

NLWJC - Kagan

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Puerto Rico Questions [3]

The Interagency Working Group on Puerto Rico
Telephone (202) 482-0037 • Facsimile (202) 482-2337

Facsimile Transmission Cover Sheet

Date: 6/10

To: Elena Kagan

Fax Number: _____

From: Jeff Farrow

Message: Please note re the renunciation of
U.S. citizenship issue.

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Number of pages with cover: 2

Otro ciudadano puertorriqueño

Por la Redacción

CLARIDAD 6/6/96

La Embajada estadounidense en México le informó a Pablo Marcano, portavoz del Comité Unitario Contra la Represión y por la Defensa de los Prisioneros Políticos (CUCRE), su descertificación oficial como ciudadano norteamericano.

De acuerdo a Marcano, la funcionaria de la Oficina de Visas y Pasaportes de dicha embajada, Silvia Delgado, ratificó la decisión emitida por el Departamento de Estado de los Estados

... el gobierno federal le requirió a Marcano que entregara su pasaporte ...

Unidos. Sin embargo, el gobierno federal le requirió a Marcano que entregara su pasaporte para poder enviarle la copia de certificación. Esta situación es diferente a la surgida en el caso de Juan Mari Brás, a quien los federales no quisieron aceptar su pasaporte

cuando renunció a la ciudadanía estadounidense al decirle que este era de su propiedad porque había pagado por él.

Marcano informó a Delgado, que quemó su pasaporte al llegar a Puerto Rico para dramatizar su "reclamo por la excarcelación de los prisioneros políticos y una salida al caso colonial." La funcionaria le indicó que tenía que someter una declaración jurada para poder enviarle la descertificación de la ciudadanía estadounidense.

En esta declaración jurada, preparada por

el ciudadano puertorriqueño y veterano líder independentista Juan Mari Brás, Marcano puntualizó las motivaciones políticas que dan base a su acción.

El también ex-prisionero político manifestó que viajará en julio próximo a México y luego a La Habana para validar su derecho a viajar como ciudadano puertorriqueño. Además, a través de estos viajes reafirmará la trascendencia de su ciudadanía por sobre las violaciones coloniales que implican las leyes de inmigración norteamericanas para con los puertorriqueños.

The U.S. Embassy in Mexico accepted Pablo Marcano's renunciation of his U.S. citizenship. However, the Federal government asked Marcano to rescind his passport in order for them to mail him a copy of the certificate. This situation is different from that of Juan Mari Brás who was told to keep his passport since he had paid for it.

Desestiman pedido recusar Mari Bras

6/6/96

Por Julio Víctor Ramírez Redactor — EL VOCERO

MAYAGUEZ — Tras concluir que la parte recusadora no cumplió con los requisitos contemplados en la Ley Electoral, la Junta Local de Inscripción Permanente (JIP), desestimó el martes el pedido de la Dra. Miriam Ramírez de Ferrer, para que se impugne como elector al líder independentista Juan Mari Brás. Ramírez está alegando que el Lcdo. Mari Bras quedó descalificado como votante en la lista luego de renunciar a la ciudadanía norteamericana.

Aunque los miembros de la JIP no entraron en los méritos sobre el derecho de Mari Bras a permanecer como elector bona fide, el querellado aseguró "que nadie podrá recusarlo el día de las elecciones generales, por tratarse de un asunto juzgado".

El planteamiento del licenciado Mari Bras fue refutado de inmediato por el abogado Vidal Rodríguez Amaro, representante legal de la Dra. Ramírez de Ferrer. Este adelantó que recurrirá a los foros pertinentes para probar que la JIP erró en su apreciación de los hechos.

Los comisionados Angie Lugo (PIP), Manuel Pérez (PPD) e Israel Forestier (PNP) declararon sin lugar la recusación invocada por Ramírez de Ferrer, aduciendo que el emplazamiento del Lcdo. Mari Bras, no se efectuó como lo dispone la Ley.

Juan Mari Brás is being allowed to vote in the November elections in Puerto Rico. | ? on what basis?

EL VOCERO, San Juan — Jueves 6 de Junio de 1996 12

The Interagency Working Group on Puerto Rico

June 10, 1996

MEMORANDUM FOR ELENA KAGAN
Associate Counsel to the President
Executive Office of the President

FROM: JEFFREY FARROW, Co-Chair

SUBJECT: PUERTO RICO STATUS BILL UPDATE

The House insular affairs subcommittee will mark-up the bill that would provide for 1) Puerto Rico to choose between nationhood and statehood before 1999 and 2) an implementation process lasting at least 12 years with the Commonwealth option from the islands' 1993 vote on status aspirations added to it Wednesday.

The mark-up was scheduled shortly after commonwealth party president Acevedo responded to a request from primary sponsor and full Committee Chairman Young and Subcommittee Chairman Gallegly for any commonwealth proposals that his party wanted considered other than the 1993 option by continuing to object to the bill. (Gov. Rossello and other leaders of the statehood party and leaders of the independence party continue to support the bill.)

I expect amendments:

- that are negative regarding the commonwealth option;
- to eliminate the suggestion that U.S. citizenship would be withdrawn from individuals born before nationhood under that option; and
- to make a number of relatively lesser changes to the bill.

The key staffer has indicated that we will be asked to report on the amended bill's provisions prior to a full Committee mark-up around the end of the month.

The Interagency Working Group on Puerto Rico

June 3, 1996

NOTE FOR ELENA KAGAN

FROM: JEFF FARROW
Co-Chair

As you may know, the minimum wage bill that the House sent the Senate recently would end the federal tax credit related to U.S. corporate investments in insular areas that is a substantial factor in Puerto Rico's economy and politics, 'Section 936'.

Background points on the issue follows.

Section 936

- Although the Sec. 936 tax credit is a major factor in Puerto Rico's economy, it is also widely considered to be 'corporate welfare' -- primarily because some companies are said to get excessive benefits in comparison to the jobs that they create.
- Congress' budget bill would have terminated the incentive, phasing-out benefits for manufacturers already in the islands over 10 years and taxing income on earnings now kept tax-free in Puerto Rico and other Caribbean areas (QPSII) as of 1/1/96.
- The President objected to these provisions ignoring Puerto Rico's needs in vetoing the bill.
- The President's subsequent balanced budgets have proposed --
 - 1) phasing-out only the part of the credit based on income merely attributed to the islands over five years;
 - 2) using the revenue estimated to be raised (\$2.3 billion from FY '97 to FY '02 according to CBO) for SSI, Medicaid, employment, and other programs needs in Puerto Rico;
 - 3) continuing the part of the credit based on real economic activity in the islands -- wages, local taxes, and capital investments -- and expanding it by allowing companies to take the credit for this activity in previous years; and
 - 4) continuing QPSII benefits.
- The President personally pressed for this in the budget talks.
- The new GOP budget continues to assume the end of Sec. 936.
- The GOP phase-out was included in the legislation that would provide tax benefits to small business that is now tied to the minimum wage hike bill. The only change is that the phase-out of the economic activity credit would occur under tax code Sec. 30A.
- The Administration strongly opposed this proposal in the House, worked with Rep. Rangel to identify other taxes to pay for the small business benefits, and offered its plan as an alternative. But the bill was approved with the GOP proposal, 414-10.
- Many Puerto Ricans oppose the proposal but Gov. Rossello sees it as a step toward a permanent Sec. 30A economic activity credit. Some companies which now take large 936 credits support it because of specific phase-out provisions.
- The Administration continues to advocate its plan. The Senate is expected to take up the bill soon.

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Facsimile Transmission Cover Sheet

Date: 5/6

To: Elena Kagan

Fax Number: _____

From: Jeff Farrow

Message: Draft DAT letter on HR 3024
earlier draft testimony on US citizenship
in Puerto Rico that Teresa Roseborough gave me
my own internal comments on HR 3024
8/6/05.

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Number of pages with cover: 12

Handwritten signatures and initials:
J. Farrow
E. Kagan
T. Roseborough
HR 3024

The Interagency Working Group on Puerto Rico

April 4, 1996

MEMORANDUM FOR ELENA KAGAN
Associate Counsel to the President

FROM: JEFFREY FARROW
Co-Chair

SUBJECT: PUERTO RICO POLITICAL STATUS BILL

This is to update you on the House bill that would provide Puerto Rico with political status options to be voted on before 1999 and provide a transition and implementation process for a selected status change.

The bill, H.R. 3024, has now been sponsored by 41 Members, mostly Democrats.

The key sponsors, Resources Committee Chairman Young and Resident Commissioner Romero-Barcelo, have indicated that changes will be made in response to two major criticisms of the bill --

- to add a commonwealth option (it now only has nationhood and statehood choices) and
- to not suggest that U.S. citizenship would be taken away from persons born before nationhood.

They are also considering other changes that were proposed by Gov. Rossello, who heads the insular party that favors statehood, or by the head of the independence party in their generally supportive testimony during a hearing in Puerto Rico.

Leaders of the commonwealth party continue to oppose the bill. They say that efforts should be focused on implementing the Commonwealth option that won a plurality in the locally-called status vote in 1993 and other options should not be considered.

The Committee still suggests that further action is expected this month (possibly a hearing at which we will be asked to appear).

Room 6061, U.S. Department of Commerce Building, Washington, D.C. 20230
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The Interagency Working Group on Puerto Rico

March 12, 1996

MEMORANDUM FOR ELENA KAGAN
Associate Counsel to the President

FROM: JEFFREY FARROW, Co-Chair

SUBJECT: PUERTO RICO NATIONHOOD OR STATEHOOD BILL

A bill that would ask Puerto Ricans to choose between nationhood and statehood before 1999 has been introduced by the chairman of the House committee of jurisdiction and a number of other Members of Congress. The bill would also provide for an at least 12 year follow-up process that would require a transition plan and further votes in Congress and Puerto Rico on the plan and final implementation of the status change.

Among those who joined Resources Chairman Young in sponsoring the measure were Speaker Gingrich (in an unusual endorsement), Resident Commissioner Romero-Barcelo, Rep. Serrano, and International Relations Committee Chairman Gilman.

The bill is supported by Governor Rossello and by leaders of Puerto Rico's independence party. But it is opposed by leaders of the party that supports the existing governing arrangement and that promoted the Commonwealth option that won a plurality in Puerto Rico's 1993 vote on status aspirations.

Other critics include Resources Ranking Democrat George Miller and Reps. Gutierrez and Velazquez.

Young and others justify the bill's options by asserting that commonwealth doesn't provide for fully democratic governance.

I have reiterated that the President is committed to supporting the status determined by the people of Puerto Rico among commonwealth, statehood, and independence options and that he continues to be willing to work with Puerto Ricans' various representatives and the Congress to develop a process that would enable Puerto Ricans' aspirations for self-determination to be fulfilled.

A full committee hearing is scheduled for March 23rd in Puerto Rico. I am told that we will be asked to testify next month.

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draft

COMMENTS ON H.R. 3024

Sec. 2. is superfluous. It is also ~~more~~ more controversial than informative. It is selective and incomplete information.

(2) inaccurately suggests that citizenship was extended to Puerto Rico (rather than persons born in Puerto Rico) and that the Constitution was partially applied to Puerto Rico in 1917.

(3) inaccurately suggests that Congress amended Puerto Rico's constitution (rather than approving it subject to Puerto Rico amending it) and does not note that the people of Puerto Rico also authorized, wrote, and approved the constitution. It, further, does not note that this was a joint action termed a "compact". It suggests that Puerto Rico's government is now called the "Commonwealth" whereas the constitution has always been the constitution of the Commonwealth. It states that the constitution did not change the territory's economic, political and legal relationship with the U.S. whereas the committee reports on the legislation referred to Puerto Rico's political, social, and economic relationship.

(4) ignores that Pres. Bush's statement was made after a joint request from Puerto Rico's three major political parties for a federal authorization for a status referendum and that Congress authorized and recognized the 1950 and '52 referenda in which Puerto Ricans freely expressed their wishes regarding their political status.

(6) suggests that the Interagency Group's mandate is limited to "administrative" (rather than all policy) and policy only in light of the 1993 status vote (rather than also the other issues that Puerto Rico raises).

(7) suggests that the fact of inconsistent and conflicting interpretations of the 1993 results is noteworthy when most events are interpreted in inconsistent and conflicting ways. Its statement regarding congressional responsibility is superfluous.

(9) inaccurately suggests that Puerto Rico is within the American political system and has been within the customs territory of the U.S. for nearly 100 years.

(10) is confusing in its suggestion that the status needs to be "either without or within" U.S. sovereignty -- what else could it be?

Sec. 3. suggests that the self-determination process should meet unspecified internationally recognized standards while ignoring the U.N. action on the matter -- General Assembly Res. 748.

Sec. 4. (a) would objectionably require (rather than authorize) a referendum. Additionally, the approval referred to is not clear -- could it be of the Puerto Rico laws providing for the referendum? It would also objectionably not include a commonwealth option.

(1) does not make a distinction between the independence and free association options and suggests in (A) that Puerto Rico would conduct external affairs under free association whereas they could be delegated to the U.S. under that status. (B) states that the free association pact would be an international one (vs. one just between the U.S. and P.R.). (C) does not recognize that some parts of the Constitution and U.S. laws could apply in Puerto Rico under free association. (D) objectionably suggest that citizenship would be withdrawn from Puerto Ricans who are already citizens when sovereignty is attained. (F) does not outline the assistance that would be provided whereas we should make some basic commitments to enable the option to be evaluated and its suggests that the amounts will be subject to U.S. discretion as opposed to negotiated and committed (as in the cases of the existing FAS'). (G) seems to suggest that rights vested by employment abroad would not be honored.

(2) is superfluous -- statehood is defined in the Constitution except for any special provisions that Congress might want to apply. (A) is confusing in suggesting that Puerto Rico would be fully self-governing whereas the U.S. would because of the supremacy clause. (E) and (F) are inaccurate in stating that Puerto Rico would be represented in the Senate and the Electoral College proportionate to population. (G) seems to suggest that all state language requirements would apply since there is no federal requirement.

(b) (1) suggests that the consultation is limited to the submission of the plan (rather than development).

(3) (B) suggests that the legislature as well as the governor would have to certify the results.

(4) suggests that the proclamation would have to be issued immediately upon receipt of the results (as opposed to within a period after receipt).

(c)(4) also suggests an immediate proclamation.

Sec. 5. (a)(1) suggests that the Elections Commission can determine voter eligibility beyond its authorization under local law and eligibility of any non-residents (i.e., the entire population of the Earth).

The Interagency Working Group on Puerto Rico

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104TH CONGRESS
2D SESSION

H. R. 3024

To provide a process leading to full self-government for Puerto Rico.

IN THE HOUSE OF REPRESENTATIVES

MARCH 6, 1996

Mr. YOUNG of Alaska (for himself, Mr. GALLEGLY, Mr. GINGRICH, Mr. SERRANO, Mr. KENNEDY of Rhode Island, Mr. RAHALL, Mr. ROMERO-BARCELÓ, Mr. GILMAN, Mr. BURTON of Indiana, Mr. UNDERWOOD, Mr. CALVERT, Mr. LONGLEY, Mr. GENE GREEN of Texas, Mr. DEUTSCH, and Mr. KLINK) introduced the following bill; which was referred to the Committee on Resources, and in addition to the Committee on Rules, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide a process leading to full self-government for Puerto Rico.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “United States-Puerto Rico Political Status Act”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for
7 this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Findings.
- Sec. 3. Policy.
- Sec. 4. Process for Puerto Rican full self-government, including the initial decision stage, transition stage, and implementation stage.
- Sec. 5. Requirements relating to referenda, including inconclusive referendum and applicable laws.
- Sec. 6. Congressional procedures for consideration of legislation.
- Sec. 7. Availability of funds for the referenda.

1 **SEC. 2. FINDINGS.**

2 The Congress finds the following:

3 (1) Puerto Rico is an unincorporated and lo-
4 cally self-governing territory of the United States,
5 ceded to the United States and under this Nation's
6 sovereignty pursuant to the Treaty of Paris ending
7 the Spanish-American War in 1898. Article IX of
8 the Treaty of Paris expressly recognizes the author-
9 ity of Congress to provide for the political status of
10 the inhabitants of the territory.

11 (2) United States citizenship was extended to
12 Puerto Rico in 1917, as well as partial application
13 of the United States Constitution.

14 (3) In the period 1950-1952, Congress author-
15 ized, amended, and then approved a constitution for
16 Puerto Rico's local government, which is now called
17 the "Commonwealth of Puerto Rico", without alter-
18 ing the territory's fundamental economic, political,
19 and legal relationship with the United States.

20 (4) In the 1989 State of the Union Message,
21 President George Bush urged the Congress to take

1 the necessary steps to authorize a federally recog-
2 nized process allowing the people of Puerto Rico, for
3 the first time since the Treaty of Paris entered into
4 force, to freely express their wishes regarding their
5 future political status in a congressionally recognized
6 referendum, a step in the process of self-determina-
7 tion which the Congress has yet to authorize.

8 (5) In November of 1993, the Government of
9 Puerto Rico conducted a plebiscite initiated under
10 local law on Puerto Rico's political status. In that
11 vote none of the three status propositions received a
12 majority of the votes cast. The results of that vote
13 were: 48.6 percent commonwealth, 46.3 percent
14 statehood, and 4.4 percent independence.

15 (6) In 1994, President William Jefferson Clin-
16 ton established the Executive Branch Interagency
17 Working Group on Puerto Rico to coordinate the re-
18 view, development, and implementation of executive
19 branch administrative policy concerning Puerto Rico
20 in light of the November 1993 plebiscite in the is-
21 lands.

22 (7) There have been inconsistent and conflicting
23 interpretations^{in Puerto Rico} of the 1993 plebiscite results, and
24 under the Territorial Clause of the Constitution (ar-
25 ticle IV, section 3, clause 2), Congress has the au-

1 thority and responsibility to determine Federal pol-
2 icy and clarify status issues in order to advance the
3 self-determination process in Puerto Rico.

4 (8) On December 14, 1994, the Puerto Rico
5 Legislature enacted Concurrent Resolution 62, which
6 requested the 104th Congress to respond to the re-
7 sults of the 1993 Puerto Rico Status Plebiscite and
8 to indicate the next steps in resolving Puerto Rico's
9 political status.

10 (9) Nearly 4,000,000 United States citizens live
11 in the islands of Puerto Rico, which have been with-
12 in the American political system and the United
13 States customs territory for almost 100 years, mak-
14 ing Puerto Rico the oldest, largest, and most popu-
15 lous United States island territory at the southeast-
16 ern-most boundary of our Nation, located astride the
17 strategic shipping lanes of the Atlantic Ocean and
18 Caribbean Sea.

19 (10) Full self-government for Puerto Rico is at-
20 tainable only through establishment of a political
21 status either without or within United States sov-
22 ereignty, under which Puerto Rico is no longer an
23 unincorporated territory subject to the plenary au-
24 thority of Congress arising from the Territorial
25 Clause.

1 **SEC. 3. POLICY.**

2 In recognition of the significant level of local self-gov-
3 ernment which has been attained by Puerto Rico, and the
4 desire by both the United States and Puerto Rico to en-
5 able the people of the territory to achieve full self-govern-
6 ment through a self-determination process consistent with
7 United States and internationally recognized standards,
8 this Act is adopted with a commitment to encourage the
9 mutual development and implementation of procedures to
10 determine the political status of Puerto Rico.

11 **SEC. 4. PROCESS FOR PUERTO RICAN FULL SELF-GOVERN-**
12 **MENT, INCLUDING THE INITIAL DECISION**
13 **STAGE, TRANSITION STAGE, AND IMPLEMEN-**
14 **TATION STAGE.**

15 (a) INITIAL DECISION STAGE.—A referendum on
16 Puerto Rico's political status shall be held not later than
17 December 31, 1998. The referendum shall be held in ac-
18 cordance with the applicable provisions of Puerto Rico's
19 electoral law and other relevant statutes, and approval
20 must be by a majority of the valid votes cast. The referen-
21 dum shall be on the following question:

22 "Which path leading to full self-government for Puer-
23 to Rico do you prefer to be developed through a transition
24 plan enacted by the Congress and approved by the people
25 of Puerto Rico?"

1 “(1) A path of separate Puerto Rican sov-
2 ereignty leading to independence or free association,
3 in which—

4 “(A) Puerto Rico is a sovereign nation
5 with full authority and responsibility for its in-
6 ternal and external affairs, exercising in its own
7 name and right the powers of government with
8 respect to its territory and population, language
9 and culture, and determining its own relations
10 and participation in the community of nations;

11 “(B) a negotiated treaty of friendship and
12 cooperation or an international bilateral pact of
13 free association terminable at will by either
14 Puerto Rico or the United States, defines fu-
15 ture relations between Puerto Rico and the
16 United States, providing for cooperation and
17 assistance in matters of shared interest as
18 agreed and approved by Puerto Rico and the
19 United States pursuant to this Act and their re-
20 spective constitutional processes;

21 “(C) a constitution democratically insti-
22 tuted by the people of Puerto Rico, establishing
23 a republican form of full self-government and
24 securing the rights of citizens of the Puerto
25 Rican nation, is the supreme law, and the Con-

1 stitution and laws of the United States no
2 longer apply in Puerto Rico;

3 “(D) Puerto Rico exercises the sovereign
4 power to determine and control its own nation-
5 ality and citizenship, and United States nation-
6 ality and citizenship conferred on the people of
7 Puerto Rico based upon birth in the territory
8 during the period in which the United States
9 exercised sovereignty and jurisdiction over
10 Puerto Rico is withdrawn in favor of Puerto
11 Rican nationality and citizenship, and the Unit-
12 ed States Congress has authority to prescribe
13 criteria for affected individuals to establish eli-
14 gibility for retention of United States national-
15 ity and citizenship or naturalization in the
16 United States on a basis which does not create
17 an exception to the establishment and preserva-
18 tion of separate United States and Puerto
19 Rican nationality and citizenship;

20 “(E) upon recognition of Puerto Rico by
21 the United States as a sovereign nation and es-
22 tablishment of government-to-government rela-
23 tions on the basis of comity and reciprocity,
24 Puerto Rico’s representation to the United
25 States is accorded full diplomatic status;

1 “(F) Puerto Rico is eligible for United
2 States assistance provided on a government-to-
3 government basis, including foreign aid or pro-
4 grammatic assistance, at levels determined at
5 the discretion of Congress and the President;

6 “(G) property rights and previously ac-
7 quired rights vested by employment in Puerto
8 Rico or the United States are honored, and
9 where determined necessary such rights are
10 promptly adjusted and settled consistent with
11 government-to-government agreements imple-
12 menting the separation of sovereignty; and

13 “(H) Puerto Rico is outside the customs
14 territory of the United States, and trade be-
15 tween the United States and Puerto Rico is
16 based on a treaty.

17 “(2) A path under United States sovereignty
18 leading to statehood, in which—

19 “(A) the people of Puerto Rico are fully
20 self-governing with their rights secured under
21 the United States Constitution, which is the su-
22 preme law and has the same force and effect as
23 in the other States of the Union;

24 “(B) the sovereign State of Puerto Rico is
25 in permanent union with the United States, and

1 powers not delegated to the Federal Govern-
2 ment or prohibited to the States by the United
3 States Constitution are reserved to the people
4 of Puerto Rico or the State Government;

5 “(C) United States citizenship of those
6 born in Puerto Rico is guaranteed and pro-
7 tected to the same extent as those born in the
8 several States;

9 “(D) residents of Puerto Rico have equal
10 rights and benefits as well as equal duties and
11 responsibilities of citizenship, including payment
12 of Federal taxes, as those in the several States;

13 “(E) Puerto Rico is represented in the
14 United States Senate and the House of Rep-
15 resentatives proportionate to the population;

16 “(F) Puerto Rico is enfranchised to vote
17 for United States presidential and vice-presi-
18 dential electors proportionate to the population;
19 and

20 “(G) Puerto Rico adheres to the same lan-
21 guage requirement as in the several States.”

22 (b) TRANSITION STAGE.—

23 (1) PLAN.—Within 180 days of the receipt of
24 the results of the referendum from the Government
25 of Puerto Rico certifying approval of a ballot choice

1 in a referendum held pursuant to subsection (a), the
2 President shall submit to Congress legislation for a
3 transition plan of 10 years minimum which leads to
4 full self-government for Puerto Rico consistent with
5 the terms of this Act and in full consultation with
6 leaders of the three branches of the Government of
7 Puerto Rico, the principal political parties of Puerto
8 Rico, and other interested persons as may be appro-
9 priate.

10 (2) CONGRESSIONAL CONSIDERATION.—The
11 plan shall be considered by the Congress in accord-
12 ance with section 6.

