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## Concepts of Citizenship in the Controversy About Constitutional Citizenship for People Born in U.S. Territories

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# CONCEPTS OF CITIZENSHIP IN THE CONTROVERSY ABOUT CONSTITUTIONAL CITIZENSHIP FOR PEOPLE BORN IN U.S. TERRITORIES

*Janet M. Calvo\**

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## INTRODUCTION

Citizenship is the formal hallmark of recognized membership. The right to formal citizenship is the right to have rights. Citizenship defines who has the right to determine how a society is run, who has the right to permanently gain the benefits that the society has to offer, as well as who takes responsibility for the society as a whole. In a democracy, citizenship is the foundation on which self-determination and consent of the governed are built.<sup>1</sup>

The U.S. Constitution affords citizenship at birth in the United States, a right that is protected from legislative change.<sup>2</sup> *Fitisemanu v. United States*<sup>3</sup> elevated the controversy regarding constitutional citizenship for those born in U.S. territories. American Samoan plaintiffs challenged their individual exclusion from constitutional citizenship, asserting the Constitution's goal of equal citizenship without racial inferiority or subclasses. But members of the American Samoan government claimed that imposing constitutional citizenship denies the people of American Samoa their right to self-determination and threatens their culture.<sup>4</sup>

The Constitution's Fourteenth Amendment provides that persons born in the United States and subject to its jurisdiction are U.S. citizens.<sup>5</sup> The amendment was deemed essential to prevent future legislative action that would limit citizenship on the basis of race or ethnicity.<sup>6</sup> However, lower courts have determined that the Citizenship Clause does not apply to persons born in unincorporated U.S. territories.<sup>7</sup> The decisions are based on several early 1900s cases, known as the *Insular Cases*,<sup>8</sup> that held that the Constitution's applicability in territories with respect to certain constitutional provisions turned on express actions of Congress.<sup>9</sup> The cases were not about the Citizenship Clause. However, they were grounded in and justified by a racist ideology that the nonwhite inhabitants of certain territories were "unfit" for citizenship and required the control of Congress.<sup>10</sup>

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1. See T. ALEXANDER ALEINIKOFF & DOUGLAS KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 42 (2002); Janet M. Calvo, *The Constitutional Right to Acquire Citizenship: Comparative Provisions and Issues*, in *LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE* 165, 165 (Penelope E. Andrews & Susan Bazilli eds., 2008).

2. See *Rogers v. Bellei*, 401 U.S. 815, 834–35 (1971).

3. 426 F. Supp. 3d 1155 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

4. See *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

5. U.S. CONST. amend. XIV, § 1, cl. 1.

6. See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

7. See *Fitisemanu*, 1 F.4th at 864; *Tuaua v. United States*, 788 F.3d 300, 306–07 (D.C. Cir. 2015).

8. *Dorr v. United States*, 195 U.S. 138 (1904); *Armstrong v. United States*, 182 U.S. 243 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Goetze v. United States*, 182 U.S. 221 (1901).

9. See *Fitisemanu*, 1 F.4th at 874–81; *Tuaua*, 788 F.3d at 306–09.

10. See *United States v. Vaello Madero*, 142 S. Ct. 1539, 1553–54 (2022) (Gorsuch, J., concurring).

Residents of four of the five territories are considered statutory citizens of the United States, but they are not recognized as constitutional citizens.<sup>11</sup> Those born in American Samoa are designated as nationals by statute.<sup>12</sup> Even when American Samoans are residents of U.S. states, they are denied the right to vote, to run for certain offices, to serve on juries or as commissioned officers in the military, to petition for immigrant relatives, to obtain citizenship for their children, and to be eligible for federal and state public service employment on the basis of their national status.<sup>13</sup>

In 2019, the U.S. District Court for the District of Utah in *Fitisemanu v. United States* rejected the *Insular Cases* and held that persons born in American Samoa acquired Fourteenth Amendment constitutional citizenship at birth.<sup>14</sup> Government officials of American Samoa intervened and argued that affording constitutional citizenship to American Samoans would jeopardize American Samoan cultural identity, American Samoa's unique form of governance, and American Samoans' right to self-determination.<sup>15</sup> This position was contested by American Samoans residing in U.S. states who endured the inequalities and political powerlessness of their status as nationals.<sup>16</sup> Over an extensive dissent, the U.S. Court of Appeals for the Tenth Circuit reversed the district court through an analysis that attempted to "repurpose" the *Insular Cases* and thereby respect the American Samoan government's position.<sup>17</sup> The American Samoan-born plaintiffs sought review by the U.S. Supreme Court and filed a petition for a writ of certiorari to address the question, "[w]hether persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause, including whether the *Insular Cases* should be overruled."<sup>18</sup>

This Essay discusses the differing concepts of citizenship presented in the *Fitisemanu* case. The case raises questions about the nature and import of American constitutional citizenship and addresses its purpose and consequences. The controversy requires confronting the denigrating ideology that some people are not "fit" for citizenship because of their race or ethnicity and acknowledging the need to respect the agency and cultural identity of colonized people.

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11. See Brief for *Amici Curiae* Current and Former Elected Officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Petitioners at 21–24, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1810971.

12. 8 U.S.C. § 1408(1).

13. See *infra* Part II.

14. See 426 F. Supp. 3d 1155, 1195–96 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

15. See *id.* at 1196.

16. See *id.*

17. See *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

18. Petition for a Writ of Certiorari at i, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1307059.

The Essay begins with three background sections. The first is an overview of U.S. citizenship and the role of constitutional citizenship in American democracy.<sup>19</sup> The second explains the “national” status of those born in American Samoa.<sup>20</sup> The third briefly describes the legal status of American Samoa.<sup>21</sup>

The Essay then examines the perspectives on citizenship in the district and circuit court decisions and the dissent in *Fitisemanu*.<sup>22</sup> It further analyzes the concepts of citizenship that were presented in the *Fitisemanu* petition for a writ of certiorari, and the impact that those concepts have on American Samoans, U.S. citizens born in other U.S. territories, and others concerned with citizenship in American democracy.<sup>23</sup> These concepts of citizenship include constitutional citizenship’s import for an American democracy without racial inferiority or subclasses, citizenship’s protection of individual rights, and constitutional citizenship’s guarantee of continuing and equal membership.<sup>24</sup> Lastly, this Essay addresses the claim that citizenship for those born in a territory undermines consent and impedes self-determination and cultural preservation.<sup>25</sup>

The Supreme Court’s recent denial of certiorari in the *Fitisemanu* case<sup>26</sup> unfortunately leaves these important questions about American citizenship unresolved. It further continues the second-class status of individuals born in territories—whether they are nationals or statutory citizens—and underscores the uncertainty of their futures.

