America's Experiment with Imperialism and Post-WWII Restoration of American Anti-Colonialism

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After WWI, the League of Nations was advocated by U.S. President Wilson to create a new world order that could prevent another world war. Yet, at the same time America was practicing imperialism conquering and annexing from Spain the U.S. territories of Philippines, Guam and Puerto Rico. The U.S. also usurped and overthrew the legal government of Hawaii, and annexed that nation as a U.S. territory.

Because of America's zeal for its own "enlightened imperialism" the popular belief was that the U.S. was bringing democracy and modern values to the territories the USA purchased or conquered. That is the reason the U.S. Congress rejected the League of Nations and chose instead to act unilaterally and in cooperation with its allies to shape a better world order without joining the multilateral world league as Wilson advocated.

In America at the time there was an ideological narrative that the Spanish-American War was justified by the liberation of Philippines, Cuba, Guam and Puerto Rico from over three centuries of Spanish colonialism. Cuba was granted independence although the U.S treated it as a client state in many respects. The Philippines, Guam and Puerto Rico were made U.S. territories but the failure of the U.S. to grant citizenship and extend the U.S. Constitution fully created a political status limbo for those territories that is the focus of this case study.

But the context for this case study is the failure of American imperialist ideology that gave way to restoration of America's anti-colonialist traditions. In the expansion of American empire across the North American continent the Northwest Ordinance model of territorial integration was generally based on the original "Northwest Ordinance" model leading to admission of each territory to the federal union of states.

Of course, the Native American tribes resisted until conquered and the political strife between slave states and non-slave free-states led to the

American Civil War. But as the 20th century began robust American imperialism gradually gave way to restored anti-colonialism. This was true in the case of Hawaii after it was annexed, Alaska after it was purchased from Russia, and the Philippines after it was re-taken and liberated by the U.S. from brutally imperialistic and militaristic WWII Japanese occupation in 1944.

In contrast to Puerto Rico and Guam, the U.S. courts ruled that the extension of U.S. citizenship in Hawaii and Alaska meant full rights of citizenship through incorporation into the union of states, leading eventually to full statehood in 1959. As discussed below, although some minority factions argue statehood remains an imperialist regime, the U.S. position is that upon approval by the people of the territory in free acts of democratic self-determination, statehood is an anti-colonialist and anti-imperialist status, even where the territory was acquired through imperialist actions.

Also, in contrast to Puerto Rico and Guam, the U.S. denied U.S. citizenship to the Philippines and adopted a policy leading to independence for that U.S. territory. That also was an imperialist and colonialist policy, but one intended to lead to restoration of American anti-colonialist traditions, after the territory was ready for democracy and nationhood.

Apologists for Spain's brutal colonialism in North and South America as well as Asia claim that Madrid was reforming and granting "autonomy" to its last colonies in the America's and in the Philippines. However, the so-called Charter of Autonomy granted to Puerto Rico, for example, was a revocable delegation of limited home rule. The reality was that Spain practiced slavery in Puerto Rico for 13 years after slavery ended in the USA, and the U.S. annexation of Puerto Rico ended centuries of Spanish tyranny.

Indeed, the Charter of Autonomy model Madrid foisted on Puerto Rico in the late 19th century was revived to bring the Spanish state of Catalonia into alignment with Madrid, and proved to be a hoax when Catalonia attempted to assert its autonomous sovereignty in 2016, leading to exile and arrest of its elected leaders. So much for Spanish "reform" in Puerto Rico before it was annexed by the U.S. in 1899, much less the Philippines where Spain was waging war against the nationalist movement there.

Upon annexing the Philippines at the same time in 1899, the U.S. also waged war against the nationalist insurgency, only to adopt a pro-independence

policy after defeating the independence army. From 1900 to 1941 constitutional self-government was established and independence was gradually becoming feasible when Japan invaded the Philippines and defeating American defense of its territorial regime in that U.S. imperial possession.

And it was in the immediate aftermath of WWII that America found its way back to its anti-colonial tradition. Based on the Atlantic Charter principle that the Allied Powers would not annex territory conquered in the war against the Axis powers, the U.S. supported establishment of the United Nations based on the principle of self-determination for all non-self-governing peoples.

That internationalization of the "government by consent of the governed" principles in the U.S. Constitution as a pillar of the U.N. Charter is why the U.S. did not annex the territory or peoples of the Axis Powers.

Nor did the U.S. annex the vast Micronesian island chains that Japan ruled under a League of Nations mandate, after liberating those islands from Japanese occupation. Japan had violated its commitments to the League of Nations by militarizing the Micronesian region as part of its planning for conquest throughout the Pacific and Asia in WWII.

Instead of annexing those islands the U.S. agreed to administer the region under the United Nations Trusteeship system. That led to the formation of three new island nations in free association with the U.S. under compacts approved by the people in U.N. observed acts of self-determination.

Ironically, while the Philippines, Micronesia, Hawaii and Alaska benefitted from the restoration U.S. anti-colonialism based on the self-determination principles recognized by the U.S. in the post WWI era, the results are mixed for the remaining U.S. territories of Puerto Rico, Guam, as well as the U.S. Virgin Islands, American Samoa and the Northern Mariana Islands.

None of these territories has attained equality or status or rights under U.S. national law or in the federal political process. Conferral of U.S. nationality and classification of nationals in Puerto Rico, Guam, Northern Marianas and USVI has not changed the condition of political limbo and suspended animation for those four "unincorporated territories.

Only tiny American Samoa, which was not conquered by the U.S. but rather sought U.S. affiliation, seems so far to prefer and consent to the

balance between strong allegiance to the U.S. and the autonomy it has under the current unincorporated territory status. American Samoa does not even petition for reclassification as “citizens” because that makes no real difference for U.S. nationals from the territories while residing in the islands, and nationals from American Samoa can acquire citizenship to enjoy equal rights when residing in a state.

