Ohio Northern University Law Review

Volume 37 | Issue 2 Article 5

U.S. Territories and Affiliated Jurisdictions: Colonialism orReasonable Choice for Small Societies?

Stanley K. Laughlin JR.

U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?

STANLEY K. LAUGHLIN, JR.[*]

> *"*[*The United States of America*] *is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania*[.]*"*
>
> *-Chief Justice, John Marshall (1820)*[1]

In 1820, the great Chief Justice John Marshall said that the United States of America "is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania[.]"[2]

The first thing to understand when talking about a U.S. territory is that you are not talking about alien peoples clamoring to break away from the United States, but rather about people who consider themselves to be and are as American as residents of Ohio, California, or Texas.

As I once wrote about American Samoa:

> "When you land in American Samoa, the first thing you notice is how Samoan it is. You see the *fale*,[3] the *lava lava*,[4] the palm trees and mountains. The next thing you notice is how American it is; the American flags, the number of U.S. military veterans, how everyone talks about a relative in one of the states. American Samoans are proud to be American. As such, they want their U.S. constitutional rights. American Samoans are also proud to be Samoan and do not want the U.S. Constitution [or other legal

---

* Professor of Law and Adjunct Professor of Anthropology, The Ohio State University. This piece is adapted from a presentation the author made at the 2010 Ohio Northern Law Review Symposium.

1. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).
2. *Id.*
3. The traditional, open-air Samoan house.
4. The colorful skirts worn by men and women.

> doctrines] applied in a way that will destroy their traditional Samoan culture."[5]

Are U.S. territories "colonies?" In some circles it is fashionable to hold that opinion, but the overwhelming majority of people who live in each of them do not think so. Several years ago, a United Nations "Committee on Decolonization" met in Fidel Castro's Cuba and, with no apparent embarrassment or even sense of irony, issued a statement from Havana expressing concern, *not about the total absence of political rights in Cuba*, but about *Puerto Rico* allegedly not being *self-governing*.[6] The U.N. Committee apparently saw no irony in standing in a nation that certainly had then, and perhaps still has, the most patently authoritarian regime in the Western Hemisphere and denouncing Puerto Rico, which has and had then a robust free press and free elections of its own legislature, governor, and other officials.[7] While the statement may have resonated with the five percent of the Puerto Rico population who call themselves *Independistas*, most Puerto Ricans shake their heads in wonder.[8] In American Samoa, the elected U.S. Congressional delegate, Faleomavaega Eni Hunkin, called U.N. allegations that American Samoa was a colony "far-fetched," noting that not only does American Samoa have many levels of self-government but that it became part of the United States by mutual agreement.[9] If the question is, are the citizens of United States territories entirely satisfied with their political status, the answer is no, as it would be if you asked Ohioans if they were completely satisfied with their government. But any serious

---

5. Stanley Laughlin, Article, *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. Haw. L. Rev. 331, 331 (2005) [hereinafter *Cultural Preservation*].

6. *Importance of UN decolonization work stressed at Caribbean seminar in Havana*, UN News Centre, CUBANET, May 30, 2001, http://www.cubanet.org/CNews/y01/may01/30e4.htm (last visited Apr. 27, 2011).

7. Albeit they have only non-voting representation in the U.S. Congress. *See* 48 U.S.C. § 891 (2009) (addressing Puerto Rico); 48 U.S.C. § 1731 (2009) (addressing American Samoa). This is a defect in our governmental structure that clearly could and should be corrected by a U.S. constitutional amendment.

8. *See* REP. BY THE PRESIDENT'S TASK FORCE ON P.R. (2005).

9. *See* Fili Sagapolutele, *American Samoa to UN: "Don't Call us a Colony*," SAMOA NEWS, Apr. 26, 2001 (Hunkin said:

> [A] colony [exists] when a country of greater force . . . conquers smaller island countries or obtains a smaller country as a prize of war. But American Samoa was never a prize of war or conquered for that matter. We became a territory by mutual agreement through the treaty of cession and we have established a unique political relationship with the U.S.

See also Fila Sagapolutele, *Clinton Rejects UN Label 'Colony' for American Samoa*, SAMOA NEWS, Nov 10, 2010 (The following year the popularly elected governor of America Samoa, Tause Sunia formally asked the UN to remove American Samoa from its list of non-self-governing areas. The UN committee at first agreed to take American Samoa off the list but then did not do so, because U.S. officials declined to promise to continue meeting with the committee after the removal).

discussion of territories, including questions of how the United States Constitution and law apply there, must start with the proposition that territorial Americans want to improve their relationship with the rest of the United States, not end it.