#### I. AN OVERVIEW OF CONSTITUTIONAL AND STATUTORY U.S. CITIZENSHIP

The Constitution did not directly designate who was a U.S. citizen until the passage of the Fourteenth Amendment.<sup>27</sup> The Fourteenth Amendment’s Citizenship Clause states that all persons born or naturalized in the United States and subject to its jurisdiction are U.S. citizens.<sup>28</sup> All persons born in the United States are constitutional citizens at birth, with the exceptions of children of diplomats, of occupying military personnel, and of Native Americans subject to tribal sovereignty.<sup>29</sup> In 1898, the Supreme Court held that a person’s ethnicity could not bar them from citizenship through birth in the United States, even though that person’s parents’ ethnicities barred them from naturalization.<sup>30</sup>

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19. *See infra* Part I.

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. *See infra* Part V.

24. *See infra* Parts V.A–C.

25. *See infra* Parts V.D–F.

26. *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (mem.).

27. *See* Akhil Reed Amar & John C. Harrison, *The Citizenship Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/700> [<https://perma.cc/74P4-LFM5>] (last visited Mar. 6, 2023).

28. U.S. CONST. amend. XIV, § 1, cl. 1.

29. *See United States v. Wong Kim Ark*, 169 U.S. 649, 654, 693–94 (1898).

30. *See id.* at 699–700, 705.

Fourteenth Amendment citizenship through birth or naturalization is protected from legislative change.<sup>31</sup> But in 1971, the Supreme Court decided that statutory citizenship is not constitutionally protected, and thus, those with such citizenship effectively lost their citizenship through a statute.<sup>32</sup> The Court rejected the dissenters' view that all citizenship was constitutionally protected through a broader conceptualization of the term "naturalization" that included citizenship afforded through legislation.<sup>33</sup>

The United States also conveys citizenship through several statutes. Statutes provide citizenship to persons born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, as well as to Native Americans.<sup>34</sup> Statutes provide citizenship to some children born outside of the United States to at least one U.S. citizen parent.<sup>35</sup> The Child Citizenship Act of 2000<sup>36</sup> applies to permanent-resident children when their parents become naturalized citizens.<sup>37</sup> A child with a citizen parent automatically becomes a citizen when they are under eighteen and a legal permanent resident living in the United States in the legal and physical custody of their citizen parent.<sup>38</sup>

## II. THE STATUTORY STATUS OF "NATIONAL"

American Samoans are now the only persons under U.S. dominion designated as U.S. nationals under a federal statute.<sup>39</sup> Persons with the statutory status of "national" owe permanent allegiance to the United States.<sup>40</sup> They are allowed to have U.S. passports.<sup>41</sup> But their passports designate them as nationals and note that they are not U.S. citizens.<sup>42</sup> They are allowed to travel to and reside in U.S. states.<sup>43</sup> However, even when residing in U.S. states, they can vote neither in federal elections, nor in state

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31. See *Frequently Asked Questions: Defending Citizenship Under the 14th Amendment to the U.S. Constitution*, ACLU, <https://www.aclu.org/other/frequently-asked-questions-defending-citizenship-under-14th-amendment-us-constitution> [https://perma.cc/4NCC-4TPR] (last visited Mar. 6, 2023).

32. See *Rogers v. Bellei*, 401 U.S. 815, 827–28, 831 (1971).

33. See *id.* at 837, 839–41 (Black, J., dissenting); *id.* at 845 (Brennan, J., dissenting).

34. See Brief for *Amici Curiae* Current and Former Elected Officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Petitioners, *supra* note 11, at 21–24.

35. See 8 U.S.C. §§ 1401, 1409; *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1687 (2017).

36. Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended in scattered sections of 8 and 18 U.S.C.).

37. See 8 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 301.10-1(b) (2021).

38. See 8 U.S.C. § 1431.

39. *Id.* §§ 1408(1), 1101(a)(29).

40. See 7 U.S. DEP'T OF STATE, *supra* note 37, § 1130(a)(2) app. H.

41. See *id.* § 1130(c) app. H.

42. See *id.*

43. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners at 22–24, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1810855; Petition for a Writ of Certiorari, *supra* note 18, at 9.

or local elections that require citizenship to vote.<sup>44</sup> They cannot run for federal political offices.<sup>45</sup> They cannot be employed in certain federal and state positions that require citizenship.<sup>46</sup> Nationals can enlist in the armed forces, but they cannot serve as commissioned officers.<sup>47</sup> Unlike permanent residents, nationals are not entitled to the streamlined pathway to citizenship for persons who served in the military.<sup>48</sup> Unlike citizens and permanent residents, nationals cannot petition for their noncitizen relatives to immigrate to the United States.<sup>49</sup>

Nationals residing in American Samoa cannot apply for naturalization.<sup>50</sup> Nationals who establish residence in states and are at least eighteen years old can apply to be naturalized.<sup>51</sup> But a child with national status cannot become a citizen upon the naturalization of a parent, while a permanent-resident child can.<sup>52</sup>

### III. LEGAL STATUS OF AMERICAN SAMOA

American Samoa became a U.S. territory through deed of cession by local chiefs of Tutuila in 1900 and Manu'a in 1904.<sup>53</sup> Swain's Island joined the territory in 1925 through an act of Congress.<sup>54</sup> Authority over American Samoa was initially placed with the U.S. Navy and then transferred to the U.S. Department of the Interior in 1956.<sup>55</sup>

American Samoa is "unincorporated" and subject to the plenary powers of Congress.<sup>56</sup> It has only a nonvoting delegate to Congress.<sup>57</sup> American Samoa is the only territory that remains "unorganized."<sup>58</sup> Its government is

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44. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5, 23; Petition for a Writ of Certiorari, *supra* note 18, at 9.

45. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5, 23; Petition for a Writ of Certiorari, *supra* note 18, at 9.

46. Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5, 23–24; Petition for a Writ of Certiorari, *supra* note 18, at 9.

47. Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5, 23–24; Petition for a Writ of Certiorari, *supra* note 18, at 9.

48. See HOLLY STRAUT-EPPSTEINER & LAWRENCE KAPP, CONG. RSCH. SERV., IF12089, U.S. CITIZENSHIP THROUGH MILITARY SERVICE AND OPTIONS FOR MILITARY RELATIVES (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12089> [<https://perma.cc/Y8AM-BMKT>].

49. See 6 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL pt. B, ch. 1 (2023), <https://www.uscis.gov/policy-manual/volume-6-part-b-chapter-1> [<https://perma.cc/BQ8W-U443>].

50. See 8 U.S.C. § 1436.

51. See *id.*

52. *Id.* § 1431(a); 8 U.S. DEP'T OF STATE, *supra* note 37, §§ 301.10-1(b)(1), 301.10-2(H)(d).

53. *American Samoa*, U.S. DEP'T OF INTERIOR, <https://www.doi.gov/oia/islands/american-samoa> [<https://perma.cc/8Q8H-4KZU>] (last visited Mar. 6, 2023).

54. *Id.*

55. *Id.*

56. *Fitisemanu v. United States*, 1 F.4th 862, 865, 877 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

57. 48 U.S.C. § 1731.

58. *Fitisemanu*, 1 F.4th at 875 n.15.

under the plenary authority of the secretary of the interior.<sup>59</sup> In 1977, the secretary permitted the governor of American Samoa to be selected by popular vote.<sup>60</sup> The secretary approved an American Samoan constitution that recognizes due process of law, basic civil rights, and freedom of speech and religion.<sup>61</sup> In 1983, Congress passed legislation specifying that any amendment or modification to the constitution of American Samoa, “as approved by the Secretary of the Interior . . . may be made only by an Act of Congress.”<sup>62</sup>

American Samoa is considered a “Non-Self-Governing Territory” under the Charter of the United Nations.<sup>63</sup> In 2021, the UN General Assembly passed a resolution requesting that the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples “continue to examine the question of American Samoa.”<sup>64</sup> However, the United States asserted that the committee “had no authority to alter in any way the relationship between the United States and [its] territories” and “had no mandate to engage the United States in negotiations on their status.”<sup>65</sup>

American Samoa has a governor, a judiciary, and a bicameral legislature.<sup>66</sup> One legislative branch is elected.<sup>67</sup> The other branch includes hereditary leaders chosen through clan-based groups.<sup>68</sup> Land ownership in American Samoa is predominantly communal, with more than 90 percent of land belonging to extended family groups and not individuals.<sup>69</sup> There are also racial restrictions that require landowners to be at least 50 percent American Samoan.<sup>70</sup> As of June 2021, the population of American Samoa was 49,437.<sup>71</sup> Many more people of Samoan descent live in U.S. states: 204,640.<sup>72</sup>

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59. Exec. Order No. 10,264, 3 C.F.R. § 447 (1951) (vesting the secretary of the interior with “all civil, judicial, and military powers” of government in American Samoa).

60. *Hueter v. Kruse*, 576 F. Supp. 3d 743, 754 (D. Haw. 2021).

61. AM. SAM. CONST. art. I, §§ 1–16.

62. 48 U.S.C. § 1662a.

63. Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Indep. to Colonial Countries and Peoples, *American Samoa*, at 3, U.N. Doc. A/AC.109/2022/1 (2022).

64. *Id.* at 18.

65. *Id.* at 15.

66. *Id.* at 4.

67. *Id.*

68. *Id.*

69. *See Fitisemanu v. United States*, 1 F.4th 862, 866 (10th Cir.), *reh’g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

70. *See id.* (citing AM. SAMOA CODE ANN. § 37.0204(a)–(b) (2021)).

71. *See id.*

72. *See id.*



IV. THE *FITISEMANU* DECISIONSA. *The District Court's Opinion*

The district court in *Fitisemanu* held that persons born in American Samoa are U.S. citizens at birth under the Fourteenth Amendment.<sup>73</sup> Judge Clark Waddoups determined that the Supreme Court's opinion in *United States v. Wong Kim Ark*<sup>74</sup> was controlling precedent.<sup>75</sup> Wong Kim Ark was born in California to parents of Chinese heritage.<sup>76</sup> The government argued that he was not a U.S. citizen and was therefore excludable from the United States under the then existing Chinese exclusion laws.<sup>77</sup> The Supreme Court found that he was a citizen under the Fourteenth Amendment, as were all other persons regardless of color or race if they were born in the United States and subject to its jurisdiction.<sup>78</sup> In *Fitisemanu*, the district court held that *Wong Kim Ark* concluded that the Fourteenth Amendment affirms the English common-law rule of citizenship that all persons born within the dominion of a sovereign, including territories, are citizens.<sup>79</sup>

The district court then examined the history of U.S. citizenship and the text, structure, and history of the Fourteenth Amendment.<sup>80</sup> The court found that the Fourteenth Amendment was a repudiation of the Supreme Court's pre-Civil War decision in *Dred Scott v. Sandford*,<sup>81</sup> which "created a racial exception to birthright citizenship . . . inconsistent with the rule of birthright citizenship . . . which required only birth within the allegiance and dominion of the sovereign."<sup>82</sup>

The court rejected the government's argument that the *Insular Cases* controlled.<sup>83</sup> The government argued that the doctrine of territorial incorporation excludes the full application of the Constitution to unincorporated territories and that the Citizenship Clause's language "in the United States" does not include unincorporated territories like American Samoa.<sup>84</sup> Therefore, Congress controlled American Samoans' citizenship.<sup>85</sup> The court determined that the *Insular Cases* were limited to the specific constitutional provisions at issue in those cases.<sup>86</sup> It noted that language in

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73. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

74. 169 U.S. 649 (1898).

