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The Constitution of the Northern Mariana Islands: Does A Different Cultural Setting Justify Different Constitutional Standards?

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I. INTRODUCTION

The purpose of this article is to examine certain constitutional questions that recently have been raised by Howard Willens and Deanne Siemer[1] concerning the constitution of the Northern Mariana Islands.[2] Essentially, Willens and Siemer assert that certain constitutional "innovations" are justified in a United States territory, such as the Northern Marianas, which these authors argue have different social and economic values from the mainland.[3] In their article, two "innovations" contained in the constitution of the Northern Mariana Islands are discussed in detail, which Willens and Siemer argue are justified in light of the "cultural setting."[4] Specifically, these "justified" constitutional "innovations" include: (a) a provision for the composition of the Northern Mariana's Senate which is not based on

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1. Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovations in a Pacific Setting*, 65 GEO. L. J. 1373 (1977). Howard P. Willens and Deanne C. Siemer have both worked in the Northern Marianas as consultants. Willens is an attorney with Wilmer, Cutter & Pickering, and Siemer is an attorney for the Department of Defense.

2. The constitution was ratified on March 6, 1977. The Northern Marianas will have a commonwealth status with the United States similar to that of Puerto Rico. *See* notes 18 and 19 *infra*.

3. One may wonder how different these values really are since as early as 1961 the people of the Northern Marianas have wanted to be closely associated with the United States. On February 5, 1961 the people conducted their own plebiscite and of a total of 2,847 registered voters, 1,557 voted for unification with Guam (and thus association with the United States) and 818 voters opted for annexation by the United States. *See* M. WHITEMAN, 1 DIG. INT'L L. 813 (1963); and Green, *Termination of the U.S. Pacific Islands Trusteeship*, 9 TEX. INT'L L. J. 175, 180 (1974) where the author points out: "This action [separate petition to the United States] characterizes a culture *considerably more westernized* than its ethnic counterparts to the southwest and southeast." (Emphasis added.)

4. In fact, the cultural setting is quite similar to that of the mainland. Christianity is the predominant religion with 98% of the people belonging to the Catholic faith. The schools are similar to American schools and English is the common language. In addition, many of the work habits of the people are very American. *See generally* S. DE SMITH, MICROSTATES AND MICRONESIA (1970); and C. HEINE, MICRONESIA AT THE CROSSROADS (1974). This author, having lived in New Mexico and Saipan, found the Chamorro culture of Saipan very similar to the Spanish-American culture of New Mexico.

population;[5] and (b) a provision providing for nonalienation of property to persons of other than "Northern Marianas descent."[6]

Willens and Siemer find support for their position in the doctrine of *"incorporation,"*[7] a doctrine which evolved during a series of cases heard between 1901 and 1922 and which, collectively, have become known as the *Insular Cases.*[8] The doctrine of incorporation states that the United States Constitution does not "follow the flag"[9] and does not apply fully to offshore territories unless (or until) such territories are "incorporated" into the Union. The Court has never precisely defined when a territory is "incorporated,"[10] and to date it has only once found an outlying territory to be "incorporated."[11]

Although Willens and Siemer acknowledge that the provisions of the Northern Marianas constitution, dealing with the composi-

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5. MARIANAS CONST. art. II, § 2 (a), provides in part:
The Senate shall consist of nine members with three members elected at large from each of three districts. The first Senatorial district shall consist of Rota, the second Senatorial district shall consist of Tinian and Aguiauan, and the third Senatorial district shall consist of Saipan, and the islands north of it.

6. MARIANAS CONST. art. XII, § 1 provides: "The acquisition of permanent and long term interest in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent."

7. The term "incorporation" has never been defined by the Court; Justice Harlan in his dissent in Downes v. Bidwell, 182 U.S. 244, 391 (1901), thought it had some "occult" meaning and was "enveloped in some mystery which he was unable to unravel."

8. These cases include: De Lima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); and Balzac v. Porto Rico, 258 U.S. 298 (1922). The name *Insular* apparently refers to the fact that the territories in these cases were island possessions of the United States. The exact source of the title is unknown, although the cases were so called by legal writers as early as 1901. *See* Randolph, *The Insular Cases,* 1 COLUM. L. REV. 436 (1901).

9. This expression of the "constitution following the flag" originated with William Jennings Bryan in the election of 1900 when he campaigned against "imperialism." W. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES 1888-1910 at 262-68 (1967).

10. Frederick Coudert, who was the attorney for the plaintiffs in the *De Lima* and *Downes* cases has suggested that Justice White considered a promise of statehood implicit in the concept of "incorporation." *See* Coudert, *The Evolution of the Doctrine of Territorial Incorporation,* 26 COLUM. L. REV. 823, 834 (1926). This observation is supported by Chief Justice Taft's statement in *Balzac,* 258 U.S. at 311 where he stated: "Incorporation has always been a step, and an important one, leading to statehood."

11. Alaska was found to be an "incorporated" territory in the *Rassmussen* case, 197 U.S. at 525.

tion of the senate and the "nonalienation of land," are in violation of the United States Constitution,[12] they argue that the provisions are justified in light of the "Pacific setting" involved since the Constitution does not apply fully to this territory under the doctrine of "incorporation."[13] Their position is further predicated on the assumption that the provisions in question do not affect "fundamental rights," since certain "fundamental rights" guaranteed by the Constitution have been held to apply to the territories regardless of whether the territory in question has been "incorporated."[14]

This paper will examine the soundness of these "innovations" which have been justified by Willens and Siemer in the above arguments. First, the concept of "incorporation" as a constitutional doctrine in the modern world[15] will be evaluated. In discussing this doctrine (and the *Insular Cases*) the leading case of *Downes v. Bidwell*[16] will be carefully reviewed. It was in the *Downes* case that Mr. Justice White originally planted the seeds for the doctrine of "incorporation," although Mr. Justice Harlan wrote a vigorous dissent pointing out some of the mischiefs of the doctrine. Some emphasis will be placed on Harlan's dissent as, in terms of individual rights, it is the sounder of the two opinions. Some later cases will also be discussed which generally involve similar issues in a different setting, such as the rights of Americans abroad[17] and the rights of resident aliens.

Second, the question of whether the United States Constitution should fully apply to the new Commonwealth of the Northern Marianas will be examined.[18] Since the "cultural setting" is important to

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12. Willens & Siemer, *supra* note 1, at 1391, 1392.

13. *Id.* at 1412.

14. The Court in *Balzac* stated: "[C]ertain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico . . . ." 258 U.S. at 312-14.

15. The "modern world" is used here to distinguish the present from the world of 1901. It is intended to suggest that with modern transportation, communication, and technology, the territories cannot be considered far away and isolated as they no doubt were in 1901. Thus, it is further suggested that to the extent any such sense of remoteness influenced the Court's decisions in the *Insular Cases*, it should no longer have a bearing on future decisions.

16. 182 U.S. 244 (1901).

17. Some writers have referred to these cases as the "new" *Insular Cases*. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT 818 (1976).

18. The form of Association which exists between the Northern Marianas and the United States is that of a Commonwealth and is similar to that of Puerto Rico. The Supreme Court has said that Puerto Rico "occupies a relationship to the United States

any discussion of this question, the geography and history of the Northern Marianas are briefly reviewed so as to acquaint the reader with this "cultural setting."

Next is discussed the two provisions of the constitution of the Northern Marianas which set forth the present constitutional challenges: the nonalienation of land provision and the unequal representation provision. The argument will be made that these constitutional "innovations" are not justified in a modern "Pacific setting" because: (a) the doctrine of "incorporation" is not a sound constitutional principle; (b) the rights affected by these "innovations" are "fundamental" and the United States Constitution would apply fully to protect such rights; and, (c) as a purely practical matter, the "innovations" will not accomplish the purposes for which they were intended, regardless of the constitutional questions.

It is the author's position that the provision relating to unequal representation, which would violate principles of one person one vote, is unconstitutional and cannot be cured except by compliance with the principles set forth in *Reynolds v. Simms.*[19] The provision relating to nonalienation of land is likewise unconstitutional, but the general principles and goals of this provision can effectively be implemented in appropriate legislation which would not contain unconstitutional prohibitions. Several suggestions for such legislation are included.

