

# U.C.L.A. Law Review

## Citizenship, Self-Determination, and Cultural Preservation in American Samoa

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### ABSTRACT

Recent litigation about the Citizenship Clause's applicability in American Samoa exposes tensions between competing goals of inclusion, self-determination, and cultural preservation. The noncitizen national category and the *Insular Cases* are both legacies of a long tradition of racial exclusion in the United States, but their current significance is more complicated, as shown by American Samoa's opposition to extending U.S. citizenship. None of the positions taken by parties, intervenors, or amici in the litigation strike a satisfactory balance between respecting American Samoa's self-determination, respecting other territories' self-determination, and repudiating the *Insular Cases*' racist legacy. Nor could any outcome in this litigation guarantee what American Samoa was really seeking: protection for its cultural practices, including race-based land ownership laws, from constitutional challenges. U.S. equal protection jurisprudence is not well equipped to deal with tensions between nondiscrimination, indigenous self-determination, and cultural preservation, and the most certain way for American Samoa to develop its own answers to these issues is to renegotiate its political relationship with the United States.

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## INTRODUCTION

Shortly after taking office, President Joseph Biden submitted an immigration bill to the U.S. Congress. A single sentence in the White House announcement addressed a proposed terminology change in U.S. citizenship and nationality law: “[T]he bill further recognizes America as a nation of immigrants by changing the word ‘alien’ to ‘noncitizen’ in our immigration laws.”<sup>1</sup> Biden also instructed U.S. Citizenship and Immigration Services to begin using “noncitizen” in internal and public communications.<sup>2</sup> Removing the word “alien” from the Immigration and Nationality Act (INA) is an important step in combatting how the legal system dehumanizes immigrants.<sup>3</sup> “Noncitizen” is a commonsense substitution but also raises its own questions about belonging and classification.

Biden’s proposed linguistic change suggests a binary classification of citizens and noncitizens. However, U.S. nationality law actually has a third, intermediate category. The INA recognizes some people as “nationals” of the United States. This category would include both a U.S. citizen and “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”<sup>4</sup> Currently, the primary people classified as “nationals, but not citizens, of the United States at birth” are those born in the U.S. territory of American Samoa.<sup>5</sup> They are noncitizens, in that they are not U.S. citizens, but they would not be noncitizens under Biden’s proposed amendments to the INA because they are not currently classified as aliens. They occupy a hybrid space, enjoying many of the

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1. Press Release, White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system> [<https://perma.cc/6F7N-FHLS>].
  2. See Hamed Aleaziz, “Illegal Alien” Will No Longer Be Used in Many US Government Communications, BUZZFEED NEWS (Feb. 17, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/illegal-alien-uscis-biden-term> [<https://perma.cc/WS6G-7PGS>].
  3. César Cuauhtémoc García Hernández explains, “it is important to remove the word ‘alien’ . . . because it’s offensive to describe people using the same word that conjures images of two-headed Martian invaders.” *Id.*
  4. 8 U.S.C. § 1101(a)(22).
  5. 8 U.S.C. § 1408; see also 8 U.S.C. § 1101(a)(29) (defining “outlying possessions”). Although the Immigration and Nationality Act separately enumerates American Samoa and Swains Island as outlying possessions, Swains Island is currently administered as part of American Samoa. *American Samoa*, CIA WORLD FACTBOOK (Apr. 11, 2023), <https://www.cia.gov/the-world-factbook/countries/american-samoa> [<https://perma.cc/8R6J-3LKB>].

rights of U.S. citizens but needing to go through the same naturalization process as immigrants from foreign countries if they wish to have the right to vote in one of the fifty states, for example. This in-between, often-forgotten status highlights many of the contradictions inherent in the idea of citizenship.

Citizenship functions to both include and exclude. It includes by marking citizens as members of a political community and, at least in theory, granting all citizens equal rights.<sup>6</sup> On the flip side, citizenship “is usually premised on a conception of community that is bounded and exclusive,” meaning that some people are necessarily excluded from community membership and its benefits.<sup>7</sup> And the border between inclusion and exclusion, much like physical borders, is often porous.<sup>8</sup> Differentiated citizenship is one manifestation of this porosity. Contrary to the ideals of equality often attributed to the U.S. political project,<sup>9</sup> the United States has a long history of differentiated citizenship, with racial minorities and people living in U.S. overseas territories often granted fewer rights and privileges than white Americans in the states<sup>10</sup> But not all civic differentiation functions to oppress. While civic differentiation can be used to maintain unequal power structures, it can also serve to address the legacy of past injustice or accommodate cultural differences.<sup>11</sup>

The legal category of noncitizen national started out as a means of excluding territorial residents from certain benefits of U.S. citizenship, but American Samoans—the last noncitizen nationals—disagree about how it functions today. Some view it as an inferior, second-class status, but others oppose the idea of full U.S. citizenship. Many fear that granting U.S. citizenship to persons born in American Samoa would threaten the territory’s traditional cultural practices,

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6. EDIBERTO ROMÁN, CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE 5 (2010).

7. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 3 (2006). Not only are some people forcibly excluded from citizenship, but others choose to opt out of citizenship they could claim. See generally Rose Cuison-Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. 1033 (2022) (describing various reasons some lawful permanent residents, noncitizen nationals, and U.S. citizens choose to forego naturalization or to renounce U.S. citizenship).

8. BOSNIAK, *supra* note 7, at 4.

9. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . .”).

10. See ROMÁN, *supra* note 6, at 83.

11. Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 103, 105–06 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

known as *fa'a Sāmoa*.<sup>12</sup> The “precarious positioning” of American Samoans as both “indigenous and migrants to the [United States]” has opened the door to litigation that has the potential to affect the legal status of not only American Samoa and its residents but also the status of all U.S. territories.<sup>13</sup> In the last decade, two federal circuit courts have ruled against American Samoan plaintiffs who claimed to be U.S. citizens under the Citizenship Clause of the Fourteenth Amendment. They relied on a controversial line of precedent known as the *Insular Cases* to hold that it would be “impractical and anomalous” to do so against the will of the American Samoa government.<sup>14</sup> In both cases, the American Samoa government intervened to argue against the extension of citizenship to the territory. Although the issue at hand is the applicability of the Citizenship Clause, a large portion of the American Samoa government’s arguments focus on potential legal risks to *fa'a Sāmoa* if citizenship led to fuller application of other constitutional provisions to the territory.

But can Citizenship Clause litigation actually help protect *fa'a Sāmoa*? U.S. constitutional law is ill-suited for the task of cultural preservation. Neither conventional equal protection doctrine nor the *Insular Cases* do a good job of addressing Indigenous peoples’ particular needs, including cultural protection issues.<sup>15</sup> It is also not clear that a colonial legal system is fit to protect Indigenous rights.<sup>16</sup> As long as American Samoa maintains a legal relationship with the United States, it will be subject to U.S. laws to some extent. This Comment examines tensions between full political inclusion, self-determination, and cultural preservation in the context of *Fitisemanu v. United States*,<sup>17</sup> a recent Tenth Circuit case addressing the applicability of the Citizenship Clause in American Samoa.

12. *Fa'a Sāmoa* is written in many different ways in different sources, including *fa'a Samoa* and *fa'a Sāmoa*. In this Comment, I attempt to follow the orthographical conventions described in Eseta Magaui Tualualei, Fepuleai Lasei John Mayer & Galumalemana A Hunkin, *Diacritical Marks and the Samoan Language*, 27 CONTEMP. PAC. 184 (2015).

13. Kirisitina Gail Sailiata, *The Samoan Cause: Colonialism, Culture, and the Rule of Law* 48 (2014) (Ph.D. dissertation, University of Michigan) (on file with the University of Michigan Library).

14. See *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F. 4th 862, 865, 881 (10th Cir. 2021) (using the interchangeable phrasing “impracticable and anomalous”).

15. See Rose Cuison Villazor, *Commentary, Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 142 (2018) (“Thus, conventional equal protection analysis is currently ill-suited to address the needs of certain [I]ndigenous groups’ political, cultural, and postcolonial interests.”). See also *infra*, Part III.B.4 (addressing the *Insular Cases*’ shortcomings for territorial self-government and cultural preservation interests).

16. See Sailiata, *supra* note 13, at 22 (“There’s this pernicious myth that by reforming the law, settler law that is, it will become less colonial, and that’s simply impossible.”).

17. 20 F. 4th 1325, 1328 (10th Cir. 2021).

Part I reviews the history of three crucial areas of legal doctrine: birthright citizenship, the U.S. Constitution's applicability to unincorporated territories, and the category of noncitizen nationals. A common motivation of racially exclusionary citizenship runs through these histories. Today, scholars and advocates disagree about whether the *Insular Cases*, which suggest the Constitution applies differently in unincorporated territories, should be overturned or repurposed as a tool of cultural preservation. Part II summarizes the unique history and legal status of American Samoa.

Recent debates about American Samoans' citizenship status are the focus of Part III. The American Samoa government has argued that extending the Citizenship Clause to American Samoa would run contrary to self-determination principles and possibly threaten certain cultural practices through fuller application of the Constitution to American Samoa. The Tenth Circuit decision in *Fitisemanu* is sympathetic to these concerns, holding that it would be "impracticable and anomalous" to apply the Citizenship Clause in American Samoa. This Comment argues that courts should uphold American Samoa's right to self-determination without relying on the *Insular Cases* or undermining other territories' rights. However, Citizenship Clause litigation cannot resolve American Samoa's underlying concerns about the vulnerability of its traditional practices to constitutional challenges.

Part IV explores potential legal strategies for American Samoa to maintain cultural preservation measures without relying on the *Insular Cases*. This could be done under traditional equal protection jurisprudence by showing a compelling governmental interest, or American Samoa could renegotiate its political and legal relationship with the United States to provide more explicit protections for *fa`a Sāmoa* and limitations on the applicability of the U.S. Constitution to the American Samoa Government. Any of these strategic choices would come with mixed advantages and disadvantages for American Samoa but so does maintaining the ambiguity of the status quo.<sup>18</sup>

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18. I seek to be mindful of American Samoans' right to self-determination and self-government. Beyond arguing that greater clarity as to American Samoa's status would be beneficial, I do not take a position on whether people born in American Samoa should be U.S. citizens, what American Samoa's relationship with the United States should look like, or what aspects of *fa`a Sāmoa* should be preserved. These decisions can be made only by American Samoans themselves. Instead, I seek to explore how U.S. law or alternate political arrangements might provide a better framework for addressing issues of political inclusion, self-determination, and cultural preservation in American Samoa.

## I. LEGAL BACKGROUND: CITIZENSHIP AND TERRITORIES

Two areas of law and history that figure prominently in Citizenship Clause litigation are birthright citizenship and the *Insular Cases*, a line of cases dealing with the U.S. Constitution and unincorporated territories. Both histories reveal a long tradition of trying to exclude racialized populations from full inclusion into American society. These traditions of exclusion converge in the strange legal category of noncitizen national, which has been applied to inhabitants of some U.S. territories to mark them as neither full citizens nor foreigners.

### A. Birthright Citizenship in the United States

This Subpart describes the historical connection between U.S. citizenship and race. Even after the Fourteenth Amendment removed explicit racial barriers to citizenship, there were continued attempts to limit various racialized groups' access to citizenship. As citizenship was extended to previously excluded groups, sometimes via constitutional interpretation and sometimes via statute, the method of extending citizenship carried potential consequences for the security of the resulting status.

#### 1. Early Foundations in Whiteness

Although the original U.S. Constitution did not define citizenship, early naturalization laws and U.S. Supreme Court opinions about citizenship show that whiteness was considered a prerequisite for citizenship. The United States inherited the English common law principle of *jus soli* ("law of the soil"), which provides that citizenship is acquired based on one's place of birth.<sup>19</sup> This principle would seem to be conducive to a racially inclusive regime of citizenship, particularly when compared with *jus sanguinis* ("law of blood"), the idea that citizenship is inherited from one's parents.<sup>20</sup> But U.S. conceptions of citizenship actually drew on a long European intellectual and political tradition of simultaneously associating citizenship with ideals of equality yet implementing gradations of membership, even among citizens.<sup>21</sup> In the American context, this often manifested in differential political inclusion on the basis of race.<sup>22</sup>

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19. HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 72 (2006).

20. *Id.*

21. ROMÁN, *supra* note 6, at 12.

22. *Id.* at 83.

As adopted in 1789, the Constitution did not define citizenship, but it did imply that Indigenous people and enslaved Africans were not included.<sup>23</sup> Early naturalization laws further indicated that citizenship was reserved for white people by providing that only a “free white person” could naturalize.<sup>24</sup> The Supreme Court confirmed the exclusion of Black people from citizenship in the infamous 1857 case *Dred Scott v. Sandford*.<sup>25</sup>

## 2. The Fourteenth Amendment and its Aftermath

After the Civil War, explicit racial barriers to birthright citizenship were removed. The Civil Rights Act of 1866<sup>26</sup> and the Fourteenth Amendment provided 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.”<sup>27</sup> However, the United States continued to create and enforce both *de facto* and *de jure* racially-motivated membership gradations.<sup>28</sup>

As straightforward as the Fourteenth Amendment’s Citizenship Clause may be on its face, litigation was needed to firmly establish its meaning, particularly insofar as it applied to racialized groups other than Black Americans. The Supreme Court first interpreted the Citizenship Clause in the *Slaughter-House Cases*.<sup>29</sup> These cases helped to clarify the Fourteenth Amendment’s relevance to *jus soli* citizenship in three main ways. First, the Citizenship Clause overturned *Dred Scott*’s racial restrictions on birthright citizenship.<sup>30</sup> Second, “[t]he phrase ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within

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23. See U.S. CONST. art. I, § 2 (providing that apportionment shall be based on population as calculated “by adding to the whole Number of free Persons . . . and excluding Indians not taxed, three fifths of all other Persons,” i.e., enslaved Africans).

24. Naturalization Act of 1790, ch. III, § 1, 1 Stat. 103 (1790) (repealed 1795).

25. 60 U.S. 393 (1857). The Court contrasted the situation of Black people, who could not be citizens, with that of the continent’s Indigenous peoples, who could naturalize. However, it also suggested that “in their then untutored and savage state,” Indigenous peoples may be racially unfit for citizenship. *Id.* at 420.

26. Ch. 31, 14 Stat. 27 § 1 (1866).

27. U.S. CONST. amend. XIV, § 1.

28. ROMÁN, *supra* note 6, at 12–13.

29. 83 U.S. 36 (1872).

30. *Id.* at 73.

the United States.”<sup>31</sup> And third, U.S. citizenship is separate from, and does not require, citizenship of one of the states.<sup>32</sup>

Later cases expanded on the Citizenship Clause’s jurisdiction requirement in the context of two different racialized communities: Indigenous peoples and individuals of Chinese descent. *Elk v. Wilkins*<sup>33</sup> concerned an Indigenous person who had “severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States” and claimed to be a U.S. citizen under the Fourteenth Amendment.<sup>34</sup> The Court held that although the plaintiff was born in the United States, he was not born subject to its jurisdiction because at birth he owed allegiance to a tribe, which was “an alien, though dependent, power.”<sup>35</sup> This ruling was based on tribal sovereignty, but the Court also questioned, in dicta, whether any Indigenous peoples or individuals were “so far advanced in civilization” as to be fit for U.S. citizenship.<sup>36</sup>

Tribal citizens are no longer precluded from holding U.S. citizenship, but this change reflects a shift in statutes, not constitutional interpretation. Congress extended citizenship first to individual tribal citizens who “adopted the habits of civilized life” by accepting land allotments and then, in 1924, to all Indigenous persons “born within the territorial limits of the United States.”<sup>37</sup> While the eventual extension of citizenship could be seen as abandoning racist ideas that Indigenous peoples were not “civilized” enough to be citizens, its legacy is complicated. Some Indigenous scholars have argued that it contributed to projects that forced assimilation and undermined tribal sovereignty.<sup>38</sup> The statutory extension of citizenship did not necessarily challenge *Elk*’s anti-Indigenous racism nor its holding that allegiance to a foreign power could preclude birthright citizenship. However, the Supreme Court would hold that citizenship of a sovereign nation outside the U.S. geographical bounds, even a nation subject to

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31. *Id.*

32. *Id.* at 73–74.

33. 112 U.S. 94, 98 (1884).

34. *But see* Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1215–18 (2016) (describing what is known of John Elk and his community and arguing that contrary to how he was portrayed in legal filings, “he probably sought citizenship less from a desire for full assimilation than from a plea to escape the federal campaign of domination and civilization”).

35. *Wilkins*, 112 U.S. at 102.

36. *Id.* at 106–07.

37. Act for Allotment of Lands to Indians, ch. 119, § 6, 24 Stat. 388 (1887); Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924).

38. *See generally* Robert B. Porter, *The Demise of Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

negative racial stereotypes, did not place someone outside U.S. jurisdiction under the Citizenship Clause.

Fourteen years after *Elk*, the Supreme Court decided the landmark case about *jus soli* citizenship, *U.S. v. Wong Kim Ark*.<sup>39</sup> The plaintiff was born in San Francisco to Chinese immigrant parents at a time when Chinese people were ineligible to naturalize. Since the Constitution does not define citizenship, the Court said that it must be interpreted in the context of English common law principles.<sup>40</sup> English nationality was granted based on “birth within the allegiance” of the king, which included children of foreigners present within the kingdom.<sup>41</sup> There were exceptions for the children of ambassadors and foreign enemies because they were not within the king’s allegiance or jurisdiction.<sup>42</sup> In the U.S. context, this exception also applied to members of Indian tribes, but it “had no tendency to deny citizenship to children born in the United States of foreign parents . . . not in the diplomatic service of a foreign country.”<sup>43</sup> *Wong Kim Ark* affirmed that the Citizenship Clause should be interpreted as an extension of the English common law tradition of *jus soli* and that it was not affected by a person’s racial or ethnic background.

The Fourteenth Amendment and *Wong Kim Ark* may have prevented racially restrictive interpretations of *jus soli* such as that adopted in *Dred Scott*,<sup>44</sup> but Congress continued trying to preserve the whiteness of the citizenry until the mid-twentieth century. Its primary method was restricting immigration and naturalization on the basis of race. Naturalization was limited to “free white persons” until 1870, when eligibility was extended to people of African descent.<sup>45</sup> Congress considered removing all racial restrictions at that time but decided not to, largely due to anti-Chinese sentiment.<sup>46</sup> Racial restrictions were further loosened in the 1940s and finally abolished in 1952.<sup>47</sup>

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39. 169 U.S. 649 (1898).

40. *Id.* at 654.

41. *Id.* at 655.

42. *Id.*

43. *Id.* at 682.

44. 60 U.S. 393 (1856).

45. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254 (1870).

46. MOTOMURA, *supra* note 19, at 73.

47. *Id.* at 75; Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, 66 Stat. 163 (1952) (“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . .”).

### 3. Losing Citizenship?

As the statutory extension of U.S. citizenship to Indigenous peoples illustrates, not all citizenship obtained at birth is derived from the Fourteenth Amendment. The rights and privileges of constitutional and statutory citizens are generally the same. Denaturalization is an important exception. U.S. citizens who derive their citizenship from the Fourteenth Amendment cannot be denaturalized without their consent. The Supreme Court has held that statutory citizenship does not provide the same guarantee.