75. *Fitisemanu*, 426 F. Supp. 3d at 1181.

76. *Id.* at 1157.

77. *See id.* at 1188 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 699 (1898)).

78. *Id.* at 1187.

79. *Id.* at 1157, 1181–84, 1189.

80. *See id.* at 1160–71.

81. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

82. *Fitisemanu*, 426 F. Supp. 3d at 1180.

83. *See id.* at 1195–96.

84. *Id.* at 1190–91.

85. *Id.*

86. *Id.* at 1195–96.

some of the *Insular Cases* addressed the concept of U.S. citizenship, but it stated that language was dicta that was based on the bigoted premise that some people are inferior to others because of their race and are not fit to be U.S. citizens.<sup>87</sup>

Government officials from American Samoa intervened and argued that recognition of Fourteenth Amendment citizenship would be an imposition of citizenship by judicial fiat, which fails to recognize American Samoa's sovereignty and the import of the Samoan way of life, and would violate fundamental principles of self-determination.<sup>88</sup> The district court responded that citizenship is required by the Fourteenth Amendment and noted that the plaintiffs were American Samoans seeking to vindicate their rights to citizenship under the Fourteenth Amendment.<sup>89</sup>

The district court in *Fitisemanu* honored the Constitution's protection of each individual's right to citizenship in a democracy when they are subjected to the power and control of a government. The opinion also promoted the goal of the Fourteenth Amendment to prevent the persistence of inferior subclasses grounded in race or ethnicity. In doing so, it rejected the assertion of American Samoan government officials that American Samoa as an entity had the collective right to determine the relationship of American Samoans to the United States.

#### B. The Tenth Circuit's Opinion

Judge Carlos F. Lucero wrote the opinion for the Tenth Circuit that reversed the district court's decision.<sup>90</sup> The court held that persons born in American Samoa were not citizens at birth under the Fourteenth Amendment.<sup>91</sup> The court found that the text of the Citizenship Clause left its geographic scope ambiguous, i.e., it did not provide an answer to whether "in the United States" included a territory in the dominion of the United States.<sup>92</sup> It also stated that, based on the consistent historical practices of the U.S. government, citizenship in territories came from specific laws, not from the Constitution.<sup>93</sup>

Judge Lucero explained that the *Insular Cases* supplied the correct framework for the application of constitutional provisions to unincorporated territories and that the district court erred by relying on *Wong Kim Ark*.<sup>94</sup> The court recognized that the *Insular Cases* facilitated the twentieth-century imperial ambitions of the United States and that the cases repeatedly stated that inhabitants of unincorporated territories were unfit for citizenship based

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87. *Id.* at 1190–95.

88. *Id.* at 1196.

89. *Id.*

90. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir.), *reh'g en banc denied*, 20 F.4th 1325 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

91. *Id.* at 864–65.

92. *Id.* at 875–76.

93. *Id.* at 869.

94. *Id.* at 869, 873–74.

on their race.<sup>95</sup> Yet, the Tenth Circuit stated that the approach of the *Insular Cases* could be “repurposed to preserve the dignity and autonomy” of the people in U.S. territories.<sup>96</sup> “The flexibility of the *Insular Cases*’ framework gives federal courts . . . latitude to preserve traditional cultural practices that might . . . run afoul of individual rights . . . in the Constitution” and “permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.”<sup>97</sup> Nevertheless, the opinion acknowledged that the determination of citizenship was within the power of Congress<sup>98</sup> and not the people of American Samoa, who do not even have voting representation in Congress.

Applying the repurposed framework, the court held that birthright citizenship was not a fundamental personal right.<sup>99</sup> Because other countries with free governments do not recognize citizenship at birth, it is not a principle that is the basis of all free governments.<sup>100</sup> The opinion then found that the recognition of birthright citizenship for American Samoans would be impracticable and anomalous for two reasons: (1) “the preference against citizenship expressed by the American Samoan . . . elected representatives” and (2) “the tension between individual constitutional rights and the American Samoan way of life.”<sup>101</sup>

Judge Lucero wrote that there was “[n]o circumstance . . . more persuasive” than the fact that American Samoans did not want American citizenship.<sup>102</sup> Imposing citizenship violates a basic principle that a government derives its power from the consent of the governed and that “a people’s incorporation into the citizenry of another nation” should be done only with their consent.<sup>103</sup> In the court’s view, “[r]ecognizing consent as a cornerstone of a flexible approach to the extension of citizenship . . . is a step toward rectifying”<sup>104</sup> the “historical subordination” of territories and their inhabitants.<sup>105</sup> Imposing citizenship over the preference of the American Samoan people “would be anomalous to [U.S.] history and our understanding of the Constitution.”<sup>106</sup> The court also stated that there was “insufficient caselaw to conclude with certainty” that citizenship would not undermine local culture and autonomy.<sup>107</sup>

While expressing sympathy for the plaintiffs’ desire for citizenship, the opinion did not recognize the agency of the American Samoan plaintiffs in

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95. *Id.* at 869–70.

96. *Id.* at 870.

97. *Id.* at 870–71.

98. *See id.* at 864–65.

99. *Id.* at 878–79.

100. *Id.*

101. *Id.* at 879–80.

102. *Id.* at 879.

103. *Id.*

104. *Id.* at 879–80.

105. *Id.* at 880 (quoting T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 183 (2002)).

106. *Id.*

107. *Id.* at 881.

their relationship to the government that ruled them and to which they owed allegiance. The plaintiffs were more than consenting to U.S. citizenship—they were actively fighting for it in litigation. Further, the application of the *Insular Cases* led the Tenth Circuit to a determination that citizenship at birth on U.S. soil—i.e., jus soli citizenship—is not a “fundamental” right because not all free countries recognize jus soli as a basis for citizenship.<sup>108</sup> But jus soli is fundamental in American democracy. It is so fundamental that it is protected by the Constitution,<sup>109</sup> while other potential bases for citizenship (e.g., through heredity) are left to the fluctuating determinations of Congress.