In the case of areas affiliated with the United States, it seems as if a majority of the people in each territory and affiliated jurisdiction wish to remain a part of or affiliated with the United States, although they may disagree over the exact form that relationship should take. In Puerto Rico, for example, people are divided over whether to become a state, remain a commonwealth, or devise some new form of relationship with the rest of the United States.[10] But the Independence Party never musters more than ten percent of the vote.[11]

For Americans who grew up on the mainland there is something a little exotic about U.S. territories, those parts of our nation which are not part of any state. The old mainland territories were associated with tales of the wild west and today's are all on tropical islands. Even territorial courts partake of this romantic aura. Going into the past, the Wrecker's Court on Key West—the subject of an important opinion by John Marshall in 1828—conjures up images of pirates and brigands, people operating on the edge of the continent and at the edge of the law with a court that may or may not have been an accomplice.[12]

Even today, courts such as the High Court of American Samoa carry on the romantic image. The High Court is housed in a square, white clapboard building tucked in among coconut palms. On a typical court day its downstairs porch is filled with witnesses and litigants, some of the men wear the traditional *lava lava* (knee length skirt) while black-robed judges confer on the second story porch. Yet it should not be forgotten that these territorial courts decide the destinies and fortunes of millions of men and women, most of them American citizens or U.S. nationals.

TERRITORIAL JUSTICE IS SERIOUS BUSINESS

Nearly five million people live in those parts of the United States that are not a part of any state and the numbers are increasing.[13] At present, only Puerto Rico is large enough to be a serious candidate for statehood and

10. *See* REP. BY THE PRESIDENT'S TASK FORCE ON P.R. (2005).
11. *See id*.
12. *See generally* American Insurance Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828).
13. CIA – The World Factbook, https://www.cia.gov/library/publications /the-world-factbook/ (last visited Feb. 22, 2011) (population data is as follows: Puerto Rico 3,978,702, Guam 180,865, Virgin Islands 709,750, Northern Mariana Islands 48,317, and America Samoa 66,432) .

Puerto Ricans are divided over whether they want to become a state.[14] The other U.S. territories are too small to seriously consider statehood individually so long as the U.S. Constitution requires that each state have equal representation in the Senate.[15] Occasional suggestions that territories be combined with existing states or joined with each other to form a new state have met with cool receptions in the territories concerned.[16]

But no territory is seeking to sever its relationship with the United States. In Puerto Rico, the pro-affiliation voters are split over whether to seek statehood, remain a commonwealth, or devise some new form of affiliation, but the Independence Party garners only a small fraction of the vote.[17] The Northern Mariana Islands became a U.S. Commonwealth in the 1980s after a 1976 plebiscite expressed two-to-one support for becoming a permanent part of the United States.[18] In American Samoa, Guam and the U.S. Virgin Islands, my experience is that the overwhelming majority of people I have talked with favored continued affiliation.[19]

Those who challenge the choice of territorial citizens to remain affiliated sometimes argue that those citizens have been brainwashed by the American presence. Such allegations clearly undersell the democratic spirit. Recent experiences in eastern Europe and the former U.S.S.R. demonstrates that even after a lifetime of subjugation to actual totalitarian rule and accompanying propaganda, people will still express a choice for freedom and (when applicable) for independence whenever they are given even the smallest opportunity to do so. To deny to American insular residents the

---

14. *See* REP. BY THE PRESIDENT'S TASK FORCE ON P.R. (2005) (although every election in Puerto Rico is to some extent a referendum on political status the last formal referendum was done in 1998. In the 1998 vote, statehood received 46.49 percent of the vote, independence was 2.54 percent, the status quo was less than 1 percent, and "none of the above" was 50.3 percent. The last category in rejecting independence obviously favors affiliation in some form other than statehood or the current commonwealth arrangement).

15. *See* U.S. CONST. art. I, § 3. After Puerto Rico, Guam has the largest population: 180,865. It seems highly unlikely that the Congress would award two U.S. Senators to a population that size. *See supra* note 13.

16. A big problem would be the distances between various parts of the state. Hawai'i has, of course, lived with two thousand miles of open water between it and the mainland. But that is not quite the same as having to travel two thousand miles to the state capitol.

17. *See supra* note 8.

18. *See* S. REP. NO. 94-596, at 5 (1976).

