev. 445, 450 (1992).

11. James R. Thornbury, *A Time for Change in the South Pacific?*, 67 Rev. Jur. U.P.R. 1099, 1099 (1998).

12. Translated to mean "the Samoan way," this concept is best described as "the essence of being Samoan" as well as a "unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race." 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, 41–42 (2000).

13. *See* Line-Noue Memea Kruse, The Pacific Insular Case of American Samoa: Land Rights and Law in Unincorporated US Territories 89 (2018).

14. The term "Indigenous" is capitalized in this Comment to denote that these groups are proper nouns and have a unique place in historical, legal, and political language. *See* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 Marq. L. Rev. 127, 127 n.3 (2011) [hereinafter Sproat, *Wai Through Kānāwai*].

15. Daniel E. Hall, *Curfews, Culture and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to the U.S. Territories*, 2 Asian-Pac. L. & Pol'y J. 69, 72 (2001); *see also* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 Cal. L. Rev. 801, 828 (2008).

16. Karen Armstrong, *The Weight of Names in American Samoa*, 48 Ethnology 53,

distinct structure may have the appearance of self-determination, it is built on the unstable foundation of the *Insular Cases*. Under the *Insular Cases* framework, legal challenges are not only possible, but to be expected.

While a modernized and compromised system of governance exists in Samoa, it is not protected from the reaches of American courts. Other territories have attempted to assert their self-determination in the hopes of creating their own Indigenous governance structure, but have been met by an unswayed judiciary.[17] In considering the territory of Guam, for example, the Ninth Circuit was faced with the question: whether the territory's "political status plebiscite" that limits voting to the "Native Inhabitants of Guam" constitutes an "impermissible racial classification in violation of the Fifteenth Amendment."[18]

Guam attempted to use the *Insular Cases* as a shield to protect the political voice of its Indigenous people. According to case precedent, "[t]he people of Guam are forever being reminded that 'Guam remains an unincorporated territory of the United States subject to the plenary power[19] of Congress."[20]

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56 (2009); *see* discussion *infra* Part I.

17. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942–43 (2016) (holding that Puerto Rico is not a "State" under the Bankruptcy Code and therefore cannot authorize its municipalities to file for Chapter 9 relief); Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1868 (2016) (holding that because Puerto Rico does not enjoy the same sovereignty classification as States, it cannot prosecute a single defendant for the same criminal conduct because the "oldest roots . . . of Puerto Rico's power to prosecute lie in federal soil."); Davis v. Commonwealth Election Comm'n, 844 F.3d 1087, 1087–90 (9th Cir. 2016) (holding that a voting limitation to only "persons of Northern Marianas descent" was race based and violated the Fifteenth Amendment to the U.S. Constitution).

18. Davis v. Guam, 932 F.3d 822, 824 (9th Cir. 2019). The Chamorro or Chamoru are Indigenous people of Guam. According to legal scholar Julian Aguon, "Because the [I]ndigenous Chamoru people are not recognized under U.S. domestic law as a distinct legal entity, i.e., as an [I]ndigenous people privy to certain collective rights such as the rights to preserve and protect our cultural integrity and practices, we lack the legal standing necessary to assert rights as an [I]ndigenous people." Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy For the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. Haw. L. Rev. 113, 114 (2008).

19. This plenary power is similar to the authority Congress asserts over Indian affairs. *See* Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 Yale L. & Pol'y Rev. 427, 429 (2002) ("Plenary means full, or complete, and application of the doctrine means that U.S. courts, rather than assessing the constitutionality of governmental action, defer to the 'political' branches of government, Congress and the executive . . . . Thus, the plenary power doctrine, though rarely discussed in general constitutional jurisprudence, is core U.S. law relating to American Indian nations, immigrants, and colonized territories such as Puerto Rico and Guam." (internal quotation marks omitted)); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 240 (2002) ("Courts also have expanded plenary power over territories to recognize a broad executive authority over the territories, generally stemming from the strategic function of U.S. overseas possessions and the Commander in Chief power."). The constitutional basis for Congress's plenary power over territories are rooted in the Territory Clause found in Article IV of the United States Constitution. *See* U.S. Const. art. IV, § 3, cl. 2.

20. Appellee's Answering Brief at 27, Davis v. Guam, 2013 WL 5616000 (9th Cir.

Guam, however, argued that "as an instrumentality of Congress," a principle established through the *Insular Cases*, the territory was able to limit voting to a particular group even on the basis of ancestry.[21] Citing caselaw involving another U.S. territory, Guam reminded the court that the "Bill of Rights was not intended to interfere with the performance of [the United States'] international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not enforce homogeneity."[22]

Unfortunately, the U.S. District Court for the District of Guam rejected the territory's application of the *Insular Cases* as a shield and claimed that "Congress has explicitly extended the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment to Guam when it enacted the Organic Act of Guam."[23] As a result, the court found that the plebiscite statute impermissibly imposes race-based restrictions in violation of the Fifteenth and Fourteenth Amendments.[24] On appeal, the Ninth Circuit affirmed only the lower court's judgment based on the Fifteenth Amendment, choosing not to address the Fourteenth Amendment.[25] The court acknowledged that while Guam's status as an unincorporated territory means that federal constitutional rights do not automatically apply absent the will of Congress, the Organic Act was amended by Congress in 1968 and as a result incorporated the Fifteenth Amendment into the territory.[26] This result is demonstrative of the United States' arbitrary treatment of both the territories and the laws that govern them.

American jurisprudence has constructed a hierarchy of Indigenous peoples.[27] There are those Indigenous peoples who are able to be classified as federally recognized and therefore deemed to be political entities, while

2013) (No. 13-15199) (quoting Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002)).

21. Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should be Taught in Law School*, 21 J. Gender Race & Just. 395, 445 (2018).

22. Appellee's Answering Brief at 27, Davis v. Guam, 2013 WL 5616000 (9th Cir. 2013) (No. 13-15199) (quoting Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990)). Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. Haw. L. Rev. 331, 338 (2004) [hereinafter Laughlin, *Cultural Preservation*] ("The *Wabol* rule recognizes that the U.S. Constitution . . . is not a genocide pact, 'whether we define genocide as physically destroying a people or killing their culture.'").

23. Davis v. Guam, 2017 WL 930825 slip op. at 14 (D. Guam Mar. 8, 2017).

24. *Id.*

25. Davis v. Guam, 932 F.3d at 824 n.4.

26. *Id.* at 825 n.2.

27. *See generally* Villazor, *supra* note 15. Legal scholar Villazor argues that equal protection analysis should be expanded to be more inclusive of all Indigenous peoples, not just those federally recognized tribes whose legislations are reviewed under the rational basis standard and not strict scrutiny. Villazor examined the Court's racial versus political dichotomy in regard to its treatment of different Indigenous groups. According to Villazor, the Court in Rice v. Cayetano, "used an ancestral blood requirement to construct a racial category and a racial purpose as opposed to the legally permissible political purpose of promoting the right of self-government of American Indian tribes." *Id.* at 801.

others are merely racial.[28] The Supreme Court has consistently held any applicable precedent under Federal Indian Law, such as preferential treatment in hiring and a recognized government to government relationship, is limited to those groups that meet the narrow definition of a federally recognized tribe.[29] American Samoans and other Indigenous peoples of the territories, however, must unfortunately rely upon the *Insular Cases* as a means to protect any vestiges of self-determination.

While Samoa may enjoy the unique system of government it has developed since Western contact, reliance on the *Insular Cases* to protect *fa'a Samoa* and more specifically one of the "cornerstones" of the Samoan culture and identity—the *matai* system—may be fatal. This Comment will demonstrate that the Nobility Clauses of the United States Constitution may be used to challenge the *matai* system. Such an attack, however, can be defeated under two separate legal theories: the "impractical and anomalous" framework and the showing that the Indigenous leadership system actually comports with the Constitution.

Under the first legal theory, the "impractical and anomalous test" was developed as a workable filter to determine which constitutional provisions apply to an unincorporated territory. For example, the Court of Appeals for the D.C. Circuit recently held that imposing birthright citizenship on the people of American Samoa would be impractical and anomalous.[30] Here, the Nobility Clauses are inapposite in the American Samoan system.[31] However,

28. *See generally* Morton v. Mancari, 417 U.S. 535 (1974) (articulating that federally recognized tribes are not racial groups, but rather political entities); *but see* Rice v. Cayetano, 528 U.S. 495, 522 (2000) ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision making in critical state affairs.").