13 (3) PUERTO RICAN APPROVAL.—

14 (A) Not later than 180 days after enact-
15 ment of an Act pursuant to paragraph (1) pro-
16 viding for the transition to full self-government
17 for Puerto Rico as approved in the initial deci-
18 sion referendum held under subsection (a), a
19 referendum shall be held under the applicable
20 provisions of Puerto Rico's electoral law on the
21 question of approval of the transition plan.

22 (B) Approval must be by a majority of the
23 valid votes cast. The results of the referendum
24 shall be certified to the President of the United
25 States by the Government of Puerto Rico.

1 (4) EFFECTIVE DATE FOR TRANSITION PLAN.—

2 Upon receipt of the results of the referendum under
3 this subsection certifying approval of the transition
4 plan, the President of the United States shall issue
5 a proclamation announcing the effective date of the
6 transition plan to full self-government for Puerto
7 Rico.

8 (c) IMPLEMENTATION STAGE.—

9 (1) PRESIDENTIAL RECOMMENDATION.—Not
10 less than two years prior to the end of the period
11 of the transition provided for in the transition plan
12 approved under subsection (b), the President shall
13 submit to Congress legislation with a recommenda-
14 tion for the implementation of full self-government
15 for Puerto Rico consistent with the ballot choice ap-
16 proved under subsection (a).

17 (2) CONGRESSIONAL CONSIDERATION.—The
18 plan shall be considered by the Congress in accord-
19 ance with section 6.

20 (3) PUERTO RICAN APPROVAL.—

21 (A) Within 180 days after enactment of
22 the terms of implementation for full self-govern-
23 ment for Puerto Rico, a referendum shall be
24 held under the applicable provisions of Puerto
25 Rico's electoral laws on the question of the ap-

1 proval of the terms of implementation for full
2 self-government for Puerto Rico.

3 (B) Approval must be by a majority of the
4 valid votes cast. The results of the referendum
5 shall be certified to the President of the United
6 States by the Government of Puerto Rico.

7 (4) EFFECTIVE DATE OF FULL SELF-GOVERN-
8 MENT.—The President of the United States shall
9 issue a proclamation announcing the date of imple-
10 mentation of full self-government for Puerto Rico,
11 upon receipt of the results of the referendum certify-
12 ing approval of the terms of implementation.

13 **SEC. 5. REQUIREMENTS RELATING TO REFERENDA, IN-**
14 **CLUDING INCONCLUSIVE REFERENDUM AND**
15 **APPLICABLE LAWS.**

16 (a) APPLICABLE LAWS.—

17 (1) REFERENDA UNDER PUERTO RICAN
18 LAWS.—The referenda held under this Act shall be
19 conducted in accordance with the laws of Puerto
20 Rico, and voter eligibility for residents and non-
21 residents shall be determined by the Puerto Rico
22 State Election Commission.

23 (2) FEDERAL LAWS.—The Federal laws appli-
24 cable to the election of the Resident Commissioner
25 of Puerto Rico shall, as appropriate, also apply to

1 the referenda. Any reference in such Federal laws to
2 elections shall be considered, as appropriate, to be a
3 reference to the referenda, unless it would frustrate
4 the purposes of this Act.

5 (b) CERTIFICATION OF REFERENDA RESULTS.—The
6 results of each referendum held under this Act shall be
7 certified to the President of the United States and the
8 Senate and House of Representatives of the United States
9 by the Government of Puerto Rico.

10 (c) CONSULTATION AND RECOMMENDATIONS FOR IN-
11 CONCLUSIVE REFERENDUM.—

12 (1) IN GENERAL.—If a referendum provided in
13 this Act does not result in approval of a fully self-
14 governing status, the President, in full consultation
15 with leaders of the three branches of the Govern-
16 ment of Puerto Rico, the principal political parties
17 of Puerto Rico, and other interested persons as may
18 be appropriate, shall make recommendations to the
19 Congress within 180 days of receipt of the results of
20 the referendum.

21 (2) EXISTING STRUCTURE TO REMAIN IN EF-
22 FECT.—If the inhabitants of the territory do not
23 achieve full self-governance through either integra-
24 tion into the Union or separate sovereignty in the
25 form of independence or free association, Puerto

1 Rico will remain an unincorporated territory of the
2 United States, subject to the authority of Congress
3 under Article IV, Section 3, Clause 2 of the United
4 States Constitution. In that event, the existing Com-
5 monwealth of Puerto Rico structure for local self-
6 government will remain in effect, subject to such
7 other measures as may be adopted by Congress in
8 the exercise of it's Territorial Clause powers to de-
9 termine the disposition of the territory and status
10 of it's inhabitants.

11 **SEC. 6. CONGRESSIONAL PROCEDURES FOR CONSIDER-**
12 **ATION OF LEGISLATION.**

13 (a) **IN GENERAL.**—The Chairman of the Committee
14 on Energy and Natural Resources shall introduce legisla-
15 tion providing for the transition plan under section 4(b)
16 and the implementation recommendation under section
17 4(c), as appropriate, in the United States Senate and the
18 Chairman of the Committee on Resources shall introduce
19 such legislation in the United States House of Representa-
20 tives, providing adequate time for the consideration of the
21 legislation pursuant to the following provisions:

22 (1) At any time after the close of the 180th cal-
23 endar day beginning after the date of introduction of
24 such legislation, it shall be in order for any Member
25 of the United States House of Representatives or

1 the United States Senate to move to discharge any
2 committee of that House from further consideration
3 of the legislation. A motion to discharge shall be
4 highly privileged, and debate thereon shall be limited
5 to not more than two hours, to be divided equally
6 between those supporting and those opposing the
7 motion. An amendment to the motion shall not be in
8 order, and it shall not be in order to move to recon-
9 sider the vote by which the motion was agreed to or
10 disagreed to.

11 (2) At any time after the close of the 14th leg-
12 islative day beginning after the last committee of
13 that House has reported or been discharged from
14 further consideration of such legislation, it shall be
15 in order for any Member of that House to move to
16 proceed to the immediate consideration of the legis-
17 lation (such motion not being debatable), and such
18 motion is hereby made of high privilege. An amend-
19 ment to the motion shall not be in order, and it shall
20 not be in order to move to reconsider the vote by
21 which the motion was agreed to or disagreed to. For
22 the purposes of this paragraph, the term "legislative
23 day" means a day on which the United States
24 House of Representatives or the United States Sen-
25 ate, as appropriate, is in session.

1 (b) COMMITMENT OF CONGRESS.—Enactment of this
2 section constitutes a commitment that the United States
3 Congress will vote on legislation establishing appropriate
4 mechanisms and procedures to implement the political sta-
5 tus selected by the people of Puerto Rico.

6 (c) EXERCISE OF RULEMAKING POWER.—The provi-
7 sions of this section are enacted by the Congress—

8 (1) as an exercise of the rulemaking power of
9 the Senate and the House of Representatives and, as
10 such, shall be considered as part of the rules of each
11 House and shall supersede other rules only to the
12 extent that they are inconsistent therewith; and

13 (2) with full recognition of the constitutional
14 right of either House to change the rules (so far as
15 they relate to the procedures of that House) at any
16 time, in the same manner, and to the same extent
17 as in the case of any other rule of that House.

18 **SEC. 7. AVAILABILITY OF FUNDS FOR THE REFERENDA.**

19 (a) IN GENERAL.—

20 (1) AVAILABILITY OF AMOUNTS DERIVED FROM
21 TAX ON FOREIGN RUM.—During the period begin-
22 ning on October 1, 1996, and ending on the date the
23 President determines that all referenda required by
24 this Act have been held, the Secretary of the Treas-
25 ury, upon request from time to time by the Presi-

1 dent and in lieu of covering amounts into the treas-
2 ury of Puerto Rico under section 7652(e)(1) of the
3 Internal Revenue Code of 1986, shall make such
4 amounts available to the President for the purposes
5 specified in subsection (b).

6 (2) USE OF UNEXPENDED AMOUNTS.—Follow-
7 ing each referendum required by this Act and after
8 the end of the period specified in paragraph (1), the
9 President shall transfer all unobligated and unex-
10 pended amounts received by the President under
11 paragraph (1) to the treasury of Puerto Rico for use
12 in the same manner and for the same purposes as
13 all other amounts covered into the treasury of Puer-
14 to Rico under such section 7652(e)(1).

15 (b) GRANTS FOR CONDUCTING REFERENDA AND
16 VOTER EDUCATION.—From amounts made available
17 under subsection (a)(1), the President shall make grants
18 to the State Elections Commission of Puerto Rico for
19 referenda held pursuant to the terms of this Act, as fol-
20 lows:

21 (1) 50 percent shall be available only for costs
22 of conducting the referenda.

23 (2) 50 percent shall be available only for voter
24 education funds for the central ruling body of the
25 political party or parties advocating a particular bal-

1 lot choice. In the case that more than one party is
2 advocating a ballot choice, the 50 percent shall be
3 apportioned equally among the parties.

4 (c) ADDITIONAL RESOURCES.—In addition to
5 amounts made available by this Act, the Puerto Rico Leg-
6 islature may allocate additional resources for administra-
7 tive and voter education costs to each party so long as
8 the distribution of funds is consistent with the apportion-
9 ment requirements of subsection (b).

○

Puerto Rico Mtg 5-7-96

What should it look like - mutual compact?

2 issues in bill

1. No commonwealth option

3. Provide free assoc. option

2. Citizenship issue -

Bill seems to say - loss of citizenship?

3.7 in US civ in island

2.7 in states of PR origin

In PR, wld move in event of indep./no citizenship

TR shut suggested: under indep. P. can make election

New bill may well say This.



Letter going in opposite direction

May ask us for our views before such a change is made

Some practical probs. - US citizens abroad -
how to protect etc.

But very few want indep anyway -
This is not a real danger.

The Interagency Working Group on Puerto Rico

April 29, 1996

Elena,

The enclosed law review article provides a good background on the U.S. insular areas political status issue (in addition to a serious examination of a major matter in federal relations with the Commonwealth of the Northern Mariana islands). But I'm primarily sending it with -- an encouragement that you read it when you have time -- because the points that it makes regarding insular status possibilities are important and provocative.

Jeff

HASTINGS CONSTITUTIONAL LAW QUARTERLY

DOES THE CONSTITUTION FOLLOW THE FLAG INTO UNITED STATES
TERRITORIES OR CAN IT BE SEPARATELY PURCHASED AND SOLD?

Marybeth Herald

UNIVERSITY OF CALIFORNIA
SPRING 1995



HASTINGS COLLEGE OF THE LAW
VOLUME 22, NUMBER 3

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CLINTON LIBRARY PHOTOCOPY

Does the Constitution Follow the Flag Into United States Territories or Can It Be Separately Purchased and Sold?

By MARYBETH HERALD*

Table of Contents

Introduction	708
I. The Constitution and the Territories: A Brief History ..	713
A. The Supreme Court and the Territories	713
B. Federal Appellate Court Interpretation of the <i>Insular Cases</i>	719
1. Jury Trials and War Claims—The D.C. Circuit Expands Constitutional Protections	719
2. The Ninth Circuit Narrows Constitutional Protections	721
II. Further Separating Constitutional Protections from the Flag— <i>Wabot v. Villacrusis</i>	722
III. Criticism of <i>Wabot</i>	725
A. The Problem of Precedent	725
B. Misapplication of an Incorrect Test—Reclassifying Fundamental Rights	730
C. Other Possible Paths to the Same Result	733
1. Affirmative Action Theory	733
2. The Native American Analogy	734
3. The NMI Status Argument: The NMI Is Not a State Under the Fourteenth Amendment	738
IV. Reliance on the Wrong Policy	741
A. Covenant Section 805: Preserving the Cultural Base?	742
1. The Goal—Protection of NMI Culture	742
2. Unimpressive Implementation	744

* Associate Dean and Assistant Professor, Thomas Jefferson School of Law; J.D. Harvard Law School, 1980. The author lived and practiced law in the Northern Mariana Islands from 1982 to 1991 and was counsel on appeal in *Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir.), *cert. denied*, 113 S.Ct. 675 (1992).

- a. Land as the Proxy for a Complicated Problem—Race as the Easiest Answer 744
- b. The Problem Is Outside Pressure; the Solution Is a Restriction Designed with the Help of Outside Pressure? 748
- c. Majority Enforcement of a Racial Restriction Against a Minority 749
- 3. The Results Are Clear 751
- B. Preserving the Consensual Nature of the Agreement 753
 - 1. Working with a Fait Accompli 753
 - 2. Negotiating the United States Constitution 755
 - a. Constitutional Principles Are Not Negotiable 756
 - b. Get to Yes and Then Claim You Have an International Obligation 757
 - c. NMI Inhabitants as a Limiting Force 759
 - d. The Compromises—Sellable but Not Necessarily Workable 763
- V. Adopting a Policy That Addresses Real Problems With Solutions That Are Constitutional 765
- Conclusion 768

Introduction

A question that has long troubled courts and commentators is how far the United States Constitution should extend beyond the borders of the states.¹ At the turn of the century, the Supreme Court developed the theory that portions of the United States Constitution were severable.² Only certain parts automatically applied in United States territories. Despite criticism of this theory, for the past hundred years the United States flag has flown over a number of territo-

1. See, e.g., Gerald L. Neuman, *Whose Constitution?* 100 YALE L.J. 909 (1991); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926) ("It is difficult to realize how fervent a controversy raged some twenty-five or more years ago over the question of whether the Constitution follows the flag.").

2. See generally Coudert, *supra* note 1; Stanley Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337 (1980); Howard P. Willens and Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1393-97 (1977).

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ries that are subject to an abridged version of the United States Constitution.³

In 1992, a Ninth Circuit Court of Appeals decision made editing the Constitution for use in territories easier than ever before by allowing United States and territorial negotiators to modify or delete specific constitutional protections.⁴ The only significant limitation is that the United States and the territorial negotiators must agree on what constitutional protections apply in the territory. The decision drastically increases the power of the negotiators to expand United States sovereignty and conclude permanent political unions at the expense of individual constitutional rights. More specifically, the decision allows the United States to impose race-based land alienation restrictions in its territories outside any equal protection constraints.

The story begins in a series of opinions from decades past that came to be known as the *Insular Cases*.⁵ In these cases, the United States Supreme Court grappled with the question of whether the Constitution travels with the flag into the territories. The answer was not a clear "yes" or "no," but rather "it depends." What it depends upon is whether the territory is destined for statehood and whether the constitutional right in question is fundamental.⁶ For various reasons—some of which are suspect and subject to criticism—the United States did not want to be bound by particular constitutional provisions.⁷ In 1995, the United States and its territories still struggle to define their legal relationship and obligations.⁸ Today the territories sometimes request that the United States keep some Constitutional provisions out of their back yards.

The Commonwealth of the Northern Mariana Islands (the "NMI") is the setting for revisiting the legal and policy questions left dangling in the *Insular Cases*. The NMI's association with the United

3. As used in this Article, U.S. territories include Guam, the Virgin Islands, American Samoa, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands. The 1990 census placed their collective populations at roughly 4 million although Puerto Rico claims the majority with a population of 3.7 million. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION.

4. *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir.), cert. denied 113 S. Ct. 675 (1992).

5. See *infra* note 27.

6. See Laughlin, *supra* note 2, at 346; Willens and Siemer, *supra* note 2, at 1394; JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 54-56 (Universidad de Puerto Rico ed., 1985).

7. ARNOLD LIEBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 17-26 (1989); Laughlin, *supra* note 2, at 344-46. See *infra* note 175.

8. See *Torres v. Puerto Rico*, 442 U.S. 465 (1979).

States came after centuries of control by various foreign powers. Spain controlled the islands from the sixteenth century until 1898 when Germany took over until after World War I.⁹ After World War I, Japan acquired the NMI under a League of Nations mandate.¹⁰ In 1947, the NMI became part of the Trust Territory of the Pacific Islands under chapters XI, XII, and XIII of the United Nations Charter.¹¹ Under the Trusteeship system, the United States was "placed in a temporary guardian relationship with the trust territories for the purpose of fostering the well-being and development of the territories into self-governing states."¹²

In 1976, the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America was signed into law.¹³ The "Covenant" vested sovereignty in the United States, granted United States citizenship to the NMI's people, and contained a variety of provisions outlining the relationship between the United States and the NMI.¹⁴

In representing a consensual joining of the NMI under U.S. sovereignty, the Covenant is unique. The Covenant is also unique because the NMI and United States agreed that critical parts of the United States Constitution would not apply to the NMI. Three provi-

9. LIEBOWITZ, *supra* note 7, at 523-25.

10. *Id.* at 485-86, 525. Naomi Hirayasu, *The Process of Self-Determination and Micronesia's Political Status Under International Law*, 9 U. HAW. L. REV. 487, 490 (1987); NORMAL MELLER, *THE CONGRESS OF MICRONESIA* 10 (1969).

11. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-N. Mar. I., art. 3, 61 Stat. 3301, 3302 [hereinafter Trusteeship Agreement].

12. Harry G. Prince, *The United States, the United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 MICH. J. INT'L L. 11, 20 (1989).

13. On November 3, 1986, a formal presidential proclamation terminated the Trusteeship with the Northern Mariana Islands, conferring United States citizenship on NMI residents pursuant to § 301 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986). See *Holmes v. Director of Revenue and Taxation, Government of Guam*, 827 F.2d 1243, 1244 (9th Cir. 1987).

The United Nations terminated the Trusteeship in December, 1990. S.C. Res. 683, U.N. SCOR, 45th Sess., 2972d mtg. at 29 (1990). See *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 650 (9th Cir. 1989) ("Thus the Commonwealth is now a part of the sovereign United States and the Federated States and Marshall Islands are fully independent, sovereign nations"), *cert. denied*, 496 U.S. 925 (1990); *accord*, *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1539 (9th Cir. 1994).

14. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. §1681 (1988)) [hereinafter Covenant]; Covenant § 101 ("The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America.").

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sions of the Covenant make the document exceptional in the scheme of United States constitutional law. First, disregarding the Sixth Amendment, the local government need not provide a jury trial for offenses prosecuted by the NMI government.¹⁵ Second, the Covenant guarantees the NMI a malapportioned legislature despite the equal protection guarantee of "one person, one vote."¹⁶ Third, the Covenant provides that the NMI will restrict the alienation of land in the NMI to persons of NMI descent for the first twenty-five years following termination of the United Nations Trusteeship.¹⁷

Of these three, the jury trial provision is perhaps the easiest to address because the authority for an exemption from the procedural safeguard of a jury trial is rooted in the criticized, but not discredited, *Insular Cases*. The malapportioned legislature and racially-based land restriction provisions, however, are not sanctioned by the *Insular Cases* and implicate the substantive principle of equal protection.

Theoretically, only the local government, and not the United States government, is exempted from these particular constitutional requirements by the Covenant. The specter is not one of a large and powerful government deciding which constitutional constraints it is convenient for it to observe in the territories. Rather, the picture that is painted is one of a large and powerful government agreeing that some parts of its constitution may not be in harmony with the conditions and cultures present in the territory and therefore those provisions will not bind the local governments. Specifically, in the case of the land alienation restriction, the United States was anxious to protect NMI persons from the economic and cultural changes that would follow the improvident alienation of their land.¹⁸ They feared that the people would become the "landless pawns of outside investors" and wished to prevent subsequent dependence upon United States economic aid should that occur.¹⁹

In reviewing the land alienation restriction, the Ninth Circuit revisited the *Insular Cases* doctrine and revised it in a manner that has

15. Covenant § 501.

16. Covenant § 203(c); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (equal protection requires that both houses of a state legislature be apportioned by population). For reasons similar to those discussed in this Article, the NMI's malapportioned legislation is vulnerable to attack. See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982) ("We thus think it is clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States.").

17. Covenant § 805(a).

18. See LIEBOWITZ, *supra* note 7, at 591-92; see also Willens and Siemer, *supra* note 2, at 1405-1412.

19. *Id.*

important implications for territories and territorial policy. In *Wabot v. Villacrusis*,²⁰ the Ninth Circuit addressed the issue of whether equal protection guarantees limited United States government action in the NMI.²¹ The Ninth Circuit held that equal protection guarantees do not fully bind the United States government in the NMI, or, more specifically, that the Congress could mandate a race-based land alienation restriction in the NMI without even the minimal constraints of rational relationship review.²² The conclusion is surprising because the principle of equal protection embodies far more than procedural rights, and is one of the most basic and fundamental principles guaranteed by the United States Constitution. In upholding the NMI's racial land alienation restriction, the Ninth Circuit expanded the *Insular Cases* doctrine under the guise of encouraging territorial self-government, preserving culture, and limiting colonialism. The *Wabot* court's endorsement of a broad exemption for the United States Congress from equal protection constraints when dealing with territories opens the door to future exemptions from other constitutional constraints on government action in the territories.

There are three problems with the Ninth Circuit's approach. First, the Ninth Circuit's analysis is inconsistent with United States Supreme Court precedent. This vice may be common enough in judicial opinions to make it a mundane criticism, but the importance of the issue and the depth of disregard for *stare decisis* sets the case apart for special study. Part I of this Article provides background treatment of the application of the Constitution in the territories. The Supreme Court's, the District of Columbia Circuit's, and the Ninth Circuit's interpretations of that issue will be discussed, with special emphasis on the Ninth Circuit's reasoning in *Wabot v. Villacrusis*.²³ Part II outlines the *Wabot* decision. Part III of this Article then draws on this background to discuss why the Ninth Circuit's decision in *Wabot* misinterprets existing case law.

The second problem with the Ninth Circuit's decision is that its new analytical framework provides an imprecise standard that is likely to lead to unsound policies and disappointing results. The standard created by the Ninth Circuit is flawed even from the public policy perspectives that appeared to drive the result. In practice, the race-based land alienation restriction has not protected the NMI's cultural base,

20. 958 F.2d 1450 (9th Cir. 1992).

21. *Id.* at 1458.

22. *Id.* at 1462.

23. 958 F.2d 1450 (9th Cir. 1992).

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nor could it be expected to, given its design. Moreover, the principle that the court establishes is boundless and dangerous because the test defers to the negotiating parties to decide whether equal protection guarantees or perhaps any other constitutional restraint should protect individual rights and bridle governmental action in a territory. Part IV explores the policy behind the *Wabot* decision, and demonstrates why the policy justifications in *Wabot* are also flawed.

The rule adopted by the Ninth Circuit in *Wabot* appears, on the surface, to mitigate social and political problems caused when the United States brings territories under United States sovereignty. In reality, however, *Wabot* is little more than a politically expedient compromise that fuels expansionist policies at the expense of individual rights.

The Ninth Circuit's rule also disregards the value of constitutional principles accorded to all who live under United States sovereignty. Ultimately, the Ninth Circuit's rule may be used to strip away individual rights, encourage race and gender discrimination, and openly adopt such policies without fear of any judicial scrutiny.

The root issue is what principles should govern United States policy toward the territories. Part V of this Article discusses some constitutional protections given to states and not afforded to territories and how the *Wabot* decision contributes to, rather than corrects, these inequalities. This Article concludes that improving United States-territorial relationships lies with solutions less drastic than bargaining away the Constitution.

I. The Constitution and the Territories: A Brief History

A. The Supreme Court and the Territories

Article IV of the United States Constitution gives Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."²⁴ This provision, known commonly as the Territorial Clause, appears to give Congress almost unlimited authority to do what it pleases regarding the territories. Other enumerated powers of Congress, such as the commerce power, are read subject to other constitutional limitations, such as the Bill of Rights.²⁵ Therefore, when

24. U.S. CONST., art. IV, § 3, cl. 2.

25. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Congressional power over District of Columbia's school system subject to the limitations of the due process clause of the Fifth Amendment); see generally John Van Dyke, *The Evolving Legal Relationships Between the*

Congress acts under any power granted by the Constitution, it should act consistently with the Constitution. As the Supreme Court has observed: "[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution."²⁶

The Supreme Court, however, has not limited congressional power under the Territorial Clause in this manner. At the turn of the last century, in a series of six cases known as the *Insular Cases*,²⁷ the Supreme Court aided United States expansion by broadly construing the Territorial Clause. In the *Insular Cases*, the Supreme Court decided that not all constitutional provisions need apply to unincorporated territories—those territories not destined for statehood.²⁸ The Supreme Court determined that only fundamental rights constrain United States government action in unincorporated territories. The Court stated that fundamental rights are derived from those "principles which are the basis of all free government which cannot be with impunity transcended."²⁹ For example, the Supreme Court decided that the right to a jury trial is not fundamental,³⁰ but that the right to due process of law is fundamental.³¹

Important in this early history was an analysis distinguishing procedural from fundamental rights. In the leading case, *Downes v. Bidwell*,³² Justice White expanded on this distinction. In *Downes*, the Court decided that Congress could impose special duties on imports from Puerto Rico notwithstanding the constitutional requirement that

United States and its Affiliated U.S.-Flag Islands, 14 U. HAW. L. REV. 445 (1992); Laughlin, *supra* note 2, at 340-341.

26. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

27. *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

28. The concept of incorporation as implying eventual statehood is derived from various references in the cases. The Supreme Court has never been very precise about the definition. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 874-75 (1990).

29. *Dorr v. United States*, 195 U.S. 138, 146 (1904). The incorporated-unincorporated distinction was first drawn by Justice White in his concurring opinion in *Downes*, 182 U.S. at 292, but subsequently adopted by the Court in *Dorr v. United States*, 195 U.S. 138, 142-43 (1904) (majority) and *Balzac v. Porto Rico*, 258 U.S. 298, 304-305 (1922) (unanimous court).

30. *Balzac*, 258 U.S. at 299.

31. *Id.*

32. *Downes*, 182 U.S. at 244.

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"all duties, imposts and excises" be uniform.³³ Justice White suggested the following in a concurring opinion:

[T]here may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the right to one's own religious opinion . . . the right to personal liberty and individual property; . . . to due process of law and to an equal protection of the laws; . . . [o]f the latter class are the rights to . . . particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence . . .³⁴

In *Balzac v. Puerto Rico*,³⁵ the Court again distinguished procedural rights from fundamental rights. The Court held that the right to a jury trial was not fundamental, but stated in dicta that certain fundamental rights, such as due process of law, enjoy full application in the territories.³⁶

Commentators have concluded that the policies that provoked differentiation between unincorporated and incorporated territories, and fundamental and non-fundamental rights, were, in part, racist.³⁷ The *Insular Cases* expressed a fear that if "uncivilized race[s]" were incorporated into the United States, it might trigger "the immediate bestowal of citizenship on those absolutely unfit to receive it[.]"³⁸ The rule enunciated in the *Insular Cases*, however, provided flexibility for governance while "civilization" took place.³⁹

Thus, United States policy, as affirmed in the *Insular Cases*, reflected the view that full application of the United States Constitution

33. U.S. CONST. art. I, § 8, cl. 1.

34. *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

35. 258 U.S. at 309-10.

36. *Id.* at 312-13.

37. LIEBOWITZ, *supra* note 7, at 22. Of course, the Court often couched its language in more neutral terms; the cases discuss the fact that the people inhabiting the territories differed from Americans in "religion, customs, laws, methods of taxation, and modes of thought," *Downes*, 182 U.S. at 287, and had a "different origin and language from those of our continental people." *Balzac*, 258 U.S. at 311.

38. *Downes*, 182 U.S. at 306.

39. James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DENV. J. INT'L L. & POL'Y 35, 43 (1980) ("The rationale for the rule has been that it allows 'semi-civilized' societies to become civilized before adopting our legal system. . . ."); Coudert, *supra* note 1, at 827 ("[T]he dominant practical consideration in favor of the plenary power of Congress was the fear that, if the newly acquired territories were held to be part of the United States, people of alien race and civilization would become citizens and have the right to claim jury trials and the other safeguards of personal liberties guaranteed by the first ten Amendments to the Constitution.").

to the territories was inappropriate for both the United States (which did not want its citizenship granted to the inhabitants of the territories) and the inhabitants of its territories (who might have unwanted requirements, e.g., jury trials, thrust upon them).⁴⁰

Although the Supreme Court has never overruled the *Insular Cases*, its decision in *Reid v. Covert*⁴¹ signaled a temporary halt to their expansion. In *Reid*, the issue presented was whether a criminal defendant—a United States citizen on a United States military base in a foreign country—was entitled to indictment by grand jury and a jury trial.⁴² A four justice plurality determined that the defendant was entitled to both constitutional protections.⁴³ *Reid* criticized the *Insular Cases* while suggesting that full constitutional rights should apply, at least to all United States citizens, when the United States government was taking action against them.⁴⁴

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.⁴⁵

40. Congress might have hoped for such free ranging authority under its power to conclude international agreements after the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), suggested that Congress' treaty power could be exercised free of other constitutional restraints. *Holland*, 252 U.S. at 433-34. That decision may be seen as an attempt by the Supreme Court to extricate itself from the pre-1936 restrictive approach that the Court had taken to Congress' authority under the Commerce Clause. The suggestion never took hold. *Reid v. Covert*, discussed *infra* text accompanying notes 41-44, seemed to put it to rest. Perhaps it became unnecessary to explore that approach after the Court renounced its restrictive Commerce Clause approach and indeed the *Lochner* era. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) with *Lochner v. New York*, 198 U.S. 45 (1905). See generally, Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

41. 354 U.S. 1 (1957).

42. *Reid*, 354 U.S. at 5.

43. *Id.*

44. *Id.* at 8-9 ("While [the *Insular Cases* have] suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments."); accord, *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, Blackmun, Marshall, and Stewart, J.J., concurring).

45. *Reid*, 354 U.S. at 5-6 (footnotes omitted).

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Justice Harlan concurred in the *Reid* result,⁴⁶ but urged the adoption of an "impractical and anomalous" standard to determine whether constitutional protections should apply to United States government action outside the fifty states.⁴⁷ Harlan cautioned that "there is no rigid rule that a jury trial must always be provided in the trial of an American overseas, if the circumstances are such that trial by jury would be impractical and anomalous."⁴⁸ Rather, whether certain procedural rights were applicable to United States citizens outside the United States should depend on "the particular local setting, the practical necessities, and the possible alternatives. . . ."⁴⁹ Justice Harlan proposed a balancing test so that the Court would be able to avoid a "rigid and abstract" rule that would apply all constitutional guarantees to Americans overseas.⁵⁰

Justice Harlan relied on *Balzac v. Porto Rico*,⁵¹ one of the *Insular Cases*, as authority for his test.⁵² In *Balzac*, the Court refused to extend application of the procedural right to a jury trial to Puerto Rico.⁵³ It reaffirmed, however, that the basic rights of life, liberty, property, and due process "had from the beginning full application in the Philippines and Porto Rico. . . ."⁵⁴ Justice Harlan assumed due process applied and was balancing what process was due rather than asking whether the fundamental right of due process should attach in the territory.⁵⁵

More recently, the Supreme Court considered the *Insular Cases* in *Examining Board of Engineers v. Flores de Otero*.⁵⁶ In this case, Puerto Rico enacted a law allowing only United States citizens to practice privately as engineers.⁵⁷ The Supreme Court examined the

46. Justice Harlan's concurrence in *Reid* established a test that would gain a future following. See *infra* Section I, Part B.

47. *Reid*, 354 U.S. at 65.

48. *Id.* at 75.

49. *Id.* A fifth justice later joined in rejecting the Harlan-Frankfurter approach. See *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234 (1960) (*Reid* applies to dependents of military accused of crimes). At least one current justice, however, seems to favor Harlan's approach. See *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

50. Critics might contend that such an ad hoc approach is a vice precisely because it contains no standards, and is subject to the value judgments of individual judges.

51. 258 U.S. 298 (1922).

52. *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring).

53. *Balzac*, 258 U.S. at 309-310.

54. *Id.* at 312-13.

55. *Reid*, 354 U.S. at 75.

56. 426 U.S. 572 (1976).

57. *Id.* at 575.

Insular Cases and held that equal protection was a fundamental right applicable to the unincorporated territory of Puerto Rico.⁵⁸ Its discussion was not ambiguous: "It is clear now, however, that the protections accorded by the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico."⁵⁹ After determining that the Equal Protection Clause was fundamental, the Supreme Court examined the alienage restriction under traditional equal protection analysis and held that it did not withstand strict scrutiny.⁶⁰

Surprisingly, however, *Examining Board of Engineers* did not indicate whether it was the Fifth or the Fourteenth Amendment that invalidated Puerto Rico's law. This ambiguity, criticized by Chief Justice Rehnquist in his dissent,⁶¹ left many critical questions unanswered. If the Court invalidated the law on the basis of the Fifth Amendment, then the United States government might be responsible for all actions of the territorial government—a conclusion that would raise serious concerns about the appearance of colonialism and the limits of self-government for the territories.⁶² Moreover, if the United States government was responsible for all actions of the territorial government, then the Court should have applied the rational relationship test. The rational relationship test would have been applicable because the category under consideration was alienage, a category in which the federal government has had broad authority to make classi-

58. *Id.* at 600. The Supreme Court found it unnecessary to address the question whether it was the Fifth or Fourteenth Amendment that required the result. *Id.* at 601. The Supreme Court has held the Equal Protection clauses of the Fifth and Fourteenth Amendments are co-extensive. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2106-08 (1995).

59. *Examining Board of Engineers*, 426 U.S. at 600.

60. See also *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7 (1982) (citations omitted) ("It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. . . . In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974) (protection against government taking of property without just compensation is a fundamental right applicable in Puerto Rico) (quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953)).

61. See *Examining Board of Engineers*, 426 U.S. at 606-09 (Rehnquist, J., dissenting).

62. Cf. *Lawson*, *supra* note 28. Lawson argues that all territorial government officials are officers of the United States and must be appointed by the President with the advice and consent of the Senate. Both Guam and the NMI have elected their own officials, both governor and legislators, and appoint their own local judicial officers. As the commentator himself admits, arguing that all actions of the territorial governments are actions of the United States as a constitutional matter, and thus locally elected leaders violate the Appointments Clause, is not a politically popular suggestion. *Id.* at 899-911.

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fications under the Equal Protection Clause.⁶³ Additionally, if the Fifth Amendment was applicable, the Court would have needed to incorporate its assumption that the Fifth Amendment's Due Process Clause contains an "equal protection component" because there is no explicit Equal Protection Clause in the Fifth Amendment.⁶⁴ On the other hand, if the Court invalidated the Puerto Rican law on the basis of the Fourteenth Amendment, the Court would have needed to address how the Fourteenth Amendment applied to the government of Puerto Rico, which is not a state.⁶⁵

Although the Supreme Court left some important issues unresolved in *Examining Board of Engineers*, the Court did not waste paper on the claim that the equal protection of the laws was a non-fundamental right, inapplicable in an unincorporated territory.

B. Federal Appellate Court Interpretation of the *Insular Cases*

Justice Harlan's balancing test, although set out in a concurring opinion, provided a popular test for both the District of Columbia and Ninth Circuit Courts of Appeals when confronted with interpreting the *Insular Cases*.

1. *Jury Trials and War Claims—The D.C. Circuit Expands Constitutional Protections*

The D.C. Circuit was called upon to apply the Constitution to territories in *King v. Morton*.⁶⁶ In this case, as in *Reid* and *Balzac*, the procedural right to a jury trial was at issue.⁶⁷ A non-Samoan United States citizen, who faced prosecution by the American Samoan government for tax code violations, asserted that he had a right to a jury trial.⁶⁸ The court in *King* held that neither the procedural right to a jury trial nor an exemption from that right would be automatically granted.⁶⁹ Rather, the court held that the United States government

63. See *Mathews v. Diaz*, 426 U.S. 67 (1976).

64. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

65. See *Examining Board of Engineers*, 426 U.S. at 607 (Rehnquist, J., dissenting).

66. 520 F.2d 1140 (D.C. Cir. 1975).

67. *Id.* at 1146.

68. *Id.* at 1142. American Samoa was acquired by the United States through an International Accord and a United States Proclamation. The United States, Germany, and Great Britain met to discuss the Samoan group of islands and, ultimately the United States exercised sovereignty over them. Samoan Convention Agreement, 31 Stat. 1878 (1899); Exec. Order 125-A (Feb. 19, 1900); Joint Resolution of Feb. 20, 1929, 45 Stat. 1253, codified at 48 U.S.C.A. § 1661 (c) (West 1994).

69. *King*, 520 F.2d at 1147.

must show that the guarantee of such a right in American Samoa, an unincorporated territory, would be impractical and anomalous.⁷⁰ The D.C. Circuit court remanded the case for consideration of whether the right to jury trial would be impractical and anomalous.⁷¹ To guide this inquiry, the D.C. Circuit focused on whether American Samoan culture and society could accommodate the jury system, not whether that system might disrupt American Samoan culture and society.⁷² In other words, the emphasis was not on keeping the culture of the territory intact, but on keeping the United States Constitution intact and applicable in the territory.

In *King*, the Court of Appeals for the District of Columbia Circuit applied the impractical and anomalous test to expand application of the United States Constitution to a territory.⁷³ The court did not simply cite *Balzac* as precedent for the proposition that the procedural right of a jury trial need not be guaranteed in an unincorporated territory. Rather, it adopted the concurrence of Justice Harlan in *Reid* as the starting point. The District of Columbia Circuit used Justice Harlan's test to expand the list of rights that might be held inapplicable in an unincorporated territory. The decision in *King* takes a narrow view of the *Insular Cases* and allows the courts to deny residents of territories certain constitutional rights if guaranteeing those rights would be impractical and anomalous.⁷⁴ Furthermore, the opinion mandates that courts look at the circumstances and present conditions in detail.⁷⁵ Upon remand, the lower court concluded that, given the erosion of American Samoan culture by western world encroachment and the fact that, technically, there were enough jurors and legal personnel to successfully implement the system, it would not be impractical and anomalous to accord a jury trial right in American Samoa.⁷⁶

70. *Id.*

71. *Id.* at 1148.

72. Thus the questions remanded were "whether the Samoan mores and matai culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers[, and] whether a jury in Samoa could fairly determine the facts of a case . . . without being unduly influenced by customs and traditions of which the criminal law takes no notice[.]" *Id.* at 1147.

73. The impractical and anomalous test was derived from Justice Harlan's concurrence in *Reid*. 354 U.S. at 75.

74. *King*, 520 F.2d at 1147.

75. *Id.* ("The importance of the constitutional right at stake makes it essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts.")

76. *King v. Andrus*, 452 F. Supp. 11, 15 (D.D.C. 1977) ("The institutions of the present government of American Samoa reflect not only the democratic tradition, but also the

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At around the same time, in *Ralpho v. Bell*,⁷⁷ the D.C. Circuit also extended the right of due process to the inhabitants of the Trust Territory of the Pacific Islands, even though those inhabitants were neither living under the sovereignty of the United States nor were they United States citizens.⁷⁸ Without much discussion, the court dismissed the claim that Congress' powers under the Territorial Clause enabled it to disregard the Due Process Clause of the Fifth Amendment:

We need not in this case choose among the conflicting interpretations of Congress' Article IV [Territorial Clause] powers, however, because even under the most restrictive standard it is settled that 'there cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law. . . . ' Of course, the United States does not hold the Trust Territory in fee simple, as it were, but rather as a trustee; yet this is irrelevant to the question. That the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories. We thus find the actions of the United States in the Trust Territories constrained by due process.⁷⁹

Thus, when the dust settled, the District of Columbia Circuit had adopted Justice Harlan's test, but had not approved any deviations from constitutional protections for residents of the territories.

2. *The Ninth Circuit Narrows Constitutional Protections*

The Ninth Circuit also rejected the argument that the constitutional guarantee of a jury trial automatically extended to the territories.⁸⁰ In *Commonwealth v. Atalig*, the Ninth Circuit relied on the

apparent adaptability and flexibility of the Samoan society. It has accommodated and assimilated virtually in toto the American way of life.").

77. 569 F.2d 607 (D.C. Cir. 1977).

78. See *Gushi Bros. v. Bank of Guam*, 28 F.3d 1535, 1540 (9th Cir. 1994) ("We have never considered the Trust Territory as simply a United States territory or insular possession."); *United States v. Covington*, 783 F.2d 1052, 1055 (9th Cir. 1985), *cert. denied*, 479 U.S. 831 (1986); *accord*, *In re Rothstein*, 884 F.2d 490, 491 (9th Cir. 1989); *Barusch v. Calvo*, 685 F.2d 1199, 1202 (9th Cir. 1982); *Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243, 1245 (9th Cir. 1987) (under Trusteeship Agreement, NMI was not a possession of the United States, but a United Nations Trust administered by the United States); *People of Saipan v. United States Dept. of Interior*, 502 F.2d 90, 95 (9th Cir. 1974) ("... the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign"), *cert. denied*, 420 U.S. 1003 (1975).

79. *Ralpho*, 569 F.2d at 618-19 (citations omitted).

80. *Commonwealth v. Atalig*, 723 F.2d 682, 688 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

Insular Cases and the opinion of the D.C. Circuit in *King v. Morton* to hold that there was no constitutional right to a jury trial in the NMI.⁸¹ Although the court cited both Harlan's impractical and anomalous standard and the *King* decision, the Ninth Circuit placed little emphasis on whether a jury trial would be impractical and anomalous in the NMI. Ultimately, the court neither remanded the case for a consideration of the circumstances then present in the NMI, nor did it closely examine the justifications recited in the Covenant.⁸²

The Ninth Circuit then approached the application of the United States Constitution to the NMI in a more difficult context—the race-based land alienation restriction contained in the Covenant between the NMI and the United States.⁸³

II. Further Separating Constitutional Protections from the Flag—*Wabol v. Villacrusis*

In *Wabol v. Villacrusis*,⁸⁴ the Ninth Circuit was presented with an equal protection challenge to a United States imposed land alienation restriction that prevented anyone other than a person of Northern Marianas descent from owning land in the NMI.⁸⁵ Both lower courts considering the issue held that the land alienation restriction survived equal protection scrutiny.⁸⁶ Both courts applied only the rational rela-

81. *Id.* at 690.

82. *Id.*

83. Several district courts also have considered the same issues. For example, in *Thompson v. Kleppe*, 424 F.Supp. 1263 (D. Haw. 1976), the court held that United States citizens living on the military base of Kwajalein in the Trust Territory of the Pacific Islands were entitled to "the protections afforded them under the Constitution of the United States." *Id.* at 1268.

United States v. Tiede, 86 F.R.D. 227 (U.S.D. G.D.R. 1979), involved proceedings in a Berlin court which was designated an instrumentality of the United States and created under Article II of the United States Constitution. As the court was created by the executive branch, the Secretary of State argued that the executive-backed by foreign policy considerations had the authority to give or deny the defendant whatever constitutional protections it desired. See HERBERT J. STEIN, JUDGMENT IN BERLIN 94-100, 108-13 (1984). Such an approach was rejected by the court which emphatically declared that the United States authorities could not exercise their governmental powers "in any geographical area . . . without regard for their own Constitution." *Tiede*, 86 F.R.D. at 242.

84. 958 F.2d 1450 (9th Cir. 1992). The Ninth Circuit issued the original *Wabol* opinion in 1990, two years after oral argument. *Wabol v. Villacrusis*, 898 F.2d 1381 (9th Cir. 1990). It amended it later that year. See 908 F.2d 411 (9th Cir. 1990). The final opinion, incorporating further amendments was issued almost two years later, or four years after oral argument.

85. *Wabol*, 958 F.2d 1450.

86. The issue was considered by the local trial court—then the Commonwealth Trial Court—as well as the Federal District Court for the Northern Marianas Appellate Division which then had jurisdiction over all appeals from the local trial court. *Wabol v. Muna*, 2

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tionship test to the classification and assumed that equal protection principles were fully applicable to United States' action in the NMI.⁸⁷ Such a conclusion avoided any decision of whether the Congress could exempt itself from the equal protection guarantees of the United States Constitution when dealing with the inhabitants of a territory.⁸⁸

The issue presented in *Wabot* concerned section 805 of the Covenant, where the NMI and the United States agreed that the NMI would restrict land alienation to persons of NMI descent.⁸⁹ Section 805 provides:

Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency: (a) will until twenty five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and (b) may regulate the ex-

Commw. Rptr. 231 (Commw. Trial Ct. 1985), *aff'd in part and rev'd in part*, 2 Commw. Rptr. 963 (D. N. Mar. App. Div. 1986).

87. *Id.*; *Wabot*, 958 F.2d at 1453, 1462 n.22.

88. Covenant § 501(b) ("The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section 203 [malapportioned legislature] . . . Section 805 and the proviso of Subsection (a) of this Section [dealing with the right to jury trial in local law cases].").

The Covenant framers had taken this route, hoping to avoid the issue altogether, by maintaining that the restrictions could pass constitutional scrutiny. *See*, S. REP. NO. 433, 94th Cong., 1st Sess. 65, 74 (1975) [hereinafter Senate Committee Report] ("This subsection [501(b)] has been inserted only out of super-abundance of caution. In the discussion of those provisions it has been pointed out that they are in accord with the Constitution.").

At the time of the Covenant's approval, the Supreme Court had not yet considered the issue of affirmative action. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974) (claim involving constitutional challenge to an affirmative action program dismissed on mootness grounds). The doctrine governing race based classifications that advantage a particular ethnic group has changed and grown more stringent over the years since the Covenant was approved in the mid-1970's. *Compare Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) *with City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

One can only surmise that the Ninth Circuit felt that deviating from the lower courts' rationale was more analytically defensible, that is, that the rational relationship test was not defensible or that the land alienation restriction could not even pass the rational relationship test. The lower courts' approach, finding equal protection guarantees applicable, was more consistent with the framers' intent.

89. *Wabot*, 958 F.2d at 1459.

ment to which a person may own or hold land which is now public land.⁹⁰

Wabol involved a lease agreement that violated the NMI's land alienation restriction because the lessee, a non-NMI descent entity, took a longer lease than permitted under the NMI constitutional provision implementing section 805.⁹¹ When the lessor sued to void the lease under Article 12, the lessee attacked the constitutionality of both Covenant section 805 and Article 12 of the NMI Constitution.⁹²

The Ninth Circuit, affirming on a different ground, developed the theory that the land alienation restriction, which the court acknowledged was a racial classification,⁹³ was not subject to an equal protection attack.⁹⁴ The Covenant's language purported to exempt the land alienation restriction from equal protection scrutiny, while extending equal protection guarantees to the NMI in other respects.⁹⁵ Thus, because the NMI and United States negotiators chose to exempt this provision from the reach of equal protection guarantees, this aspect of equal protection did not apply of its own force to the NMI. The Ninth Circuit held that the land alienation restriction was not even subject to the rational basis test—the most minimal scrutiny afforded most legislation under equal protection attack. The Ninth Circuit shielded provisions of the NMI-United States Covenant from any equal protection scrutiny, holding that “the right of equal access to long-term interests in Commonwealth real estate [was not] a fundamental one which is beyond Congress' power to exclude from operation in the territory.”⁹⁶ Furthermore, the court narrowed the definition of fundamental rights to include only those rights “fundamental in the *international* sense.”⁹⁷

90. Covenant § 805.

91. The NMI corporation was not considered of Northern Marianas descent because only 50% (rather than 51%) of its voting stock was owned by persons of NMI descent and only 33% of its directors (one of three) was determined to be of NMI descent. See N. Mar. I. Const., art. XII, § 5, amended by NMI CONST. amend. 36 (1985).

92. *Wabol*, 958 F.2d at 1451.

93. *Id.* at 1451, 1455.

94. *Id.* at 1462 n.22 (“The district court's conclusion that equal protection analysis was applicable was error.”).

95. Covenant § 501 (listing specific constitutional provisions applicable to the NMI and then stating that “[t]he applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to § [805]”).

96. *Wabol*, 958 F.2d at 1460.

97. *Id.* The court asserted that “[i]n the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense.” *Id.* The court provided no citation for this proposition.

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The court then concluded that the right to buy land in the Commonwealth failed to meet this international standard.⁹⁸

In citing the *King* and *Atalig* cases to support its opinion, the Ninth Circuit also noted that the application of equal protection guarantees in these circumstances would be impractical and anomalous because it would have a negative impact on the local culture, interfere with the United States' political arrangement with the NMI, and interfere with the United States' international commitments under the Trusteeship Agreement.⁹⁹ The Ninth Circuit also recited the Covenant's boilerplate justifications for the restriction and concluded that extending the equal protection guarantee in the context of land alienation would be both impractical and anomalous.¹⁰⁰

III. Criticism of *Wabot*

A. The Problem of Precedent

The Ninth Circuit's decision in *Wabot* is difficult to reconcile with precedent. The Ninth Circuit's theory does not take into account nor does it adequately distinguish the Supreme Court's decision in *Examining Board of Engineers v. Flores de Otero*.¹⁰¹ In *Examining Board of Engineers*, the Supreme Court recognized that equal protection of the laws was a fundamental right applicable to residents of the unincorporated territory of Puerto Rico.¹⁰² Confronted with this ostensible roadblock, the Ninth Circuit reached its result by recasting equal

98. *Id.* at 1462.

99. *Id.* at 1460-62.

100. *Id.* at 1461-62. The Court cited to the analysis of the NMI Constitution adopted by the delegates.

101. 426 U.S. 572 (1976).

102. *Id.* A more difficult question is whether the Appointments Clause is a "fundamental right" applicable to the territories. See Lawson, *supra* note 28.