19. In addition, three new nations created in the 1980s in the Caroline and Marshall Islands (The Federated States of Micronesia, Republic of the Marshall Islands and Republic of Palau) have entered into a relationship of "free association" with the United States, and show no serious indications that they wish to withdraw. That is not to say that in the Free Association states withdrawal is never discussed. Occasionally frustration in dealing with certain representatives of the U.S. has caused individual legislators or government officials to suggest withdrawal. But very few really believe that is the answer. See generally Stanley K. Laughlin, Our Island Friends: Do We Still Care? The Compacts of Free Association with The Marshall Islands and Micronesia (Center for Interdisciplinary Law and Policy Studies, Working Paper No. 100, 2007), available at http://papers.ssrn.com/sol3/papers.cfm? abstract_id=1015596.

validity of their choice of their own political arrangements—when they have had freedom of speech and press for the entire lives—may itself be the ultimate colonial mentality. It treats the island people as children incapable of asserting their own political beliefs except under the most artificially ideal conditions. The fact is that island people are not any different than those Europeans previously mentioned and others in their willingness to speak out on behalf of their own political freedom when the need arises to do so.

REASONS FOR CONTINUED AFFILIATION - NATIONAL AND INTERNAL SECURITY

Several reasons may help explain this preference for continued affiliation with the United States. First, as previously noted, insular Americans are Americans and think of themselves as such.[20] Secession is not anymore in their minds than it is in mind of the typical Ohioan.

But secondly, what is in their minds is that it is literally impossible for small island nations to have a military that could successfully defend against an invasion by even a relatively weak (by world standards) military power.[21] These islands do not have the numbers of people and they do not have the resources to support such a force.[22] They must rely on others to defend them, either on the basis of a treaty or some other arrangement.[23] These small societies find it attractive to have a security arrangement with a larger power more dependable than a mere treaty obligation. Territorial status provides this security.

A LESSON FROM THE FALKLAND ISLANDS WAR AND FIJI

A comparison of two events from the 1980s, the Falkland Islands war and the original Fiji *coup d'etat* is illustrative of the point. Had the Falklands been an independent nation and Britain's obligation simply one of treaty, would Great Britain have made the same wholehearted and costly effort that it did to regain control of the islands from Argentina? It is clear

20. *See supra* note 5.

21. *See, e.g.* CIA – The World Factbook, https://www.cia.gov/library/publications /the-world-factbook/ (last visited Feb. 22, 2011) (showing that the manpower fit for military service in the Northern Mariana Islands was only 9,359 individuals).

22. *See, e.g .id.* That is not to say they would not try. The people of Guam, for example, fought bravely alongside U.S. troops in an unsuccessful attempt to repel the Japanese invasion early in WWII. They also joined the U.S. troops in liberating the island late in the war.

23. I am obviously aware that the UN at times engages in peacekeeping efforts and efforts to resist aggression. But I do not think it is disparaging to the UN to say that not many nations would want UN peacekeeping efforts as their first line of defense.

from the debate in the House of Commons that both the British Government (Conservative at the time) and Her Majesty's Most Loyal Opposition (Labour) considered the Argentine invasion of the Falklands a violation of British sovereignty.[24] For example, Mr. John Silkin, Member of Parliament from Deptford speaking for the Labour Party, said on April 2, 1982, "The Labour Party pledges full support for the right of the people of the Falkland Islands to *stay British*, as they wish, and we believe that it is *our duty to defend that right*."[25]

Prime Minister Margaret Thatcher addressed the Commons on Saturday, April 3, 1982, stating, "We are here because for the first time for many years, *British sovereign territory has been invaded by a foreign power*[.]"[26] The Prime Minister also reported that the British Governor of the Falkland Islands told her that the islanders were in tears when he left:

> They do not want to be Argentine . . . they are still tremendously loyal. I must tell the House that *the Falkland Islands and their dependencies remain British Territory*. No aggression and no invasion can alter that simple fact. It is the Government's objective to see that the islands are freed from occupation and are returned to British administration at the earliest possible moment.[27]

The language employed on both sides of the House of Commons calling for action unmistakably reveals a justification for war based on international concepts of sovereignty, which is a very different argument than one based upon treaty obligations to defend a friend. In the Falkland Islands, Britain went to war on the grounds that it was defending part of itself.[28]

FIJI

Unlike the reaction of Great Britain to the Argentine invasion of the Falkland Islands in 1982, the reaction of the United Kingdom to the 1987 and 1988 (and subsequent) *coups d'etat* in the British Commonwealth nation of Fiji was one of caution and distance.[29] By the 1980s, the British

24. *See generally* THE FALKLANDS CAMPAIGN: A DIGEST OF DEBATES IN THE HOUSE OF COMMONS 2 APRIL to 28 JUNE 1982 (K.S. Morgan ed. 1982)

25. *Id.* at 1.