29. *See generally* Morton v. Mancari, 417 U.S. 535 (1974). The Bureau of Indian Affairs, an agency under the Department of Interior, defines a federally recognized tribe as an "American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian affairs. Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States. At present, there are 573 federally recognized American Indian and Alaska Native tribes and villages." *FAQ*, Bureau of Indian Aff., https://www.bia.gov/frequently-asked-questions (last visited Jan. 1, 2020).

30. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015). Notably, at the publication of this Comment, this very issue is currently pending review by the 10th Circuit Court of Appeals. The United States District Court for the District of Utah has issued a memorandum decision finding that those born in American Samoa are guaranteed birthright citizenship under the Fourteenth Amendment. *See* Fitisemanu v. United States, 2019 WL 6766502 (D. Utah 2019); Fili Sagapolutele, *Federal Judge Rules American Samoans are U.S. Citizens—ASG and Amata Intend to Appeal*, Samoa News (Dec. 13, 2019), https://www.samoanews.com/local-news/update-federal-judge-rules-american-samoans-are-us-citizens-asg-and-amata-intend-appeal.

31. *See* Boumediene v. Busy, 553 U.S. 723, 758–59 (2008); Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992); Laughlin, *Cultural Preservation*, *supra* note 22.

because the Territorial Clause of the U.S. Constitution, the federal government has plenary authority over the territories and can unilaterally decide to apply the Nobility Clauses to American Samoa.[32] Simply put, there is no finality for unincorporated territories.

The second legal theory is that the *matai* system survives constitutional scrutiny. In the event the Nobility Clauses are applied to Samoa, the traditional form of Samoan leadership actually comports with the very intent of the Framers. If there is a legitimate claim based on the Nobility Clauses, it would be against the Secretary of Interior who holds unfettered power over the territories, and there is no political process to elect or remove such a government official.[33]

Part I of this Comment will explore the cultural relationship and significance of *fa'a Samoa* to Samoan society, and the necessity of the *matai* system in both traditional and modern times. The High Court in Samoa best articulated this necessity by declaring that the tenets of *fa'a Samoa* to "the American Samoan is life itself."[34] Part II will unpack the *Insular Cases* and the doctrine of territorial incorporation. While the doctrine may be steeped in colonial history and racist notions, the "impractical and anomalous test" developed by the courts has the potential to serve as a framework for the protection of Indigenous self-determination. Part III will trace the sociohistorical context of and the Framers' intent behind the Nobility Clauses of the U.S. Constitution, breaking down what a constitutional challenge based on the clauses might entail and how the *matai* system would be vulnerable. Part IV will demonstrate that applying the Nobility Clauses to the unique government system in American Samoa would be both "impractical and anomalous," and lead to the unraveling and subsequent cultural destruction of *fa'a Samoa*. Lastly, Part V will illustrate that even if the courts or Congress were to apply the Nobility Clauses, the *matai* system would meet constitutional muster because the cultural practice comports with constitutional intent and the very democratic ideals that the United States was founded on.

32. U.S. Const. art IV, § 3, cl. 2.

33. *See* Thornbury, *supra* note 11, at 1102. "However, the Secretary of the Interior retains nearly all legislative, executive and judicial power over this territory. He can appoint and remove officials at will, overturn decisions of the Samoan courts, and amend nearly the entire governing system. The only governing matter which Congress has withdrawn from the Secretary is the ability to amend the Samoan Constitution, which limitation occurred only in 1983." *Id.*

34. Craddick v. Territorial Registrar, 1 A.S.R.2d 10, 13 (App. Div. 1980).

I. America Samoa and the "Samoan Way of Life"

Samoa has been described as an "anomaly,"[35] "the most important island in the Pacific" for the U.S. Navy,[36] "unique,"[37] and even as the "actual historic location of the Garden of Paradise."[38] All these descriptions notwithstanding, American Samoa is an archipelago of small islands with the nearest country being Tonga at approximately 330 miles; Hawai'i is approximately 2500 miles away.[39] With a total surface area of about 224 square kilometers, American Samoa is slightly larger than Washington, D.C.[40]

Compared to other Indigenous Pacific territories, American Samoa is distinct for three reasons. First, American Samoa ranks at the top among states and territories in residents per capita who volunteer for the U.S. Army,[41] and sixth for the other military branches.[42] Second, and vital to understanding the context in which American Samoa exists, the island boasts the most homogenous and Indigenous population.[43] From a 2018 demographic estimate, there are approximately 50,826 residents in American Samoa with 92.6 percent identifying as Pacific Islander (88.9 percent as Samoans, 2.9 percent Tongan, and 0.8 percent identifying as other).[44] This data is monumental when compared to Guam that has a population of 167,772 with 37.3 percent identifying as Chamorro, 26.3 percent as Filipino, and Chuukese with 7 percent.[45] Additionally, in the Commonwealth of the Northern Mariana Islands the population is approximately 51,994, of which 50 percent of its residents identifying as Asian (Filipino 35.3 percent, Chinese 6.8 percent, Korean 4.2

35. Kruse, *supra* note 13, at 76 ("American Samoa is an anomaly. It is the only U.S. territory that is politically and legally classified as 'unorganized' and 'unincorporated' because, although it has a legislature (*Fono*) and an elected governor, the operation of the civil government is not the result of an Organic Act.").

36. *Id.* at 28 (quoting U.S. Secretary of State John Hay who stated that Tutuila was "the most important island in the Pacific as regards harbor conveniences for our navy, and a station on the trans-Pacific route").

37. Tuaua v. United States, 951 F.Supp. 2d 88, 91 (D.D.C. 2013).

38. Talili v. Satele, 4 Am. Samoa 2d 23, 26–27 (Land & Titles Div. 1987).

39. *What are the Differences between Western Samoa and American Samoa*, World Atlas, https://www.worldatlas.com/articles/what-are-the-differences-between-samoa-and-american-samoa.html (Oct. 19, 2019).

40. *Factbook*, *supra* note 1.

41. Adam Clanton, *Born to Run: Can an American Samoan become President?*, 29 UCLA Pac. Basin L.J. 135, 139 (2012) (citing StateMaster, Military Statistics—Total Army Recruits by State, http://www.statemaster.com/graph/mil_arm_rec_per_pac_isl-army-recruits-percent-pacific-islander).

42. *Id.*

43. This Comment does not contend that having a homogenous Indigenous population is the reason why Samoans, as opposed to other Indigenous peoples, *should* continue to enjoy a cultural centric government and an exclusive land alienation policy. The population comparison with the other Pacific territories is to merely point out that Samoa's homogenous population and that 90 percent of the land is owned by its Indigenous people, are significant factors that have contributed to Samoa's unique assertion of self-determination.

44. *Factbook*, *supra* note 1.

45. *The World Factbook: Guam*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html (last visited Dec. 29, 2019).

percent, and other Asian 3.7 percent) and with Native Hawaiians or other Pacific Islanders comprising of 34.9 percent.[46] Third, American Samoa has preserved and incorporated its traditional way of life known as *fa'a Samoa* into its government "and take[s] pride in [its] unique political and cultural practices."[47]

A. *Tracing the History of American Samoa Today*

Before analyzing the potential (and expected) challenges to *fa'a Samoa*, it is necessary to understand the context that has cultivated what American Samoa is today. Absorbing Samoa into the United States politic was not a singular display of America's expansionist policies, but rather, was demonstrative of America's larger political and racial aims.[48] Indeed, the legal foundation upon which colonization rests can be traced to the Doctrine of Discovery.[49] The Supreme Court, in a series of decisions that became known as the Marshall Trilogy, articulated a colonial tool that displaced Native

46. *The World Factbook: Northern Mariana Islands*, CIA, https://www.cia.gov/library/publications/resources/the-world-factbook/geos/cq.html (last visited Dec. 29, 2019).

47. Tuaua v. United States, 951 F.Supp. 2d 88, 91 (D.C.C. 2013).

48. *See* Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. Va. L. Rev. 849, 871–73 (2009) ("After the Lewis and Clark expedition, American history is dominated by an erratic but fairly constant advance of American interests across the continent under the principles of the Doctrine of Discovery. This was not an accident but was instead the expressed goal of Presidents Jefferson, Madison, Monroe, John Quincy Adams, Polk, and a host of other American politicians and citizens. 'Manifest Destiny' is the name that was ultimately used to describe this predestined and divinely inspired advance . . . . Thereafter, the advocates of Manifest Destiny then used the Doctrine of Discovery and its elements to prove that it was America's destiny to reach the Pacific."); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 Chicano-Latino L. Rev. 1, 35 (2001) ("The issue of race relations goes to the very essence of the [doctrine of territorial incorporation] since the colonial inhabitants were, and remain, overwhelmingly not Anglos."); Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 Ariz. J. Int'l & Comp. L. 51, 72 (1991) ("The basis of the Court's holding in Johnson, the Doctrine of Discovery, as even Marshall was forced to concede, originated in the cultural racism of the Christian European peoples who invaded and colonized the New World.").

49. Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 Wyo. L. Rev. 329, 330–31 (2011) ("The English colonists in North America and then the American colonial, state, and federal governments all utilized the Doctrine [of Discovery] and its religious, cultural, and racial ideas of superiority over Native Americans to stake legal claims to the lands and property rights of the [I]ndigenous peoples. Ultimately, the United States enforced the Doctrine against the Indian nations as American Manifest Destiny led the United States' expansion across the continent."); Robert T. Coulter & Steven M. Tullberg, *Indian Land Rights*, *in* The Aggressions of Civilization 185, 190 (Sandra L. Cadwalder & Vine Deloria, Jr. eds., 1984) ("The doctrine of discovery came into existence with the rapid expansion of European empires in the fifteenth century. Its basic tenet—that the European nation which first 'discovered' and settled lands previously unknown to Europeans thereby gained the exclusive right to acquire those lands from their occupants—became part of the early body of international law dealing with aboriginal peoples.").

Americans' right to land ownership, instead granting an "Indian title of occupancy."[50] According to the Court, the United States' obtained "superior title" because of its self-proclaimed "discovery."[51] This mentality continued through various policy adaptations from the Northwest Ordinance of 1787[52] to the doctrine of territorial incorporation under the *Insular Cases*.[53] It is these permutations and expansion of the Doctrine of Discovery that pushed the United States westward and eventually overseas.[54] As anthropologist Patrick Wolfe aptly describes, "[L]and acquisition as well as the wealth and opportunities it brought were the principal factors that motivated settlement and imposed the interminable process of Indigenous possession, elimination by various means, and the legitimation of settler sovereignty over both land and people."[55] It should come as no surprise that the United States landed on the shores of Samoa in 1839 during an "exploratory expedition."[56]

The United States was interested in Samoa's strategic location in the Pacific. Samoa proved to be an ideal place for vessels to fuel, rest, and gather provisions for routes between China or Japan to San Francisco or Hawai'i.[57] United States Navy Commander Richard Meade attempted to negotiate a bilateral treaty to provide American protection in exchange for establishing a naval station at Pago Pago harbor.[58] Unfortunately, the agreement was

50. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823); *see* Worcester v. Georgia, 31 U.S. 515, 520 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

51. *See* Worcester v. Georgia, 31 U.S. 515, 520 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831); Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) ("They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.").

52. Ordinance of 1787: The Northwest Territorial Government, U.S.C.A. Northwest Ordinance (West) (1787). "The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made." *Id.* at § 14, art. 4.

53. Kruse, *supra* note 13, at 106 ("The 'Splendid Little War' (as it was described by Theodore Roosevelt) fed the American political machine with victory and a belief that the Monroe Doctrine called for the United States to expand policy democracy outside the Americas.").

54. *See* Miller & Ruru, *supra* note 48, at 872 ("Rather than being a new idea, Manifest Destiny grew out of the elements of the Doctrine of Discovery, Thomas Jefferson's ambitions, and the Lewis and Clark expedition.").

55. Kruse, *supra* note 13, at 24 (citing Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. Genocide Res. 387, 388 (2006)).

56. Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 Cal. W. Int'l L.J. 220, 227 (1980) [hereinafter Leibowitz, *American Samoa*] (citing to Senate Comm. On Interior and Insular Affairs, Study Mission to Eastern [American] Samoa, S. Doc. No. 38, at 3–4 (1st Sess. 1961)).

57. Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the Insular Cases*, 97 Iowa L. Rev. 101, 168 (2011).

58. Kruse, *supra* note 13, at 27.

never ratified by Congress.[59] Other countries, specifically Great Britain and Germany, also saw the value and strategy of the islands and began to claim Samoan lands and build relationships with the *matai*.[60]

Conflicts between the three nations grew as each attempted to exert its own influence over the islands.[61] These tensions led to the Berlin Treaty of 1889, which sought to abate the disputes between the three countries.[62] While the Berlin Treaty established the island as an "independent and neutral nation," the "independent" Samoa was nonetheless under the supervision and control of Great Britain, Germany, and the United States.[63] The treaty did not subdue the rising tensions between the three countries.[64] In 1899, the countries met again to address their competing claims, and enlisted the Kings of Sweden and Norway as the arbitrators.[65]

At the conclusion of the convention, the Tripartite Treaty of 1899 was signed.[66] Germany and Great Britain absolved all claims to Tutuila and the other eastern islands.[67] In return, the United States granted all rights to Upolu, Savai'i, and the other western islands to Germany.[68] The treaty became the means to "secure a strong American presence, which it accomplished through the establishment of the Tutuila naval station."[69] The convention also preserved trade rights to all three countries within the Samoan Islands.[70]

59. *Id.*

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

61. Michael W. Weaver, *The Territorial Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 Pac. Rim L. & Pol'y J. 324, 344 (2008).

62. Van Dyke, *supra* note 10, at 492.

63. General Act by and Between the United States of America, the Empire of Germany, & the United Kingdom of Great Britain & Ireland, Providing for the Neutrality & Autonomous Gov't of the Samoan Islands., art. I, May 21, 1890, 26 Stat. 1497 ("It is declared that the Islands of Samoa are neutral territory in which the citizens and subjects of the Three Signatory Powers have equal rights of residence, trade and personal protection.").

64. Convention Between the United States of America, Germany, and Great Britain, Relating to the Settlement of Certain Claims in Samoa by Arbitration, Nov. 7, 1898, 31 Stat. 1875.

65. *Id.*

66. Convention Between the United States, Germany, & Great Britain to Adjust Amicably the Questions Between the Three Governments in Respect to the Samoan Grp. of Islands., Feb. 16, 1900, 31 Stat. 1878.

67. *Id.*; Van Dyke, *supra* note 10, at 492–93.

68. Convention Between the United States of America, Germany, and Great Britain, Relating to the Settlement of Certain Claims in Samoa by Arbitration, Nov. 7, 1898, 31 Stat. 1875.

69. Kruse, *supra* note 13, at 106.

70. *Id.*

In 1900 and 1904, both the *matai* of Tutuila and the King of Manu'a[71] respectively ceded the islands to the United States.[72] In exchange for cessation, the *matai* arranged for the protection of traditional Indigenous Samoan rights and more precisely asserted two "non-negotiable protections"—customary lands and the *matai* system.[73] The Deed of Cession "granted protective sovereignty to the United States while at the same time empower[ed] chiefs to control their own villages and districts according to the *fa'a Samoa*."[74] Agreeing to the protection of *fa'a Samoa* aligned with the United States' own self-interests.[75] Allowing land restrictions under traditional *matai* leaders "functioned to protect the United States' new territorial possession from foreign encroachment."[76]

The islands were initially under the control of the United States Department of the Navy, with the naval commander serving as governor of the territory.[77] Within two weeks of the cessation, the governor signed Regulation 5, which "applied U.S. laws to the territory, as long as they did not conflict with Samoan customs."[78] Additionally, the administration created an official registration of *matai* titles to facilitate succession procedures in the event that Samoans were unable to select a new titleholder.[79]

71. At the time, Manu'a was considered its own kingdom that was separate from the other Samoan Islands. Arthur A. Morrow, My Thirty-Two Years in American Samoa 6 (1974).

72. *Cession of Tutuila and Aunu'u*, Am. Sam. B. Ass'n, https://www.asbar.org/index.php?option=com_content&view=article&id=1950&Itemid=184 (last visited Dec. 29, 2019); *American Samoa*, Dep't of Interior, https://www.doi.gov/oia/islands/american-samoa (last visited Dec. 29, 2019).

73. *See* Kruse, *supra* note 13, at 38; Weaver, *supra* note 61, at 345–346; Van Dyke, *supra* note 10, 492–93.

74. Ivy Yeung, *The Price of Citizenship: Would Citizenship Cost American Samoa its National Identity*, 17 Asian-Pac. L. & Pol'y J. 1, 6 (2016); *see* Corp. of Presiding Bishop v. Hodel, 830 F.2d 374, 386 (D.C. Cir. 1987) ("First, the instruments of Cession by which these islands undertook allegiance to the United States provided that the United States would 'respect and protect the individual rights of all people . . . to their land,' and would recognize such rights 'according to their customs.'").