Further, the author wishes to point out that his paper does not attempt to discuss or resolve the question of what would be the effect on the covenant between the Northern Marianas and the United States should, in fact, these provisions be found to be unconstitutional. It is hoped that that will be the topic of a subsequent paper. Rather, the principal purpose of this paper is to indicate the problems inherent in the rationale of the *Insular Cases.*

Finally, it should be clearly stated that it is not the author's position that a different cultural setting does not at times justify different rules of law that reflect different social norms. However, once

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that has no parallel in our history." Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572, 596 (1976). Puerto Rico is an "organized" (operating under Organic Act of Congress), "unincorporated" territory. *See* Balzac v. Porto Rico, 258 U.S. 298. For more information about the Commonwealth of Puerto Rico and the territories in general, *see* Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L. J. 219 (1967); Comment, *The Constitution Abroad: The Operation of the Constitution Beyond the Continental Limits of the United States*, 32 TEX. L. REV. 58 (1953); Willens & Siemer, *supra* note 1, at 1383 n.41; and Green, *supra* note 3, at 187.

19. 377 U.S. 533 (1964).

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. In this regard, Mr. Justice Black stated in *Reid v. Covert*[20] that "[t]he prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."[21] As will be illustrated in this paper, constitutional safeguards will do more to benefit the culture than will deviations from constitutional standards.

II. DEFINING THE PROBLEM: THE INSULAR CASES—WHITE'S THEORY OF "INCORPORATION" AND HARLAN'S DISSENT

The problem of whether the Constitution "follows the flag" and applies fully to the territories[22] of the United States can best be understood by reviewing the *Insular Cases* decided at the turn of the century. At the conclusion of the Spanish American War,[23] the United States acquired the territories of Puerto Rico, Guam, and the Philippines. During this same period, Hawaii became a United States possession.[24] These new territories presented the country with the problem of how to govern "remote" possessions,[25] which the Supreme Court was to resolve in the *Insular Cases.*

Today it is difficult to imagine the controversy these cases caused at the turn of the century. They were the source of a number

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20. 354 U.S. 1 (1957).

21. *Id.* at 17.

22. The United States territories include Puerto Rico, Guam, the Virgin Islands, American Somoa, and formerly the Canal Zone. All but American Somoa are "organized" by Act of Congress. American Somoa is "unorganized" and governed by executive order. *See generally* Note, *Executive Authority Concerning the Future Political Status of the Trust Territory of the Pacific Islands,* 66 MICH. L. REV. 1277 (1968); and Willens & Siemer, note 1 *supra.* For a discussion of the status of the Canal Zone since the Panama Canal Treaty, *see generally* Note, *Panama: The Proposed Transfer of the Canal and Canal Zone by Treaty,* 5 GA. J. INT'L & COMP. L. 195 (1975).

23. The Spanish American War ended with the Treaty of Paris approved by the Senate on April 11, 1899. *See* Coudert, note 10 *supra.*

24. Hawaii was annexed into the Union by a joint resolution in both houses of Congress which only required a simple majority rather than the two-thirds majority of the Senate required by a treaty. For an interesting discussion of how and why the annexation occurred, *see* W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932 at 81-82 (1969).

25. *See* note 15 *supra.*

of legal articles[26] and political debate,[27] as well as the subject of some political satire.[28] In much the same way that American thought was occupied in the sixties by the war in Vietnam, and in the seventies by inflation, in 1900 American thought centered on its new possessions and the *Insular Cases.*

The first *Insular Case* to come before the Supreme Court was *De Lima v. Bidwell,*[29] heard in 1901. The case involved the status of the territory of Puerto Rico which was acquired at the conclusion of the Spanish American War. The issue before the Court was whether "territory acquired by the United States by cession from a foreign power remains a 'foreign country' within the meaning of the tariff laws."[30] The case involved a customs agent of the Port of New York, who, pursuant to the General Customs Administration Act of 1890,[31]

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26. *See generally* Whitney, *Another Philippine Constitutional Question—Delegation of Legislative Power to the President,* 1 COLUM. L. REV. 33 (1901); Randolph, note 8 *supra*; and Lowell, *The Status of Our New Possessions—A Third View,* 13 HARV. L. REV. 155 (1899).

27. The question of whether the Constitution "follows the flag" was an issue in the political campaign of 1900. *See* W. KING, *supra* note 9, at 262-77.

28. An example of this political satire is the following piece by the Irish humorist Finley Peter Dunne:

> "I see," said Mr. Dooley, "th' Supreme Coort has decided th' Consitution don't foolow th' flag."
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> Ye can't make me think th' Consitution is goin' thrapezin' around ivrywhere a young liftnant in th' arrmy takes it into his head to stick a flag pole. It's too old. It's a homestayin' Consitution with a blue coat with brass buttons onto it. . . .
>
> [While everyone was waiting, the Supreme Court] "just put th'argymints iv larned counsel in th' ice box an' th' chief justice is in a corner writin' a pome. Brown J. an' Harlan J. is discussin' th' condition iv th' Coort is considerin' th' Roman Empire befure th' fire. Th' rrest iv th' Coort is considerin' th' question iv whether they ought or ought not to wear ruchin' on their skirts. . . .
>
> Th' decision was rread by Brown J. . . . We've been strugglin' over it iver since ye see us las' an' on'y come to a decision (Fuller C.J., Gray J., Harlan J., Shiras J., McKenna J., White J., Brewer J., an' Peckham J. dissentin' fr'm [Brown J.] an' each other). . . .
>
> Some say it laves th' flag up in th' air an' some say that's where it laves th' Consitution. Annyhow, something's in the' air. But there's wan thing I'm sure about.
>
> "What's that?" asked Mr. Hennessy.
>
> "That is," said Mr. Dooley, "no matter whether th' Consitution follows th' flag or not, th' Supreme Court follows th' illiction returns."

F. DUNNE, MR. DOOLEY AT HIS BEST 72-77 (E. Ellis ed. 1969).

29. 182 U.S. 1 (1901).

30. *Id.* at 174.

31. 26 Stat. 131 (1890).

had collected an import duty on sugar arriving from San Juan, Puerto Rico. Since the United States Constitution requires in article I, section 8 that "all duties, imports, and excises shall be uniform" throughout the land, the question arose as to whether the duties in question had been imposed unconstitutionally. It was conceded that the duty was not "uniform," thus leaving as the only issue the question of whether Puerto Rico was "a port of the United States."

The Court, speaking through Mr. Justice Brown in a five to four decision, held that due to the previous ratification of the Treaty of Paris, Puerto Rico was not a "foreign country" within the meaning of the tariff laws, and therefore, the customs agent had illegally collected the duties in question. This case seems to be limited to its facts, and seems only to hold that Puerto Rico is not a foreign country under the tariff laws. However, at the same time the Court heard the *De Lima* case, it also heard the arguments in the companion case of *Downes v. Bidwell.*[32]

Downes also raised the fundamental question of whether Puerto Rico was a part of the United States. The facts of that case were essentially the same as in *De Lima,* with the exception that Congress had enacted the Foraker Act[33] which temporarily provided a civil government and revenues for the island. *Downes* is the more interesting of the two cases since it held that Puerto Rico was not a part of the "United States" within that provision of the Constitution which declares that "all duties, imports, and excises shall be uniform throughout the United States";[34] furthermore, it was in this decision that Justice White first mentioned the concept of "incorporation."[35] Like *De Lima, Downes* was a five to four decision, except there was no majority opinion; instead, there were five separate concurring opinions[36] and two dissents, one with four dissenters in which Harlan concurred, and one where Harlan wrote a separate dissent.[37]

Essentially, three important interpretations emerged in the

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32. 182 U.S. 244 (1901).

33. 31 Stat. 77 (1900).

34. U.S. CONST. art. I, § 8.

35. It has been suggested that the doctrine of "incorporation" was not original to Justice White and that he borrowed the doctrine from Abbott Lawrence Lowell who was later to become president of Harvard University. *See* W. KING, note 9 *supra*; and Lowell, note 26 *supra.*

36. Brown, J., delivered the opinion of the Court. White, J., wrote a separate concurring opinion in which Shiras, J., and McKenna, J., concurred. Gray, J., wrote another concurring opinion. Fuller, C.J., wrote a dissent supported by Harlan, J., Brewer, J., and Peckham, J. Harlan also wrote a separate dissent. 182 U.S. at 244-47.

37. *Id.*

Downes decision.[38] Justice Brown advocated the application of the "extension theory" which held that the Constitution only applied to the territories to the extent that it had been "extended" to the territories by Congress.[39] Justice White, on the other hand, advanced the theory of "incorporation," which held that the Constitution only applied to territories which had been "incorporated" into the Union.[40] This theory was subsequently to become the unanimous rule of the Court,[41] although it is not clear even today when exactly a territory has become "incorporated" into the union.[42] The third theory of importance was that advanced by the dissenters, especially Justice Harlan, and may be referred to as the theory of *ex proprio vigore.* This theory holds that the Constitution applies of its own force to the territories from the moment they become territories.

Since Brown's theory of "extensionism" was never recognized by a majority of the Court, it seems to be only of historical value. In contrast, White's concept of "incorporation" and Harlan's objections to it have been the subject of some debate and shall now be examined in more detail.

