

**COLONY IN THE CROSSHAIRS: A REEVALUATION  
OF THE HIGH COURT OF AMERICAN SAMOA'S  
DECISION IN *CRADDICK V. TERRITORIAL  
REGISTRAR* IN LIGHT OF SUBSEQUENT FEDERAL  
DECISIONS IN *WABOL V. VILLACRUSIS* AND  
*STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD***

Dante C.H. Harootunian

ABSTRACT

This article analyzes the High Court of American Samoa's 1980 ruling in *Craddick v. Territorial Registrar* and compares the decision's reasoning with preceding cases that had also evaluated the constitutionality of racial restrictions under the equal protection guarantees of the Fifth Amendment and Fourteenth Amendment. The article then compares the legal analysis used by the High Court in *Craddick* with the legal analysis used by the Ninth Circuit Court of Appeals in *Wabol v. Villacrusis*, a case that was based on similar facts and had a similar outcome to *Craddick*, but which relied on a different and completely incompatible analysis of the Constitution's equal protection guarantees. Finally, this article compares the legal analysis in *Craddick* with the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. Harvard* and concludes that if a challenge to *Craddick* were to make it into a federal court today, the Supreme Court's analysis in *Harvard* would require that *Craddick* be overturned.

ABOUT THE AUTHOR

Dante C.H. Harootunian is a staff attorney at American Samoa Legal Aid and former clerk for the High Court of American Samoa. He holds a J.D. from the University of Minnesota and is admitted to the Wisconsin Bar and American Samoa Bar. The author would like to thank his friend Stella Arce as well as the dedicated members of the Pacific Basin Law Journal who made this article possible.

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## I. INTRODUCTION

As other scholars have noted, American Samoa is the most unusual jurisdiction within the United States.<sup>1</sup> American Samoa is the only populated U.S. territory in the southern hemisphere, the only populated U.S. territory without a federal district court,<sup>2</sup> and it is one of only two jurisdictions in the United States that enforces laws which explicitly restrict land ownership rights on the basis of race.<sup>3</sup>

1. See generally Michael W. Weaver, *The Territory Federal Jurisdiction Forgot: The Question of Greater Federal Jurisdiction in American Samoa*, 17 PAC. RIM L. & POL'Y J. 325 (2008).

2. *Id.* at 325.

3. Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 340 (1980) [hereinafter Laughlin 1980].

This last feature may soon come to an end if challenges to American Samoa's race-based land laws ever make it into federal court. Race-based laws have been subject to strict scrutiny since the Supreme Court's *Korematsu* decision in 1944.<sup>4</sup> However, in recent years the Supreme Court's application of strict scrutiny has become tighter and less forgiving towards these laws. Notably, *Korematsu*, the original Supreme Court case establishing strict scrutiny, was overturned in 2018 for not applying strict scrutiny strictly enough.<sup>5</sup> This ultimately culminated in the Supreme Court's recent 2023 decision in *Students for Fair Admissions, Inc. v. Harvard*, which effectively, if not directly, overturned several prior cases to hold that the race-based affirmative action programs used by Harvard University and the University of North Carolina (UNC) are unconstitutional.<sup>6</sup> If the strict scrutiny analysis used by the Court in *Harvard* were to be applied to American Samoa's race-based statutes, those statutes would be declared unconstitutional. Thus, if the Government of American Samoa wishes to continue its policy of protecting the Fa'a Samoa (Samoa's culture or way of life) through statutes restricting the alienation of land, it should develop a way to meet that goal without relying on racial categorizations.

## II. HOW AMERICAN SAMOA'S LAND AND RACIAL CATEGORIZATIONS WORK

American Samoa recognizes three categories of land: communal land, freehold land, and individually owned land. The first category, communal land, makes up about 90 percent of the land in American Samoa.<sup>7</sup> It is, as the name implies, held communally by a family and cannot be alienated from said family except through adverse possession or by undergoing a specific statutory procedure for approval of alienation that requires, among other things, the consent of the Governor.<sup>8</sup> The second category, freehold land, can be bought and sold by anyone regardless of race, but is the rarest of the three categories.<sup>9</sup> There are only about 1.5625 square miles of freehold land in American Samoa.<sup>10</sup> Finally,

4. *Korematsu v. United States*, 323 U.S. 214, 216 (1944), (*overruled on other grounds by Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018)).

5. *Trump*, 585 U.S. at 710 (“*Korematsu* was gravely wrong the day it was decided”); *see also* *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 207 n.3 (2023) (“*Korematsu* nevertheless demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification”).

6. *See Harvard*, 600 U.S. at 287 (Gorsuch, J., concurring); *see also* APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10893, THE SUPREME COURT STRIKES DOWN AFFIRMATIVE ACTION AT HARVARD AND THE UNIVERSITY OF NORTH CAROLINA 4 (2023), <https://crsreports.congress.gov/product/pdf/LSB/LSB10893> [<https://perma.cc/QFQ5-W8CJ>] (stating that *Harvard* “leaves in doubt how much room exists under equal protection principles for any form of race-based admissions program”).

7. Weaver, *supra* note 1, at 325.

8. *Ava v. Logoai*, 19 Am. Samoa 2d 75, 77 (1991).

9. 37 AM. SAMOA CODE ANN. § 37.0204(b).

10. FORESTRY DEP'T FOOD AND AGRIC. ORG. OF THE U.N., FRA2005/041, GLOBAL

individually owned land comprises the remainder of American Samoa's territory. Although it can be freely sold among Samoans, it cannot be sold to anyone who does not have at least one Samoan parent.<sup>11</sup>

Similarly, American Samoa generally groups all people into one of three racial categories: 1) Samoans, who can control any type of land; 2) Non-Samoans, who can only own freehold land; and 3) people who are at least half Samoan but have non-Samoan blood, who may only own non-freehold land if they were born in American Samoa, are a descendant of a Samoan family, live with Samoans as a Samoan, or have lived in American Samoa for more than five years and have officially declared their intention of making American Samoa their home for life.<sup>12</sup>

