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Birthright Citizenship & the Plight of American Samoa

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BIRTHRIGHT CITIZENSHIP AND THE PLIGHT OF AMERICAN SAMOA

DEANNA SALEM*

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I. INTRODUCTION

John Fitisemanu is an American born in the United States territory of American Samoa.¹ For his entire life, he was denied the right to vote because the United States government refused to

* Deanna Salem has a J.D. from University of Chicago School of Law. This Case Note is dedicated to my parents for their unwavering love and support throughout my law school journey. Thank you to Jacqueline Romo for your mentorship and guidance as I was writing my Note. A special thank you to Zachary Sikora and the other members of the UIC Editorial Board for the UIC Law Review. Finally, thank you to my professors who transformed my life.

1. Complaint for Declaratory & Injunctive Relief at 2, *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 1:18-cv-00036-EJF), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) [hereinafter *Complaint*].

recognize birthright citizenship in American Samoa.² However, in the 2019 case *Fitisemanu v. United States*, a federal district court in Utah recognized American Samoans as U.S. citizens for the first time.³ Fitisemanu registered to vote less than twenty-four hours after the district court's order was issued.⁴ Later that week, Fitisemanu's citizenship status was once again uncertain when the order was placed on hold pending resolution of the case on appeal.⁵ As a result, Fitisemanu lost the ability to vote and the many other privileges that come with U.S. citizenship.⁶

In *Fitisemanu*, three American Samoans sought judicial recognition that people born in American Samoa are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause.⁷ This Note argues that the Citizenship Clause applies to the U.S. territories. Part II provides an overview of the history and legal precedent underlying American Samoa's treatment under the U.S. Constitution. Part III analyzes the Tenth Circuit's holding in *Fitisemanu*, which relied on the rationale created under the Insular Cases. Part IV explains how the Tenth Circuit reached the wrong conclusion by ruling that the Citizenship Clause does not apply to the territories. Finally, Part IV argues that application of the Citizenship Clause would not threaten the American Samoan culture because courts have protected similar cultural institutions.

II. BACKGROUND

The United States annexed the islands of American Samoa in 1900.⁸ Americans born in the territory are legislatively categorized as non-citizen nationals.⁹ To understand their unique status, it is important to first examine the region's union with the United

2. *Id.* at 3.

3. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019) (“Persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment.”), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022).

4. Vanessa Romo, *American Samoans' Citizenship Status Still In Limbo After Judge Issues Stay*, NPR (Dec. 13, 2019, 6:14 PM), www.npr.org/2019/12/13/787978353/american-samoans-citizenship-status-still-in-limbo-after-judge-issues-stay [perma.cc/3VWS-VQ57].

5. *Id.*

6. *Id.*

7. *See generally* Complaint, *supra* note 1.

8. Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 72 (2013).

9. *See* 8 U.S.C. § 1408 (2022) (stating that persons “shall be nationals, but not citizens, of the United States at birth” if they are “born in an outlying possession of the United States.”). *See also* *Miller v. Albright*, 523 U.S. 420, 467 (1998) (Ginsburg, J., dissenting) (“[T]he only remaining noncitizen nationals are residents of American Samoa and Swains Island.”).

States.¹⁰ It is also necessary to discuss the United States Supreme Court's Insular Cases and how the Court's Territorial Incorporation Doctrine is applied.¹¹ The Insular Cases, which have been criticized for legally justifying racism and colonialism under the Constitution, are responsible for forming the relationship between the territories and the United States.¹² Thus, this Part explores how the U.S. government has been relegating American Samoans to a second-class status for over a century.¹³ Finally, the legal consequences of being a non-citizen national also warrant consideration as they reveal the plight of American Samoa.¹⁴

A. *The Union between the United States of America and American Samoa (1900-1904)*

During the end of the Spanish-American War, the United States began forming its union with the territory of American Samoa.¹⁵ American Samoa is an archipelago¹⁶ in the South Pacific Ocean, consisting of seven islands.¹⁷ It is roughly halfway between

10. See Ian Falefuafua Tapu, *Who Really Is A Noble?: The Constitutionality of American Samoa's Matai System*, 24 ASIAN PAC. AM. L.J. 61, 64-75 (2020) (exploring American Samoan history from when the United States annexed the islands to today).

11. See Lisa Maria Perez, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1034 n.13 (2008) (collecting twenty-three cases “decided between 1901 and 1922 that set out the constitutional posture of Puerto Rico and the other insular territories.”).

12. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 286 (2007) (arguing that the Insular Cases “w[ere] strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience.”). See *Igartúa de la Rosa v. United States*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (arguing that the Insular Cases were “anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda.”).

13. See Morrison, *supra* note 8, at 126 (“[T]he government’s interest in maintaining [American] Samoans’ status as nationals is not clear.”).

14. See *generally* Complaint, *supra* note 1.

15. Morrison, *supra* note 8, at 131. See also José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 395-96 (1978) (noting “[t]he expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American War and dominated the presidential election campaign of 1900.”). However, “[t]he electoral victory of President William McKinley settled the controversy in favor of imperial expansion.” *Id.*

16. NAT'L OCEANIC & ATMOSPHERIC ADMIN., *What is an archipelago?*, NAT'L OCEAN SERV., www.oceanservice.noaa.gov/facts/archipelago.html [perma.cc/JX3D-CQEK] (last visited Mar. 9, 2023) (defining “archipelago” as “an area that contains a chain or group of islands scattered in lakes, rivers, or the ocean.”).

17. See UNITED STATES CENTRAL INTELLIGENCE AGENCY, *Australia & Oceania: American Samoa*, in WORLD FACTBOOK, www.cia.gov/the-world-factbook/countries/american-samoa/ [perma.cc/A3C5-WNJT] (last updated Apr.

Hawaii and New Zealand with a population of 44,620.¹⁸ The territory was initially recognized as a resource for the United States' military efforts.¹⁹ Between 1900 and 1904, the American Samoan leaders voluntarily ceded sovereignty to the United States through instruments of cessions.²⁰ The American Samoan leaders obtained assurance of equal treatment with U.S. citizens.²¹ In fact, the territory's leaders believed that American Samoans were going to be U.S. citizens until they later discovered that was not true.²² Nonetheless, when Congress ratified the cessions, American Samoa became a U.S. territory and has been under the sole sovereignty of the United States ever since.²³

B. *The Insular Cases (1900-1922)*

After the United States acquired American Samoa and several other Pacific and Caribbean islands, the Supreme Court decided a series of cases known as the Insular Cases.²⁴ These cases formed the relationship between the United States and its new territories.²⁵

17, 2023) (providing background and further context on American Samoa).

18. *Id.*

19. Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 71 (2001) ("Historically, the islands have been of strategic importance to nations due to both their location and the presence of a natural deep-water harbor at Pago Pago . . ." (citing UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK 8 (1998))).

20. See *Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, www.history.state.gov/historicaldocuments/frus1929v01/d853 [perma.cc/R96L-K4LY] (last visited Feb. 15, 2023) (ceding the islands of American Samoa to the United States); *Instrument of Cession Signed July 14, 1904 by the Representatives of the People of the Islands of Manua*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, www.history.state.gov/historicaldocuments/frus1929v01/d855 [perma.cc/4H2G-VZ2E] (last visited Feb. 15, 2023) [hereinafter 1904 Instrument of Session] (enumerating assurances of equal treatment of American Samoans with U.S. citizens).

21. See 1904 Instrument of Cession, *supra* note 20 (stating that "there [would] be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein, and also that the rights of the Chiefs in each village and of all people concerning their property according to their custom shall be recognized.").

22. See Morrison, *supra* note 8, at 86-87 (noting that "[t]he Samoans' realization that they were not U.S. citizens helped propel the Mau (opposition) movement of the 1920s.").

23. See 1929 Ratification Act, Pub. Res. No. 70-89, ch. 281, 45 Stat. 1253 (1929) (codified at 48 U.S.C. § 1661) (ceding and accepting the islands of Tutuila and Manua and other islands in the Samoan group to the United States).

24. See Christian Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 835-36 (2015) (identifying the Insular Cases).

25. Cody Sargeant, *Misplaced Fear: Tuaua and the False Link Between Citizenship and Equal Protection*, 27 S. CAL. REV. L. & SOC. JUST. 145, 148 (2018).

The Insular Cases are still used by courts today—despite their spotted history.²⁶ Interestingly, the Insular Cases interpreted the application of many constitutional rights to the territories, but not the Citizenship Clause of the Fourteenth Amendment.²⁷ Specifically, the Insular Cases provided a framework that allows some—but not all—constitutional rights to extend to the territories.²⁸ The framework comes from a court-made doctrine known as the Territorial Incorporation Doctrine.²⁹

The Territorial Incorporation Doctrine was first introduced in the most famous decision among the Insular Cases, *Downes v. Bidwell*.³⁰ *Downes* arose when a merchant, Samuel Downes, was taxed for importing oranges to the United States from Puerto Rico.³¹ Downes challenged those taxes under the Uniformity Clause.³² He argued that the imposition of those taxes in Puerto Rico was unconstitutional because the taxes were not imposed in other parts of the United States.³³ Ultimately, in a five-to-four decision, the Court held that the Uniformity Clause’s command that all “[d]uties, [i]mposts and [e]xcises shall be uniform throughout the United States”³⁴ did not extend to Puerto Rico.³⁵

In his concurring opinion, Justice White proposed a theory that distinguished incorporated territories from unincorporated territories.³⁶ Following *Downes*, the federal government went

26. See *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (stating that “[a]lthough some aspects of the Insular Cases’ analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories.”).