Again, it is in the context of the preceding history as it relates to Japan, the League of Nations, the decision of the U.S. not to annex all or any part of Japan or other Axis Power nations after WWII that the following case study is provided on arrested political development under the U.S. federal model for the remaining “unincorporated” U.S. territories.

This case study focuses on the complex problems in the American system of constitutional federalism governing political subdivisions not fully incorporated under the federal constitution. As a result, even though classified as citizens the people of the territories are not democratically represented in the government by consent process at the national level, and democratic participation is limited to local home rule, though still subject to supremacy of federal law. Of specific import is the question of whether the national legislature, the federal courts, or both, should provide remedies for inequities in territorial status.

Fair play for nationals and citizens of unincorporated territories

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A Two-Part Case Study

I. Democracy and federal judicial power in Puerto Rico
II. Democracy and federal judicial power in American Samoa

Introduction:

Since early in 2019 this writer has called for Congress to intervene and resolve by federal statutory measures the political questions raised in recent federal court cases, including

Tuaua v. U.S., No. 13-5272 (D.C. Cir. 2015) (cert. denied);

Segovia v. U.S., 880 F. 3d 384-2018 (cert. denied);

Fitisemanu v. U.S., Case No. 1:18-CV-36 (D. Utah Dec. 12, 2019);

U.S. v. Vaello-Madero, No. 19-1390 (1st Cir. 2020).

On January 28, 2021, the non-voting members of the U.S. House of Representatives from Puerto Rico, U.S. Virgin Islands and American Samoa, along with a Congressman from New York City, introduced H. R. 537 to address the political question presented to the courts in the case of U.S. v. Vaello-Madero.

By providing for equal U.S. Social Security benefits in Puerto Rico in parity with the states of the union, H.R. 537 seeks the remedy sought by the plaintiff from Puerto Rico in the Vaello-Madero case. As explained below the U.S. government lost the Vaello-Madero case at the trial level in the U.S. Federal District Court in Puerto Rico, and the U.S. Department of Justice also lost in the U.S. Court of Appeals for the First Circuit.

At this writing the U.S. has petitioned the U.S. Supreme Court to reverse the

trial and appellate court rulings. If the U.S. Supreme Court takes up the U.S. Department of Justice appeal, timely approval of H.R. 537 before the Supreme Court rules could moot the Vaello-Madero case, not only as to Puerto Rico but American Samoa, Guam and the U.S. Virgin Islands as well. A court ruling on rights of citizens in the territories under the Social Security Act would be of intense interest to legal historians like me. But federal jurisprudence embraced by Congress for 120 years point to resolution of political status and rights accorded territories by the political branches, with the courts forced to intervene only if federal law and policy infringes on rights extended to the territories under the U.S. Constitution and federal laws.

As the discussion that follows reveals, the Vaello-Madero case may just be the first time in 120 years that the courts intervene to resolve the rights of the territories under federal law…if Congress does not act first.

Congress not courts should define citizenship status/rights in U.S. territories

In each of the cases listed above, individual Americans have asked federal courts to provide judicial remedies for anomalies, inconsistencies and irrational discrimination in how residents of unincorporated territories are treated under federal territorial law and policy.

Starting with the Northwest Ordinance re-enacted as U.S. law in 1789, federal territorial law largely represents a Congressional tradition respecting local self-determination and self-government for peoples in incorporated and non-incorporated U.S. territorial possessions.

However, failure of the U.S. Congress to provide mechanisms to resolve the permanent political status of the last five unincorporated territories based on equal rights of citizenship at the national level has persisted for over a century.

So far, the federal courts have allowed early high court rulings following the 1901 case of *Downes v. Bidwell* case to stand. Known as the *Insular Cases*, the *Downes* ruling and its progeny invented "unincorporated territory" status, but also signaled to Congress the need to decide where permanent sovereignty, nationality and citizenship would vest.

Equal rights of national citizenship can be attained through incorporation into the Union leading to statehood like Hawaii and Alaska in 1959, or independent nationhood like the U.S. Territory of the Philippine Islands in 1946. Only statehood secures full equality for U.S. citizens, and statehood can include integration of a territory into an existing state.

It is because Congress has not exercised - and some would say has abdicated - it authority and responsibility to determine disposition of the status of the unincorporated territories that lawsuits challenging the glaring political inequities of the status quo continue.

Federal courts "restless" with Congressional complacency on territorial rights?

Federal courts are entertaining these lawsuits with a mixture of confusion and concern about whether "fundamental rights" are being respected. This is perhaps an expression of judicial frustration and restlessness that Congress has allowed political questions to come visiting the courts dressed up as legal claims.

The adjudicated outcomes in *Tuaua* and *Segovia* confirmed the boundaries of Insular Cases jurisprudence. A U.S. District Court ruling in *Fitisemanu* in favor of plaintiffs from American Samoa in Utah seeking the same birthright citizenship as persons born in a state is expected to be overturned on appeal.

That's because, so far, the courts have declined to confer for nationals born in American Samoa or nationals with statutory "citizenship" in the other four territories the same 14th Amendment birthright citizenship status and rights acquired by U.S. citizens born in a state of the union.

Indeed, the record in each case strongly suggests these lawsuits should have been dismissed for lack of jurisdiction. A ruling that each case was non-justiciable would have been proper because both actions presented political questions outside the powers of the judicial branch.

The ruling of the federal trial court and three judge federal appellate court in *U.S. v. Vaello-Madero* so far has had a very different outcome than S*egovia* and *Tuaua*.

In an unexpected but compelling judicial intervention, in V*aello-Madero* for

the first time since *Downes* was handed down a federal appellate court has declared an act of Congress exercising its Article IV territorial powers as interpreted by the Insular Cases to be an unconstitutional violation of fundamental rights.

This demonstrates the need for Congress to exercise its powers under Art. IV, Sec. 3, Cl. 4 of the Constitution to promote coherent federal and local territorial policy development for American Samoa.