A second, more difficult question is whether Article III is applicable to the territorial courts. See U.S. CONST., Art. III, § 1:

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

The NMI has an Article IV territorial court with a judge appointed by the President, but with limited tenure. Covenant, art. IV. The Supreme Court has held that the constitutional right to a trial conducted by a judge with the salary and tenure guarantees of Article III is inapplicable in the territories. See *Palmore v. United States*, 411 U.S. 389, 400 (1973); Lawson, *supra* note 28, at 893 (criticizing *Palmore*). See also 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, 437-51 (1991) (arguing that equal protection principles dictate inclusion of the territories in the Article III system of courts).

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protection guarantees as protecting various activities deemed worthy of protection from government racial discrimination, rather than a broad principle protecting all activities from discrimination.¹⁰³ In holding that the racial restriction on the acquisition of property in the NMI was immunized from any equal protection scrutiny, the Ninth Circuit posed the critical question: "Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?"¹⁰⁴ The Ninth Circuit explained that such unusual phrasing of the issue was necessary because "[i]t is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection."¹⁰⁵ Of course, if the Ninth Circuit had asked, "is the equal protection of the laws a fundamental right?" the answer would have been "yes" based on the *Examining Board of Engineers* decision.

There is little support for the Ninth Circuit's distorted construction of the issue presented in the *Wabot* case. Rather, the Ninth Circuit played a judicial version of the "Jeopardy" game show by constructing a question that matches the desired answer.¹⁰⁶ If the Supreme Court had followed the Ninth Circuit's approach in *Examining Board of Engineers*, they would have asked: "Is the right of equal access to a private civil engineering practice in Puerto Rico resident in the equal protection clause a fundamental one?" No doubt the answer would have been "no" because the question removes the offensive nature of the restriction—whether the classification is based on race or alienage—and emphasizes the importance of the underlying activity. The Supreme Court, however, has not adopted such a cramped view of equal protection. Instead, it has stated that, "[t]he guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity."¹⁰⁷

Thus, the Ninth Circuit shifted the emphasis from invidious discrimination to the specific activity sought to be conducted without

103. *Wabot*, 958 F.2d at 1460 n.19; see *infra* note 108 and accompanying text.

104. *Wabot*, 958 F.2d at 1460.

105. *Id.*

106. See also *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 420 (1947) (Frankfurter, J., dissenting) ("But answers are not obtained by putting the wrong question and thereby begging the real one.").

107. *Harris v. McRae*, 448 U.S. 297, 322 (1980).

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eemed worthy rather than a violation.¹⁰³ In property in the territory, the Ninth Circuit's equal access to resident in the "second Congress" under Article IV, usual phrasing of equality incorporation, protection."¹⁰⁵ Of protection of the "yes" based

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race discrimination—the purchase of a long-term interest in Commonwealth property. The Ninth Circuit's analysis ultimately resulted in the conclusion that the fundamental right to equal protection was not implicated because the right to buy land in the NMI is not fundamental enough to be protected from race discrimination in its exercise.¹⁰⁸ If one is left wondering what activities are worth protecting from racial discrimination in an unincorporated territory, the Ninth Circuit's answer would be those declared "fundamental in the *international* sense."¹⁰⁹ Thus, equal protection of the laws was no longer a fundamental right; rather, a person is only entitled to equal protection of the laws where the underlying right that one would like to exercise without racial discrimination is fundamental in the international sense.

This shift in emphasis is inconsistent with the Supreme Court's decision in *Examining Board of Engineers* and with the underlying purpose of the equal protection guarantees. Equal protection of the laws means more than the right to live free from certain kinds of government racial discrimination in some facets of our existence. Equal protection guarantees that the government will treat all persons equally, regardless of race, creed, sex, or national origin.¹¹⁰ Equal protection guarantees apply regardless of the arbitrary value assigned by others to the underlying activity that the individual would like to conduct without discrimination. For example, there may be no "fundamental right" to eat lunch at a particular lunch counter, but that does not mean that the government may prevent people from being served on the basis of race.¹¹¹ Similarly, many rights are not deemed fundamental, such as the right to an education.¹¹² When the government provides a public education, however, both Congress and the states must provide it without racial discrimination.¹¹³

The Ninth Circuit defended its interpretation in *Wabol* by citing *Califano v. Torres*,¹¹⁴ a case in which the Supreme Court held that

108. *Wabol*, 958 F.2d at 1460-62.

109. *Id.*

110. See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (race); *Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (national origin).

111. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151-52 (1970) (white female school teacher was denied service at a lunch counter and was subsequently arrested because she was in the company of African American students).

112. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

113. Compare *id.* (education not a fundamental right) with *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (Equal Protection Clause prohibits states from maintaining racially segregated public schools) with *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (equal protection component prohibits Congress from maintaining racially segregated schools in the District of Columbia).

114. 435 U.S. 1 (1978) (per curiam).

Congress could deny social security benefits to all persons living in Puerto Rico.¹¹⁵ *Califano*, however, involved a facially race-neutral non-suspect geographic restriction, not a suspect classification such as race.¹¹⁶ The restriction in *Califano* was applicable to all residents; it did not deny social security to persons of certain races or ancestries living in Puerto Rico. In addition, the Supreme Court in *Califano* applied equal protection scrutiny, although at the rational relationship level.¹¹⁷

The cases the Ninth Circuit discussed do not support its conclusion. In neither *King* nor *Atalig* did Congress grant a right in a racially discriminatory manner. The Ninth Circuit's conclusion in *Atalig*—that the jury trial right in local law cases was non-fundamental¹¹⁸—was made in the context that the denial of the “non-fundamental” right was to every person, regardless of race, creed, or color, including all United States citizens living in the NMI. In *Wabot*, however, the suspect classification of race determined the extent of the grant of equal protection rights. None of the cases specifically considered equal protection as a right dispensable upon a finding that application of the principles of equal protection would be “impractical and anomalous.”¹¹⁹

The court misinterpreted precedent by misplacing the adjective “fundamental.” The *Insular Cases* asked whether the constitutional right in question was fundamental. Fundamental described a broad right, not its narrow application. The importance of working as an engineer was not the focus in *Examining Board of Engineers*, nor was the amount of the war claim in *Ralpho*, nor the nature of the criminal charge in *Balzac* or *Atalig* or *King*. Accordingly, the right the parties wished to exercise without racial discrimination—the purchase of land in the NMI—should not have been the focus in *Wabot*. Carried to its logical conclusion, the Ninth Circuit's reasoning would mean that First Amendment protections might only be applicable where the conversa-

115. *Id.* at 5 (describing federal law as a “geographic limitation”).

116. *Id.* at 20. Thus it applied to all citizens of all races living in Puerto Rico. One could argue that this operated in effect as a racial restriction, but it would require a more sophisticated argument involving congressional intent. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (where law or regulation is facially neutral but has a racially disproportionate impact, it will not be subjected to heightened scrutiny under the Equal Protection Clause unless motivated, at least in part, by an invidiously discriminatory intent); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

117. *Califano*, 435 U.S. at 5.

118. *Atalig*, 723 F.2d at 688.

119. *Id.*

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damental importance in the international sense.¹²⁰

Wabot sanctions a broad power in Congress to extend a wide
range of rights and benefits to United States territories and posses-
sions in a race-based manner. If a court makes the impractical and
anomalous finding, race or gender-based restrictions need not survive
any level of scrutiny to be upheld. Race or gender discrimination
under the United States flag need not support a compelling, impor-
tant, or even a legitimate goal. Nor need the means used be narrowly,
substantially, or rationally tailored to achieve the goal.

The Ninth Circuit’s approach in *Wabot* was not consistent with
the spirit of the cases that the court did acknowledge and use to sup-
port its analysis. The court used Justice Harlan’s impractical and
anomalous test, not to limit the exemptions from constitutional guar-
antees in unincorporated territories, as in *King v. Morton*,¹²¹ but to
expand the exemptions of constitutional guarantees applicable in un-
incorporated territories.¹²² The Ninth Circuit assumed that Justice
Harlan’s test was appropriate, yet made no attempt to follow it. The
impractical and anomalous test required examination of “the particu-
lar circumstances, the practical necessities, and the possible alterna-
tives which Congress had before it.”¹²³ The *Wabot* opinion, recited
the interests ostensibly offered for the restriction without examining
the validity of those interests or whether the interests were currently
relevant.¹²⁴ The Ninth Circuit acknowledged that challenges to the
“precision with which the restrictions operate to further these inter-
ests . . . would have substantial force in an equal protection analy-
sis.”¹²⁵ The Ninth Circuit, however, then nonchalantly announced
that “[a] restriction need not be precisely tailored to qualify for ex-

120. See *El Vocero de Puerto Rico v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993) (the
Supreme Court refused to consider Puerto Rican tradition in deciding whether the First
Amendment required preliminary hearings to be open to the public). Of course, under the
Ninth Circuit’s analysis, Puerto Rico need only include this constitutional right on its hit
list at subsequent status negotiations. If negotiators agree that this aspect of the First
Amendment conflicts with tradition, it will be eliminated as a constitutional guarantee in
Puerto Rico.

121. 520 F.2d at 1140. The *King* court took what the Supreme Court had labelled a
non-fundamental right and turned it into a fundamental right by requiring proof that it
would be impractical and anomalous to apply it in the territory. *Id.* at 1147.

122. 520 F.2d 1140 (1975).

123. *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring). In *King v. Morton*
the D.C. Circuit had remanded the case for full factual development of the record. See
supra note 75.

124. *Wabot*, 958 F.2d at 1462.

125. *Id.* at 1461.

emption from equal protection scrutiny."¹²⁶ Thus impractical and anomalous meant somewhat impractical and rather anomalous. In other words, the Ninth Circuit signalled that it would turn a blind eye to implementation of race-based restrictions once the exemption was granted.

B. Misapplication of an Incorrect Test—Reclassifying Fundamental Rights

In addition to asking the wrong question, the Ninth Circuit's answer to that question was wrong. Not only did the court incorrectly recast equal protection doctrine, but the application of its revised version required some result-oriented lapses in logic.

The Ninth Circuit transformed a fundamental right into a non-fundamental right by labeling the fundamental right impractical and anomalous.¹²⁷ The Ninth Circuit, however, obscured its action by continuously repeating its underlying theme that straightforward application of constitutional restrictions on actions by the United States outside the geographic boundaries of the United States reflected an insular vision of the world.¹²⁸ The Ninth Circuit reinterpreted the phrase "fundamental right" to mean that any right that is "fundamental in the *international* sense" should automatically apply in an unincorporated territory.¹²⁹ Yet, having appealed for a world vision, the Ninth Circuit then defined "fundamental in the *international* sense" in the most *provincial* sense possible.¹³⁰ The court deferred to the negotiating parties and did not determine whether the right to own land was fundamental in the international sense.¹³¹ Although packaged as an international standard, the Ninth Circuit did not inquire what the international consensus was on the subject.¹³² Moreover, the Ninth

126. *Id.* at 1462.

127. *Id.*

128. *Id.* at 1460 ("In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in the international sense.").

129. *Id.* at 1460.

130. As one commentator noted, the Ninth Circuit decided that the right to own real property is not fundamental "because the NMI and United States do not mutually consider this right to be inalienable." Robert A. Katz, Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 789 (1992). Little attention is paid to what the rest of the international community thinks.

131. *Wabot*, 958 F.2d at 1462.

132. *Cf.* Neuman, *supra* note 1, at 980-81 n.420 (the author rejects the suggestion that equating the fundamental rights of United States citizens abroad with rights under international human rights law is an inappropriate standard).

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Circuit asserted that inclusion of different cultures would necessarily "narrow" the meaning of a "basic and integral freedom."¹³³

The right of equal access to ownership of property is fundamental within the United States constitutional system:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.¹³⁴

Similarly, the principle of equal access to property regardless of race or ancestry is an internationally recognized right.¹³⁵ The Ninth Circuit did not explore this issue. Rather, in keeping with its broad global focus, the court bolstered its argument that equal protection guarantees were inapplicable because the "[t]he Bill of Rights was not intended to interfere with the performance of our international obli-

As a purely normative matter, this suggestion should lose its appeal once it is recognized that international human rights standards have not been offered as a sufficient constitution for all societies, but rather as a uniform minimum standard of rights that can be agreed upon notwithstanding cultural diversity. A citizen of the United States may appropriately expect more from her government than the international minimum standard.)

133. *Wabot*, 958 F.2d at 1462.

134. See *Shelley v. Kraemer*, 334 U.S. 1, 10-11 (1948). See also, *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972) (quoting *Shelley*, 334 U.S. at 10); 42 U.S.C. § 1982 (1988) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

135. See International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, art. 5 ("States parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (d) . . . (v) The right to own property alone as well as in association with others; . . .") (signed but not ratified by the United States); U.N. CHARTER art. 76. ("The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter shall be: . . . (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the people of the world."); U.N. CHARTER art. 1, ¶ 3 (purposes of United Nations include "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race."); *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. GAOR, 3d sess., art. 2, U.N. Doc. A/810 (1948) reprinted in [1948-49] 3 V.B. 535 (United States not a signatory party) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); *Id.* at art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law."); *Id.* at art. 17 ("Everyone has the right to own property alone as well as in association with others.").

gations."¹³⁶ Exactly the opposite is legally true—whether Congress acts domestically or internationally, it must act within the bounds of the Constitution.¹³⁷

The Ninth Circuit's allusion that Covenant section 805 did not violate the Trusteeship Agreement is also misleading. Specifically, the Trusteeship Agreement gave the United States original governing authority over the NMI and provided that the "administering authority shall . . . protect the rights and fundamental freedoms of all elements of the population without discrimination . . ."¹³⁸ In *Wabol*, the court declined to consider the argument that the Trusteeship Agreement had been breached by the enactment of Covenant Section 805.¹³⁹ Instead, the Ninth Circuit blithely asserted that the Trusteeship Agreement required Covenant section 805, a disputed proposition that the Court earlier declined to resolve.¹⁴⁰

136. *Wabol*, 958 F.2d at 1462.

137. See *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.") (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)); *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988), cert. denied, 489 U.S. 1087 (1989); *In re Burt*, 737 F.2d 1477, 1484-85 (7th Cir. 1984). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 721 (1987) ("The provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.").

138. Trusteeship Agreement, *supra* note 11.

139. The defendants in *Wabol* actually argued before the Ninth Circuit that:

The trust relationship, rather than sanctioning a discriminatory land alienation restriction, bolsters the conclusion that the United States had no authority to limit the right to acquire property to a certain segment of the population based on ancestry. Although the United States has the duty to "protect the inhabitants against the loss of their land and resources," it must be read in conjunction with the mandate [of the Trusteeship Agreement] not to discriminate among any elements of the population.

Philippine Goods, Opening Brief at 19-20 (quoting art. 6, § 2 of the Trusteeship Agreement).

140. *Wabol*, 958 F.2d at 1461. The Ninth Circuit refused to consider whether Covenant § 805 violated the Trusteeship Agreement, saying that it had not been raised by the parties. *Wabol*, 958 F.2d at 1458 n.15. It was. The court's dodging of this issue is also disingenuous because it chose—without further briefing—to rest its decision on a basis wholly different from that of the lower courts. The court rested its new theory in part on its interpretation of the very article of the Trusteeship Agreement relied upon by the appellants in *Wabol* to argue that the United States had no authority under the Trusteeship Agreement to agree to § 805. See *Wabol*, 958 F.2d at 1461 ("And we must be mindful also that the preservation of local culture and land is more than mere desideratum—it is a solemn and binding undertaking memorialized in the Trusteeship Agreement.").

Note that in design, Covenant § 805 requires the NMI to disenfranchise from land ownership persons of other Micronesian ancestries, e.g., Palauan or Yapese, although the United States was under the same Trusteeship obligation to these persons. A number of

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C. Other Possible Paths to the Same Result

The United States' primary defense of Covenant section 805 was not that the United States government could exempt its action from the constraints of equal protection guarantees. Rather, the legislative history shows that negotiators thought the provision would pass equal protection scrutiny.¹⁴¹ United States negotiators discussed two approaches to reach this result: (1) early affirmative action cases; and (2) a Native American analogy. The usefulness of the first approach has eroded as the Supreme Court has increased the level of scrutiny applied to affirmative action legislation. Although the second approach might produce the desired result, it is not legally or logically defensible.

1. Affirmative Action Theory

Affirmative action theory was in its embryonic stages when Covenant section 805 was initially considered.¹⁴² Since that time, the Supreme Court has increased the level of scrutiny for race-based affirmative action programs—a result the negotiators may not have anticipated.¹⁴³ It now appears that strict scrutiny would apply to

Micronesians reside in the NMI —approximately 3500 of the 43,345 people living in the NMI. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, 1990 CPH-6 16 (March 1992).

141. See Senate Committee Report, *supra* note 88, at 74.

142. The Supreme Court's decision in *Examining Board of Engineers*, 426 U.S. 572 (1976) was not issued until 1976, after the Covenant had been negotiated and finalized. Its rather curt application of the Equal Protection Clause to Puerto Rico must have been a shock to the negotiators.

143. The Senate Committee Report cited *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 177 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971) (summarily upholding federal affirmative action plan against equal protection challenge because the "Fifth Amendment does not prohibit such action."). The Senate Committee Report claimed that this case held "that differentiations and even quotas designed to remedy past evils are not inconsistent with the equal protection aspects of the Fifth Amendment [and the] same considerations would apply to measures designed to avoid future wrongs." Senate Committee Report, *supra* note 88, at 87-88.

The legislative history also shows reliance on the Hawaiian Homes Act passed in 1921. See Senate Committee Report, *supra* note 88, at 88. This measure, applying only to a finite amount of public land in Hawaii, was much more limited in scope than § 805, but perhaps as much a failure:

This measure ostensibly guaranteed special homestead leases on pockets of land throughout the island for those claiming 50 percent or more Hawaiian blood. . . . However, relatively few native families benefitted from the act, and at the time of statehood only 10 percent of the land originally set aside was being used by Hawaiian or part-Hawaiian families, while about 20 percent was unusable, and the remainder was leased to ranches or plantations.

Covenant section 805.¹⁴⁴ For reasons discussed in Part IV of this Article, Covenant section 805 most likely would not pass this level of review.¹⁴⁵ The NMI and the United States have shown a lack of interest in the goals of the alienation restriction in most other aspects of their actions, casting doubt on its compelling nature. Moreover, the means used to achieve the goals are—by design—doomed because they allow free alienation among NMI persons and lengthy leases for all others.

2. *The Native American Analogy*

In *Wabot*, the Ninth Circuit might have analogized the relationship between the NMI and the United States to that between Native Americans and the United States government. The legislative history makes a shallow attempt to compare the two situations.¹⁴⁶ Although it is true that federal legislation affecting Native Americans is subject to rational relationship review under the Equal Protection Clause, the comparison to the NMI situation is unpersuasive because: (1) Covenant § 805 is based on a racial classification only, not a political plus racial classification that characterizes legislation involving Native Americans; (2) the basis for Congress' authority over Indian tribes is different from Congress' authority over the NMI and does not support singling out NMI descent persons for special treatment; and (3) there is no law comparable to the sweeping nature of Covenant § 805 that has been upheld with respect to Native Americans. Moreover, the answer should not be found in applying equal protection analysis, but lowering the level of scrutiny to the rational basis test so that the scrutiny is meaningless.

ROGER BELL, *LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS* 46-47 (1984).

144. Even benign race classifications enacted by Congress are subject to strict scrutiny—the goal must be compelling and the means narrowly tailored to achieve the goal. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (federal affirmative action program). See also, Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 385 (1980-81) (suggesting an intermediate level of scrutiny for racial land alienation restriction in American Samoa).

145. These reasons include its over and under-inclusiveness, and that it does not address remedying past discrimination but rather future harm. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978) (opinion of Powell, J.). It is possible, of course, that the Court would find the future protection of land and culture a compelling interest, but the value of equal protection analysis at the higher level is that it would require specificity in both the goal and the means.

146. Senate Committee Report, *supra* note 88, at 87 (“Similar legislation has been upheld with respect to American Indians.”).

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The United States Supreme Court has applied the rational relationship test for federal government actions toward Native Americans. This level of review is partly premised upon a finding that the category "Indians" is a political and not a racial category.¹⁴⁷ Thus, the Supreme Court has held that where the United States government classifies Native Americans in legislation by "singling out tribal Indians," such legislation is based on a political and not a racial classification.¹⁴⁸

The Ninth Circuit might have claimed that the classification "persons of Northern Mariana Islands descent,"¹⁴⁹ was a political, not a racial category, even though it relied on blood quantum as part of its description.¹⁵⁰ The problem with the analogy is that the target of comparison is based on a flawed argument. Classifications involving Native-Americans contain both racial (Indian) and political (tribal affiliation) components where the legislation refers to certain tribes.¹⁵¹ The classification, however, is at least partially racial and the decisions choose to ignore the racial and focus on the political. That a classification has two components, one racial and another not, does not erase the racial nature of the restriction. The racial component is a necessary criteria. This legal fiction has been criticized as convenient but not logical and should not be extended further.¹⁵²

Moreover, the definition of "persons of Northern Marianas descent" does not even contain a political component that can provide minimal cover for the race-based component. There are no non-suspect criteria, such as political affiliation, or even residency, which counterbalance the suspect race classification in the Northern Mari-

147. *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (to qualify for employment preference with the Bureau of Indian Affairs, person needed to be a member of a federally recognized tribe and be one-fourth or more Indian blood).

148. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979).

149. *Covenant § 805(a)*.

150. See *Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162, 1167-68 (9th Cir. 1982). *But see* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 796-98 (1991) (criticizing *Alaska Chapter* decision).

151. See Williams, *supra* note 150, at 786-810.

152. *Id.*; LIEBOWITZ, *supra* note 7, at 435 ("[T]he general approach is troubling . . . To build upon this precedent outside the Indian context would appear to promote racial discrimination in the legal system. Further, it appears inappropriate to bring to bear upon the 'Territories' the special character of the Indian reservations. Many of the key issues in the federal-territorial relationship (immigration and tariff) and international arena are outside the doctrinal framework developed for Indian tribes.").

anas.¹⁵³ In addition, the negotiating history of the Covenant demonstrates that the parties intended to adopt a classification based on ancestry.¹⁵⁴ The Ninth Circuit's recognition that the classification was racial is the most candid part of its opinion.¹⁵⁵

Further, part of the Supreme Court's rationale was that the Commerce Clause specifically singled out Indian tribes for special treatment by Congress and the special treatment was accorded members of

153. A political rather than a racial basis for the employment preference in *Morton v. Mancari* has been defended in part upon the basis that the employment preference applied to only those "in federally recognized tribes." 417 U.S. at 553 n.24. See generally Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1263-67 (1994).

154. See Senate Committee Report, *supra* note 88, at 89:

Under this section [Covenant § 805] the Government of the Northern Mariana Islands and [sic] until 25 years after the termination of the Trusteeship [will] regulate the alienation of permanent and long-term interests in property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent, i.e., of Chamorro or Carolinian ancestry.

When the NMI set about enforcing the restriction through Article XII of the NMI Constitution, they complied with this directive. The legislative history of Article XII reveals that before 1966 only indigenous Chamorros or Carolinians qualified for Trust Territory citizenship and only such persons met the Article XII test. N. MAR. I. CONST. art. XII § 4 (Person is a full-blooded NMI Chamorro or Carolinian if "born or domiciled in the Northern Mariana Islands by 1950 and [a] citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.") Citizens of the Trust Territory were those born in the Trust Territory who did not acquire other citizenship at birth, or those outside the Trust Territory of Trust Territory citizen parents. 53 T.T.C. § 1. See *Temengil v. Trust Territory of the Pacific Islands*, 2 Commw. Rptr. 598, 637 (D. N. MAR. I. 1986) ("Trust Territory citizenship is an administrative classification designed by the Trust Territory government to identify those persons who claim origin or ancestry in the islands of Micronesia."), *rev'd on other grounds*, 881 F.2d 647, 650 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

Moreover, NMI person status is passed on strictly by the circumstances of birth or adoption. Thus children may be citizens of any country, and live anywhere, so long as they descend from "a person of Northern Mariana Islands descent." Yet a person whose parents are not 25% NMI descent, e.g., a person of Palauan descent, will be ineligible to own land in the NMI, no matter what her citizenship or how long she has lived in the NMI. In operation, the definition of person of Northern Marianas descent is based on race and/or ancestry.

Although the definition of Northern Marianas descent eventually adopted by the NMI had United States citizenship or eventual United States citizenship as a requirement, not all persons living in the NMI who were eligible under the Covenant to become United States citizens qualified to be of Northern Marianas descent. Thus many persons with ties to the NMI—longstanding enough to be eligible for United States citizenship—did not qualify for land ownership privileges under the land alienation restriction. See, e.g., *Pangelinan v. Castro*, 688 F.2d 610, 612 (9th Cir. 1982) (holding that agency was bound by determination that plaintiffs met citizenship requirements).