27. See Elizabeth K. Watson, *Citizens Nowhere: The Anomaly of American Samoans’ Citizenship Status After Tuaua v. United States*, 42 U. DAYTON L. REV. 411, 412 (2017) (explaining that the Insular Cases “interpreted application of existing tariff laws, right to a jury trial, double jeopardy, cruel-and-unusual punishment, and governmental immunity to the island territories.”). See also U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

28. See *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (“[T]he Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed.”).

29. See Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. L. REV. 801, 806 (1926) (discussing the doctrine and its name change over time).

30. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

31. *Burnett*, *supra* note 24, at 807 (“The *Downes* case arose out of a dispute over duties charged on a shipment of oranges from Puerto Rico to New York under the Foraker Act, an organic act passed by Congress in 1900 to establish a civil government on the island.”).

32. Sargeant, *supra* note 25, at 149. See also U.S. CONST. Art. I, § 8, cl. 1 (stating that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States . . .”).

33. Sargeant, *supra* note 25, at 149.

34. U.S. CONST. art. I, § 8, cl. 4.

35. *Downes*, 188 U.S. at 287.

36. *Id.*

through many changes.³⁷ As a result, the Court eventually adopted Justice White's theory in the case *Balzac v. Porto Rico* and it is now known as the Territorial Incorporation Doctrine.³⁸

1. *The Territorial Incorporation Doctrine Applied*

The Territorial Incorporation Doctrine categorizes U.S. territories as either incorporated or unincorporated.³⁹ An incorporated territory is one that Congress intends make a state at some point in the future.⁴⁰ Meanwhile, an unincorporated territory was never fully defined.⁴¹ Puerto Rico, Guam, U.S. Virgin Islands, Northern Mariana Islands, and American Samoa have all been categorized as unincorporated territories.⁴² Under the doctrine, the Constitution does not apply entirely to unincorporated territories, as opposed to incorporated territories, where the Constitution would apply fully.⁴³

37. See Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching A Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 82 (1997) (explaining that President William H. Taft, elected to office in 1908, held "views regarding the applicability of the Constitution to the territories and the power of Congress to govern them [which] were in line with Justice White's beliefs . . ."). While Taft was President, he "elevated Justice White to Chief Justice, and filled the four vacancies in the Court with Justices sympathetic to the incorporation theory." *Id.*

38. See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922) (denying Puerto Rico the Sixth Amendment right to jury trials). "[T]he opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the Court." *Id.*

39. *Downes*, 182 U.S. at 287-88 (White, J., concurring). Justice Brown, writing only for himself, argued that the Constitution does not apply fully to the territories and that it is up to Congress to decide which provisions apply. *Id.* at 279 (opinion of Brown, J.).

40. See *id.* at 311-12 (White, J., concurring). See also *Balzac*, 258 U.S. at 311 ("Incorporation has always been a step, and an important one, leading to statehood.")

41. See *Downes*, 182 U.S. at 391 (Harlan, J., dissenting) (stating the "idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.")

42. See Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171, 185 (2012) (noting that the island territories in the Caribbean Sea and Pacific Ocean are unincorporated territories of the United States); see also Pedro A. Malavet, *The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up with It": From Downes v. Bidwell to Boumediene v. Bush*, 80 MISS. L.J. 181, 197 (2010) (identifying Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa as "insular possessions," which are unincorporated U.S. territories (citing ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 3 (1980))).

43. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 5 (2006) ("The United States' island territories in the

Unincorporated territories are given constitutional rights that are deemed “fundamental.”⁴⁴ Fundamental rights apply to the unincorporated territories by “their own force.”⁴⁵ For example, the Fifth Amendment’s fundamental right of Due Process applies to unincorporated territories.⁴⁶ However, what exactly constitutes a fundamental right in the context of the unincorporated territories is unclear.⁴⁷ Nonetheless, determining whether a constitutional right applies to an unincorporated territory does not end with the determination of whether that right is fundamental.⁴⁸ In 1957, the Supreme Court addressed whether non-fundamental constitutional provisions could also apply to unincorporated territories in *Reid v. Covert*.⁴⁹

2. *Reid v. Covert and the “Impractical and Anomalous” Standard (1957)*

In *Reid*, the Court expanded the Territorial Incorporation Doctrine.⁵⁰ It was well-settled under the doctrine that fundamental rights apply in the territories by their own force.⁵¹ Non-fundamental rights on the other hand, could only be extended to the territories by an act of Congress.⁵² However, in *Reid*, Justice Harlan allowed courts to use the doctrine to apply non-fundamental rights to the territories as well.⁵³

In his concurring opinion, Justice Harlan created a balancing

Caribbean Sea and the Pacific Ocean were ‘unincorporated’ territories that were to receive only unspecified ‘fundamental’ constitutional protections, whereas the ‘incorporated’ territories of continental North America were a part of the Union and enjoyed the full protections of the U.S. Constitution.”)

44. *Dorr v. United States*, 195 U.S. 138, 147-49 (1904); *Downes*, 182 U.S. at 288 (White, J., concurring).

45. *Burnett*, *supra* note 24, at 821 n. 101 (quoting Northern Mariana Islands v. *Atalig*, 732 F.2d 682, 688 (9th Cir. 1984)).

46. *Balzac*, 258 U.S. at 312-13.

47. *Compare* *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that the right to jury trials in criminal cases are “fundamental to the American scheme of justice . . .”), *with* *Balzac*, 258 U.S. at 309–10 (holding that the Sixth Amendment right to a jury trial is not a fundamental right). *See also* *Tapu*, *supra* note 10, at 83 (noting “one example [where] the District of Columbia Circuit determined that the Sixth Amendment right to a criminal jury trial was fundamental in 1975, while the Ninth Circuit concluded otherwise in 1984.”).

48. *Morrison*, *supra* note 8, at 126.

49. Stanley K. Laughlin, Jr., *U.S. Territories and Affiliated Jurisdictions: Colonialism or Reasonable Choice for Small Societies?*, 37 OHIO N.U.L. REV. 429, 439 (2011).

50. *Id.*; *see also* *Reid v. Covert*, 354 U.S. 1, 74 (1957) (holding that non-fundamental provisions “do not necessarily apply in all circumstances in every foreign place. . .”) (emphasis added).

51. *Morrison*, *supra* note 8, at 116.

52. *Id.* at 116-17.

53. *Id.* at 117.

test to determine whether a particular non-fundamental right may be applied to a particular unincorporated territory.⁵⁴ Specifically, courts must determine whether applying the non-fundamental right would be “impractical and anomalous.”⁵⁵ Thus, while fundamental rights apply by their own force, other non-fundamental rights *may* apply to an unincorporated territory as long as it would not be “impractical and anomalous.”⁵⁶

Simply stated, the impractical prong requires courts to determine if compliance with the right would be possible or feasible in the territory.⁵⁷ The anomalous prong requires courts to determine the congruity of the right with the territory’s cultural practices.⁵⁸ Under this test, Justice Harlan explained that courts must consider “the particular local setting, the practical necessities, and the possible alternatives” to determine whether the application of the right would be “impractical and anomalous.”⁵⁹ Essentially, courts must make a case-by-case determination under this standard.⁶⁰

Although the standard has faced much criticism, courts still employ the standard to apply rights to the territories.⁶¹ For example, the United States Court of Appeals for the District of Columbia Circuit applied the modified Territorial Incorporation Doctrine to require jury trials in American Samoa.⁶² As for the Fourteenth Amendment’s Citizenship Clause, courts have found it impractical and anomalous to apply in American Samoa.⁶³

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

55. *Id.*

56. *Id.* Justice Harlan explained that “the basic teaching of . . . the *Insular Cases* is that there is no rigid and abstract rule that Congress . . . must exercise [its power] subject to all the guarantees of the Constitution.” *Id.*

57. Merriam, *supra* note 42, at 175.

58. *Id.*

59. *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

60. *Id.*

61. See Merriam, *supra* note 42, at 174 (noting that “the syntactic structure of the ‘impracticable and anomalous’ standard is still unclear, as the Court has not clarified whether it is a disjunctive or conjunctive standard, and there is also confusion about the standard’s semantic content, since the Court has provided little insight into what these words mean in this context.”). See also *Reid*, 354 U.S. at 74-75 (using the words “impractical” and “impracticable” interchangeably in applying the standard).

62. *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977).

63. See, e.g., *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (holding that the extension of birthright citizenship to American Samoa would be “impracticable and anomalous”); *Tuaua*, 788 F.3d at 310 (“The imposition of citizenship on the American Samoan territory is impractical and anomalous at a more fundamental level.”).

C. American Samoa: The Only U.S. Territory without Birthright Citizenship

American Samoa has been denied both forms of citizenship—statutory and constitutional.⁶⁴ In terms of statutory citizenship, Congress has the power to extend this form of citizenship to the residents of the territories.⁶⁵ So far, the legislative branch has statutorily extended the right to the residents of four U.S. territories: Puerto Rico, the U.S. Virgin Islands, Guam, and Northern Mariana Islands.⁶⁶ Meanwhile, Congress refuses to extend the right to American Samoa.⁶⁷ Instead, Congress designated those born in American Samoa as non-citizen nationals⁶⁸ and differentiated American Samoa as an “outlying possession[] of the United States.”⁶⁹ To this day, American Samoa is the only territory whose residents have not been extended birthright citizenship, leaving their citizenship status as an anomaly.⁷⁰ As for constitutional citizenship, the Fourteenth Amendment’s Citizenship Clause grants everyone born in the United States the right to citizenship.⁷¹ However, the judiciary has also refused to recognize citizenship in the territories under the Citizenship Clause.⁷²

64. Morrison, *supra* note 8, at 88.

65. See Terrasa, *supra* note 37, at 78 (discussing the Territory Clause of the Constitution and the plenary power it grants Congress to legislate over United States territories).