That will, in turn, prevent legal and political issues at stake in these recent cases that are unique to American Samoa and Puerto Rico from being misunderstood or misrepresented in federal courts.　Courts are not as well-suited as Congress to parse and resolve political status issues.

If we learned nothing from the Insular Cases it is that when presented with national policy issues Congress should act before the courts because it has a wider range of solutions.　Courts have limited range of remedies and often solve one problem in one territory that creates confusion and misconceptions about both the common and unique political and legal status questions facing all five unincorporated territories.

Shattering the myths and imbalances created to sustain dysfunctional policies in territories is a first step toward reform.　That also includes repudiating the false promises of both the autonomy-as-permanent-substitute-for-equal-citizenship hoax and the citizenship-equality-without-statehood hoax.

Statehood or nationhood are the only national political status with equal citizenship rights options.

I.　Democracy and federal judicial power in Puerto Rico

U.S. Constitution applies differently in unincorporated territories

A U.S. First Circuit Court of Appeals three judge panel ruled on April 10, 2020, that Congress can't deny U.S. citizens in Puerto Rico benefits equal to those provided to citizens in the states under a federal Social Security program for older disabled Americans.

The court's ruling in *U.S. v. Vaello-Madero* held it was unconstitutional for Congress to confer Supplemental Income Security (SSI) benefits for U.S. citizens in a state, but then terminate those benefits when citizens determined eligible in a state relocate to Puerto Rico.

The court ruled that denial of eligibility for benefits based on residence in Puerto Rico is a violation of the 5th Amendment right to equal protection under law. The legal logic of the court's order, if upheld, would in effect extend the SSI program to Puerto Rico, and presumably U.S citizens denied SSI benefits in other U.S. possessions with the same "unincorporated" territory status.

Since 1901 the U.S. Supreme Court has consistently upheld its ruling in *Downes v. Bidwell* that fundamental principles of the U.S. Constitution apply to federal actions in unincorporated territories, but not in the same way as in states of the union, as well as territories incorporated into the union as a step toward statehood.

Instead, constitutional standards apply in unincorporated territories as provided by federal territorial laws passed by Congress and federal court rulings, rather than by direct application of the Constitution.

As recently as 2016 the U.S. Supreme Court has confirmed in *Puerto Rico v. Sanchez Valle* that under *Downes v. Bidwell* the U.S. Congress can apply federal law in Puerto Rico and four smaller unincorporated territories differently than in the states or incorporated territories.

But if *Vaello-Madero* is upheld it will be the first time since the high court invented unincorporated territory status in 1901 in *Downes* and the ensuing *Insular Cases* that any federal court final ruling has declared a federal territorial law unconstitutional.

In the 1976 case of *Board of Examiners v. Flores De Otero* the U.S. high court declared a Puerto Rico professional licensing law to be an unconstitutional denial of federal equal protection rights. Other acts by territorial governments have been held unconstitutional as well, but never a federal law.

Instead, federal laws that would not be allowed in states or even incorporated territories have been allowed by federal courts in unincorporated territories. For example, in the 1980 case of *Harris v. Rosario* the U.S. Supreme Court upheld an act of Congress denying equal federal benefits to disadvantaged children in Puerto Rico.

The court's reasoning in the 1980 *Harris v. Rosario* case was that historically and in the modern era U.S citizen residents in territories still do not have the same political and legal status, rights or duties under the Constitution as

citizens of the states.　The court also cited lower federal revenue from the territory as a “rational basis” for lower benefits for citizens in an unincorporated territory.

Why the *Vaello-Madero* case matters

In this new case, *Valleo-Madero*, the Social Security Administration determined U.S. citizen Jose Luis Vaello-Madero eligible to receive (SSI) when residing in New York.　When he moved to Puerto Rico his benefits continued until the Social Security Administration discovered he was resident of a territory Congress excluded from SSI.

Not only were SSI benefits terminated when his move to Puerto Rico was discovered, but Vaello-Madero was sued in the federal court by the Department of Justice to demand repayment for over $28,000 in benefits that had been given to the territorial resident.　There were even menacing suggestions welfare fraud allegations could be implicated.

When Vaello-Madero finally got a pro-bono lawyer, he asserted in court that less than equal benefits to U.S. citizens in the territories was an unconstitutional denial of equal protection.　Alarms must have gone off at the U.S. Department of Justice, which then tried to dismiss the case to avoid federal litigation risk.

The risk federal lawyers at DOJ sought to avoid was that the U.S. federal courts might order SSI for all eligible U.S. citizens in Puerto Rico.　By extension that could include any other territories also excluded from the program by Congress, i.e. Guam and U.S. Virgin Islands, possibly even U.S. nationals of American Samoa.　Only the Northern Mariana Islands is eligible for SSI, under federal statutes making it a U.S. territory in 1976 after SSI had been established.

The federal District Court in Puerto Rico denied the U.S. motion to dismiss and ruled Vaello-Madero was entitled under the U.S. Constitution to keep his benefits the same as if in a state.　The U.S. Department of Justice appealed the lower District court result, but as USDOJ feared the ruling was upheld by the First Circuit Court of Appeals.

However, the three-judge appellate court panel articulated its own reasoning on the facts and the law.　The panel noted that unlike back in 1980 when the

Harris case was decided, federal revenues from Puerto Rico are now greater than federal tax collections in several states. That's one more reason the court ruled there is now no "rational basis" for providing less benefits to the territory in 2020.

Notwithstanding the differences between the political and legal status of states and territories, treating U.S. citizens differently without a rational basis is one definition of discrimination denying equal protection of law. In that larger context, the ruling means the 5th Amendment equal protection clause in effect applies in Puerto Rico essentially as it applies in the states, at least for purposes of the SSI provisions of the Social Security Act.

This ruling that the 5th Amendment equal protection clause applies to an unincorporated territory does not extend other equal constitutional rights to unincorporated territories. It remains a legal and political reality that the U.S. Constitution applies by its own force only in the states and territories fully incorporated into the union by Congress as a step toward statehood.