75. Villazor, *supra* note 15, at 828 ("The decoupling of sovereignty and poverty was significant because the protection of property rights functioned as a form of political autonomy within the context of colonialism. It protected the [I]ndigenous peoples', particularly the chiefs' critical leadership roles in the social landscape of American Samoa.").

76. *Id.* at 827; Poblete-Cross, *supra* note 60, at 503 ("This restriction prevented the purchase of [I]ndigenous land by private foreigners, thus avoiding the exploitation of these lands by independent Western businessmen.").

77. Captain J.A.C. Gray, Amerika Samoa, A History of American Samoa and its United States Naval Administration 108 (1960).

78. Poblete-Cross, *supra* note 60, at 503; David A. Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920–1935*, 69 Pac. Hist. Rev. 217, 222 (2000). "The Navy attempted to step lightly and maintain the pre-existing Samoan social and political structure." Weaver, *supra* note 61, at 345.

79. *Weaver*, *supra* note 61, at 346.

In 1951, President Truman transferred the administrative authority of American Samoa from the Secretary of War to the Secretary of Interior.[80] The Secretary of Interior maintained its nearly unrestricted control over the territory.[81] The Secretary granted a limited form of self-determination when it allowed Samoans to create their own constitution in 1962, which was later revised in 1967.[82] Samoans feared that all provisions of the United States Constitution would be applicable to the island, and thus fought Congress to create one of their own.[83] The full weight of the Constitution, and in particular the application of the Equal Protection Clause, would leave their communal land and *matai* system at risk for a race-based challenge.[84]

The adopted Samoan Constitution melded both Western and Samoan concepts: it created three branches of government similar to those of United States,[85] required Senators to be registered *matai* holders,[86] and stated an express commitment to the protection of "lands, customs, culture, and the traditional Samoan family organization of persons of Samoan ancestry."[87]

B. *The Matai System—A "Cornerstone" of Fa'a Samoa*

There are two cornerstones of *fa'a Samoa*, or features of an Indigenous Samoan living in American Samoa: the system of communal land tenure and the *matai* system.[88] *Fa'a Samoa* has been fittingly described as an "*ie toga*,' loosely translated to mean 'a fine mat,' which holds significant ceremonial, political, and social value.[89] In fact, one nineteenth-century observer described a renowned mat as "a title-deed to rank and money."[90] Similar to the *'ie toga* that is made from finely woven pandanus leaves, the existence of *fa'a Samoa* is dependent on the tightly weaving of communal lands and the *matai* system. If any of the threads are unraveled, "the whole pattern of the Samoan way of life will be forever destroyed."[91]

80. *See* Exec. Order No. 10264, 3 C.F.R. § 765 (1949–1953) (transferring administrative authority and oversight to the Secretary of the Interior).

81. Thornbury, *supra* note 11, at 1102. I use this to describe the Secretary of Interior's authority as nearly unrestricted because in 1983 Congress withdrew from the Secretary the ability to amend the Samoan constitution. *See id.*

82. *See* Watson, *supra* note 9, at 415.

83. Robert C. Kiste, Tides of History: The Pacific Islands in the Twentieth Century 247 (K.R. Howe et al. eds., 1994); Weaver, *supra* note 61, at 347.

84. Kiste, *supra* note 83; Weaver, *supra* 61, at 347.

85. Am. Sam. Const. art. II (legislature), art. III (judicial branch), art. IV (executive branch).

86. Am. Sam. Const. art. II, § 3, cl. 4.

87. Am. Sam. Const. art. I, § 3.

88. *See* A.P. Lutali & William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the Matai System in the Territory of American Samoa*, 4 Ga. J. Int'l & Comp. L. 387, 388 (1975).

89. *'Ie Toga (fine mat)*, https://collections.tepapa.govt.nz/object/91919 (last visited Jan. 22, 2020).

90. Jocelyn Linnekin, *Fine Mats and Money: Contending Exchange Paradigms in Colonial Samoa*, 64 Anthropological Q. 1, 3 (1991).

91. Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United

An original and historic translation of the word *matai* may be difficult to trace but does merit some discussion. The term was construed by foreigners to mean "chief," but such a definition is too narrow and often understood in a context that is separate from Samoa or the Pacific Islands.[92] A more accurate word would be "leader."[93] The word may have been the combination of *mata* meaning "eye" and *iai* meaning "to" or "toward," which together would mean "to look toward another."[94]

There are multiple *matai* titles that correspond with a hierarchy, which is reflected in almost every structure of Samoan life from the *'aiga* (roughly translated into "family," or typically described as the title holder's cognatic descent group), village, district, and island.[95] The ranking among *matai* is determined by history, genealogy, kinship relations, mythology, the ability to garner supporters, and origin of the title.[96] According to Samoan law, the title must be properly registered with the government and no person is to have more than one title at a time.[97] There is such deference to the *matai* that asserting a title that has not been properly registered or claiming a title that has been removed by proper proceeding is a class B misdemeanor.[98]

The traditional leaders, which include both men and women, have various roles.[99] The *matai* are not just linked to a geographic area, but are associated with a specific plot of land.[100] Leaders are tasked with allocating and determining the use of the land among immediate and extended family, and if applicable, other village members.[101] Its role is based on "group responsibility"[102] and promoting the "common good."[103] The Samoan High Court succinctly described this vital traditional role:

> The duties and responsibilities of a *matai* defy common law labels. They are more than chiefs who are merely leaders. They are more than trustees who merely protect property. A *matai* has an awesome responsibility to his family. He must protect it and its lands. He acts for the family in its relations with others. He gives individual family members advice,

States Territorial Relations 424 (Kluwer Academic 1989).

92. Lutali & Stewart, *supra* note 88, at 389.

93. *Id.*

94. *Id.*

95. *See* Kruse, *supra* note 13, at 13–14; Weaver, *supra* note 61, at 342.

96. *Id.*

97. Am. Samoa Code Ann. § 1.0402.

98. Am. Samoa Code Ann. § 1.0414.

99. Michael Keyser, *The Best Kept Secret in the Law: How to Get Paid to Live on a Tropical Island*, 15 J. Transnat'l L. & Pol'y 219, 231 (2006); Merrily Stover, *Individual Land Tenure in American Samoa*, 11 Contemp. Pac. 69, 72 (1999).

100. Stover, *supra* note 99.

101. *See* Villazor, *supra* note 15, at 826; Leibowitz, *American Samoa*, *supra* note 56, at 223.

102. Uilisone Falemanu Tua, *A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa*, 11 Asian-Pac. L. & Pol'y J. 246, 250 (2010) (citing Peter Tali Coleman, *Peter Tali Coleman on the FBI Report*, Samoa News, Aug. 7, 1995).

103. Irving Goldman, Ancient Polynesian Society 268–69 (1970).

> direction and help. He administers the family affairs, designates which members of the family will work particular portions of the family land, and determines where families will live. His relationship to his family is a relationship not known to common law.[104]

The *matai's* duty and service to the family is derived from the fact that it is the *'aiga* that bestows the title upon the individual. Framed in a western context, the *matai* is "owned" by the *'aiga.*[105] It is a lifetime appointment, unless family members petition and the Samoan judicial system strips the title from the former chief.[106] Most importantly, the *matai* is voted by the consensus of the '*aiga*, as opposed to a simple majority.[107] Requiring a consensus compels the family to come together to have dialogue and compromise, resolve any objections, and to promote harmony.[108] These deeply-rooted traditions and customs stood in stark contrast to the United States' empire-building approach at the start of the twentieth century, as described in the next Part.

II. The Insular Cases and the new Manifest Destiny

At the dawn of the twentieth century, the United States engaged in a colonial regime that was unprecedented.[109] Prior to the nine Supreme Court decisions that comprise the *Insular Cases*, the Northwest Ordinance laid out the legal process and principle for the newly acquired "possessions." These new territories were expected to and eventually became incorporated into the United States as states.[110] However, with the conclusion of the Spanish-American War and the acquisition of Puerto Rico, the Philippines, and Guam, the United States backed away from "U.S. law and tradition" and contemplated a new process to deal with the distant lands.[111] Professor Rubin Francis Weston described the America's doctrinal tensions:

> Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have with the body politic? Was it to be the relationship of the Reconstruction period, an attempt

104. Poumele v. Ma'ae, 2 A.S.R.2d 4, 5 (App. Div. 1984).

105. Kruse, *supra* note 13, at 13–14.

106. Laughlin, *Cultural Preservation*, *supra* note 22, at 338.

107. *Id.*

108. Teichert, *supra* note 12, at 41.

109. Pedro Malavet, *The Inconvenience of a "Constitution [that] Follows the Flag . . . But Doesn't Quite Catch Up With It": From* Downes v. Bidwell *to* Boumediene v. Bush, 80 Miss. L.J. 181, 204 (2010).