In the 1960s and 1970s, the Supreme Court clarified the relationship between the Fourteenth Amendment, denaturalization, and consent. In *Afroyim v. Rusk*,<sup>48</sup> it held that the Fourteenth Amendment settled any doubts as to whether Congress possessed the power to denaturalize citizens without their consent.<sup>49</sup> The “undeniable purpose of the Fourteenth Amendment . . . would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent.”<sup>50</sup> But just a few years later, the Court upheld a statute denaturalizing citizens who were born abroad and did not meet certain residency requirements. It justified this abrupt shift by distinguishing Fourteenth Amendment citizenship from statutory citizenship. Unlike the *Afroyim* plaintiff, who was naturalized in the United States, the plaintiff in *Rogers v. Bellei*<sup>51</sup> had statutory citizenship based on birth abroad to a U.S. citizen parent. Because the plaintiff’s citizenship was derived from a statute rather than the Constitution, the Court held that Fourteenth Amendment protections against denaturalization did not apply to him.<sup>52</sup>

In addition to citizens of Indigenous nations and individuals born abroad to U.S. citizen parents, people born in several U.S. territories have U.S. citizenship

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48. 387 U.S. 253 (1967).

49. *Id.* at 257 (“And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power . . . to determine what conduct should and should not result in the loss of citizenship.”).

50. *Id.* at 263.

51. 401 U.S. 815 (1971).

52. *Id.* at 819, 827, 835. Being naturalized in the United States is not a complete protection from denaturalization. Historically, denaturalization efforts have largely targeted war criminals such as former Nazis, but the Trump administration drastically increased denaturalization case referrals. *See, e.g.*, AM. IMMIGR. LAWS. ASSOC., NO. 18072705, FEATURED ISSUE: DENATURALIZATION EFFORTS BY USCIS (Aug. 27, 2021), <https://www.aila.org/advo-media/issues/all/featured-issue-denaturalization-efforts-by-uscis> [https://perma.cc/X5R4-55XN].

that is, at least purportedly, not derived from the Fourteenth Amendment.<sup>53</sup> Persons born in Puerto Rico, the Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands were granted U.S. citizenship by statute, in some cases decades after the territory was acquired by the United States.<sup>54</sup> Government officials from these territories have expressed concern that if the Citizenship Clause does not apply to them, there is no legal obstacle to Congress to deny or even revoke U.S. citizenship for persons born in the territories.<sup>55</sup> Regardless of the actual likelihood of this happening, the possibility of denaturalization haunts those whose citizenship is by mere “legislative grace.”<sup>56</sup> Similar precarity has long been a hallmark of territorial relations with the federal government.

### B. The *Insular Cases*: Using Space as a Proxy for Race

The *Insular Cases*, a series of early-twentieth-century Supreme Court decisions addressing the U.S. Constitution’s application in newly acquired island territories, emerged as U.S. political leadership grappled with a desire to annex more land and a competing reluctance to include the inhabitants of these territories in the U.S. citizenry. This Subpart outlines the emergence, evolution, and contested contemporary relevance of this controversial line of cases.

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53. This is the common interpretation of the source of territorial inhabitants’ citizenship, supported by past legislation classifying persons born in some of the territories as noncitizen nationals. However, the U.S. Supreme Court has never ruled on the Citizenship Clause’s applicability to any of the territories, so this claim is open to legal argument. *See infra* Part III.
  54. Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917) (granting U.S. citizenship to citizens of Puerto Rico); Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234 (granting U.S. citizenship to inhabitants of the U.S. Virgin Islands); Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (granting U.S. citizenship to inhabitants of Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Pub. L. No. 94-241, § 303, 90 Stat. 263 (1976) [hereinafter CNMI Covenant] (granting U.S. citizenship to persons born in the Northern Mariana Islands).
  55. Brief for *Amici Curiae* Members of Congress and Former Governmental Officials in Support of Petitioners at 3, *Tuaua v. United States*, 579 U.S. 902 (2016) (No. 15-981) [hereinafter Brief for Members of Congress and Former Governmental Officials].
  56. *Id.* at 5. *See also* *Fitisemanu v. United States*, 20 F. 4th 1325, 1328 (10th Cir. 2021) (Bacharach, J., dissenting) (“[T]hey are treated as citizens only at the whim of Congress.”); Cuisson-Villazor, *Rejecting Citizenship*, *supra* note 7, at 1054 (“[T]he fact that this citizenship is statutory shows its vulnerability: what Congress has given, Congress can take away.”).

## 1. American Colonial Expansion

The United States began acquiring new territories almost as soon as the original thirteen states gained their independence from England.<sup>57</sup> The Northwest Ordinance of 1787 laid out a path for these territories to become states if they met certain population thresholds.<sup>58</sup> Statehood was not automatic, as it depended on Congressional consent, but laws and policies like the Northwest Ordinance showed an expectation that new territories would eventually attain statehood. Some political leaders believed that the United States was destined to encompass all of North America,<sup>59</sup> but these imperialist ambitions would be tempered in part by concerns about what such a sweeping expansion would do to the country's racial makeup.

Race was a central part of the United States' territorial expansion and decisions to grant or withhold statehood from new territories. The country's white population was growing rapidly and clamoring for new land to settle, and territories with large numbers of white inhabitants gained statehood more quickly.<sup>60</sup> Areas with larger white populations and smaller nonwhite populations were also more likely to be annexed by the United States in the first place. None of the current fifty states were uninhabited when the United States first laid claim to them, but the presence of "scattered bodies of native Indians," in the words of Justice Brown, were not seen as an obstacle to annexation—as long as there was ample room for white settlers.<sup>61</sup> The Mexican-American War and the subsequent annexation of what is now California, Nevada, Utah, Arizona, and New Mexico illustrate tensions between expansionism and a desire to keep the United States mostly white.<sup>62</sup> When the United States won the war in 1848, Congress considered taking all of Mexico.<sup>63</sup> But Congressmembers were wary of incorporating large numbers of Indigenous, Black, and mixed-race people, so they decided to limit

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57. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 29–30 (2019).

58. *Id.*

59. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 37 (2009).

60. IMMERWAHR, *supra* note 57, at 33–35.

61. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901). Daniel Immerwahr describes how the purchase of Alaska from Russia "went through only because, in the end, there weren't that many [Indigenous inhabitants] and there was quite a lot of Alaska." IMMERWAHR, *supra* note 57, at 77.

62. See Natsu Taylor Saito, *Border Constructions: Immigration Enforcement and Territorial Presumptions*, 10 J. GENDER, RACE & JUST. 193, 215–16 (2007).

63. IMMERWAHR, *supra* note 57, at 75.

their annexation to the sparsely-populated northern third of the country.<sup>64</sup> Territorial expansion continued, but only after considering a potential acquisition's racial demographics.

Shortly after the Mexican-American War, the United States began a new pattern of annexation. Its previous territorial acquisitions had been contiguous to states or territories of the United States. However, beginning in the mid-nineteenth century, the United States annexed nearly a hundred uninhabited islands in the Caribbean and the Pacific in search of guano, a coveted source of nitrogen for fertilizing crops.<sup>65</sup> The United States did not stop with guano islands, although it was more selective when it came to annexing inhabited islands. For example, it turned down opportunities to annex the Dominican Republic and Cuba due to concerns about the islands' mostly Black populaces.<sup>66</sup> But in the late nineteenth century, the United States saw a strategic need for ports, coaling stations, warehouses, and naval bases throughout the oceans to support its maritime commerce.<sup>67</sup> In 1898, the United States gained possession of the Spanish colonies of the Philippines, Puerto Rico, and Guam after it won the Spanish-American War.<sup>68</sup> In the same year, the United States annexed the Hawaiian islands, whose Indigenous government had been overthrown by a group of American and European sugar planters several years earlier.<sup>69</sup> The United States also acquired what is now American Samoa around the same time.<sup>70</sup>

The 1898 annexations represented a shift in American colonial expansion. Whereas the United States had previously followed a settler colonial model of gradual westward expansion, the annexation of overseas territories looked more like contemporaneous European models of exploitation colonialism,<sup>71</sup> such as

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64. *Id.* at 75–77; Saito, *supra* note 62, at 216–17.

65. IMMERWAHR, *supra* note 57, at 46–48.

66. See Saito, *supra* note 62, at 225 (discussing nineteenth century attitudes towards an acquisition of Cuba); IMMERWAHR, *supra* note 57, at 77.

67. IMMERWAHR, *supra* note 57, at 62.

68. *Id.* at 71; Saito, *supra* note 62, at 225–26. The United States also gained control of Cuba but only occupied the island, rather than annexing it. IMMERWAHR, *supra* note 57, at 71.

69. Saito, *supra* note 62, at 221–22. There were massive protests against the annexation in Hawai'i. LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SAMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES 25 (2018).

70. See *infra* Part II.

71. Unlike settler colonialism, “[e]xploitation colonialism involves the emigration of far fewer people; the goal here is to extract as many resources as possible from the colony and to transfer them to the centre.” Christopher Mick, *Colonialism in the Polish Eastern Borderlands 1919–1939*, in THE SHADOW OF COLONIALISM ON EUROPE'S MODERN PAST 126 (Róisín Healy & Enrico Dal Lago eds., 2014).

planter and extractive colonialism.<sup>72</sup> The racial makeup of the new island territories was also notable given the United States' historical reluctance to annex lands with large nonwhite populations. This was a source of contention when the United States decided to annex Hawai'i and the former Spanish territories.<sup>73</sup> These concerns about welcoming the new territories' populations into the United States were reflected in the terms of annexation. The treaty with Spain, for example, left the civil rights and political status of territorial inhabitants up to Congress's discretion, unlike prior annexations of contiguous territories that assumed the territories were eventually destined for statehood.<sup>74</sup> And just what the new territories' political and legal status was became a hotly contested question.

## 2. The *Insular Cases*

The *Insular Cases* are a set of early-twentieth-century Supreme Court rulings dealing with the legal status of territories recently acquired from Spain. The *Insular Cases* start with *De Lima v. Bidwell*<sup>75</sup> and several other cases decided in 1901; some scholars also include later cases through the 1922 case *Balzac v. Porto Rico*.<sup>76</sup> In issuing these decisions, the Supreme Court weighed in on a heated debate about the legal and political status of the United States' new territories.<sup>77</sup> It established that while the Constitution applied to the new territories, this was not necessarily true of every constitutional provision. The *Insular Cases* left many open questions about the territories' legal relationship to the United States—including some questions that remain unresolved to this day.

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72. See Nancy Shoemaker, *A Typology of Colonialism*, PERSPECTIVES ON HISTORY (Oct. 1, 2015), <https://www.historians.org/research-and-publications/perspectives-on-history/october-2015/a-typology-of-colonialism> [https://perma.cc/U3KQ-KBWE] (describing different methods and motives of colonialism).

73. See Saito, *supra* note 62, at 221 (quoting a senator's argument that the United States should not annex lands "which did not, and could not, sustain a race equipped in all essentials for the maintenance of free civilization"); IMMERWAHR, *supra* note 57, at 73 (describing President William McKinley's doubts that Filipinos could govern themselves).

74. Saito, *supra* note 62, at 226.

75. 182 U.S. 1, 2 (1901) ("this and the following cases . . . may be collectively designated as the 'Insular Tariff Cases'").

76. 258 U.S. 298 (1922); see also Efrén Rivera Ramos, *The Insular Cases: What Is There to Reconsider?*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 29, 30 n.2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (including *Balzac* in a list of the *Insular Cases*).

77. For a summary of the academic debate, see *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616, 1618–19 (2017).

In *De Lima*, the Court held that Puerto Rico, having been acquired by the United States, was not a foreign country within the meaning of tariff laws.<sup>78</sup> However, *Downes v. Bidwell*,<sup>79</sup> decided the same day, essentially placed a giant asterisk after *De Lima*'s holding. *Downes* dealt with disputed tariffs that had been placed on oranges brought from Puerto Rico to New York and sought to answer "whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories."<sup>80</sup> The somewhat confusing conclusion was that Puerto Rico was "appurtenant and belonging to the United States," but—at least as far as the Revenue Clauses were concerned—it was "not a part of the United States."<sup>81</sup>

*Downes* had no majority opinion, but the opinion that would come to carry the most weight was that of Justice White.<sup>82</sup> White stated that the question at hand was not whether the Constitution was operative in Puerto Rico (it was) but whether the particular provision at issue was operative there.<sup>83</sup> This depended on whether the territory had "been incorporated into and become an integral part of the United States,"<sup>84</sup> an idea now known as the Incorporation Doctrine. According to White, Congress had not incorporated Puerto Rico into the United States.<sup>85</sup> Incorporation was a novel concept and not fully explained, leading Justice Harlan to remark that the term must have "some occult meaning which my mind does not apprehend."<sup>86</sup>

Although *Downes* addressed a narrow legal question, the justices' commentary was wide-ranging, shedding light on potential motivations for their positions. These included power on the international stage,<sup>87</sup> economic concerns,<sup>88</sup> and the race of territorial inhabitants. In light of the United States' long wariness of annexing territories with large communities of nonwhite people, the decision to annex faraway islands with largely nonwhite populations was a marked

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78. *De Lima*, 182 U.S. at 194.

79. 182 U.S. 244 (1901).

80. *Id.* at 249.

81. *Id.* at 287.

82. *See Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

83. *Downes*, 182 U.S. at 292 (White, J., concurring).

84. *Id.* at 299.

85. *Id.* at 341–42. "[T]he treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress." *Id.* at 339.

86. *Id.* at 391 (Harlan, J., dissenting).

87. According to Justice White, the United States would be "helpless in the family of nations" if forced to apply the full U.S. Constitution to territories immediately upon their acquisition. *Id.* at 306 (White, J., concurring).

88. *See id.* at 311.

change. By finding that these new territories were not “incorporated” into the United States, the Supreme Court established an uneasy compromise between the nation’s competing desires to join the European imperial club and to keep its population as white as possible.

Several justices expressed concern that full application of the Constitution to the United States’ new territories could mean automatic extension of U.S. citizenship to racial others who were not, in their view, fit for such a status. Justices White and Brown raised concerns that “uncivilized” and “alien races” may not be fit for U.S. citizenship to support their arguments that the Revenue Clause should not apply to Puerto Rico.<sup>89</sup> Harlan, on the other hand, saw this as a warning for the political branches. If a people could not assimilate with white America, the United States should not acquire their territory.<sup>90</sup> Citizenship was not at issue in *Downes* or in any of the other *Insular Cases*. But these dicta about “alien” and “uncivilized” races suggest that the Court had created a new strategy to reserve U.S. citizenship for white people, to the extent possible. It could withhold citizenship based on location by categorizing territories with majority nonwhite populations as “unincorporated.”

White did not explain which constitutional provisions did and did not apply in the so-called unincorporated territories. In the coming years, the Supreme Court would address the applicability of the constitutional right to trial by jury in several different territories, consistently finding that it was not automatically applicable unless a territory had been incorporated.<sup>91</sup> The Court also developed guidelines for understanding if a territory had been incorporated by looking at the terms of the treaty annexing it and Congress’s later actions toward the territory. For example, the Court found no right to trial by jury in Hawai’i or the Philippines because the 1898 Newlands Resolution and the Treaty of Paris did not provide for such a right.<sup>92</sup> But had this right been “fundamental”—a key concept in later cases—it noted that the right would have had to be provided regardless.<sup>93</sup> Alaska, on the other hand, did have to provide trial by jury because the treaty acquiring it

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89. *Id.* at 287, 306 (White, J., concurring).

90. *See id.* at 384 (Harlan, J., dissenting) (“Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty.”).

91. Later, courts considering this question in different territories would not always arrive at the same conclusion. *See infra* Part I.B.4.

92. *Hawaii v. Mankichi*, 190 U.S. 197, 215–16 (1903); *Dorr v. United States*, 195 U.S. 138, 149 (1904).

93. *Dorr*, 195 U.S. at 148.

stated that its inhabitants should “be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States,” showing an intent to incorporate the territory.<sup>94</sup>

Granting people U.S. citizenship was not sufficient to incorporate their territory. The Supreme Court found no constitutional right to trial by jury in Puerto Rico even after its inhabitants had been granted U.S. citizenship because Congress had not made a “plain declaration” of intent to incorporate the territory.<sup>95</sup> The Court also contrasted Puerto Rico with the less-populated and less-distant Alaska,<sup>96</sup> calling for caution in inferring an intent to incorporate “distant ocean communities of a different origin and language.”<sup>97</sup> Here, we can see that the Court approached questions of incorporation similarly to how the legislative and executive branches had previously approached questions of territorial acquisition: only lands that had large white populations or could be settled by large numbers of white people were easily welcomed into the United States.

### 3. Later Supreme Court Rulings

Since *Balzac*, the Supreme Court has not further extended the *Insular Cases*, in that it has not held any other constitutional provisions to be inapplicable in the territories. It has even expressed some doubts about the validity of the *Insular Cases*. However, it has declined to overturn them.<sup>98</sup>

One of the most important cases on the geographic reach of the Constitution dealt with events that occurred not in a U.S. territory but on a military base in Germany. Like *Downes*, *Reid v. Covert*<sup>99</sup> had no majority opinion but has become extremely influential. In this case, the Court held that civilian wives of military servicemembers stationed abroad could not constitutionally be tried for murder by military tribunals.<sup>100</sup> *Reid* is relevant to the *Insular Cases* and territories in three main ways. First, Justice Black’s plurality opinion declared “that neither the [*Insular Cases*] nor their reasoning should be given any further expansion.”<sup>101</sup>

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94. *Rasmussen v. United States*, 197 U.S. 516, 522 (1905) (citing Treaty Concerning the Cession of the Russian Possessions in North America, Russia-U.S., Mar. 30, 1867).

95. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

96. *Id.* at 309.

97. *Id.* at 311.

98. Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Next for the Insular Cases?*, 130 *YALE L.J.F.* 284, 286 (2020).

99. 354 U.S. 1 (1957).

100. *Id.* at 5.

101. *Id.* at 14.

Second, the Court departed from precedent to find that at least for U.S. citizens, constitutional protections could apply outside U.S. borders. Third, concurring opinions lay out two of the frameworks that would later be used by lower courts in applying the *Insular Cases*: the fundamental rights test and the “impractical and anomalous” test.

Prior to *Reid*, it was widely accepted that no one, regardless of citizenship status, had constitutional rights outside the United States.<sup>102</sup> In 1956, the Supreme Court found no constitutional issue with trying the *Reid* defendants in a military court without guarantees of indictment by grand jury or trial by jury.<sup>103</sup> The next term, it reheard the case and reversed its position, “reject[ing] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution.”<sup>104</sup> This changed the questions that courts have to ask about the Constitution’s territorial scope. The *Insular Cases* asked, “Is this territory in the United States?” and determined that territories like Puerto Rico were both foreign and domestic. The in-between category of “unincorporated territory” indicated limited constitutional protections. But *Reid* said that the Constitution may apply even in locations that were entirely foreign.

Justice Frankfurter agreed that the *Insular Cases* “did not lay down a broad principle that the protective provisions of the Constitution do not apply outside the continental limits.”<sup>105</sup> Rather, cases such as *Dorr*<sup>106</sup> enunciated a “fundamental right” test for dealing with claims of restrictions to Congress’s power to make rules for unincorporated territories.<sup>107</sup> Frankfurter found this test, which was similar to due process analysis, appropriate for dealing with constitutional questions on military bases, too.<sup>108</sup>

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102. See RAUSTIALA, *supra* note 59, at 59–72 (describing U.S. courts in Japan and China).

103. *Kinsella v. Krueger*, 351 U.S. 470, 476, 479 (1956).