But even for incorporated territories, the *Vaello-Madero* ruling, if upheld, means only that irrational discrimination by Congress is not permissible in territories because it violates the "fundamental right" to equal protection. However, that does not mean territories have equality with states. Indeed, the First Circuit ruling in this case does not overrule *Downes* or the *Insular Cases*, but merely finds that this specific denial of equal rights in a territory went too far.

Thus, the *Vaello-Madero* ruling does not mean the U.S. Constitution secures full equality with citizens in a state. In addition to permitting discrimination not allowed in states or incorporated territories, the recent ruling in this case does not secure the right for Americans in Puerto Rico or the territories to vote for full and equal representation in Congress and the Electoral College, that comes only with statehood.

Court's opinion shines but stiff challenge is expected on appeal

The court's opinion in Vaello-Madero was authored by nationally recognized jurist, Judge Juan R. Torruella, who is from Puerto Rico. Clearly, he and the other two judges saw this case as a chance to right what the court determined was wrong in how Americans in the territory have been treated by

Congress, in some respects at least.

However, the U.S. has petitioned the U.S. Supreme Court to review the First Circuit ruling and reverse it. The USDOJ petition argues the U.S. high court should uphold *Downes*, *Harris* and *Sanchez Valle*, and leave the question of equal rights and status in the territories to Congress. Not without juridical predicates the U.S. Department of Justice pleadings note that the Constitution itself treats territories differently than states.

The USDOJ briefs make strong arguments the Court should follow *Harris* and *Torres* cases giving Congress latitude to treat territories different than states and other territories. But Vaello-Madero and the Federal District Court in Puerto Rico and the First Circuit Court of Appeals presented sound arguments that those cases were different as to facts and law.

By applying the 5th Amendment directly to federal actions in a territory, the V*aello-Madero* ruling runs parallel to a recent lower trial court ruling in the Federal District Court in Utah. In the case of Fitisemanu v. U.S. the court ruled the U.S. citizenship clause of the 14th Amendment applies to the tiny territory of American Samoa, and by extension all five current unincorporated territories, including Puerto Rico.

If both rulings are upheld on appeal, it could come to pass that the citizenship clause of the 14th Amendment and 5th Amendment equal protection clause would apply directly to all the territories rather than by federal territorial statutes and court rulings. That would define the rights of citizens in the territories in virtual equivalency with citizens in the already incorporated territories and even states.

Progressive but incomplete incorporation replaces statehood?

Direct application of the 14th and 5th amendments in unincorporated territories by court edict sure sounds like incorporation to most territorial law experts. But does it mean the same as historical Congressionally enabled incorporation leading to statehood? Or, is it a new judicially invented form of incorporation that may or may not lead to permanent union and eventual statehood?

Last time we went down that road the U.S. Supreme Court gave us the judicially invented doctrine of the 1901 Dow*nes v. Bidwell* ruling defining some

territories as unincorporated. So, perhaps we will we see a new political status doctrine emerge that secures some but not fully equal right of citizenship for Americans in the last five territories. Will these territories be provided a path to full rights of citizenship possible only through statehood?

As flawed as D*ownes v. Bidwell* may have been, the 2016 ruling in *Sanchez Valle* confirmed unincorporated territory doctrine still provides the ground rules for Congress and the territories to address the political question of terms for transition from territorial status to full democratic self-government. For any territory that wants to retain U.S. citizenship full equality comes only with statehood. That reality finally has produced a political catharsis and majority rule in Puerto Rico favoring statehood. The court's ruling in *Vaello-Madero* may build into a tsunami of Puerto Ricans nationwide favoring equal civil rights through incorporation leading to statehood for Puerto Rico. For smaller territories *Vaello-Madero* could mean Congress would be obliged to offer equal rights possible only through integration into an existing state. If not, then separate sovereign nationhood without U.S. citizenship like the Micronesian mini-nation "free association" model is the only other fully democratic non-territorial status option.

Since there are 3.5 million U.S. citizens in Puerto Rico and 5.5 million Americans from Puerto Rican in the 50 states, denying statehood to Puerto Rico may soon become politically unsustainable. Especially given our nation's historical commitment to integration of territories with U.S. citizen populations.

The huge Puerto Rico voting blocs in multiple swing states may be encouraged by the ruling in the *Vaello-Madero* case to support statehood sooner rather than later for the last large U.S. territory.

Part Two

II. Democracy and federal judicial power in American Samoa

Does our Constitution require - or allow - one judge to overrule the will of a people?

In *Fitisemanu v. U.S.* a federal judge in Utah tentatively granted the claim for judicially imposed reform of federal territorial law. The court's judgment

not only purported to change the status and rights of the three plaintiffs, but for the entire population of American Samoa. Recognizing the potential for unintended consequences, the judge wisely stayed his own order pending the conspicuous necessity of an appeal.

If upheld, the effect of the ruling would be to incorporate American Samoa permanently into the union, at least for purposes of the national citizenship provision in Section 1 of the 14th Amendment to the U.S. Constitution.

That would overrule the more than century old territorial law jurisprudence of the *Insular Cases.* See, *Downes v. Bidwell*, 182 244 (1901), *Dorr v. U.S.* 195 U.S. 138 (1904). Though controversial and imperfect, for 119 years the U.S. Supreme Court has upheld the *Insular Cases* doctrine, which holds the U.S. Constitution does not apply in unincorporated territories by its own force as it does in the states of the union.

In contrast, since 1789 federal territorial law has held that to the extent not applicable only to states the Constitution applies directly in territories permanently incorporated into the union during transition to statehood. See, *Scott v Sandford* 60 U.S. 393 (1857); *Rassmussen v. U.S.* 197 U.S. 516 (1905).

Accordingly, it is a material and critical deficiency that the court in *Fitisemanu* failed to address the constitutional implications of ruling that the 14th Amendment applies directly of its own force in an unincorporated territory in the same manner as it applies in the states and incorporated territories.