110. Leibowitz, *supra* note 91, at 6; Jose A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 411 (1978). The first treaty to articulate this territorial doctrine occurred in 1803 with the United States' purchase of Louisiana from France. According to the agreement, "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States." Treaty Between the United States and the French Republic, U.S.-Fr., 8 Stat. 200, Apr. 30, 1803, T.S. No. 86 (Apr. 30, 1803).

111. Leibowitz, *supra* note 91.

> at political equality for dissimilar races, or was it to be the Southern "counterrevolutionary" point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.[112]

The Supreme Court articulated this doctrinal shift in the *Insular Cases*, which were described as a "judicial drama of truly Olympian proportions" and "the most hotly contested and long continued duel in the life of the Supreme Court."[113] While it may not be the first of the *Insular Cases*, *Downes v. Bidwell* stands today as the "centerpiece"[114] and principal decision of the *Insular Cases*.[115] The controversy in *Downes* arose over the Foraker Act, which imposed duties on products brought into the United States from Puerto Rico.[116] The petitioner, S.B. Downes & Company, argued that the Uniformity Clause of the Constitution, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States," invalidated New York's law because Puerto Rico was part of the United States following the ratification of the 1898 Treaty of Paris with Spain.[117] In addition to determining the constitutionality of the Foraker Act, the Court was also left to decide whether the Uniformity Clause was to "extend" to the new territories.[118] Justice Henry B. Brown described the question posed to the Court: "[U]pon the ratification of the treaty of peace with Spain, Porto Rico [*sic*] ceased to be a foreign country, and became a territory . . . [and] we are now asked to hold that it became a part of the United States . . . ."[119]

The controversy present in the *Downes* case was evidenced by the fact that no opinion by the Court garnered a majority.[120] In fact, five justices filed their own separate opinions.[121] Justice Brown determined that the Uniformity Clause could not be applied to Puerto Rico because the territory is "appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution."[122] According to Justice Brown, the inhabitants of the possessions are "alien races, differing from us in

112. Rubin Francis Weston, Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893–1946 15 (1972).

113. John Davis, *Edward Douglass White*, 7 A.B.A. J. 377, 378 (1921).

114. Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 Colum. L. Rev. 797, 803 (2010).

115. *See* Malavet, *supra* note 109, at 214.

116. Downes v. Bidwell, 182 U.S. 244, 247 (1901).

117. U.S. Const. art I, § 8, cl. 1.

118. *Downes*, 182 U.S. at 249.

119. *Id.* at 248–49.

120. Serrano, *supra* note 21, at 406.

121. *Id.*

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

religion, customs, laws, methods of taxation, and modes of thought" and their incorporation into the United States would be "a false step" that threatens "what Chief Justice Marshall called the American empire."[123]

Justice Edward Douglass White's concurrence, joined by Justices Shiras and McKenna, articulated what would be the rule of the *Insular Cases* and the prevailing opinion in the latter case of *Dorr v. United States*.[124] White's legal proposition, the territorial incorporation doctrine, created two distinct classifications. "Incorporated" territories are those slated for statehood because they are "an integral part of the United States" and "worthy . . . of such blessing."[125] White emphasized a deference to Congress and the legislative branch's plenary authority under the Territorial Clause which states, "The Congress shall have Power to dispose of and make needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[126] "Unincorporated territories," however, are a legal fiction created by the court. It excludes those "uncivilized race[s]" of people from the privileges and immunities enjoyed by the "white inhabitants" of states, and yet whose lands "rich in soil" are still within the reach of "the United States for commercial and strategic reasons."[127] Simply put, unincorporated territories are "foreign to the United States in a domestic sense."[128]

Often described as "flexible," the doctrine of incorporation that White articulated, was not designed to support Indigenous self-determination but instead legitimized colonialism and unequal treatment.[129] In fact, it allowed the political branches to select which provisions of the Constitution would be applicable to the unincorporated territory through an "inquiry into the situation of the territory and its relations to the United States."[130] The racist undertones throughout the *Insular Cases* come as no surprise as it was almost the exact same court that decided *Plessy v. Ferguson* and espoused the infamous "separate but equal" doctrine in 1896.[131]

But why did the Court treat the island territories wholly differently when prior to the *Insular Cases*, the unincorporated territory did not exist?

123. *Id.*

124. Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) ("[T]he opinion of [Mr.] Justice White of the majority, in *Downes v. Bidwell*, become the settled law of the court."); Dorr v. United States, 195 U.S. 138, 142–43 (1904).

125. *Downes*, 182 U.S. at 312.

126. U.S. Const. art IV, § 3, cl. 2.

127. *Downes*, 182 U.S. at 306, 320.

128. *Id.* at 341.

129. *See* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 Loy. L. Rev. 1, 13 (2004); Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 Rev. Jur. U.P.R. 225, 290 (1996).

130. Tuaua v. United States, 788 F.3d 300, 307 (D.D.C. 2015) (quoting Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring)); *American Samoa and the Citizenship Clause*, 130 Harv. L. Rev. 1680, 1694 (2017).

131. Torruella, *Ruling America's Colonies*, *supra* note 5, at 68; Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 3–5 (1988) (drawing comparisons between *Plessy v. Ferguson* and the *Insular Cases*).

Judge Juan Torruella described the differences in the overseas colonies which helps contextualize the Supreme Court's decisions and the governments treatment of those inhabitants. He explained:

> There were, of course, factual differences between these newly conquered Spanish lands and the territories annexed prior to 1898—differences which, as we shall see, were used by the Supreme Court as an excuse for its differing constitutional treatment of these new acquisitions. The new lands were non-contiguous islands separated by thousands of miles of ocean from the U.S. continental mainland. Perhaps more importantly, they were not, in contrast to the American West, large areas of mostly uninhabited land masses, but were instead populated by established communities whose inhabitants differed from the dominant state-side societal structures with respect to their race, language, customs, cultures, religions, and even legal systems.[132]

While the *Insular Cases* may have been bound by the colonial and racist chains prevalent during that time period, they have since been refashioned in a few cases as a tool to assert self-determination.[133] Samoa has taken advantage of the legal limbo that it occupies and has been able to protect *fa'a Samoa*. In fact, in Samoa's 3000-year history, the people "have never been a landless people, nor have their lands been sold to non-Samoans (except for less than three percent freehold lands sold prior to the 1900 Deeds of Cession)."[134] However, under this legal framework, American Samoa's cultural institutions are vulnerable and open to Constitutional attacks as evidenced in attempts to impose birthright citizenship[135] and its communal land policies.[136] The *matai* system is no exception.

III. The Nobility Clauses and the Constitutional Challenge to the Matai System

A challenge to the *matai* system would most likely be based on the theory that the cultural leaders contravene the Nobility Clauses of the United States Constitution. Accordingly, the two clauses are as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant a Title of Nobility.[137]

132. *Id.* at 62.

133. *See* Serrano, *supra* note 21, at 400.

134. Kruse, *supra* note 13, at 43.

135. *See generally Tuaua*, 788 F.3d at 301–02 (holding it "anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives").

136. *See generally* Craddick v. Territorial Registrar, 1 A.S.R.2d 10 (App. Div. 1980) (finding that "restrictions on the alienation of all lands, except freehold lands, are necessary to the accomplishments of the desired ends of preserving Samoan lands and culture for Samoans").

137. U.S. Const. art. I, § 10, cl. 1 (emphasis added).

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[138]

The Nobility Clauses may be implicated because the *matai* are not just cultural symbols, but have specific roles and functions in Samoan society that have been enumerated and protected both constitutionally[139] and statutorily[140] within the territorial government. As such, the *matai* are more than just tolerated by territorial law. In fact, the government and the Indigenous leaders actively intersect as evidenced by the government's regulation of the chiefly titles.[141]

However, such a constitutional attack would face many difficulties. Not only would it be an issue of first impression if such a case were to reach the United States Supreme Court, but the Court has never had the occasion to substantively interpret the clauses or provide meaning to them.[142] In fact, in 1837, the Court refused to provide an analysis of the clauses.[143] In *Briscoe v. Bank of Commonwealth of Kentucky*, Justice Henry Baldwin declared in his concurring opinion that a discussion on the Nobility Clauses was "useless" because "there has never been any difference of opinion as to the meaning of . . . a title of nobility."[144]

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138. U.S. Const. art. I, § 9, cl. 8.