66. 8 U.S.C. § 1408 (2022); see also *id.* at § 1402 (declaring all persons born in Puerto Rico to be citizens of the United States); *id.* at § 1406 (declaring all persons born in the Virgin Islands to be citizens of the United States); *id.* at § 1407 (declaring all persons born in the island of Guam to be citizens of the United States); 48 U.S.C. § 1801 (2022) (approving “[t]he Covenant to Establish Commonwealth of Northern Mariana Islands”); Covenant to Establish Commonwealth of the Northern Mariana Islands, Pub. L. No. 94-241, art 3, § 303, 90 Stat. 264 (Feb. 15, 1975) (establishing that all persons born in the Northern Mariana Islands are citizens of the United States).

67. Watson, *supra* note 27, at 417.

68. See 8 U.S.C. § 1408 (2022) (stating that persons “shall be nationals, but not citizens, of the United States at birth” if they are “born in an outlying possession of the United States.”). See also 8 U.S.C. § 1101(a)(29) (2022) (defining “outlying possessions of the United States” to mean “American Samoa and the Swains Islands”); 48 U.S.C. § 1662 (2022) (declaring Swains Island part of American Samoa).

69. 8 U.S.C. § 1109(a)(29) (2022); 48 U.S.C. § 1662 (2022).

70. Watson, *supra* note 27, at 412.

71. U.S. CONST. amend. XIV, § 1 (“All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . .”).

72. The Second, Third, Fifth, Ninth, Tenth, and D.C. Circuit Courts have all refused to extend constitutional citizenship to people born in the U.S. territories based on the framework from the Insular Cases. See, e.g., *Fitisemanu*, 1 F.4th at 864 (“[T]he Insular Cases provide the more relevant, workable, and, as applied here, just standard.”); *Tuaua*, 788 F.3d at 302 (“[T]he framework [of the Insular Cases] remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories.”); *Valmonte v. INS*, 136

1. *Tuaua v. United States*

In June 2015, the U.S. Court of Appeals for the D.C. Circuit invoked the Insular Cases, holding that birthright citizenship is barred in unincorporated territories without an act of Congress.⁷³ *Tuaua* arose when five non-citizen nationals born in American Samoa sought declaratory relief against the United States in the U.S. District Court for the District of Columbia.⁷⁴ The plaintiffs asserted that the Citizenship Clause made them “U.S. citizens at birth” because of the clause’s guarantee of citizenship to all people “born . . . in the United States.”⁷⁵ The District Court disagreed and dismissed their complaint.⁷⁶

On appeal, the D.C. Circuit affirmed the District Court’s decision and relied on the following conclusions.⁷⁷ First, the Citizenship Clause’s geographic scope does not encompass the territories because it is “textually ambiguous.”⁷⁸ Second, citizenship is not a “fundamental right,” therefore, the right to citizenship does not extend under the framework from the Insular Cases.⁷⁹ Third, extending birthright citizenship to American Samoa would be “impractical and anomalous.”⁸⁰

2. *Fitisemanu v. United States: The Plight of American Samoans Continues*

Three years after *Tuaua*, American Samoans living in Utah sought a declaratory judgment that persons born in American Samoa were U.S. citizens under the Citizenship Clause.⁸¹ Plaintiffs John Fitisemanu, Pale Tuli, and Rosavita Tuli live in Utah, but

F.3d 914, 918 (2d Cir. 1998) (“[T]he Supreme Court in the Insular Cases provides authoritative guidance on the territorial scope of the term ‘the United States’ in the Fourteenth Amendment.”); *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) (relying on the Insular Cases to refuse to recognize birthright citizenship in the territories); *Thomas v. Lynch*, 796 F.3d 535, 539 (5th Cir. 2015) (holding same); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (holding same); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (holding same).

73. *Tuaua*, 788 F.3d at 302.

74. *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013).

75. *Id.*

76. *Id.* at 98.

77. *Tuaua*, 788 F.3d at 302.

78. *Id.* at 307.

79. *Id.* at 308.

80. *Id.* at 310. See Rose Cuisson Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 130, 147 (2018) (“The D.C. Circuit in *Tuaua* refused to extend the Citizenship Clause to American Samoa because it believed that doing so would be tantamount to ‘overt cultural imperialism’” (quoting *Tuaua*, 788 F.3d at 312)).

81. *Fitisemanu*, 426 F. Supp. 3d at 1158.

were born in American Samoa.⁸² Due to their non-citizen national status, they are denied several basic rights.⁸³ The *Fitisemanu* complaint was rife with grievances the Plaintiffs face.⁸⁴ Many concerns were similar to those raised in *Tuaua*.⁸⁵

Non-citizen nationals who reside in the continental United States cannot “vote in federal, state, or local elections.”⁸⁶ They cannot run for public office or serve on a jury.⁸⁷ Due to laws that limit certain public service areas to U.S. citizens, non-citizens nationals are excluded from many employment opportunities including jobs in firefighting, law enforcement, and certain federal roles.⁸⁸ American Samoan nationals who bravely serve in the U.S. Armed Forces are denied the opportunity to serve as military officers.⁸⁹ Notably, American Samoa has the highest rate of military enlistment than any other state or territory in the nation.⁹⁰ American Samoans have served in the U.S. military since 1900, including in Iraq and Afghanistan.⁹¹

Nationals are also confronted with obstacles when trying to sponsor family members for immigration visas to the United States.⁹² In *Fitisemanu*, Plaintiff Rosavita Tuli was unable to sponsor her father, who ultimately died before he could move to Utah for better health care.⁹³ The Plaintiffs also emphasized the

82. *Id.* at 1157.

83. *See generally* Complaint, *supra* note 1.

84. *Id.*

85. *See generally Tuaua*, 951 F. Supp. 2d at 89–90; Complaint for Declaratory & Injunctive Relief at 2–11, *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-1143).

86. Complaint, *supra* note 1, at 3.

87. *Id.* at 20.

88. *Id.* at 4. *See also* Gabriela Melendez Olivera & Adriel Cepeda Derieux, “Nationals” but not “Citizens”: How the U.S. Denies Citizenship to American Samoa, ACLU NEWS & COMMENT. (May 22, 2020), www.aclu.org/news/voting-rights/nationals-but-not-citizens-how-the-u-s-denies-citizenship-to-american-samoans [perma.cc/A46G-L4ZV] (stating *Fitisemanu*, a health care worker, was unable to secure work with the government because of his “non-citizen national” status, despite living in Utah for over two decades).

89. Complaint, *supra* note 1, at 4.

90. *Id.* at 15. *See also Military Service ‘Part of Our Makeup as a Warrior People,’ RESERVE & NAT’L GUARD MAG.* (June 10, 2022), www.reservenationalguard.com/reserve-guard-deployment/guardsman-from-samoa-carries-on-warrior-tradition/ [perma.cc/ZM3Y-M3EX] (emphasizing that America Samoa was ranked first out of 800 recruiting stations in 2021 and in years prior).

91. Complaint, *supra* note 1, at 15 (stating that, on a per capita basis, the American Samoan casualty rate in Afghanistan and Iraw was “seven times the national average.”).

92. *Id.* at 4. *See Watson, supra* note 27, at 419 (“While citizens of the United States, either by birthright or naturalization, may sponsor any relative in the immigration process, nationals are permitted to serve as a sponsor only to spouses.”).

93. Complaint, *supra* note 1, at 27; *see also* Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship*, N.Y. TIMES (Dec. 29, 2022, 3:39

“badge of inferiority” inscribed on American Samoans’ U.S. issued passport: “THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN.”⁹⁴

Non-citizen nationals may apply for U.S. citizenship, but the naturalization process is long.⁹⁵ They face the same obstacles as other immigrants seeking naturalization.⁹⁶ When arriving in the continental United States, American Samoans are treated like they are arriving from a foreign country.⁹⁷ Like immigrants, non-citizen nationals seeking naturalization must first establish residency in a State.⁹⁸ Next, they must go through fingerprinting and an in-person interview for a determination of good moral character.⁹⁹ They must also pass an English and civics test even though public schools in American Samoa teach in English and cover American history and American government.¹⁰⁰ Without any guarantee of success, the costs are at least \$725, not including any other expenses, like attorneys’ fees – and can take years to process.¹⁰¹

Despite the legal consequences American Samoans face due to their status as non-citizen nationals, the government of American Samoa intervened in *Fitisemanu* against the application of the Citizenship Clause to the territory.¹⁰² In *Fitisemanu*, the American Samoan government concurred with the United States government’s argument that the Insular Cases are controlling.¹⁰³ The United States government argued that the Insular Cases confirm that the Citizenship Clause’s geographic scope excludes the unincorporated territories.¹⁰⁴ The American Samoan government also argued that it would be impractical and anomalous to impose

PM), www.nytimes.com/2022/11/25/world/australia/american-samoan-birthright-citizenship.html [perma.cc/QY3C-2NW4] (sharing stories demonstrating the effects of denying U.S. birthright citizenship to American Samoans).

94. Complaint, *supra* note 1, at 3-4.

95. *Id.* at 28. See U.S. CITIZENSHIP & IMMIGR. SERVS., A GUIDE TO NATURALIZATION 18-19, www.uscis.gov/sites/default/files/files/article/M-476.pdf [perma.cc/52ZS-8NAH] (last visited Mar. 10, 2023) (explaining eligibility requirements for U.S. naturalization).