Insular Cases jurisprudence providing a juridical paradigm for determining if and how any provision of the Constitution applies in an unincorporated territory. In overturning the *Insular Cases* the court in *Fitisemanu* had a responsibility to determine if and how other constitutional provisions apply and change the legal and political status of the 55,000 Americans who are residents of American Samoa.

If *Fitisemanu* is upheld, the question of perhaps greatest import is whether there is any basis for distinguishing the ruling so that the legal logic employed by the court does not also apply to four other locally self-governing unincorporated territories. Those four territories – Guam, Puerto Rico, Northern Mariana Islands (NMI) and U.S. Virgin Islands (USVI) – have a combined population of 3.5 million Americans.

Judicial shell game

In reaching its unprecedented ruling, the court in *Fitisemanu* relied on the 1898 ruling in *U.S. v. Wong Kim Ark*, which confirmed the 14th Amendment citizenship of an American born in a state of the union to parents who were lawfully present in the U.S. under federal law.

The Congressional Research Service has confirmed that Wong Kim Ark has never been expanded by courts to apply beyond its original ruling. Rather, Wong Kim Ark stands only to confirm for 14th Amendment birthright citizenship for persons born in state of the union to parents lawfully present in the United States. See, for example, "Birthright Citizenship Under the Fourteenth Amendment of Persons Born in the United States to Alien Parents," LOC-CRS: RL33079 - August 12, 2010, pp. 15–16.

The court in *Fitisemanu* also side stepped the important fact that almost all of the same court members who had decided *Wong Kim Ark* in 1898 three years later also decided the *Downes v. Bidwell* in 1901. Thus, there can be no doubt the court ruled in *Downes* with full awareness of what it recently had done in *Wong Kim Ark*.

The court ruled in *Downes* that the 14th Amendment did not apply directly of its own force to in unincorporated territories in the same manner as it applies in the states and incorporated territories. That ruling still defines the status of American Samoa and the other four remaining unincorporated U.S. territories, Guam, Puerto Rico, NMI and USVI.

It is juridical and historical revisionism to apply the ruling in the *Wong Kim Ark* case in an unincorporated territory, when that ruling applied only to states. That is underscored by the fact that the same high court members who had joined in the *Wong Kim Ark* case also joined in the *Insular Cases* that defined unincorporated territory status outside direct application of the Constitution.

It is anticipated by most informed observers that the appellate court will apply and rely on the Insular Cases unincorporated territory doctrine in disposition of the appeal of the *Fitisemanu* ruling.

Differentiating constitutional and statutory nationality/citizenship

The national citizenship provision in Sec. 1 of the 14th Amendment confers

constitutionally defined guaranteed citizenship for persons born or naturalized in a state or territory permanently incorporated into the union. For purposes of the citizenship provision of the 14th Amendment, the terms "citizenship" and "nationality" have the same meaning.

Before and after adoption of the 14th Amendment in 1868, Congress had and retains power to confer citizenship by statute under the "uniform naturalization clause" in Art. I, Sec. 8, Cl. 4 of the Constitution. For purposes of statutory naturalization, the terms "national" and "citizen" can be used interchangeably, or given different meaning by Congress, as in the case of American Samoa and the other four territories.

Congress has exercised that naturalization power by conferring statutory U.S. nationality and citizenship under 8 U.S.C. 1401 to various classifications of persons. Sec. 1401 explicitly defines classes of person who acquire the status of "national" and "citizen," and those who acquire the status of "national" but not "citizen." Each class of statutory citizenship is defined by and subject to varying conditions precedent and conditions subsequent (See, Rogers v. Bellei).

Statutory conditions and classifications apply to the nationality and citizenship of persons born to U.S. citizen parents in foreign countries (8 USC 1401), as well as foreign nation immigrants who apply and become eligible for statutory nationality and citizenship pursuant to U.S. immigration laws. If naturalized in a state, persons who earn statutory naturalization thereby acquire constitutional nationality and citizenship under Section 1 of the 14th Amendment.

In addition, and separately, Congress has conferred U.S. nationality and citizenship under Art. I, Sec. 8, Cl. 4 for persons born in unincorporated territories (8 USC 1402-1408). The birthright nationality in American Samoa and nationality with "Balzac citizenship" in Puerto Rico, Guam, NMI and USVI are statutory not constitutional.

That is, all persons born in any on the five remaining unincorporated territories have statutory birthright U.S. nationality currently conferred under federal law applicable to those territories. Birthright citizenship in territories is not conferred under the 14th Amendment, if it were there would be no need for 8 USC 1401-1408.

The differentiation between constitutional and statutory nationality and citizenship is illustrated by federal territorial nationality law applicable to the NMI. Under Sec. 301, Sec. 501 and Sec. 506 of U.S. Public Law 94-241, birth in the NMI is treated "as if" the 14th Amendment applied, and is also "deemed" to be statutory birthright citizenship under 8 USC 1401 and 8 USC 1408.

Like the general birthright umbrella provision of 8 USC 1401 as it relates to birth in a state, the CNMI's "as if a state" naturalization provision adopts constitutionally expressed nationality and citizenship in Section 1 of the 14th Amendment as a statutorily prescribed federal territorial law conferring nationality and citizenship.

Illustrating the maxim that all citizens are nationals but not all nationals are citizens, in the case of Puerto Rico, Guam, NMI and USVI Congress denominated U.S. nationality for persons born in those four territories as a class of "citizenship." However, the status and rights of "nationals" in American Samoa and "citizens" in the other four unincorporated territories are indistinguishable while residing in any of the territories.

There arises a difference between the status and rights of a "national" from American Samoa and a "citizen" from the other four unincorporated territories only upon relocation to establish legal residence in a state. "Citizens" from Puerto Rico, Guam, NMI and USVI are also "nationals, and have the same limited rights when present in a territory, but nationals from the "Balzac citizen" territories are treated as full and equal citizens in a state.