White seemed intent on establishing that the Constitution would not apply to the territories fully,[43] even if it meant somehow distinguishing Chief Justice Marshall's prior ruling that "[t]he District of Columbia, or the territory west of the Missouri [or any territory] is not less within the United States than Maryland or Pennsylvania."[44]

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38. *See generally* Coudert, note 10 *supra.*

39. Congress was considered to have this power under the territory clause of the Constitution. U.S. CONST. art. IV, § 3, cl. 2.

40. *See* notes 7 and 10 *supra.*

41. *See* Balzac v. Porto Rico, 258 U.S. 298 (1922).

42. *See* notes 7 and 10 *supra;* and text accompanying notes 44 and 45 *infra.*

43. White, who was appointed to the Bench by President Cleveland, was a wealthy Louisiana sugar planter with strong protectionist tariff instincts. *See* A. KELLY & W. HARBISON, *supra* note 17, at 485. Thus, if the Constitution was held to be fully applicable to the territories, the tariff laws would not have applied to any imported goods (including sugar) from the territories. That pro-protectionist instincts influenced White's philosophy is further supported by the fact that when he was a Senator and had just been appointed to the Bench, he refused to take his seat on the Bench until he had finished supporting a pro-protectionist measure in the Senate. *See generally* W. SWINDLER, note 24 *supra;* W. KING, note 9 *supra;* and A. KELLY & W. HARBISON, note 17 *supra.*

44. In the case of Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1920), Chief Justice Marshall had said:

> The power to lay and collect duties, imports, and excises, may be exercised, and must be exercised, throughout the United States. Does this term [the United States] designate the whole or any particular portion of the American Empire? Certainly this question can admit but of one an-

Although Brown had argued that Marshall's statement was mere *dictum,* White found Brown's position "inadmissible" and proceeded to distinguish Marshall's holding by finding that the Constitution only had the "potential" to apply to the territories.[45] This idea of "potentiality" lay at the heart of White's concept of "incorporation," (*i.e.*, that territories only had the "potential" for constitutional safeguards, and that this "potential" could only be fulfilled when the territory was actually "incorporated" into the Union). Although there is some indication that White held a conservative racial and pro-protectionist tariff philosophy which no doubt contributed to the development of the "incorporation" doctrine,[46] nevertheless, this theory became the unanimous doctrine of the Court within twenty years.[47]

The chief mischief in the doctrine of "incorporation" is that it provides for unequal treatment of citizens under the Constitution, and results in two classes of citizenship. Thus, citizens who are fortunate enough to have been born on the mainland can be assured of all the constitutional protections, while those unfortunate souls who may have been born in a territory can never be sure that they will be guaranteed all of the rights under the Constitution. That such a doctrine could have developed in light of the thirteenth, fourteenth, and fifteenth amendments (and forty years after the Civil War) seems inappropriate. That this doctrine is still the rule of the Court in territorial matters in 1980 is unfortunate. The rationale for the rule has been that it allows "semi-civilized" societies to become civilized before adopting our legal system, and the rule is said to preserve traditional systems and customs. These supposed benefits greatly risk the protection of individual freedoms, as Justice Harlan pointed

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swer. It is the name given to our great republic, *which is composed of States and territories.* (Emphasis added.)

Further, in the case of Callan v. Wilson, 127 U.S. 540, the Court had previously held that there was a right to jury trial in the District of Columbia. *Loughborough* is hard to reconcile with the *Downes* decision as the dissenters in *Downes* pointed out. 182 U.S. at 352-53. The *Balzac* case is likewise hard to reconcile with *Callan. Id.*

45. 182 U.S. at 292-344.

46. Frederick Coudert, who was attorney for the plaintiffs in *Downes* stated:

> Mr. Justice White feared that a decision in this case in favor of the plaintiffs might be held to confer upon the citizens of the new possessions rights which could not be taken away from them by Congress. I may say that in a conversation subsequent to the decision he told me of this dread lest by a ruling of the Court it might have become impossible to dispose of the Philippine Islands. . . . It is evident that he was much preoccupied by the danger of racial and social questions. . . .

Coudert, *supra* note 10, at 832.

47. 258 U.S. 298.

out in his dissent in *Downes*,[48] and the remaining *Insular Cases*.

Another evil that Justice Harlan saw in the concept of "incorporation" was that it violated the principle of separation of powers and, in Harlan's words, resulted in "legislative absolutism."[49] Under the concept of "incorporation" and under the territorial clause of the Constitution, Congress would have absolute authority in making laws for the territories, even laws which would otherwise be unconstitutional. This extraordinary power was said to exist under article IV, section 3(a) which states: "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 . . . ."[50] Interpreted in light of the concept of "incorporation," the above section of the Constitution was held to give the Congress plenary powers to apply otherwise unconstitutional standards to the territories. Thus, under the guise of the doctrine of "incorporation," the people of the various territories have been at times denied the right to jury trials,[51] the right to a grand jury indictment,[52] and other very important (if not "fundamental") rights.[53] Harlan foresaw these potential wrongs in 1901.

Harlan's objections to the concept of "incorporation" are well stated in his dissent in the *Downes* case. Among the evils he foresaw included the implicit colonialism[54] involved in such a concept, the danger of legislative absolutism,[55] and the fact that such a "vague"[56]

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48. 182 U.S. at 375-91.

49. *Id.* at 379.

50. U.S. CONST. art. IV, 3, cl. 2.

51. Puerto Rico was denied this right in *Balzac*, 258 U.S. 298.

52. *See Mankichi*, 190 U.S. 197, which held that the fifth and sixth amendment right to a grand jury proceeding and a unanimous verdict in criminal cases did not apply to the territory of Hawaii.

53. Implicit in all the *Insular Cases* is the right to equal protection and due process.

54. Harlan stated:

> The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.

182 U.S. at 380.

55. In this regard, Harlan stated: "[If Congress has plenary powers over the territories] . . . We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism." *Id.* at 379.

56. Harlan stated that "[m]onarchical and despotic governments, unrestrained

concept could only result in subjecting the people of the territory to an arbitrary and despotic rule.[57] Harlan, known as "the great dissenter," continued to voice his objection to this concept while he remained on the Court.[58] It was only after he had left the Bench that the Court was able to obtain a unanimous vote which made this concept of "incorporation" a doctrine of the Court.[59]

The inherent weaknesses in the doctrine of "incorporation" began to develop in the cases which came to the Court after *Downes*. The first of these was the case of *Hawaii v. Mankichi*,[60] a *habeas corpus* proceeding on behalf of Mankichi who had been tried without the benefit of a grand jury indictment, and convicted by less than a unanimous verdict (nine out of the twelve jurors). Again, White argued his concept of "incorporation" and once again, Harlan dissented.[61] Although White's argument prevailed, Harlan, in his dissent argued that the concept of "incorporation" was an insupportable solution[62] to a complex problem which could only result in the subjugation of the inhabitants of the territories who would be "controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish."[63]

By the time the case of *Dorr v. United States*[64] was heard in 1904, Justice Holmes had taken the place of Justice Shiras and Justice Day had replaced Justice Gray. The *Dorr* case involved the right of an accused to a jury trial in the Philippines. This decision repre-

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by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law." *Id.* at 380.

57. *Id.* Justice Black seems to have shared these fears as will be pointed out in the discussion of *Reid v. Covert, infra*.

58. Harlan served on the Court from 1877-1911, during which time he heard 14,226 cases, and delivered the majority opinion of the Court in 745 cases and dissented in 380 cases. He was accordingly known as "the great dissenter." Despite having been a slave-holder in the early years of his life, he became a great man of liberal principles. He participated in 39 cases dealing with civil rights of Blacks, and in every case in which the Court upheld the rights of Blacks, Harlan voted with the majority, whereas he dissented in every case in which the Court declared federal civil rights legislation to be unconstitutional. *See* F. LATHAM, THE GREAT DISSENTER, JOHN MARSHALL HARLAN, 1833-1911 at 160 (1970).

59. *Id.*

60. 190 U.S. 197.

61. Brown delivered the opinion of the Court, and White and McKenna joined in a separate concurring opinion. *Id.* at 218. Fuller wrote a dissent joined by Harlan, Brewer, and Peckham. *Id.* at 221. Harlan again wrote his own separate dissent. *Id.* at 226.

62. *Id.* at 244.

63. *Id.* at 240.