### III. THE DECISION OF THE HIGH COURT OF AMERICAN SAMOA IN *CRADDICK V. TERRITORIAL REGISTRAR*

American Samoa does not have a federal district court and is not a part of any of the thirteen federal circuit courts of appeals.<sup>13</sup> However, federal constitutional questions can be heard in the territorial court system.<sup>14</sup> The judges and justices in this system are not Article Three federal judges, nor are they analogous to state court judges.<sup>15</sup> Instead they are probably best thought of as fulfilling a similar constitutional role as immigration judges. However, unlike immigration judges, which exist as a branch of the Attorney General's office, American Samoa judges exist as part of the Department of the Interior. Indeed, the entire territorial government of American Samoa exists, at least nominally, under the Department of the Interior.<sup>16</sup> American Samoa is not an independent sovereign entity like a Native American tribe. As a result, it is possible to challenge a decision of the High Court of American Samoa by bringing a collateral action against the Secretary of the Interior in the United States District Court for the District of Columbia.<sup>17</sup> From there, any decision by the District Court can be appealed to the D.C. Circuit, and from there, to the U.S. Supreme Court. While legal practitioners in American Samoa are almost universally aware of this option, the complexity and expenses involved in challenging a High Court decision means that in most matters, it is the High Court that has the final say on a case.

Although a federal court has never ruled on the constitutionality of American Samoa's race-based land ownership system, the High Court

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FOREST RESOURCES ASSESSMENT COUNTRY REPORTS AMERICAN SAMOA 10(31) (2005), <https://www.fao.org/4/ai797E/ai797E00.pdf> [<https://perma.cc/98WW-DQBK>].

11. *Id.*

12. *Id.*

13. Weaver, *supra* note 1, at 325.

14. Hueter v. Kruse, 576 F.Supp.3d 743, 770–71 (D. Haw. 2021).

15. 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, 380–81 (1991).

16. Laughlin 1980, *supra* note 3, at 361–62.

17. *Id.* at 366.

of American Samoa has. In *Craddick v. Territorial Registrar*, the court turned back a challenge to the system that was brought by a couple who were unable to register a warranty deed that conveyed a parcel of individually owned land to them because one of them was a non-Samoan.<sup>18</sup> The decision contained three important findings.

First, the High Court held that “the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa.”<sup>19</sup> While this would be a given in most other jurisdictions, it is an important finding for the High Court to have made here because not all aspects of the United States Constitution are fully applicable in American Samoa.<sup>20</sup> The test for whether a provision of the Constitution applies in American Samoa (or any unincorporated territory) is whether the provision in question protects “fundamental” rights.<sup>21</sup> The relevant question for determining if a federal right is fundamental for purposes of applying automatically in unincorporated territories is “whether the asserted right was one of those fundamental limitations in favor of personal rights which are the basis of all free government.”<sup>22</sup>

Confusingly, the use of the term “fundamental rights” in this context differs from the use of the same term which is often employed by courts in the context of making decisions about the incorporation doctrine under the Fourteenth Amendment.<sup>23</sup> In those cases the relevant inquiry for determining if something is a fundamental right is whether the right “is necessary to an Anglo-American regime of ordered liberty.”<sup>24</sup> This is a less burdensome threshold than the “basis of all free government” inquiry used in applying the Constitution to unincorporated territories. Consequently, some rights are considered fundamental under the Fourteenth Amendment but do not automatically apply in unincorporated territories. The right to a jury trial provides a useful example of this distinction. Although the Supreme Court has held that the right to a trial by jury is a “fundamental right” such that it is incorporated into the rights that states may not abridge under the Fourteenth Amendment,<sup>25</sup> multiple federal courts have subsequently held that it is not a sufficiently “fundamental right” such that it automatically applies to unincorporated territories of the United States.<sup>26</sup> Instead, those courts determined

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18. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 14 (1980).

19. *Id.* at 12.

20. Laughlin 1980, *supra* note 3, at 346.

21. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903) (holding that the right to a trial by jury and indictment by a grand jury do not apply in the Territory of Hawai'i because they are “not fundamental in their nature”).

22. *Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984).

23. *Id.* at 689.

24. *Id.*

25. *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).

26. *See, e.g., Atalig*, 723 F.2d at 689; *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

that while the right to a “fair trial” was a fundamental one, the right to a trial by jury is a mere “method of procedure” created to help ensure the realization of this fundamental right and accordingly would not itself be a “fundamental right” that would apply automatically in unincorporated territories.<sup>27</sup> Returning to the *Craddick* decision, the High Court of American Samoa held that the trial court was correct when it determined that the due process and equal protection guarantees in the Fifth Amendment “are so basic to our system of law that it is inconceivable that the Secretary of the Interior would not be bound by these provisions in governing the territories, whether ‘organized,’ ‘incorporated,’ or no.”<sup>28</sup>

Second, *Craddick* held that American Samoa’s anti-alienation statute, specifically, 27 ASC 204(b) (codified at 37 A.S.C.A. § 370204(b)) creates “a classification based on race” and is therefore subject to strict scrutiny.<sup>29</sup> Though some scholars have questioned whether similar native blood requirements in Native American law are racial classifications within the meaning of *Korematsu*,<sup>30</sup> the High Court’s decision in *Craddick* had no such misgivings and found that the use of blood, rather than residence, to define Samoan nationality “is clearly a racial distinction.”<sup>31</sup> Consequently, in order to survive judicial review, American Samoa’s anti-alienation statute must both “further a compelling government interest” and “be narrowly tailored” to serve that interest.<sup>32</sup>

Finally, the High Court held that although American Samoa’s anti-alienation land ownership statute contains distinctions based on race, the statute survives strict scrutiny analysis, as applied by the High Court. Regarding the “compelling interest” part of the test, the High Court determined that the law served to further a compelling government interest. Specifically, the Court said “preserving the Fa’a Samoa, or Samoan culture” was a “compelling historical and continuing” government interest in part because “land holds a central and vital place in Samoan culture.”<sup>33</sup> The Court also relied on the fact that “the critical need to protect this land and to preserve it for the Samoan people is codified in the Samoan Constitution itself.”<sup>34</sup> This refers specifically to Article I, Section 3 of American Samoa’s constitution, which states that “it shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best

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27. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 218 (1903).

28. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980).

29. *Id.*

30. *See, e.g., Rose Cuison Villazor, Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 801-838 (2008).

31. *Craddick*, 1 Am. Samoa 2d at 12.

32. *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 206 (2023) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013).

33. *Craddick*, 1 Am. Samoa 2d at 12.