104. *Reid*, 354 U.S. at 5–6. The concurring opinions took a narrower view of the Constitution’s extraterritorial scope than the plurality, noting that having civilian defendants charged with capital offenses made the instant case unique. See *id.* at 45 (Frankfurter, J., concurring), 65 (Harlan, J., concurring).

105. *Id.* at 54 (Frankfurter, J., concurring).

106. 195 U.S. 138 (1904).

107. *Id.* at 53. Frankfurter cited to several of the *Insular Cases*, including *Downes*, *Dorr*, and *Balzac* to support this claim. *Id.* See, e.g., *Dorr v. United States*, 195 U.S. 138, 148 (1904) (stating that if the right to trial by jury were fundamental, it must be established, whatever the needs or capacities of the territory’s inhabitants).

108. *Reid*, 354 U.S. at 53 (Frankfurter, J., concurring).

The approach taken by Justice Harlan<sup>109</sup> focused on the practicality of guaranteeing a particular right in a particular context.<sup>110</sup> Under his interpretation, *Balzac* stood for the proposition that the Constitution did not require the U.S. government to provide for trial by jury overseas “if the circumstances are such that trial by jury would be impractical and anomalous.”<sup>111</sup> He thought trial by jury was constitutionally required in the capital cases at issue but noted that it may be “impractical and anomalous” to provide trial by jury in unincorporated territories or for less serious criminal cases on military bases.<sup>112</sup> The impractical and anomalous test, like the fundamental rights test, provides courts a way to determine how the Constitution should apply in unincorporated territories or overseas settings.

In the 2008 case *Boumediene v. Bush*,<sup>113</sup> the Supreme Court considered the applicability of the Constitution in yet another overseas setting: Guantánamo Bay. Here, the Court cited the *Insular Cases* for the proposition that the Constitution has independent force in territories, but this is limited by the territorial incorporation doctrine.<sup>114</sup> Notably, it also suggested that the territorial incorporation doctrine may not lead to the same result in every territory at every moment in time because the ties between the United States and its territories may strengthen over time.<sup>115</sup> It called this a “functional approach,” explaining that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”<sup>116</sup> In some ways, *Boumediene* departed from the earlier *Insular Cases* by limiting Congressional discretion and challenging the incorporated/unincorporated binary.<sup>117</sup> Yet by referencing the *Insular Cases*, it also seemed to reinforce their continued relevance.

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109. The grandson of the *Insular Cases*’ Justice Harlan.

110. Justice Frankfurter also discussed the importance in the *Insular Cases* of considering “the particular situation in each newly acquired territory.” *Id.* at 54.

111. *Id.* at 75 (Harlan, J., concurring). Harlan used “impractical” and “impracticable” interchangeably throughout his opinion. *E.g., id.* at 74. Both terms appear in later court cases and scholarship.

112. *Id.* at 75–76.

113. 553 U.S. 723 (2008).

114. *Id.* at 757.

115. *Id.* at 757–58 (“It may well be that over time the ties between the United States and any of its unincorporated [t]erritories strengthen in ways that are of constitutional significance.”).

116. *Id.* at 764.

117. *Compare id.* at 765–66 (explaining that “the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain”) with *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (stating that the Constitution applies to territories “only when and so far as Congress shall so direct”).

The Supreme Court has since placed more doubt on that continued relevance. In a 2020 case considering whether the Appointments Clause governed the appointment of members to the Financial Oversight and Management Board for Puerto Rico, the Court declined to rely on the *Insular Cases* because “whatever their continued validity,” they did not reach the issue.<sup>118</sup> While this statement may be interpreted as cautioning parties and lower courts against relying on the *Insular Cases*, it does not do so unequivocally. The Court was unwilling to extend the *Insular Cases*, but it was also unwilling to overrule them—despite explicit requests from parties and amici to do so.<sup>119</sup> The lack of a clear position from the Supreme Court left the status and proper interpretation of the *Insular Cases* even more uncertain than they already were.<sup>120</sup>

#### 4. The *Insular Cases* in the Lower Courts

Lower courts have varied in how they apply the *Insular Cases*, sometimes using the fundamental rights test, sometimes the impractical and anomalous test, and sometimes combining the two. The *Insular Cases* are often interpreted to grant flexibility in how the Constitution applies to the territories to be accommodating of local culture and history. While the need for flexibility was highlighted in the *Insular Cases*, there has been a shift (at least rhetorically) from seeing such flexibility as imperative for enabling imperial projects to focusing on its potential to accommodate territorial cultures.

The Ninth Circuit case *Wabol v. Villacrusis*<sup>121</sup> illustrates how the *Insular Cases*’ flexibility can support self-government and cultural preservation. The court upheld race-based land ownership restrictions in the Commonwealth of the Northern Mariana Islands (CNMI), drawing on both fundamental rights and “impractical and anomalous” reasoning in its analysis. It noted that the right to equal access to long-term real estate interests in the CNMI was only constitutionally protected “if this guarantee is fundamental in this *international* sense” of being “the basis of all free government.”<sup>122</sup> To determine if this right was

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118. *Fin. Oversight and Mgmt. Bd. for P.R. v. Aurelius*, 140 S. Ct. 1649, 1665 (2020).

119. *Id.*

120. Several years before *Aurelius*, a group of former judges from Puerto Rico, the Virgin Islands, and Guam expressed frustration that although “the territorial incorporation doctrine is incapable of sensible or objective application,” they felt obligated to apply it. Brief of Former Federal and Local Judges as *Amici Curiae* in Support of Petitioners at 2, *Tuaua v. United States*, 579 U.S. 902 (2016) (No. 15-981) [hereinafter Brief of Former Federal and Local Judges].

121. 958 F.2d 1450 (9th Cir. 1990).

122. *See id.* at 1460.

fundamental, the Ninth Circuit turned to the “impractical and anomalous” test. It held that it would be impractical and anomalous to require nondiscrimination in land ownership because of the scarcity of land and the paramount importance of Native land ownership for social and cultural stability in the CNMI. Land ownership restrictions were so important that the political union between the Northern Mariana Islands and the United States would not have been possible if they were not protected in the Covenant establishing the union.<sup>123</sup> In this context, “[i]t 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.”<sup>124</sup> This takes the “impractical and anomalous” reasoning beyond questions of practicality or of cultural compatibility to considerations of special legal obligations that the United States may have to help protect certain cultural institutions in the territories.

Not all constitutional issues in unincorporated territories are analyzed under the *Insular Cases*. Many individual rights enshrined in the U.S. Constitution are explicitly provided to territorial inhabitants by other legal instruments, such as territorial organic acts, making the U.S. Constitution’s geographic scope less relevant. For example, the Fifteenth Amendment has been explicitly extended to Guam and the CNMI.<sup>125</sup> In those territories, the Ninth Circuit held that laws restricting voting in certain elections to Indigenous inhabitants violated the Fifteenth Amendment, without asking if the amendment’s guarantees were fundamental or impractical and anomalous.<sup>126</sup> The U.S. Constitution’s inherent reach makes little difference in such cases. But when it does become pertinent, parties and judges have continued to look to the *Insular Cases* to grant flexibility in governance to both territorial and federal governments.<sup>127</sup>

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123. *Id.* at 1461.

124. *Id.* at 1462.

125. *Davis v. Commonwealth Election Comm’n*, 844 F.3d 1087, 1089 (9th Cir. 2016) (holding a Commonwealth of the Northern Mariana Islands (CNMI) election provision to be invalid under the Fifteenth Amendment); Guam Organic Act, 48 U.S.C. § 1421b(u) (including the Fifteenth Amendment in Guam’s bill of rights).

126. *Davis v. Guam*, 932 F.3d 822, 842–43 (9th Cir. 2019).

127. For examples of how the *Insular Cases* have allowed the federal government to treat people living in territories differently, and often less favorably, than people in the states, see ROMAN, *supra* note 6, at 105–06 (listing federal programs under which territorial residents receive less favorable treatment than citizens on the mainland); Cepeda Derieux & Weare, *supra* note 98, at 302 (describing how the Virgin Islands is subject to the “border search exception” to the requirement that law enforcement obtain a warrant before searching packages, despite being domestic territory); Bartholomew H. Sparrow, *The Centennial of Ocampo v. United States: Lessons From the Insular Cases*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 39, 44–45 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015)

## 5. Colonial Relic or Tool for Cultural Preservation?

Today, the *Insular Cases*' racist origins are widely acknowledged.<sup>128</sup> Even courts that apply the doctrine are forced to concede its problematic foundation.<sup>129</sup> Despite this consensus about the *Insular Cases*' unsavory origins, there is no similar consensus about the territorial incorporation doctrine's contemporary relevance or desirability. As one account puts it, the *Insular Cases* "contain multitudes": they remind us of an era of overt racism and colonialism, they have been referenced (sometimes more progressively than one would expect) in contemporary issues that do not deal with territories, and they have been repurposed for indigenous cultural protection.<sup>130</sup> They sit in an uneasy gray zone. There is much to denounce about the *Insular Cases* and how they are used, yet it is not clear that discarding the doctrine would have only positive effects on territorial inhabitants.

The most common scholarly view of the *Insular Cases* is that they represent reprehensible, outdated ideas and should be abolished.<sup>131</sup> Many scholars and other commentators have opined that the *Insular Cases* and their later interpretations cannot overcome their racist origins.<sup>132</sup> The doctrine's legal foundations have also been called into question. The late Judge Juan R. Torruella argued that the cases were wrongly decided because they contradicted the Constitution and the Supreme Court's precedent regarding territorial expansion.<sup>133</sup> Not only that, but

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(describing contemporary impacts of the *Insular Cases*, including federal courts overturning territorial laws when the Tenth Amendment would prohibit overturning similar state laws).

128. *E.g.*, Saito, *supra* note 62, at 233; Brief for Members of Congress and Former Governmental Officials, *supra* note 55, at 13; Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 64 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).
129. *See, e.g.*, Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015) (noting that "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect").
130. *Developments in the Law*, *supra* note 77, at 1680.
131. *See, e.g.*, Cepeda Derieux & Weare, *supra* note 98, at 289–91 (arguing that the *Insular Cases* should be overruled and discussing the "scholarly consensus . . . that the cases cannot be separated from their racialized justifications").
132. *E.g.*, Cepeda Derieux & Weare, *supra* note 98, at 291 (arguing that the *Insular Cases* "cannot be separated from their racialized justifications"); Brief for Members of Congress and Former Governmental Officials, *supra* note 55, at 13 (calling on the Supreme Court to overturn the *Insular Cases* so lower courts would not have to reaffirm their racist reasoning); Brief of Former Federal and Local Judges, *supra* note 120, at 2 ("it is impossible to separate [the *Insular Cases*' territorial incorporation doctrine] from the outdated notions of racial inferiority that animated its adoption").
133. *See* Torruella, *supra* note 128, at 62.

the *Insular Cases* relied on now-outdated precepts of international law.<sup>134</sup> U.S. Supreme Court Justices Gorsuch and Sotomayor have described the *Insular Cases* as a “misguided framework.”<sup>135</sup> Lower court judges have also complained that the cases are vague and incapable of consistent application, raising concerns about fair treatment.<sup>136</sup>

Other criticisms consider the wide discretion given to the federal government and the negative effects that such discretion creates for territorial inhabitants. The *Insular Cases* are often seen as subjecting unincorporated territories to the U.S. government’s plenary power without the safeguards that restrict governmental power in the states.<sup>137</sup> Territorial residents do not enjoy all the same benefits and rights that they would if they lived in one of the states, and the *Insular Cases* are one legal justification for this disparate treatment. For example, people living in unincorporated territories are eligible for fewer federal benefits,<sup>138</sup> may have fewer Fourth Amendment rights,<sup>139</sup> and have more limited self-government rights, among other disadvantages.<sup>140</sup> For many, these disparities show that the *Insular Cases* continue to be used as a tool of colonial oppression.

Recently, opposition to the *Insular Cases* has even reached the U.S. House of Representatives. Fifteen cosponsors (including the delegates from all U.S. territories except American Samoa) have introduced a resolution condemning the cases. The resolution would acknowledge:

[T]he United States Supreme Court’s decisions in the *Insular Cases* and the ‘territorial incorporation doctrine’ are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes

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134. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 281 (2002) (“[T]he constitutionalization of international law norms raises the question whether those norms should be frozen in time. If U.S. authority derived from international law, should those powers evolve as international norms develop?”). See also Torruella, *supra* note 128, at 62 (pointing out that the *Insular Cases* run contrary to international treaties).

135. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1556 (2022) (Gorsuch, J., concurring), 1560 n.4 (Sotomayor, J., dissenting).

136. Brief of Former Federal and Local Judges, *supra* note 120, at 3–4. For example, courts do not know which practical factors are appropriate to consider, and more recent cases such as *Boumediene* have only increased confusion. Brief of Former Federal and Local Judges, *supra* note 120, at 6, 9.

137. E.g., Saito, *supra* note 62, at 232. But see Christina Duffy Burnett (Ponsa-Kraus), *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 990, 1020–21 (2009) (arguing that the *Insular Cases*’ holdings are quite limited in scope and that contrary to popular belief, the Constitution is not always fully applicable even within the states).

138. ROMÁN, *supra* note 6, at 105–06.

139. Cepeda Derieux & Weare, *supra* note 98, at 302.

140. See Sparrow, *supra* note 127.

from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to our Nation's most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.<sup>141</sup>

Members of Congress have also called on the Biden administration to “admit the error of the *Insular Cases*” and to “call on the Supreme Court to grant review of . . . the question of whether the *Insular Cases* should be overruled.”<sup>142</sup>

Another view is that while the *Insular Cases* have problematic origins, they have also been ascribed too much importance.<sup>143</sup> Christina Duffy Ponsa-Kraus argues that the *Insular Cases* themselves did little more than rule on the scope of the Uniformity Clause and the right to trial by jury.<sup>144</sup> She has criticized later interpretations such as the “impractical and anomalous” test for wrongly exaggerating the differences in how the Constitution applies inside and outside the United States, however the United States is defined.<sup>145</sup> Others have voiced concerns about the frequency and manner in which lower courts invoke them—despite the Supreme Court's suggestions that the cases should not be further extended and may no longer be relevant.<sup>146</sup>

However, not everyone agrees that the *Insular Cases* should be discarded or severely limited in scope. Some scholars, judges, and territorial governments have seen an “opportunity to repurpose the framework in order to protect indigenous culture from the imposition of federal scrutiny and oversight.”<sup>147</sup> In the context of American Samoa, there are fears that full application of the Constitution could threaten the survival of traditional cultural and legal practices.<sup>148</sup> The government

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141. H.R. Res. 279, 117th Cong. (2021).

142. Letter from Stacey E. Plaskett, Member of Cong., et al. to Joseph R. Biden, President, and Kamala D. Harris, Vice President (July 12, 2022), [https://assets.nationbuilder.com/wethepeopleproject/pages/306/attachments/original/1657639741/Letter\\_to\\_the\\_Administration\\_Urging\\_Rejection\\_of\\_the\\_Insular\\_Cases\\_-\\_Final\\_7-12-22.pdf?1657639741](https://assets.nationbuilder.com/wethepeopleproject/pages/306/attachments/original/1657639741/Letter_to_the_Administration_Urging_Rejection_of_the_Insular_Cases_-_Final_7-12-22.pdf?1657639741), [<https://perma.cc/26T7-ZJNR>].

143. Ponsa-Kraus, *A Convenient Constitution?*, *supra* note 137, at 990.

144. *Id.* at 990.

145. *Id.* at 976–78.

146. See Cepeda Derieux & Weare, *supra* note 98, at 294 (discussing how the “misplaced reliance on the *Insular Cases* by lower courts deprives territorial residents of rights and protections to which they are almost surely entitled.”).

147. *Developments in the Law*, *supra* note 77, at 1680.

148. Ivy Yeung, *The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?*, 17 *ASIAN-PAC. L. & POL'Y J.* 1, 30–31 (2016) (suggesting the Equal Protection Clause could threaten traditional land tenure systems); Brief Intervenor for Defendants-Appellants at 17–18, *Fitisemanu v. United States*, 1 F. 4th 862 (10th Cir. 2020) (Nos. 20-4017, 20-4019) [hereinafter Intervenor Defendants-Appellants' Opening Brief] (arguing that applying the

of America Samoa has indicated that it would prefer the territorial incorporation doctrine remain intact, making it an outlier among territorial governments.<sup>149</sup> In cases such as *Wabot*, judges have used the *Insular Cases* to uphold special protections for Indigenous peoples that might otherwise have been overturned on equal protection grounds. Since Federal Indian Law precepts cannot be applied in the territories, the territorial incorporation doctrine may be the best available legal tool for indigenous cultural preservation in such situations.<sup>150</sup>

The two main views of the *Insular Cases*, as a colonial relic and as a tool for Indigenous cultural preservation, exist in an uneasy tension. The cases certainly originated as instruments of racism and colonialism, and to some extent they still function to legitimate the subordination of the territories' inhabitants. At the same time, abolishing them could have mixed results. In particular, Indigenous peoples in the territories may find themselves worse off when looking for strategies to protect their traditional practices and right to self-determination.

### C. U.S. Nationals

After acquiring overseas territories in the late nineteenth century, the United States was faced with the question of their inhabitants' political status. The *Insular Cases* contained dicta discussing citizenship and the new territories, but the issue was outside those cases' scope.<sup>151</sup> An in-between status, the noncitizen national, was created by the courts and later codified as part of U.S. immigration and nationality law. Inhabitants of most of the unincorporated territories were classified as noncitizen nationals for a time. All but American Samoans have since been granted statutory citizenship.

In 1904, the U.S. Supreme Court ruled that Isabel González, a Puerto Rican who had been detained by immigration authorities, was not an "alien" within the meaning of existing immigration law. It did not, however, elucidate just what her

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Citizenship Clause to American Samoa could threaten "its basic social structures, its traditional practices for land alienation, and its religious customs").

149. *Compare* Intervenor Defendants-Apellants' Opening Brief, *supra* note 148, at 17–24, with Brief for Members of Congress and Former Governmental Officials, *supra* note 55, at 13, 17–21 (calling on the Supreme Court to overturn the *Insular Cases* and arguing that this would not threaten traditional cultures in any of the territories). See also *Hearing on H.R. Res. 279, "Insular Cases Resolution" Before the H. Comm. on Natural Resources*, 117th Cong. 14–17 (2021) (statement of Talauega Eleasalo Va'alele Ale, Lieutenant Governor, American Samoa).

150. See Ian Falefuafua Tapu, Comment, *Who Really Is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 *ASIAN PAC. AM. L.J.* 61, 67 (2020); Cuison Villazor, *supra* note 154, at 127, 145.

151. *Supra* Part I.B.2.

status was.<sup>152</sup> Ponsa-Kraus identifies this as “the creation of a new form of partial membership for the new colonial subjects—one that could be expanded indefinitely” as the U.S. empire expanded.<sup>153</sup> Early twentieth-century cases such as this not only created the category of noncitizen nationals but also joined the long American tradition of tying citizenship to whiteness.<sup>154</sup> The Fourteenth Amendment prevented restrictions of birthright citizenship on the basis of race. But the United States adapted and took a page from European colonial powers’ book, using space as a proxy for race.<sup>155</sup> The people living in new U.S. territories were classified as noncitizen nationals based on where they lived, which had the effect of excluding largely nonwhite populations from U.S. citizenship.