The Tenth Circuit opinion gave little attention to the rights that were denied to the plaintiffs because they were noncitizen nationals. It acknowledged that American Samoans are “denied the right to vote, the right to run for elective federal or state office . . . and the right to serve on federal and state juries.”<sup>110</sup> But the decision ignored the fact that nationals are a subordinate class who lack the right to participate in a government that controls their lives.

### C. Judge Tymkovich’s Concurrence

In his concurrence, Judge Timothy M. Tymkovich found that the precise geographic scope of the Citizenship Clause could not be determined through the text or constitutional structure.<sup>111</sup> He relied on the historical principle that Congress has the authority to decide the citizenship status of inhabitants of unincorporated territories.<sup>112</sup> However, he did not address that the historical reason for this principle, as expressed in the *Insular Cases*, was that territorial inhabitants were unfit for citizenship and required congressional control.

### D. Judge Bacharach’s Dissent

Judge Robert E. Bacharach’s dissent focused on the meaning of the language in the Fourteenth Amendment at the time it was proposed and ratified and on the concepts of citizenship it established. He concluded that the Citizenship Clause’s extension of birthright citizenship to every person born in the United States provided citizenship to the individual plaintiffs for three reasons.<sup>113</sup> First, they were born in a territory of the United States, and “[w]hen the Fourteenth Amendment was ratified, courts, dictionaries, maps, and censuses uniformly regarded territories as land ‘in the United States.’”<sup>114</sup> Second, even if American Samoa were “outside” of the United States, the Citizenship Clause would apply because “citizenship is a fundamental

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108. *Id.* at 878.

109. U.S. CONST. amend. XIV, § 1, cl. 1.

110. *See Fitiseanu*, 1 F.4th at 865.

111. *See id.* (Tymkovich, C.J., concurring).

112. *See id.* at 883.

113. *Id.* at 883–84 (Bacharach, J., dissenting).

114. *Id.* at 884.

right.”<sup>115</sup> Third, “applying the Citizenship Clause to the three American Samoan plaintiffs would not be impracticable or anomalous.”<sup>116</sup>

Judge Bacharach extensively examined the text and the public understanding by Congress and ordinary Americans of the phrase “in the United States” at the time that the Fourteenth Amendment was proposed and ratified.<sup>117</sup> He concluded that the phrase unambiguously included U.S. territories like American Samoa based on “(1) the judicial opinions . . . , (2) the dictionaries, maps, and censuses from the era, (3) the debates surrounding the Citizenship Clause, (4) and the common law’s conception of a citizen.”<sup>118</sup>

Judge Bacharach’s dissent also examined the history and purpose of the Citizenship Clause. He noted that the common law was that “everyone born in [a] sovereign’s dominion” was a “subject[] of the sovereign.”<sup>119</sup> The *Dred Scott* decision—holding that African Americans born in the United States could not be citizens—repudiated the common law’s recognition of birthright citizenship.<sup>120</sup> The Citizenship Clause repudiated the Supreme Court’s position in *Dred Scott* and restored the law of the land that every person born within the United States was a citizen thereof.<sup>121</sup>

Judge Bacharach relied on the Supreme Court’s opinion in *Wong Kim Ark*, which stated that “[t]he [F]ourteenth [A]mendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country” and that the Citizenship Clause, “in clear words and in manifest intent, includes the children born within the territory of the United States . . . of whatever race or color . . . .”<sup>122</sup> Further, Judge Bacharach explained that the Citizenship Clause was “designed to adjust the constitutional structure by putting ‘this question of citizenship . . . beyond the legislative power.’”<sup>123</sup>

Judge Bacharach rejected the applicability of the *Insular Cases* and refuted the assertion that birthright citizenship is not a fundamental right.<sup>124</sup> Rather, citizenship in the United States lies at the “core of . . . national identity.”<sup>125</sup> “Citizenship . . . is fundamental because political participation lies at the core of government and turns on citizenship.”<sup>126</sup> Judge Bacharach also pointed to Supreme Court cases that “regarded citizenship . . . as a ‘fundamental right’ beyond the control of ordinary governmental powers”<sup>127</sup> and recognized that “‘the very nature of our free government’ prevents government officials from

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115. *Id.*

116. *Id.*

117. *See id.* at 885–93.

118. *Id.* at 885.

119. *Id.* at 893.

120. *See id.*

121. *See id.*

122. *Id.* at 894 (quoting *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898)).

123. *Id.* at 897 (alteration in original) (quoting *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967)).

124. *See id.* at 900–02.

125. *Id.* at 901.

126. *Id.*

127. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958)).

taking away [an individual's] constitutional citizenship."<sup>128</sup> He concluded that "the fundamental nature of citizenship prevents delegation of . . . citizenship to Congress or any other political body."<sup>129</sup>

This dissent rejected the notion that citizenship "would be impractical because it would lead to recognition of other constitutional rights . . . that would threaten local cultural traditions," noting that the constitutional protections of due process and equal protection already apply in American Samoa.<sup>130</sup> Judge Bacharach also rejected the argument that birthright citizenship would undermine self-determination.<sup>131</sup> There was no factual basis for the conclusion that the people of American Samoa do not want citizenship.<sup>132</sup> Further, the Citizenship Clause was designed "to remove the right of citizenship by birth from transitory political pressures."<sup>133</sup>

Judge Bacharach also stated that citizenship for the plaintiffs would not be impracticable or anomalous.<sup>134</sup> He noted that an injunction for the individual plaintiffs would afford them the essential privileges of citizenship: voting, serving on juries, and running for office.<sup>135</sup> It would not impair their ability to follow American Samoan cultural practices because Utah residents do not live on communal land or vote for members of the Samoan legislature.<sup>136</sup>

Judge Bacharach also dissented from the Tenth Circuit's denial of en banc rehearing.<sup>137</sup> He stressed the exceptional importance of determining to whom the Constitution affords citizenship, especially for those born in American Samoa and for the statutory citizens born in other territories.<sup>138</sup>

#### V. CONCEPTS OF CITIZENSHIP IN THE *FITISEMANU* CERTIORARI FILINGS

The briefs submitted in consideration of the petition for a writ of certiorari in *Fitisemanu* expanded the different perspectives of the lower courts on the role, import, and consequences of citizenship. Important concepts of citizenship remain in contention. These include constitutional citizenship's function in fostering an American democracy free of subclasses designated as inferior, citizenship's role as an individual right, and citizenship's impact on a territory's concept of self-determination and cultural integrity. The resolution of the controversy regarding constitutional citizenship has significant consequences for American Samoans residing in U.S. states, American Samoans inhabiting American Samoa, statutory citizens born in U.S. territories, and all those concerned with preserving the Fourteenth

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128. *Id.* at 901–02 (quoting *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967)).