34. *Id.* at 13.

interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons.”<sup>35</sup> As to the “narrow tailoring” part of the test, the Court determined that “restrictions on the alienation of all lands, except freehold lands, are necessary to the accomplishments of the desired ends of preserving Samoan lands and culture for Samoans.”<sup>36</sup> Accordingly, the High Court held that American Samoa’s race-based land ownership statutes were constitutional.

#### IV. COMPARING *CRADDICK* TO EXISTING PRECEDENT ON THE CONSTITUTIONALITY OF RACIAL RESTRICTIONS ON LAND OWNERSHIP

Even when it was decided, the High Court’s *Craddick* decision stood apart from, and in seeming conflict with, the general tendency of federal courts to invalidate similar restrictions. At the time *Craddick* was decided, the U.S. Supreme Court had already rejected every single attempt by states to uphold racial restrictions on land ownership that had come before the Court.<sup>37</sup>

First, in *Buchanan v. Warley*, the Court struck down a local ordinance in Louisville, Kentucky that restricted “colored people” from occupying a home on any block that had more white people than “colored people.”<sup>38</sup> The Court was unpersuaded by Louisville’s claims that the law was necessary to protect home values and prevent racial conflicts, holding that the attempt to prevent the alienation of white owned land to other racial groups violated the property rights of the white property owners.<sup>39</sup> Notably, the Court did this even while treating *Plessy v. Ferguson* as good law.<sup>40</sup>

After the decision in *Buchanan*, many segregationists sought to get around the Court’s decision by drafting private covenants between property owners that prevented the sale of white owned land to non-whites. However, in *Shelley v. Kraemer*, the Supreme Court rendered these agreements ineffective when it held the use of the judicial system to enforce such agreements constituted a state action that triggered strict scrutiny analysis for race-based discrimination under the Equal Protection Clause, and reiterated that “freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment.”<sup>41</sup> On

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35. AM. SAMOA CONST. art I, § 3.

36. *Craddick*, 1 Am. Samoa 2d at 14.

37. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948); *Oyama v. California*, 332 U.S. 633, 646–47 (1948).

38. *Buchanan*, 245 U.S. at 60–61.

39. *Id.* at 61.

40. *Id.* at 79–80.

41. *Shelley*, 334 U.S. at 20.

this ground, the Court in *Shelley* struck down judicial action to enforce such agreements as unconstitutional.

Finally, in *Oyama v. California*, the Supreme Court struck down a statute that prohibited “aliens ineligible for American citizenship” to acquire, own, occupy, lease, or transfer certain land.<sup>42</sup> The Court determined that this law constituted a racial restriction on the ownership of land and violated the Equal Protection Clause of the Fourteenth Amendment.<sup>43</sup> The language employed in *Oyama* casts especially strong doubt on the validity of the *Craddick* decision. The Court, in considering the potential justifications the state might raise to justify a racial restriction on land ownership, stated that when there is “a conflict between the State’s right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States . . . the rights of a citizen may not be subordinated merely because of his father’s country of origin.”<sup>44</sup>

Although *Oyama* and the other Supreme Court cases discussed above relied on the Equal Protection Clause of the Fourteenth Amendment, which only directly applies to states and may not apply to unincorporated territories such as American Samoa, the exact same equal protection requirements are implicit in the Fifth Amendment guarantee of due process, which clearly does apply to the actions of the Department of the Interior, including the actions of the government of American Samoa.<sup>45</sup> For the purposes of applying a strict scrutiny analysis, the only meaningful difference between *Craddick* and the cases discussed above was the rationale used to justify the racial restrictions. However, even as to the rationale for racial restrictions, it is possible the Supreme Court would not have seen much of a difference. An uncharitable reading of American Samoa’s claimed interest in “preserving the Fa’a Samoa, or Samoan culture” is that the government’s compelling interest in creating a racial restriction on land ownership was to preserve a system where a locally dominant racial group retains its numerical majority. To some, this may not sound so different from Louisville’s desire to ensure that majority white blocks stayed majority white. Moreover, even a charitable view of “preserving the Fa’a Samoa” that emphasizes the importance of protecting the local culture from being destroyed by an influx of outside colonizers (a concern with a historical basis, as many Samoans might point out, given what happened to the native people of Hawaii)<sup>46</sup> would still have trouble overcoming the presumption *Oyama* seemed to create that posits that when legitimate state regulations and the rights of property owners clash, the rights of property owners must

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42. *Oyama*, 332 U.S. at 636.

43. *Id.* at 634.

44. *Id.* at 647.

45. *Weinberger v. Wiesenfeld*, 420 U. S. 636, 638 n.2 (1975) (“[T]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment....”).

46. Laughlin 1980, *supra* note 3, at 369–70.

win if the regulation only interferes with the property owner's rights on account of their heritage.

That being said, all three of the above cited Supreme Court cases date from the 1940s or earlier, while *Craddick* was decided in 1980. In contrast, the Supreme Court's decision in *Regents of Univ. of California v. Bakke* was decided in 1978, a mere two years before the High Court's decision in *Craddick*. *Bakke* upheld, for the first time, the use of certain race-based decision making in the context of the university admission processes.<sup>47</sup> Given the split nature of the *Bakke* decision and its rare decision to uphold a government policy that relied on race (as the Court in *Harvard* noted, the nine-member Supreme Court produced six different decisions on the matter),<sup>48</sup> it was not necessarily unreasonable for the High Court in *Craddick* to think the Supreme Court was headed in a new direction with its equal protection jurisprudence, or at least, to be unsure as to what the future held.

Ultimately, the *Craddick* decision was never appealed to a federal court and has stood as the law of the land in American Samoa for nearly half a century. However, if a determined enough plaintiff ever emerges, there is no reason the High Court's ruling could not be challenged today. Regardless of how such a challenge might have fared in the 1980s when *Craddick* was initially decided, today's Supreme Court seems less likely to allow the *Craddick* decision to stand, based on the criteria it used to invalidate Harvard University and UNC's affirmative action programs in *Harvard*.

## V. SQUARING *CRADDICK* WITH THE 9TH CIRCUIT'S SUBSEQUENT DECISION IN *WABOL v. VILLACRUSIS*

There is one federal court ruling, decided subsequently to *Craddick*, that must be addressed before the strict scrutiny analysis of *Craddick* can be compared with the Supreme Court's analysis in *Harvard*.