96. Complaint, *supra* note 1, at 28.

97. *Id.*

98. *Id.* (citing 8 U.S.C. § 1436). Under the Immigration and Nationality Act, “State” is defined to include “the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.” 8 U.S.C. § 1101(a)(36) (2022).

99. Complaint, *supra* note 1, at 28.

100. *Id.*

101. *Id.* at 29.

102. *Fitisemanu*, 426 F. Supp. 3d at 1158-59. Intervenor Defendants-Appellants’ Opening Brief at 1, *United States v. Fitisemanu*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

103. *Fitisemanu*, 426 F. Supp. 3d at 1158-59.

104. *Id.* at 1191; Brief for Defendants-Appellants at 18, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

citizenship on American Samoans.¹⁰⁵ Specifically, the American Samoan government speculated that citizenship would threaten the territory's self-determination.¹⁰⁶ Thus, the government argued that the question of citizenship should be left to the American Samoan people and its elected representatives.¹⁰⁷

In 2019, the district court ruled in favor of the Plaintiffs and held that “[p]laintiffs, having been born in the United States, and owing allegiance to the United States, are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment.”¹⁰⁸ Judge Clark Waddoups held that, for purposes of the Citizenship Clause, the Insular Cases are not controlling.¹⁰⁹ Instead, Judge Waddoups referred to the case *Wong Kim Ark v. United States*, a Supreme Court case that actually analyzed the basis for the Citizenship Clause.¹¹⁰ The Court in *Wong Kim Ark* found that the Citizenship Clause incorporated the common law principle of *jus soli*,¹¹¹ which simply reasons that individuals born in the United States are birthright citizens.¹¹² *Wong Kim Ark* was decided a few years prior to the Insular Cases.¹¹³

Judge Waddoups determined that American Samoa is within the dominion of the United States and within the meaning of “in the United States” found in the Fourteenth Amendment.¹¹⁴ Subsequently, on June 15, 2021, a divided Tenth Circuit panel reversed the district court, ruling that the U.S. Constitution does not guarantee citizenship to people born in the territories.¹¹⁵ Writing for the majority, Judge Carlos Lucero relied heavily on the Insular Cases and denied *Wong Kim Ark* as controlling precedent.¹¹⁶ The Tenth Circuit explored whether the Citizenship Clause should apply in American Samoa, and focused its analysis on whether it

105. *Fitisemanu*, 426 F. Supp. 3d at 1158-59.

106. *Id.* at 1196; Brief for Defendants-Appellants at 30, *Fitisemanu*, 1 F.3th 862 (Nos. 20-4017, 20-4019).

107. *Fitisemanu*, 426 F. Supp. 3d at 1159.

108. *Id.* at 1196.

109. *Id.* at 1158.

110. *Fitisemanu*, 426 F. Supp. 3d at 1158 (holding that the Fourteenth Amendment guaranteed citizenship to all persons born within the “dominion and sovereign” of the United States (citing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898))).

111. Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 77 (1997) (explaining the concept of *jus soli* as “the rule under which nationality is acquired by the mere fact of birth within the territory of a state.”).

112. *United States v. Wong Kim Ark*, 169 U.S. 649, 667 (1898).

113. *Id.*

114. *Fitisemanu*, 426 F. Supp. 3d at 1158.

115. *Fitisemanu*, 1 F.4th at 864; *Divided Tenth Circuit Relies on Insular Cases to Reject Right to Citizenship in U.S. Territories*, EQUALLY AM., www.equalrightsnow.org/divided_tenth_circuit_relies_on_insular_cases_to_reject_right_to_citizenship_in_u_s_territories [perma.cc/9DSZ-YN4C] (last visited Mar. 20, 2023).

116. *Fitisemanu*, 1 F.4th at 864.

would be “impracticable and anomalous” to extend birthright citizenship to American Samoa.¹¹⁷ Ultimately, the court found that the application of the clause would be impracticable and anomalous.¹¹⁸ In contrast, Judge Robert Bacharach, in dissent, set forth how the Constitution’s text, purpose, and history all “unambiguously” support recognizing that the Constitution’s guarantee of birthright citizenship extends to people born in the territories.¹¹⁹

III. ANALYSIS

Sections A and B begin with a discussion of the majority opinion in *Fitisemanu* that led to the Court’s reversal.¹²⁰ Section C discusses the concurring opinion.¹²¹ Section D addresses relevant arguments within the dissenting opinion.¹²² Writing for the majority, Judge Carlos Lucero addressed whether American Samoans qualified for citizenship under Fourteenth Amendment.¹²³ The majority’s reasoning against extending birthright citizenship to American Samoa was primarily based on the Insular Cases and the consent of the American Samoan people.¹²⁴

The Tenth Circuit found that what we call citizenship has “developed in the context of English law.”¹²⁵ The majority pointed out that “[a] model of citizenship based on consent is imbued in our founding documents.”¹²⁶ Judge Lucero stated that the American Samoan residents indicate an anti-citizenship attitude because of “the elected government of American Samoa intervening in this case to argue against ‘citizenship by judicial fiat.’”¹²⁷ However, the majority acknowledged that many American Samoans believed they were going to be U.S. citizens after the territory’s cession to the United States.¹²⁸ Many American Samoans even advocated for

117. *Id.* at 870.

118. *Id.*

119. *Id.* at 930 (Bacharach, J., dissenting) (explaining “[t]hough I regard the Citizenship Clause as unambiguous, the majority doesn’t. In characterizing the clause as ambiguous, the majority never considers what ‘in the United States’ means in the Citizenship Clause, choosing instead to find ambiguity based on other uses of ‘United States’ in other constitutional provisions enacted at other times.”).

120. *See generally id.* at 864-81 (majority opinion).

121. *See generally id.* at 881-83 (Tymkovich, C.J., concurring).

122. *See generally id.* at 883-908 (Bacharach, J., dissenting).

123. *Id.* at 865 (majority opinion).

124. *Id.*

125. *Id.* at 867.

126. *Id.* The D.C. Circuit previously agreed that consent is needed, stating, “[w]e can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will.” *Tuaua*, 788 F.3d at 311.

127. *Fitisemanu*, 1 F.4th at 867.

128. *Id.* at 866 (“When the American Samoan people first learned they were

citizenship upon learning that being subject to U.S. sovereignty did not equate to full citizenship protections.¹²⁹ As a result, the United States Senate passed legislation in order to grant citizenship to American Samoans, but the effort failed in the House of Representatives.¹³⁰

After reviewing the constitutionality of extending birthright citizenship to the U.S. territories, the court ultimately concluded that neither constitutional text nor Supreme Court precedent demands extending the Citizenship Clause to American Samoa.¹³¹ The majority relied on the framework from the Insular Cases and reasoned that Congress plays a “preeminent role in the determination of citizenship” to the U.S. territories, while “the courts play but a subordinate role in the process.”¹³² Judge Lucero stated that the consistent practice of the American government has been that “citizenship in the territories comes from a specific act of law, not from the Constitution.”¹³³ The following Section discusses two lines of Supreme Court precedent that guides the Tenth Circuit’s analysis.¹³⁴

A. *The Applicability of Two Lines of Precedent: The Insular Cases and Wong Kim Ark*

When discussing the Insular Cases, Judge Lucero acknowledged the explicitly racist history.¹³⁵ For instance, the Insular Cases disfavored extending citizenship to “those absolutely unfit to receive it.”¹³⁶ The court recognized how the Insular framework was established due to the assumption that “differences of race” raised “grave questions” about the rights that should be applied to the territories.¹³⁷ Irrespective of their ignominious

not considered American citizens, many advocated for citizenship.”).

129. *Id.* See also Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 AM. J. LEGAL HIST. 311, 335-40 (2020) (detailing how American Samoans advocated for citizenship with a commission in the U.S. Senate consisting of members of Congress and American Samoan leaders).

130. *Fitisemanu*, 1 F.4th at 867.

131. *Id.* at 864.

132. *Id.*

133. *Id.* at 869. See U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

134. See *Fitisemanu*, 1 F.4th at 869 (stating “[t]he choices before us are the Insular Cases, a string of Supreme Court decisions issued at the turn of the twentieth century that addressed how the Constitution applies to unincorporated territories, and *United States v. Wong Kim Ark*, . . . a case in which the Supreme Court considered the Citizenship Clause’s guarantee of birthright citizenship to those born in the United States.”).

135. *Id.* at 869-70.

136. *Id.* at 870 (quoting *Downes*, 182 U.S. at 306 (White, J. concurring)).

137. *Id.* (quoting *Downes*, 182 U.S. at 282). See Carlos R. Soltero, *The*

history, Judge Lucero explained that the Insular Cases supply a “relevant, workable, and . . . just standard.”¹³⁸ Judge Lucero contended that the Insular framework should be “repurposed in order to preserve the dignity and autonomy of the peoples of America’s overseas territories.”¹³⁹ He wrote that the Insular Cases “permit this court to respect the wishes of the American Samoan people.”¹⁴⁰

Next, the majority examined *Wong Kim Ark* and rejected its applicability to this case.¹⁴¹ While the district court determined that *Wong Kim Ark* extended birthright citizenship to the U.S. territories, the Tenth Circuit disagreed.¹⁴² *Wong Kim Ark* was handed down three years prior to the first Insular Case, *Downes*.¹⁴³ In *Wong Kim Ark*, the Court found that the Citizenship Clause incorporated the English common law doctrine of *jus soli* from *Calvin’s Case*.¹⁴⁴ *Jus soli* is “the rule under which nationality is acquired by the mere fact of birth within the territory of a state.”¹⁴⁵ In other words, a person automatically acquires citizenship when born within the dominion of a nation.¹⁴⁶ “In light of the English common law,” the district court determined that “American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States.”¹⁴⁷ Thus, the district court concluded that American Samoans are birthright citizens because they owe permanent allegiance to the United States and are born within the dominion of the United States.¹⁴⁸

Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism, 22 CHICANO-LATINO L. REV. 1, 3 (2001) (arguing that the Insular Cases were handed down “to a large extent because of the race and non-Anglo-Saxon national origin of the majority of the people living in those places.”).