It is important to understand that "nationals" in American Samoa have the same birthright allegiance and limited rights while present in that territory as "citizens" have in the other four territories. Yet, unlike "citizens" from the other territories, "nationals' from American Samoa who relocate to a state are required to apply for "citizenship" to acquire full and equal rights as Americans in a state.

U.S. Supreme Court updates territorial jurisprudence

Contrary to pleadings by plaintiffs and amicus curie in *Fitisemanu*, the denial of fully equal rights of national citizenship in unincorporated territories is not first and foremost a result of the *Insular Cases*. Rather, it is the U.S.

Constitution that denies full and equal citizenship rights in the territories, but limiting one of the most fundamental rights of all – government by consent through representation in Congress and the Electoral College – to citizens in the states.

From *Downes* in 1901 to *Balzac* in 1922 and thereafter, the *Insular Cases* held persons who acquire statutory U.S. nationality at birth in an unincorporated territory, with or without further statutory classification as "citizens," do not have the same status and rights equal to U.S. citizens born or residing in states.　But that denial of equal rights and status is not limited to non-citizen and or citizen nationals in the unincorporated territories as defined in the *Insular Cases*.

U.S. citizens in territories permanently incorporated into the union during transition to statehood are not subject to the law of the *Insular Cases*.　And, yet, even though most provisions of the U.S. Constitution apply directly in incorporated territories, U.S. citizens in territories in permanent union are denied fully equal status and rights that come only with statehood.　As in the unincorporated territories, that includes federal voting rights for fully equal representation in the political branches of the national government.

Similarly, the arguments of plaintiffs and amici in *Fitisemanu* and other related cases include assertions that the *Insular Cases* must be overturned as unconstitutionally racist in motive and effect.　That is a political and ideological rather than a legal or constitutional question.

If it were true, then active institutionalized acts of racism under the color of law must be imputed to every member of the U.S. Supreme Court and federal judge in the modern era who has joined in rulings upholding the Insular Cases.　From *Board of Examiners v. Flores de Otrero* 426 U.S. 572 (1976) to *Puerto Rico v. Sanchez Valle* 136 S. Ct 1863 (2016), every high court justice, and every lower court federal judge, who promulgated rulings based on the *Insular Cases* implicitly stands so accused.

That argument increasingly is perceived as legal hyperbole associated with anachronistic content of 1901 court opinions.　Those judicial commentaries in the original Insular Cases were influenced as much or more by platform of a robust pro-imperialist caucus in Congress, and that racist/imperialist thinking was also promoted by law professors at Harvard and Yale law

schools extolling the advent of imperial rule over foreign lands and peoples. But time and federal territorial jurisprudence have not stood still since Oliver Wendell Holmes and Louis Brandeis joined in the less than persuasive logic employed by Chief Justice Taft in *Balzac v. Puerto Rico*. That deeply flawed and arguably racist/imperialist 1922 ruling extended the Insular Cases to territories where Congress conferred a statutory "citizenship" classification on the U.S. nationals in an unincorporated territory. That became the precedent for statutory "citizenship" for nationals in four current territories.

The provocative race narrative of *Fitisemanu* plaintiffs aside, the anomalies of federal territorial law and policy in the 20th century deserve more serious consideration by Congress. For whatever the past may or may not mean, the denial of full democratic rights now best can be rectified when each of the last five unincorporated territories with local governments achieves a permanent constitutionally defined political status based on self-determination.

That truism is underscored by the 2016 ruling of the U.S. Supreme Court in *Puerto Rico v. Sanchez Valle,* affirming the unincorporated territory doctrine of *Downes v. Bidwell*, *Balzac*, and the *Insular Cases* emanating therefrom. In doing so, the court explicitly affirmed the Balzac doctrine prescribing the remedy for denial of equal rights to U.S. nationals from the territories, including nationals also classified as "citizens."

That path of redress is to relocate to states to secure the same status and rights as citizens of the states. This "Balzac citizenship" model was then extended by Congress to Guam, NMI and USVI. One question arising under Balzac that so far has never been addressed is whether relocation to a state could be regulated differently than travel between states. The likely answer is yes, because the federal courts have never ruled unconstitutional any act by the federal government treating a territory differently than a state. It would not be inconsistent with the *Insular Cases*, as applied to nationals with "Balzac citizenship" from the other four territories, to also allow "nationals but not citizens" from American Samoa to acquire equal rights of U.S. citizenship upon relocating and establishing legal residence in a state.

Indeed, consistent with the 2016 ruling in *U.S. v. Sanchez Valle* ruling, Congress can and arguably should exercise its authority and responsibility

under the Territorial Clause to normalize the status of U.S. nationals born in American Samoa who establish legal residence in a state of the union.

The effect of a statute addressing the rights of American Samoa nationals residing in states can and arguably should be clear and straight forward. Stated simply, Congress should provide that U.S. national from American Samoa who establish residence in a state have the same rights while state residents as nationals born in any other unincorporated territory who also are classified as "citizens" under federal territorial law.

It is vital to understand that "nationals but not citizens" in American Samoa and "nationals and citizens" in the other four self-governing unincorporated territories have the same allegiance to the America as well as the same status and rights while residing in any of those five territories.

Accordingly, there is no beneficial federal or local purpose served by treating nationals without citizenship from American Samoa differently than nationals with citizenship from the other four territories when residing in a state.

Equal rights in states for "nationals" and "citizens" from territories

Currently, U.S. citizens from Guam, Puerto Rico, NMI and USVI have limited rights of national citizenship compared to citizens of the states, including denial of voting rights for full and equal representation in Congress and the Electoral College.

Nationals from American Samoa also have the same limited rights as citizens from the other territories in the national political process compared to citizens of the states.

Both citizens and nationals from the territories have limited rights in the territory, but can acquire equal rights with citizens in the states by relocating to a state.　It also bears repeating that both citizens and nationals have the same allegiance and duties while residing in a territory or a state.

Citizens from territories acquire equal rights simply by relocating and establishing legal residency.　Nationals acquire equal rights in states by applying for reclassification as citizens after relocating and establishing residency in a state.