Ten years after the High Court of American Samoa held that the equal protection and due process provisions of the Fifth Amendment were fundamental rights that automatically applied in unincorporated U.S. territories, the Ninth Circuit Court of Appeals addressed the same question in *Wabol v. Villacrusis*. The Ninth Circuit ruled in *Wabol* that, contrary to the holding in *Craddick*, the equal protection and due process guarantees of the Fifth Amendment do not create fundamental rights, at least in the context of evaluating racial restrictions on land ownership.<sup>49</sup> In doing so, the *Wabol* Court boldly, arrogantly, and falsely declared that “[n]o court has yet confronted” the question of whether the constitutional guarantee against discrimination contained in the Fifth Amendment's Due Process Clause was a fundamental right that must

47. See generally *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

48. *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 208 (2023).

49. *Wabol v. Villacrusis*, 908 F.2d 411, 424 (9th Cir.), amended by 958 F.2d 1450 (9th Cir. 1990).

apply in unincorporated U.S. territories.<sup>50</sup> To say that these two cases are in tension would be an understatement; the cases dealt with a similar set of facts with nearly identical territorial statutes, ruled on the same constitutional question, and produced irreconcilable answers to that question.<sup>51</sup> Any attempt to try and find harmony between the High Court's opinion in *Craddick* and the Ninth Circuit's decision in *Wabol* would be pointless.

The Ninth Circuit's decision did not overrule *Craddick*. American Samoa is not part of the Ninth Circuit so decisions by the Ninth Circuit Court of Appeals are not binding on the territory.<sup>52</sup> Instead, the decisions in *Craddick* and *Wabol* essentially constitute a circuit split (despite the fact that the High Court of American Samoa is not an Article Three circuit court). Normally when these types of splits occur, the Supreme Court can step in to resolve the question. Unfortunately, the Supreme Court did not review the Ninth Circuit's decision in *Wabol*, so the contradiction between the two cases has been left to stand for over thirty years.

Although *Wabol* was decided subsequent to *Craddick* and contained a much lengthier legal analysis to justify its holding, there is good reason to believe that if the Supreme Court were ever to attempt to resolve the split between the two cases, the Supreme Court would uphold *Craddick* and overturn *Wabol*. Length is not synonymous with quality, and even a cursory review of the legal analysis employed in *Wabol* reveals at least three significant flaws that cast doubt on the decision's validity.

A. *Wabol Failed to Apply Strict Scrutiny to a Congressional Action Authorizing Discrimination Based on Race.*

*Wabol* not only addressed the constitutionality of the Northern Mariana Islands' race-based land ownership restrictions, but also directly addressed the decision by Congress authorizing the Northern Mariana Islands to make race-based distinctions.<sup>53</sup> However, in doing so the court in *Wabol* apparently forgot that it was effectively reviewing a federal statute that discriminated on the basis of race.

The *Wabol* Court made this mistake in two steps. First, the Court determined that it did not need to apply strict scrutiny to the Northern Mariana Islands policies restricting land ownership based on race if Congress had the power to choose to not apply the provisions of the Equal Protection Clause to the territory.<sup>54</sup> Next, the Court decided that the Territories Clause of the Constitution authorized Congress to permit

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50. *Id.* at 421–22.

51. *Compare* *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980) (“the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa”), *with* *Wabol*, 908 F.2d at 424 (“We cannot say that this particular aspect of equality is fundamental....”).

52. *Weaver*, *supra* note 1, at 325.

53. *Wabol*, 908 F.2d at 421 (9th Cir. 1990).

54. *Id.* at 423 (“This attack would have substantial force in an equal protection analysis, but it is of only minimal relevance to the threshold question of the validity of the Congressional waiver of equal protection....”).

the Government of the Northern Marianas Islands to abridge the equal protection of the law, at least in the context of long-term interests in real property.<sup>55</sup> When combined, these steps treat the racial classifications used in the Northern Marianas Islands as artificially separated from the Congressional decision authorizing the territory to make and enforce a racially discriminatory policy.

Congressional enactments made pursuant to the Territories Clause, like enactments made pursuant to any other clause, are still subject to judicial review under the equal protection guarantee contained in the Due Process Clause of the Fifth Amendment.<sup>56</sup> Under most circumstances those enactments are subject only to rational basis review.<sup>57</sup> However, when government action authorizes discrimination on the basis of race, that action is subject to strict scrutiny review.<sup>58</sup> Moreover, in *Shelley*, the Supreme Court rejected an attempt to pass off state action as the action of a private actor.<sup>59</sup> Although not directly analogous, the same underlying principle cautions against allowing blame for an act of Congress to be passed onto a territory making a decision authorized by Congress's act. Since the federal statute enacted pursuant to the Territories Clause was interpreted so as to authorize the government of the Northern Mariana Islands to engage in race-based discrimination, the Congressional act itself was subject to strict scrutiny, which the *Wabot* decision failed to apply.

#### B. *Wabot Misapplied Justice Harlan's Interpretation of the Insular Cases.*

The *Wabot* decision applied the wrong standard to determine what constitutional rights are so fundamental that they must automatically apply in unincorporated territories. According to *Wabot*, a court must “consider whether the claimed right is one which would be impractical or anomalous” if applied in a given U.S. territory.<sup>60</sup> The *Wabot* Court then determined that the application of the Fifth Amendment's equal protection guarantee was impractical or anomalous, and therefore it was not a fundamental right.<sup>61</sup> The *Wabot* Court claimed to have taken this ‘impractical or anomalous’ standard from *King v. Morton*, a D.C. Circuit opinion.<sup>62</sup> The *King* decision, in turn, had taken the standard from its original source: Justice Harlan's concurring opinion in *Reid v. Covert*.<sup>63</sup>

55. *Id.* at 422–24.

56. *See, e.g.*, *United States v. Vaello Madero*, 596 U.S. 159 (2022).

57. *Id.* at 164 (“Congress may distinguish the Territories from the States in tax and benefits programs . . . so long as Congress has a rational basis for doing so.”).

58. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967).

59. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that judicial enforcement of private racial covenants constitutes government action).

60. *Wabot*, 908 F.2d at 422, *amended by*, 958 F.2d 1450 (9th Cir. 1990).

61. *Id.*

62. *Id.* (citing *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975)).

63. *King*, 520 F.2d at 1147 (citing *Reid v. Covert*, 354 U.S. 1, 74–75 (1956) (Harlan, J., concurring)).