138. *Fitisemanu*, 1 F.4th at 873.

139. *Id.* at 870.

140. *Id.* at 873.

141. *Id.* at 873-74.

142. *Id.*

143. *Wong Kim Ark*, 169 U.S. at 649. *See Downes*, 182 U.S. at 341-42 (White, J. concurring) (“In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.”).

144. *Wong Kim Ark*, 169 U.S. at 656. *See Calvin v. Smith (Calvin’s Case)*, 77 Eng. Rep. 377, 399 (K.B. 1608) (holding that, following the union of England and Scotland, Scotland’s citizens became full subjects of the English kingdom because “whosoever is born within the fee of England, though it be another kingdom, was a natural-born subject.”).

145. Price, *supra* note 111, at 77.

146. *Id.* “Dominion” was defined broadly and included “colonies and dependencies.” *Calvin’s Case*, 77 Eng. Rep. at 409; *see Inglis v. Trs. of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 120, 7 L.Ed. 617 (1830) (stating that “all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects.”).

147. *Fitisemanu*, 426 F. Supp. 3d at 1191.

148. *Id.* at 1156. *See Membership Has Its Privileges and Immunities:*

However, the Tenth Circuit did not interpret the discussion of English common law from *Wong Kim Ark* as binding case law.¹⁴⁹ The majority viewed *Wong Kim Ark* as standing for the proposition that the Citizenship Clause “must be interpreted *in the light of* the common law.”¹⁵⁰ The majority reasoned that the general meaning of “in light of” means “in context, through the lens of, or taking into consideration.”¹⁵¹ Therefore, the majority determined that “in light of” is “a phrase that introduces persuasive, not binding, authority.”¹⁵²

Additionally, the majority explained that *Calvin’s Case* and *Wong Kim Ark* centered around a citizenship requirement different from the one at the crux of *Fitisemanu*.¹⁵³ *Calvin’s Case* and *Wong Kim Ark* addressed the “allegiance” requirement for citizenship.¹⁵⁴ Whereas in *Fitisemanu*, the court addressed whether U.S. territories are “in the United States” for purposes of the Fourteenth Amendment.¹⁵⁵ Ultimately, the Tenth Circuit found that, unlike *Wong Kim Ark*, the Insular Cases were controlling because they addressed how the Constitution should apply to the U.S. territories.¹⁵⁶

B. The Insular Framework

After determining that *Wong Kim Ark* was not controlling, the majority applied the Insular framework to determine whether the Citizenship Clause could be applied to American Samoa.¹⁵⁷ The majority first considered whether the Citizenship Clause is a right that should apply “by its own terms.”¹⁵⁸ Evidently, “if the text of the constitutional provision states that it applies to unincorporated

Congressional Power to Define and Enforce the Rights of National Citizenship, 102 HARV. L. REV. 1925, 1932 n.42 (1989) (explaining that citizenship is a broad concept “signifying an individual’s membership in a political community and the resulting relationship of allegiance and protection that binds the citizen and the state.”).

149. *Fitisemanu*, 1 F.4th at 871.

150. *Id.* (quoting *Wong Kim Ark*, 169 U.S. at 654) (emphasis added).

151. *Id.*

152. *Id.*

153. *Id.* at 872.

154. *Id.* “The essence of Lord Coke’s reasoning in *Calvin’s Case* concerned whether it mattered for subjectship purposes that Scotsmen owed allegiance to King James as the King of Scotland rather than in his capacity as the King of England. Lord Coke concluded that this distinction did not matter, that a Scotsman was an English subject once he owed allegiance to King James in any of his royal capacities.” *Id.* See also Price, *supra* note 111, at 83 (stating that the decision in *Calvin’s Case* “turned on the allegiance owed by those born in the King’s territories.”).

155. *Fitisemanu*, 1 F.4th at 872.

156. *Id.* at 874.

157. *Id.* at 875.

158. *Id.* (quoting Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 589 (1976)).

territories, courts have no discretion to hold otherwise.”¹⁵⁹ The plain language of the Citizenship Clause states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”¹⁶⁰ Thus, there are two requirements American Samoa must fall under: the geographic scope clause—“in the United States”—and the jurisdictional clause—“subject to the jurisdiction thereof.”¹⁶¹

For purposes of this case, the citizenship question hinges on whether the scope of the geographic clause encompasses American Samoa.¹⁶² Both the district court and the Tenth Circuit agreed that the Citizenship Clause’s geographic scope is ambiguous.¹⁶³ The dissent stated, “[f]rom the Territories Clause and the Eighteenth Amendment, we can safely conclude that the term ‘United States’ doesn’t always include territories.”¹⁶⁴ However, in that same vein, the dissent argued that historical evidence shows the Citizenship Clause was ratified to encompass unincorporated territories.¹⁶⁵ Nonetheless, the majority moved onto the next step in the Insular framework “in light of the [clause’s] textual ambiguity.”¹⁶⁶

1. *Is Birthright Citizenship a Fundamental Right?*

In Part IV of *Fitisemanu*, Judge Lucero concluded that birthright citizenship was not a fundamental right under the Insular framework.¹⁶⁷ Judge Lucero was writing for only himself in Part IV.¹⁶⁸ He explained that fundamental rights are “principles which are the basis of all free government.”¹⁶⁹ He determined that the right to citizenship “is not a prerequisite to a free

159. *Id.* (citing *Tuaua*, 788 F.3d at 306).

160. *Id.* at 881; U.S. CONST. amend. XIV, § 1.

161. *Fitisemanu*, 1 F.4th at 875.

162. *Id.* Previously, the D.C. Circuit concluded that American Samoa does not even meet the jurisdictional requirement because as a “significantly self-governing political territor[y],” it was not “completely subject to [the United States] political jurisdiction.” *Tuaua*, 788 F.3d at 305, 306 (quoting *Elk v. Wilkins*, 112 U.S. 94, 102 (1884)). The Tenth Circuit here does not agree because “the statutory and practical control exercised by the United States over American Samoa render American Samoa subject to the jurisdiction of the United States.” *Fitisemanu*, 1 F.4th at 875. By statute, American Samoans “owe[] permanent allegiance to the United States.” *Id.* (quoting 8 U.S.C. § 1101(a)(22)(B)).

163. *Fitisemanu*, 1 F.4th at 875.

164. *Id.* at 896. (Bacharach, J., dissenting).

165. *Id.* at 883.

166. *Id.* (majority opinion).

167. *Id.* at 878-79. See *Boumediene*, 553 U.S. at 758 (“[G]uaranties of certain fundamental personal rights declared in the Constitution” apply “even in unincorporated Territories.”).

168. *Fitisemanu*, 1 F.4th at 878-79.

169. *Id.* at 878 (quoting *Dorr*, 195 U.S. at 147).

government.”¹⁷⁰ Instead, the right of citizenship “is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding fundamental right.”¹⁷¹

Judge Lucero recognized that “parsing rights to determine whether they are truly necessary to free government is a somewhat uncomfortable inquiry.”¹⁷² He acknowledged that the assessment of whether a right is fundamental, even under the Insular framework, is an “unusual mode of inquiry.”¹⁷³ Nonetheless, he classified birthright citizenship as a non-fundamental right.¹⁷⁴ He then turned to the last inquiry under the Insular framework: whether the application of the right of citizenship would be “impracticable and anomalous.”¹⁷⁵

2. The “Impracticable and Anomalous” Standard

In Part V, Judge Lucero wrote that extension of the Citizenship Clause to American Samoa would be “impracticable and anomalous.”¹⁷⁶ This part was also not joined by any other judge.¹⁷⁷ In large part, Judge Lucero’s refusal to extend birthright citizenship under this standard rests on the American Samoan way of life (the *fa’a Samoa*).¹⁷⁸ Judge Lucero concluded that extension of the Citizenship Clause would undermine American Samoa’s local culture and autonomy because “[f]undamental elements of the *fa’a Samoa* rest uneasily alongside the American legal system.”¹⁷⁹

Fa’a Samoa is a “traditional and distinct way of life” consisting of “*matai* chieftain social structure, communal land ownership, and

170. *Id.* (“Birthright citizenship, like the right to a trial by jury, is an important element of the American legal system, but it is not a prerequisite to a free government. Numerous free countries do not practice birthright citizenship, or practice it with significant restrictions, including Australia, France, and Germany. The United States, for its part, does not apply birthright citizenship to children of American citizens born abroad. Nor has birthright citizenship proven necessary to safeguard basic human rights in American Samoa, where the rights to freedom of speech, freedom of religion, and due process of law are constitutionally guaranteed.”).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 879.

175. *Id.* The Supreme Court has not yet invoked the “impracticable and anomalous” standard for cases defining geographic scope. See generally *Verdugo-Urquidez*, 494 U.S. at 259; *Boumediene*, 553 U.S. at 723.

176. *Fitisemanu*, 1 F.4th at 879. Justice Harlan previously used “impractical” and “impracticable” interchangeably. *Reid*, 354 U.S. at 74–75.

177. *Fitisemanu*, 1 F.4th at 879 (majority opinion).

178. *Id.* at 880. See Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1718 (2017) (arguing in favor of the Insular framework “to protect [indigenous people’s] ways of life from the risks of constitutional imposition.”).