26. *Id.* at 4.

27. *Id.* at 5 (emphasis added).

28. *See generally* IAN J. STRANGE, THE FALKLAND ISLANDS (3d ed. 1983). Mutual defense treaties, by contrast, are notorious for containing deliberate ambiguities that allow a nation to opt out of military action if it chooses to do so.

29. *See generally* DERYCK SCARR, FIJI: THE MILITARY COUPS IN FIJI (1988).

Commonwealth was little more than a treaty alliance and Great Britain did not seem to consider itself a sovereign over its Commonwealth affiliates.

In 1987 Colonel Sitivani Rabuka, acting in the name of Fijian ethnicism, overthrew the elected government of Fiji and installed one more to his liking.[30] The following year, he was again displeased and overthrew the new government that he had created.[31] Britain relied heavily on its Governor General, a Fijian representative of the Queen, to use moral persuasion in an unsuccessful effort to remove the military government.[32] For example, the Governor General attempted to exercise the traditional executive role of the Queen to control the Fiji military as its Commander-in-Chief. He ordered, in vain, all troops not necessary for the defense of the islands back to their barracks. He also refused to swear in the newly-appointed cabinet as the legitimate government.[33] All of this was to no avail. Finally, Fiji was expelled from the Commonwealth, but by then *General* Rabuka continued to run it.

Britain, it was clear, viewed this uprising not as a violation of her sovereignty but as a problem arising within an independent nation affiliated with her by treaty. The Secretariat wrote to the Governor General that, "[t]he Queen wishes you to know how much she admires your stand as her personal representative in Fiji and the guardian of the constitution . . . We are here to help in any way that we can."[34] But the British Parliament and people would not support armed intervention.[35] It is not surprising then that when islanders think of a need to seek armed protection, they would rather be in a position similar to the Falkland Islands than that of Fiji..

Fiji also illustrates that these small island societies with no plausible military capability are vulnerable not only to foreign sovereigns but also to insurgents who frequently have support from foreign governments or outside groups.[36] It is impossible for any one of them to maintain a military

30. *See id*. at 70-73, 135 (1988).
31. There have been two more *coups* since. *See generally id.*
32. *See id*. at 76-89.
33. *See id*. at 84.
34. *See id*. at 83.
35. *See id*.
36. The experience of the Republic of Vanuatu, formerly the New Hebrides, is an example of this additional threat to small societies. Prior to 1980, the New Hebrides were governed jointly by Britain and France as a *condominium*. (We have become used hearing the term used to describe a jointly owned multiple unit building that we have forgotten that term in international law refers to a jointly governed area.) On May 28, 1980, on the eve of independence, a secessionist insurrection occurred, believed in many quarters to have been financed by American businessmen. British and French forces intervened to restore government control. At the request of the new government the British stationed a battalion of troops in Vanuatu through the end of the year. *See* Notes, *New Hebrides Now Vanuatu*, THE NEW PACIFIC MAGAZINE, Oct. 1980, at 10. More than one Puerto Rican has volunteered to me that they believe that independence would lead to attempted takeovers by leftists groups with support from outside

of its own that is large enough to repel an invasion from even a minor power and, as Fiji demonstrated, the existence of even a small military may threaten democracy from within. Insular areas that are a part of the United States are confident that the U.S. Government would not permit either an invasion or a *coup* against them to stand and hence believe that neither is likely to happen.[37]

POLITICAL AND ECONOMIC REASONS FOR CONTINUED AFFILIATION

There are a number of additional reasons that favor affiliation. First, being part of a major economic unit has obvious advantages.[38] Second, territorial inhabitants, as United States citizens or nationals, have an unrestricted right to travel and settle throughout the United States.[39] Finally, as we have pointed out, most territorials prize United States citizenship and think of themselves as Americans.[40] Thus, these benefits are seen not as gifts but as birthrights of native-born American citizens and nationals.[41]

These arguments for continued affiliation are entitled to respect. Recent history demonstrates that formal independence for small societies does not always yield political or economic well-being. Conversely, affiliation with a larger unit is not necessarily antithetical to self-government. That a majority of United States territorials wish to remain part of the Union is evidence that the basic concept of affiliation is worth pursuing. Work on improving the legal structures remains if the relationships are to endure and be entirely just, but the challenge is worth taking. If the United States can successfully create a system whereby people of different cultures can participate as equals in a common economic, political, and legal system without endangering their cultural heritage, it could provide a useful model to smaller societies for living in harmony with larger ones in the world community.