It is true that, towards the end of his concurring opinion, Justice Harlan states that, "I cannot agree . . . that a full Article III trial, with indictment and trial by jury, is required in every case . . . overseas. The Government . . . has made an impressive showing that . . . such a requirement would be . . . impractical and . . . anomalous."<sup>64</sup> This quote, taken in isolation, would seem to indicate, as the *Wabob* Court believed, that the determination of whether a constitutional right applies in a territory depends entirely on whether implementation of that right locally would be impractical and anomalous. Yet a closer examination of the entirety of Justice Harlan's concurrence reveals that the 'impractical or anomalous' standard was not intended to determine if a constitutional right was so fundamental that it automatically applied. Instead, Justice Harlan's standard was to be a secondary inquiry, applied to those rights which had already failed the fundamental rights inquiry established in the *Insular Cases*.

Justice Harlan's concurrence accepts the validity of the *Insular Cases*,<sup>65</sup> which had already established that certain fundamental rights protected by the Constitution always apply, while other less fundamental rights do not.<sup>66</sup> However, Justice Harlan then added an important gloss to his understanding of these cases. In his view, it went too far to say that rights that are not considered fundamental "are never operative without the United States, regardless of the particular circumstances."<sup>67</sup> Harlan understood the *Insular Cases* to instead stand for the broad proposition that "there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."<sup>68</sup> The phrasing used by Justice Harlan here leaves in place by implication the *Insular Cases*' determination that certain fundamental rights do necessarily apply in every foreign place. It was only at this point that Justice Harlan introduced the use of the 'impractical and anomalous' standard. Justice Harlan related this standard to a previous case which had held that the right to a jury trial, already deemed to not be a fundamental right in the *Insular Cases*, did not apply in American Samoa.<sup>69</sup> A full reading of Justice Harlan's opinion makes clear that when he created the impractical and anomalous standard, he was only outlining the second half of what should be understood as a two-step process for determining if a constitutional right applies outside the core territory of the United States. First, a court must determine if a constitutional right always applies, presumably using the fundamental rights standard established in the *Insular Cases*. Second, the court, only *after* a right is deemed not to be fundamental,

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64. *Reid*, 354 U.S. at 75–76 (Harlan, J., concurring).

65. *Id.* at 67 (Harlan, J., concurring) ("I believe [*the Insular Cases*], properly understood, still have vitality.")

66. *Territory of Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903).

67. *Reid*, 354 U.S. at 74 (Harlan, J., concurring).

68. *Id.*

69. *Id.* at 74–75.

must inquire “if the circumstances are such that [application of a given right] would be impractical and anomalous.”<sup>70</sup>

The recent decision of the Tenth Circuit Court of Appeals in *Fitise-manu v. United States* provides a good example of an analysis hewing to Justice Harlan’s vision. In that case, the Tenth Circuit, faced with the question of the applicability of the Fourteenth Amendment’s birthright citizenship clause to American Samoa, first analyzed birthright citizenship under the “fundamental personal right” standard of the *Insular Cases*.<sup>71</sup> Only after determining birthright citizenship was not a fundamental personal right, the court then applied the “impracticable and anomalous” test.<sup>72</sup> Additionally, while the dissenting opinion does not agree with the majority’s conclusions, its author also used the same two step framework to analyze the question.<sup>73</sup>

This is completely different from the Ninth Circuit’s application of the ‘impractical and anomalous’ standard. By using the standard to determine whether or not a right is fundamental, the *Wabol* decision erroneously used the second part of Justice Harlan’s inquiry in place of the first part of the analysis. This is clearly not what Justice Harlan intended, and even if it was, the Ninth Circuit would have been unjustified in using the concurring opinion of a single justice, speaking only for himself, to replace the analytical framework established by a majority of the Supreme Court in the *Insular Cases*. Indeed, there is a great irony to the fact that *Wabol* misapplied a standard from a prior decision that placed great emphasis on the importance of evaluating cases in light of their context by failing to consider the context of that prior decision.

### C. *Wabol Erroneously Failed to Evaluate the Right to Due Process in its Entirety.*

*Wabol*’s analysis of the Fifth Amendment’s Due Process Clause impermissibly attempts to split the clause into multiple parts. The language of the Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>74</sup> This right inherently includes the right to equal protection under the law.<sup>75</sup> Yet the language of *Wabol* constantly emphasized that it was addressing the narrow question of equal protection “regarding access to . . . interests in real property.”<sup>76</sup> This focus on the clause’s protection of real property is

70. *Id.*

71. *Fitise-manu v. United States*, 1 F.4th 862, 877-78 (10th Cir. 2021).

72. *Id.* at 879.

73. *Id.* at 884 (Bacharach, J., dissenting).

74. U.S. CONST. amend. V.

75. See *Davis v. Passman*, 442 U.S. 228, 234 (1979) (“[T]his Court ‘has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.’”) (quoting *Vance v. Bradley*, 440 U. S. 93, 95 n.1 (1979)).

76. *Wabol v. Villacrusis*, 908 F.2d 411, 422 (9th Cir.), *amended by* 958 F.2d 1450 (9th Cir. 1990).

treated as a narrow question, distinct from the separate issue of whether the Due Process Clause's equal protection element might be considered fundamental in other circumstances. This de facto division of the Due Process Clause is inconsistent not only with the High Court's Decision in *Craddick*, which treated the right to equal protection contained within the Due Process Clause as a single fundamental right,<sup>77</sup> but also completely departs from how the Supreme Court has addressed issues relating to equal protection for over a century. To the extent the Supreme Court applies different standards to equal protection cases, the Court has, since *Korematsu* and *Bolling*, always emphasized the importance of the class being denied equal protection over the substantive details of what protections are being denied. Equal protection denied on account of race demands strict scrutiny,<sup>78</sup> equal protection denied on account of sex commands only intermediate scrutiny,<sup>79</sup> and equal protection denied on account of age requires only rational basis scrutiny.<sup>80</sup> This framework is applicable regardless of whether the alleged equal protection violation relates to a denial of life, liberty, or property. Similarly, in due process cases that do not address equal protection issues, the Supreme Court uses the same three factor test, known as the *Mathews* standard, to evaluate claimed violations of due process, regardless of whether the violation related to life, liberty, or property.<sup>81</sup> One of these factors does consider the nature of the interest that is at stake,<sup>82</sup> but when considered together with the other two factors, the universal applicability of the *Mathews* standard implies that the underlying right to due process is one right, not several. To put it more simply, under *Mathews*, the amount of process that is due in a civil case involving real property may be less than the amount of process due in a criminal case that might result in jail time, but in both instances whatever process that is due must be carried out. When the *Wabot* Court decided that the equal protection component of the Due Process Clause is not fundamental in relation to cases about real property but could be fundamental in other cases regarding life, liberty, or property other than real property, it misunderstands the singular and indivisible nature of the right to due process and the guarantee of equal protection inherent within that right.