Both citizens and nationals return to a status with limited rights of nation citizenship coopered to citizens in the states when they return to reside in a

territory. All U.S. citizens lose equal rights of national citizenship, including voting rights for representation in the national political process when they establish legal residence in a territory.

As noted, the federal territorial laws conferring statutory birthright nationality and/or citizenship in the unincorporated territories are enacted in the exercise the Art. IV territorial clause power of Congress.

Again, that territorial law power is carried out in tandem with the power of uniform law of naturalization under Article I, Sec. 8, Cl. 4 of the Constitution. The naturalization clause has continued to give Congress power to create statutory citizenship, both before and since the 14th Amendment established constitutional citizenship based on birth or naturalization in a state.

The birthright nationality and citizenship statutes of the U.S. are codified at 8 U.S.C. 1401-1408. 8 U.S.C. 1401 in the umbrella domestic birthright naturalization provision, mixing both citizenship based on place of birth in the U.S. and citizenship derived from parents, depending on the circumstances of birth.

Like Section 1 of the 14th Amendment, 8 U.S.C. 1401 recognizes both U.S. nationality and U.S. citizenship for persons born in a state of the union. To that extent nationality and citizenship mean the same.

However, 8 USC 1401-1408 also confers U.S. nationality and/or citizenship for persons who are not born in a state, including those born overseas to U.S. citizen parents and persons born in the incorporated territories.

It is in conferring U.S. nationality but not citizenship outside the states of the union and in unincorporated territories that 8 U.S.C. 1401-1408 gives different meanings to the terms "national" and "citizens." That's true even though in many respects those two words mean the same for both nationals and citizens when residing in an unincorporated territory.

Again, it is when citizens and nationals relocate from an unincorporated territory to a state that the terms have different meaning, and the difference is primarily in the procedure nationals must follow to acquire fully equal citizenship.

It is in that context that Congress can and should ensure that nationals from American Samoa have the same status and rights when present in a state as "citizens" from the other unincorporated territories.

There are precedents for non-citizens in territories being enabled to enjoy some or all of the rights of citizens in the states, as permitted by Congress. Thus, as already noted, under the 1899 treaty of cession with Spain, Puerto Rico, Philippines and Guam were ceded to the United States (United States Statutes at Large 30:17540). Article IX of that treaty expressly provided that Congress would determine the "political status and civil rights" of the foreign citizen population in those territories.

Accordingly, the people classified as "nationals" were deemed not to be aliens for purposes of U.S. immigration laws. See, *Gonzales v. Williams*, 192 U.S. 1 (1904). Under the Insular Cases doctrine of non-incorporation, U.S. nationals from these territories were allowed under federal territorial law to travel, reside and work in the states.

The unincorporated territories organized under federal law also have been enabled to establish local self-government. It was in that context that the non-citizen nationals of Puerto Rico petitioned for and were granted statutory U.S. citizenship that was interpreted in the Balzac ruling to be indistinguishable from national status in the territory, and equal to constitutional citizenship only upon relocation to a state.

An earlier example, before that of statutory citizenship granted in Puerto Rico, followed U.S. acquisition of sovereignty over a foreign citizen population in the territory ceded to the U.S. by France in the 1803 Louisiana Purchase.

Even before the territory that became Louisiana was incorporated into the U.S. as a step toward eventual statehood, under Article Ill of the treaty the people were "incorporated" into the body politic of the America people a part of the transition to full "rights, advantages and immunities" as U.S. citizens. It was not until nine years later, in 1812, Louisiana was admitted to the union, the first of fifteen states all or part of which would be formed from the Louisiana Purchase territory was admitted to the union.

Even more on point, perhaps, in the case of Alaska, the U.S. also acquired sovereignty from Russia over a territory inhabited by a foreign population. Article III of the treaty recycled Article III of the Lousiana Purchase treaty:

> "The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the

> United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion." See, Rassmussen v. United States, 197 U.S. 516 at p. 522 (1905)

Based on those precedents and common sense about the territorial political status issues raised in the *Tuaua*, *Segovia* and *Fitisemanu* cases, one way to resolve equities between nationals and citizens residing in the states would be for Congress to consider a federal territorial law statue along the following lines:

> "Notwithstanding any other provisions of law, any person who is a U.S. national pursuant to 8 U.S.C. 1408 based on birth in American Samoa shall upon entering a state of the union have and enjoy full and equal rights, privileges and immunities that U.S. citizens have in any state of the union, to the same extent as persons acquiring United States nationality and citizenship under federal territorial law based on birth in any other unincorporated territory; provided that this provision shall apply in any state only for the period any such person is present in a state, and provided that all persons born in the unincorporated territory of American Samoa will continue to have the status of United States nationals, whether residing in American Samoa or residing in a state; and provided further that U.S. passports issued to nationals residing in American Samoa shall continue to identify the bearer as a "National But Not Citizen of United States."

Federal territorial status policy and international law

The current statutory citizenship conferral is constitutionally temporary, just as statutory territorial status defined by Congress is constitutionally temporary. Since territorial status can be discontinued and terminated by Congress, it is consistent for the citizenship of people born in the territory to be terminable.

Once citizenship is conferred on an individual it is for life unless renounced. But Congress can repeal the statute and end future conferral of citizenship. It would be perverse to give permanent citizenship to the future population of a territory that does not have a permanent political status. The only permanent status is statehood, or permanent incorporation into the union

during transition to statehood.

In the modern era of democratic self-determination and decolonization, both U.S. and international law contemplate the attainment of equal national citizenship for the people of all dependent territories. Equal national citizenship can be attained through statehood or national independence.

Accordingly, statutory national citizenship that can be continued or ended is consistent with the power of Congress to determine the future status of unincorporated territories. It also is consistent with post WWII decolonization principles recognizing the freely expressed will of the people, as between status options available to them under governing national and international law.