This new status was not codified for almost four decades.<sup>156</sup> The Nationality Act of 1940 stated that persons born in outlying possessions of the United States were born nationals but not citizens of the United States.<sup>157</sup> At that time, “outlying possessions” included “all territory . . . over which the United States exercises sovereignty” with the exception of the continental United States, Alaska, Hawai`i, Puerto Rico, the Virgin Islands, and the Panama Canal Zone.<sup>158</sup> In other words, residents of U.S. territories who had not yet been granted statutory citizenship were noncitizen nationals.<sup>159</sup> Discussion of naturalization eligibility during Congressional hearings on the Nationality Act reveals that Congressmembers were still wary of allowing certain racial groups, particularly those of Asian descent, full access to U.S. citizenship.<sup>160</sup>

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152. Christina Duffy Burnett (Ponsa-Kraus), “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659, 706 (2008). For a detailed account of Isabel González and her case, see generally *id.*; Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905*, J. AM. ETHNIC HIST. 1, 5 (Summer 2008).

153. Ponsa-Kraus, “*They Say I Am Not an American*,” *supra* note 152, at 713.

154. See Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1698 (2017).

155. See Ponsa-Kraus, “*They Say I Am Not an American*,” *supra* note 152, at 718 (discussing “the importation into U.S. law of an insidious geographically based form of discrimination, favoring peninsular Spaniards over” mixed-race inhabitants of Spanish colonies).

156. The Nationality Act of 1940 first defined a “national of the United States” as either a citizen or “a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” Nationality Act of 1940, ch. 876, § 101(b), 54 Stat. 1137 (1940).

157. *Id.* at § 204.

158. *Id.* at §§ 101(d)–(e).

159. The Panama Canal Zone is an exception, as children born in the zone did not have U.S. nationality unless they had a U.S. citizen parent, in which case they were U.S. citizens. *Id.* at § 203.

160. Cuison Villazor, *supra* note 154, at 1704–06.

The noncitizen national category disrupts the citizen-noncitizen binary, existing in an in-between space that has been referred to as “interstitial citizenship.”<sup>161</sup> U.S. nationals enjoy many, but not all, of the privileges of citizenship. For example, they can travel to the United States without a visa and do not need special permission to work in the United States.<sup>162</sup> However, if they move to one of the states, they can be excluded from voting, running for public office, serving on a jury, bearing arms, and holding certain jobs.<sup>163</sup> Of particular relevance for American Samoans, who have one of the highest rates of military enlistment, noncitizen nationals are ineligible to serve as officers in the U.S. Armed Forces.<sup>164</sup>

Noncitizen nationals who wish to access the benefits of full U.S. citizenship must move away from American Samoa and apply for naturalization following the same process as immigrants from foreign countries.<sup>165</sup> The requirements include being a resident of the United States (excluding American Samoa), establishing good moral character, passing an English and civics test, and paying an application fee.<sup>166</sup> Thus, despite already owing sole allegiance to the United States, noncitizen nationals are treated essentially as foreigners and forced to jump through numerous hoops in order to become U.S. citizens. American Samoan Delegates to the House of Representatives have repeatedly introduced bills that would simplify the naturalization process for American Samoans, including as recently as 2021.<sup>167</sup> None of these bills, however, have thus far been successful.

Beginning in the 1990s, a series of federal court cases have confronted and confirmed the legitimacy of the noncitizen national category as applied to persons born in the Philippines while it was a U.S. territory. The first of these cases was

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161. *Id.* at 1714.

162. *Id.* at 1676; *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., INSTRUCTIONS FOR FORM I-9 3 (Oct. 21, 2019) (indicating that noncitizen nationals are authorized to work).

163. *Id.* at 1676; *see also* Brief for Plaintiffs-Appellees at 7, *Fitisemanu v. United States*, 1 F. 4th 862 (10th Cir. 2020) (Nos. 20-4017, 20-4019).

164. Brief for Plaintiffs-Appellees, *supra* note 163, at 6–7.

165. 8 U.S.C. § 1436; U.S. CITIZENSHIP & IMMIGR. SERVS., A GUIDE TO NATURALIZATION 18–19 (2016).

166. 8 U.S.C. §§ 1423, 1427, 1436; U.S. CITIZENSHIP & IMMIGR. SERVS., *N-400, Application for Naturalization* (Oct. 27, 2022), <https://www.uscis.gov/n-400> [<https://perma.cc/YMR2-BYC8>]. However, there is one difference between naturalization for U.S. nationals as opposed to permanent residents: nationals may count residence in “outlying possessions” like American Samoa towards the three- or five-year U.S. residence requirement that applies to most naturalization applicants. 8 U.S.C. § 1436.

167. Press Release, Congresswoman Aumua Amata Coleman Radewagen, Amata Proposes Bill to Ease Path to Citizenship (Apr. 1, 2021), <https://radewagen.house.gov/media-center/press-releases/amata-proposes-bill-ease-path-citizenship> [<https://perma.cc/NDN6-6JRC>].

*Rabang v. INS*.<sup>168</sup> The *Rabang* plaintiffs, facing deportation from the United States, asserted that they were U.S. citizens because they or their parents were born in the Philippines while it was a U.S. territory.<sup>169</sup> They argued that during this time the Philippines was “in the United States,” and the plaintiffs were subject to U.S. jurisdiction, within the meaning of the Fourteenth Amendment’s Citizenship Clause.<sup>170</sup> The Ninth Circuit disagreed, relying in part on the *Insular Cases* to find that the Philippines was not “in the United States” for Citizenship Clause purposes.<sup>171</sup> Several later cases in other circuits have addressed the same question as *Rabang*, and all federal courts to consider the issue have come to the same conclusion: birth in the Philippines did not grant U.S. citizenship because it was not “in the United States.”<sup>172</sup>

Some scholars and litigants have argued that the Philippines cases, regardless of whether they were correctly decided, are not determinative of whether the Citizenship Clause applies in current U.S. territories. Two main arguments are advanced. First, the United States always intended to grant independence to the Philippines, so the Filipino peoples’ situation was distinct from that of territorial residents who owe permanent allegiance to the United States.<sup>173</sup> Second, even if Filipinos had been born with U.S. citizenship from 1898–1946, gaining independence would have stripped them of any allegiance to—and citizenship of—the United States.<sup>174</sup>

Whatever the relevance of the Philippines to today’s U.S. territories, the fact that most people born in U.S. territories have statutory citizenship means there have been scarce opportunities to challenge the assumption that unincorporated

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168. 35 F.3d 1449 (9th Cir. 1994).

169. *Id.* at 1451.

170. *Id.*

171. *Id.* at 1452.

172. See *Valmonte v. Immigr. & Naturalization Serv.*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. Immigr. & Naturalization Serv.*, 138 F.3d 518 (3d Cir. 1998); *Licudine v. Winter*, 603 F. Supp. 2d 129 (D.D.C. 2009); *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); *Entines v. United States*, 160 F. Supp. 3d 208 (D.D.C. 2016). For a summary of *Rabang* and later litigation about the Philippines and the Citizenship Clause, see Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, 100 TEX. L. REV. 1325, 1336–37 (2022).

173. Brief for Plaintiffs-Appellees, *supra* note 163, at 15–16. See also Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 148 (2013) (“Using the Incorporation Doctrine, there is a strong argument that applying a right such as citizenship to the people of the Philippines during that time would be very impractical, considering the clearly stated policy of the United States to return the Philippines to independence.”).

174. See Brief of Citizenship Scholars as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance at 26, *Fitsemanu v. United States*, 20 F. 4th 1325 (10th Cir. 2020) (Nos. 20-4017, 20-4019).

territories are not in the United States for Citizenship Clause purposes. A rare exception is a 2003 case heard by the District Court for the Northern Mariana Islands. The plaintiff in *Sabangan v. Powell*<sup>175</sup> unsuccessfully argued that he was a U.S. citizen based on birth in the CNMI after the signing of the Covenant between the United States and the CNMI but before November 4, 1986, at which point the trusteeship agreement ended and statutory *jus soli* citizenship was extended to the islands.<sup>176</sup> *Sabangan* involved an unusual situation, given the transitional nature of the CNMI's status between 1976 and 1986. Ten years later, federal courts would again consider the question of constitutional citizenship in unincorporated territories. Unlike the Philippines cases and *Sabangan*, which dealt with individuals born in discrete historical periods, this case involved a long-term and ongoing withholding of *jus soli* U.S. citizenship.

## II. AMERICAN SAMOA

American Samoa consists of five volcanic islands and two atolls in the Pacific Ocean. Tutuila, the largest and most populated of the islands, makes up a majority of the territory's seventy-six square miles.<sup>177</sup> American Samoa is the eastern part of the Samoan archipelago. The western islands are the Independent State of Samoa, formerly known as Western Samoa.<sup>178</sup>

American Samoa is culturally and legally distinct from other U.S. territories. Its contemporary legal system preserves many aspects of *fa'a Sāmoa*, the traditional Samoan way of life.<sup>179</sup> Two key manifestations of this are *fa'a mātai*, which is the system of traditional chiefs (*mātai*); and communal land ownership.<sup>180</sup> The historical and contemporary relationship between American Samoa and the United States also differs from the circumstances of other territories. For example, the American Samoan government maintains that the territory was never colonized by the United States, although not all American Samoans agree with this characterization of their history. Today, American Samoa stands out among U.S. territories because its inhabitants are not U.S. citizens. This Part describes how American Samoa became a U.S. territory and

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175. No. Civ.A. 02-0039, 2003 WL 22997247, at \*1 (D. N. Mar. I. July 10, 2003).

176. *Id.*

177. KRUSE, *supra* note 69, at 5.

178. *Id.* at 18.

179. For a more in-depth description of *fa'a Samoa*, see, e.g., KRUSE, *supra* note 69, at 7–16; Tapu, *supra* note 150, at 74–76.

180. Tapu, *supra* note 150, at 74.

how this history led to the territory's and its people's unique current legal status of the territory, as well as the centrality of *fa`a Sāmoa* in American Samoan law.

### A. How American Samoa Became a U.S. Territory

Foreigners—both European and American—became interested in the Samoan islands in the 1800s for their convenient location along major Pacific trade routes.<sup>181</sup> The United States was particularly interested in establishing a naval coaling station at Pago Pago Harbor on Tutuila, and officials worried that if they did not act soon, Germany would claim all of Samoa.<sup>182</sup> To that end, the United States negotiated treaties with the *mātai* in 1872 and 1878 to gain exclusive rights to establish a coaling station in Pago Pago.<sup>183</sup>

While the United States sometimes negotiated directly with the *mātai*, it also negotiated with European powers to determine the nations' respective influence in the archipelago. In 1889, the United States, Great Britain, and Germany signed their first trilateral treaty regarding Samoa. They “recognize[d] the independence of the Samoan Government and the free right of the natives to elect their chief or king and choose their form of Government according to their own laws.”<sup>184</sup> But they also undermined Samoan self-government by establishing a Supreme Court of Justice for Samoa and laying down property laws, among other acts, which would normally be reserved for an independent nation's own government.<sup>185</sup> A decade later, the Tripartite Convention of 1899 split the Samoan archipelago into Eastern Samoa and Western Samoa, which would be under the influence of the United States and Germany, respectively.<sup>186</sup> There was no Samoan representation

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181. KRUSE, *supra* note 69, at 19; Tapu, *supra* note 150, at 71.

182. *Id.* at 26.

183. David A. Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920–1935*, 69 PAC. HIST. REV. 217, 220 (2000); Treaty Between the United States of America and the Government of the Samoan Islands, Jan. 17, 1878, Samoa-U.S., 20 Stat. 704. The first treaty was never ratified by the U.S. Senate, although the *mātai* did not know this. KRUSE, *supra* note 69, at 27.

184. General Act by and Between the United States of America, the Empire of Germany, and the United Kingdom of Great Britain and Ireland, Providing for the Neutrality and Autonomous Government of the Samoan Islands art. I, June 14, 1889, 26 Stat. 1497 [hereinafter 1890 Treaty of Berlin].

185. *See id.* at arts. III, IV, V.

186. Convention Between the United States, Germany, and Great Britain to Adjust Amicably the Questions Between the Three Governments in respect to the Samoan Group of Islands art. II, Dec. 2, 1899, 31 Stat. 1878 [hereinafter Tripartite Convention of 1899]. Great Britain had ceded its interests in Samoa to Germany in exchange for Germany ceding its interests in Southwest Africa to Great Britain. KRUSE, *supra* note 69, at 18.

in these negotiations, once again illustrating that the three powers did not see Samoan participation as necessary for determining issues related to Samoa.<sup>187</sup>

Samoan leaders saw foreigners fighting over their lands and decided to make their own choice about who held power in their islands. The presence of Europeans and Americans in Samoa had resulted in foreigners trying to take control of Samoan lands, often through fraudulent land claims and transfers.<sup>188</sup> The *mātai* of Eastern Samoa recognized that the United States would not relent in its pursuit of Pago Pago Harbor, so they voluntarily ceded sovereignty to the United States, in hopes that this would protect them from further foreign interference with their lands and way of life.<sup>189</sup> The *mātai* of Tutuila and Aunu'u signed deeds of cession on April 17, 1900,<sup>190</sup> and the king and *mātai* of Manu'a did the same on July 16, 1904.<sup>191</sup>

However, the United States did not wait for these voluntary deeds of cession. On February 19, 1900, two months before the cession of Tutuila and Aunu'u, President William McKinley issued an executive order placing Eastern Samoa "under the control of the Department of the Navy, for a naval station."<sup>192</sup> By issuing an executive order, McKinley began what would be a half-century of naval rule in American Samoa without approval from even the U.S. Congress, let alone the *mātai* or any other Samoans.

To make matters worse, the United States did not even ratify the Deeds of Cession until more than two decades had passed and Samoans had mounted a sustained protest, or *Mau*.<sup>193</sup> The leaders of the *Mau* demanded lower taxes and a clarification of their relationship with the United States, which still had not ratified the Deeds of Cession.<sup>194</sup> Congress finally ratified the Deeds of Cession in 1929, nearly thirty years after the cession of Tutuila and Aunu'u.<sup>195</sup> During the 1930s, Congressmembers drafted several acts that would have established a civilian government in American Samoa and granted U.S. citizenship to those born there, but none were successfully passed.<sup>196</sup> American Samoa remained under naval rule

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187. See KRUSE, *supra* note 69, at 31.

188. *Id.* at 19.

189. *Id.* at 33; Tapu, *supra* note 150, at 73.

190. Cession of Tutuila and Aunu'u (Apr. 17, 1900).

191. Cession of Manu'a Islands (July 16, 1904).

192. Exec. Order No. 125-A (Feb. 19, 1900).

193. For an in-depth exploration of American Samoan resistance during the 1920s and 1930s, see generally Chappell, *supra* note 183.

194. *Id.* at 250–51.

195. H.R.J. 70th Cong., 45 Stat. 1253, (1929).

196. Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. L. HIST. 311, 339–45 (2020).

until 1951, when President Harry S. Truman transferred the administration of American Samoa from the Navy to the Secretary of the Interior.<sup>197</sup>

## B. American Samoa Today

### 1. The Legal Relationship Between American Samoa and the United States

American Samoa remains under the jurisdiction of the U.S. Secretary of the Interior.<sup>198</sup> The Secretary of the Interior has broad authority over American Samoa's governance, although much of this authority is rarely if ever exercised. In 1983, Congress removed the Secretary of Interior's ability to modify the American Samoa Constitution.<sup>199</sup> Apart from this, there are few limits to the Secretary of the Interior's authority.<sup>200</sup> For example, the Secretary of the Interior appoints judges<sup>201</sup> and can even reverse or amend decisions of American Samoa's courts.<sup>202</sup> Ian Falefuafua Tapu has argued that although the Secretary of the Interior has "permitted" American Samoa to govern itself largely without interference, this is only a "mirage of self-determination," as ultimate authority still rests with the Secretary rather than the people of American Samoa.<sup>203</sup> Mirage or not, in practice there are some areas where American Samoa exercises more autonomy than U.S. states or other U.S. territories. For example, American Samoa is the only U.S. territory that controls its own immigration laws and policy.<sup>204</sup> This de facto independence stands in contrast with the Department of the Interior's de jure plenary power over the territory. In 2010, American Samoan voters rejected a slate of proposed constitutional amendments that would have made substantial

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197. Exec. Order No. 10,264, 16 Fed. Reg. 6417 (June 29, 1951).

198. Tapu, *supra* note 150, at 88.

199. Act of Dec. 8, 1983, Pub. L. No. 98-213, § 12, 97 Stat. 1462 (codified at 48 U.S.C. § 1662a) (providing "Amendments of, or modifications to, the constitution of American Samoa . . . may be made only by Act of Congress.").

200. See Tapu, *supra* note 150, at 89.

201. AM. SAM. CONST. art. III, § 3.

202. 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, 75 (2001). The Secretary of the Interior generally does not exercise this power, but the D.C. Circuit has reaffirmed that "[t]he Secretary of the Interior . . . possesses plenary authority over the judicial system of American Samoa." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel, 830 F.2d 374, 376 (D.C. Cir. 1987).

203. Tapu, *supra* note 150, at 89. Similarly, Sam Erman has argued that the U.S. government uses "spectral sovereignty" as a way to manipulate territories. See generally Sam Erman, *Status Manipulation and Spectral Sovereignty*, 53 COLUM. HUM. RTS. L. REV. 813 (2022).

204. *Immigration Office*, AM. SAM. DEP'T OF LEGAL AFFS., <https://www.legalaffairs.as.gov/copy-of-immigration-office-1> [https://perma.cc/R8BA-E6NN].

changes to the territorial constitution, including reducing the Secretary of the Interior's power.<sup>205</sup>

Many leaders of the *Mau* in the 1920s and 1930s wanted U.S. citizenship, but American Samoans' views on the issue shifted in the following decades. Many feared that citizenship would come with harmful effects on their land ownership and culture.<sup>206</sup> Partly due to this wariness, American Samoa has remained the only unorganized U.S. territory, meaning it does not have an organic act formally creating a territorial government, and its people are the only noncitizen nationals. American Samoans' status as noncitizen nationals is particularly impactful for the many American Samoans who have left American Samoa for other parts of the United States.<sup>207</sup>

## 2. *Fa`a Sāmoa* in American Samoa's Legal System

The Revised Constitution of American Samoa establishes an obligation to protect *fa`a Sāmoa*, including to “protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry.”<sup>208</sup> This constitutional obligation is further elaborated by statutes. While not the only

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205. Voters were presented with a single question asking them to vote “yes” or “no” for all proposed changes. Fili Sagapolutele, *No Constitutional Convention This Time, Says Lolo, Legislative Process Is Cheaper*, SAMOA NEWS (Dec. 6, 2017, 6:22 AM), <https://www.samoanews.com/local-news/no-constitutional-convention-time-says-lolo-legislative-process-cheaper> [<https://perma.cc/M4TR-K52Q>]. In addition to changing the Secretary of the Interior's role, the proposed amendments would have instituted a wide range of changes, some of which raised potential U.S. constitutional concerns. Dwyer Arce, *American Samoa Constitutional Convention Approves Amendments to Limit Federal Authority*, JURIST (July 4, 2010, 12:26 PM), <https://www.jurist.org/news/2010/07/american-samoa-concludes-constitutional-convention> [<https://perma.cc/Y7MG-AKD2>]. See also Memorandum from Jon M. Van Dyke to Dan Aga, Analysis of Proposed Amendments to the American Samoa Constitution (June 21, 2010) <https://scholarspace.manoa.hawaii.edu/bitstream/10125/55136/Folder%20114.pdf> [<https://perma.cc/JA58-8F6G>] (analyzing the compatibility of a non-final list of proposed amendments with the U.S. Constitution).