Even within the narrower context of applying the Due Process Clause of the Fifth Amendment to unincorporated territories, the Ninth Circuit's decision in *Wabot* appears to create a circuit split with the Third Circuit. In *Soto v. United States*, decided nearly 70 years prior to *Wabot*,

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77. See *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980).

78. See *Loving v. Virginia*, 388 U.S. 11 (1967).

79. See *United States v. Virginia*, 518 U.S. at 524 (1996).

80. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (“[R]ationality is the proper standard by which to test whether compulsory retirement at age 50 violates equal protection.”).

81. See *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (establishing a three-factor balancing test to evaluate claims made under the due process clause).

82. *Id.*

the Third Circuit described the Fifth Amendment as protecting “the *right* not to be deprived of life, liberty, or property, without due process of law.” (emphasis added) and held that this singular right was a fundamental one.<sup>83</sup> Admittedly, this decision was handed down before the Supreme Court introduced the notion that there is an equal protection component inherent to the Due Process Clause, but that addition does not affect the analysis underlying the holding. Additionally, *Soto* is not some long-forgotten or dead-letter case - the decision has continued to be cited within the Third Circuit well after the Ninth Circuit issued its ruling in *Wabol*.<sup>84</sup> If *Soto* is correct that the Fifth Amendment’s right to due process is indeed a fundamental right, then *Wabol* erred in finding that the equal protection requirements that are an inherent and integral aspect of the Fifth Amendment’s right to due process were not fundamental. This apparent split between the Ninth and Third Circuits regarding the application of the Fifth Amendment’s Due Process Clause to unincorporated United States territories has gone unremarked upon and, quite possibly, completely unnoticed, by both circuits for over 30 years. Should a challenge to *Craddick* ever make it to the United States Supreme Court, it is hoped that the Court might use the opportunity to resolve the issue by clarifying how the equal protection requirements within the Fifth Amendment’s right to due process apply to unincorporated territories.

Taken together, these three flaws with *Wabol*’s analysis render the Court’s final holding suspect. In light of the Ninth Circuit’s lack of jurisdiction over American Samoa, the holding in *Craddick* should be given deference when evaluating the applicability of Fifth Amendment rights to unincorporated territories. Consequently, when evaluating the impact that *Harvard* may have on *Craddick*, this paper will assume that *Craddick* is good law with respect to its finding that due process and equal protection are fundamental rights that apply in American Samoa.

## VI. *STUDENTS FOR FAIR ADMISSIONS, INC. v. HARVARD*’S NEW GLOSS ON HOW TO EVALUATE STATUTES THAT MAKE DISTINCTIONS BASED ON RACE

Prior to *Harvard*, the Supreme Court had only ever identified three compelling state interests that permitted the use of government policies that discriminated on the basis of race: 1) remediating specific, identified instances of past discrimination that violated the Constitution or a statute; 2) avoiding imminent and serious risks to human safety in prisons; and 3) obtaining the educational benefits that flow from a racially diverse student body.<sup>85</sup> The decision by the Court in *Harvard* effectively eliminated

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83. *Soto v. United States*, 273 F. 628, 633–34 (3d Cir. 1921).

84. *See e.g.*, *United States v. Pollard*, 209 F.Supp.2d 525, 536 (D.V.I. 2002) (“[*Soto*] held that persons in the United States Virgin Islands are fully protected by the ‘fundamental right’ of due process.”).

85. *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 207 (2023).

the last of these three categories as a legitimate government interest.<sup>86</sup> Chief Justice Roberts's majority opinion cited four specific reasons why the racial classifications used by Harvard University and UNC's admissions policies failed to pass the Court's strict scrutiny analysis. Namely, the policies "[l]ack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."<sup>87</sup>

Although the Court's decision was about the use of race in university admissions, the strict scrutiny analysis it employed is applicable to all instances in which the government utilizes policies that discriminate on the basis of race. Much of the opinion itself relies on discussion of precedents in which the court applied its strict scrutiny analysis in cases having nothing to do with school admissions, including cases about the wartime internment of Japanese Americans,<sup>88</sup> limitations on voting rights for non-Native Hawaiians in Hawaii,<sup>89</sup> and the unequal enforcement of laundromat permitting regulations.<sup>90</sup> Therefore, the rationale employed by the Supreme Court in voiding Harvard University and UNC's admissions policies can be applied to American Samoa's racially discriminatory anti-alienation laws to determine if the High Court's decision in *Craddock* would survive review today.

A. *Does American Samoa's Race-Based Statute Have Sufficiently Focused and Measurable Objectives Warranting the Use of Race?*

In evaluating Harvard and UNC's admissions policies, the Supreme Court required that for any purported government interest to be sufficiently "compelling" to survive a strict scrutiny analysis, the interest must be measurable enough that it can be subjected to judicial review.<sup>91</sup> Using examples from the two instances where the Court continues to allow race-based discrimination, the Court pointed out that in the context of racial prison violence, "courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison" and in cases where a policy seeks to address past discrimination, the court can inquire if the victims of that discrimination have been made whole by the policy.<sup>92</sup> In both cases a policy that may initially be constitutionally permissible ceases to be once its goal has been accomplished. For example, a government program that uses race to undo the government's previous segregation policies is constitutionally permissible.<sup>93</sup> However if the same policy continues with the goal of remedying societal segregation

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86. *Id.* at 287 (Gorsuch, J., concurring).

87. *Id.* at 230.

88. *Id.* at 207 n.3 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *overruled on other grounds by Trump v. Hawaii*, 585 U.S. 667, 710 (2018)).

89. *Id.* at 208 (citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)).

90. *Id.* at 202 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

91. *Id.* at 214.

92. *Id.* at 215.