Under both U.S. law (P.L. 108-188) and international law (See, UNGA Res. 1541, 1960; UNGA Res. 2625, 1970), the options for Congress and the people of the remaining unincorporated territories to achieve equality with all other citizens at all levels of government are:

- Full integration though incorporation leading to statehood, direct admission as a state, or incorporation into an existing state.
- Independence based on separate sovereignty, nationality and citizenship.
- Independence with a treaty of free association defining a close strategic and economic alliance contingent on core features including -
    - ○ Unilateral termination by either party to ensure association is free and preserve the right of both nations to full independence without association.
    - ○ Separate national citizenship consistent with separate national sovereignty under international law and federal-state sovereignty and citizenship under American system of constitutional federalism.

Implementing the *Fitisemanu* ruling would supersede and end birthright U.S. nationality and citizenship conferred under current federal territorial nationality and citizenship statutes. Not just for American Samoa, but all remaining unincorporated territories.

If the court's order takes effect, it would nullify the federal statutes codified at 8 U.S.C. 1401-1408. Those federal laws are the only source of U.S. nation-

ality and citizenship in our locally self-governing territories.

In contrast, the *Fitisemanu* ruling would make birthright national citizenship sourced in Section 1 of the 14th Amendment a permanent constitutional right. National citizenship would become a vested right and status, unlike territorial status and statutory nationality and citizenship.

However, while grandiosely declaring vested and permanent national citizenship for an unincorporated territory, the court utterly and abjectly failed to address much less secure the interdependent rights of state citizenship that are also guaranteed in Section 1 of the 14th Amendment.

That is a constitutional conundrum because only statehood secures the right to consent of the governed through federal voting rights for representation in the U.S. Congress and the Electoral College.

That means under *Fitisemanu* the territory of American Samoa and the other territories could be subjected under federal territorial law to state-like uniform taxation and obligations without state-like rights, powers or equal footing under federal law. All without any consent of the governed through voting representation.

At the same time, unlike constitutionally incorporated territories, under the *Fitisemanu* ruling the five remaining unincorporated territories would be bound to U.S. citizenship, but there would be no binding promise, commitment, policy favoring, or even allowing eventual future full and equal rights of U.S. nationality and citizenship that come only with statehood.

That condition of partial but incomplete constitutional integration would be imposed by the *Fitisemanu* ruling is a form of colonial servitude. That is the term for binding federal supremacy, vested permanent citizenship but no binding rights or powers.

That is limited recourse permanent political and citizenship status. It provides no meaningful mechanism for consent of the government, and no assured access to self-determination on any future political status with equal rights of national citizenship.

In contrast to constitutionally sourced citizenship that would be imposed by *Fitisemanu*, the current federal territorial statute sourced nationality and citizenship granted by statute can be ended by statute. Since it's discretionary and Congress is not obligated to confer nationality or citizenship,

conditions and terms to acquire and/or lose it can be prescribed by operation of federal statute. See, *Rogers v. Bellei*, 401 U.S. 815 (1971).

If the *Fitisemanu* ruling is implemented, the relationship between the people of the unincorporated territories would change, even though the democratic deficit and asymmetry of government powers and rights of the people would not be enhanced. Specifically, under the 14th Amendment citizenship guaranteed by the court all territorial peoples would acquire constitutional citizenship beyond the reach of Congress.

Under the *Fitisemanu* ruling there could be no conditions precedent to acquire, or conditions subsequent to retain, constitutionally guaranteed U.S. citizenship. See, Afroyim v. Rusk, 387 U.S. 253 (1967).

Congress has power to decide a territory will not be incorporated into the union leading to statehood, or integration into an existing state. Because only citizens of a state can vote for equal representation in the national political process, rejection of statehood by Congress could mean the territory concerned will never attain full U.S. nationality and citizenship equal to that of citizens in a state.

Thus, court ordered partial or even complete incorporation without a legal right or even political commitment to eventual statehood is an indefinite condition of suspended self-determination at the national level, and limited less than equal or fully democratic local self-government in a dependent client state.

Conclusion

The elected leaders and duly-constituted territorial government of America Samoa have intervened in opposition to the plaintiffs in the three above-referenced lawsuits at the trial and appellate levels.

The formal legal position and policy of the territorial government regarding these three cases has been adopted by democratic majority rule in accordance with its constitutional process. The formal position taken in each court case by local leaders is that any change in political status and civil rights of persons born in American Samoa should be initiated by the territorial government based on majority rule in an act of democratic self-determination.

Similarly, the current pro-statehood party majority in power under the territorial governing regime in Puerto Rico conducted two political status referenda in 2012 and 2017. In each of these two status votes, a majority twice has expressed a preference for transition to statehood to achieve fully equal rights of national citizenship.

The body politic of Guam, NMI and USVI, respectively, have not yet achieved democratic majority rule expressing a preference on future status, through an applicable constitutional process of self-determination. Those three territories are still engaged in weighing the relative efficacy of seeking "autonomy" for the local regime of territorial government, on one hand, and equal rights through statehood or integration into a state, on the other hand.

The government of American Samoa would appear to prefer the status quo. Because the status quo is under attack by lawyers for suitors, Congress should consult with territorial leaders about the efficacy of a federal statute giving nationals from that territory who establish legal residence in a state the same status as nationals with "Balzac citizenship" from other unincorporated territories who move to a state.

For Puerto Rico, virtual incorporation under the 14th Amendment pursuant the Fitisemanu ruling, for purposes of constitutional citizenship without a binding commitment to statehood based on self-determination, does not ensure fully equal rights of national citizenship. Indeed, a vested right to constitutional citizenship, without a path to equal rights under all provisions of the U.S. Constitution, could make permanent territorial status based on denial of equality the new status quo.

Accordingly, actual enforcement of the *Fitisemanu* ruling would be not only a set-back, but aggressively undermines orderly self-determination to secure equal rights of nationality and citizenship for the patriotic and loyal American citizens of American Samoa, Guam, Puerto Rico, NMI and USVI.