155. *Wabol*, 958 F.2d at 1451, 1455.

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federally recognized tribes.¹⁵⁶ In contrast, the Ninth Circuit found that Congress acted in accordance with the Territorial Clause in enacting section 805.¹⁵⁷ The Territorial Clause does not single out any particular people, nor people in general.

Finally, no legislation passed by Congress regarding Native Americans approaches the sweep of Covenant Section 805. Congress granted preferential tax status, hiring policies, and fishing rights to Native Americans.¹⁵⁸ Even when Congress enacted restrictions on Native American land, it did so on a theory that the property is either in plenary control of the United States government, or is public or trust land held for the benefit of Native Americans.¹⁵⁹ Federal legislation did restrict the sale of Native American land to any person without the approval of the federal government. United States ownership of the land as trustee, however, is the basis for this legislation.¹⁶⁰ Accordingly, the United States holds fee simple title to the land upon which it places restrictions, and the right of occupancy of Native Americans is tribal, not individual.¹⁶¹ In contrast, the United States has never claimed ownership of privately held land in the NMI. Furthermore, the right to privately own lands in the NMI is individually based, not group based. For these reasons, the analogy to case law involving Native Americans does not apply in the case of Covenant section 805.

If applicable, however, it would subject the restriction to some level of equal protection scrutiny. In the Native American context, there must be a rational relationship between the special treatment and the government's unique obligation to the Native Americans.¹⁶²

156. *See supra* note 147; U.S. CONST., art. I, § 8, cl. 3 (Congress has the power to "... regulate Commerce with ... the Indian tribes.").

157. U.S. CONST., art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States") A separate problem with the court's opinion is that when Congress approved the Covenant, the NMI, as part of the U.N. Trusteeship, was not a territory or possession of the United States. *See Gushi Bros. v. Bank of Guam*, 28 F.3d 1535, 1540 (9th Cir. 1994) ("We have never considered the Trust Territory as simply a United States territory or insular possession.").

158. *See Board of County Comm'rs v. Seber*, 318 U.S. 705, 714 (1943) (tax exemption); *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) (hiring preference).

159. *Seber*, 318 U.S. 705; *Minnesota v. United States*, 305 U.S. 382, 386 n.1 (1939).

160. *See United States v. Noble*, 237 U.S. 74, 79 (1915).

161. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 86 (1977) (stating that the authority to control tribal property is "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs") (quoting F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAWS* 94, 97 (1942)).

162. *Mancari*, 417 U.S. at 555.

In the NMI context, rational relationship scrutiny would be based on the fiction that the restriction was not racial. There would be the appearance of observing equal protection restraints generally, but the artificially low level of scrutiny would make the protection worthless.

3. *The NMI Status Argument: The NMI Is Not a State Under the Fourteenth Amendment*

Another argument that the Ninth Circuit might have used was that equal protection guarantees do not bind the NMI government. The theory is that the NMI is neither an incorporated nor an unincorporated territory under the *Insular Cases*, but is an entity *sui generis* possessing characteristics of both states and territories.¹⁶³ The NMI, therefore, in consenting to join the United States, held a greater status than that held by territories considered in the *Insular Cases*. According to this theory, the NMI could choose whether to bind itself to the same constitutional restrictions that bind the fifty states because it is not a state.¹⁶⁴ For example, the United States Supreme Court, although labeling Puerto Rico's commonwealth status unique, has never indicated that such uniqueness might imply more leverage than territorial status or fewer constitutional constraints than state status.¹⁶⁵

It is uncertain whether the actions of the NMI government, absent agreement in the Covenant to be bound by such constitutional restrictions, would be constrained by these constitutional restrictions if it were not "a state." Justice Rehnquist made this observation in his

163. This argument was made but not decided in the *Atalig* case:

The NMI argues that its political status is distinct from that of unincorporated territories such as Puerto Rico. This argument is credible. Under the [T]rusteeship [A]greement, the United States does not possess sovereignty over the NMI. As a commonwealth, the NMI will enjoy a right to self-government guaranteed by the mutual consent provisions of the Covenant. . . .

Thus, there is merit to the argument that the NMI is different from areas previously treated as unincorporated territories. We need not decide this issue because the independent force of the Constitution is certainly no greater in the NMI than in an unincorporated territory.

Atalig, 723 F.2d at 691 n.28. *But see* Barusch v. Calvo, 685 F.2d 1199, 1202 (9th Cir. 1982) ("When all portions of the Covenant become effective, the Northern Marianas will have a political status comparable to other United States territories.").

164. Territories have no independent sovereignty. *See* *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937). States theoretically have sovereignty reserved under the Tenth Amendment, but it is more theoretical than real. *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549-50 (1985). *But see* *United States v. Lopez*, 115 S. Ct. 1624 (1995).

165. *Examining Board of Engineers*, 426 U.S. at 596 (Puerto Rico "occupies a relationship to the United States that has no parallel in our history.").

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dissent in *Examining Board of Engineers*.¹⁶⁶ He indicated that the Fourteenth Amendment's Due Process and Equal Protection Clauses might not bind the actions of the government of Puerto Rico absent agreement or congressional imposition because the Fourteenth Amendment uses the explicit language, "No state . . ." ¹⁶⁷

Even if the NMI is not analogous to a state, all actions of territorial governments may be considered attributable to the United States.¹⁶⁸ This argument might support the theory that the Fifth Amendment is the source of the limitation on government power.¹⁶⁹

Regardless of its validity, the argument that the NMI—as a non-state or non-territory—is constitutionally constrained only so far as it agrees to be, is not implicated in this case.¹⁷⁰ This argument assumes the United States was silent in negotiating the agreement regarding an equal protection exemption. In this case, however, the United States both endorsed the idea of an exemption from equal protection guarantees and required the NMI to enact the racially restrictive Covenant. Therefore, the United States' action of agreeing to Covenant section 805, a racially based restriction, is unconstitutional.

In *Wabot*, the Ninth Circuit endorsed Congress' power to grant equal protection guarantees to the NMI in a racially discriminatory manner. This conclusion ignored that the exclusion was racially discriminatory and therefore in violation of the Fifth Amendment of the Constitution. Congress extended to the NMI almost the full force of equal protection guarantees in the Covenant against United States and NMI government action, but granted an exclusion that *requires* racial discrimination.¹⁷¹ The heart of equal protection is the protection it affords individuals against racial discrimination.¹⁷² If Congress grants a right, it must grant it in compliance with the Constitution and without racial discrimination. Congress cannot carve out exceptions

166. *Id.* at 606-09 (Rehnquist, J., dissenting).

167. *Id.* at 607-09 (Rehnquist, J., dissenting).

168. See Lawson, *supra* note 28.

169. One could also argue that the equal protection component of the Fifth Amendment is not as extensive as that of the Fourteenth Amendment. The Fifth Amendment incorporates the Fourteenth Amendment's equal protection component in the Fifth Amendment's Due Process Clause. The Supreme Court has stated that the guarantees are co-extensive. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2106-08 (1995).

170. There is nothing in the Constitution that distinguishes a territory or possession of the United States from a Commonwealth. Indeed, the Ninth Circuit simultaneously ruled in *Wabot* that Congress governs the NMI under the Territorial Clause. *Wabot*, 958 F.2d at 1459.

171. Covenant § 805.

172. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

for itself in granting rights where the exceptions in the grant run counter to the equal protection clause.¹⁷³

The Territorial Clause does not justify United States abridgment of the Constitution over its own citizens. The Territorial Clause should not sanction this perverse exercise of power because congressional power to legislate under the territorial clause, like every other legislative power, is subject to the constitutional restrictions contained in the Bill of Rights.¹⁷⁴ The *Insular Cases* doctrine has never made an exception for the equal protection clause. Arguably, the *Insular Cases* should be completely disregarded where the United States is sovereign by consent and the inhabitants have United States citizenship.¹⁷⁵

Equal protection is a shield that attaches to a United States citizen wherever that citizen is subject to United States government action.¹⁷⁶ To hold that the United States government may ignore equal

173. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Fifth Amendment's equal protection component restricts Congressional action).

174. See *Lawson*, *supra* note 28, at 867 (arguing that the Territorial Clause is subject to the constraints of the Appointments Clause).

175. Some commentators have argued that the *Insular Cases* should be overruled on various other grounds. See *Liebowitz*, *supra* note 7; *TORRUELLA*, *supra* note 6, at 5, 268 (1985); *Joycelyn Hewlett, The Virgin Islands; Grand Jury Denied*, 35 *How. L.J.* 263, 273 (1992). The *Insular Cases*—for reasons that are not necessarily admirable—took liberties with the application of the United States Constitution beyond the fifty states giving Congress more power in the form of providing less protection for individual rights. The motive was to avoid bestowing United States citizenship upon the inhabitants of these distant lands while maintaining expansionist policies. See *Neuman*, *supra* note 1, at n.286, 334. These are not abiding or admirable principles upon which to build a legal theory. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (questioning whether the Bill of Rights had to be fully extended to territories populated “by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought”). Justice Black, writing for the plurality in *Reid*, said that only fundamental constitutional rights applied in unincorporated territories because of their “wholly dissimilar traditions and institutions.” 354 U.S. at 14.

Considerations of distance also played a role in the *Insular Cases*. That factor, key in the early 1900s, retains no relevance in this era of modern transportation and communication. The NMI is neither isolated nor untouched by outside influence. *Branch*, *supra* note 39, at 66 (assumptions about isolation “are not valid today where all the territories have television, direct communications with the States, automobiles, jet airplane transportation, and when many of the inhabitants have high school and college education, and where virtually all speak and understand English”).

176. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“These provisions [the Fourteenth Amendment] are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race or color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

This is not the case where the Supreme Court has held that the inherent limitations on the constitutional provision itself frees United States government action outside the fifty states' borders. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (actions of the United States on foreign soil against a Mexican citizen with no significant connections to the U.S. were not constrained by the Fourth Amendment); *Downes v. Bidwell*, 182 U.S.

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IV. Reliance on the Wrong Policy

The Ninth Circuit's creation of an equal protection exemption zone is inconsistent with case law and moves the case law in the wrong direction.¹⁷⁷ The *Insular Cases* "fundamental rights" test at least set a minimum level of individual constitutional guarantees for territorial residents—the Ninth Circuit's test removes any floor. Moreover, the Ninth Circuit's legal gyrations only succeed in saving a fundamentally flawed land alienation restriction. Neither the journey nor the destination are worth the price paid.

Two policy concerns drive the *Wabot* decision's result. First, the Ninth Circuit thought that Covenant section 805 protected NMI culture.¹⁷⁸ Second, the Ninth Circuit perceived that declaring section 805 unconstitutional would amount to a rewriting of the covenant and undermine the consensual nature of the NMI's union with the United States.¹⁷⁹

The Ninth Circuit's concerns were misplaced because Covenant section 805 does not protect NMI culture in design or practice. Moreover, the focus on the land alienation restriction diverted attention from the real factors threatening the NMI's cultural base. Other less drastic and equally effective protections were available.

Nor would subjecting Covenant section 805 to equal protection review undermine the consensual nature of the Covenant. At the

244, 287 (1901) (Revenue Clause providing that "all duties, imposts, and excises shall be uniform throughout the United States" did not encompass Puerto Rico).

177. The United States Supreme Court denied certiorari in *Wabot*. *Wabot v. Villacrusis*, 958 F.2d 1450 (9th Cir.), *cert. denied*, 113 S. Ct. 675 (1992). One problem with granting certiorari in *Wabot* was that a jurisdictional issue would have confronted the Supreme Court at the outset. *Id.* at 1453-58. The Ninth Circuit and the newly created NMI Supreme Court were at odds over who had jurisdiction over the case, with the Ninth Circuit ultimately claiming victory. *Wabot v. Villacrusis*, 11 F.3d 124, 126 (9th Cir. 1993). The NMI Supreme Court reluctantly agreed. See *Wabot v. Villacrusis*, No. 89-005 (Villagomez, J., concurring) (NMI Sup. Ct. filed April 6, 1994).

The Supreme Court may have been reluctant to accept this case as a vehicle for deciding the issue presented because it would have to confront the jurisdictional issue first. See *Izumi Seimitsu v. U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993). Of course, the Court could have decided against granting certiorari for hundreds of other reasons.

178. *Wabot*, 958 F.2d at 1461.

179. *Id.* at 1462. Although it did not explicitly discuss this issue, the court also might have been unsure of the consequences for the entire agreement of striking down § 805 because the Covenant provides that § 805 cannot be altered without the mutual consent of the NMI and the United States. Covenant § 105.

time it was ratified, the parties knew that section 805 was subject to judicial review. Even treaties are necessarily subject to judicial review.

The Ninth Circuit's decision sanctions a loss of constitutional protections in the territories. By endorsing a broad power in United States negotiators to cut and paste the United States Constitution, the Ninth Circuit opened the door to race and gender-based discrimination and other losses of liberties for residents of territories. The Ninth Circuit's rule encourages an ad hoc result-oriented approach to the application of the Constitution. As negotiators and courts make their determinations, the result will be an outcome that undermines the legitimacy of the United States Constitution for all United States citizens.

A. Covenant Section 805: Preserving the Cultural Base?

1. *The Goal—Protection of NMI Culture*

In theory, Covenant section 805 aimed to: (1) protect NMI persons from exploitation; (2) promote economic advancement and self-sufficiency; and (3) recognize the importance of ownership of land for the culture and traditions of the people of the NMI.¹⁸⁰ In the Ninth Circuit's opinion, Covenant section 805 prevents the demise of NMI culture. The Ninth Circuit expressed its sentiments in a passage near the close of its opinion:

It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.¹⁸¹

In relying on the "cultural genocide" argument to override the application of equal protection, however, the court avoids the ques-

180. Covenant § 805.

181. *Wabot*, 958 F.2d at 1462. See Laughlin, *supra* note 102, at 377-78. The author proposes application of the Equal Protection Clause generally and intermediate scrutiny specifically to any claimed exceptions in American Samoa:

In order to prevail on the issue in a mainland court, the territory will have to (1) argue for modification of strict scrutiny and the application of an intermediate standard of review, and (2) document both the central role of land in the preservation of *fa'a Samoa* and the lack of practical alternatives by which the Government could "achieve its ends in the foreseeable future without the use of race conscious measures."

Id. at 385 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 376 (1978) (Brennan, J., concurring in part)).

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tion whether a race-based land alienation restriction is consistent with equal protection guarantees.¹⁸² An idea or practice may be compelling or important enough to comply with equal protection scrutiny, but it has never *overridden* application of equal protection scrutiny. If the goals were as compelling as the Ninth Circuit claims, why not apply equal protection standards? The answer is that even a curt examination under traditional analysis would reveal troubling questions about the goals and means of achieving them. The Ninth Circuit chose to eliminate the test, the more rigorous scrutiny, and any specific inquiry into the NMI situation. Its discussion barely scuffs the surface of a complex problem.

For example, one of the Ninth Circuit's supporting citation for its proposition was a law review article concerning land alienation in American Samoa.¹⁸³ Analogies to other "diverse native cultures"¹⁸⁴ are flawed, however, because other cultures employ diverse alienation schemes. Samoa's alienation patterns differ from those in the NMI—Samoans tend to hold their land by clan,¹⁸⁵ while individual ownership and alienation has been the dominant pattern in the NMI for 350 years.¹⁸⁶ If one wants to limit the loss of land in a culture in which individual ownership has been the rule, different rules will be required than where clan ownership defines the land tenure system. Thus, although protecting the culture may be a goal shared by various territories, the means will depend upon the culture.

Although claiming that "it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition,"¹⁸⁷ the court could have more fully explored or analyzed what this vision was, is, and how the land alienation restriction furthers either the past or present vision in the NMI.¹⁸⁸ Without examining the former or current conditions in any detail, the Ninth Circuit

182. *Wabot*, 958 F.2d at 1462.

183. *Id.* (citing Laughlin, *supra* note 2, at 386-88).

184. *Id.*

185. LIEBOWITZ, *supra* note 7, at 430 ("The communal land system, covering approximately 92 percent of the land area of American Samoa, is the key to the land tenure system.") (footnotes omitted).

186. See *Wabot v. Muna*, 2 Commw. Rptr. 231, 247 (Commw. Tr. Ct. 1985) ("By the time of the Spanish administration period in the islands, the land tenure system for the Chamorros had become directed to individual ownership as contrasted with clan or lineage ownership.").

187. *Wabot*, 958 F.2d at 1462.

188. This same superficial gloss characterized other justifications of the land alienation restriction as well. In defending the restriction, two consultants to the Northern Marianas Constitutional Convention in 1976 stated:

stated that "[i]t appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system."¹⁸⁹ The Court also noted that "[land] traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members."¹⁹⁰ Yet it did not explore how this identity or economic well-being would be maintained if the land were alienated to another person of NMI descent. The Ninth Circuit announced a rhetorically compelling goal, but did not explain or describe it beyond the legislative justification. Moreover, the means of implementing this goal were not examined.

2. *Unimpressive Implementation*

a. Land as the Proxy for a Complicated Problem—Race as the Easiest Answer

Implementation of section 805 undermines its goals of preserving land ownership, protecting culture, and avoiding exploitation. Section 805 allows persons of NMI descent to acquire unlimited amounts of land from other persons of NMI descent. Section 805 places no controls on these acquisitions. Interestingly, if the racial restriction was intended to prevent the people of the NMI from losing their lands or being exploited, it incorrectly assumes: (1) there is no threat of exploitation or cultural dislocation when NMI persons sell their land to ambitious or unscrupulous persons who happen to be of the correct

The residents of the Northern Marianas have developed a substantial expectation that their government would and should equalize economic bargaining power by erecting legal barriers. If long-term interests cannot be alienated, disadvantageous short-term arrangements can be undone at the end of their term and no permanent dislocation will result from the relative inexperience of the Northern Marianas people. Recent experience in neighboring Guam—where the absence of such a restriction resulted in the transfer of ownership of more than half of the privately owned land to non-Guamanians in a few decades—indicated that a similar result could be expected in the Northern Marianas unless an appropriate restriction was imposed while the Commonwealth develops as a self-governing entity.

Willens & Siemer, *supra* note 2, at 1407-08 (footnote omitted).

The authors ignore the effects of a 40-year dislocation on culture through the permissible leasing system. There are no protections from predators of Northern Marianas descent. Further, they cite only to a phone conversation with a legislative assistant to the Guam delegate to the United States House of Representatives for the proposition that the absence of a land alienation restriction resulted in the transfer of half the privately held land to non-Guamanians. *Id.* at 1408 n.143. As shown by the NMI experience, half the privately held land on Guam may have been transferred, but it was probably not due to the lack of a land alienation restriction of this type.

189. *Waboi*, 958 F.2d at 1461 (citation omitted).

190. *Id.* (quoting ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 174-76 (1976)).

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NMI ancestry; or (2) there are no persons of NMI descent who would exploit persons of NMI descent.¹⁹¹ The Court and Section 805 also assume that all outsiders constitute a threat.¹⁹²

Moreover, if the culture of the NMI is truly dependent on the land, it is ridiculous to suggest that outright sales will disrupt the culture, but that long-term leases will not. These fifty-five-year leases displace NMI persons regardless of the effect on the culture. Section 805 offers no protection from such long-term leases, except on the chance that the culture will resurge after several decades of outsider occupancy. Imagine the five year old child, whose parents leased the land for fifty-five years. What ties will the child have with the culture—if the culture is tied to the land—at age 60?

Ironically, section 805 also allows a person of NMI descent who has never lived in the NMI (but has an ancestor who did) to buy land. Simultaneously, section 805 disenfranchises persons of other races who have life-long ties to the NMI. Nor does it matter that a person of NMI descent builds a casino on their property or buys lands from another NMI person to do that, despite the changes that a casino may pose to the culture.

The negotiators of the Covenant claimed that the people of the NMI wished to forego outside intrusion and proceed slowly along the development path. They wished to limit the ability to alienate land

191. See Branch, *supra* note 39, at 62 (noting problems within families when war-claims money was distributed). See also *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. . . . Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concern; the race, not the person, dictates the category.") (citations omitted). The restriction operates on the assumption that the economic and social advantages of outsiders are the main problems to address regarding potential exploitation. This approach fails to take into account the social, economic, and psychological exploitation that may be practiced by insiders as well. See *infra* note 222.

192. *Id.* Statutes and laws in the United States once barred persons of different races and ancestries from owning land. Some of the rationales behind these laws were the same as those put forth for the land alienation restriction here, e.g., a fear that a particular group would take over and control the states' lands. See *Sei Fujii v. California*, 242 P.2d 617, 627-28 (Cal. 1952) (California law barring Japanese aliens from owning or occupying land in California based on a fear that the Japanese would take over a sizable portion of land and control the state's agricultural lands). The California Supreme Court in *Sei Fujii* held that the law violated the Fourteenth Amendment, but not the United Nations Charter because the Charter is not self-executing.

The intermediate appellate court in the *Sei Fujii* case based its reversal of the land alienation restriction on the U.N. Charter, indicating some recognition that the charter—an international document—endorsed the right to alienate land without racial discrimination. *Sei Fujii v. State*, 217 P.2d 481, 486-88 (Cal. Dist. Ct. App. 1950). The California Supreme Court upheld the result but reversed the rationale, finding that the U.N. provisions were too vague to create enforceable rights. *Sei Fujii*, 242 P.2d at 619-22.

until they established a firmer anchor in the world. Such claims appear on the surface as impressive attempts at maintaining cultural identity. The problem, however, is that the negotiators' evaluation ended with a recitation of the goal and little examination of the means. The sole focus on land ownership allowed other factors—as important as land ownership in achieving the goals—to be ignored. Section 805 also allocates blame for any cultural ill-effects on outsiders, ignoring any internal responsibility for the situation. History teaches that racial classifications often are the remedy of choice but seldom solve the problems used to justify them.¹⁹³ This case was no different.

Land ownership alone does not bind the NMI culture to the NMI people. Rather, land ownership is one of a number of factors that interact in the cultural ecosystem. A close-knit family structure and common languages, for example, contribute to the culture of the NMI. Even assuming land ownership is the critical link to culture, it is an individual's link to the land that provides the tie.¹⁹⁴ The idea of protecting cultural identity through retaining land ownership in any NMI person's name is nonsensical. Moreover, section 805 enables NMI culture to be threatened by other factors by failing to acknowledge and provide for such factors. For example, land alienation restrictions do not preclude local leadership from adopting casino gambling, allowing unlimited immigration as a source of cheap labor, limiting environmental protections, and fighting land use restrictions and zoning codes.¹⁹⁵ All of these measures, however, are equally devastating to culture and tradition as changes in land ownership because they intrude on the culture and change it.

The folly of treating land ownership as isolated from other effects upon the culture is illustrated by the NMI's recent history. The change to a cash economy—that occurred years ago—increases the pressure to sell land. Before World War II, the NMI's economy changed from that of a subsistence to a cash economy. The Japanese developed an agricultural economy, leasing a large amount of private land from NMI inhabitants (estimated to be about 75% of the private

193. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns . . .").

194. Even the Ninth Circuit acknowledged this point. See *Wabot*, 958 F.2d at 1461 ("[Land] traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members.").

195. See Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under Its Covenant with the United States*, 71 OR. L. REV. 127, 186-87 (1992).

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land).¹⁹⁶ The NMI's economy changed further after the United States took control of the islands under the Trusteeship Agreement and then with the arrival of war claims money.¹⁹⁷ The economy continued to change as Covenant funds have flowed into the NMI.¹⁹⁸ Indeed, the Covenant guarantees intrusions on the culture by guaranteeing many federal programs—including federal welfare, nutrition assistance, social security, and legal services programs.¹⁹⁹ Pushes for economic development and higher standards of living, including health and education programs, inevitably result in cultural change.²⁰⁰ While proclaiming a duty to protect the NMI from too much outside intrusion, the negotiations maximized federal financial intrusion and influence. The land alienation restriction has not stood up to powerful market forces that encourage alienation. Economic development drives up land prices and decreases dependence on the land.

196. See generally *Temengil v. Trust Territory of the Pacific Islands*, 2 Commw. Rptr. 598, 642 (D. N. MAR. I. 1986) ("Thus the local inhabitants to a large extent lived off the rents obtained from the family land. Also, the inhabitants obtained more income from employment as teachers, policemen, stevedores, nurses, and the like. A money economy began to evolve.") (footnotes omitted), *rev'd on other grounds*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

197. *Id.* at 610 ("The United States' administration of the Trust Territory produced a rapid change in the economy of the islands, substituting a money economy for the subsistence economy familiar to the people. The post-war money economy has been heavily dependent on government employment.")

198. Covenant § 701 (United States promised to "assist the Government of the Northern Mariana Islands in its efforts to achieve a progressively higher standard of living for its people as part of the American economic community."). Covenant § 904 (b) ("United States will assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands.")