206. Morrison, *supra* note 170, at 87–88.

207. 2019 data from the U.S. Census Bureau estimates that there are over 200,000 people of Samoan descent living in the United States (including the fifty states, D.C., and Puerto Rico). 2019: ACS 1-Year Estimates Detailed Tables, U.S. CENSUS BUREAU. This does not distinguish between people from American Samoa and the Independent State of Samoa. However, this number suggests that there are far more American Samoans in other parts of the United States than in American Samoa itself, which has a population of around 50,000. Press Release, U.S. Census Bureau, Census Bureau Releases 2020 Census Population and Housing Unit Counts for American Samoa (Oct. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/2020-census-american-samoa.html> [<https://perma.cc/92LZ-EP4W>].

208. AM. SAM. CONST. art. I, § 3.

aspects of *fa`a Sāmoa* protected by constitutional or statutory provisions, the *mātai* system and customary land ownership practices are two of the most notable and most treasured by American Samoans. Line-Noue Memea Kruse has described these as the “core non-negotiable protections.”<sup>209</sup>

Although *mātai* are mentioned in the American Samoa Constitution,<sup>210</sup> the codification of the system has taken place largely through statutes.<sup>211</sup> The law places several restrictions on who may be chosen as a *mātai*, including that the individual must be “at least one-half Samoan blood” and living “with Samoans as a Samoan.”<sup>212</sup> However, the precise method of choosing *mātai* is left to local custom, which varies from county to county.<sup>213</sup> There are also statutory provisions allowing the removal of a *mātai* title upon petition from the *‘āiga* (the extended family unit that chooses the *mātai*).<sup>214</sup> These laws provide a basic framework while allowing communities significant flexibility on who will be their *mātai*, how to choose that person, and whether a *mātai* must have their title revoked according to local custom and desire.

The importance of communal land ownership was highlighted in the Deeds of Cession,<sup>215</sup> and since then, the American Samoa Constitution, statutes, and case law have reinforced the system. Land laws are so important that the American Samoa Constitution requires the approval of two thirds of both houses of two successive territorial legislatures and the governor in order to change land alienation laws.<sup>216</sup> American Samoan law seeks to preserve communal land and prevent the displacement of Indigenous Samoans from their land. Strict land alienation laws prohibit *mātai* from alienating their communal lands without permission from the governor and forbid the conveyance of non-freehold lands

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209. KRUSE, *supra* note 69, at 38.

210. AM. SAM. CONST. art. II, § 3; *id.* art. IV, § 4.

211. The statutes governing *mātai* titles can be found at AM. SAMOA CODE ANN. §§ 1.0401–1.0414 (2021).

212. AM. SAMOA CODE ANN. § 1.0403(a), (d) (2021).

213. KRUSE, *supra* note 69, at 10.

214. AM. SAMOA CODE ANN. §§ 1.0411–1.0412 (2021).

215. *See Cession of Manu’a Islands, supra* note 191 (providing “that the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.”). The Cession of Tutuila also references customary land ownership practices, although its language on the issue is not as strong. *See Cession of Tutuila and Aunu’u, supra* note 190 (providing that the *mātai* will “will be entitled to retain their individual control of the separate towns, *if that control is in accordance with the laws of the United States of America* concerning Tutuila.”) (emphasis added).

216. AM. SAM. CONST. art. I, § 3.

“to any person who has less than one-half native blood.”<sup>217</sup> The High Court of American Samoa has upheld racial restrictions on land alienation under strict scrutiny analysis, holding that there is a compelling governmental interest in preserving land for Samoans and *fa`a Sāmoa* and that such restrictions are necessary to safeguard these interests.<sup>218</sup>

Both the *mātai* system and land alienation laws restrict certain privileges to people of Indigenous Samoan descent. That makes these aspects of American Samoan law particularly vulnerable to legal challenges. Given that the *mātai* system and communal land ownership are at the core of *fa`a Sāmoa*, increased judicial scrutiny—and perhaps invalidation—of these practices could have significant effects for *fa`a Sāmoa*. Fears about legal challenges to *fa`a Sāmoa* have been a recurring theme in litigation around the Fourteenth Amendment’s Citizenship Clause’s applicability to American Samoa.

### III. THE CITIZENSHIP CLAUSE AND AMERICAN SAMOA

In the past decade, two sets of American Samoa-born plaintiffs have sued in federal courts, arguing that the Fourteenth Amendment grants them U.S. citizenship. This Part describes these cases, the arguments made, and the potential implications of the rulings. In both cases, American Samoa intervened to argue, based on the *Insular Cases*, that American Samoa is outside the geographical scope of the Citizenship Clause and that interpreting the constitutional provision to include the territory would threaten *fa`a Sāmoa*. The D.C. and Tenth Circuits both ruled for the U.S. and American Samoa governments, holding that American Samoans are not U.S. citizens. Although these rulings relied on the *Insular Cases* and American Samoa’s cultural protection concerns, the legal basis for claiming that any ruling on the Citizenship Clause will protect or threaten *fa`a Sāmoa* is shaky at best.

#### A. *Tuaua v. United States*

In 2013, the U.S. District Court for the District of D.C. decided the first case addressing whether individuals born in American Samoa are U.S. citizens under

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217. AM. SAMOA CODE ANN. § 37.0204 (2021). Furthermore, a person with “any nonnative blood whatever” cannot own land in American Samoa “unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than 5 years and has officially declared his intention of making American Samoa his home for life.” *Id.*

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

the Citizenship Clause of the Fourteenth Amendment.<sup>219</sup> The case, *Tuaua v. United States*, was then appealed to the D.C. Circuit, which affirmed the District Court in finding that the Citizenship Clause does not extend to American Samoa.<sup>220</sup> The court relied on the *Insular Cases* and stated that it would be “‘impractical and anomalous’ to impose citizenship by judicial fiat” against American Samoans’ democratically elected government’s wishes.<sup>221</sup>

The plaintiffs were five individuals born in American Samoa and the Samoan Federation of America, a nonprofit based in Los Angeles.<sup>222</sup> Some of the individual petitioners were living in American Samoa; others had moved to U.S. states.<sup>223</sup> Three out of the five were military veterans.<sup>224</sup> All had been denied opportunities to vote or advance in their careers due to being classified as nationals rather than citizens of the United States.<sup>225</sup> The petitioners argued that the language “in the United States” in the Citizenship Clause is properly read broadly to encompass American Samoa, making the petitioners U.S. citizens at birth.<sup>226</sup>

The plaintiffs were opposed not only by the U.S. government but also by the government of American Samoa, which intervened in the case. The intervenors expressed concerns that extending the Citizenship Clause to American Samoa could result in greater scrutiny under the Fourteenth Amendment’s Equal Protection Clause. They feared this could endanger *fa`a Sāmoa*, particularly the *mātai* system and racial land alienation restrictions.<sup>227</sup> The D.C. Circuit did not consider the merits of these fears but placed great weight on the American Samoa government’s opposition to extending citizenship.<sup>228</sup>

In analyzing the case, the D.C. Circuit applied a framework derived from the *Insular Cases*, despite noting that “some aspects of the *Insular Cases*’ analysis may now be deemed politically incorrect.”<sup>229</sup> It first asked whether the right to

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219. *Tuaua v. U.S.*, 951 F. Supp. 2d 88 (D.D.C. 2013).

220. *Tuaua v. U.S.*, 788 F.3d 300, 302 (D.C. Cir. 2015).

221. *Id.* (internal citation omitted).

222. Petition for a Writ of Certiorari at 11, *Tuaua v. U.S.*, 788 F.3d 300 (D.C. Cir. 2015) (No. 15-981).

223. *Id.* at 11–12.

224. *Id.*

225. *Id.* For example, one petitioner was a Vietnam veteran with two Purple Hearts whose application to join the U.S. Special Forces was denied and whose foreign national wife faced additional immigration restrictions compared with spouses of U.S. citizens. *Id.*

226. *Tuaua v. U.S.*, 788 F.3d 300, 301, 303 (D.C. Cir. 2015).

227. *Id.* at 309–10.

228. *See id.* at 310 (stating that it is unnecessary to consider the Equal Protection Clause concerns because extending citizenship against American Samoans’ wishes “is impractical and anomalous at a more fundamental level”).

229. *Id.* at 307.

birthright citizenship is fundamental under the *Insular Cases*' meaning of the term. The court adopted the conclusion of Justice Brown's dictum in *Downes: Jus soli* citizenship is not a fundamental right.<sup>230</sup> Having determined this, it went on to ask "whether the circumstances are such that recognition of the right to birthright citizenship would prove 'impracticable and anomalous,' as applied to contemporary American Samoa."<sup>231</sup> It held that it would be "anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives."<sup>232</sup>

Following this decision, the plaintiffs petitioned for a writ of certiorari at the U.S. Supreme Court.<sup>233</sup> Their petition was supported by numerous amici curiae from academia, civil society, and government. Amici notably included former government officials and judges from other U.S. territories, all asking the Supreme Court to overturn the *Insular Cases*.<sup>234</sup> The Supreme Court denied certiorari in 2016, declining the opportunity to clarify the geographical scope of the Citizenship Clause and the modern relevance of the *Insular Cases*.<sup>235</sup>

## **B. Revisiting *Tuaua: Fitisemanu v. United States***

The Supreme Court's denial of certiorari was not the end of the conversation about American Samoa and the Citizenship Clause. A few years later, another group of American Samoans filed a lawsuit alleging that they are U.S. citizens in a federal district court in Utah. The district court came to the opposite conclusion from the D.C. Circuit, holding that the Citizenship Clause does in fact apply to American Samoa. On appeal, a divided panel of the Tenth Circuit reversed. The plaintiffs requested en banc review, which was denied.<sup>236</sup> The Supreme Court then denied plaintiffs' petition for a writ of certiorari.<sup>237</sup>

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230. *Id.* at 308.

231. *Id.* at 309.

232. *Id.* at 310.

233. Petition for a Writ of Certiorari, *supra* note 222.

234. See Brief for Members of Congress and Former Governmental Officials, *supra* note 55, at 13; Brief of Former Federal and Local Judges, *supra* note 120, at 2.

235. *Tuaua v. U.S.*, 136 S. Ct. 2461 (2016) (denying petition for writ of certiorari).

236. Plaintiffs-Appellees Petition for Rehearing En Banc, *Fitisemanu v. U.S.*, 20 F.4th 1325 (10th Cir. 2021) (No. 20-4019); *Fitisemanu v. U.S.*, 20 F.4th 1325 (10th Cir. 2021) (denying rehearing en banc).

237. Petition for a Writ of Certiorari, *Fitisemanu v. U.S.*, (U.S. 2022) (No. 21-1394); *Fitisemanu v. U.S.*, 598 U.S. \_\_\_ (2022) (denying petition for writ of certiorari).

## 1. District Court

The facts of *Fitisemanu v. United States* bear a close resemblance to those of *Tuaua*. The plaintiffs are three individuals who were born in American Samoa and now live in Utah and a nonprofit, the Southern Utah Pacific Island Coalition.<sup>238</sup> The government of American Samoa again intervened to argue that it would be impractical and anomalous to impose birthright citizenship on American Samoans and that the question was better left to American Samoans and their government, not the courts.<sup>239</sup> Where *Fitisemanu* diverges significantly from *Tuaua* is in the district court's analysis.

The district court described the issue as a choice “between two Supreme Court cases and their respective lines of precedent—*Wong Kim Ark* and *Downes v. Bidwell*.”<sup>240</sup> It held that it was obligated to apply the rule of “birth within the dominion and allegiance of the sovereign” articulated in *Wong Kim Ark*.<sup>241</sup> It reasoned that *Wong Kim Ark* constituted binding precedent as to the interpretation of the Citizenship Clause, whereas *Downes* was not controlling because its holding was limited to the Uniformity Clause.<sup>242</sup> As a territory under the full sovereignty of the United States, American Samoa is thus within the dominion of the United States, or “in the United States” for Fourteenth Amendment purposes.<sup>243</sup> The court rejected claims that it was imposing citizenship by judicial fiat, asserting that it was simply interpreting the Fourteenth Amendment as required by binding precedent.<sup>244</sup>

## 2. Arguments Presented to the Tenth Circuit

On appeal to the Tenth Circuit, both sides made arguments that the scope of the Citizenship Clause is clear based on the text and structure of the Constitution.<sup>245</sup> Courts had not previously found such textual arguments

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238. *Fitisemanu v. U.S.*, 426 F. Supp. 3d 1155, 1157, 1160 (D. Utah 2019).

239. *Id.* at 1158–59.

240. *Id.* at 1157.

241. *Id.* at 1158.

242. *Id.* at 1183–84, 1193. The district court also pointed out that “the Supreme Court has, since *Downes*, thoroughly rejected the bigoted premise upon which Justice White’s dicta is founded—that some groups are inferior to others based simply on their race.” *Id.* at 1194.

243. *Id.* at 1191.

244. *Id.* at 1196.

245. Brief for Defendants-Appellants at 11, *Fitisemanu v. U.S.* (10th Cir. 2020) (Nos. 20-4017, 20-4019); Brief for Plaintiffs-Appellees, *supra* note 163, at 12.

convincing, and the Tenth Circuit was no exception.<sup>246</sup> Understanding the key arguments at play requires looking not at the text of the Constitution but at the parties' precedential and policy-based arguments.

The federal and American Samoa governments took different approaches to arguing against the district court ruling, with each governmental entity highlighting its own authority over American Samoa's status. The U.S. government emphasized historical practice and the importance of maintaining plenary power over unincorporated territories. Its arguments relied heavily on the *Insular Cases*' assertion that the Constitution does not necessarily apply in full in unincorporated territories.<sup>247</sup> It stated that this rule was needed to provide "flexibility in acquiring, governing, and relinquishing territories."<sup>248</sup> The federal government also relied on *Downes* as a definitive answer to two key questions: the meaning of "in the United States"<sup>249</sup> and whether the Constitution confers citizenship on residents of unincorporated territories.<sup>250</sup> In doing so, it made the dubious claim that the statements about citizenship in *Downes*—a case concerned with the scope of the Uniformity Clause—were not dicta but binding precedent regarding the relevance of the Citizenship Clause to unincorporated territories.<sup>251</sup> It also claimed that the district court's logic would grant U.S. citizenship to every person born in the Philippines between 1898 and 1946.<sup>252</sup> In addition to judicial precedent, the government pointed to Congress's long history of dealing with territorial citizenship by statute as further evidence that the federal government

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246. See *Tuaua v. U.S.*, 788 F.3d 300, 303 (D.C. Cir. 2015) ("The text and structure alone are insufficient to divine the Citizenship Clause's geographic scope."); *Fitisemanu v. U.S.*, 426 F. Supp. 3d 1155, 1177 (D. Utah 2019) ("The Fourteenth Amendment text's alone is insufficient to determine the Citizenship Clause's geographic scope."); *Fitisemanu v. U.S.*, 1 F. 4th 862, 876 (10th Cir. 2021) ("Neither of these arguments [about the Citizenship Clause's text] is entirely persuasive").

247. See Brief for Defendants-Appellants, *supra* note 245, at 16–20.

248. *Id.* at 17. The government did not elaborate on whether there was any contemporary need for flexibility in acquiring territories.

249. *Id.* at 18 (citing *Downes* as an example of when "the Supreme Court has recognized that provisions like the Citizenship Clause that are expressly limited to 'the United States' do not extend to unincorporated territories like American Samoa").

250. *Id.* at 19 (explaining that "the Justices in the majority in *Downes* recognized that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories").

251. See *id.* at 10.

252. *Id.* at 22–23.

has plenary power with respect to the citizenship status of inhabitants of unincorporated territories.<sup>253</sup>

Given this heavy emphasis on Congressional plenary power, it is unsurprising that the federal government did not spend much time discussing the issue of self-determination. It did acknowledge that “[the American Samoa government’s] opposition counsels strongly against” extending constitutional citizenship.<sup>254</sup> It suggested that American Samoans could bring the issue to Congress if they reached a consensus in favor of U.S. citizenship but made it clear that authority rested with Congress.<sup>255</sup>

The American Samoa government, by contrast, focused its arguments on the importance of self-determination and the potential risks to *fa`a Sāmoa* if full U.S. citizenship is extended to American Samoa. It argued that extending citizenship against the American Samoa government’s wishes would “violate[] every legal principle of self-determination, sovereignty, and autonomy” and that this decision should be left to American Samoans and their elected representatives, in cooperation with Congress.<sup>256</sup> Self-determination underlays many of the American Samoa government’s arguments that on their face were similar to the U.S. government’s arguments but served a different purpose in the intervenors’ briefs. For example, both parties called on the Tenth Circuit to rely on the *Insular Cases* rather than *Wong Kim Ark*. But whereas the U.S. government relied heavily on *Downes*, the American Samoa government focused on later cases such as *Reid*, which was not even cited in the U.S. brief and developed the “impractical and anomalous” test.<sup>257</sup> This highlights a discrepancy in how the parties are using the *Insular Cases*: to support the idea of Congressional plenary power or to protect against potential threats to *fa`a Sāmoa*.<sup>258</sup> The American Samoa government identified the *mātai* system, racial land tenure laws, and prayer curfews as aspects

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253. See *id.* at 22 (“Congress’s longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress’s plenary powers with respect to unincorporated territories like American Samoa.”).

254. *Id.* at 30.

255. See *id.* (declining to state whether Congress would have an obligation to grant or even consider a request for statutory citizenship).

256. Intervenor Defendants-Appellants’ Opening Brief, *supra* note 148, at 11–12.

257. *Id.* at 17.

258. Compare Brief for Defendants-Appellants, *supra* note 245, at 21–22 (citing *Downes* for the proposition that Congress has plenary power over unincorporated territories, including with respect to their inhabitants’ citizenship status), with Intervenor Defendants-Appellants’ Opening Brief, *supra* note 148, at 17 (“[T]he district court improperly disregarded the anomalous and potentially disruptive consequences for the people and culture of American Samoa that would result from a judicial determination that American Samoans are automatically American citizens.”).

of Samoan culture that could be threatened by a fuller application of the Equal Protection Clause.<sup>259</sup>

The intervenors departed even more strikingly from the U.S. government's position when it came to explaining why American Samoa is not within the scope of the Citizenship Clause. The American Samoa government suggested that not only is American Samoa not "in the United States," it may not even be "under the jurisdiction" of the United States.<sup>260</sup> This argument had not been raised by any party or amicus at the district court or during the *Tuauua* litigation.<sup>261</sup> The American Samoa government now argued that as a largely self-governing territory, it could be analogized to the Indigenous peoples in the mainland United States who were held not to be covered by the Citizenship Clause in *Elk*.<sup>262</sup>

The plaintiffs pushed back on the American Samoa government's framing of the territory's relationship with the United States and on arguments that the *Insular Cases* or Philippines citizenship cases are determinative of the questions at hand. They argued that the intervenors' suggestion that American Samoa may not be under the jurisdiction of the United States is untenable given that U.S. states are also significantly self-governing and, unlike American Samoa, possess "inviolable sovereignty."<sup>263</sup> If states are under the jurisdiction of the United States, it does not make sense to suggest that a territory subject to the Secretary of the Interior's plenary power is not.<sup>264</sup> The plaintiffs also disagreed with the claim that U.S. citizenship would lead to the application of constitutional provisions such as the Equal Protection Clause that could threaten *fa`a Sāmoa*. They pointed out that these provisions are not citizenship-dependent and have already been held to apply in unincorporated territories such as American Samoa.<sup>265</sup> Rather than speculating about potential harms that could result if the status quo were changed, they emphasized ongoing harms suffered by American Samoans who "are labeled second-class by their government."<sup>266</sup> The plaintiffs also questioned the idea that self-determination had much to do with American Samoans' current status as noncitizen nationals, given Congress's repeated failure to pass

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259. Intervenor Defendants-Appellants' Opening Brief, *supra* note 148, at 19–23.