93. *Id.*

that was not the result of government action, the program ceases to be constitutional.<sup>94</sup>

The Court then evaluated Harvard and UNC's goals of "better educating its students through diversity" and "broadening and refining understanding" and determined that, while commendable, the goals were too amorphous to be measured, or at least too amorphous to be measured in a way that a court could determine the goal had been sufficiently achieved so that any further continuation of the racially discriminatory policy would be unconstitutional.<sup>95</sup>

Applying this criteria to the rationale used by the American Samoa Government to justify its racially discriminatory land laws, it seems overwhelmingly likely that the Supreme Court would find American Samoa's goals, like Harvard and UNC's goals, commendable, but insufficiently coherent. The only goal that the High Court in *Craddick* relied on to justify the existence of a "compelling government interest" was the preservation of "the Fa'a Samoa, or Samoan culture."<sup>96</sup> This rationale presents two problems that make it untenable. First, preservation is, definitionally, not a goal that can ever be fully complete. When the goal of a territorial statute is preservation, that statute must grapple not only with the laws of the United States, but the laws of thermodynamics (or more specifically entropy).<sup>97</sup> If the policy of American Samoa was to "restore" the Fa'a Samoa, it might be possible to determine when the Fa'a Samoa was sufficiently restored to some past state that the policy could be abandoned. However, preserving something, like the example in *Harvard* of "broadening and refining understanding," is not a goal with any particular endpoint, which in turn means it is impossible for a court to determine when the policy has gone too far. Second, the Fa'a Samoa is an inherently nebulous concept that is functionally impossible to measure. Cultures, by nature, change overtime, as new traditions and ways of life are gradually adopted and old ones are abandoned.<sup>98</sup> This process can be messy, since different individuals with the same cultural identity can and do vociferously disagree with each other about what may or may not be a part of their culture. Any attempt at static cultural preservation risks confining a culture to its past, which stunts what would otherwise have been the culture's natural evolution.<sup>99</sup> Consequently, it is impossible for any policy maker or court to come up with a universally agreeable definition of "Samoan culture" that could serve as a consistent measuring stick for the American Samoa Government's policies over time.

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94. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

95. *Harvard*, 600 U.S. at 214 (2023).

96. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12-13 (1980).

97. See Nicola Jane Brazendale, *The Preservation of Heritage Buildings in the Wake of the Canterbury Earthquakes*, 17 N.Z. J. ENV'T. L. 237, 251 (2013).

98. Russel Lawrence Barsh & James Youngblood Henderson, *The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand*, 42 MCGILL L.J. 993, 1001 (1997).

99. Brazendale, *supra* note 97, at 251.

B. *Does American Samoa's Race-Based statute Unavoidably Employ race in a Negative Manner?*

As a general rule, the Equal Protection Clause commands that race should not be used as a negative against someone, at least as far as government policies are concerned.<sup>100</sup> In the context of cases concerning the use of race in affirmative action policies, this has traditionally meant that any policy that makes distinctions based on race must not penalize any applicants on account of their race.<sup>101</sup> However, as the Court in *Harvard* observed, any policy that benefits persons of one race in a zero-sum competition would, by definition, penalize others for not being of that race.<sup>102</sup> For example if a college admits 100 students each year, and the 100<sup>th</sup> (and therefore last admitted) student in a given year made it over the line because they received a “plus” on account of their race, that the 101<sup>st</sup> student did not, than in the Court’s view, the 101<sup>st</sup> student was penalized on account of their race and was denied admission as a result. The Court’s opinion was quite harsh on Harvard University and UNC’s arguments to the contrary, describing them as “hard to take seriously.”<sup>103</sup> As a result, the Court determined that the policies both schools had in place benefitted some racial groups penalized members of other racial groups, and were therefore constitutionally impermissible.<sup>104</sup>

American Samoa’s race-based land ownership restrictions likewise fail this test. The text of the statute is clear: Samoans are the only persons allowed to own most of the land in the territory.<sup>105</sup> Just as admission decisions are zero-sum because universities only select a finite number of students, land restrictions in American Samoa are zero-sum because the amount of land available is finite. Indeed, the entire territory in question is only about 76 square miles.<sup>106</sup> Therefore, American Samoa’s statute penalizes all non-Samoans who wish to purchase land in the territory. Black, White, Asian, Native American, and even other Pacific Islander people are all directly negatively affected by the policy because of their race. Indeed, American Samoa’s policies are worse than Harvard and UNC’s. While applicants to those schools could (and often did) overcome a small penalty they faced because of their race, non-Samoans attempting to buy non-freehold land have no way to overcome American Samoa’s complete prohibition on non-Samoan ownership.

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100. *Harvard*, 600 U.S. at 218 (2023).

101. *Id.*

102. *Id.* at 219.

103. *Id.*

104. *Id.* at 230.

105. 37 AM. SAMOA CODE ANN. § 37.0204(b).

106. Weaver, *supra* note 1, at 341 n.22.

C. *Does American Samoa's Race-Based Statute Unavoidably Rely On or Perpetuate Racial Stereotypes?*

The Equal Protection Clause prohibits the use of race-based policies that are based on racial stereotypes.<sup>107</sup> As the Court in *Harvard* noted, this requirement is not specific to the context of evaluating university admission policies but applies broadly, and this requirement has been cited by the Court regarding the use of race by the government in other contexts, like legislative redistricting.<sup>108</sup> As a practical matter, this means that no government policy can assume that an individual holds certain beliefs or viewpoints based on their race.

In *Harvard*, the Court determined that Harvard University and UNC's programs both racially stereotyped students. In Harvard University's case, the court focused on the university's claims that "a black student can usually bring something that a white person cannot offer," and in UNC's case, the court similarly focused on the university's claims that race itself "says [something] about who you are."<sup>109</sup> In both instances, even though the universities were not necessarily ascribing a specific viewpoint to a given individual based on their race, the Court found that it was sufficiently impermissible that the schools assumed that a person of one race would hold a different viewpoint from someone else solely because of their race.<sup>110</sup>

Similarly, if the Court were to review the justification given in support of American Samoa's race-based land ownership policies, it would doubtless find that they too are based on stereotypes. The "compelling government interest" that supposedly justifies the restrictions is the preservation of the Fa'a Samoa, or Samoan culture.<sup>111</sup> It is implicit in this assertion, that non-Samoans cannot have grown up in or adopted Samoan culture. Inversely, it is also assumed that any Samoan person would believe in and work to uphold the ideals of the Fa'a Samoa in ways a non-Samoan would not solely because of their parentage. If Harvard University and UNC's vague assertions that a person might hold a unique viewpoint based on their racial identity were considered stereotyping by the Supreme Court, American Samoa's much more specific, if implicit, assertion that belief in or conformity to Samoan culture is based solely on race must also be considered an impermissible racial stereotype.