129. *Id.* at 902.

130. *See id.*

131. *See id.* at 903–05.

132. *See id.* at 904.

133. *See id.* (quoting RICHARD SOBEL, *CITIZENSHIP AS FOUNDATION OF RIGHTS: MEANING FOR AMERICA* 6 (2016)).

134. *See id.* at 906–07.

135. *Id.* at 906.

136. *See id.*

137. *Fitisemanu v. United States*, 20 F.4th 1325, 1327 (10th Cir. 2021) (Bacharach, J., dissenting).

138. *See id.* at 1327–28.

Amendment's guarantee of American democratic citizenship regardless of race or ethnicity.

A. *Constitutional Citizenship's Import for American Democracy*

Petitioners and supporting amici asserted that denial of constitutional citizenship for those born in U.S. territories contravenes the goals of the Fourteenth Amendment's Citizenship Clause.<sup>139</sup> The petitioners asserted that the drafters of the Fourteenth Amendment intended to firmly establish democratic citizenship, regardless of race or ethnicity, for all people subject to U.S. dominion, including those in territories.<sup>140</sup> The Citizenship Clause also removed the political branches' ability to impose tiers of membership in the American polity by placing the question of citizenship at birth within the United States beyond legislative power.<sup>141</sup> The words and concomitant understanding of the Citizenship Clause supported children's citizenship at birth in an expanding America—whether that expansion was through territories or migration—despite political choices that denied their parents' naturalization.<sup>142</sup> The racist basis of the *Insular Cases*—that some people are not deserving of citizenship because of their race or ethnicity—is a continuing rejection of the framers' goals and a stain on U.S. democracy.<sup>143</sup> Further, the legislatively created status of “national” has perpetuated the treatment of American Samoans as an inferior subclass.<sup>144</sup>

The amicus brief for the descendants of Dred Scott and Isabel Gonzalez argued that recognition of constitutional citizenship for those born in U.S. territories is necessary to conclusively reaffirm the purpose of the Fourteenth Amendment.<sup>145</sup> Further, the amendment honored American citizenship by repudiating the racist basis of *Dred Scott*<sup>146</sup> and “obliterat[ing] the race line” from American citizenship.<sup>147</sup> The Citizenship Clause was an unambiguous affirmation of equality and confirmed that the United States does not belong to any one race.<sup>148</sup> It also rejected tiers of membership in the nation.<sup>149</sup>

Amicus contended that application of the *Insular Cases* to deny constitutional citizenship to those born in territories also denigrates the import of constitutional citizenship in America's democracy. The view that certain racial or ethnic groups are not fit for American citizenship is at the core of the doctrine of territorial incorporation. The amicus brief filed by

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139. See Petition for a Writ of Certiorari, *supra* note 18, at 20–23.

140. *Id.*

141. See *id.*

142. See *id.*

143. See *id.* at 24–25, 27–31.

144. See *id.*

145. See Brief of the Descendants of Dred Scott and Isabel Gonzalez as *Amici Curiae* in Support of Petitioners at 4–6, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1810893.

146. See *id.* at 6–11.

147. See *id.* at 9–11 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting)).

148. *Id.*

149. See *id.* at 11.

former federal and local judges asserted that because the *Insular Cases* remain binding precedent, lower courts have to apply them, and in doing so, must implicitly endorse unacceptable racial assumptions.<sup>150</sup> The amicus brief filed by the American Civil Liberties Union on behalf of a number of civil rights organizations advocates that the *Insular Cases*' doctrine of territorial incorporation should be overruled because it has no foundation in the Constitution's text or history, and it rests on obsolete and abhorrent notions of racial inferiority.<sup>151</sup>

The brief of citizenship scholars explains that the rule of citizenship flowing from the place of birth has "deep roots in the American tradition [that is] drawn from English common law."<sup>152</sup> The common law recognized that all people who were born in a place over which the king had sovereignty were subjects of the king, including those in overseas colonies.<sup>153</sup> Persons born in American colonies while under British rule were considered natural-born British subjects.<sup>154</sup> After independence, the United States continued the common-law concept but briefly recognized an exception in the *Dred Scott* case, which denied citizenship to African Americans born in the United States.<sup>155</sup> "The Fourteenth Amendment [c]onstitutionalized the [r]ule that [c]itizenship [f]lows from the [p]lace of [b]irth."<sup>156</sup> At the time of the ratification of the Fourteenth Amendment, this rule was understood to include persons born in the territories of the United States.<sup>157</sup> The Supreme Court in *Wong Kim Ark* recognized that a person may be a citizen of the United States without being a citizen of a state.<sup>158</sup> Being subject to U.S. jurisdiction did not depend on birth in an established state or on membership in a particular racial, cultural, or social group.<sup>159</sup>

#### B. Constitutional Citizenship as a Right Protected from Legislative Change

The amicus brief for the current and former elected officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands asserts that recognition of constitutional citizenship is essential for all individuals born in U.S. territories, even those who hold statutory citizenship.<sup>160</sup>

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150. See Brief of Former Federal and Local Judges as *Amici Curiae* Supporting the Petitioners at 4, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1837733.

151. See Brief for Amici Curiae American Civil Liberties Union et al. in Support of Petitioners at 6, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 2015430.

152. See Brief of Citizenship Scholars as *Amici Curiae* in Support of Petitioners at 5–6, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 1810962.

153. See *id.* at 6–8.

154. See *id.* at 7.

155. See *id.* at 8–10.

156. See *id.* at 10.

157. See *id.* at 12.

158. See *id.* at 11.

159. See *id.* at 12–13.

160. See Brief for *Amici Curiae* Current and Former Elected Officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Petitioners, *supra* note 11, at 7–8.