260. *Id.* at 33–34, 42–44.

261. Brief for Plaintiffs-Appellees, *supra* note 163, at 51–52.

262. Intervenor Defendants-Appellants' Opening Brief, *supra* note 148, at 45.

263. Brief for Plaintiffs-Appellees, *supra* note 163, at 52.

264. *Id.*

265. *Id.* at 49.

266. *Id.* at 7. The plaintiffs specifically highlighted that they did not have the right to vote, serve on juries, or serve as military officers. *Id.*

bills introduced by the American Samoan delegate that would simplify the naturalization process for American Samoans.<sup>267</sup>

Regarding precedent, the plaintiffs asserted that both the *Insular Cases* and the Philippines citizenship cases are inapposite because they dealt with distinct issues. *Downes* does not provide an answer, they argued, because it did not concern the Citizenship Clause, it had no majority opinion, and the dicta about citizenship was premised on white supremacy.<sup>268</sup> While they argued that the *Insular Cases* should not be extended, they claimed that birthright citizenship is a fundamental right that Congress cannot abridge even under that framework.<sup>269</sup> The plaintiffs also dismissed the U.S. government's argument that the case should be analyzed the same as earlier cases dealing with the citizenship status of people born in the Philippines. Unlike American Samoa, whose inhabitants owe permanent allegiance to the United States, the Philippines was never meant to remain a U.S. territory, and any claim its people may have had to U.S. citizenship would have been extinguished when the country became independent.<sup>270</sup>

In addition to the parties' arguments, the Tenth Circuit appeal attracted several briefs by amici curiae, including nonprofit organizations, legal scholars, and government officials from other U.S. territories. Most supported the plaintiffs' position, although one brief did not take a position on what the ultimate outcome should be. That brief, authored by several prominent scholars of the *Insular Cases*, argued simply that the *Insular Cases* do not control the outcome of the case and should not be further extended.<sup>271</sup> Another notable brief was submitted by current and former government officials from other U.S. territories. They sought to highlight the potential implications of *Fitisemanu* for residents of their territories, who could find their U.S. citizenship vulnerable to Congressional revocation and experience further marginalization within American politics.<sup>272</sup>

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267. *Id.* at 51.

268. *Id.* at 40.

269. *Id.*

270. *Id.* at 15–16.

271. Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees With Respect to the *Insular Cases* at 2, *Fitisemanu v. United States*, 20 F. 4th 1325 (10th Cir. 2020) (Nos. 20-4017, 20-4019).

272. Brief of Amici Curiae Members of Congress, Former Members of Congress, and Former Governors of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Plaintiffs-Appellees and Affirmance at 4, *Fitisemanu v. United States*, 20 F. 4th 1325 (10th Cir. 2020) (Nos. 20-4017, 20-4019) [hereinafter Brief of Members of Congress, Former Members of Congress, and Former Governors].

They cautioned the court that “American Samoa’s leaders do not hold a veto over the constitutional rights of the inhabitants of *all* the Territories.”<sup>273</sup>

### 3. Tenth Circuit Outcome

A divided three-judge panel of the Tenth Circuit reversed the district court’s opinion, finding that the Citizenship Clause does not apply in American Samoa.<sup>274</sup> It rejected the district court’s choice to rely on *Wong Kim Ark* and identified three reasons that the *Insular Cases* provide the appropriate framework: (1) the *Insular Cases* directly address questions of how the Constitution applies in unincorporated territories; (2) *Wong Kim Ark* treats the English common law rule as merely persuasive, rather than binding, authority in interpreting the Citizenship Clause; and (3) the *Insular Cases* allow consideration of American Samoans’ wishes.<sup>275</sup> While acknowledging the *Insular Cases*’ problematic origins, the Tenth Circuit found that they “lead to the most respectful and just outcome.”<sup>276</sup>

The majority opinion, written by Judge Carlos F. Lucero, used a three-step analysis in applying the *Insular Cases* framework. First, it asked if the Citizenship Clause applies to American Samoa by its own terms. It found the geographic scope of the provision ambiguous.<sup>277</sup> It did note that if the issue were to be decided based on the text alone, “its consistent historical interpretation would counsel a narrow reading,” which would leave American Samoans’ citizenship up to Congress.<sup>278</sup> However, the court did not stop there but moved on to the next two steps, derived from the *Insular Cases*. Judge Lucero wrote only for himself in these sections. The second question was whether citizenship is a “fundamental personal right” as defined in *Dorr*.<sup>279</sup> Judge Lucero noted that “parsing rights to determine whether they are truly necessary to free government is a somewhat uncomfortable inquiry.”<sup>280</sup> Despite this discomfort, he determined that birthright citizenship is not necessary to free government, considering that many democratic countries do not provide for birthright citizenship.<sup>281</sup>

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273. *Id.*

274. *Fitisemanu v. United States*, 1 F.4th 863, 864–65 (10th Cir. 2021).

275. *Id.* at 873.

276. *Id.* at 875.

277. *Id.*

278. *Id.* at 877.

279. *Id.* at 878.

280. *Id.*

281. *Id.* at 878–79.

He then moved on to the third question, where he spent the most time: whether it would be “impracticable and anomalous” to apply the Citizenship Clause to American Samoa. To Judge Lucero, the most persuasive factor was the opposition by American Samoa’s elected representatives.<sup>282</sup> He emphasized that people should not be incorporated into another nation’s citizenry without their consent and that “[r]espect for this principle should be at its zenith in the case of territories born from American imperial expansion . . . .”<sup>283</sup> He also accorded substantial weight to the American Samoa government’s concerns about effects on *fa`a Sāmoa*, finding “insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of *fa`a Samoa*.”<sup>284</sup> Given these practical concerns, Judge Lucero concluded that extension of the Citizenship Clause would be “impracticable and anomalous.”<sup>285</sup>

Chief Judge Timothy Tymkovich concurred in the judgment but not with Judge Lucero’s analysis of the second and third steps. He opined that considerations of American Samoans’ wishes are better left to the political branches.<sup>286</sup> Instead, given the Citizenship Clause’s ambiguous text, he turned to historical practice, which supports the idea that Congress can decide the citizenship status of residents of unincorporated territories.<sup>287</sup>

Judge Robert Edwin Bacharach dissented. He used the same framework as Judge Lucero but came to the opposite conclusion on each question. He argued that the Citizenship Clause’s scope is not ambiguous because when the Fourteenth Amendment was passed, “Congress and ordinary Americans understood that U.S. citizenship extended to everyone born within the nation’s territorial limits who did not owe allegiance to another sovereign entity.”<sup>288</sup> Even if this were not the case, Judge Bacharach concluded that the Citizenship Clause would still apply to American Samoa because citizenship is a fundamental right whose application would be neither impracticable nor anomalous.<sup>289</sup> He was particularly critical of Judge Lucero’s invocation of American Samoa’s self-determination. American Samoans have a choice, he pointed out: they can remain part of the United States (as U.S. citizens) or they can choose independence.<sup>290</sup> Even if public opinion

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282. *Id.* at 879.

283. *Id.*

284. *Id.* at 881.

285. *Id.*

286. *Id.* at 883 (Tymkovich, C.J., concurring).

287. *Id.*

288. *Id.* at 885 (Bacharach, J., dissenting).

289. *Id.* at 902.

290. *Id.* at 903.

were persuasive in the issue at hand, there was no poll or other evidence on the record to show how most American Samoans feel about U.S. citizenship.<sup>291</sup> Judge Bacharach expressed further concern that “[b]y Judge Lucero’s logic, every change in popular will would require a change in our application of the Citizenship Clause.”<sup>292</sup>

Following the Tenth Circuit’s decision, the plaintiffs petitioned unsuccessfully for a rehearing by the full Tenth Circuit.<sup>293</sup> While the petition was pending, the Fono, American Samoa’s legislature, passed a unanimous resolution supporting the Tenth Circuit decision and calling on the plaintiffs, their lawyers, and amici to reconsider their position. The resolution also invites special interest groups to visit American Samoa, meet with American Samoans, “and if convinced the people want U.S. citizenship to be conferred by the U.S. Congress, work within the existing governmental processes to hold a referendum on the subject . . . .”<sup>294</sup>

The Tenth Circuit ruling could still be overturned if the Supreme Court decides to hear the plaintiffs’ appeal. A Supreme Court decision could clear up a number of uncertainties, including the contemporary relevance of the *Insular Cases*, how to analyze constitutional issues in U.S. territories, the citizenship status of American Samoans, and whether the citizenship of persons born in other territories is constitutionally protected. But if past trends continue, the Court is likely to avoid clarifying questions about the *Insular Cases*.<sup>295</sup> For now, any Supreme Court decision is merely hypothetical; the Tenth Circuit decision still holds.

#### 4. Implications of the Tenth Circuit Decision

As the variety of actors and perspectives represented in briefs to the Tenth Circuit illustrate, there are competing interests at stake, and *Fitisemanu*’s outcome has potential repercussions far beyond the plaintiffs and even beyond American Samoa. There is a danger in trying to reduce *Fitisemanu* into binary choices

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291. *Id.* at 904.

292. *Id.* at 905.

293. *Americans Denied Citizenship Seek Review by Full Tenth Circuit*, EQUALLY AMERICAN (July 31, 2021), [https://www.equalrightsnow.org/americans\\_denied\\_citizenship\\_seek\\_review\\_by\\_full\\_tenth\\_circuit](https://www.equalrightsnow.org/americans_denied_citizenship_seek_review_by_full_tenth_circuit) [<https://perma.cc/2VBU-QSVD>]; *Fitisemanu v. United States*, 20 F.4th 1325 (10th Cir. 2021).

294. *Fono Passes Resolution Affirming Self-Determination for American Samoa*, SAMOA NEWS (Aug. 18, 2021, 8:37 AM), <https://www.samoanews.com/local-news/fono-passes-resolution-affirming-self-determination-american-samoa> [<https://perma.cc/EL89-385P>].

295. See Cepeda Derieux & Weare, *supra* note 98, at 295–96 (describing the Supreme Court’s reluctance to either rely on or overturn the *Insular Cases*).

between citizenship or national status, individual rights or collective rights, status quo or change, and colonialism or self-determination. Even an account of three different interests, such as the positions of the plaintiffs, defendants, and intervenors, leaves out important perspectives. It obscures the interests of people living in other U.S. territories, whose legal rights and status could be affected by the winning legal doctrine, as well as those American Samoans whose desires do not align with those of their elected government or of the plaintiffs.<sup>296</sup> The following discussion outlines some of the implications of the Tenth Circuit's ruling.

**a. Self-Determination and Citizenship**

The finding that the Citizenship Clause does not apply in American Samoa would, on its face, seem to be a win for both the U.S. government and the American Samoa government. After all, that is the result that both advocated for. However, the two governments advanced very different arguments, and the implications of such a holding depend in part on the underlying rationale. Judge Lucero's opinion was closely aligned with the American Samoa government's position, as it emphasized American Samoa's self-determination rights and potential threats to *fa'a Sāmoa*. However, the portions of the opinion focusing on these issues are the portions that Chief Judge Tymkovich did not join.

Judge Lucero's application of the "impractical and anomalous" test not only led to the outcome and relied on the factors called for by the American Samoa government, it also left open the possibility of a different outcome if the same question were asked in a different territory. If there were a bright-line ruling that the Citizenship Clause does not apply in unincorporated territories (as the U.S. government argued, and as Chief Judge Tymkovich seemed to conclude), people born in U.S. territories would still have statutory citizenship, but it would not necessarily be constitutionally protected. By contrast, if a territory's residents are already U.S. citizens and its government takes the position that their citizenship should be constitutionally protected, there would be no reason for a court to find it impractical or anomalous to apply the Citizenship Clause to that territory. In this sense, Judge Lucero's opinion supports all unincorporated territories' ability

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296. Sailiata explains how the perspectives presented in *Tuaua* "revolved around a limited consideration of Samoan sovereignty" and did not consider more than slight changes to American Samoa's current political status. Such framings erase the positions of American Samoans who favor a more drastic departure from the status quo, such as independence from the United States and reunification with the Independent State of Samoa. Sailiata, *supra* note 13, at 77–79.

to decide their own citizenship status—and have their residents’ citizenship protected.<sup>297</sup>

However, the use of the “impractical and anomalous” test does not guarantee results that align with territorial residents’ wishes or protect local cultural practices. Several scholars have criticized Judge Lucero’s application of the test as lacking rigorous factual or legal analysis. They have pointed out that Tenth Circuit had limited information available to assess American Samoan public sentiment about U.S. citizenship; rather, it performed a “holistic review” based only on the briefs of parties and amici.<sup>298</sup> Furthermore, it lacked a convincing factual or legal basis for concluding that U.S. citizenship would threaten *fa`a Sāmoa*.<sup>299</sup> When applied in such a way, the test may not deliver the results it promises.

Reliance on government positions and public opinion to determine if extending citizenship is impractical or anomalous may also create uncertainty about the citizenship status of people born in American Samoa in the event that public and governmental opinion on the issue changes in the future. In *Boumediene*, the Supreme Court noted that “over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”<sup>300</sup> Rose Cuison Villazor has suggested that changes in the culture, economy, and land use of the Northern Mariana Islands could lead to a different outcome from that of *Wabot*, which upheld racial land alienation restrictions under the “impractical and anomalous” test, if an analogous challenge were mounted today.<sup>301</sup> A similar issue could arise if public opinion in American Samoa shifted strongly in favor of U.S. citizenship.<sup>302</sup> Judge Lucero insists that his “analysis certainly does not ‘require’ a change in outcome for ‘every change in the

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297. However, individuals born in territories with statutory grants of U.S. citizenship have previously been unable to obtain a judicial declaration about the source of their citizenship, so it may be difficult to find a potential plaintiff with standing to raise the issue in the courts and clarify whether a territory’s residents’ citizenship is constitutional or merely statutory. See Brief for Members of Congress and Former Governmental Officials, *supra* note 55, at 9–10.

298. Guy C. Charlton & Tim Fadgen, *Case Note: Fitiseanu v. United States: U.S. Citizenship in American Sāmoa and the Insular Cases*, 39 UCLA PAC. BASIN L.J. 25, 45 (2022).

299. Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2516–18 (2022); Erman, *supra* note 203, at 843–45.

300. *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

301. Cuison Villazor, *supra* note 154, at 148.

302. One hopes that if this were to happen, Congress would pass legislation extending U.S. citizenship to individuals born in American Samoa, making a determination of the constitutional question less important. However, given Congress’s repeated failure to pass bills that would make naturalization easier for American Samoans, this cannot be taken for granted.

popular will’ of American Samoa.”<sup>303</sup> Oscillating public opinion may be unlikely, but a future court applying the same framework under changed circumstances could presumably come to the opposite conclusion: that the Citizenship Clause does have force in American Samoa. Given that public opinion is constantly evolving, whether or not the Citizenship Clause applies to American Samoa could again become an open question if it is subject to shifting “majoritarian winds.”<sup>304</sup>

Chief Judge Tymkovich’s concurrence, which is based on historical practice, aligns more closely with the U.S. government’s position emphasizing Congressional plenary power over unincorporated territories.<sup>305</sup> This goes against the principles at the center of American Samoa’s arguments. Plenary power over unincorporated territories would allow the federal government the flexibility to defer to the American Samoa government’s wishes and consider American Samoans’ unique needs and circumstances in governing the territory, but the federal government would not be required to do so. If American Samoans are not U.S. citizens because Congress has not exercised its sole discretion to grant them citizenship, Congress could also extend citizenship against the wishes of the people and government of American Samoa.

Fortunately, none of the Tenth Circuit judges endorsed another problematic aspect of the U.S. government’s briefs: the argument that the remarks about citizenship in *Downes* are not dicta but binding precedent regarding the Citizenship Clause and unincorporated territories. Notwithstanding the questionable basis of this position, given that *Downes* was not a case about the Citizenship Clause, a judicial ruling reinforcing this argument could have two negative effects. First, it would uplift the racist ideologies embedded in these statements. The justices who opined that territorial residents could not immediately be U.S. citizens explicitly said this was because they were “uncivilized race[s]” unfit for citizenship.<sup>306</sup> These racist stereotypes should have no place in our constitutional jurisprudence. Second, a holding that the Citizenship Clause does not apply in any unincorporated territory would foreclose any claim that the

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303. *Fitisemanu v. U.S.*, 1 F. 4th 862, 880 (10th Cir. 2021).

304. See Ponsa-Kraus, *supra* note 299, at 1008.

305. Although Judge Carlos F. Lucero emphasizes American Samoans’ self-determination over Congressional plenary power, his opinion arguably does not practically challenge Congress’s wide discretion in the area of citizenship. Robertson and Manta argue that although the “rhetoric [of *Tuaua* and *Fitisemanu*] sounds as if it defers to the wishes of the inhabitants of the U.S. Territories, by failing to recognize that the Fourteenth Amendment applies to the U.S. Territories, the courts are leaving the primary power to control citizenship to Congress, not to the people born there.” Robertson & Manta, *supra* note 172, at 1351.

306. *Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J., concurring).

citizenship of people born in other territories is derived from the Constitution and not just from statute.

If a future court were to adopt the reasoning of the district court or Bacharach's dissent, it would offer more certainty and provide numerous benefits to individuals born in American Samoa and other U.S. territories. Perhaps the most obvious beneficiaries would be the plaintiffs and other people born in American Samoa who have moved to one of the states or enlisted in the U.S. military,<sup>307</sup> although American Samoans in American Samoa may also benefit from full U.S. citizenship and recognition "as an equal among all Americans—continental and territorial."<sup>308</sup> Looking beyond American Samoa, people born in other U.S. territories would have the peace of mind of knowing that their citizenship is constitutionally protected and cannot be taken away without their consent.<sup>309</sup> Recognizing constitutional citizenship for those born in U.S. territories could be a first step away from treating territorial residents as second-class citizens.<sup>310</sup>

However, these benefits would come at a heavy cost for principles of self-determination. If all U.S. territories are automatically within the scope of the Citizenship Clause, people who live in those territories have no opportunity to decide for themselves whether U.S. citizenship is even something they want. The relationship between the United States and its unincorporated territories has been shaped by shameful efforts to bar racialized territorial populations from full political inclusion. However, unqualified inclusion into the colonial power is not necessarily the best solution to that wrong, especially given the history of U.S.

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307. These benefits would be particularly significant for American Samoans who are unable to naturalize. Recognizing the barriers created by naturalization requirements, the Samoan Federation of America described laws requiring American Samoans to go through the standard naturalization process as "a poll tax, literacy test, voter identification requirement, and felon disenfranchisement provision all rolled into one." Brief of *Amicus Curiae* Samoan Federation of America, Inc. in Support of Plaintiffs-Appellees and to Affirm at 2, *Fitisemanu v. U.S.*, 1 F. 4th 162 (10th Cir. 2020) (Nos. 20-4017, 20-4019).