64. 195 U.S. 138.

sented the first time that the concept of "incorporation" was to receive a clear majority vote of the Court in the *Insular Cases*. Justice Day wrote the opinion of the Court which illustrated that White's concept of "incorporation" was becoming the accepted doctrine of the Court. The Court held that Congress had complete authority over the territories under article IV, section 3 of the Constitution, and that the "Constitution does not, without legislation and of its own force, carry such rights [to a jury trial] to territory so situated [*i.e.*, not "incorporated"]."[65] Commenting on the fact that the right to a trial by jury was imported to protect individual freedom, Harlan cited Blackstone's observation that "Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury."[66]

Between 1904 and 1922 there were other cases which dealt with the question of whether the Constitution "follows the flag," but it was clear after *Dorr* that White's theory of "incorporation" had won the day. One case decided during this period, *Rassmussen v. United States*,[67] was especially interesting since it was the only case in which the Court held a territory to be "incorporated" into the Union. *Rassmussen* held that the territory of Alaska had been "incorporated" into the Union as evidenced by the language contained in the treaty with Russia.[68]

In 1922, the *Insular Cases* finally came to a close with Chief Justice Taft's[69] opinion in *Balzac v. Porto Rico*,[70] which received the unanimous support of the Court. In this case the Court held that the right to a jury trial did not extend to Puerto Rico since Puerto Rico was not an "incorporated" territory. Thus, by 1922 the concept of "incorporation" had become a doctrine of the Court and it was to remain the dogma of the Court until the present time.

III. RELATED CASES AND PRINCIPLES: AMERICANS ABROAD AND RESIDENT ALIENS

Between 1922 and the present, there were several cases decided by the Court which raised constitutional questions similar to those raised in the *Insular Cases*, but in a different context. Some of these

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65. *Id.* at 149.

66. *Id.* at 157, *quoting* 2 W. BLACKSTONE, COMMENTARIES 379.

67. 197 U.S. 516.

68. *Id.* at 521. It should be noted that Harlan actually wrote a separate concurring opinion in this case. *Id.* at 525.

69. Interestingly, at one time Chief Justice Taft had served as the governor of the Philippines and had imposed the Philippine tariffs, and had drafted the congressional acts which ratified them. W. KING, *supra* note 9, at 276.

70. 258 U.S. 298.

later cases arose during the "Cold War" and were the product of stationing large numbers of American soldiers and their dependents on foreign soil. The issue generally involved in these cases was whether the Constitution "followed the flag" and provided rights for Americans stationed overseas.

The first of these cases was *United States ex rel. Toth v. Quarles,*[71] decided in 1955. The defendant in this case was accused of murdering a civilian while stationed in Korea. The defendant was arrested after he returned to the United States and after he had been honorably discharged from the service. Nonetheless, the military tried him under article 3(a) of the Uniform Code of Military Justice Act of 1950.[72] This Act permitted the trial of former servicemen who had committed crimes while in the service. Thus, the issue was whether this congressional act was constitutional to the extent that it allowed the overseas trial of civilians by a court-martial. The Court found the Military Justice Act unconstitutional in this context.

The next case which involved American civilians overseas was the case of *Reid v. Covert.*[73] *Reid* is an important case in two regards: first, it holds that certain "fundamental" rights are to be accorded American citizens even in a "foreign" context; and second, it holds that treaties are subject to constitutional limitations. For our purposes, the first holding is the more significant as it seems to imply that the Constitution at least "follows the citizens" in certain situations, even if it does not always "follow the flag."

The facts in *Reid* involved a civilian wife of military personnel who was accused of murdering her husband while stationed overseas. Pursuant to a Status of Forces Agreement (an executive agreement) she was to be tried by a court-martial which would have denied her certain constitutional rights. Justice Black, writing the opinion of the Court, found that, as to American citizens, certain "fundamental rights" did apply even on foreign military bases, and that to try such citizens by a court-martial would deprive a U.S. citizen of due process.[74] Although *Reid* did not overrule the *Insular Cases*, Justice Black, in his opinion, stopped one step short of overruling them.

Harlan's view of the *Insular Cases* was apparently shared by

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71. 350 U.S. 11 (1955).

72. Now known as the Military Justice Act of 1968, 10 U.S.C. §§ 801-940 (1976).

73. 354 U.S. 1 (1957). The case was heard with the companion case of Kinsella v. Krueger, 354 U.S. 1 (1957).

74. There was no majority in *Reid*. Black, J., wrote the opinion of the Court which was joined by Warren, C.J., Douglas, J., and Brennan, J.

Mr. Justice Black where, in attempting to distinguish the *Insular Cases* in *Reid*, he stated:

> The "Insular Cases" can be distinguished from the present cases in that they [the *Insular Cases*] involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is *American citizenship*. . . . Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. *The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.* If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination to read exceptions into it which are not there.[75] (Emphasis added.)

If, as Black says, congressional measures were to be of a "temporary" nature, such measures can no longer be justified in the "modern world." Furthermore, if *citizenship* is the *sine qua non* of applying the Constitution to the territories, then there is *no* justification for denying the full application of the constitution of the Commonwealth of the Northern Marianas (or to our other territories), and, as Black points out, inconvenience and expediency can only result in dangerous doctrine.

Thus, Black's opinion in *Reid*, rather than distinguishing the *Insular Cases*, lend support to the position taken by Harlan in his dissents to those cases. Both Black and Harlan seem to recognize the inherent weakness in the underlying rationale of the *Insular Cases*.

Therefore, after *Reid* one envisions several possible classes of citizenship being created: there is the American citizen in the *Reid* class who has the right to a jury trial and the guarantee of certain "fundamental rights" when on foreign soil; there is the American citizen in Puerto Rico, who, under *Balzac*, would have some undefined "fundamental rights," but not the right to a jury trial; and, there is the "mainland" citizen who has access to all the constitutional safeguards.

How do these various rights afforded "citizens" compare to the

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75. 354 U.S. at 14.

rights of "noncitizens" (aliens) residing in the United States? It is interesting to note that one of the leading cases in this area, *Wong Wing v. United States,*[76] was decided by practically the same Court that decided the *Insular Cases.*[77] *Wong Wing* involved the question of whether an alien who entered the country illegally could be convicted and sentenced to hard labor without a jury trial. Justice Shiras wrote the opinion of the Court which held that the defendant could be held for deportation without the right of a jury trial, but he could not be held to answer to a sentence at hard labor without the right to a jury trial.[78] It is especially noteworthy that the Court cited with approval the case of *Yick Wo v. Hopkins,*[79] which had held that "the fourteenth amendment to the Constitution is not confined to the protection of citizens."[80] In addition, the Court in *Yick Wo* seemed to have elevated certain fourteenth amendment rights to a natural right to be enjoyed by all mankind. The Court in *Wong Wing* thus cited with approval the following language from *Yick Wo*:

> It [the fourteenth amendment] says: "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." *These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.*[81] (Emphasis added.)

Consequently, not only are aliens entitled to all "fundamental rights" when they reside in the territory of the United States, but they have been granted some not so fundamental rights as well, such as the right to take a bar exam and be admitted to the practice of law,[82] and the right to welfare payments.[83] If aliens have such extensive rights once they come into United States territory, how can it be argued that citizens of the United States only have certain undefined "fundamental rights" if they happen to live in an "unincorpo-

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76. 163 U.S 228 (1896).

77. Justice Field was on the Court when *Wong Wing* was heard in 1896. He was replaced by McKenna in 1898; otherwise the composition of the Court which heard *Wong Wing* was the same as the composition of the Court which heard the *Insular Cases.*

78. 163 U.S. at 237.

79. 118 U.S. 356 (1886).

80. *Id.* at 364.

81. 163 U.S. at 238, *quoting Yick Wo* at 369.

82. In re Griffiths, 413 U.S. 717 (1973).

83. Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

rated," territory?

Through the doctrine of "incorporation," developed in the *Insular Cases,* one sees the creation of two classes of citizenship to which the law is not equally applied. Indeed, one sees the development of a rule of law which at times gives greater rights to aliens than to citizens of the United States, and which treats both the citizen and noncitizen inhabitants of our offshore territories with less regard than it treats mainland aliens.[84] The Court in *Yick Wo* certainly understood this discrepancy, and clearly argued that due process and equal protection should be accorded to *all* persons found within United States territory (and indeed all mankind). This is essentially the same position taken by Justice Harlan in his dissents in the *Insular Cases,* and by Justice Black in *Reid,* and is today, the better constitutional principle by which people should be governed. The Rule of Law and American concepts of equal protection require equal treatment of citizens throughout the United States—regardless of how a geographical area is denoted—territory or state.

IV. THE CULTURAL SETTING: THE NORTHERN MARIANAS

Since the customs and traditions of the people of the Northern Marianas play such an important role in the issue of whether certain constitutional "innovations" make good law, a brief understanding of those people, their history, and the geography of their islands is in order. Only with this understanding can the constitutional dilemma posed by the two "innovations" found in the Northern Marianas constitution, and discussed by Willens and Siemer, be fully appreciated.