“Without that protection, people who have lived their entire lives as U.S. citizens could face the real danger of having their citizenship revoked by legislative whim, even as the United States continues to maintain full and exclusive sovereignty over their lands.”<sup>161</sup>

In *Rogers v. Bellei*,<sup>162</sup> the Supreme Court held that statutory citizenship is not entitled to the same protections as Fourteenth Amendment citizenship.<sup>163</sup> Congress can take away a statutory citizen’s citizenship without that citizen’s assent.<sup>164</sup> The potential threat to citizenship is heightened if a territory chooses independence, as indicated in the congressional proposals to terminate Puerto Ricans’ citizenship if Puerto Rico became independent, rather than to afford dual citizenship.<sup>165</sup>

### *C. Citizenship as the Individual Right to Belong and the Right to Have Rights*

The Samoan Federation of America and petitioners stated that American Samoans are citizens of nowhere, as they owe allegiance exclusively to the United States but have no citizenship.<sup>166</sup> They must carry an endorsement code in their U.S. passports that disclaims their citizenship and creates confusion about their relationship to the United States, inhibiting their right to travel.<sup>167</sup> If they were citizens, they would be acknowledged as worthy of full membership. Their U.S. passports would not carry the denigrating and confusing notification that the holder is not a U.S. citizen.<sup>168</sup>

The Samoan Federation and petitioners’ briefs also addressed the practical and political harms suffered by American Samoans from lack of constitutional citizenship.<sup>169</sup> American Samoans cannot serve as commissioned officers in the military, yet American Samoa’s military recruitment rate is among the highest of any state or territory.<sup>170</sup> Further, individuals born in American Samoa but residing in states cannot exercise political rights anywhere.<sup>171</sup> Despite being taxpayers, they cannot vote in federal or state elections where they reside because they are not citizens.<sup>172</sup>

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161. *See id.* at 8.

162. 401 U.S. 815 (1971).

163. *See id.* at 835.

164. *See id.*

165. *See* Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1033–34 (2008).

166. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5, 23–24; Petition for a Writ of Certiorari, *supra* note 18, at 9; Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1676 (2017).

167. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 24.

168. *See id.*

169. *See id.* at 22–25; Petition for a Writ of Certiorari, *supra* note 18, at 9.

170. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 23–24.

171. *See id.* at 22–23; Petition for a Writ of Certiorari, *supra* note 18, at 9.

172. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 22–23; Petition for a Writ of Certiorari, *supra* note 18, at 9.

As citizens living in a state, they would have the right to vote for federal and state officials, run for office, and serve on juries.<sup>173</sup> As citizens, they could work as public servants for state and federal governments.

The federal and American Samoan governments responded that federal law allows nationals who move to states to apply for naturalization and count time residing in American Samoa toward the five-year residency requirement.<sup>174</sup> The petitioners replied that requiring persons who owe their allegiance to the United States to go through naturalization is the harm, not the remedy.<sup>175</sup>

Naturalization has many requirements and involves a lengthy and costly process.<sup>176</sup> Moreover, the naturalization of a parent with national status cannot result in automatic citizenship for their child.<sup>177</sup> That American Samoan child could not apply for naturalization because a naturalization applicant must be eighteen years old.<sup>178</sup> Consider an American Samoan family that relocates to a U.S. state and desires citizenship. Each parent would have to apply with supporting documentation, pay the fee, meet all the criteria for naturalization, and wait for a final determination. Even if the parents are granted naturalization, their children would spend their childhoods without citizenship. Each child would have to wait until age eighteen, apply, pay the fee, meet all the requirements of naturalization, and wait for the determination.

The federal and American Samoan governments noted that the nonvoting congressional representative from American Samoa proposed legislation to simplify American Samoan naturalization.<sup>179</sup> The bill proposes naturalization eligibility for those born in American Samoa who live in an outlying possession or state, but significant naturalization requirements would still remain.<sup>180</sup> The bill does not afford citizenship to children with national status in the custody of naturalized American Samoan parents.<sup>181</sup> It allows citizen parents to apply for naturalization of their children if they

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173. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 23.

174. See Brief for the Federal Respondents in Opposition at 20, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 3757351; Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata at 2, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394), 2022 WL 3928291.

175. See Reply Brief for Petitioners at 12, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394).

176. HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., R43366, U.S. NATURALIZATION POLICY 3, 7, 24–26 (2021), <https://crsreports.congress.gov/product/pdf/R/R43366> [<https://perma.cc/MA6B-GZ4Q>].

177. 8 U.S.C. § 1431(a); 8 U.S. DEP'T OF STATE, *supra* note 37, §§ 301.10-1(b)(1), 301.10-2(H)(d).

178. 8 C.F.R. § 316.2(a)(1) (2021).

179. See Brief for the Federal Respondents in Opposition, *supra* note 174, at 19–20; Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 174, at 21.

180. H.R. 1941, 117th Cong. (2021).

181. *Id.*

reside in an outlying possession, but not if they reside in a state.<sup>182</sup> Changes in the naturalization law could, at the very least, provide nationals with the same rights as permanent residents. But they should go further by providing automatic citizenship to nationals who establish residency in U.S. states. The bill has only one voting member of the U.S. House of Representatives as a cosponsor and no related U.S. Senate bill.<sup>183</sup>

#### *D. Citizenship by Consent*

The American Samoa Government filed a brief in opposition and argued that judicial recognition of citizenship would impose citizenship without consent.<sup>184</sup> The petitioners and the Samoan Federation responded that there is no evidence that the majority of American Samoans oppose U.S. citizenship, and that the pursuit of U.S. citizenship has been an integral part of American Samoan history.<sup>185</sup> In 1900, when American Samoans transferred their sovereignty and pledged allegiance to the United States, they expected U.S. citizenship.<sup>186</sup> When they discovered that the United States did not consider them citizens, they actively advocated for it and were subjected to racism and fearmongering when they sought recognition of the citizenship that the Constitution already provided.<sup>187</sup>

In this world of nation-states, initial citizenship is attributed at birth through *jus soli*, heredity, or a combination of both, not consented to by infants.<sup>188</sup> Attributing citizenship rather than national status at birth to American Samoans would not be different in terms of consent. The American Samoan government, however, views citizenship as a collective political decision.<sup>189</sup> It is not clear when or how that decision would be made and who would have a part in it—e.g., whether stateside American Samoans would be able to participate.