308. KRUSE, *supra* note 69, at 81 (discussing the benefits of an easier naturalization process). One area where tangible benefits may be noted is in international travel. U.S. national passports state prominently that the bearer is not a U.S. citizen. Some countries, including the Independent State of Samoa, impose different travel requirements for U.S. nationals than for U.S. citizens. This led one former governor of American Samoa to complain that U.S. national passports are "not real at all." *Lolo Raises Issue of U.S. National Status With Feds*, SAMOA NEWS (Feb. 23, 2016, 8:40 AM), <https://www.samoanews.com/lolo-raises-issue-us-national-status-feds> [<https://perma.cc/4W6K-KYSZ>].

309. Robertson & Manta, *supra* note 172, at 1334.

310. See Brief of Members of Congress, Former Members of Congress, and Former Governors, *supra* note 272, at 3 ("And if those Territories are not 'in the United States,' then the millions of citizens born there are truly second-class citizens.").

citizenship being seen as an unwelcome imposition by Indigenous peoples and individuals born in U.S. territories.<sup>311</sup> As the American Samoa government's arguments make clear, there are still people under U.S. governance who would prefer not to be U.S. citizens.<sup>312</sup> The risks of adopting a blanket rule to apply to all U.S. territories are particularly great given the fact that territories do not have voting representation in Congress and do not have a say in constitutional amendment processes.

Given these concerns, is Judge Lucero's opinion using the "impractical and anomalous" test the best possible outcome? Or is there a way future courts could strike a better balance and respect American Samoans' right to self-determination without relying on racist precedent, perpetuating legal uncertainty, and possibly undermining other territories' self-determination? One possibility may be to explicitly tie the Citizenship Clause's territorial scope to agreements between the federal government and a territory's elected leadership. This would align the Citizenship Clause with the United States' repeated commitments at the international level to support self-determination rights.<sup>313</sup> By incorporating the principle of self-determination into the interpretation of the Citizenship Clause, courts could recognize the right of all U.S. territories to choose their own citizenship status, even if not all territories make the same choice. It would leave constitutional citizenship up to territorial residents and their elected governments, rather than federal courts or Congressional discretion. And requiring an agreement about citizenship status between the federal and territorial governments would make it easy to tell where the Citizenship Clause applies, unlike the "impractical and anomalous" test, which could have unpredictable results due to changing circumstances and the interpretive difficulty of determining where to draw the line.

Courts would have to define what type of agreement suffices to extend the Citizenship Clause to a territory. Would the political negotiations that led to

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311. See, e.g., Porter, *supra* note 38; Smith, *supra* note 11, at 118–19 (discussing the unsuccessful efforts by some Puerto Ricans to denounce U.S. citizenship while remaining Puerto Rican citizens).

312. It is unclear how widely this sentiment is held in American Samoa, but lack of unanimity is no reason for excluding territorial peoples from any say over their own status.

313. See, e.g., U.N. Charter art. 1, ¶ 2; International Covenant on Civil and Political Rights art. 1, ¶¶ 1, 3, Dec. 16, 1966, 993 U.N.T.S. 3 [*hereinafter* ICCPR]; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples art. 3 (Sept. 13, 2007) [*hereinafter* UNDRIP]. While the United States did not vote for UNDRIP when it was passed by the UN General Assembly, it officially announced its support for the Declaration in 2011. Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/HS6U-9WRY>].

Congress granting statutory citizenship to Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands qualify, or would an agreement need to explicitly mention the Citizenship Clause? Whatever the answer, once the requirements are defined, it would be easy for territorial governments to determine if the Citizenship Clause applies in their territory and, if the answer is no, pursue forming the required agreement with the federal government. If courts require an express agreement about the Citizenship Clause, there is a risk that the federal government could refuse to make such agreements, even if territorial governments ask for them and even if the territory's residents already have statutory citizenship. To avoid a situation where U.S. citizens born in unincorporated territories are denied constitutionally protected citizenship, then, it would be better to interpret any citizenship agreement between the federal government and a territory's democratically elected leaders as extending the Citizenship Clause to that territory.

**b. Implications for *fa`a Sāmoa***

Thus far, this discussion has not analyzed the issue that appears to be most salient to the American Samoa government: implications for *fa`a Sāmoa*. This is because there is no clear relationship between the outcome of Citizenship Clause litigation and the protection or erosion of traditional practices in American Samoa. An extension of U.S. citizenship to American Samoans would not necessarily be harmful to *fa`a Sāmoa*.<sup>314</sup> Conversely, maintaining the status quo is no guarantee that courts will uphold American Samoa's current laws and policies if legal challenges arise.

For example, the American Samoa government suggests that granting full U.S. citizenship to persons born in American Samoa "would include full application of the Equal Protection Clause of the Fourteenth Amendment," which could threaten cultural institutions such as the *mātai* system and land alienation restrictions.<sup>315</sup> However, it has not proven that the Equal Protection Clause does not already apply in full. The High Court of American Samoa has held that "the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa."<sup>316</sup> It also held that

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314. The American Samoa government admits that "it is far from predetermined that precedent would require abolition of the matai system if the Court extended U.S. citizenship to American Samoans." Intervenor Defendants-Appellants' Opening Brief, *supra* note 148, at 20.

315. *Id.* at 19.

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

race-based land alienation restrictions survive strict scrutiny because of a compelling state interest in preserving lands for Samoans and protecting *fa`a Sāmoa*.<sup>317</sup> Future courts could overrule this holding, and that may be particularly likely if a challenge were heard in the District of D.C. rather than in a court located in American Samoa.<sup>318</sup> This highlights the current constitutional precarity of American Samoa's land alienation laws, but it does not suggest that U.S. citizenship would change how the Equal Protection Clause or other constitutional provisions are applied in American Samoa. It has long been established that the Fourteenth Amendment's equal protection guarantees are not limited to U.S. citizens.<sup>319</sup>

In addition to its concerns about the Equal Protection and Due Process Clauses, the American Samoa government suggests that the Establishment Clause of the First Amendment<sup>320</sup> could threaten American Samoa prayer curfews.<sup>321</sup> Given that the Revised Constitution of American Samoa also prohibits the establishment of a state religion,<sup>322</sup> it seems unlikely that extending the Establishment Clause to American Samoa would change much—assuming that it does not already apply in the territory, which is far from certain.<sup>323</sup> Taken together, the caselaw and language of the Revised Constitution of American Samoa dealing with due process, equal protection, and establishment of religion suggest that the provisions of the U.S. Constitution highlighted by the American Samoa government as potentially threatening to *fa`a Sāmoa* already have force in the territory, regardless of its residents' citizenship status.

Even if some of these constitutional provisions do not currently apply in American Samoa, there is no guarantee that aspects of *fa`a Sāmoa* codified in American Samoa law will not be found unconstitutional if legal challenges are mounted. In its briefs, the American Samoa government advocates for applying the “impractical and anomalous” test. By allowing courts flexibility in their

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317. *Id.*

318. Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337, 384–85 (1980) (arguing that the outcome of *Craddick* was justified but that a mainland court would likely apply a much more rigorous review).

319. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

320. U.S. CONST. amend. I.

321. Intervenor Defendants-Appellants' Opening Brief, *supra* note 148, at 23. For a detailed analysis of the constitutionality of curfews in American Samoa, see generally Hall, *supra* note 202.

322. AM. SAM. CONST. art. I, § 1.

323. See Brief for Plaintiffs-Appellees, *supra* note 163, at 49 (remarking that the Supreme Court has already held that the Establishment Clause applies in unincorporated territories).

analysis of constitutional provisions in unincorporated territories, this test certainly offers a possibility of greater legal protection of *fa`a Sāmoa* than would be afforded under traditional constitutional analysis.<sup>324</sup> But this possibility is not a guarantee. The flexibility of the “impractical and anomalous” test is both a blessing and a curse; its vagueness can result in unpredictable outcomes.<sup>325</sup> While the American Samoa government may, understandably, prefer this ambiguity to a clear rule that all constitutional provisions apply in American Samoa in exactly the same way as they do in the states, the *Insular Cases* do not offer clear protection for *fa`a Sāmoa*.

#### IV. PRESERVING FA`A SĀMOA WITHOUT THE *INSULAR CASES*

This uncertainty about which parts of the U.S. Constitution have force in American Samoa and how courts could apply them highlights the undesirability of the *Insular Cases*, and of U.S. constitutional law more broadly, for dealing with intersecting issues of political inclusion, self-determination, and cultural protection.

Cultural preservation for its own sake is certainly not always desirable, and it has a long, complicated history in United States-American Samoa relations. Kirisitina Gail Saliata argues that U.S. naval officials around the turn of the twentieth-century:

saw themselves as guardians of primitive peoples, protecting them from the opportunistic settlers or colons, who had ‘fatally impacted’ the rest of the Pacific in the preceding century. It was their moral duty to rescue and preserve Samoans as they were culturally endangered by the age of empire.<sup>326</sup>

Their supposed duty of cultural preservation was then used to justify military occupation of the islands.<sup>327</sup> This shows how language of cultural preservation can sometimes be a cover for harmful forces like colonial paternalism.

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324. See Cuison Villazor, *supra* note 154, at 145 (“[G]iven that conventional frameworks appear to be hostile to laws that may be viewed as protective of the rights of [I]ndigenous groups, the *Insular Cases* seem to be, at this juncture, the primary means through which some territorial peoples might be able to push for protection of certain cultural and political rights that they believe they would not be able to achieve under traditional constitutional analysis.”).

325. A group of former judges from U.S. territories have complained that the *Insular Cases* do not offer clear guidance to judges seeking to determine if a particular constitutional provision applies or not. Brief of Former Federal and Local Judges, *supra* note 120, at 6.

326. Saliata, *supra* note 13, at 14.

327. *Id.* at 2; Dardani, *supra* note 196, at 332.

Rose Cuison Villazor offers a helpful framework for thinking about cultural preservation in light of the dangers such narratives can pose. She argues that the law should protect Indigenous territorial cultures, but this goal should be subject to certain limiting principles. First, cultures change, and the law should not protect cultural beliefs or institutions that no longer exist. Second, cultural preservation arguments should not automatically be accepted at face value. We must also listen to the voices of marginalized members of Indigenous communities who may be seeking to change aspects of the culture. Third, we must be mindful of the ways that cultural preservation arguments can be used to discriminate against nonindigenous persons.<sup>328</sup>

This third caveat is especially pertinent in the case of laws that treat people differently based on race, which can walk a fine line between legitimate purposes, such as remedying past wrongs, and subordinating other groups. Consider land alienation restrictions. American Samoans have reason to fear displacement. Without racial land ownership laws, American Samoa could easily have ended up like Hawai`i, where Indigenous Hawaiians suffered massive displacement from their ancestral lands and now experience disproportionate levels of poverty and homelessness.<sup>329</sup> Access to land is especially critical in island nations, where climate change and rising sea levels have left some Indigenous communities struggling to survive.<sup>330</sup> In this context, prioritizing land ownership for Indigenous Samoans may be necessary for survival. Removing racial land ownership restrictions could open the door for wealthy outsiders to buy up large tracts of land as investments or vacation homes, as has happened in Hawai`i, limiting land access for the Indigenous population. However, laws that privilege Indigenous Samoans could also adversely affect other marginalized populations in the territory. American Samoa is home to substantial numbers of immigrants, many of whom are Pacific Islanders from places such as Tonga and come to the territory to work in low-paying, dangerous cannery jobs. Many American

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328. Cuison Villazor, *supra* note 15, at 132.

329. Victor Geminiani & Madison DeLuca, *Hawai`i Vacation Rentals: Impact on Housing & Hawai`i's Economy*, HAWAI`I APPLESEED CTR. FOR L. & ECON. JUST. (Mar. 2018), <http://hiappleseed.org/wp-content/uploads/2018/03/Appleseed-Vacation-Rental-Report-rev.-3.29.18.pdf> [<https://perma.cc/EG46-5W2K>]; Carla Herreria Russo, *Land, Loss and Love: The Toll of Westernization on Native Hawaiians*, HUFFPOST, (May 31, 2018), [https://www.huffpost.com/entry/hawaii-land-westernization\\_n\\_5afc9c72e4b0a59b4e003a35](https://www.huffpost.com/entry/hawaii-land-westernization_n_5afc9c72e4b0a59b4e003a35) [<https://perma.cc/6KHF-FMY6>].

330. See Views, Commc'n No. 2728/2016, Hum. Rts. Comm., CCPR/C/127/D/2728/2016, ¶¶ 3, 8.6 (2016) (finding that for admissibility purposes, complaint author established a risk of impairment to his right to life based on deportation to Kiribati, where sea level rise has led to violent land disputes over decreasing habitable space and contamination of freshwater supply).

Samoans view these immigrants from different cultural backgrounds as a threat to their way of life.<sup>331</sup> By not being of Samoan descent, non-Samoan immigrant workers in American Samoa are already excluded from land ownership and certain governmental positions.<sup>332</sup> Some American Samoans have argued that U.S. national status should only be granted to children of American Samoan parents, which would further entrench immigrant communities as permanent outsiders.<sup>333</sup> While any influx of people to small islands can create pressures on land and resources, there are different histories and power dynamics at play when the newcomers are poor economic migrants rather than wealthy businesspeople or tourists.

Neither American Samoa's racial restrictions nor U.S. equal protection jurisprudence distinguishes clearly between these types of racial distinctions. It is not surprising that U.S. constitutional law is not well-suited to address the nuances of some issues that arise in American Samoa. It was developed in a different political, racial, and geographical context. Furthermore, contemporary American equal protection jurisprudence often falls short even in addressing racial discrimination in the mainland United States, particularly as the Supreme Court has shifted to an anti-classification rather than anti-subordination approach to equal protection.<sup>334</sup> Even if one takes issue with some of the ways in which the American Samoa government has chosen to protect *fa`a Sāmoa*, American Samoans should be allowed to develop their own framework to balance questions of cultural preservation and equal protection, if they so desire, rather than having the American framework forced on them.<sup>335</sup>

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331. JoAnna Poblete-Cross, *Bridging Indigenous and Immigrant Struggles: A Case Study of American Sāmoa*, 62 AM. Q. 501, 504 (2010).

332. See *supra* II.B.2 (describing racial restrictions in American Samoa law).

333. Poblete-Cross, *supra* note 331, at 512.

334. See, e.g., Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2661–62 (2022) (describing anti-classification and anti-subordination views of race and law); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273, 305 (Rachel F. Moran & Devon Wayne Carbado, eds.) (“[T]he principal harm of racism involves violent subordination, not the transgression of meritocratic norms [such as colorblindness]”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257, 257 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds., 1995) (arguing that color-blind constitutionalism “fosters white racial domination”).

335. C.f. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 803 (2007) (“Though I do not always agree with the decisions of tribal courts and tribal councils . . . I nevertheless advocate against further expansions of federal control over tribal decisionmaking that would impede tribal self-governance and risk the destruction of tribal culture.”).

This Part briefly outlines some ways that American Samoa could protect its traditional practices against legal challenges without relying on the *Insular Cases*. This Part's particular focus is on practices designed to benefit Indigenous Samoans, which would be classified as racially discriminatory under traditional equal protection analysis.

### A. Finding a Compelling Governmental Interest

The American Samoa government's positions in Citizenship Clause litigation and in statements to United Nations (UN) bodies reflect a desire to maintain the status quo as much as possible when it comes to the relationship between the United States and American Samoa. It has acknowledged the options available "[s]hould the American Samoan people decide to change their status with the United States"<sup>336</sup> but presented a largely positive story about the current and historical relationship.<sup>337</sup> For as long as American Samoa chooses to continue this relationship without major changes, its defense against any constitutional challenges to aspects of *fa'a Sāmoa* has to rely on traditional constitutional jurisprudence. In the area of racial classifications, such as land alienation restrictions and rules about who can hold a *ma'tai* title, this would mean establishing a compelling governmental interest that could overcome strict scrutiny.<sup>338</sup>

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336. Intervenor Defendants-Appellants' Opening Brief, *supra* note 148, at 26.

337. *See id.* at 7 ("Since 1900, American Samoa . . . has worked together with the United States to curate a unique relationship between the U.S. Government and American Samoa."); Eni F.H. Faleomavaega, Delegate for American Samoa, U.S. House of Representatives, Statement Before the United Nations Special Committee on Decolonization (May 23, 2001), [https://web.archive.org/web/20120518045415/http://www.house.gov/list/speech/as00\\_faleomavaega/undecolonization.html](https://web.archive.org/web/20120518045415/http://www.house.gov/list/speech/as00_faleomavaega/undecolonization.html) [<https://perma.cc/7X4Q-967Z>].

338. "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand v. Peña*, 515 U.S. 200, 227 (1995). Establishing a compelling interest for racial classifications has become ever more important as jurisprudence has limited non-mainland Indigenous peoples' ability to legally distinguish themselves using non-racial categories such as indigeneity. Rolnick, *supra* note 334, at 2722, 2755.

## 1. Foundational Documents: Treaties, Deeds of Cession, and Constitutions

*Craddick v. Territorial Registrar*<sup>339</sup> lays out a blueprint for finding a compelling governmental interest rooted in American Samoa's founding documents. This 1980 case addressed the constitutionality of statutory restrictions on the alienation of land to non-Samoans. The Territorial Registrar of American Samoa refused to register a deed conveying land to the Craddicks, a married couple consisting of a non-Samoan U.S. citizen and an Indigenous Samoan. The couple argued that American Samoa's land alienation restrictions violated constitutional guarantees of due process and equal protection.<sup>340</sup> The High Court of American Samoa held that due process and equal protection guarantees applied to American Samoa and that the statute in question created a race-based classification that was subject to strict scrutiny.<sup>341</sup> It found that racial classifications in land alienation restrictions were permissible because of the "compelling historical and continuing interest in preserving the land and culture of the Samoan people."<sup>342</sup> The basis for the compelling interest identified by the High Court derived from the Revised Constitution of American Samoa and various treaties.<sup>343</sup> These foundational documents continue to constitute a source of governmental duty to protect *fa'a Sāmoa* and a potential basis for a compelling governmental interest.

The United States has formally recognized the importance of preserving Samoan lands for Indigenous Samoans since the 1890 Treaty of Berlin, which declared: "In order that the native Samoans may keep their lands for cultivation by themselves and by their children after them, it is declared that all future alienation of lands in the Islands of Samoa to the citizens or subjects of any foreign country, whether by sale, mortgage or otherwise shall be prohibited," subject to certain enumerated exceptions.<sup>344</sup> The *Craddick* court recognized that the later Deeds of Cession "carried forward the spirit" of this treaty, also providing for the protection of Samoan lands and culture.<sup>345</sup> The Cession of Tutuila and Aunu'u called on the United States to "respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property" and asked that "[t]he Chiefs of the towns

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339. 1 Am. Samoa 2d 10 (App. Div. 1980).

340. *Id.* at 11–12.

341. *Id.* at 12.

342. *Id.* at 14.

343. *Id.* at 13.

344. 1890 Treaty of Berlin, U.S.-Am. Sam., art. IV, § 1, June 14, 1889, 26 Stat. 1497.

345. *Craddick*, 1 Am. Samoa 2d at 13 n.3.

will be entitled to retain their individual control of the separate towns.”<sup>346</sup> The later Cession of Manu’a was even more explicit about the *mātai*’s intent to retain certain aspects of their traditional governance. It provided “that the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.”<sup>347</sup> The fact that American Samoans voluntarily ceded sovereignty under the express condition that their customs regarding land ownership and the *mātai* system be recognized weighs strongly in favor of finding a compelling governmental interest in protecting these customs, so long as that remains the desire of the American Samoan people.<sup>348</sup>

In addition to these agreements, the Revised Constitution of American Samoa codifies a responsibility to protect *fa`a Sāmoa*, as noted by the High Court in *Craddick*.<sup>349</sup> The Bill of Rights establishes a governmental policy “to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests.”<sup>350</sup> The Constitution further enshrines the protection of *fa`a Sāmoa* by making it difficult to change land alienation laws<sup>351</sup> and reserving certain offices for *mātai* who fulfill their “obligations as required by Samoan custom.”<sup>352</sup> This constitutional duty to protect *fa`a Sāmoa* forms another basis for a compelling governmental interest in doing so for the American Samoa government. Given the Secretary of the Interior’s vast powers over the governance of American Samoa, this compelling interest would arguably extend to the U.S. federal government as well.