199. Covenant § 703(a).

200. The current Governor of the NMI, Froilan Tenorio, testified before a congressional committee blaming the Trust Territory for luring the people of the NMI into government desk jobs. He then noted:

Worse, we were inculcated with a welfare mentality. Uncle Sam paid the bills and cleaned up the messes, and we came to rely on that. Our rapid economic development in the 1980s did little to change this underlying psychology. . . . Most stayed close to a government that grew even faster than our booming economy. An endless supply of alien workers to do society's dirty jobs did little to promote social responsibility.

Hearing on H.R. 602, The "Omnibus Territories Act," Before the Subcomm. on Native American and Insular Affairs of the House Comm. on Resources, 104th Cong., 1st Sess. (January 31, 1995) (statement of Froilan C. Tenorio, Governor of the Commonwealth of the Northern Mariana Islands) (on file with author).

b. The Problem Is Outside Pressure; the Solution Is a Restriction Designed with the Help of Outside Pressure?

Covenant section 805 sought to address the problem of outside pressure exerted on the local community. Negotiators feared that outsiders would exert undue pressure on people of Northern Marianas descent to sell long-term interests in land for immediate short-term gains.²⁰¹ Interestingly, the Covenant left the implementation of section 805 completely to the people of the NMI.²⁰² The pressure that outsiders may exert, however, may also be used to shape the design and operation of the restriction. Article XII of the NMI Constitution, which implements section 805, reflects this tension. Article XII of the NMI Constitution allows "outsiders" to lease land in the NMI and permits persons of NMI descent to buy, sell, and lease land freely. The leasehold period allowed the outsiders was lengthy—beginning with forty years and then increasing to fifty-five years. The lengthy leasehold periods do not allow each generation a choice, but rather displace succeeding generations.

Immigration control, a power granted the NMI under the Covenant, illustrates a similar problem.²⁰³ The NMI retained the power to "cope with the problems which unrestricted immigration may impose upon small island communities."²⁰⁴ This provision was based on concerns similar to the land restrictions—that outsiders would change NMI culture. If United States immigration controlled the process, the negotiators apparently feared that Asian immigrants to the United States would relocate in the NMI, thereby upsetting the cultural bal-

201. See *Commonwealth of the Northern Mariana Islands: Hearing on H.J. Res. 549 Before the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 164 (1975) [hereinafter H.J. Res. 549 Hearing] (administration comments on Senator Gary W. Hart's oral and written statements) ("The purpose of [§ 805] is not to confer an undue privilege but is rather to protect the people of the Northern Mariana Islands from exploitation from aggressive and economically more advanced outside groups."). See also *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 ("The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors.").

202. Covenant § 805.

203. Covenant § 503 (federal immigration laws "presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by Congress by law after termination of the Trusteeship Agreement").

204. Senate Committee Report, *supra* note 88, at 78.

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ance.²⁰⁵ That was the theory behind ceding immigration control to the NMI. The 1990 census, however, shows that the NMI population has more than doubled since 1980, and that politically disenfranchised alien workers composed at least 52% of the NMI's total population in 1990 of 43,345.²⁰⁶ The number of resident alien workers has grown tenfold in the last ten years, as alien workers from surrounding Asian countries legally enter and work in the NMI.²⁰⁷ Their presence produces dramatic long and short term effects on the population.²⁰⁸

These statistics demonstrate that the NMI community opted for swift economic development at the price of swift cultural change. Businesses wanted to import a cheap and malleable labor force to fuel the economic boom, and NMI government leaders accommodated them.²⁰⁹ The outside pressures that the negotiators feared would cause rapid cultural change did in fact result. In this case, however, the problem was only exacerbated by the Covenant negotiators' solution of placing immigration controls with the NMI.

c. Majority Enforcement of a Racial Restriction Against a Minority

Racial restrictions imposed upon a political minority by the political majority are troublesome.²¹⁰ The Ninth Circuit, however, simply

205. Senate Committee Report, *supra* note 88, at 78 ("The reason this provision [Covenant § 503] is included is to cope with the problems which unrestricted immigration may impose upon small island communities.").

206. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (March, 1992) at 16. More recently, the Acting Assistant Secretary of the Office of Territorial and International Affairs told a Senate Committee that the "CNMI population rose from 17,900 in 1980 to 62,800 in 1993 with indigenous residents falling from 66.6 percent to 36.5 percent of the population—non-resident aliens, most of whom are legally admitted, now account for 58.89 percent of the population." *Hearing Regarding Immigration Into the Commonwealth of the Northern Mariana Islands and Immigration Questions Before the Senate Subcomm. on Mineral Resources Before the Senate Subcommittee on Mineral Resources Development and Production*, 103d Cong., 2d Sess. (September 22, 1994) (testimony of Allen P. Stayman).

207. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS, *supra* note 206, at 18; *see generally* Herald, *supra* note 195.

208. *See Herald, supra* note 195, at 173-80; *see also* Ferdie de la Torre, *Filipino Births Still Do Outnumber Chamorro*, MARIANAS VARIETY, Aug. 26, 1994, at 1. Children born in the NMI are automatically U.S. citizens so the NMI already may anticipate a long-term change in its population structure no matter how it acts to stem the current tide of legal immigration.

209. *See Herald, supra* note 195. Tenorio, *supra* note 200 (NMI Governor asserted that the main reasons why the NMI government could raise large public revenues is that the NMI "can offer investment incentives, such as low business taxes, a lower minimum wage, and easy entry of necessary foreign workers.").

210. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989) (where five of nine city council seats were held by African Americans and population was 50% African

rubber-stamped the methods that the NMI chose to implement the congressional directive to discriminate in the ownership of real property. There is an inherent hazard when persons of the favored classification control implementation of that classification.²¹¹ Ironically, the Ninth Circuit has acknowledged that the small and family-centered structure of NMI society imposes some limitations on the traditional justice system. In upholding the NMI's exemption from the procedural requirement of jury trials in local criminal cases, the Ninth Circuit emphasized the importance of the exemption, explaining that the limitation was justified because "the small, closely knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases."²¹²

The Ninth Circuit encountered this problem again in a recent case where it labeled the NMI Supreme Court's construction of the land alienation restriction of its Constitution "untenable."²¹³ The NMI Supreme Court had assembled an elaborate resulting trust theory that allowed an NMI descent landowner to void a land sale based on the NMI purchaser's allegedly unconstitutional agreement with a lessee.²¹⁴ Again, the aim was to provide advantage to those of NMI descent at the expense of outsider groups. The Ninth Circuit in *Wabol*, disregarded this inherent problem when it acknowledged that although the land alienation restriction might be misused by insiders,

American, "[C]oncern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny . . ." of affirmative action programs).

211. *Id.* at 522-23 ("The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States, . . . [because of the] heightened danger of oppression from political factions in small, rather than large, political units . . .") (Scalia, J., concurring).

212. *Northern Mariana Islands v. Magofna*, 919 F.2d 103, 106 (9th Cir. 1990) (citation omitted). See also LIEBOWITZ, *supra* note 7, at 526 (the extended family is still the basic social and political unit of NMI society).

213. *Ferreira v. Borja*, 1 F.3d 960, 963 (9th Cir. 1993) (holding that "[t]he Commonwealth cannot constitutionally deprive a person of a property interest through the expedient of an untenable judicial interpretation of local law that denies that a property interest ever existed"). See generally, Comment, *Ferreira v. Borja: Land Transactions in the Northern Marianas*, 29 NEW ENG. L. REV. 209 (1994).

214. The contortions that the NMI Supreme Court had to engage in to reach this result are fascinating but beyond the scope of this Article. Suffice it to say that the decision undermined the land title system in the NMI, but resulted in a number of "original" landowners being entitled to sue to recover their land when the price of land had sufficiently inflated during the booming 1980s. The challenges were based on unrecorded transactions between the NMI purchaser and their lessee. *Ferreira v. Borja*, 1 F.3d at 961, 963.

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any changes in the system would have to be implemented through the political process, which is controlled by persons of NMI descent.²¹⁵

The *Wabol* court's decision is particularly insufficient when considered in context. Even benign classifications based on race where the majority penalizes itself are considered so potentially dangerous that they are subject to a heightened level of review.²¹⁶ To allow racially based treatment in these circumstances is both unprecedented and unwise.

3. *The Results Are Clear*

It is now difficult to argue that restricting the alienation of land in the NMI to NMI persons will protect the culture and traditions of the NMI. During the last two decades, the NMI itself opted to enter the global economy.²¹⁷ The resulting disruption to culture, traditions, and

215. *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 n.23.

216. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (providing for strict scrutiny for Congressionally mandated benign race-based classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (requiring strict scrutiny for state-mandated benign race-based classifications).

217. Consider the description offered by a former Peace Corps volunteer who had lived in Saipan in the 1970s and returned for a visit in the late 1980s:

Down the road, I cruise past what used to be the White Sands Hotel, where we wrote a constitution. Now it's a Miami Beach-scale place called the Pacific Islands Club, a staff of gung-ho "club-mates" helping vacationers enjoy themselves. They've got waterslides and a Disney-esque Spanish galleon picturesquely wrecked on some rocks around the swimming pool. Next I come into the crowded part of the island, San Antonio Village, Chalan Kanoa, and Susupe, a gamut of tourist shops, mini shopping malls, Korean and Chinese restaurants, beauty parlors, discos, gaming rooms, and target-shooting parlors. The road is jammed and there is construction everywhere; not the wishful construction I saw in Truk, where a year-old pile of sand and a few rods of rusted re-bar say maybe we will, maybe we won't, but hectic under-the-gun hard-hatting Koreans and Filipinos working like they work in Saudi Arabia. Then, more hotels, the Saipan Grand, the old Royal Taga, renamed and expanded.

Past Susupe, the road runs close to the beach, too close to permit construction on the ocean side. Here, I find the same placid, grassy shoreline I remember, parked cars and picnic tables under graceful, soft-needled ironwood trees. But right across the road, on the inland side, the hits just keep on coming: car dealerships, Chinese restaurants, hotels and motels, duty-free shops. One continuous blur, all the way to Garapan where there's another cluster of hotels, the ten-story HafaAdai, the Hyatt, and the Intercontinental, big deals that have spawned a whole zone—the Ginza, it's called—of smaller operations, video rentals, curry houses, soft ice cream, moped rentals, strip joints, you name it: Athlete's Foot, Winchell's Donuts. Flags of all nations fly outside the Duty Free Shopping Center. It looks like an embassy.

P.F. KLUGE, *THE EDGE OF PARADISE: AMERICA IN MICRONESIA* 123 (1991). Compare William H. Stewart, *Looking Back at Saipan, 1970s*, *MARIANA'S VARIETY*, December 9, 1994 at 30 ("By the late summer of 1970, the islands were almost devoid of the amenities of the last quarter of the twentieth century . . . There were only two hotels . . . The number of island restaurants could be counted on one hand.").

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the environment has occurred despite any racially based land alienation restrictions.

Economic development boomed in the NMI in the 1980s, with hotel development and tourist arrivals dramatically increasing, all with the approval and support of the NMI government.²¹⁸ Tinian, one of the smaller islands in the NMI, voted to allow casino gambling, and the establishment of five casino gambling resorts is now authorized under local law.²¹⁹ The Island of Rota unsuccessfully attempted to follow suit.²²⁰ Saipan has legalized poker and pachinko machines.²²¹ The NMI also developed a garment industry that has over 20 plants which are mostly alien owned and operated.

Land is freely alienated to wealthier persons of NMI descent,²²² and hotel and resort development, casino gambling, and garment factories all achieved anchors in the community, despite the land alienation restriction. Low-paid foreign domestic workers are employed in a majority of NMI households.²²³ Because of the changes, Chamorro and Carolinian languages must struggle to survive.

NMI culture cannot survive a plague of alcoholism, drugs, and prostitution, or unlimited immigration that diversifies the composition

218. Office of Planning & Budget, Commonwealth of Northern Mariana Islands, *Economic Development Strategy: A Prospectus for Guiding Growth*, 36-46 (2d rev. ed. 1993) [hereinafter "Economic Development Strategy"]; Herald, *supra* note 195.

219. Tinian Local Initiative 1 (1989).

220. Rota Local Initiative 2 (1993); Rota Local Initiative 1 (1991).

221. See Raphael H. Arroyo, *Pachinko Bill Becomes Law*, MARIANAS VARIETY, February 17, 1995, at 3; 6 C.M.C. § 3152 (stating legislative finding that certain forms of gambling, such as poker machines require a higher degree of skill and "are more readily accepted by the people of the Commonwealth.").

222. See, e.g., Amy Gretsche, *Joe Millions*, GUAM BUS. NEWS, July 1989, at 56 (detailing land-wealth of persons of NMI descent acquired in part by purchase of land from NMI persons who lost money in poker machines); Nancy Shaw, *Paradise?*, GUAM BUS. NEWS, July 1990 at 8, 10 (noting acquisition of Tinian land by persons of NMI descent following enactment of casino gambling law); see also Tom Brown, *Beyond the Reef*, SEATTLE TIMES, May 13, 1990, at J1 ("Some of the indigenous Chamorro and Carolinian families that made instant fortunes on their land—prime waterfront property goes for \$1,000 a square meter—spent the money just as fast as they made it and now have neither money nor land. Other families have been split by disputes over property that is suddenly valuable.").

223. According to at least one survey, domestic workers topped the list of foreign laborers employed in the NMI in 1993 at 2,068. There were also 586 foreign workers employed as farm workers. Rafael I. Santos, *House Helps Top RP Worker Lists*, MARIANAS VARIETY, June 17, 1994, at 1, 18. Both categories of workers are exempt from the NMI's minimum wage of \$2.45 an hour. 4 C.M.C. § 9223(a). Their minimum wage is \$200 per month, with the limitation that they may not be worked for over 72 hours per week without receiving overtime. 4 C.M.C. § 9223(b).

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of the island population and changes the family structure.²²⁴ The human rights issues that have arisen from the changing population base and the alien workers' tenuous life in the NMI have presented some complex issues of coping with a multi-cultural society.²²⁵

The changes in the NMI occurred in part because the land alienation restriction served as an effective diversion from the real problems and tough decisions that any society must make to regulate economic development. Employing a race-based limit on one aspect of the cultural ecosystem—land ownership—failed to achieve its goal and diverted attention from many other aspects that define and support a culture.

B. Preserving the Consensual Nature of the Agreement

1. Working With a Fait Accompli

In deciding *Wabot*, the Ninth Circuit was reluctant to tamper with the agreement between the NMI and the United States. The Ninth Circuit was uncomfortable with the notion that the United States and the NMI agreed to the Covenant, but a court could invalidate one of its key provisions. The court emphasized that the Covenant was an "international obligation" of the United States. Whether the Covenant is an "international obligation," however, is a disputed proposition. The Covenant is an instrument of political union by which the

224. See Herald, *supra* note 195, at 173-80; Ferdie de la Torre, *DCCA Sees Increase in Child Abuse Cases*, MARIANAS VARIETY, Apr. 7, 1994, at 1, 9; Ferdie de la Torre, *Alcohol 'Epidemic' Grips NMI*, MARIANAS VARIETY, Apr. 1, 1994, at 1, 28. Ferdie de la Torre, *88 Kids Sexually Abused in '93*, MARIANAS VARIETY, April 8, 1994, at 3 (social worker "said that among the main factors which contribute to the growing number of child[ren] being sexually molested were drugs, economic problems, and poor relationship[s] within the family").

225. See, e.g., William Branigin, *U.S. Pacific Paradise Is Hell For Some Foreign Workers; Filipinos Report Beatings, Rapes, Lockups*, WASH. POST, Aug. 29, 1994, at A1; Philip Sheanon, *Made in the U.S.A.—Hard Labor on a Pacific Island*, N.Y. TIMES, July 18, 1993, § 1 at 1.

See also *Hearing on H.R. 602, The "Omnibus Territories Act," Before the Subcomm. on Native American and Insular Affairs of the House Comm. on Resources*, 104th Cong., 1st Sess. (1995) (statement of T. Alexander Aleinikoff, General Counsel of the U.S. Immigration and Naturalization Service) ("[T]his population growth has severely tested local social services. . . . Immigration authorities have no reliable records of aliens who have entered the CNMI, how long they remain, and when, if ever, they depart. . . . Furthermore, there appears to be some measure of cultural and political resistance in this area.") (on file with author). A Philippine Senate Committee recently listed the NMI as one of five places which were dangerous destinations for Filipino contract workers. Also included on the list were Malaysia, Iran, Iraq, and Kuwait. See *NMI Tops "High Risk" List for RP Workers*, MARIANAS VARIETY, January 9, 1995, at 1.

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Northern Marianas became a part of the United States.²²⁶ The Covenant was approved by a joint resolution of Congress and signed by the President. Moreover, as noted earlier, Congress may not ignore the Constitution through the use of its treaty power.²²⁷

Though it did not directly address this issue, the Ninth Circuit may have feared the repercussions of invalidating Covenant section 805 as unconstitutional. Covenant section 105 provides that the "mutual consent" of the NMI and the United States is necessary to alter several provisions of the Covenant. The meaning of this provision, however, is that Congress (not the judiciary) cannot unilaterally change Covenant section 805 through its power to enact legislation under the Covenant.²²⁸ The NMI was well aware that the land alienation restriction mandated by Covenant section 805 might be challenged in federal courts and ultimately held unconstitutional.²²⁹ The Covenant also specifically provides for review in federal court.²³⁰

226. See, e.g., Senate Committee Report, *supra* note 88, at 91; *Northern Mariana Islands: Hearing on S.J. Res. 107 Before the Senate Committee on Interior and Insular Affairs of the House Comm. on Resources*, 94th Cong., 1st Sess. 486 (1975) [hereinafter *S.J. Res. 107 Hearing*]. During the Covenant approval process, executive branch officials denied that the Covenant was an international agreement because "[t]he Marianas are not a foreign country." H.J. Res. 549 Hearing, *supra* note 201, at 64-65 (revised testimony by Deputy Secretary of State Robert S. Ingersoll); *id.* at 64 (executive branch comments in response to Senator Hart's claim that the Covenant was a treaty). But see Roger S. Clark, *Self-Determination and Free Association—Should the United Nations Terminate The Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 14 n.72, 18 n.93, 32-33 n.197 (1980).

227. See *supra* note 137 and accompanying text.

228. See LIEBOWITZ, *supra* note 7, at 539-40, 543 ("[Section 105] is a unique, specific limitation of Congress' territorial clause authority."). See Senate Committee Report, *supra* note 88, at 67; S.J. Res. 107 Hearings, *supra* note 226, at 364, 371-77.

There would be a constitutional problem with a congressional attempt to preempt judicial review of the constitutionality of a congressional action. See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

229. Even in the negotiations as the MPSC sought to expand the mutual consent provisions to limit Congress' authority under the Territorial Clause, the United States negotiators warned that "[o]f course, it cannot be said with certainty what courts will say about the restrictions which may be imposed in this agreement on Congress' authority under IV-3-2 [the Territorial Clause]". Arnold H. Liebowitz, *The Marianas Covenant Negotiations*, 4 FORDHAM INT'L L.J. 19, 27 n.30 (1981) (citation omitted). See generally Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention; Briefing Paper No. 12, *Restrictions on Land Alienation* at 10 n.5 (1976) ("Section 501 attempts to insulate § 805 from the effects of otherwise applicable portions of the United States Constitution but it is not clear that the courts will give effect to § 501 because American courts are reluctant to exempt American governments from limitations on their own powers.") (on file with author).

230. Covenant § 903 ("Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States.").

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Finally, despite self-serving language in the Covenant,²³¹ the claim that the land alienation restriction was "fundamental" to the NMI must be viewed with some skepticism. Although the legislative history indicates that the United States thought that the land alienation restriction was important, the NMI negotiators did not consider it fundamental and questioned the wisdom of making it mandatory.²³² The NMI's acknowledged open door development policy raises further doubts about its commitment to the "fundamental" goals of section 805.²³³ Proper equal protection scrutiny would have enabled the lower court to explore the impact of a court-ordered modification, and weigh that impact, if any, against the petitioner's equal protection interests.

2. *Negotiating the United States Constitution*

The Ninth Circuit expressed discomfort with the idea that the NMI must abide by United States constitutional provisions (or laws) when they are viewed as inappropriate for the territory. One commentator argues that the Ninth Circuit based its decision in *Wabol* on the belief that:

... American rule over the NMI derives its legitimacy from the consent of the NMI people and from the United States' respect for the NMI's unique customs and values. As a result, the court has concluded that certain constitutional rights are at odds with local ways need not be strictly applied there, provided that the territorial inhabitants themselves demanded release from such rights.²³⁴

Thus, it was important to the Ninth Circuit to preserve the consensual nature of the union, to respect the wishes of the territorial inhabitants, and to rationalize the constitutional exemption as a product of democracy at work. This philosophy protects democratic values, although admittedly at the expense of individual rights. Robert Katz concluded that it "provides the inhabitants of the NMI with more democratic space to enact communitarian policies."²³⁵ More-

231. Covenant § 105 ("In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.").

232. *See* LIEBOWITZ, *supra* note 7, at 592. In fact, the position of the MPSC was correct in hindsight. The Commission argued that a land alienation restriction would not be successful unless the people voluntarily agreed to and understood it. *Id.*

233. *See* Herald, *supra* note 195, at 144-54.

234. Katz, *supra* note 130, at 798.

235. *Id.* at 803.

over, the Ninth Circuit's test, admittedly "speculative and abstract, . . . arguably imposes fewer constraints on the courts' ability to impair rights overseas."²³⁶ There are several problems with this general approach. First, constitutional principles are enduring, not negotiable. Second, there are no effective limits on these exemptions.

a. Constitutional Principles Are Not Negotiable

The Ninth Circuit approaches the Covenant as a contract and finds no limitations on the parties' ability to bargain away equal protection guarantees. The argument is that the United States should be flexible enough to cut constitutional corners to meet the needs of individual territories. The item under discussion, however, is not a statute or regulation, but a constitution. It is more troublesome to claim exemptions from constitutional equal protection guarantees than federal laws or regulations. Inconvenience has never openly been used as an excuse to ignore the Constitution. Here, the United States extended its sovereignty and its citizenship to the NMI, not just foreign aid. Indeed, the Covenant created a political union between the NMI and the United States.²³⁷ As one commentator observed:

[O]nce a society, such as the Northern Marianas, *freely* chooses to become a "part" of the United States, and its inhabitants *freely* choose to become citizens of the United States, then the application of the Constitution should not be the subject of negotiation. In such a situation, deviations from constitutional standards cannot be justified under the guise of a "different cultural setting merely to meet the expedient needs of the negotiators of a covenant."²³⁸

The claim that the NMI majority wished not to be constrained by "inappropriate" principles in the United States Constitution is irrelevant. One of the values of a constitution is that it enshrines certain principles from floating majoritarian values. In fact, if United States citizens voted on the Bill of Rights today, there might be serious questions as to its likelihood of passage. Like the Ninth Circuit's opinion, the electorate—in the quest for an immediately desired specific result—might lose sight of the long term consequences.²³⁹ Thus, arguing that the majority in the NMI demanded release from a provision

236. *Id.* at 801.

237. Covenant § 101 (NMI will exist "in political union with and under the sovereignty of the United States of America.").

238. Branch, *supra* note 39, at 38-39.

239. See Laurence Tribe, *American Constitutional Law* § 1-7, at 10-11 (2d ed. 1988).

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designed to protect minority interests illustrates a problem and is not a justification for the race-based land restriction.

b. Get to Yes and Then Claim You Have an International Obligation

The Ninth Circuit concluded that the United States government may dispense with fundamental constitutional protections when military expediency and "international obligations" so require.²⁴⁰ The Ninth Circuit claimed that "[t]he Bill of Rights was not intended to interfere with the performance of our international obligations."²⁴¹ Legally, however, exactly the opposite is true. The Constitution exists to protect these rights from infringement in both domestic and international contexts.²⁴² Further, the Ninth Circuit's doctrine that limits the Constitution where it is "inconvenient" is not based on any precedent and is limitless in principle. What the Ninth Circuit does is enable agreements between the United States and territorial entities that abridge individual constitutional rights where there is some boilerplate language that the "agreement would not have been possible without the concession."²⁴³

The problems with a negotiated constitution are numerous. Territories, or rather territorial leaders and negotiators, may claim that the small nature of their societies makes full grant of First Amendment privileges impractical, that free speech is anomalous in a small, closely knit society, that the majority's religious preference should be supported by the territorial government,²⁴⁴ that equal rights for women would cut against the grain of the culture and values of the society, that arrest without cause and detention without trial are acceptable in a particular culture,²⁴⁵ and that the racial classifications, provide the best solutions for a number of troublesome social issues.²⁴⁶ Balanced

240. *Wabol*, 958 F.2d at 1462.