139. Am. Samoa Const. art II, § 3, cl. 4 ("[B]e the registered *matai* of a Samoan family who fulfills his obligations as required by Samoan custom in the county from which he is elected."); art. IV, § 4 ("The Secretary of Samoan Affairs shall be appointed by the Governor from among the leading registered *matais*. He shall hold office during the pleasure of the Governor. The Secretary of Samoan Affairs shall be the head of the Department of Local Government. In conjunction with the District Governors he shall coordinate the administration of the district, county, and village affairs as provided by law and also in conjunction with the District Governors he shall supervise all ceremonial functions as provided by law.").

140. A.S.C.A. § 1.0401 ("Registration required—closing of register."); § 1.0402 ("Registering more than one matai title prohibited."); § 1.0403 ("Qualifications for succession to title—Delegate to the U.S. House of Representatives, staff members, dependents."); § 1.0404 ("Eligibility to file claim or objection—Record of absent residents—Delegate to the U.S. House of Representatives and staff members."); § 1.0405 ("Filing written claim—Supporting documents."); § 1.0406 ("Notice of claim."); § 1.0407 ("Counterclaims and objections—Supporting documents."); § 1.0408 ("Certificate of succession to issue if no counterclaim or objection is filed."); § 1.0409 ("Disputed claims—Hearing—Determination—Certificate issued when."); § 1.0410 ("Effective date of succession."); § 1.0411 ("Removal of title for cause—Service of petition—Default—Selection of successor."); § 1.0412 ("Removal of title after year's absence—Procedure—Default."); § 1.0413 ("Nonrecognition of titles improperly bestowed."); § 1.0414 ("Violation—Penalty."); § 37.0204 ("Restrictions on alienation of land.").

141. *Id.* § 1.0401 ("Registration required—closing of register."); § 1.0402 ("Registering more than one matai title prohibited.").

142. Maurice H. McBride, *The Application of the American Constitution to American Samoa*, 9 J. Int'l L. & Econ. 325, 348 (1974).

143. *See generally* Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257 (1837).

144. *Id.* at 70 (Baldwin, J., concurring).

It was not until over a century later, in *Fullilove v. Klutznick*, that the Court slightly referenced the clauses.[145] In Justice John Paul Stevens' dissent, he asserted that the Public Works Employment Act of 1977, which required state and local governments to use a portion of the federal funds granted for public works projects to purchase services and goods from minority owned-businesses was unconstitutional.[146] According to Justice Stevens, having a statutorily preferred class of citizens directly conflicts with the Nobility Clauses. He stated, "Our historic aversion to titles of nobility is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially."[147] Justice Stevens did articulate, however, that even if government action implicated the Nobility Clauses, those actions can be constitutional if there is a reason for the difference and if the "classification be clearly identified and unquestionably legitimate."[148] In particular, he inferred that a preference may be legitimate if there are "economic, social, geographical, or historical criteria" that are relevant.[149]

Additionally, Justice Stevens provided limited historical context, describing that the Framers, in reaction to the "shadow of ancient feudal traditions . . . set out to establish a society that recognized no distinctions among white men on account of their birth."[150] Justice Stevens was the lone justice on the bench to discuss the Nobility Clauses and no other member of the Court referenced or inferred to it.

Notwithstanding the lack of Supreme Court case precedent, Professor Carlton Larson explained how such a constitutional argument is fraught with challenges. He stated, "The Nobility Clauses rarely appear in academic writings, and the case law is similarly frugal . . . . [N]o decided case has ever invoked them to invalidate federal or state action."[151] In most cases, the clauses have been utilized by pro se litigants in asserting vapid claims.[152] For example, litigants attempted to assert that driver's licenses[153] and dog licenses[154] conferred titles of nobility in violation of the Constitution. The lack of tangible jurisprudence for those wishing to challenge the *matai* structure or any similar institution requires the unpacking of the history and context that led to the adoption of the Nobility Clauses into the Constitution.

When the Constitutional Convention of 1787 convened, the discussion of banning titles of nobility was not an unfamiliar subject. It was considered

145. *See* Fullilove v. Klutznick, 448 U.S. 448, 531 n.13 (1980).

146. Fullilove v. Klutznick, 448 U.S. 448, 532–33 (1980) (Stevens, J., concurring).

147. *Id.*

148. *Id.* at 535.

149. *Id.*

150. Fullilove v. Klutznick, 448 U.S. 448, 531 n.13 (1980).

151. Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 Wash. U. L. Rev. 1375, 1409–10 (2006).

152. *Id.*

153. State v. Larson, 419 N.W.2d 897, 898 (N.D. Sup. Ct. 1988).

154. City of Bismarck v. Vetter, 417 N.W.2d 186 (N.D. 1987).

to be an uncontroversial topic to the Framers because it resonated with American sentiments of the time.[155] In fact, the Articles of Confederation already included such a provision. In relevant part, it stated that "nor shall the United States, in Congress assembled, or any of them, grant any title of nobility."[156] Such an aversion to nobility is rooted in the troubled history and relationship with the "fundamental[ly] wrong" British monarchy and its insulated aristocracy.[157] Indeed, it was this "inherited privilege that the leaders of the American Revolution sought to overthrow forever."[158]

The Framers' motivation and the underlying principles behind the Nobility Clauses were founded on the notions of equality and the value of a meritocracy. According to Alexander Hamilton, "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."[159] James Madison also characterized titles of nobility as directly contravening a republican form of government's "complexion."[160] Because of such strong opposition to the social order of a monarchy, the Nobility Clauses found their way from the Articles of Confederation, to the early state constitutions,[161] and then finally into the United States Constitution.[162]

As evidenced by the history and intent behind the Nobility Clauses, there may be a legitimate claim against the *fa'a Samoa's matai* structure. However, because the *Insular Cases* are still good law, courts must employ a different framework when Constitutional challenges are brought within the American Samoa context as a U.S. territory. As discussed earlier, as an unincorporated territory, Samoa does not enjoy the full application of the Constitution. As a result, as described in the Part below, a court would likely determine that the Nobility Clauses are not "fundamental" in American Samoa.

IV. Under the Impractical and Anomalous Framework, the Nobility Clauses are not Fundamental

The *Downes* decision, along with the other *Insular Cases*, articulated the rule that the only constitutional provisions and rights applicable to the

155. James W. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 Loy. L. Rev. 561, 615 (2001).

156. Articles of Confederation of 1781, art. VI, cl. 1.

157. *See* Brian Mikulak, *Classism and Equal Opportunity: A Proposal for Affirmative Action in Education Based on Social Class*, 33 How. L.J. 113, 130 (1990).

158. Larson, *supra* note 151, at 1384.

159. The Federalist no. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

160. The Federalist No. 39, at 236 (James Madison) (Clinton Rossiter ed., 1999).

161. An example of a state constitution can be seen with the Maryland Declaration of Rights which states, "[N]o title of nobility, or hereditary honours, ought to be granted in this State." Md. Const. of 1776, Declaration of Rights, art. XL.

162. *See Larson*, *supra* note 151, at 1383–84; *see generally* Gordon S. Wood, The Radicalism of the American Revolution (1991).

territories are those so "fundamental in nature" that they are "the basis of all free government, which cannot be with impunity transcended."[163] Therefore, if the Court determines a right or provision to be fundamental under the framework of the *Insular Cases*, then the specific constitutional provision would be incorporated into the particular territory. The process of determining a fundamental right within a territorial setting is distinct and separate from analyzing a fundamental right in the due process context.[164] The amorphous concept of a fundamental right in the territories "encourage[s] judicial legislation and unwarranted judicial activism. These rights more often than not turned out to be the rights of the rich and powerful and were used to prevent reform."[165] The lack of a clear articulated rule or meaning has led to circuit court splits.[166] In one example, the District of Columbia Circuit determined that the Sixth Amendment right to a criminal jury trial was fundamental in 1975, while the Ninth Circuit concluded otherwise in 1984.[167]

In search for more clarity, some courts developed a workable test to determine whether a right is fundamental. In *King v. Morton*, for example, the D.C. Circuit Court cited Justice John Marshall Harlan's concurrence in *Reid v. Covert* in determining that a fundamental rights analysis must take into consideration "the particular local setting, the practical necessities, and the possible alternatives" in order to ascertain whether a right is "impractical and anomalous."[168] Similarly, the Ninth Circuit in *Wabol v. Villacrusis* utilized the same "impractical and anomalous" test because it "sets forth a workable standard for finding a delicate balance between local diversity and constitutional command."[169] There, the court found that due to the "vital role native ownership of land plays in the preservation of Northern Mariana Islands' (NMI) social and cultural stability," the restriction on land alienation to Indigenous Chamorros and Carolinians was not subject to an Equal Protection attack.[170] According to the Ninth Circuit, applying such a constitutional standard would be "impractical and anomalous" to the territory.[171] The court

163. Downes v. Bidwell, 182 U.S. 244, 291 (1901) (White, J., concurring); Dorr v. United States, 195 U.S. 138, 147 (1904).