Puerto Rico, and from Marxist governments. Rightly or wrongly, a number of Puerto Ricans believe this is what some independence advocates want.

37. US CONST. art. IV, § 4 provides, "The United States shall guarantee to every state in this Union a Republican Form of Government and shall protect each of them against invasion and . . . against domestic violence." While not by its terms applying to a territory it seems likely that in practice it would be. The clause has been held to be non-justiciable, that is *not* judicially enforceable (at least in most cases) and therefore its enforcement depends on Congressional and presidential discretion. *See generally* Baker v. Carr, 369 U.S. 186 (1962); Luther v. Borden, 48 U.S. 1 (1849) (holding Guaranty Clause to be a political question and not justiciable).

38. REPORT OF THE SECOND FUTURE POLITICAL STATUS COMMISSION TO THE GOVERNOR OF AMERICAN SAMOA, (2d Reg. Sess. 2007) at 22-23 [hereinafter REPORT].

39. *See id*. at 22.

40. *Id*. at 41-47.

41. *See id*. at 62.

In the current U.S. system, the absence of voting representation at the federal level impairs achievement of the ideal. This roadblock can and should be remedied by constitutional amendment.[42] At a high level of abstraction, most U.S. territorials have three desired outcomes from their relationship with the Federal Government. These desires are potentially conflicting and the major challenge is to reconcile them in a functional and satisfactory manner. Territorials want: (a) substantial autonomy in local affairs; (b) preservation of their traditional cultures; and (c) the rights and privileges of American nationality insofar as those rights and privileges are compatible with (a) and (b).[43]

THE CONSTITUTION AND U.S. TERRITORIES

Another important reason why U.S. territories do not think of themselves as colonies is that the residents of those territories, as U.S. citizens and nationals, have enforceable rights under the United States Constitution. I have written on this topic extensively and in great detail. Here I shall summarize my conclusions very briefly. Those who are interested in a more detailed discussion and the doctrine that supports it should consult my books and the articles cited in the following footnote.[44]

There are those who argue that the application of the Constitution in U.S. territories proves the opposite; that they are colonies. These critics base their argument upon the fact that constitutional rights are not always enforced in exactly the same way in a territory as in a state. This reflects a basic misunderstanding, or in some cases a deliberate distortion, of the applicable constitutional doctrine.

---

42. In proposing the District of Columbia Voting Rights Amendment, Congress acted on the assumption that a constitutional amendment was necessary to give congressional representation to an entity other than a state. *See* generally Rev. Jesse L. Jackson, *District of Columbia: The "State" of Controversy: Foreword: The State of New Columbia – A Call for Justice and Freedom*, 39 CATH. U. L. REV. 307 (1990). That supposition is probably correct.

43. *See* REPORT, *supra* note 39, at 41-52.

44. I have explored this issue extensively, one could say exhaustively, in several publications. These include my book, STANLEY K. LAUGHLIN, JR.,THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED TERRITORIES (1995), a new book to be published next year, and three articles. Since the articles are the most easily accessible, the citations in this section will be to them. They are, Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337 (1981) [hereinafter *Application of the Constitution*]; *Cultural Preservation*, *supra* note 5. A third University of Hawaii Law Review article I wrote dealt with the more narrow issue of the application the Constitution to territorial courts. Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: the Case of American Samoa*, 13 U. HAW. L. REV. 379 (1991) [hereinafter *Constitutional Structure*]. Where the law was settled before 1981 and has not changed, I will cite to the 1981 article. Otherwise I will cite to the 2005 article, except where courts are the specific issue.

The earliest United States territories were on the mainland, starting with the Northwest Territory, which was part of the Union at the time the Constitution was ratified. The early cases applying the Constitution to a territory adhered to what was known as the *ex proprio vigore* theory.[45] That is, the theory that the Constitution applied "of its own force" (i.e., was fully applicable) in all U.S. territories.[46]

The doctrine began to change after the U.S. annexed insular territories. The mere fact that such a change took place is seen by some as proof that the insular territories *are* colonies. Again, that is too simplistic. It is easy to assume that if the residents of territories are to be first-class citizens, the Constitution should be interpreted exactly the same on these islands as it is in any city or county on the mainland. But that view overlooks the fact that many of these territories have long-established cultures that are quite different from those of the U.S. mainland and these territories want to preserve their cultures which the U.S. has pledged itself to help them do. For that reason the abandonment of the *ex proprio vigore* doctrine was in fact a good thing for the territories.