D. *Does American Samoa's Race-Based Statute Lack a Meaningful Endpoint?*

The Supreme Court has stated that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed

107. *Harvard*, 600 U.S. at 213.

108. *Id.* at 219-20 (citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

109. *Id.* at 220.

110. *See id.* at 230.

111. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980).

discrimination based on race.”<sup>112</sup> As a result, even when the Supreme Court approved of the use of race-based affirmative action in *Grutter*, it imposed a requirement that such policies must be limited in time.<sup>113</sup> A government policy “[e]nshrining a permanent justification for racial preferences would offend [the] fundamental equal protection principle.”<sup>114</sup> The Court speculated, though did not directly hold, that in 25 years (that is, by 2028) racial preferences would no longer be permissible as a factor in university admissions.<sup>115</sup> This requirement is closely related to the measurable objectives requirement discussed above in Part A of this Section, since part of the need for measurable objectives is to determine when the time has come to end a policy. In *Harvard*, Harvard University and UNC claimed that their policies were limited in time because “universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity.”<sup>116</sup> The Court rejected this assertion because it was impossible to measure and because it was impossible to evaluate if the policies in question were even helping to achieve the universities’ stated end goal.<sup>117</sup> The Court also rejected the universities’ claim that “that their programs need not have an endpoint at all because [the universities] frequently review them to determine whether they remain necessary.”<sup>118</sup> On the contrary, the Court determined that part of the point of durational limits was that a race-based policy could not survive forever based on periodic review.<sup>119</sup>

The American Samoan Government’s racial restrictions on land ownership suffer from the same lack of an endpoint. When upholding the validity of the statute, the High Court described American Samoa’s interest in preserving the Fa’a Samoa as being “historical and continuing.”<sup>120</sup> The natural question the American Samoan Government must answer, should its laws ever be challenged in a federal court, is “continuing until when?” There is likely no realistic answer to that question that would satisfy the Supreme Court. As discussed above, the preservation of the Fa’a Samoa is a goal that, by its own definition, is very difficult, if not impossible, to formulate a coherent and measurable endpoint for. Therefore, the use of racially discriminatory policies to try to accomplish this goal must be terminated.

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

113. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).

114. *Id.* at 342.

115. *Id.* at 343.

116. *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 224 (2023).

117. *Id.*

118. *Id.* at 225

119. *Id.*

120. *Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 14 (1980).

## VII. CONCLUSION

The implications of the Supreme Court's decision to invalidate the race-based affirmative action policies used by Harvard University and UNC as impermissible under the Equal Protection Clause are not limited to the context of affirmative action cases. The standards the Supreme Court used are applicable in a wide array of issues that implicate equal protection questions under both the Fifth and Fourteenth Amendments. When viewed in light of these standards, American Samoa's race-based land ownership laws do not just fail to comply with some of those standards, they fail to comply with all of them; the laws are unfocused, use race as a negative, perpetuate stereotypes, and lack a meaningful endpoint.

If the Government of American Samoa wishes to continue a policy aimed at preventing the alienation of land to outsiders, it is left with three potential options. The first is simply to do nothing and hope that the issue is either never litigated or that in some future case the Supreme Court sides with the Ninth Circuit's decision in *Wabot* and overturns the portion of *Craddick* that held that the constitutional protections of due process and equal protection are fundamental rights. The practical difficulties of getting a case from American Samoa before a federal court, combined with the small and relatively transient pool of lawyers in the territory, means that this option is not as ridiculous a plan as it might seem if a similar situation were unfolding in a state like California or Texas. The second option is for American Samoa to reform its land statutes so that they no longer make distinctions based on race. There are a number of ways this might be done, ranging from residency requirements to mandatory pledges to follow the Fa'a Samoa to cleverly crafted tax incentives. Each of these policies would likely raise new Constitutional concerns, but they probably still have a better chance of surviving than the territory's current policies would.<sup>121</sup> Finally, and most drastically, if both of the previous options fail, American Samoa could pursue a policy to achieve independence from the United States and make its debut as the world's newest independent country. After all, if the rights contained in the United States Constitution are indeed incompatible with the Fa'a Samoa, and the people of American Samoa want to maintain the Fa'a Samoa, it is not an unreasonable question to wonder what business the United States has ruling the eastern islands of the Samoan Archipelago in the first place. However, independence would cause a number of practical problems. Independence would be harmful for the many American Samoan families with relatives living in the United States who would likely face additional barriers to visiting each other. On the economic front, American Samoa receives millions

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121. The Supreme Court has invalidated policies that were facially race-neutral but which were passed for the purpose of discriminating on the basis of race. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Any new race neutral policy might risk being invalidated for the same reason.

of dollars in support from the U.S. Federal Government every year,<sup>122</sup> and the largest private employer in the territory, the Starkist Samoa Co. tuna cannery, continues to exist in part because its location within the United States allows the company to service government contracts that contain made in America requirements.<sup>123</sup> Consequently, any move towards independence would require major social and economic sacrifices that residents of the territory may not be willing to endure.

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122. *Interior Provides \$26.6 Million to American Samoa for Fiscal Year 2022 Government Operations*, U.S. DEP'T OF THE INTERIOR OFF. OF INSULAR AFFS. (May 17, 2022), <https://www.doi.gov/oia/press/interior-provides-266-million-american-samoa-fiscal-year-2022-government-operations#:~:text=WASHINGTON%20%E2%80%93%20The%20U.S.%20Department%20of%20judicial%20system%20in%20the%20territory> [https://perma.cc/R32Z-EWUX].

123. Samoa News Staff, *Chicken of the Sea Seeks Exception to Buy American Mandate for Tuna*, SAMOA NEWS (Nov. 4, 2021), [https://www.samoanews.com/local-news/chicken-sea-seeks-exception-buy-american-mandate-tuna#google\\_vignette](https://www.samoanews.com/local-news/chicken-sea-seeks-exception-buy-american-mandate-tuna#google_vignette) [https://perma.cc/6HVP-GKKJ].