164. According to Cornell Law School's Legal Information Institute, a fundamental right is a "group of rights that have been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. These rights are specifically identified in the Constitution (especially in the Bill of Rights), or have been found under Due Process." *Fundamental Right*, Legal Information Institute, https://www.law.cornell.edu/wex/fundamental_right.

165. Laughlin, *Cultural Preservation*, *supra* note 22, at 372.

166. Clanton, *supra* note 41, at 150.

167. *Id.*; *see generally* N. Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir. 1984); King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975); Clanton, *supra* note 41, at 150–51.

168. King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (citing Reid v. Covert, 354 U.S. 1, 75, 77 (1957) (Harland, J., concurring)).

169. Wabol v. Villacrusis, 958 F.2d 1450, 1461 (9th Cir. 1990).

170. *Id.*

171. *Id.* at 1462.

also clarified that "free alienation is impractical in this situation not because it would not work, but because it would not work too well."[172]

But what does impractical and anomalous mean, and how is it determinative when applied to the *matai* system? Professor Stanley Laughlin, whose work on the *Insular Cases* was cited by the Ninth Circuit, provides a more thorough understanding of this test. According to Laughlin, the concept of impracticality is premised on the notion that applying a certain constitutional provision or right would cause "a substantial degree of inconvenience."[173] Additionally, impracticality requires the territory to be in a unique situation, meaning that the reasons for not applying a constitutional provision to the unincorporated territory cannot be the same reason a state or another territory would have.[174] For example, "[a] territory could properly argue, as American Samoa did in the *King* case (albeit unsuccessfully), that the Samoan culture made it impractical to institute jury trials."[175] Under the anomalous test, the question that is asked is whether applying a constitutional provision "would damage or destroy the Indigenous culture or some aspect of it."[176]

Applying the Nobility Clauses to American Samoa would be impractical and anomalous, and therefore would not be considered a fundamental right under the *Insular Cases*. When analyzing the impractical standard, the *matai* system is wholly unique from any other political or leadership structure found in a territory or state. Even attempting to draw similarities between the *matai* system and an American form of government as a way to minimize this uniqueness would be incomplete and overly expansive. Peter Tali Coleman, the first governor of Samoan descent in the territory, explained that:

> Our American legal system—which also operates in Samoa—is based on English jurisprudence as it has evolved over the centuries. It's a system of conflict resolution which produces clearly identifiable winners and losers. Our Samoan culture, on the other hand, is based on thousands of years of the evolution of a Polynesian heritage of conflict resolution by consensus building. Wherever possible, we, as Polynesians, try to avoid conflict. When we can't avoid conflict, we try to resolve it so everyone goes away a winner if at all possible.[177]

Additionally, challengers to the *matai* system would assert that the territorial government is so mirrored after the United States that applying the

172. *Id.* at 1462 n.21 (citing Stanley K. Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 386 (1980)).

173. *See* Laughlin, *Cultural Preservation*, *supra* note 22, at 353.

174. *Id.*

175. *Id.*

176. *Id.* at 353–54. *See id.* at 353–54 ("The *Wabol* rule recognized that the U.S. Constitution, in the words of my Hawai'i Law Review article paraphrased in the *Wabol* opinion, is not a genocide pact, whether we define genocide as physically destroying a people or killing their culture." (quoting Stanley K. Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 386 (1980)) (internal quotation marks omitted)).

177. Teichert, *supra* note 12, at 3 (quoting Peter Tali Coleman, *Peter Tali Coleman on the FBI Report*, SAMOA NEWS, Aug. 7, 1995, at 10–11).

Nobility Clauses would be inconsequential. While it is true that Samoa has adopted a western structure of government, such as the bicameral legislative branch, it continues to require senators to be registered *matai* titleholders.[178] Indeed, Samoa's system has been molded to accommodate and blend with Western values and concepts, but the very essence of *fa'a Samoa* remains central to Samoan law and the Samoan identity.[179] Samoan Congressman Eni Faleomavaega, in his amici curiae brief for the D.C. Circuit case, *Tuaua v. United States*, explained that the territory "has managed to maintain *unique* cultural practices such as *matai* titles and community-owned American Samoan land; these traditions *are unlike anything else in the United States*, and Congress has made sure to preserve this unique culture for over a century."[180]

Stating that the application of the Nobility Clauses would create a "substantial degree of inconvenience" would be an understatement.[181] The *matai* system and communal land ownership go hand in hand: one cannot exist without the other.[182] Can the clauses be applied in such a way as to reconcile the *matai's* control over the most fundamental social unit in Samoan society—the '*aiga*?[183] Even assuming that it would be possible to tease apart the *matai* and communal land ownership without any disastrous effects, it would nonetheless be substantially inconvenient to force the Samoan people to amend their constitution, laws, and everyday cultural practices to accommodate the Nobility Clauses.

In the second analysis, the prohibition of nobility titles would detrimentally affect land ownership, thereby erasing the very foundation of *fa'a Samoa*. Attorney General Sue'su'e testified in D.C. District Court that the loss of native-owned land "would ultimately destroy [Samoan] society."[184] Understandably, it is hard to ascertain what hypothetical harms would come about if the Nobility Clauses were to be applied to American Samoa. This is especially true when considering that Samoans "have not felt the humiliation or sense of defeat that has been described by other communities that have experienced colonialism."[185] Despite the lack of comparative harms, the framework of the *Insular Cases* continues to bind the islands to the United

178. *See* Am. Samoa Const., art. II, § 3.

179. *See* Kruse, *supra* note 13, at 110; Teichert, *supra* note 12, at 41.

180. Br. for Intervenors or, in the Alternative, *Amici Curiae* the American Samoan Government and Congressman Eni F.H. Faleomavaega at 23, Tuaua v. United States, 788 F.3d 300, 301–02 (D.C. Cir. 2014) (No. 13-5272) (emphasis added).

181. See Laughlin, *Cultural Preservation*, *supra* note 22, at 353.

182. "Communal ownership of land is a fundamental aspect of American Samoan identity because other important parts of Samoan culture, such as the '*aiga* and the *matai*, are intimately and historically predicated upon control of the land.'" *Id.* (second emphasis added).

183. *See* Br. of the Honorable Eni F.H. Faleomavaega as *Amicus Curiae* in Support of Defs. at 4–5, Tuaua v. United States, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-1143-RJL).

184. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1402 n.2 (D.D.C. 1986).

185. Karen Armstrong, *The Weight of Names in American Samoa*, 48 Ethnology 53, 56 (2010).

States as a possession. Samoa can and should look to other Indigenous peoples to learn the context and colonial policies that have been detrimental to their collective identity and culture. Indeed, in one observation:

> If the *fa'a Samoa* disappears, the Samoan values system, sense of responsibility, and social morality would surely disappear with it. One only need observe the heartbreaking social, moral, and economic struggles of the Native Americans, native Hawaiians, New Zealand Maoris, and a number of other [I]ndigenous groups who have lost their cultural identities, to understand the benefit of protecting living cultures.[186]

Under the "impractical and anomalous" framework, applying the sweeping prohibition on nobility titles would have profound and long-lasting impacts on culture and identity. After a careful examination of Samoa's vibrant traditional practices and a contextual inquiry[187] into the island's colonial history with the United States, the American courts should conclude as the Samoan High Court did, that "[l]and to the American Samoan is life itself."[188] Therefore, the Nobility Clauses are not fundamental right in American Samoa.

V. The Matai System Meets Constitutional Muster Under the Nobility Clauses

Surviving the "impractical and anomalous" test would not foreclose any future litigation or federal action. In fact, as the Court articulated in *Downes v. Bidwell*, the United States federal government retains plenary authority over the islands by way of the Territorial Clause of the Constitution.[189] Additionally, the *Insular Cases* to this day have not been overruled and are still controlling case law. As a result, any celebration of surviving application of the Nobility Clauses would be short-lived because the United States may unilaterally decide through its plenary power to apply the Nobility Clauses to Samoa, thus rendering the *Insular Cases* moot, which leaves open the possibility of Samoa becoming fully incorporated and on the path towards statehood.[190] Therefore, if the Nobility Clauses are imposed on American Samoa, the *matai* system is nonetheless constitutional and should continue to be protected.