241. *Id.*

242. See *Boos v. Barry*, 485 U.S. 312, 324 (1988) ("No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.") (quoting *Reid v. Covert*, 354 U.S. 1, 16 (1957)); *Sahagian v. United States*, 864 F.2d 509, 513 (7th Cir. 1988), *cert. denied*, 489 U.S. 1087 (1989); *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984).

243. *Wabol*, 958 F.2d at 1462 ("Absent the alienation restriction, the political union would not be possible.").

244. In the largely Catholic community of Guam, for example, there might be a desire to exempt those aspects of the constitutional right to privacy that protect a woman's freedom to have an abortion. See *Guam Society of Obstetricians and Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.), *cert. denied*, 113 S. Ct. 633 (1992).

245. Compare *infra* notes 264-266 and accompanying text.

246. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) ("The history of racial classifications in this country suggests that blind judicial deference to legislative or

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against these needs will be the United States' desire to bring the particular entity under United States sovereignty. If the territorial leaders are good negotiators, or have a strong negotiating position, they may receive many constitutional exemptions. The problem with a test that relies upon the demands of territorial negotiators is that it will place the entire Constitution on the table for negotiation; the only remaining hurdle will be that all the negotiators collaborate in designing the boilerplate.²⁴⁷

Before *Wabot*, the negotiators were restrained by the potential threat that the judiciary would invalidate their constitutional exemptions. The *Wabot* decision, however, now gives the negotiators explicit authority to cut and paste the United States Constitution. The Constitution can now become the starting point for questionable experiments. Every agreement with a territory will include appropriate rhetoric about the need to compromise. Also, because the Ninth Circuit's test places no effective limits on the number of exemptions, most territorial entities will try to obtain as many exemptions as possible.²⁴⁸

In practice, the Ninth Circuit's opinion will preserve the existing power structure in the islands.²⁴⁹ Persons negotiating on behalf of the territories are generally the elite in that society. Not surprisingly, they may have little interest in adopting practices that may limit their power, and therefore will probably negotiate as many exemptions to preserve their power.²⁵⁰

United States negotiators may provide some protection against demands to grant exemptions from constitutional protections to territorial inhabitants. It is questionable, however, how much protection negotiators can provide where there are few limits on what is negotiable. In the NMI's case, United States negotiators' main purpose was

executive pronouncements of necessity has no place in equal protection analysis.") (citing *Korematsu v. United States*, 323 U.S. 214, 235-40 (1944) (Murphy, J., dissenting)).

247. The practical result of the Ninth Circuit's opinion in *Wabot* is that the Constitution applies to the NMI only to the extent that the Covenant provides. This approach was explicitly rejected by the Ninth Circuit in *Atalig*. *Atalig*, 723 F.2d at 688.

248. In the Covenant negotiations, the drive was to place as many provisions as possible under the "mutual consent" umbrella of Covenant § 105, to limit Congress' authority in the NMI. See LIEBOWITZ, *supra* note 7, at 540.

249. Representatives from Rota and Tinian were able to successfully preserve a large chunk of power by negotiating the malapportioned legislature. Covenant § 203(c). See also Herald, *supra* note 195, at 181-85.

250. See *infra* notes 265-66 and accompanying text.

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to secure military and national security objectives.²⁵¹ The agreement was viewed, as the Ninth Circuit acknowledged, as a very desirable military objective.²⁵² United States negotiators also face the competing concern that they will be viewed as “colonizing” the territory and therefore will want to appear to be granting a measure of independence or self-government. For example, the negotiators worded Covenant section 805 to reflect concern for the culture of the inhabitants, but the legislative history indicates that the federal checking account was a concern as well.²⁵³

These conflicting concerns are at work in the Covenant. Although voicing a commitment to preserving cultural integrity and land ownership in the name of NMI descent persons, the United States also negotiated a 50 year lease on two-thirds of Tinian, and a power of eminent domain.²⁵⁴ This lease reserved Tinian for future military bases. Neither this land displacement nor the military base are entirely compatible with the section 805 rhetoric. It is not that such compromises among competing concerns are wrong—that is negotiation. When the negotiators may freely bargain with constitutional values, however, every principle can be sacrificed. It will not be difficult under *Wabot* to design the boilerplate with appropriate reference to military and national security needs. Such circumstances call for more, not less, judicial scrutiny.

c. NMI Inhabitants as a Limiting Force

The Ninth Circuit viewed the negotiators and territorial inhabitants as an important limitation on constitutional corner cutting. The Ninth Circuit’s characterization of Covenant section 805 as a “demand” for release from equal protection rights is questionable, how-

251. See HIRAYASU, *supra* note 10, at 496 (“The United States negotiated from a position of its perceived security and defense needs in the areas. The Micronesian negotiating teams sought to attain the highest possible level of United States funding consistent with the greatest possible degree of political autonomy.”).

252. *Wabot*, 958 F.2d at 1462 (“It would also hamper the United States’ ability to form political alliances and acquire necessary military outposts.”).

253. See LIEBOWITZ, *supra* note 7, at 71 (“Congress feared that if no such restrictions were imposed, the Marianas people might sell off their land and then turn to the federal government for continued financial assistance.”).

254. Covenant §§ 803, 806. The United States’ strategic military interest in Micronesia has influenced the negotiating process in both the NMI as well as other entities such as Palau. Palau’s refusal to amend its “nuclear free” Constitution to allow United States nuclear-powered vessels and to allow the United States to exercise eminent domain power, caused a negotiating impasse for almost 15 years. See Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915 (1990).

ever, considering that in the negotiating history, the Marianas side did not demand section 805 at all.²⁵⁵ Moreover, the vote on the Covenant was an "up or down" one, the choice being between the already negotiated Covenant and a return to a Trust Territory District.²⁵⁶ Finally, common sense dictates that requiring approval by the majority group that they be allowed to enforce a racial restriction against a minority group may not be a significant barrier.

The Ninth Circuit's "demand" requirement, however, would probably exclude a situation where the United States tried to use its powerful position to undercut constitutional protections to the majority of the inhabitants, e.g., deciding that equal protection guarantees would be too cumbersome to apply to United States action against the majority interests of the voting population. If the United States, for example, proposed to apply disparate pay scales based on race and ethnicity to its employees in a particular territory, a majority of the voting inhabitants would not agree to this exception from equal protection constraints.

For example, when the United States administered the Trust Territory of the Pacific Islands, the United States paid Micronesian employees significantly less than its United States citizen employees, and citizens from other countries varying amounts depending upon their country of origin.²⁵⁷ If the rule adopted is simply an "impractical and anomalous" standard, the United States could construct an argument that payment of equal wages regardless of race or national origin was "impractical and anomalous" due to market forces.²⁵⁸ If an additional caveat on adoption of the "impractical and anomalous" standard is

255. See LIEBOWITZ, *supra* note 7, at 592. The negotiators representing the NMI—the Marianas Political Status Commission (MPSC)—questioned the wisdom of making the restriction mandatory. It was the United States that insisted on the land alienation restriction. The MPSC preferred to leave the issue to the NMI people.

256. See LIEBOWITZ, *supra* note 7, at 505, 533-34. The Covenant as a whole was what the general population voted on—a take it or leave it deal. The Marianas Political Status Commission was composed of leaders whose wealth and interests may have differed from the general population. Certainly the land alienation restriction works to the advantage of wealthy persons of NMI descent. They have a captive land market, and absolutely no restriction placed on their acquisition of NMI land. The very manner in which the restriction was designed reflects these interests.

257. *Temengil v. Trust Territory of the Pacific Islands*, 2 Commw. Rptr. 598, 640 (D.N. Mar. 1. 1986).

258. The Trust Territory justified the disparate wage scales by saying they were necessary "to promote economic advancement and self sufficiency of the inhabitants," as mandated by the Trusteeship Agreement. The Trust Territory needed to recruit off island labor and would have to pay that labor the prevailing wage rate in their country of recruitment. The Trust Territory believed paying Micronesian employees the higher level would be "financially disastrous and economically unsound." *Id.*

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that territorial inhabitants must demand release from some particular aspect of equal protection, it is unlikely that the disparate wage scales would be released from equal protection constraints because the voting majority would not demand lower wages for themselves.

Yet, the danger of government overreaching does not disappear with the requirement that territorial voting residents demand release from these individual rights—especially equal protection rights. Their demands should not be entitled to any less suspicion.²⁵⁹ The protection of individual rights demands protection against the power of government, the United States or a territorial government, especially on behalf of minority voting interests or non-voting interests. Although it would be comforting to believe that the territorial government always has the best interests of people at heart, governments consisting of humans all too often favor the interests of their leadership and the maintenance of their power.

Territorial governments, for example, may be just as likely to adopt disparate pay scales based on race or national origin if non-voters are the losers; the NMI has effectively adopted such pay scales already.²⁶⁰ Its low minimum wage covers mainly nonresident workers from Asian countries. The exemption categories from even this low wage rate—maids and farmers and fisherman—are almost exclusively nonresident workers with non-United States citizenship.²⁶¹ If the Covenant was negotiated today, NMI claims of preserving their differ-

259. One factual difficulty confronting this theory is that it was not the NMI that wished the § 805 policy written into the Covenant. See LIEBOWITZ, *supra* note 7, at 592.

260. See *Hearing on H.R. 602, The "Omnibus Territories Act," Before the Subcomm. on Native American and Insular Affairs of the House Comm. on Resources*, 104th Cong., 1st Sess. (1995) (statement of Leslie Turner, Assistant Secretary of the Interior for Territorial and International Affairs) ("Virtually all local residents of the CNMI, including government employees, are earning more than the federal minimum wage. The only purpose served by the lower CNMI minimum is to maintain a lower wage for guest workers; in contrast, all workers are subject to the federal minimum wage in neighboring Guam.") (on file with author).

261. See *Herald*, *supra* note 195, at 151-52. The NMI law allows employers to work maids and farmers up to 72 hours per week without payment of any overtime. 4 C.M.C. § 9223(b). These categories of workers are also exempt from the minimum wage and their basic pay rate is \$200 per month. *Id.* In response to a question from the United States House Committee on Interior and Insular Affairs as to why housemaids (most from the Philippines) were exempt from the NMI minimum wage, the NMI government at first proposed the cavalier reply, "Maids in the Philippines are making below \$25 per month." *What the Answers Answered*, MARIANAS VARIETY, Sept. 18, 1992, at 4.

In response to another question whether the \$2.15 per hour minimum wage in the NMI was a living wage in the NMI, the NMI government responded "Thousands voluntarily work at or below this wage because it is many times the available wage in their homelands. To them it is a 'living wage.' It keeps them and their families alive." *Answers to 61 Questions*, MARIANAS VARIETY, Sept. 17, 1992, at 4.

CLINTON LIBRARY PHOTOCOPY

ing economic base and their right to govern could all be used to justify continuing to pay the non-citizen domestic workers \$200 a month, and allowing the employers to make them work 72 hours a week without overtime, and the votes could conceivably demand it.²⁶²

Thus, if the *Wabot* standard prevails, it could open the door to United States expansionism—the extension of United States sovereignty—where it seems inappropriate for the United States to develop such a close political affiliation. An example is the State of Yap in the Federated States of Micronesia, formerly also part of the same Trust Territory system that contained the NMI. The State of Yap maintains a highly traditional caste system.²⁶³ Thus, although the Yap Constitution purports to provide the guarantee of equal protection, the custom of the caste system is also a constitutional guarantee.

The framers of the Yap Constitution rejected a proposal prohibiting slavery and involuntary servitude:

The Standing Committee acknowledged that “involuntary servitude might exist to some degree. . . . Some people might believe that low caste people are at times pressured to perform certain tasks against their will. This might be true in some cases.” The Committee’s candid recognition of the caste system and potential conflicts which might arise from a prohibition against involuntary servitude resulted in a clause which only prohibits slavery.²⁶⁴

The NMI government recently settled a lawsuit that the U.S. Department of Justice brought against it for discrimination in the employment of Filipino school teachers. See *Mariana Islands to Pay \$2 Million to Filipino Teachers in Bias Accord*, BNA DAILY LABOR REPORT, August 22, 1994, available in Westlaw 1994 DLR 160 d 9.

262. Thus the NMI Special Task Force on the Minimum Wage agreed with the Saipan Chamber of Commerce that household workers should continue to be exempt from the minimum wage because “it allows local mothers to enter the workforce and, therefore, provides dual-income support to households.” Nick Legaspi, *Task Force Presents 2 Wage Hike Options*, MARIANAS VARIETY, November 4, 1992, at 1; see also *Wage Bill Means Surrender of NMI Sovereignty*, MARIANAS VARIETY, May 4, 1993 at 1.

263. See Brian Z. Tamanaha, *The Role of Custom and Traditional Leaders Under the Yap Constitution*, 10 U. HAW. L. REV. 81, 93 n.90 (1988).

If the United States wanted a closer relationship with Yap for military purposes—including United States citizenship and sovereignty—than that actually negotiated (free association), the *Wabot* decision might justify allowing the perpetuation of the caste system, which is incompatible with equal protection values. The *Wabot* requirements seem to be that the constitutional right is incompatible with local values and the majority (the non-untouchables) demand release from this right. Both requirements could be met in the case of Yap’s caste system.

264. See Tamanaha, *supra* note 263, at 93 (footnotes omitted).

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The Yapese leadership negotiated a prominent place in their constitution for traditional leaders.²⁶⁵ In addition, traditional customs also appear to be protected. For example:

[i]n a recent case, three juveniles causing a disturbance in a village were caught by the villagers, beaten, bound to a tree, and held until a traditional apology was tendered by the offenders' village. Although this action was illegal under the criminal code, no prosecution ensued because the villagers' response was legitimate under tradition.²⁶⁶

The argument is not that outside forces should break down the Yapese caste system. Rather, the United States should not allow its sovereignty to be extended to Yap in such a way that a stronger wall of government protection may be built around the caste system. United States equal protection values are incompatible with the Yapese system. Knowing this makes close political affiliation less likely.²⁶⁷ But under the *Wabul* analysis, United States citizenship and sovereignty may easily be extended to all members of the Yapese castes without all corresponding constitutional rights. The United States may therefore guarantee perpetuation of the caste system to protect cultural integrity, and equal protection will not be a barrier.

Finally, departures from constitutional constraints will be based on negotiating ability and how much bargaining power the territorial entity has, instead of any particularly defensible principle. Although groups living in the United States may not be entitled to any protection or special deference for their culture, some United States citizens in the territories will be entitled to it and others similarly situated in another territory will not.

d. The Compromises—Sellable but Not Necessarily Workable

Covenant section 805 reflects the negotiating pressures on both sides. The restriction was "sellable." The negotiators left the design up to the NMI, because they wanted to avoid the label "colonialist" that would attach if they designed and imposed the land alienations restriction. It was simpler and more sellable to get an agreement on the grand theory and then allow the NMI to work out the important details. NMI persons, who for the most part had been accustomed to

265. *Id.* at 101-02. One wonders if the members of the "untouchables" caste had been doing the negotiating, whether the same prominent protection for tradition would have been maintained.

266. *Id.* at 93 n.90.

267. Yap, as part of the Federated States of Micronesia is part of an independent sovereign state. See *Bowoon Sangsa v. Micronesian Indus. Corp.*, 720 F.2d 595, 600 (9th Cir. 1983).

individual land ownership and the buying and selling of land for some years, might have been unwilling to make the sacrifice of including themselves in the restriction. Thus, a racial restriction was particularly attractive because it blocked others from the market yet left those with existing wealth free to buy up as much land as they wanted, and with less competition. The Covenant negotiators simply chose to take the easy route of racial preference rather than confront the complex issues that every society faces in deciding the amount and level of acceptable economic development and change.

To the United States negotiators, the racial restriction also provided an attractive option because it allowed the negotiators to claim that they had taken some action on a difficult issue without pushing the NMI to adopt any specific approach; it allowed the United States to say "we tried, you failed." To be fair, the United States was damned either way. If it took the tough approach of forcing a land alienation provision or other measures that might be likely to succeed, it risked having the NMI leadership refuse to deal with the "imperialist" power that was forcing the leaders to accept provisions that were against their best interests or that would stunt economic development. If the United States did not address the issue of land alienation, it risked being blamed for the same problems that had occurred in other places such as Hawaii and Guam. There is a tension, unresolved in the Trusteeship Agreement, between preserving culture and encouraging economic development. The United States could be criticized on one or the other grounds, no matter which approach it adapted.

Covenant section 805 is the perfect scapegoat for both sides. Because it blamed the problems on the "outsiders," there were no pressures on the insiders to set development limits, such as standards of local participation or zoning codes. NMI persons, under the alienation restrictions, can buy and sell among themselves. No focus is placed on whether these insider sales might be disruptive to the culture or economically displace NMI persons. The focus is on the outsiders and not on ensuring minimal displacement or that land transactions are generally scrutinized for fairness.²⁶⁸ When the land

268. See, e.g., Northern Mariana Islands, Journal of the Second Constitutional Convention, 34th Day, July 21, 1985, at 747 (on file with author). The NMI's Second Constitutional Convention deleted a proposed amendment that would have required appraisals of land before persons entered into long term leases or sales because it would apply to persons of NMI descent buying and selling their lands among themselves and agreements with outsiders. The objection appeared to be that any appraisal requirement should apply to outsiders only, not to land sales and leases generally, no matter the ethnicity of the transacting parties.

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alienation restriction was designed, privately held land comprised only ten percent of the land in the NMI.²⁶⁹ Restrictions on alienation of public land based on culturally compatible purposes might have been more effective. Zoning to control the nature and placement of development, general regulation of development, and immigration limits could also have furthered the cause.²⁷⁰ The classification used was neither necessary nor sufficient to achieve the goal of protecting culture and traditions. There existed a number of non-racial alternatives. These restrictions—applicable to all races and ethnic groups—would have protected civil rights, family structures, and culture.

V. Adopting a Policy That Addresses Real Problems With Solutions That Are Constitutional

If the land alienation restriction was designed to achieve the goals set out in Covenant section 805, it has failed. There is no reason to cut constitutional corners—as the court in *Wabot* did—to protect the end result. Indeed, it is wrong to continue the charade because it delays taking appropriate steps to achieve the real objectives.

The land alienation restriction and the *Wabot* decision can be viewed as symbolic gestures. They demonstrate that the United States will only impose its Constitution as far as the inhabitants of a territory wish to have it imposed upon them. Or as one commentator has argued, the *Wabot* decision helps, "to maximize the legitimacy of the United States' authority in each particular territory."²⁷¹ United States expansion is by contract, not conquest. It makes territorial expansion easy, but it also makes it less legitimate because it gives territorial inhabitants less constitutional protection than they had even under the *Insular Cases*. It reduces the United States Constitution to the status of a franchise agreement, and it justifies, in part, these results as required by United States military needs.

There are a number of tensions inherent in the relationship between the United States and its territories. A few specific differences between the states and territories that have caused concern about unequal treatment are: (1) the right of self-government; (2) the right to vote for president; (3) the guarantee of an Article III court; (4) the right to representation in Congress; and (5) guarantees of the applica-

269. Willens and Siemer, *supra* note 2, at 1407.

270. See Herald, *supra* note 195, at 174-80. Recently the Saipan legislative delegation acted to suspend zoning controls for another three years. See *Saipan Solons Agree to Suspend Zoning*, MARIANAS VARIETY, July 8, 1994, at 1.

271. Katz, *supra* note 130, at 780.

CLINTON LIBRARY PHOTOCOPY

tion of other constitutional provisions, including individual rights.²⁷² The *Wabot* decision does not solve any of the first four issues and exacerbates the fifth.

In practical terms, the NMI has a right of local self-government, both guaranteed in the Covenant, and at least the practical equivalent of that left to the fifty states.²⁷³ In searching for alleged interferences with its right of self government, the NMI has not come up with an emotionally or judicially strong example of congressional interference with its right of self-government.²⁷⁴ Moreover, the Ninth Circuit has inserted a protective barrier by recently holding that whenever Congress acts pursuant to its Covenant powers to pass legislation affecting the NMI, the federal interest is balanced against the degree of intrusion in the Commonwealth's internal affairs.²⁷⁵

Of course the states have the explicit protection of the Tenth Amendment. But it—at present—is much more theoretical than real protection. If the only difference between federal authority over the states and the territories lies with the Tenth Amendment, the whole debate would seem to be a tug of war over the Emperor's new clothes. The Supreme Court's current interpretation of the Tenth Amendment provides little protection against the overwhelming authority of the Congress under the Commerce Clause.²⁷⁶ Indeed, the Supreme Court, until recently, referred everyone to their senators and representatives for redress of claims of overreaching against their federal government.²⁷⁷

Second, the right to vote for the President is a right of state citizenship and therefore a right denied citizens residing in territories.²⁷⁸

272. See Van Dyke, *supra* note 25, at 469-71; Lawson, *supra* note 28, at 877-79; LIEBOWITZ, *supra* note 7, at 114, 120; Attorney General of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) (residents of territories have no constitutional right to vote for the president), *cert. denied*, 469 U.S. 1209 (1985); Palmore v. United States, 411 U.S. 389 (1973) (requirement of Article III court inapplicable to territories); TORRUELLA, *supra* note 6.

273. Covenant § 103 ("The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.")

274. See Hillblom v. United States, 896 F.2d 426, 431 n.3 (9th Cir. 1990) (discussing and rejecting claims that three federal laws applicable to the NMI violated the NMI's right of self-government).

275. United States v. Guerrero, 4 F.3d 749, 755 (9th Cir. 1993).

276. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *But see* United States v. Lopez, 115 S. Ct. 1624 (1995) (striking down federal law as beyond the scope of Congress' Commerce Clause power).

277. Garcia, 469 U.S. 528.

278. Attorney Gen. of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984) ("The right to vote in presidential elections under Article III inheres not in citizens but in

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Nothing short of a constitutional amendment will solve this problem. Third, the Supreme Court has held Article III inapplicable to the territories and citizens there must content themselves with Article IV territorial courts, staffed by federal judges with limited tenure. Others have made strong arguments that this arrangement is a mistake.²⁷⁹ The Supreme Court could rectify that problem, or it could be done by constitutional amendment.

A fourth problem is the lack of representation in the Congress. The territories do not have representatives in the Senate. The NMI has no representation in the House of Representatives. The Congress may pass legislation applicable to them without their legislative participation. This lack of a right of participation in the federal government has been softened in some ways in the Covenant between the NMI and the United States. The NMI may request a non-voting delegate in the House of Representatives and other territories have non-voting delegates.²⁸⁰ This arrangement is far short of the representation a state enjoys. On the other hand, the NMI population falls far short of that of a state, and changes in representation might not have popular support.²⁸¹ The taxes collected in the NMI remain with the NMI government easing the problem of federal taxation without representation.²⁸² Also, the Covenant specifically provides that the NMI and United States "will consult regularly on all matters affecting the relationship between them."²⁸³

Finally, the *Insular Cases* generally insure that not all constitutional provisions, such as the Revenue Clause or jury trial guarantees²⁸⁴ automatically apply in the territories. The most important constitutional safeguard available to residents of the states is the protection of individual rights from government action. This is the difference the *Wabob* court addresses and it exacerbates the problems originally caused by the *Insular Cases*. Allowing territorial and

states; citizens vote indirectly for the President by voting for state electors."), *cert. denied*, 469 U.S. 1209 (1985). The Covenant provided for United States citizenship for most NMI residents when the Trusteeship Agreement was terminated. Covenant §§ 301-303.

279. *See supra* note 102.

280. A bill was introduced in the House of Representatives making that request. *See* H.R. 4927, 103rd Cong., 2d Sess. (1994).

281. Even the slight shift in power that accompanied the largely symbolic grant to territorial delegates of voting privileges in the House of Representatives' Committee of the Whole triggered a legal challenge, though it was unsuccessful. *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

282. Covenant § 601.

283. Covenant § 902.

284. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Revenue Clause); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (jury trial).

United States negotiators to exclude these provisions with the limited check on their actions evidenced in the *Wabot* case—if they say it is impractical and anomalous, then it must be so—removes a significant check on government authority that operates in favor of the inhabitants of the territory. If indeed the inhabitants, however defined, wished to give up specific protection, it is a questionable solution to the legitimacy of United States authority in the territories. It allows a majority to remove constitutional protections specifically designed to protect individual rights. It makes the United States presence less legitimate by making expansion easier at the expense of protection of individual rights.

Conclusion

The Ninth Circuit tried to be sensitive to the territories' "separate and unequal" status.²⁸⁵ Unfortunately, it ignored precedent and established the principle that there were potentially no individual constitutional rights of territorial residents that could not be negotiated away. In the *Wabot* case, the Ninth Circuit left open the possibility that equal protection of the laws may apply of its own force in some vague manner in the territories. It may protect some activities that are "fundamental in the *international* sense."²⁸⁶ If owning property, however, does not fit into this category, it is difficult to imagine what does. Most daily activities will also fall outside the scope of coverage, and thus within the negotiators' domain. Racial (and arguably gender) discrimination are negotiable issues.

