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

By MARYBETH HERALD*

Table of Contents

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

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).

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.").

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 *Wabol 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 *Wabol* 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 *Wabol v. Villacrusis*.[23] Part II outlines the *Wabol* decision. Part III of this Article then draws on this background to discuss why the Ninth Circuit's decision in *Wabol* 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).

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 *Wabol* decision, and demonstrates why the policy justifications in *Wabol* are also flawed.

The rule adopted by the Ninth Circuit in *Wabol* appears, on the surface, to mitigate social and political problems caused when the United States brings territories under United States sovereignty. In reality, however, *Wabol* 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 *Wabol* 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.

"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).

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. Pena, 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.

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 nonfundamental 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

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 untrammeled 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

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 *Wabol* 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.*; *Wabol*, 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. *Wabol*, 958 F.2d at 1459.

> tent 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.

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 *Wabol*

A. The Problem of Precedent

The Ninth Circuit's decision in *Wabol* 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).

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

104. *Wabol*, 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).

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-fundamental[118]—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 *Wabol*, 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 *Wabol*. 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.*

tion, newspaper article, or picketing was related to something of fundamental importance in the international sense.[120]

Wabol sanctions a broad power in Congress to extend a wide range of rights and benefits to United States territories and possessions 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, important, 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 *Wabol* was not consistent with the spirit of the cases that the court did acknowledge and use to support its analysis. The court used Justice Harlan's impractical and anomalous test, not to limit the exemptions from constitutional guarantees in unincorporated territories, as in *King v. Morton*,[121] but to expand the exemptions of constitutional guarantees applicable in unincorporated 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 particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[123] The *Wabol* 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 interests . . . would have substantial force in an equal protection analysis."[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. *Wabol*, 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 nonfundamental 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. *Wabol*, 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:

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. *Wabol*, 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

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 *Wabol*, 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. Pena, 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.").

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.

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 incorporated 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.").

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 *Wabol*, 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 *Wabol* that Congress governs the NMI under the Territorial Clause. *Wabol*, 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.

protection guarantees as to its own citizens on United States territory is a novel and unjustifiable ruling.

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 *Wabol* 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 *Wabol*. Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir.), *cert. denied*, 113 S. Ct. 675 (1992). One problem with granting certiorari in *Wabol* 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. Wabol v. Villacrusis, 11 F.3d 124, 126 (9th Cir. 1993). The NMI Supreme Court reluctantly agreed. *See* Wabol 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. *Wabol*, 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. *Wabol*, 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).

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. *Wabol*, 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* Wabol 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. *Wabol*, 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. *Wabol*, 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)).

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 Wabol*, 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).

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.

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.

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. Pena, 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.").

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 Gretsch, *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).

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 *Wabol*, 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 Shenon, *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.

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.").

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).

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

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 *Wabol*, the negotiators were restrained by the potential threat that the judiciary would invalidate their constitutional exemptions. The *Wabol* 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 *Wabol* 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.

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 *Wabol* 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. *Wabol*, 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. I. 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.*

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.

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 *Wabol* 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 *Wabol* decision might justify allowing the perpetuation of the caste system, which is incompatible with equal protection values. The *Wabol* 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).

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 *Wabol* 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.

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 *Wabol* 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 *Wabol* 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 *Wabol* 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.

tion of other constitutional provisions, including individual rights.[272] The *Wabol* 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

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 guarantees[284] 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 *Wabol* 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 *Wabol* 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 *Wabol* 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. *Wabol*, 958 F.2d at 1460.

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 *Wabol* 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.