The *Insular Cases* were six cases decided by the United States Supreme Court during its 1901 term.[47] They arose in the territories acquired by the United States as a result of the Spanish-American War. The most famous was *Downes v. Bidwell*[48] which arose out of Puerto Rico. The enduring part of the *Downes* case was the concurring opinion of Justice Edward Douglass White that announced what came to be known as the "incorporation doctrine."[49] Simply stated, this doctrine held that the Constitution was fully applicable only in territories that had been "incorporated into the United States and made a part thereof."[50] In all other territories only "fundamental rights" were applicable.[51] The opinion was vague regarding the indicia of incorporation, even now those indicia never have been spelled out

45. *Application of the Constitution*, *supra* note 45, at 343-346.

46. That theory was used, but produced a notoriously bad result, in the infamous *Dred Scott* case. There the Court found the Constitution fully applicable in the Missouri Territory, but instead of holding that it guaranteed Dred Scott his freedom, it was interpreted to protect the property interests of slave-holders in their slaves. Of course, the fact that in one particular case the constitution produces a bad result, even a very bad result, does not prove that the doctrine making the constitution applicable is necessarily wrong. Nevertheless, the case permanently tainted the doctrine and hastened its demise. *See id*..; *Scott v. Sandford*, 60 U.S. 393, 447 (1856) (holding that citizens who migrate to a U.S. territory are still afforded the rights of the U.S. Constitution).

47. *Application of the Constitution*, *supra* note 45, at 346.

48. 182 U.S. 244 (1901).

49. *Application of the Constitution*, *supra* note 45, at 348-50.

50. *See id*. at 349.

51. *See id*. at 346

precisely.[52] Suffice it to say that only Alaska, among all of the noncontiguous territories, has ever been held to be "incorporated."[53]

But according to my theory, which is shared by some of the federal Courts of Appeals and now perhaps of the U.S. Supreme Court, the incorporation doctrine has been modified by the case of *Reid v. Covert*.[54] *Reid* was not a territorial case but one that involved the application of the U.S. Constitution on U.S. military bases in foreign countries (Great Britain and Japan).[55] I have analyzed the *Reid* case in great detail in several of my publications, but for here it will suffice to say two things: (1) Justice Harlan's opinion, though a concurring one, nevertheless (under established Supreme Court procedure) stated the rule of the case; and (2) Harlan's opinion was a friendly re-interpretation of the *Insular Cases* doctrine, holding them to mean that there is a presumption that the Constitution applies outside the fifty states—which can be invoked at least by U.S. citizens and nationals—but that the presumption can be overcome in a particular case by a demonstration that a specific application would be "impractical," "anomalous," or both.[56]

The United States Court of Appeals for the District of Columbia Circuit applied the modified *Insular Cases* to an actual U.S. territory (the Territory of American Samoa) in *King v. Morton*.[57] The D.C. Circuit has jurisdiction over the Secretary of the Interior, and a suit against Secretary is the only effective way to appeal a decision of the High Court of American Samoa off the island.[58] This case framed the issue as whether in American Samoa the Sixth Amendment right to a jury trial would be "impractical" and "anomalous."[59]

As I interpreted this case, the Court turned "impractical" or "anomalous" into terms of art. As I read the *King* case, "impractical" means that the provision would not work in a particular culture.[60] That is, the culture would defeat it. For example, it was claimed in *King* that jury trials would not work in American Samoa because Samoans felt such kinship for one another that they would not convict.[61] This claim, however, was properly rejected as unproven. Jury trials were instituted after the *King* case

52. *Id*. at 346, 349.
53. *Id*. at 350, 352.
54. 354 U.S. 1 (1957).
55. *Application of the Constitution*, *supra* note 45, at 356.
56. *Id*. at 355-58.
57. *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975).
58. *Cultural Preservation*, supra note 5, at 349.
59. *Id*. at 375.
60. *Application of the Constitution*, *supra* note 45, at 379-80.
61. King v. Andrus, 452 F. Supp. 11, 13 (D. D.C. 1977).

and juries have convicted in American Samoa at a rate comparable to that of the United States mainland. "Anomalous" means that the provision might damage the culture.[62] For example, to use the equal protection principle to strike down territorial laws that restrict land ownership to indigenous people would "work" as land would be sold to outsiders, but it could have disastrous consequences for a culture based on family land ownership.[63]

As I have written, the provision might work too well. American Samoans might find themselves working as maids and bellhops in hotels built upon land their grandparents owned.[64]

The Ninth Circuit explicitly adopted my interpretation in *Wabol v.Villacrusis*,[65] where it applied the *King* rule to uphold land alienation restrictions in the Commonwealth of the Northern Mariana Islands. Thus the rule has been extended to the rest of the Pacific.[66]

This rule, in my opinion, comes as close as anyone has been able to in devising a system which reconciles the possibly conflicting interests of territorial citizens. It gives them the maximum amount of rights under the U.S. Constitution without applying those rights in a way that would damage and perhaps destroy their indigenous culture. In every instance, the U.S. Government promised to protect the indigenous cultures of those areas that joined the United States, and this rule is our best effort to keep that promise. That usually does not happen in colonies.