Moreover, there is no principled basis for distinguishing equal protection from other individual rights protected under the Constitution, such as the First or Fourth Amendments. These Amendments will not block an agreement with the territories that limits these rights, as long as the negotiators cut the deal with the appropriate boilerplate language and the agreement receives majority approval. This is insufficient protection for individual rights. Negotiators have agendas that often conflict with the protection of individual rights. Requiring majority approval in the territory of the ultimate agreement may not provide sufficient protection for individual rights. Limiting the rights of unpopular or disenfranchised minorities could have popular support.

The Ninth Circuit's decision ratified failed policy with contrived law. The Ninth Circuit's sympathy with the goals of the racial land

285. TORRUELLA, *supra* note 6, at 5.

286. *Wabot*, 958 F.2d at 1460.

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alienation restriction drove it down the tortured path it took. When the restriction and the NMI's situation are examined in any depth, however, it becomes clear that the *racial* part of the restriction was irrelevant to achieving the goals. The restriction takes a complex problem, dealing with economic development and cultural change, and boils it down to race. Race has not been part of the solution, but a disturbing distraction from the real problem. Everything the negotiators feared would happen with unrestricted development and more, nevertheless occurred with that restriction in place. The potential for even greater policy failures in United States territorial relations looms because the *Wabot* decision encourages the same approach in future agreements.

There are problems when comparing the position of the states and the territories. Territorial residents do not have the same rights of participation in the executive, legislative, or judicial branches of the federal government. They have been excluded from some of the checks and balances of that system. But to remedy that problem by allowing negotiators to eliminate constitutional guarantees protecting individual rights is a giant step in the wrong direction.

The United States and the NMI faced some hard choices about the direction of their relationship and the future of the NMI when they negotiated the Covenant. Unfortunately, the NMI has not followed the path of balanced development, as envisioned in the Covenant. The land alienation restriction remains legally intact. Given the current conditions in the NMI, the practical result is that the restriction is a stark symbol of a failed policy. It is disheartening that the Covenant framers used a racial decoy to address important social concerns. It is, however, more distressing that the Ninth Circuit stamped its judicial approval on the Covenant, encouraging further agreements with the territories that limit individual constitutional rights.

The Interagency Working Group on Puerto Rico

April 4, 1996

MEMORANDUM FOR ELENA KAGAN
Associate Counsel to the President

FROM: JEFFREY FARROW
Co-Chair

SUBJECT: PUERTO RICO POLITICAL STATUS BILL

This is to update you on the House bill that would provide Puerto Rico with political status options to be voted on before 1999 and provide a transition and implementation process for a selected status change.

The bill, H.R. 3024, has now been sponsored by 41 Members, mostly Democrats.

The key sponsors, Resources Committee Chairman Young and Resident Commissioner Romero-Barcelo, have indicated that changes will be made in response to two major criticisms of the bill --

- to add a commonwealth option (it now only has nationhood and statehood choices) and
- to not suggest that U.S. citizenship would be taken away from persons born before nationhood.

They are also considering other changes that were proposed by Gov. Rossello, who heads the insular party that favors statehood, or by the head of the independence party in their generally supportive testimony during a hearing in Puerto Rico.

Leaders of the commonwealth party continue to oppose the bill. They say that efforts should be focused on implementing the Commonwealth option that won a plurality in the locally-called status vote in 1993 and other options should not be considered.

The Committee still suggests that further action is expected this month (possibly a hearing at which we will be asked to appear).

Room 6061, U.S. Department of Commerce Building, Washington, D.C. 20230
Telephone (202) 482-0037 • Facsimile (202) 482-2337

The Interagency Working Group on Puerto Rico
Telephone (202) 482-0037 • Facsimile (202) 482-2337

Facsimile Transmission Cover Sheet

Date: 3/28/96

To: Elena Kagen

Fax Number: _____

From: JPP Farrow

Message: These are background points on the President's proposal to reform the Federal tax incentive for U.S. corporate investment in insular areas -- rather than terminate it as Congress has proposed -- and use the revenue that would be generated for social programs and job creation needs in Puerto Rico.

Note: The information contained in this facsimile message is CONFIDENTIAL and is intended for the recipient ONLY. If there is a problem with this transmission, please contact the sender as soon as possible.

Number of pages with cover: 2

Puerto Rico Investment Incentive/Needs Proposal

• Congress' budget bill would have terminated 'Sec. 936' -- the Federal tax credit enacted to encourage U.S. companies to make job-creating investments in insular areas that is a substantial factor in Puerto Rico's economy. It would have:

- 1) phased-out benefits for manufacturing operations already in the islands over 10 years;
- 2) immediately taxed the investment income that these operations now earn tax free on profits invested in Puerto Rico or other qualified Caribbean areas; and
- 3) immediately taxed the profits from all new operations.

The \$3.8 billion that would have been taken from the companies over seven years would have been used for the U.S. deficit. (Sec. 936 is said to save the companies \$2.7 billion this year.)

• The President objected to the proposal ignoring Puerto Rico's needs in vetoing the bill.

• In an effort to reach a reasonable compromise, the President's seven year balanced budget plan proposed --

- 1) continuing the part of the credit based on real economic activity in the islands -- wages, local taxes, and capital investments -- and expanding it by allowing companies use credits based also on economic activity in previous years;
- 2) continuing the part on investment income from earnings reinvested in Puerto Rico or other Caribbean areas;
- 3) phasing-out the part based on income merely attributed to the islands (and not necessarily related to economic activity there) from 1997 to 2001; and
- 4) using an amount equal to the billions that would be raised for social and jobs programs in Puerto Rico.

• The President's FY '97 budget again proposes this compromise. (It would make the revenue that would be generated by reforming the credit available for Medicaid; the insular program in lieu of SSI; AFDC; the Job Training Partnership Act; and, if approved, a local jobs creation program. It would provide \$2.3 billion from FY '97 to FY '02 according to CBO December 1995 assumptions.)

The Interagency Working Group on Puerto Rico

March 12, 1996

MEMORANDUM FOR ELENA KAGAN
Associate Counsel to the President

FROM: JEFFREY FARROW, Co-Chair

SUBJECT: PUERTO RICO NATIONHOOD OR STATEHOOD BILL

A bill that would ask Puerto Ricans to choose between nationhood and statehood before 1999 has been introduced by the chairman of the House committee of jurisdiction and a number of other Members of Congress. The bill would also provide for an at least 12 year follow-up process that would require a transition plan and further votes in Congress and Puerto Rico on the plan and final implementation of the status change.

Among those who joined Resources Chairman Young in sponsoring the measure were Speaker Gingrich (in an unusual endorsement), Resident Commissioner Romero-Barcelo, Rep. Serrano, and International Relations Committee Chairman Gilman.

The bill is supported by Governor Rossello and by leaders of Puerto Rico's independence party. But it is opposed by leaders of the party that supports the existing governing arrangement and that promoted the Commonwealth option that won a plurality in Puerto Rico's 1993 vote on status aspirations.

Other critics include Resources Ranking Democrat George Miller and Reps. Gutierrez and Velazquez.

Young and others justify the bill's options by asserting that commonwealth doesn't provide for fully democratic governance.

I have reiterated that the President is committed to supporting the status determined by the people of Puerto Rico among commonwealth, statehood, and independence options and that he continues to be willing to work with Puerto Ricans' various representatives and the Congress to develop a process that would enable Puerto Ricans' aspirations for self-determination to be fulfilled.

A full committee hearing is scheduled for March 23rd in Puerto Rico. I am told that we will be asked to testify next month.

Room 6061, U.S. Department of Commerce Building, Washington, D.C. 20230
Telephone (202) 482-0037 • Facsimile (202) 482-2337

Jeff Farrow 2/13/96

"Political prisoners"

not factor in trials

13 US PRs incarcerated in local prisons for crimes of various sorts - street shuffling of a index? given long sentences - Guiterrez (DZC) wants pardon interests - not on island / US PRs much more cases reviewed by pardon atty March 29 - rally in Wash (Nahil PR coalition) Petition to Deng Sovich.

John Trevaria - Dep Asst - (ex Atty -
DOT w/ 3 compressors (?)
DOT shouldn't be inflected by politicians

I have misgivings abt WH involvement -
these are political crimes
gen'l public - unpopular cause.

Dawn Chirwa - someone has spoken to her re
correspondence.

Have a utry even?
Dawn or I should come.

Just FYI

Oct. 20, 1995

NOTE FOR MARCIA

FROM: JEFF

Pro-statehood P.R. legislators are asking U.S. House Members to ask Justice for an opinion on the mutual consent issue in the Puerto Rican context, encouraged by the memo for the Guam commonwealth bill negotiations that Justice did for Interior. (As you know, mutual consent is critical to the 'commonwealth' concept.)

I'm notifying Justice.

CC: Janet Murguia
Elena Kagen ✓
Jennifer O'Connor

**TRANSLATED EXCERPTS FROM EL NUEVO DIA
OCTOBER 18, 1995**

DOUBTS CAST ABOUT THE BILATERAL PACT

In a 1994 memo, the Clinton Administration raised doubts on the legal and constitutional viability of the alleged bilateral pact between Puerto Rico and the United States claimed by the Commonwealth supporters.

The memo, dated July 28, 1994, was written after the 1993 plebiscite in Puerto Rico in which the Popular Democratic Party promised to ratify the bilateral pact they say exists under the Commonwealth status.

However, even though the memo was prepared by a current member of the White House Interagency Working Group on Puerto Rico - Teresa Wynn Roseborough - she was not a member of the Group when she wrote it, it was said. Also, the memo is based on documents produced for the Bush Administration.

The allusion to the alleged impossibility of the bilateral pact in the current political relationship between Puerto Rico and the United States appears in a footnote of a memo that discusses the political status of Guam. This insular area voted in favor of establishing a "Commonwealth" arrangement, but includes a mutual consent clause that accepts the premise that the United States has plenary powers over the territories.

"Our conclusion is that these clauses raise serious constitutional controversies and are not legally viable," the memo said referring to Guam's desire of having the "Commonwealth" law between Guam and U.S. amended only through mutual consent. Guam also wants that no Federal law approved after it achieves "Commonwealth" status will apply to Guam without the consent of that insular area and the U.S.

The memo was taken yesterday to the Congressional Hearings. But the American Samoa Delegate, Democrat Eli Faleomavaega who was presiding the hearings at that point, did not allow Howard Hills, a former official of the Bush Administration who attacked the basis of the Commonwealth in Puerto Rico in his testimony, to read it.

Later on, Resident Commissioner Carlos Romero-Barcelo asked Miriam Ramirez de Ferrer, a witness representing the pro-statehood organization Puerto Ricans for Civic Action, to read it.

Rosselló urges Congress to tackle P.R. status issue

Governor calls for federally mandated plebiscite in 1998

By ROBERT FRIEDMAN
STAR Washington Bureau

WASHINGTON — Gov. Rosselló, echoing sentiments often expressed at a House hearing Tuesday, urged Congress to get directly and quickly involved in the island's status issue, and proposed a federally mandated plebiscite in 1998.

"I urge that you reaffirm the long-standing commitment of the Congress of the United States to Puerto Rican self-determination . . . by formally advocating that self-determination be exercised without delay in a permanently definitive manner," the governor said.

"What I have in mind is a government-to-government dialogue, initiated by Congress, for the holding of a federally mandated plebiscite," he said in testimony before the Joint Native American and Insular Affairs and Western Hemisphere Affairs subcommittees.

He said the self-determination options for each status should be "reality-based" and unequivocally accepted by Congress and the White House.

The governor said that "Congress almost made it" in its 30-month attempt in 1989-92 to mandate and regulate a status vote to Puerto Rico. That attempt failed, but Rosselló said Tuesday, "I think you should try again."

Congress would have to define "in general terms" what it deems acceptable alternatives in another island status vote, the governor said in an interview later.

"There's enough time for Congress to get into it" before a 1998 plebiscite, he said.

Others, both witnesses and panel members, wanted Congress to go further and make any subsequent plebiscite binding. One after another they spoke in no uncertain terms about the unwillingness of federal legislators to tackle the status issue.

"I'm afraid this will be more of the same," said Rep. José Serrano, D-N.Y. "So many members of Congress have no understanding of the Puerto Rico problem . . . Congress should once and for all approve a referendum, stating clear options and making it a binding vote and bring the results to the floor of the House or Senate by a certain date."

Said Rep. Robert Menéndez, R-N.J.: "The central question for the United States is, are we ready to honor the determination of the Puerto Rican people, regardless of the outcome? I have serious doubts about that. We have to strengthen Congress' commitment. I would urge we show that we sincerely, honestly and forthrightly will respond in a meaningful way, which means we will accept their decision."

Del. Robert Underwood, D-Guam, whose territory has been battling for more than 10 years to have Congress recognize its plebiscite vote for commonwealth status, said that plebiscites right now are nothing more than public opinion polls.

This brought a reply from Rep. Robert



Gov. Rosselló confers with Rep. Robert Torricelli, D-N.J., during congressional hearings Tuesday on Puerto Rico's status. In the center is Miriam Ramirez de Ferrer, president of Puerto Ricans in Civic Action.

Torricelli, D-N.J., who was testifying before the panel to push his bill for a status plebiscite in all the territories every five years. Torricelli said that perhaps Congress should bind itself to the plebiscite results.

"Mr. Burton and I will have to decide how far to go," said Torricelli, referring to Rep. Dan Burton, R-Ind., who co-authored a similar periodic-plebiscite bill with the New Jersey legislator in the last Congress and is expected to do the same in this session. Burton, who heads the Western Hemisphere Affairs Subcommittee, co-chaired the Tuesday hearing along with Rep. Elton Gallegly, R-Calif. of the insular affairs panel.

The hearing, which started at a little after 1 p.m. and was still going strong some five hours later, ranged widely. Although its main purpose supposedly was to examine the mechanics of the 1993 plebiscite, just about all issues related to Puerto Rico got discussed — including Section 936, disenfranchisement, NAFTA, presidential elections, whether the U.S.-Puerto Rico compact was permanent or not, whether American citizenship could be revoked for Puerto Ricans, the United Nations and Fidel Castro.

To the surprise of some, the commonwealth cause did not suffer any noticeable defeat at the hearing, even though joint committee co-chairman Burton made some telling points. He wanted to know what was so wonderful about 936,

since the jobs created by the tax program have not increased in the past six or seven years, the jobless rate in Puerto Rico has remained the same since 936 went into effect in the 1970s and tax credits to the companies have jumped 200 percent.

"Would you say this program was cost effective?" Burton asked Popular Democratic Party President Héctor Luis Acevedo.

Acevedo defended the commonwealth plebiscite proposals by noting that every one of them represented a U.S. position at one time, including the "reformulation" of Section 936, which the Clinton administration attempted to do in 1993, the extension of the Supplemental Security Income program to the island, which applies to the commonwealth of the Northern Mariana Islands, and full food aid funds, which Puerto Rico had received in the first years of the program.

Testifying for the White House, Jeffrey Farrow more or less recognized the legitimacy of the 1993 plebiscite, from the Clinton administration's point of view.

He said the administration was willing to work with island leaders and Congress "to develop a process" for self-determination. The process, he said, "would be built upon" the expressions of the people in the 1993 plebiscite.

He also did not dismiss out of hand the much maligned PDP plebiscite ballot proposals that a vote for commonwealth

was a vote to "reformulate" Section 936 and that full SSI funding was possible.

Farrow said that the administration opposes the current proposed changes to 936 and had attempted to "fine tune" the program in 1993 to help bring more jobs to the island, and would still like to see those changes take their full effect.

"The administration believes the economic initiatives should continue," Farrow said.

He also said that the White House is "willing to explore options to give more aid to the aged, blind and disabled" in Puerto Rico. Those are the people served by the SSI program.

Farrow, who co-chairs the Inter-Governmental Working Group on Puerto Rico, said that President Clinton "recognizes that the fundamental status debate still rages" on the island. He acknowledged that the stalemate will continue until "the federal government meets its responsibilities in this matter," but did

Please see HEARINGS, Page 10

THE San Juan Star

Virgin Islands 85c

The only Pulitzer Prize-Winning Publication in Puerto Rico
Wednesday, October 18, 1995

Puerto Rico 35c

Congress is urged to get involved in island status issue

Rosselló proposes another plebiscite in 1998. Page 3



Photo special to the STAR by Louise Kraft

Héctor Luis Acavedo addresses Congress on Tuesday about Puerto Rico's status. The colored lights warm when time is up for the statements by those testifying.

From Page 3 Hearings

not really outline a plan of federal action other than developing "a process."

This brought a somewhat testy response from Resident Commissioner Carlos Romero Barceló, a member of the joint subcommittee. "We attempted to get White House testimony on the plebiscite in 1993," the resident commissioner said, "and they asked for more time. Two years later and we're still at the same place. You tell us we should get together and discuss it. You [the U.S. government] have been saying the same thing since 1967," Romero said.

It was a rather contentious day for the resident commissioner. Earlier he had tried to get Torricelli to agree that the U.S. government should take some sort of direct action to stop the alleged disenfranchisement of island residents.

To which the New Jersey lawmaker answered: "If we set forth this process [of self-determination] and the Puerto Rican people choose to vote for the status quo, I don't think we should be faulted for any lack of rights . . . How the people of Puerto Rico vote is entirely their own affair."

When Romero tried the same argument with Farrow, asking him how the White House feels about "the disenfranchisement of 3.7 million American citizens in Puerto Rico," Farrow answered laconically: "The administration recognizes that the current status was freely adopted by the people of Puerto Rico in two plebiscites."

The hearing also opened on a heated note, this time involving Romero and Reps. Nydia Velázquez, D-N.Y., and Luis Gutiérrez, D-Ill. Both accused Romero of convincing the committee chairmen not to let them fully participate in the hearing. They walked out in protest.

OCT. 17th HEARING Q's and A's

Is there a "permanent union between Puerto Rico and the United States" (under commonwealth)?

There really is...unless Puerto Rico's status is changed in accordance with the will of its people. It is inconceivable that ties with Puerto Rico would be dissolved against the will of the 3.7 million U.S. Citizens of the islands.

Let me submit for the record a statement on this question made by the then Chairman of the Senate committee, the Hon. J. Bennett Johnston, in 1989.

Is there "a bilateral pact" between Puerto Rico and the United States "that cannot be altered except by mutual agreement"?

The current governing arrangement between the U.S. and Puerto Rico was entered into by mutual agreement through two Federal Acts -- 600 in 1950 and 447 in 1952 -- and two overwhelming votes of the people of the islands. P.L. 447 termed it a compact.

None of the fundamental provisions -- such as the scope of local authority -- should be altered without mutual agreement. In understanding this, it should also be recognized that the arrangement itself provides for areas of Federal authority.

Congress has the power to commit itself to such an arrangement, as the American Law Division of the Library of Congress concluded in an opinion for the Insular Subcommittee last year.

Does Commonwealth guarantee irrevocable U.S. Citizenship?

The Puerto Rican Federal Relations Act incorporated earlier provisions of law that granted U.S. Citizenship to Puerto Ricans. The Supreme Court has recognized that the U.S. Constitution provides them with due process protection. This means that laws concerning them must have a rational (or reasonable) basis -- as the General Accounting Office reported to now Chairman Young of the Resources Committee in 1991.

No basis whatsoever can be foreseen that would permit revoking the U.S. Citizenship of Puerto Ricans within the current commonwealth arrangement.

Does Commonwealth guarantee fiscal autonomy (i.e., exemption from Federal taxes) for Puerto Rico?

Sec. 9 of the Puerto Rican Federal Relations Act generally exempted Puerto Rico from the U.S. Internal Revenue Code with a

couple of exceptions. The primary exception is the excise tax on rum which the Federal treasury mostly transfers to Puerto Rico's treasury for the benefit of the islands. Section 3 of the Federal Relations Act provides for local revenue raising authority.

There have been a couple of other exceptions enacted.

1) Increases in the rum excise tax have been retained in the Federal treasury. This was really done because of a practice that shipped alcohol produced in the U.S. to Puerto Rico for further redistillation and, then, reshipment to the U.S., resulting in a sharp increase in the excise tax payments to Puerto Rico even though the alcohol originated in the States. It should be noted that almost all of the tax is on rum shipped to the U.S. and is not collected on rum that Puerto Ricans consume.

2) Social Security taxes were applied with the agreement of Puerto Rico's government -- for the benefit of Puerto Ricans.

3) There have been other proposals; but they were not enacted.

Federal taxes should not be applied in any significant sense without Puerto Rico's agreement or without the revenue providing direct benefit to Puerto Ricans. This is a policy of long-standing, and not just a policy concerning Puerto Rico: This country's independence was prompted by a conviction that taxes should not be levied on people who have no say in levying the taxes or spending the revenue that they raise.

Q: Would protection for agricultural products other than coffee be permissible under NAFTA and GATT?

Proposals to increase import protection for agriculture go strongly against the trend of world agricultural policy in recent years. President Clinton championed the Uruguay Round GATT agreement, which took significant steps towards liberalizing world agricultural trade. In the Uruguay Round, countries world-wide recognized that the best future for their agricultural sectors was through meeting the challenges of competition, not through high import barriers. It is our understanding that raising tariff protection on Puerto Rican agricultural products from third countries would violate both the NAFTA and the GATT since both NAFTA and GATT bind U.S. tariffs on imports. Puerto Rico is part of the U.S. Customs territory and was included in U.S. negotiations in the GATT and NAFTA. Raising U.S. tariffs above bound rates could result in compensation in terms of U.S. trade concessions to our trading partners.

The U.S. Tariff schedule does include a special tariff on coffee imports into Puerto Rico. The tariffs on imports of coffee into Puerto Rico are relatively high, thus affording a relatively high level of protection for that commodity. There is an exception for the Puerto Rico coffee tariff in the NAFTA, whereby this tariff will not be eliminated under the NAFTA. This is the only exception for Puerto Rico, for which a long-standing policy was grand-fathered.

Unlike coffee, however, most Puerto Rican agricultural products other than coffee face their toughest competition from products produced elsewhere within our own country. To raise tariffs against other U.S. imports would require a change in the historic and fundamental commercial and customs relationship between the United States and Puerto Rico.

NOTE: If asked ORALLY about *Marketing orders*

Although U.S. marketing orders are a useful tool in ensuring the orderly marketing of agricultural commodities, they would not achieve the results of limiting imports into Puerto Rico. A marketing order may establish minimum quality and/or size restrictions on products shipped from within a specific geographic region. The purpose of a marketing order is to ensure consumer confidence in the quality of a product sold from that region. By prohibiting the marketing of lower quality products, marketing orders have the ancillary effect of stabilizing returns to growers. Consumers benefit by assurances of higher quality. Local producers realize a *competitive advantage* over their outside competitors to the extent that local production is of a demonstrable higher quality than outside production.

Puerto Rico Working Group 10/13

Hearing Tuesday

Examine plebiscite + its results

Leadership - critical of commonwealth the state

2 aspects

1. Was pleb a fair process for resolving 2?

2. Did CW option ~~win~~ win legitimately

a) spirit of what CW was

b) proposals of CW phy.

Testimony -

Gov of PR - statehood phy

Mayor of San Juan - CW phy

Hrs of indep phy

Hrs of Leg (statehood)

Quiñones, Irujo, Velosquez - mem of City of PR descent

Each aligned w/ diff state option

Q - SSI ^{extended} to PR?

Q Food stamps/nutrition assistance program?

Legal questions -

CW guar perm. form of govt - unalterable except by mutual consent

CW guar as citizenship - retroactive/prospective

" " exemption from fed taxation

Both parts of T's memo w/ politically explosive

even 2nd part, because of what it says re prospective repeal of citizenship.

So can say strong policy - won't be changed
w/out mutual consent.

Due legal - at most, submit in written form.

Political responses -
could be cranked in.

But if legal answers are
given, they'll take certain
steps.

10/17 PUERTO RICO HEARING - INTER AGENCY WORKING GROUP
PRE-HEARING MTG.

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Elena Kagan	White House Council's Office	456-7594	456-1647
Jeffrey FARROW	Puerto Rico working group	482-0037	482-2337

Walt-

Not prepared to discuss these issues -

more who needs to be done.

Continue who are more serious

Put into testum - ok
Cruz never has ...

- Can't answer
- Hard Σ
- No definitive answer.
- Still studying - never squarely decided
- More study + research -
ambitious positions Dept has taken.

- Can receive of diff answers
- Prior OLC opinion -
mutual consent
valid binding
But most recently - diff.

- Citizenship.
- Constitutional basis.

But Walter wasn't agree.