179. *Fitisemanu*, 1 F.4th at 880.

communal regulation of religious practice.”¹⁸⁰ Judge Lucero wrote that those elements of *fa’a Samoa* are difficult to reconcile with “[c]onstitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause.”¹⁸¹ He believed there was “insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa’a Samoa*.”¹⁸² Ultimately, Judge Lucero believed that the Insular framework should be employed to protect the cultural identity of American Samoa.¹⁸³

C. *The Concurring Opinion*

Chief Judge Tymkovich joined all parts of Judge Lucero’s opinion except Parts IV and V.¹⁸⁴ Agreeing with Judge Lucero and the district court, Judge Tymkovich wrote that “the precise geographic scope . . . cannot be divined from the text and constitutional structure.”¹⁸⁵ Judge Tymkovich considered both *Wong Kim Ark* and the Insular Cases, which he viewed to be “uncertain Supreme Court precedent” when it comes to the question of citizenship.¹⁸⁶ He wrote that while *Wong Kim Ark*’s reasoning suggests birthright citizenship would extend to the U.S. territories, “the case does not squarely address the question because the plaintiff was born in the State of California.”¹⁸⁷

As for the Insular Cases, he noted that “although a plurality in *Downes* pronounced that American citizenship does not extend to ‘non-incorporated’ territories, that case was not brought squarely under the Citizenship Clause.”¹⁸⁸ He agreed with Judge Lucero’s reasoning “endorsing consideration of the wishes of the American Samoan people,” but would rather “leave that consideration to the

180. *Id.*

181. *Id.* at 881 (determining that “[t]he constitutional issues that would arise in the context of American Samoa’s unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable. Citizenship status has often been an important factor in determining how the Constitution applies to the unincorporated territories.”).

182. *Id.*

183. *Id.* at 870. *But see* Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2452, 2459 (2022) (arguing that “it may be possible to achieve the objective of cultural accommodation in the territories by employing ordinary constitutional doctrines, such as standard equal protection doctrine” and that “the claims advanced under the rubric of the repurposing project could and should be decoupled from the Insular Cases jurisprudence and reframed and adjudicated under . . . these doctrines.”).

184. *Fitisemanu*, 1 F.4th at 881 (Tymkovich, C. J., concurring).

185. *Id.* at 882. *Accord Tuaua*, 788 F.2d at 303 (“The text and structure alone are insufficient to divine the Citizenship Clause’s geographic scope.”).

186. *Fitisemanu*, 1 F.4th at 883 (Tymkovich, C.J., concurring).

187. *Id.* (citing *Wong Kim Ark*, 169 U.S. at 693).

188. *Id.* (citing *Downes*, 182 U.S. at 279–80).

political branches and not to our court.”¹⁸⁹ Ultimately, he found “either party’s reading of the Citizenship Clause is plausible.”¹⁹⁰ However, he resolved the tie “in favor of the historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants.”¹⁹¹

D. *The Dissent*

The dissenting opinion, written by Judge Bacharach, provides three reasons to support Citizenship Clause’s application to American Samoa.¹⁹² First, American Samoa is “in the United States” for purposes of the Fourteenth Amendment and when the Amendment was ratified, “courts, dictionaries, maps, and censuses uniformly regarded territories as land ‘in the United States.’”¹⁹³ Second, “even if American Samoa is considered outside of the United States for purposes of the Citizenship Clause, the clause would apply because citizenship is a fundamental right.”¹⁹⁴ Third, he concluded, “even if citizenship was not deemed a fundamental right, its application to American Samoa in *Fitisemanu* would neither be impracticable nor anomalous.”¹⁹⁵ In reviewing the case, Judge Bacharach applied the *de novo* standard on a motion for summary judgment.¹⁹⁶ Summary judgment requires a court to review the evidence in the light most favorable to the federal and American Samoan governments.¹⁹⁷

The dissent looked to historical records and evidence of the

189. *Id.*

190. *Id.*

191. *Id.* Compare *id.* at 864-65 (majority opinion) (stating “[w]e further understand text, precedent, and historical practice as instructing that the prevailing circumstances in the territory be considered in determining the reach of the Citizenship Clause.”), with *id.* at 886 (Bacharach, J., dissenting) (arguing that “[c]ontemporary dictionaries, maps, and censuses included the territories as part of the United States.”), and Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 426 (2020) (arguing the original public meaning of the Citizenship Clause encompasses the territories and explaining that in the nineteenth century, “[c]ourts . . . commonly referred to U.S. territories as ‘in’ the United States.”).

192. *Fitisemanu*, 1 F.4th at 884. (Bacharach, J., dissenting).

193. *Id.* See *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (“[C]onstitutional interpretation . . . demands careful examination of the textual, structural, and historical evidence.”).

194. *Fitisemanu*, 1 F.4th at 884.

195. *Id.*

196. *Id.*

197. *Id.* See also *Summary Judgment*, LEGAL INFO. INST., www.law.cornell.edu/wex/summary_judgment [perma.cc/7WWN-V3N2] (last visited Mar 28, 2023) (defining “summary judgment” as one “entered by the court for one party and against another without a full trial” and requiring the movant to demonstrate “no genuine dispute as to any material fact.”).

Citizenship Clause's original public meaning.¹⁹⁸ Judge Bacharach argued that the geographic scope clause, "in the United States," includes unincorporated territories.¹⁹⁹ Disagreeing with the majority and the district court, he argued that the Citizenship Clause's geographic scope is not ambiguous and that everyone born in American Samoa have been U.S. citizens since its annexation.²⁰⁰

Judge Bacharach also discussed the ratification of the Fourteenth Amendment.²⁰¹ A year before its ratification, the United States acquired the Territory of Alaska.²⁰² The treaty memorializing Alaska's acquisition did not mention statehood or incorporation.²⁰³ At the time, it was not determined whether Alaska was incorporated or destined for statehood; however, its inhabitants were assured equal treatment with U.S. citizens.²⁰⁴ Thus, the dissent concluded that the Citizenship Clause includes unincorporated territories because "the ratifiers had fresh experience with acquiring territory not yet destined for statehood."

²⁰⁵

Judge Bacharach also disagreed with the majority's finding that citizenship is not a fundamental right.²⁰⁶ He concluded that citizenship is indeed a fundamental right that is necessary for a free government.²⁰⁷ That is because "political participation lies at the core of our government," which requires citizenship.²⁰⁸ Additionally,

198. *Fitisemanu*, 1 F.4th at 886-90 (Bacharach, J., dissenting).

199. *Id.* at 884.

200. *Id.* at 893-94.

201. *Id.* at 891-93.

202. *Id.* at 891.

203. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russians to the United States of America, U.S.-Russ., art. III, Mar. 30, 1876, 15 Stat. 539 (lacking any mention of Alaska's statehood or incorporation, the treaty said that "[t]he inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States . . .").

204. *Fitisemanu*, 1 F.4th at 892 (Bacharach, J., dissenting).

205. *Id.*

206. *Id.* at 900.

207. *Id.* at 901.

208. *Id.* "[I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men." *Id.* (quoting *Schneiderman v. United States*, 320 U.S. 118, 122 (1943)). See also *Schneiderman*, 320 U.S. at 122 (determining that because citizenship unlocks the fundamental right of voting, a plurality of the Supreme Court has regarded citizenship itself as a "fundamental right" beyond the control of ordinary governmental powers); *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring) (determining that "to take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.").

the Citizenship Clause was meant to “put[] ‘th[e] question of citizenship . . . beyond the legislative power.”²⁰⁹

The dissent explained that it would not be impracticable and anomalous to apply birthright citizenship to American Samoa.²¹⁰ Judge Lucero’s majority opinion partially relied on an anti-citizenship attitude among American Samoans; however, Judge Bacharach pointed out that there is no consensus on what American Samoans want.²¹¹ Judge Bacharach addressed the majority’s concern that extending citizenship would lead to the implication of other constitutional rights, like equal protection.²¹² He explained that application of the Citizenship Clause would not undermine the local culture and autonomy of American Samoa since the First Amendment and the Equal Protection Clause already apply to all U.S. Territories.²¹³

IV. PERSONAL ANALYSIS

A three-judge panel for the Tenth Circuit handed down three separate opinions in *Fitisemanu*.²¹⁴ Two judges determined that the Constitution does not extend birthright citizenship to the territories, while the dissenting judge found that it does.²¹⁵ The majority was incorrect in concluding that the Citizenship Clause does not encompass the territories.²¹⁶ Thus, this Part discusses the following gaps within the majority’s analysis. First, the Citizenship Clause was ratified to remove the right to citizenship from Congress’s hands. Yet, the majority left millions of Americans’ right to citizenship in the control of a temporary legislative majority. Second, application of the Citizenship Clause would not undermine

209. *Fitisemanu*, 1 F.4th at 897 (first citing *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) then quoting *Cong. Globe*, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard)).

210. *Fitisemanu*, 1 F.4th at 902.

211. *Id.* at 904.

212. *Id.* at 901.

213. Equal protection already applies to everyone within the United States’ territorial jurisdiction regardless of whether they are citizens. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the Fourteenth Amendment’s equal protection clause applies universally to “all persons within the territorial jurisdiction” and “is not confined to the protection of citizens”); *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (observing that the Fourteenth Amendment’s equal protection clause encompasses both aliens and citizens). *See also Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (App. Div. 1980) (stating that “the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa”); *Examining Bd. of Eng’rs, Architects & Surveyors*, 426 U.S. at 600 (concluding that the right to equal protection applies to the Puerto Rican government).