The underlying principles of the Nobility Clauses are twofold: equality and a representative government that is rooted in a meritocracy. The *matai* system fits both aims. In addition, any analysis of Samoa must be done contextually, paying particular attention to the colonial history of the territory

186. Teichert, *supra* note 12, at 42.

187. *See generally* Sproat, *supra* note 14 (A Contextual Legal Inquiry or Contextual Legal Analysis is an analytical framework that challenges the formalistic approach and narrow construction of the law by the judicial system. It expands realism by centering the analysis on those peoples who have been formerly colonized).

188. Craddick v. Territorial Registrar, 1 A.S.R.2d 10, 14 (App. Div. 1980).

189. *See* Downes v. Bidwell, 182 U.S. 244, 267 (1901).

190. *See* McBride, *supra* note 142, at 350.

and understanding that democracy is not a 'one size fits all' regime. How Samoa has effectuated democracy, under the watchful eye of the United States, is no less valid than any other country or other Indigenous people's assertion of self-determination.

The *matai* titleholders adhere to the principle of equality because the cultural leaders are chosen through a consensus system of governance. Because of this method, every member is given the opportunity to equally participate, share concerns, bargain, compromise, and help determine who would be the next cultural leader through democratic means.[191] Unlike the monarchs that the Framers had experience with, the *matai* are not solely based on bloodline.[192] In fact, there are nonlineal qualities on which prospective *matai* are judged, such as oratory skills and knowledge about *fa'a Samoa* and mythology.[193] It was important to the Framers that every individual was equal before the law and that no person with a title was to be subject to immunity because of their position. In American Samoa, the *matai* do not hold such an untouchable position in society. In fact, "If the *matai* acts in a way that the *'aiga* feels is unbecoming, or if the *matai* does not take good care of the '*aiga*, the '*aiga* may remove the *matai* title from the individual and thus remove his authority over the family lands."[194]

While the *matai* system may not comport "with [the] American model of representative government," American Samoa nonetheless employs its own valid version of democracy.[195] It would be difficult to critique Samoa's form of government when the "idea of secret ballot or voting is totally foreign to the Samoan political mind."[196] It is foreseeable that Samoans place little weight on voting, when as U.S. nationals they have never had the experience of voting in a national election.[197]

The Nobility Clauses outline prohibitions on two specific actors—the state and federal governments. Clause 10 it mandates that "[n]o State shall . . . grant a Title of Nobility" and Clause 9 similarly prohibits the granting of titles "by the United States." Based on the principles articulated under the *Insular Cases*, it is clear that an unincorporated territory is not the same as a state, which therefore excludes American Samoa from Clause 10's reach. Clause 9 would also be inapposite to the *matai* system because the United States does not grant the Indigenous titles—the *'aiga* do. Accordingly, "the

191. *See* Future Political Status Study Commission, Rep. to Leg. of Am. Samoa, 11th Leg., 2d Sess., at 50 (1970).

192. Laughlin, *Cultural Preservation*, *supra* note 22, at 338.

193. Kruse, *supra* note 13, at 13–14.

194. *Id.* at 14.

195. Laughlin, *Cultural Preservation*, *supra* note 22, at 339.

196. McBride, *supra* note 142, at 349 n.125 (citing E. Hunkin, Some Observations on the Matai System's Leadership Structure in Relation to the Administrative and Legislative Processes in American Samoa 1900–1951 8 (Jun. 25, 1973) (unpublished manuscript)).

197. This Comment does not attempt to address the current debate as to whether Samoans should be granted birthright citizenship and consequently have the opportunity to vote in the presidential election. I*d*.

matai titles are family-based titles and more of a cultural institution than a government system of nobility and would most likely fall outside the Nobility Clause."[198]

Additionally, the *matai* system is actually more of a representative government than the United States' political structure. According to a 2013 statistic, there were 893 *matai* titles registered with the Office of the Territorial Registrar, equaling roughly two percent of the 2012 population of 55,519.[199] This equates to approximately one *matai* title holder for every 62 people.[200] In comparison, studies anticipate that by 2040, seventy percent of the 328 million of Americans will live in the fifteen largest states and be represented by only seventy senators.[201]

Finally, it is not the Samoan *matai* system that offends the Nobility Clauses, but actually the Secretary of the Interior, who has unfettered authority over the islands. This expansive power can be traced to 1951 when the governing authority over the islands transferred from the U.S. Navy to the Department of Interior through Presidential Executive Order No. 10264.[202] As such, "the Secretary of the Interior shall take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa."[203]

Two months after this transfer, the Secretary expanded its authority further in two drastic ways. First, he announced that "[n]o measure affecting the powers of the legislature shall become effective without the approval of the Secretary of the Interior."[204] Second, the Secretary was to approve any laws or regulations that would affect the organization or operation of the judiciary.[205]

The district courts in Hawai'i and Washington D.C. identified this expansive hold that the Interior Secretary has over Samoa. "Under the present system," the D.C. court determined, "neither the Governor nor the judges are truly independent. The Secretary of the Interior may hire and fire without consulting the very people whose daily lives are affected by his decision."[206] Therefore, as the Hawai'i court pointed out, such discretionary authority can lead "to possible separation of powers problems between the executive and judicial branches of government."[207]

198. Weaver, *supra* note 61, at 361 n.304.

199. Kruse, *supra* note 13, at 15.

200. I*d*.

201. *See* U.S. Population Census, https://www.census.gov/popclock (last visited Nov. 15, 2019); Philip Bump, *By 2040, Two-Thirds of Americans Will be Represented by 30 Percent of the Senate*, Wash. Post (Nov. 28, 2017), https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/?noredirect=on&utm_term=.af21af228217.

202. Exec. Order No. 10264, 16 Fed. Reg. 6417, (1951).

203. *Id.*

204. U.S. Dept. of the Interior, Secretary's Order No. 2657, Delimitation of Government Authority, sec. 2(b) (2019).

205. *Id.* at sec. 4.

206. King v. Morton, 520 F.2d 1140, 1160 (D.C. Cir. 1975).

207. United States v. Lee, 159 F. Supp. 2d 1241, 1246 (D. Haw. 2001).

In addition, the D.C. court observed that while it may appear that modern-day limitations are placed on the power of the Secretary of the Interior, this has not translated into practice. For example, the Interior Secretary "permitted"[208] the governor to be selected by popular vote, but implicitly asserted that in the end the "ultimate supervision"[209] rests with the Secretary of the Interior. While popularly electing the governor has a mirage of self-determination, the operative word is "permitted" which denotes discretion. In fact, the Secretary "retains nearly all legislative, executive and judicial power over this territory. He can appoint and remove officials at will, overturn decisions of the Samoan courts, and amend nearly the entire governing system."[210] The only limit came in 1983 when Congress removed the Secretary's ability to amend the Samoan Constitution.[211] Unlike the Samoan traditional system, in which the *matai* are elected by consensus of the '*aiga* or village, and even includes a legal process to remove someone's title, there is no such process for the Secretary of Interior. The Samoan people are at the will and mercy of the Secretary with no effective form of checks and balances, which contravenes the very values and intent behind the Nobility Clauses.

Conclusion

The colonial framework that is the *Insular Cases* has been recently utilized by the Samoan territory as a source of protection for its traditional *fa'a Samoa* values, and yet this system still leaves the islands under the complete discretion of the federal government's plenary authority. Fortunately, if the United States' discretion leads to the application of certain constitutional provisions such as the Nobility Clauses, the *matai* system and the communal lands would pass constitutional muster. While the *Insular Cases* may have implemented a new colonial regime, they do open the possibility that "the United States might dispose of its insular territories."[212] If Samoa has been successful thus far in protecting its cultural interests through the *Insular Cases*, that same legal imagination could find ways to more permanently assert self-determination, if that is the political will of the people.

208. Tuaua v. United States, 951 F. Supp. 2d 88, 90 (D.D.C. 2013) ("In 1977, the Secretary [of Interior] *permitted* the governor to be selected by popular vote.") (emphasis added).

209. Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015).

210. Thornbury, *supra* note 11, at 1102.

211. *Id.*

212. U.S. Const. art IV, § 3, cl. 2; Jose Cabranes, Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans 50 (1979).