IMPROVING AFFILIATION - THE ROLES OF CONGRESS, THE PRESIDENT AND THE COURTS

Over the years, Congress and the President of the United States have played major roles in shaping the legal systems of our territorial governments. Their performance of these roles has been neither as good as it could have been nor as bad as one might have feared (and some portray it). All of the existing territories have substantial measures of self-government, some chartered by Congress and others by the President. At times over the years, the Executive Branch and Congress have shown insufficient sensitivity to the cultural needs of the territories. Ultimately, it will be up to Congress to propose a constitutional amendment that will cure

62. *Application of the Constitution*, *supra* note 45, at 381-87.

63. *See id*.

64. *See id.* at 386. I have heard it said more than once in American Samoa, that "We [American Samoans] don't want to become another Hawai'i."

65. 958 F.2d 1450 (9th Cir. 1992).

66. *Cultural Preservation*, *supra* note 5, at 358-61. The U.S. Supreme Court has not passed directly on this issue in recent years, but what it has said about the *Insular Cases* in other contexts is entirely consistent with the *King-Wabol* rule. *Id*. at 364-68.

the problem of disenfranchisement at the federal level and create a more fundamentally sound charter for territorial self-government.

The courts also play a key role in shaping the governmental institutions of territories. Ultimately, the courts define the status of the territories and determine the application of federal law, including the United States Constitution, within the territories. Territorials are ambivalent about the role of courts for essentially the same reasons that residents of the states are. Territorials want judicial protection of their own rights, but they sometimes worry about the aggregate impact of judicial intervention on self-government.[67] There is also concern that the application of legal norms developed on the mainland may disrupt or destroy the indigenous cultures of the territories. Cultural and natural differences complicate many constitutional and other legal problems in the territories. For example, legislative apportionment is more difficult to accomplish fairly in territories where tribal considerations and geographic separation peculiar to island societies affects the issue.[68]

CONSTITUTIONAL DIMENSIONS OF AFFILIATION AND THE ROLE OF COURTS

As we have seen, a territory may sometimes consider departure from certain Anglo-American legal norms a necessary aspect of cultural autonomy. A territory may wish to give formal legal recognition to the powers of traditional leaders whose authority comes from custom rather than the democratic process. For example, in American Samoa *matai* (chiefs) have the exclusive right to serve in the upper house of the territorial legislature (called the "Fono" —meaning "gathering of the chiefs") and *matai* also control the communally-owned land which makes up the bulk of the territory's useable land.[69] Land is increasingly scarce in island societies due to growing populations and in some of the territories, e.g., American Samoa and the Northern Mariana Islands, land ownership is central to social organization. Territorials fear indigenous control of the land could be lost to outsiders with large bank rolls and business sophistication. In some cases territorials have sought to guard against this possibility by restrictions on alienation that, arguably, are racial in nature.[70]

---

67. *See generally Constitutional Structure*, *supra* note 45, at 451.

68. *See* Howard P. Willens & Deanna L. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1422-23 (1977).

69. *Application of the Constitution*, *supra* note 45, at 363-65. *See also* Baldwin & Laughlin, *The Reapportionment Cases: A Study in the Constitutional Adjudication Process*, 17 U. FLA. L. REV. 301 (1964).

70. *Cultural Preservation*, *supra* note 5, at 358-59.

In passing on the constitutionality of such laws and answering other territorial legal questions, courts should use thoughtful approaches that take into account not only the values expressed in the United States Constitution but also the territorials' legitimate aspirations for cultural autonomy. At the same time, courts should subject claims of cultural uniqueness to rigorous empirical evaluation as not all such claims are valid. Reconciling the territorials' desires for cultural preservation with their sometimes conflicting desire for the rights and privileges of United States citizenship is a delicate and ongoing task requiring constant re-evaluation.