A. *A Brief Geography of the Northern Mariana Islands.*

The Northern Mariana Islands consist of all the Mariana Islands except Guam, which is the southernmost island in the Mariana chain. The Marianas in turn are part of a larger island group which is collectively known as Micronesia. Micronesia means "little islands" and consists of those small islands which lie between the 180° Meridian on the east (the international dateline) and the 120° Meridian on the west, and which lie just north of the equator. Overall, Micronesia consists of some 2,000 islands scattered over three million square miles of the Pacific, its population consisting of approximately 110,000 people divided into nine district cultures and dialects.[85]

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84. That is *not* to say that mainland aliens should have fewer rights, but rather, that there should be no distinction.

85. *See generally* M. WHITEMAN, note 3 *supra;* C. HEINE, MICRONESIA AT THE CROSSROADS (1974); and NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 180-81 (4th ed. 1975).

To the extreme west of this large, vaguely defined area of Micronesia lie the Palau Islands, the Yap Islands, and the Marianas; to the extreme east lie the Marshall Islands. Between these extremes lie, from east to west, the islands of Kosrae, Ponape, and Truk. These islands vary from low lying coral atolls, as are found exclusively in the Marshalls, to high volcanic islands with dense rain forest, as is found in Ponape. The Northern Marianas lie between these geological extremes, with temperatures ranging from 70° to 85° Fahrenheit, coupled with high humidity.[86]

The Northern Mariana Islands are comprised of some sixteen islands located north of Guam, totalling approximately 200 square miles in area, but which are scattered over several thousand square miles of oceans.[87] There are approximately 14,500 inhabitants who live on the three principal islands of Saipan, Rota, and Tinian. Saipan has a population of approximately 12,500; Rota, a population of approximately 1,500; and Tinian, a population of approximately 500.[88] Guam is separated from the Northern Marianas only by historical and political events, as culturally the islands are similar.[89] The original inhabitants of the Northern Marianas were the Chamorros, and later Carolinians from the Caroline Islands to the south also settled on the islands. Thus, there are two distinct indigenous populations "of Northern Marianas descent" in the Northern Marianas which have distinctly different customs and language—the Chamorros and the Carolinians.[90] It should be emphasized that of the three major islands in the group, Saipan is the largest island and by far the most heavily populated.[91]

B. *A Brief History of the Northern Marianas: From the "Isle of Thieves" to the Commonwealth*

The Mariana Islands were discovered by Magellan, and when the Chamorro population began to steal every bit of iron they could find, he quickly named the islands "Los Ladrones," Spanish for "the thieves."[92] When Miguel Lopez de Legazpe sailed into the area in 1564 he likewise discovered that the Chamorros were very clever and quick to apprehend commercial matters. Lopez de Legazpe related an amusing story of how the Chamorros had cleverly filled their bas-

86. *Id.*
87. *Id. See also* Willens & Siemer, *supra* note 1, at 1374-75.
88. Note 85 *supra. See also* I. EDMONDS, MICRONESIA (1974).
89. Note 85 *supra.*
90. *Id.*
91. *Id.*
92. *See* I. EDMONDS, note 88 *supra.*

kets with rocks and covered the rocks with rice and fruit and sold these baskets "full of food" to the Spanish.[93]

The Marianas became an important trading station for Spain as it lay in the trade route between New Spain (Mexico) and the Philippines. The islands, named after Queen Mariana of Austria, the wife of Charles I of Spain, were changed from "Los Ladrones" to the Marianas in 1568 by a Jesuit missionary to celebrate the reception he received in Rome for having converted some 13,000 souls to the Catholic faith. This name stuck despite the fact that Queen Mariana had subsequently been deposed on the orders of her half-witted son who feared she was going to poison him.[94]

The Chamorros did not fare well under Spanish rule. Before the Spanish came to the islands the Chamorro population had been estimated as high as 100,000; by the close of the Chamorro-Spanish War in 1685, the population had been reduced to some 5,000 Chamorros. While some Chamorros died from European diseases which were introduced into the area, it is estimated that most were killed by fighting or in reprisal. Within fifty years after the Chamoro-Spanish War, only 1,500 Chamorros remained and today there are no "true" Chamorros who have survived the various colonial rules.[95]

The Spanish rule in the Marianas came to a close at the end of the Spanish-American War in 1898. At that time, Spain ceded Guam to the United States, and with its coffers still empty, Spain then sold the Northern Marianas and the Carolines to Germany for $4.5 million.[96] The German rule was only to last until shortly after the outbreak of the First World War when Japan seized the islands.[97]

At the close of the First World War, the League of Nations determined that the islands of Micronesia would be administered as a trust, to protect the dependent people who inhabited the islands. To implement this goal, a mandate system was created by the League in which dependent territories were put under the mandatory power of certain countries who in turn were accountable to the League's Permanent Mandates Commission.[98] Under this system, Japan was given a Class C Mandate over Micronesia, including the Northern

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93. *Id.* at 27-31. Apparently the Chamorros thought this was a great practical joke, as when the Spanish discovered they had been tricked, they laughed and jeered.

94. *Id.*

95. *Id.*

96. *See* Dobbs, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y. L. F. 139, 141 (1972).

97. *Id.* at 141-42.

98. *Id. See also* M. WHITEMAN, *supra* note 3 at 598-673.

Marianas.[99] Japan brought some economic prosperity to the Northern Marianas and the islands of Saipan and Tinian became large sugar producers.[100] After withdrawing from the League of Nations in 1935, however, Japan began to fortify the islands and to prepare for World War II.[101] The Northern Marianas were the sight of some of the bloodiest battles of World War II, in which many Americans, Japanese, and Chamorros were killed, and much of the property destroyed. Finally, in 1945, a B-29 by the name of the "Enola Gay" took off from the island of Tinian and brought an end to World War II while ushering in the atomic age.[102] At the end of the War, it was the United States who became the new colonial ruler of Micronesia and the Northern Marianas.

At the close of World War II the United States had driven the Japanese from the islands of Micronesia at great cost and was acutely aware of the strategic importance of these islands.[103] At the same time the United States had committed itself to a policy of "non-self aggrandizement."[104] Thus, the United States was faced with the dilemma of not wanting to annex the islands into the United States, while at the same time assuring itself that the islands would never in the future fall into the hands of a potential enemy.[105] This dilemma was resolved by the creation of the "strategic trust" under the trusteeship arrangement in the United Nations.[106]

The trusteeship arrangement came about in a similar manner as had the Mandate system under the League of Nations. As with the League of Nations' Mandate system, the trusteeship system was designed to create a "trust" in which certain dependent territories could be ruled by a "trustee" until such time as the dependent territory was ready for self-rule. A "trustee" would be accountable to the United Nations Trusteeship Council for the manner in which it administered a "trust."[107]

Micronesia, however, was to be a "strategic" trust which meant that the United States, as the administering authority for the trust, would have absolute authority over this territory, since a "strategic"

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99. Dobbs, note 96 *supra*.

100. *See* C. HEINE, note 85 *supra*, and I. EDMONDS, note 88 *supra*.

101. *See* Dobbs, note 96 *supra*.

102. *See* I. EDMONDS, note 88 *supra*.

103. *See* C. HEINE, note 85 *supra* and I. EDMONDS, note 88 *supra*.

104. Dobbs, *supra* note 96, at 143-51.

105. *Id. See also* Green, note 3 *supra*, and Comment, *International Law and Dependent Territories: The Case of Micronesia*, 50 TEMP. L. Q. 58 (1976).

106. Dobbs, *supra* note 96, at 143-51. *See also* M. WHITEMAN, *supra* note 3, at 731.

107. Dobbs, *supra* note 96, at 143-51.

trust came under the control of the Security Council, not the Trusteeship Council, and the United States had a veto power in the Security Council. Article 76 of the United Nations Charter applies to strategic trusts and provides primarily for the furtherance of international peace and security, making political, economic, and social goals secondary. The Northern Marianas (and all of Micronesia), therefore, came under United States rule at the end of World War II, a rule which has continued to the present time.[108] It should be mentioned, however, that although the United States has practically absolute rule over Micronesia (or the Trust Territory of the Pacific Islands as it is presently known), it has only *de facto* sovereign powers over the territory. The United States has never claimed *de jure* sovereignty over the area and the question of sovereignty has never been determined, other than holding that the United States is a "qualified sovereign" as the administering authority.[109]

The United States administration in the Trust Territory has not been altogether satisfactory, leaving some writers to refer to the Trust Territory as "the Rust Territory," the "Bungled Trust," and the "Trust Betrayed."[110] Much of this criticism is due to the fact that until the 1960's the United States largely ignored the area with the exception of Bikini and Enewetok, in the Marshall Islands, where the government removed the people from their homelands so that they could conduct nuclear tests. During this period Saipan was used as a base by the C.I.A. to train counter-insurgents to infiltrate mainland China. After 1962, the United States began to take an interest in the area and with this new interest came additional funding and some improvements in services such as education and health. Also, with this new emphasis in the Trust Territory came a greater effort to increase the process of self-rule in the islands; as a consequence, by 1965 the Congress of Micronesia was formed with elected leaders from the various island districts.[111]

As early as 1961 the Marianas wanted to form a permanent relationship with the United States despite the apparent "bungling" by the American administration.[112] The reason for this desire of a close relationship with the United States by the inhabitants of the North-

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108. *Id.*

109. *Id.* at 148.