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346. CESSION OF TUTUILA AND AUNU’U (Apr. 17, 1900). This was not an unqualified demand, however. The Cession provided that the *mātai* would retain control “if that control is in accordance with the laws of the United States of America concerning Tutuila.” *Id.*

347. CESSION OF MANU’A ISLANDS (July 16, 1904). The Cession of Manu’a Islands, unlike the Cession of Tutuila and Aunu’u, did not condition customary rights on harmony with U.S. law.

348. In the context of the CNMI, the Ninth Circuit noted that legislative history “indicate[s] that the political union of the Commonwealth and the United States could not have been accomplished without the [racial land alienation] restrictions.” It found this “solemn and binding undertaking” a persuasive argument that the land alienation restrictions should be upheld. *Wabol v. Villacrusis*, 958 F.2d 1450, 1461 (9th Cir. 1990). *Wabol* did not use this as the grounds for a compelling governmental interest, as it analyzed the issue under the *Insular Cases*, not equal protection doctrine. *See id.* at 1460–62 (applying the “impractical and anomalous” test). However, the reasoning could easily be transferred to the analysis of whether a compelling governmental interest exists.

349. *Craddick*, 1 Am. Sam. 2d at 12.

350. AM. SAM. CONST. art. I, § 3.

351. *Id.*

352. *Id.* art. II, § 3; *id.* art. IV, § 4.

## 2. International Law

Another argument available to the American Samoa government is that the United States' international law obligations compel it to respect American Samoa's right to self-government and Indigenous Samoans' rights to traditional cultural and land-tenure practices. The United States is notoriously reluctant to judicially enforce international treaties.<sup>353</sup> Thus, an argument based primarily on international law would almost certainly be doomed to fail in the courts. Julian Aguon has argued for the Chamoru people of Guam to use a dual rights strategy to assert cultural and self-determination rights that are not currently recognized under U.S. law.<sup>354</sup> This involves asserting both a traditional rights claim under U.S. law and a claim based on international human rights norms.<sup>355</sup> Such a strategy can allow for a critical counter-narrative that may not be articulable using domestic law alone.<sup>356</sup> While Aguon envisions a dual rights strategy for Chamoru plaintiffs seeking to raise a claim in courts, the concept can be adapted for the American Samoa government defending against challenges to laws that seek to preserve aspects of *fa'a Sāmoa*. Addie C. Rolnick has suggested that "the United States arguably has a compelling interest in upholding its obligations under international law toward Indigenous and colonized peoples."<sup>357</sup> Under a dual rights strategy, the government could argue that it has a compelling interest in preserving *fa'a Sāmoa* based both on its foundational documents, as described above, and on international law norms.

The UN Charter is one source the American Samoa government could turn to. The D.C. Circuit actually cited the UN Charter in *Tuaua* to support the United States' obligation to respect American Samoa's right to self-determination.<sup>358</sup> The UN Charter also establishes special responsibilities of administering powers, such as the United States, toward non-self-governing territories like American Samoa. These include a duty to promote territorial inhabitants' wellbeing "with due

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353. See Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 *YALE L. & POL'Y REV.* 427, 468–69 (2002) (describing judicial doctrines that allow U.S. courts to disregard international law, including the plenary power doctrine, the last-in-time rule, classifying treaties as non-self-executing, and deference to the political branches).

354. Julian Aguon, Comment, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in the U.S. Courts*, 31 *U. HAW. L. REV.* 113, 116 (2008).

355. *Id.* at 122.

356. *Id.*

357. Rolnick, *supra* note 334, at 2747.

358. *Tuaua v. U.S.*, 788 F.3d 300, 311 (D.C. Cir. 2015).

respect for the culture of the peoples concerned” and “to develop self-government” in the territory.<sup>359</sup> The American Samoa government could argue that these obligations create a compelling interest for the U.S. government to allow American Samoans to govern their territory in accordance with *fa`a Sāmoa*.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes the extensive rights of Indigenous peoples, such as Indigenous Samoans in American Samoa. As a declaration, UNDRIP does not have the same authority in international law as binding treaties like the UN Charter, but it is persuasive.<sup>360</sup> The United States announced its support for UNDRIP in <sup>361</sup>UNDRIP cannot give rise to a federal claim of <sup>362</sup>but it may provide a persuasive argument for finding a compelling government interest in combination with other grounds. UNDRIP recognizes broad rights for Indigenous peoples. Of particular relevance here are the right to <sup>363</sup>the right to maintain distinct political, legal, and cultural <sup>364</sup>the right to their traditional <sup>365</sup>and the right to determine their own group <sup>366</sup>. These rights all support Indigenous Samoans’ ability to protect *fa`a Sāmoa* as they see fit, including by maintaining political institutions such as the *mātai* system and by preserving land for Indigenous Samoans. Article 33 of UNDRIP, dealing with Indigenous communities’ right to select the membership of their own institutions, is particularly pertinent to racial restrictions on who can own land or hold a *mātai* <sup>367</sup>. This principle would allow Indigenous Samoans to determine who is eligible for benefits reserved for Indigenous Samoans—as current racial restrictions do by tying benefits to Samoan descent, time spent in American Samoa, and other factors. An obligation to respect these rights laid out in UNDRIP would add additional support to arguments that there is a compelling governmental interest in protecting *fa`a Sāmoa*.

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359. U.N. Charter art. 73.

360. See MARK WESTON JANIS, INTERNATIONAL LAW 55 (6th ed. 2012) (describing resolutions of international organizations as “soft law: rules which are neither strictly binding nor completely void of any legal significance” and which “may in time harden into customary international law.”) (internal quotations omitted).

361. Press Release, U.S. Dep’t of State, *supra* note 313.

362. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 301 F. Supp. 3d 50, 60 (D.D.C. 2018).

363. UNDRIP, *supra* note 313, art. 4.

364. *Id.* art. 5.

365. See, e.g., *id.* arts. 8, 26, 27.

366. *Id.* art. 33.

367. *Id.*

The foundational documents and international law sources discussed in this Part all provide plausible arguments that traditional practices should be upheld under equal protection analysis in spite of containing racial classifications. There is no guarantee, however, that future challenges would have the same outcome as *Craddick*. It is particularly questionable whether federal courts would be as supportive of cultural preservation arguments as the High Court of American Samoa was.<sup>368</sup> Nevertheless, under American Samoa's current relationship with the United States, the application of traditional equal protection jurisprudence would not necessarily doom the *ma'tai* system, racial land alienation laws, or other aspects of *fa`a Sāmoa*.

## B. Renegotiating Political Status

The American Samoa government states that American Samoans have not reached a consensus regarding any change in their political status partly because of fears that U.S. citizenship could undermine *fa`a Sāmoa*.<sup>369</sup> In addition to these concerns, some American Samoans worry that any change in the territory's relationship with the United States could result in a disruption to the substantial economic benefits currently received from the federal government.<sup>370</sup> Others call for drastic changes, such as leaving the United States completely and reuniting with the Independent State of Samoa.<sup>371</sup> American Samoans are far from unanimous regarding what the territory's relationship with the United States should be, which could make it difficult to reach a consensus on any potential change.<sup>372</sup>

However, if American Samoans were able to reach a consensus, renegotiating its status could have at least three significant benefits for the territory. First, it could choose exactly what type of relationship it wants to have with the United States. The United States declared naval rule over the territory without the consent of local leaders. Post-1900 changes in American Samoa's status, such as the eventual ratification of the Deeds of Cession and the transfer of

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368. Laughlin, *supra* note 318, at 384–85. See also KRUSE, *supra* note 69, at 88 (“It is political naiveté to think that the federal courts will agree to apply the Fourteenth Amendment selectively to protect American Sāmoan customs and traditions.”).

369. Intervenor Defendants-Appellants’ Opening Brief, *supra* note 148, at 21.

370. See KRUSE, *supra* note 69, at 189; Saliata, *supra* note 13, at 77 (“[T]he public debate seems to favor ongoing relations with the U.S. if not out of patriotic loyalty then economic necessity given the underwriting of territorial finances by the U.S. federal government.”).

371. Saliata, *supra* note 13, at 77.

372. See *id.* at 77–78 (stating that public opinion is much more varied than how it is portrayed in the media and litigation and describing unsuccessful attempts by former Delegate Eni Fa’aua’a Hunkin Faleomavaega Jr. to produce a new legal agreement with the United States).

the territory to the Department of the Interior, may have involved negotiations but were ultimately decisions of the U.S. federal government, not formal agreements between American Samoa and the United States. Second, a new agreement could clearly lay out the political and legal relationship. This would take away the guesswork and uncertainty associated with the current arrangement. American Samoans would not need to wonder whether they are U.S. citizens, whether certain constitutional provisions apply in American Samoa, or whether Congress will decide to limit the territory's self-government, because all these issues would be resolved in the agreement. Third, and related to the first two benefits, negotiations could remove American Samoa's current vulnerability to the whims of Congress and the courts, which could easily disrupt the status quo with no say from the territory's government or citizens.<sup>373</sup>

If American Samoa decided it wanted to keep some relationship with the United States but limit the extent to which local government actions are subject to the restrictions of the U.S. Constitution, two potential strategies would be (1) to negotiate a covenant similar to the covenant between the Northern Mariana Islands and the United States, and (2) to become independent but enter into free association with the United States.

### 1. The Covenant Model

The relationship between the Northern Mariana Islands and the United States is laid out in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (CNMI Covenant).<sup>374</sup> The United States administered the islands as part of the Trust Territory of the Pacific Islands after World War II until the CNMI Covenant was negotiated in the 1970s.<sup>375</sup> The CNMI Covenant establishes the Commonwealth of the Northern Mariana Islands as “a self-governing commonwealth . . . in political union with and under the sovereignty of the United States.”<sup>376</sup> Article V of the CNMI Covenant addresses the applicability of U.S. laws in the CNMI. “To

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373. Erman, *supra* note 203, at 851 (“American Samoa finds itself on a legal tightrope. Its self-government and its protection of Indigenous Samoan culture teeter on the edge of free fall, vulnerable to Congress rattling the federal statutory underpinnings or to courts suddenly cutting the constitutional slack in the line.”).

374. CNMI Covenant, *supra* note 54, § 303.

375. KRUSE, *supra* note 69, at 184–85; *List of Former Trust and Non-Self-Governing Territories*, THE UNITED NATIONS AND DECOLONIZATION, <https://www.un.org/dppa/decolonization/en/history/former-trust-and-nsgts> [<https://perma.cc/9XK7-UYXL>].

376. CNMI Covenant, *supra* note 54, art. I, § 101.

the extent they are not applicable of their own force,” it provides that an enumerated list of constitutional provisions will be applicable in the CNMI as if it were a state.<sup>377</sup> This list includes the first nine amendments and the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>378</sup> It goes on to state that other constitutional provisions, apart from those that are applicable of their own force, will only apply in the CNMI with the joint agreement of the U.S. and CNMI governments.<sup>379</sup>

American Samoa could negotiate its own covenant similar to the CNMI Covenant but with terms tailored to its specific situation. One change that might benefit the American Samoa government’s goals of protecting *fa`a Sāmoa* would be to introduce a different framework for how the U.S. Constitution applies in American Samoa. The CNMI Covenant makes a blanket statement that certain constitutional provisions do or do not apply in CNMI, with the exception of any provisions that apply of their own force. This leaves open ambiguities about which levels of government are restricted by the full U.S. Constitution versus just the provisions named in the CNMI Covenant, as well as about which provisions may apply of their own force. By drafting a covenant that differentiates between constitutional provisions that apply against the American Samoa government and those that apply against the federal government, American Samoa could avoid some of these ambiguities and address one of the most limiting aspects of American Samoa’s current status.

Because of the Secretary of the Interior’s authority over American Samoa, there is currently no legal distinction between actions taken by federal and local governments. If the territorial government issues a law or institutes a policy, this is done by the grace of the Secretary of the Interior, who could hypothetically overrule it.<sup>380</sup> Thus, one cannot argue that the American Samoa government is not constrained by the U.S. Constitution in the same way as the federal government is; responsibility ultimately rests with the federal government either way. This sets American Samoa apart from other semi-sovereign entities in the United States, including states and tribal governments. State governments were not considered subject to the Bill of Rights’ restrictions until the passage of the Fourteenth Amendment led to a series of judicial rulings making various amendments

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377. *Id.* at art. V., § 501(a).

378. *Id.* The Fourteenth Amendment’s applicability is limited to Section 1. *Id.*

379. *Id.*

380. Act of Feb. 20, 1929, ch. 281, 45 Stat. 1253 (“all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct”); Exec. Order No. 10,264, 3 C.F.R. § 6417 (1949–1953) (transferring the administration of American Samoa to the Secretary of the Interior).

applicable the states in a piecemeal fashion.<sup>381</sup> And Indigenous tribal governments in the mainland United States have never been directly subject to the Bill of Rights.<sup>382</sup>

This precedent suggests that a renegotiation of status could result in a different constitutional analysis of government actions in American Samoa. Rather than questioning whether a given constitutional provision applies in American Samoa, one would ask which government took the action and whether the provision applies against that government.<sup>383</sup> A covenant could specify that only certain constitutional provisions apply against the American Samoa government without purporting to exempt the federal government from those same provisions.<sup>384</sup> This two-tiered framework could allow the American Samoa government flexibility to govern itself and protect *fa`a Sāmoa* without granting the federal government plenary power over the territory, as the *Insular Cases* are often considered to do.

In addition to the constitutional framework, there are several other ways in which an American Samoa-United States covenant would likely differ from the CNMI Covenant. For example, the American Samoa government could forgo the U.S. citizenship provisions found in the CNMI Covenant and tweak the list of constitutional provisions that would apply against the American Samoa government. The Fourteenth Amendment would be one likely candidate for exclusion, given the concern that has been raised about that amendment in the *Tuaua* and *Fitise manu* litigation. This would not have to mean depriving American Samoans of all equal protection and due process rights; American Samoa could protect these rights in its own constitution in a way that is in harmony with *fa`a Sāmoa*.<sup>385</sup> American Samoa may also want to ensure greater clarity about

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381. For a comparison of Fourteenth Amendment incorporation jurisprudence and territorial jurisprudence, see Ponsa-Kraus, *supra* note 299, at 1020–31.

382. Angela R. Riley, *Native Nations and the Constitution: An Inquiry Into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173, 181 (2017). In 1968, Congress passed the Indian Civil Rights Act, which subjects tribal governments to similar—but not identical—provisions to those of the Bill of Rights. *Id.* at 181–82.

383. See Ponsa-Kraus, *supra* note 299, at 1038 (discussing how equal protection analysis of land alienation laws in the Northern Mariana Islands depends on whether the restrictions represent local or federal action).

384. Exempting the American Samoa government but not the federal government from certain constitutional restrictions would not only combat the idea of unincorporated territories as a place of federal plenary power but also place the covenant on firmer legal ground. See *id.* (“[T]he federal government does not have the power to exempt itself from constitutional prohibitions by way of negotiations”).

385. The Revised Constitution of American Samoa currently contains due process rights but not an equal protection clause. AM. SAM. CONST. art. I, § 2.

its status than the CNMI Covenant provides, since ambiguity remains about whether the CNMI is a separate sovereign or an unincorporated territory of the United States.<sup>386</sup> If negotiated well, a covenant could provide many benefits for American Samoa. It could enjoy a greater degree of self-governance, increased protections for *fā`a Sāmoa*, less threat of federal intervention, and a greater clarity in its legal relationship with the United States.<sup>387</sup>

## 2. Free Association

Alternatively, American Samoa could pursue becoming an independent state in free association with the United States. This was the path chosen by several nations that used to be part of the Trust Territory of the Pacific Islands with the Northern Mariana Islands: the Federated States of Micronesia, the Marshall Islands, and Palau. Citizens of these states currently enjoy some of the same advantages as U.S. nationals, including simplified immigration to and permission to work in the United States, U.S. economic assistance, and the ability to enlist in the U.S. military.<sup>388</sup>

Chimène I. Keitner identifies five main common features of the United States' current free association compacts. First, the associated state has an international legal personality. Second, it has full internal self-government. Third, the United States assumes responsibility for military defense measures. Fourth, although the associated state retains authority over its own foreign affairs and marine resources, it has a duty to consult with the United States regarding these matters. Finally, either party can terminate the agreement unilaterally, with certain commitments continuing for a set period beyond the termination.<sup>389</sup> If American Samoa were to pursue a free association relationship with the United States, it could seek different terms, but these examples offer an idea of what the arrangement would likely look like.

Free association would allow American Samoa a greater degree of self-governance than a compact would; the U.S. Constitution would become a non-issue because it would not be applicable in an independent state. It would also allow American Samoans to keep some of the benefits of being politically

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386. Ponsa-Kraus, *supra* note 299, at 1037–38 (discussing how courts have come to different conclusions on this question).

387. See KRUSE, *supra* note 69, at 189.

388. Keitner, *supra* note 239, at 98–99.

389. *Id.* at 97–98.

connected to the United States, such as immigration benefits and some economic assistance.

Of course, as in any negotiation, the American Samoa government would have to consider not only what would be best for American Samoans, but also what the U.S. government would agree to. Any covenant or free association agreement would likely involve some compromises. For example, American Samoans could see a substantial decrease in economic assistance under any changed status.<sup>390</sup>

### CONCLUSION

Any change in American Samoa's status will come with risks, including financial risks. However, maintaining its current relationship with the United States is not without risks, either. The ambiguity of American Samoa's position and its legal subordination to the federal government both leave it vulnerable. With no action by the American Samoa government, federal courts or even American Samoan courts could adopt less favorable positions toward the territory's laws, particularly those concerning land alienation and the *mātai* system. Congress could grant U.S. citizenship to people born in American Samoa over the objections of the American Samoa government or decrease the amount of aid it grants the territory. Some of these events may be unlikely, but there is no legal impediment to them happening. Ultimately, it is up to American Samoans to weigh the advantages and disadvantages of maintaining the status quo and of possible changes in status and decide what will work best for them.

Citizenship Clause litigation reveals how U.S. constitutional jurisprudence is poorly equipped to address many of the issues facing Indigenous Samoans and other people living in U.S. territories, including hotly contested questions of political inclusion, self-determination, and cultural preservation. The *Insular Cases* represent two competing approaches to these questions. One is a racist, colonial framework that has been used to justify excluding racially othered populations from full membership in the U.S. political community. The other is an attempt to repurpose that framework to allow territories greater autonomy. Unfortunately, increased flexibility in territorial self-governance under the *Insular Cases* comes hand-in-hand with increased legal ambiguity and decreased restraints on federal action in the territories. But a renegotiation of status would offer a possibility of creating a legal framework with more clarity, a stronger local

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390. See KRUSE, *supra* note 69, at 188–89 (describing potential disruptions to American Samoa's substantial federal financial assistance, including the imposition of a timeline for federal assistance if American Samoa entered into free association).

self-government, and a more nuanced approach to rights and cultural protection than the U.S. Constitution offers, with or without the *Insular Cases*.