214. *Fitisemanu*, 1 F.4th at 862 (majority opinion).

215. *Id.*

216. *Id.* at 870.

the cultural elements of *fa'a Samoa*.²¹⁷ Finally, the outdated precedent of the Insular Cases require reconsideration by the Supreme Court.

A. *Statutory Citizenship in the U.S. Territories and Ratification of the Citizenship Clause*

The majority opinion heavily relied on the American Samoan peoples' consent to citizenship when determining that Congress should extend the right to the territories.²¹⁸ Judge Lucero wrote that “[a] model of citizenship based on consent is imbued in our founding documents.”²¹⁹ He explained “there can hardly be a more compelling practical concern” than the imposition of citizenship that “is not wanted by the people who are to receive it.”²²⁰ Judge Lucero concluded that citizenship would be an “imposition” based solely on the “elected government of American Samoa intervening in this case to argue against ‘citizenship by judicial fiat.’”²²¹ However, while the American Samoan *government* intervened in *Fitisemanu* to argue against citizenship, it acknowledged that the *people* of American Samoa have not reached a consensus as to citizenship.²²²

On the surface, it appears the majority would allow American Samoans to have a choice in the matter of birthright citizenship, but that is not the case. The majority’s opinion left the question of citizenship to Congress, not the people of American Samoa. Under that logic, those born in American Samoa only have the power to ask for birthright citizenship from Congress. Like the residents in the other territories, American Samoans can become and “remain citizens only at the pleasure of Congress, a status that could be revoked at the whim of a temporary legislative majority.”²²³ With statutory citizenship, residents in the territories have no power to dictate how their citizenship status would be applied or

217. *Id.*

218. *Id.* at 880 (“The nature of citizenship makes consent an important consideration for application of the ‘impracticable and anomalous’ standard, but nothing in this opinion suggests consent must eclipse other factors.”).

219. *Id.* at 867 (“The fabric of American empire ought to rest on the solid basis of the consent of the People. . . .” (quoting THE FEDERALIST NO. 22 (Alexander Hamilton))).

220. *Fitisemanu*, 1 F.4th at 879.

221. *Id.* at 867.

222. Intervenor Defendants-Appellants’ Opening Brief at 26, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019).

223. Brief of Amici Curiae Members of Congress, Former Members of Congress, & Former Governors of Guam, The Northern Mariana Islands, Puerto Rico, & The U.S. Virgin Islands in Support of Petition for Rehearing *En Banc* at 4, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019) [hereinafter Brief of Amici Curiae Members of Congress]. See *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (holding that Congress can “take away an American citizen’s citizenship without his assent” when his citizenship is “not based upon the Fourteenth Amendment.”).

maintained.²²⁴ Currently, there are many residents in Puerto Rico questioning the future of their statutory citizenship because of the legislature's power to withdraw it at will.²²⁵

In its analysis, the majority placed importance on the American Samoan government's calls against citizenship.²²⁶ However, the Constitution was meant "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."²²⁷ Also, the dissent brings attention to how the Citizenship Clause was ratified "to divest legislatures of power over someone's citizenship."²²⁸

While the majority and concurring opinions left the question of citizenship to the whims of Congressional initiatives, the dissent emphasized that "constitutional rights do not flicker with the practices of political majorities."²²⁹ Judge Bacharach quoted the Supreme Court's powerful language in the case *Afroyim v. Rusk* that "[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship."²³⁰

From the outset, Plaintiffs in *Fitisemanu* disagreed that application of the Citizenship Clause would be an imposition.²³¹ Rather, application would constitute judicial recognition of the Plaintiffs' constitutional right to citizenship established with the ratification of the Fourteenth Amendment. In the well-known *Slaughter-House Cases*, the Supreme Court concluded that the Fourteenth Amendment squelches the argument that people "who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not

224. The Supreme Court held that Congress can "take away an American citizen's citizenship without his assent" when his citizenship is "not based upon the Fourteenth Amendment." *Rogers*, 401 U.S. at 835. See also *González-Alarcón v. Macías*, 884 F.3d 1266, 1277 n.5 (10th Cir. 2018) (noting that the Supreme Court "recognize[s] a distinction between those who are citizens under the Fourteenth Amendment and individuals whose claim to citizenship rests on statute.").

225. *Statutory Citizenship*, U. CONN. P.R. CITIZENSHIP ARCHIVES PROJECT, www.scholarscollaborative.org/PuertoRico/exhibits/show/historical/statutory [perma.cc/JVJ9-AXCT] (last visited Mar. 10, 2023) (addressing issues as to the future of Puerto Rico's political status).

226. *Fitisemanu*, 1 F.4th at 879 (stating that "[n]o circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives.").

227. *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015).

228. *Fitisemanu*, 1 F.4th at 906 (Bacharach, J., dissenting) (quoting *Afroyim*, 387 U.S. at 262-63).

229. *Fitisemanu*, 1 F.4th at 904.

230. *Id.* at 887 (citing *Afroyim*, 387 U.S. at 268).

231. See generally Complaint, *supra* note 1.

citizens.”²³² In the *Slaughter-House Cases*, the Court did not distinguish between Washington D.C. and the U.S. territories.²³³ Thus, there is “no textual reason why the Fourteenth Amendment should apply to the District of Columbia but not to other territories within the sovereignty of the United States.”²³⁴

Additionally, ratification of the Citizenship Clause in 1868 was intended to specifically overrule *Dred Scott v. Sandford*.²³⁵ Yet, the majority failed to discuss the implications of the Fourteenth Amendment’s repudiation of *Dred Scott v. Sandford*, the infamous decision where the Supreme Court created a caste system surrounding birthright citizenship.²³⁶ The majority went as far as supporting the assertion that the right to citizenship is not essential to a free government, and therefore, a non-fundamental right under the Insular framework.²³⁷ However, the dissent explained that citizenship is a prerequisite for political participation, which “lies at the core of our government.”²³⁸ “As Justice Brandeis once observed,” the dissent noted, “[t]he only title in our democracy superior to that

232. *Slaughter-House Cases*, 83 U.S. 36, 72–73 (1872).

233. *Id.* See Brief of Citizenship Scholars as *Amici Curiae* in Support of Rehearing En Banc at 13 n. 4, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20- 4019) (asserting “the Panel majority’s reading is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36, 72-73 (1873); *Wong Kim Ark*, 169 U.S. at 677, and would produce an absurd result never contemplated by anyone: that natives of Washington, D.C., lack Fourteenth Amendment citizenship.”).

234. Irina Manta & Cassandra Burke Robertson, *Constitutional Citizenship in the U.S. Territories*, LAWFARE (July 27, 2022, 8:01 AM), www.lawfareblog.com/constitutional-citizenship-us-territories [perma.cc/GPT7-JXX2]. See also Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEORGETOWN L.J. 1269, 1271 (2022) (discussing the constitutional implications of Washington D.C. statehood).

235. *Slaughter-House Cases*, 83 U.S. at 73 (determining that the Fourteenth Amendment’s Citizenship Clause “was framed” in response to *Dred Scott v. Sandford* to “establish a clear and comprehensive definition of citizenship.”). See Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 24 (2011) (explaining that “Dred Scott held that there was a racial exception to the normal rule of birthright U.S. citizenship.”).

236. Morrison, *supra* note 8, at 94 (explaining that “the Fourteenth Amendment’s citizenship clause was designed to remove the caste system and ‘pestilent doctrines of the Dred Scott case’” (quoting Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss at 25-33, *Tuaua v. United States*, 921 F. Supp. 2d 88 (D.D.C. Dec. 7, 2012) (No. 12-1143-RJL))); Nicole Newman, *Birthright Citizenship: The Fourteenth Amendment’s Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 448 (2008) (“The primary purpose of the Fourteenth Amendment’s Citizenship Clause was to overturn the caste systems imposed by *Dred Scott* and the Black Codes by providing a firm constitutional foundation for the citizenship of African Americans born in the United States.”).

237. *Fitisemanu*, 1 F.4th at 878 (majority opinion) (“Birthright citizenship, like the right to a trial by jury, is an important element of the American legal system, but it is not a prerequisite to a free government.”).

238. *Id.* at 901 (Bacharach, J., dissenting).

of President [is] the title of citizen.”²³⁹

B. American Samoan Cultural Identity and Autonomy

The majority described both the “purpose” and “reasoning” of the Insular Cases as “disreputable to modern eyes.”²⁴⁰ Regardless, Judge Lucero wrote that the Insular Cases “permit this court to respect the wishes of the American Samoan people.”²⁴¹ The court speculated that application of the Citizenship Clause would lead to the application of other constitutional provisions that may threaten *fa’a Samoa*, such as the Equal Protection and Due Process Clauses.²⁴² The concern is that constitutional issues under those provisions may receive federal scrutiny and oversight if citizenship is extended.²⁴³ The majority found that there is “simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa’a Samoa*.”²⁴⁴

Sean Morrison, who served two terms as the President of the American Samoa Bar Association, explained that the Equal Protection Clause already applies in American Samoa and Samoan culture can survive its application.²⁴⁵ Additionally, according to current and former elected representatives in the territories, each “[t]erritory’s continued ability to define and shape its own political destiny and relationship with the United States does not turn on the citizenship status of its residents.”²⁴⁶ Moreover, “no analysis can foresee the potential consequences to a culture.”²⁴⁷

The majority ignores this reasoning and considers hypothetical clashes between the clauses of the Fourteenth Amendment and American Samoan land restriction laws currently in place, which

239. *Id.* at 883 (quoting U.S. DEP’T OF HOMELAND SEC. & U.S. CITIZENSHIP & IMMIGR. SERVS., *THE CITIZEN’S ALMANAC* 2 (2007)).