110. *See* S. DE SMITH, *supra* note 4, at 133-37 ("Rust Territory"); Mink, MICRONESIA: OUR BUNGLED TRUST, 6 TEX. INT'L L. F. 181 (1971); and D. MCHENRY, MICRONESIA: TRUST BETRAYED (1975).

111. *See* C. HEINE, note 85 *supra;* and I. EDMONDS, note 88 *supra.*

112. *See* note 2 *supra. See also* M. WHITEMAN, *supra* note 3, at 813; and Mink, note 110 *supra.*

ern Marianas is probably due to the close ties which exist between the people of the Marianas and their cousins in Guam.[113] Given the closeness of ties which exists between members of the extended family groups in the Marianas, it is not surprising that the people of the Northern Marianas would seek a closer relationship with Guam and the United States. Moreover, the people of the Marianas acquired the religion of the Spanish and today 98 percent are Catholic, whereas the rest of Micronesia is predominantly Protestant. Since religion plays such an important role in the daily affairs of the islanders throughout Micronesia, one writer has suggested that this fact contributed substantially to the Marianas sense of separateness from the rest of Micronesia.[114] Despite the frequent "bungling" by American administrators, no doubt the people of the Northern Marianas could see beyond this and recognized the great worth of the constitutional freedoms which would come with an association with the United States. After all, the "bungling" was largely due to human error, and with local elections those "errors" could be (in theory) easily cured. Thus, by 1975 the people of the Northern Marianas had entered into a "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States."[115] Finally, on March 6, 1977, the people ratified the constitution of the Northern Mariana Islands by a 93 percent vote.[116] Given this background, the "innovations" which are contained in the Northern Marianas constitution shall now be examined. Do these "innovations" provide sound principles for the governing of the people of this new Commonwealth?[117]

V. THE CONSTITUTIONAL DILEMMA OF THE NORTHERN MARIANAS: PROTECTING CUSTOMS AND LAND WHILE ASSURING INDIVIDUAL FREEDOMS

The constitutional dilemma which exists in the Northern Marianas is to find a way to protect the customs and traditions of the people while at the same time providing the people with the same fundamental constitutional safeguards as are enjoyed by citizens on

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113. *See* FUTURE POLITICAL STATUS COMMISSION, REPORT TO THE CONGRESS OF MICRONESIA 33-37 (1967); Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1967, 34 U.N. TCOR, Supp. 2 at 27, U.N. Doc. T/1658 (1967). *See generally* C. HEINE, note 85 *supra;* I. EDMONDS, note 88 *supra;* Willens & Siemer, *supra* note 1, at 1378-81; and M. WHITEMAN, *supra* note 3, at 813-815.

114. *See* C. HEINE, note 85 *supra.*

115. *See* Willens & Siemer, *supra* note 1, at 1381.

116. Approximately 60% of eligible voters voted. *Id.* at 1373.

117. For a review of commonwealth status, *see* notes 18 and 19 *supra.*

the "mainland."[118] This is no simple task. Willens and Siemer have suggested two "innovations" to resolve this dilemma; innovations which would be unconstitutional on the mainland, but which they defend by turning to the doctrine of "incorporation" and the *Insular Cases.*[119] Although this approach is not without precedent,[120] it is an unreasonable approach to the problem, and it is an approach which is likely to create more problems than it will resolve.

The two provisions in question provide for disproportionate representation in the Northern Marianas Senate, and for the nonalienation of land to persons of other than "Northern Marianas descent."[121] A person of "Northern Marianas descent" is a person who is a citizen or national of the United States, who is at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof, and whose descent can be traced to persons born or domiciled in the Northern Mariana Islands by 1950, and who was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship.[122]

The provision providing for unequal representation in the Senate was included to appease the Northern Marianas' voters of Rota and Tinian who otherwise might not have joined in the formation of the Northern Marianas.[123] Since each of these islands has a relatively small population when compared with the island of Saipan, the voters apparently feared that the legislature would be controlled by people living on Saipan. To avoid this consequence a provision was included in the Northern Marianas constitution which provides that both Rota and Tinian have equal representation in the Senate, the upper house of representation in the Commonwealth.[124] Willens and Siemer also point out that there may be some ethnic basis to the provisions as the Tinian position was influenced by a number of Yapese who migrated to the island following the Second World War.[125] This provision would be unconstitutional if enacted by a state in the Union, due to the "one person, one vote" principles of *Reynolds v. Sims,*[126] which held that the equal protection clause of

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118. By citizens on the "mainland" is meant citizens of the fifty states.

119. *See* Willens & Siemer, *supra* note 1, at 1393-1412.

120. *See* Dobbs, *supra* note 46, at 178-215.

121. MARIANAS CONST. art. II, 2(a) and art. XII, 1, respectively.

122. *Id.* art. XII, 4. The target date for the termination of the Trusteeship is 1981 to 1982.

123. *See* Willens & Siemer, *supra* note 1, at 1400-05.

124. MARIANAS CONST. art. II, 2(a).

125. *See* Willens & Siemer, *supra* note 1, at 1402.

126. 377 U.S. 533.

the fourteenth amendment is violated when an individual's right to vote is substantially diluted in comparison to the votes of other citizens of his State. *Reynolds* also held that the equal protection clause requires that both houses of a State's bicameral legislature, such as is found in the Northern Marianas Commonwealth, be apportioned on the basis of population.

Thus, this provision creates a dilemma in which the new citizens[127] of the Northern Marianas are represented by a legislature which would be unconstitutional on the mainland, one which results in unequal treatment under the Constitution of the United States, and, additionally, one which creates two classes of citizens. Willens and Siemer do not dispute this evil, but they find justification for it in the *Insular Cases* and the doctrine of "incorporation." In defense of this provision, they cite Harlan's decision (the "Great Dissenter's" grandson of the same name) in *Reid*[128] where he stated, in regard to the question of whether the constitution applies fully to the territories, that this depends "upon the particular circumstances, the practical necessities and possible alternatives involved."[129] Such a stance is not sufficient for several reasons.

First, the Supreme Court in the *Reynolds* decision specifically held that "historical, economic or other group interests, or area alone, do not justify deviation from the equal-population principle."[130] The Court did state that some slight deviation from the equal-population principle may be allowed. The Court, however, clearly indicated that attempts to justify such plans on the basis that the purpose of the plan is to insure "effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired," are "unconvincing."[131] This language would seem to be addressed to the exact situation of the Northern Marianas, and if the Constitution applies fully to this territory or if the right to equal representation is "fundamental," then this provision is unconstitutional. Since both of these rights indeed

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127. The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States, signed on February 15, 1975, provides for United States citizenship and nationality for the people of the Commonwealth which will come officially under United States sovereignty upon termination of the Trust Territory of the Pacific Islands and termination of the Trusteeship Agreement. *See* Willens & Siemer, *supra* note 1, at 1382-83.

128. 354 U.S. at 65.

129. *Id.* at 75.

130. 377 U.S. at 579-80.

131. *Id.* at 580.

are fundamental, the provision is clearly unconstitutional.

Reliance on the doctrine of "incorporation" is unsound in that it results in unequal treatment under the law and creates different classes of citizens. The doctrine should not be allowed to support a disparity of rights between citizens by being invoked to support a provision which would deny citizens of equal representation, a provision which would assure unequal treatment under the law. The right to equal representation is a "fundamental" right as guaranteed by the fourteenth and fifteenth amendments, and the Supreme Court has so held in the *Reynolds* case.[132]

In addition to the constitutional problems with the equal representation provision, the provision also presents some serious practical problems. First, the provision, to accomplish its desired result of enhancing the representation of the people of the islands of Rota and Tinian, is based on a faulty premise. The false assumption is that the populations of these two islands will remain static and that the *status quo* will be preserved. However, one of the principal bargaining points in the Commonwealth negotiations with the United States was an agreement that the United States could build a large air base on Tinian.[133] Certainly, when the construction of the base begins, large numbers of workers will move to Tinian to work on the construction of the base, especially in light of the scarcity of jobs in the territory.[134] Undoubtedly, many of these workers will take their families with them and reside on Tinian. Further, after the completion of such a base, no doubt many people would migrate to Tinian to set up shops and other stores which, invariably, are established around and in support of a military base.