Another potential problem concerning the federal judiciary exists as well. While territorials desire recognition of their unique needs, some suspect that not all disparate treatment of territories in federal law is benign. Congress frequently either exempts territories from the benefits of certain federal laws or gives them reduced benefits. While economic justifications are usually advanced for this treatment, territorials suspect the discrimination sometimes may be due to their lack of representation in Congress. For example, in *Harris v. Rosario*,[71] the Supreme Court upheld a congressional policy that paid less in Aid for Dependent Children (AFDC) to persons in Puerto Rico than it would pay to persons similarly situated in the states. Among the justifications for this was the argument that since Puerto Ricans on the average had lower incomes, the higher payments might disrupt their economy.[72] While the majority accepted this argument, Justice Thurgood Marshall in dissent questioned its self-evident rationality.[73] He said, "Under this theory those geographic units of the country which have the strongest economies presumably would get the most financial aid from the Federal government since those units would be the least likely to be 'disrupted.'"[74] Justice Marshall was correct in reminding us that territorials, "as do other groups lacking political power," rely heavily on the courts for protection from invidious discrimination.[75]

In *United States v. Carolene Products Co.*,[76] in its famous footnote number 4 the Court introduced "The Carolene Products Approach," which has come to stand for an approach to constitutional jurisprudence that holds roughly as follows:

---

71. 446 U.S. 651 (1980).

72. *Id*. at 653.

73. *Id*. at 652 (Marshall, J., dissenting).

74. *Id*. at 656. See Stanley K. Laughlin, *The Burger Court and the United States Territories*, 36 U. Fla. L. Rev. 755, 792 (1984).

75. United States v. Carolene Prod. Co., 304 US 144, 152 n.4 (1938).

76. *Id*. *See generally* Lewis F. Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982) (discussing the constitutional implications of Justice Stone's footnote 4 in *Carolene Products*).

Courts should generally be deferential to legislative bodies, and those who are unhappy with legislative action should normally seek redress in the political process, not the courts. However, there are several special circumstances where the aggrieved cannot seek redress in the political process and therefore the courts should be more solicitous. The circumstances are set forth in footnote 4, the best known and for precedent purposes, the most important part of the opinion. It is short and worth reading. Its entire three paragraphs, including the cases relied upon are as follows:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U.S. 359, 369-370; Lovell v. Griffin, 303 U.S. 444, 452.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536; Nixon v. Condon, 286 U.S. 73; on restraints upon the dissemination of information, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-714, 718-720, 722; Grosjean v. American Press Co., 297 U.S. 233; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 369; Fiske v. Kansas, 274 U.S. 380; Whitney v. California, 274 U.S. 144, 153; 58 S. Ct. 778, 82 L. Ed. 1234, 274 U.S. 357, 373-378; Herndon v. Lowry, 301 U.S. 242; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510, or national, Meyer v. Nebraska, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404; Farrington v. Tokushige, 273 U.S. 484, or racial minorities, Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be

> relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina v. Barnwell Bros., 303 U.S. 177, 184, n.2, and cases cited.[77]

The situations suggesting less deference to the elected branches fit into three categories: (a) alleged violations of the specific prohibitions of the Constitution (such as the Bill of Rights), (b) cases where the complaint is against the political process itself, and (c) discrimination against "discrete and insular" minorities. While all of these have potential application in the territories, the second two are particularly relevant.

Those who complain that they are excluded from the political process (e.g., denied the right to vote) can hardly be told to use the political process for relief. Territories are, of course, currently denied a vote at the federal level. Similarly, "discrete and insular" minorities can be excluded from the political process simply by being ignored and, while Chief Justice Stone was speaking metaphorically of "insular minorities," the rule should also have application to literal "insular" minorities.

As challenges to territorial laws and federal laws affecting territories are adjudicated, the decisions should carefully weigh the impact that application of a constitutional or legal principle would have on the indigenous culture. Only then will the value of the constitutional guarantee or asserted legal claim be revealed in context. In my first Hawaii Law Review article, I noted that Justice Robert H. Jackson once said that the Bill of Rights is not a suicide pact.[78] I added that neither is the U.S. Constitution a genocide pact, whether we define genocide as physically destroying a people or killing their culture.[79] The U.S. legal system should be flexible enough to accommodate cultural diversity, while protecting constitutional and other legal rights.

---

77. *Carolene*, 304 U.S. at 153, n4.

78. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); *Application of the Constitution*, *supra* note 45, at 388.

79. This phrase was first used by the author in *Application of the Constitution*, *supra* note 45, at 388, and it was quoted by the Ninth Circuit U.S. Court of Appeals in Wabol v. Villacrusis, 958 F.2d 1450 at 1462 (1992).