240. *Id.* at 870 (majority opinion).

241. *Fitiseanu*, 1 F. 4th at 873.

242. *Id.* at 866. *See Tuaua*, 788 F.3d at 309–10 (noting that members of the American Samoan government “posit the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment, imperiling American Samoa’s traditional, racially-based land alienation rules.”).

243. *Fitiseanu*, 1 F.4th at 870.

244. *Id.* at 881.

245. Morrison, *supra* note 8, at 142-46; *see Sargeant*, *supra* note 25, at 161–62 (explaining that “equal protection already applies in American Samoa.”). *See also Yick Wo*, 118 U.S. at 369 (stating that the Fourteenth Amendment’s equal protection clause applies universally to “all persons within the territorial jurisdiction” and “is not confined to the protection of citizens”); *Graham*, 403 U.S. at 371 (observing that the Fourteenth Amendment’s equal protection clause encompasses both aliens and citizens).

246. Brief of Amici Curiae Members of Congress at 9, *Fitiseanu*, 1 F.4th 862 (Nos. 20- 4017, 20-4019).

247. *See Morrison*, *supra* note 8, at 139 (“[S]o long as Samoans feel their culture could even theoretically be threatened, they will fight against any change.”).

are a key tenet to *fa'a Samoa*.²⁴⁸ For more context, in American Samoa, land ownership is communal.²⁴⁹ There are racial restrictions to the land individuals can own in the territory.²⁵⁰ For example, landowners must be fifty percent American Samoan in order to hold title to property.²⁵¹ These laws can potentially be challenged under the Fourteenth Amendment. But courts have already upheld the validity of other “race-based land alienation laws.”²⁵² The Ninth Circuit upheld land alienation restrictions in Northern Mariana Islands explaining that “[t]he Bill of Rights was not intended . . . to operate as a genocide pact for diverse native cultures.”²⁵³ The legal land restrictions upheld in Northern Mariana Islands were similar to those in American Samoa.²⁵⁴ Regardless, Judge Lucero employed the Insular framework to find that the application of citizenship would lead to issues with cultural preservation.²⁵⁵

C. *The Insular Cases*

The first Insular Case, issued by the *Downes* Court, was handed down five years after the Court upheld racial segregation in *Plessy v. Ferguson*.²⁵⁶ The Insular Cases and *Plessy* are the same in how they legally rationalize racism under the Constitution.²⁵⁷

248. Villazor, *supra* note 80, at 129 (“On the one hand, the history of race discrimination underscores the importance of using equal protection principles to shield individuals against government oppression in property. On the other hand, the ongoing efforts to decolonize the U.S. territories and address the harms of imperialism demonstrate the need to protect the rights of indigenous groups.”).

249. See Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT’L L.J. 220, 239 (1980) (explaining the communal land “is owned by the extended family and controlled by the *matai*” with a feudal relationship between the *matai*, the land, and the occupants).

250. AM. SAMOA CODE ANN. § 37.0204(a)–(b) (1980).

251. *Id.*

252. See *Wabol*, 958 F.2d at 1462 (holding that Congress was “within its power” in enacting constitutional restrictions on the alienation of land, and that such restrictions are not “subject to equal protection attack.”). “It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property.” *Id.*

253. *Id.* See *Yick Wo*, 118 U.S. at 369 (stating that the Fourteenth Amendment’s equal protection clause applies universally to “all persons within the territorial jurisdiction” and “is not confined to the protection of citizens”); see also *Graham*, 403 U.S. at 371 (observing that the Fourteenth Amendment’s equal protection clause encompasses both aliens and citizens).

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

255. *Fitisemanu*, 1 F.4th at 881.

256. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

257. Neil Ware, *Why the Insular Cases Must Become the Next Plessy*, HARV. L. REV. BLOG (Mar. 28, 2018), blog.harvardlawreview.org/why-the-insular-cases-must-become-the-next-plessy/ [perma.cc/NQF5-FU2C]; *Plessy*, 163 U.S. at 559 (upholding racially discriminatory state laws which separated Americans on the basis of the color of their skin).

Plessy has been overruled, but courts continue to rely on and expand the outdated precedent from the Insular Cases.²⁵⁸ In large part, the Insular Cases are the reason for the democratic deficit among the territories.²⁵⁹ The millions of Americans living in the territories cannot vote for president and do not have voting representation in Congress.²⁶⁰ As a result, the territories have been “systematically forgotten and mistreated.”²⁶¹ In the past decade, American Samoans brought suit twice for recognition of their right to citizenship under the Constitution.²⁶² However, on both occasions, the courts have applied the reasoning under the Insular Cases to refuse to extend birthright citizenship.²⁶³

In 1957, the Supreme Court warned “that neither the [Insular] cases nor their reasoning should be given any further expansion.”²⁶⁴ The Court criticized the Insular framework as “very dangerous” for enabling “arbitrary government” by allowing Congress to dictate when and how to apply constitutional protections.²⁶⁵ Yet, the majority opinion in *Fitisemanu* stated, the “flexibility of the Insular Cases’ framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution.”²⁶⁶ In the past decade, circuit courts have used the Insular framework to preserve cultural practices in the territories, but at the expense of

258. Ware, *supra* note 257. Justice Gorsuch condemned the Insular Cases, stating that “[t]he flaws in the Insular Cases are as fundamental as they are shameful,” and that “they have no home in our Constitution or its original understanding.” *Vaello Madero*, 142 S.Ct. at 1554 (Gorsuch, J., concurring). Justice Gorsuch concluded that “the time has come to recognize that the Insular Cases rest on a rotten foundation” and wrote that he “hope[s] the day comes soon when the Court squarely overrules them.” *Id.* at 1557.

259. See Villazor, *supra* note 80, at 134 (explaining that “none of the U.S. citizen residents of the territories may vote for the President and they do not have meaningful representation in Congress.”).

260. *Id.*

261. Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1250 (2019).

262. *Fitisemanu*, 1 F.4th at 864; *Tuaua*, 788 F.3d at 302.

263. *Fitisemanu*, 1 F.4th at 864; *Tuaua*, 788 F.3d at 302.

264. *Reid*, 354 U.S. at 14 (plurality opinion).

265. *Id.* (explaining, “[t]he concept that . . . constitutional protections against arbitrary government are inoperative when they become inconvenient . . . if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.”). See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC.*, 140 S. Ct. 1649, 1665 (2020) (citing *Reid*, 354 U.S. at 287, for proposition that *Insular Cases* “should not be further extended”). See also *Downes*, 182 U.S. at 380 (Harlan, J., dissenting) (determining that leaving “the people inhabiting [the territories] to enjoy only such rights as Congress chooses to accord to them,” was “inconsistent with the spirit and genius, as well as the words, of the Constitution.”).

266. *Fitisemanu*, 1 F.4th at 873 (determining that “[t]he Insular Cases grapple with the thorny question at the heart of this case” and that “[t]his case falls squarely in that line of caselaw” which call[ed] for the extension of another constitutional provision to another unincorporated territory.”).

individual rights, like citizenship.²⁶⁷ This is problematic given the plethora of rights, benefits, and privileges attached to U.S. citizenship.²⁶⁸ Reconsideration of the Insular Cases is necessary as they have relegated the territories' residents to a subordinate and second-class legal status for far too long.²⁶⁹

V. CONCLUSION

On October 17, 2022, the Supreme Court declined the Plaintiffs' petition, passing on an opportunity to reconsider the longest standing racist decisions in the Court's history.²⁷⁰ *Fitisemanu* concerns not only the rights of American Samoans, but the rights of all Americans born in the territories due to the Insular Cases denying many constitutional rights to the territories' residents. Modern courts have been repurposing the Insular Cases to "serve as bulwarks of cultural preservation."²⁷¹ While cultural preservation is extremely important to many American Samoans, so is citizenship.²⁷² Certain fundamental constitutional protections, such as citizenship, are embedded in the United States Constitution and should not be in the control of a legislature. Cases like *Fitisemanu* have brought and will continue to bring attention to the glaring issues leftover from the Insular Cases.

267. See Villazor, *supra* note 80, at 147 (arguing that reliance on the Insular Cases for cultural preservation is problematic and that "[i]ndigenous cultures are not exempted from the inevitability of change. Indeed, survival of indigenous groups has required them to adapt and, notably, international instruments recognize the protection not only of their traditional livelihoods but also ways in which they have had to adapt to modern life.").

268. See Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR ST. MARY'S L. REV. 583, 607 (2012) ("The benefits of U.S. citizenship—stability, mobility, political rights, employment, education, and importantly, a defense from deportation—are fundamental, viewed as 'one of the most valuable rights in the world today.'" (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963))).

269. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 347 (2007) ("By its repeated decisions upholding the *Insular Cases* . . . the Supreme Court has created what amounts to a political ghetto in the territories . . . Puerto Rico's U.S citizens have no effective way of exercising the political pressure that is normally available to U.S. citizens . . .").

270. Natalie Bravo, *Supreme Court Declines to Hear Constitutional Challenge to Citizenship Law*, SYRACUSE L. REV. LEGAL PULSE (Oct. 27, 2022), lawreview.syr.edu/supreme-court-declines-to-hear-constitutional-challenge-to-citizenship-law/ [perma.cc/P4T5-7XMH]; Terrasa, *supra* note 37, at 56 - 57.

271. *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1681 (2017).

272. *Fitisemanu v. United States - Equal Citizenship in U.S. Territories*, EQUALLY AM., www.equalrightsnow.org/fitisemanu [perma.cc/XYLP-BX6Q] (last visited Mar. 10, 2023).