When such a base is built, even if the population does not show any shift (which is very unlikely), would the presence of the base itself not create a situation in which the disproportionate voice held by Tinian in the Senate would potentially only represent the interests of a small number of people who could easily be influenced by the

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132. The Court in *Reynolds* stated:

> Undoubtedly, the right of suffrage is a *fundamental* matter in a free and democratic society. Especially since the right to exercise the franchise *in a free and unimpaired manner* is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. (Emphasis added.)

377 U.S. at 561-62.

See also Yick Wo where the Court characterized the "political franchise of voting," under certain conditions, to be "a fundamental political right, because preservative of all rights." 118 U.S. at 370.

133. *See* Willens & Siemer, *supra* note 1, at 1400 n.11.

134. *See generally* C. HEINE, note 85 *supra*.

United States military? Could such a small group resist the temptation to become dependent upon the huge economic input the military would have and which interest might be reflected in the vote of the representative? In other words, the disproportionate voice given Tinian in the Northern Marianas Senate might lead to disproportionate influence by the proposed United States military base on Tinian; and rather than protecting the small population of Tinian (or other islands) relative to Saipan, the unequal representation provision may only come to exert undue influence by the military over all of the Northern Marianas.

Hypothetically and along a similar line, what if, after some time, many "mainland" Americans settle on Tinian, and they in fact become the majority on the island? Would the people of the Northern Marianas still be happy with this disproportionate representation?

The provision for disproportionate representation should be found to be unconstitutional as the right to equal representation is a "fundamental" right. Moreover, such a provision cannot be defended by the expedient, but unsound, doctrine of "incorporation." The provision is based on the false premise that it will protect minority rights and customs which in turn depend upon preservation of the *status quo.*

The other provision of the Northern Marianas constitution which lends itself to question is the so-called "nonalienation of land" provision; a provision which could prove equally as disastrous for the people of the Marianas as the disproportionate representation provision discussed above. The rationale behind this provision was to protect the people from being stripped of their most precious possession, their land.[135] Although somewhat paternalistic in nature, the idea was basically humanitarian and well-intentioned. As Willens and Siemer point out, the land alienation restrictions are designed to "increase the participation of the islanders as entrepreneurs in economic ventures using land, to preserve their ability to reexamine land uses . . . as leases are terminated, and to maximize revenues . . . to the Commonwealth."[136]

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135. The people of the Northern Marianas (and throughout Micronesia) have a special relationship to their land, and family roots are historically closely tied to land rights. Further, the people of the Northern Marianas apparently fear losing land as their cousins in Guam did, where approximately 30% of the land is held by nonindigenous people. *See generally* C. HEINE, note 85 *supra;* and I. EDMONDS, note 88 *supra.* Land is also precious due to its scarcity with only 183.5 square miles available in all the islands. Willens & Siemer, *supra* note 1, at 1407.

136. Willens & Siemer, *supra* note 1, at 1406.

Since these land restrictions are based in fact on purely racial considerations, and since they would deprive many sellers of access to markets, and since they would amount to a "taking," this nonalienation of land provision would seem to violate at least three provisions of the United States Constitution: (a) the equal protection clause of the fourteenth amendment;[137] (b) the privileges and immunities clause of the fourteenth amendment, article IV, section 2; and (c) the fifth amendment prohibition against the taking of property without just compensation.[138]

Willens and Siemer defend this provision by citing similar provisions in the laws of American Samoa and Hawaii, by citing provisions found in the law relating to American Indian land, and finally by arguing that under the doctrine of the *Insular Cases*, the right to equal protection and privileges and immunities are not "fundamental rights," and hence do not apply of their own force to the Commonwealth of the Northern Marianas.[139] This defense simply is not adequate.

First, the American Samoan and Hawaiian laws to which they cite have never been tested constitutionally.[140] It is doubtful whether such a law would be found constitutional in Hawaii, American Samoa or the Northern Marianas, because the law takes away important property rights and would deny citizens in the Northern Marianas (or Hawaii or American Samoa) the equal protection of the law as guaranteed by the fourteenth amendment. It would also deny them due process of law as guaranteed by the fourteenth and fifth amendments; and, moreover, would deny them the privileges and immunities guaranteed by the fourteenth amendment.

Second, Willens' and Siemer's position that a property right (under the equal protection clause and privileges and immunities clauses of the fourteenth amendment) is not a "fundamental" right is certainly questionable. Significantly, the Supreme Court stated in *Balzac*, one of the *Insular Cases*, that property rights are "fundamental."[141]

Finally, Willens and Siemer concede that the American Indian analogy is not on point with the situation in the Northern Marianas, as both the Congress and the courts have traditionally considered it

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137. U.S. CONST. amend. XIV, § 1, cl. 4.

138. The fifth amendment to the United States Constitution provides in part, "nor shall private property be taken for public use, without just compensation."

139. *See* Willens & Siemer, *supra* note 1, at 1405-12.

140. *Id.*

141. Note 14 *supra*.

their duty to protect the Indian from exploitation from outsiders and, further, the United States Government stands in a "guardian-ward relationship to the tribes."[142]

The "nonalienation of land" provision and the defense of the provision by resort to the doctrine of "incorporation" results in an expedient solution which produces poor law. If this provision is allowed to stand it may do much harm. First, it emphasizes the duality of citizenship which is created by the doctrine of "incorporation." People of "Northern Marianas descent" who are citizens of the United States will be able to go to the mainland and purchase property without restrictions, but citizens who are not of "Northern Marianas descent" will not be able to go to the Northern Marianas and purchase property. Thus, even aliens would have certain rights on the mainland that a "mainland" citizen would not have in the Northern Marianas.[143] This provision would thus violate equal protection as well as the privileges and immunities principles of the fourteenth amendment.[144] In addition, by cutting off the access of the people to a free marketplace, the Government has in effect "taken" the private property of the people for the public "good" (or use), without compensation and in violation of the fifth amendment.[145] Finally, the nonalienation of land provision will not accomplish the goal for which it was drafted. Closing the market on land in the Northern Marianas will not protect the people from exploitation; rather, it will only limit exploitation to people of "Northern Marianas descent." Thus, the provision would only limit any exploitation by outsiders, and Chamorros would be free to exploit Chamorros or Carolinians and vice versa. One could safely predict that within some twenty-five years a majority of the land of any value would be held by a small minority of wealthy persons of "Northern Marianas descent." Since the marketplace would be closed to outsiders and would not respond to a normal supply and demand curve, and since only a small number of purchasers would have the capital to purchase land, a seller would have to sell at whatever price a purchaser of "Northern Marianas descent" was willing to pay, which surely would be less than the fair market value due to the scarcity of buyers.

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142. Willens & Siemer, *supra* note 1, at 1410.

143. *See Wong Wing*, 163 U.S. 228; and *Yick Wo*, 118 U.S. 356. *See also* Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952), which held, *inter alia*, that a state law prohibiting sales of land to aliens was unconstitutional in that it violated the fourteenth amendment's equal protection clause.

144. U.S. CONST. amend. XIV, § 1.

145. U.S. CONST. amend. V.

It is anticipated that the argument will be made that this kind of "local" exploitation would not occur due to the extended family tradition and the unique setting of the islands. One need only reflect on the effect that the Micronesian War Claims[146] cases had on the extended family structure to realize what effect the accumulation of wealth can have on the extended family structures in this setting.[147] In these War Claims cases, often close family members would sue one another over disputed shares of War Claim proceeds which one member or group would try to hoard and not distribute in accordance with the custom. These disputes would frequently result in much bitter litigation and the disintegration of family relationships.[148]

In summary, although Willens and Siemer present justifications of the provisions in question, the provisions cannot be justified under sound constitutional principles nor are they justified due to the "cultural setting." The defense of the provisions is largely dependent upon the doctrine of "incorporation," a doctrine which is not appropriate in a modern legal setting, and which, if continued, will undermine one of the foundations of our Republic — that all people are equal under the law. Further, although the Supreme Court has never stated exactly which rights are so "fundamental" that they would apply to the territories regardless of the question of "incorporation," it would seem that the right to equal representation and the right to property are so "fundamental" that they should enjoy constitutional protection even in the territories and even in a territory that was "incorporated." Finally, the provisions in question are not justified as they simply will not accomplish the objectives of the drafters, regardless of the merits of those objectives.

VI. ANOTHER APPROACH TO THE PROBLEM IN THE NORTHERN MARIANAS: APPROPRIATE LEGISLATION AND A MOVE AWAY FROM THE CONCEPT OF "INCORPORATION"

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146. Micronesian Claims Act of 1971, Pub. L. No. 92-39, 85 Stat. 92 (1971). Terminated in 1976. *See* 50 U.S.C. App. §§ 2018-2020b (1976).

147. Under the Micronesian Claims Act of 1971, Micronesia became eligible to make claims for damages incurred during the Second World War. Many claims were heard by the War Claims Commission and damages awarded. Subsequently, there arose a number of law suits, some against the Government over the fairness and method used by the Claims Commission in arriving at awards, and others (to which the author here refers) arose among family members over a share of the claim received by certain heirs and not others; or heirs claiming to be the only heirs entitled to receive an award. In most cases, these disputes resulted in irreparable harm to some of the extended families involved. This observation is based on the author's experience as counsel for various parties in such suits during two years spent in Micronesia working as a Legal Services Attorney and as a Public Defender.

148. *Id.*

If the concept of "incorporation" is found not to be a sound constitutional principle and if the provisions contained in the constitution of the Northern Marianas do not resolve the dilemma of how to protect local custom while assuring complete constitutional freedom, then another approach must be found to resolve the problem. Any approach should insure that all the rights guaranteed by the United States Constitution apply fully to citizens of the Commonwealth.

A recent case heard in the Federal Court of Appeals may indicate that the legislative "absolutism" which Justice Harlan feared in his dissent in the *Insular Cases* may be on the wane. The case was the action of *Ralpho v. Bell*[149] decided in 1977 which held that congressional power in the territories, although broad under article IV of the Constitution, is limited by fifth amendment due process considerations. The facts of the case involved the denial of access to certain evidence in a hearing before the War Claims Commission which the plaintiff maintained was essential to the prosecution of his claim against the government for damages received in World War II.[150] Also at issue was the question of the finality language contained in the War Claims Act[151] itself, which stated that the decisions of the Claims Commission were final and not subject to appeal.[152] Thus, the issue on appeal was whether these practices resulted in a denial of due process under the fifth amendment. In finding that due process was violated, the court held that the powers of Congress over the territories are not unlimited and are constrained by principles of due process. The reasoning in *Ralpho* is sound and perhaps for this reason the Government did not appeal the case. This was unfortunate as this might have presented the Supreme Court with an excellent opportunity to review the doctrine of "incorporation." Nonetheless, the case is important as it seems to put an end to Congress' absolute control over the territories, and it seems to make a serious inroad into the doctrine of "incorporation," and, perhaps, it may mark a beginning of the end of the doctrine.

If indeed the doctrine of "incorporation" is on the wane, then another method needs to be found to protect the more noble objectives of the drafters of the constitution of the Northern Marianas. Since, for reasons already stated, this writer finds the provision pro-

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149. 569 F.2d 607 (1977).

150. Ralpho was seeking damages for his house which was destroyed by bombardment on the island of Jaluit.

151. Pub. L. No. 92-39, § 104(a), 85 Stat. 92 (1971).

152. 569 F.2d at 618.

viding for unequal representation unjustified in light of the cultural setting, no attempt will be made to find an alternative to this provision. Instead, the provision should be made to comply with the one person, one vote principle set forth in *Reynolds*.

Although the "nonalienation of land" provision is objectionable as presently drafted, the idea behind the provision should be preserved. The attempt of the provision to assure unsophisticated inhabitants of the islands that their land will not be bought up by "land barons" at much less than the fair market value, and to encourage the people to preserve their land and customs associated with the land represents a noble concept, worth implementing in another manner. Since such "land barons" may come from within as well as from without the society, any provisions dealing with land ownership should not be based only on purely ethnic considerations.

Assuming the present "nonalienation of land" provision is found to be unconstitutional by a court, or assuming it is amended out of the constitution, then its objectives could more easily be accomplished by legislation. Legislation, rather than a constitutional provision, can much better serve the needs of the people. Legislation would be easy to change and adapt to the actual needs and circumstances of the society. The present constitutional provision, on the other hand, shall require the much more difficult amendment process to effect any change.[153] Thus, if the present *status quo* should change, or if population shifts should occur, or the demand for indigenous use of land change, then any legislation dealing with the problem could be readily adapted to the needs of the people, whereas the present constitution could not. Any such legislation, however, should not rely on the doctrine of "incorporation" or the fact that the United States Constitution does not apply fully to the territories for its survival.

In order to assure that the goals are met and people of the Northern Marianas protected, such legislation might include the following provisions:

> 1. A provision which would require that all deeds involving the sale of land be in both English and Chamorro (or other appropriate native tongue).
> 2. A provision establishing a commission or board whose function would be to assure that native rights are protected and to advise indigenous land owners of:
> a. current appraised value of land;
> b. available land;

153. MARIANAS CONST. art. XVIII.

c. alternative sources of capital (loans) should the need for funds be the motivating factor in the land sale;
d. where to seek legal advice on land transactions; and
e. other appropriate advice.

3. A provision to publish periodic reports on land sales advising land owners of all land sales and the amount of native lands which have been sold to outside interests.
4. A provision which would assure that any such commission would be so composed that it would adequately represent the people and their interests.
5. A provision which would require the actual purchase price of all land sales to be disclosed and shown on the deed.
6. A provision for recordation of deeds and all transfers of interest in land.
7. A provision providing for accurate recordkeeping by the commission of all land sales which would provide the necessary information for compilation of appropriate statistical data.
8. A provision providing for periodic appraisals on land and publication of such appraisals.
9. A provision for recording fees which could be used to defray the cost of the commission.

It should be pointed out that this proposal is intentionally general, and is intended only as possible suggestions for an alternative to the present provision in the Northern Marianas constitution. The proposal may seem unduly paternalistic, but certainly not any more paternalistic than the present constitutional provision. One might well argue that neither is needed; but that decision should be left to the people themselves to determine.

The purpose of this paper has not been to question the wisdom of the underlying philosophy of the nonalienation of land provision, but rather, to emphasize its inherent legal weaknesses and to suggest alternatives. In so doing, an effort has been made to indicate the weaknesses of the present constitutional provisions and to point out the weaknesses of the doctrine of "incorporation," so that steps can be taken to correct measures which are based on principles which are not consistent with the principles of the United States Constitution and which are justified solely on the reliance that, under the doctrine of "incorporation," the United States Constitution will never apply fully to this new Commonwealth. It should be remembered that poor constitutional principles are often the subject of change at the Supreme Court.

VII. CONCLUSION

The position has been taken here, that certain "innovations" contained in the constitution of the Northern Mariana Islands are

not justified as they depend upon the doctrine of "incorporation" for their validity. Since that doctrine states that the United States Constitution does not apply fully to the territories, and since the doctrine results in unequal treatment under the law and diminishes the Rule of Law, it has no place in modern society. The doctrine of "incorporation" can and does result in different classes of citizenship based solely on the superficial fact of residency and whether a particular locale is designated a state or a territory, and if a territory, whether it is "incorporated" or "unincorporated." Further, the doctrine leads to the extreme result that a noncitizen (alien) is often given more rights under our Constitution than is a citizen who happens to live in a so-called "unincorporated" territory. Territorial constitutional "innovations" which attempt to encourage and permit otherwise unconstitutional activities by invocation of the doctrine of "incorporation" should be struck down as unconstitutional. To do otherwise will result in an unhealthy duality and a consequent weakening of the Rule of Law.

If there were ever justifications for such a doctrine, surely these justifications are no longer valid in the modern world. Historically, the doctrine was justified by the remoteness of the territories and the vast differences in culture. These justifications 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.

Many of the more noble goals of the people of the territories, such as protecting their customs and traditions, can be accomplished by the use of appropriate legislation and there is no need for resort to unconstitutional or "extra-constitutional" solutions. By applying the Constitution fully to the territories these more noble desires can in fact be better assured. For example, although a jury trial may not be part of the culture of the people, can it reasonably be argued that an American judge sitting in a territory will do more to protect the custom and values of the people than would a jury *of* the people? Certainly not.

Thus, this paper has challenged the value of the doctrine of "incorporation" and the value of constitutional "innovations" in a different cultural setting. To the extent that Willens and Siemer have advocated such results in their article, this author has taken exception with that article. There are numerous different "cultural settings" within the fifty states: there are Black, Chicano, Jewish, and Chinese communities; there is the Southwest, and the Northeast; there are mountains, and deserts — none of which justify less than

the full application of the Constitution within the fifty states based on the argument that different ethnic groups or different landscapes justify different constitutional standards. When the people of the Northern Marianas become citizens of the United States, the fact that there may exist some cultural and environmental differences should not work to deny the people their full constitutional rights under the guise that different cultural settings justify different constitutional standards.