#### *E. Citizenship as a Barrier to Self-Determination*

The American Samoan government's brief asserted that judicial recognition of citizenship would undermine their right to self-determination.<sup>190</sup> They stated that they "continue to evaluate their relationship with the United States through" dialogue, proposals to Congress,

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182. *Id.*

183. *Id.*

184. See Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 174, at 14, 19–20.

185. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5–8.

186. See *id.* at 8; Petition for a Writ of Certiorari, *supra* note 18, at 7–8.

187. See Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 9–12; Petition for a Writ of Certiorari, *supra* note 18, at 7–8.

188. See Calvo, *supra* note 1, at 165.

189. See Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 174, at 2.

190. See *id.* at 21.

and a constitutional convention.<sup>191</sup> Further, the American Samoan legislature passed a resolution expressing its support for the Tenth Circuit's decision.<sup>192</sup>

The Samoan Federation argued that self-determination is undermined by American Samoa's territorial status, not by citizenship.<sup>193</sup> Further, depriving stateside American Samoans from citizenship, which is necessary to vote, precludes any American Samoans from having input on federal decisions that affect them.<sup>194</sup>

The American Samoan government officials assume that Congress and the Department of the Interior will accede to determinations made through American Samoan processes.<sup>195</sup> The reality is that the U.S. executive and legislative branches still have overall control. Recently, the Sixth Constitutional Convention for American Samoa proposed changes in their constitution for more local control,<sup>196</sup> but a statute requires that any constitutional changes must be approved by Congress.<sup>197</sup>

The American Samoan government does not explain how citizenship would undermine either their consultations with the United States or their local government actions. The amicus brief for the current and former elected officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands stated that citizenship is compatible with the territories' right to self-determination.<sup>198</sup> The question of citizenship is separate from the political relationship between a territory and the United States.<sup>199</sup>

However, the structure of the U.S. Constitution makes it impossible to fully afford nationals or citizens residing in U.S. territories full rights of self-determination. Those residing in territories are denied the right to vote for the federal officials in the executive and legislative branches who ultimately control their lives.<sup>200</sup> The Constitution provides that members of Congress are elected by individuals living in states and requires that the members of the legislature be residents of states.<sup>201</sup> Further, the president

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191. *See id.*

192. *See id.*

193. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 21–22.

194. *See id.* at 22.

195. *See* Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 174, at 20–21.

196. *See* AM. SAM., REPORT OF THE 2022 CONSTITUTIONAL REVIEW COMMITTEE (2022), [https://www.americansamoa.gov/\\_files/ugd/abcfec\\_32f2d98730b64505a795dd53f405e6dc.pdf](https://www.americansamoa.gov/_files/ugd/abcfec_32f2d98730b64505a795dd53f405e6dc.pdf) [<https://perma.cc/RHS2-T2AT>]; *11 Proposed Constitutional Changes on the Ballot*, TALANEI (Sept. 9, 2022), <https://www.talanei.com/2022/09/09/11-proposed-constitutional-changes-on-the-ballot/> [<https://perma.cc/C43Y-9PYJ>].

197. 48 U.S.C. § 1662a.

198. *See* Brief for *Amici Curiae* Current and Former Elected Officials of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands in Support of Petitioners, *supra* note 11, at 17–18.

199. *See id.*

200. *See* Petition for a Writ of Certiorari, *supra* note 18, at 9.

201. U.S. CONST. art. I, §§ 2–3, *amended by* U.S. CONST. amend. XVII.

and vice president of the United States are indirectly elected by electors representing states.<sup>202</sup> As applied to inhabitants of territories, this undermines the basic principle of democratic citizenship that those who are subject to the control of a government have the right to participate in choosing those who govern them.

American Samoa theoretically has the options of statehood or independence. There is no indication that American Samoa is advocating for either. Congressional approval of statehood<sup>203</sup> for a territory having fewer than 50,000 inhabitants seems unlikely. Independence also seems unlikely and could adversely impact the status of American Samoans who gained or want American citizenship. There are three former territories that are independent states with Compacts of Free Association with the United States.<sup>204</sup> They have a continuing and significant dependency on the United States.<sup>205</sup> Moreover, their citizens do not have dual U.S. citizenship; they have a special, nonimmigrant status that allows them to travel to and work in states, but not to participate politically, and affords no pathway to U.S. citizenship.<sup>206</sup>

American Samoa could also negotiate with the United States for greater local control as a territory. For example, a covenant with the United States established the Commonwealth of the Northern Mariana Islands.<sup>207</sup> Individuals in the Northern Mariana Islands are U.S. citizens, so their governance coexists with citizenship.<sup>208</sup> But an amicus brief by the Northern Marianas Descent Corporation asserted that any decision regarding citizenship should be decided on grounds that do not implicate the *Insular Cases*.<sup>209</sup> They stated that the covenant allows certain conditions to exist in the Northern Marianas despite the U.S. Constitution, which could be jeopardized by the reversal of those cases.<sup>210</sup>

American Samoa only has the degree of self-determination allowed by the U.S. executive and legislature. That would not be any different if those residing in American Samoa were U.S. citizens. But citizenship for American Samoans residing in states would provide them with significant rights of self-determination through the ability to vote.<sup>211</sup>

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202. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

203. U.S. CONST. art. IV, § 3.

204. *See* THOMAS LUM, CONG. RSCH. SERV., IF12194, THE COMPACTS OF FREE ASSOCIATION (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12194/2> [<https://perma.cc/K5HV-KN66>].

205. *See id.*

206. *See id.*

207. *See* Brief for *Amici Curiae* Northern Marianas Descent Corporation and United Carolinians Association in Support of Respondents at 3, *Fitisemanu v. United States*, 143 S. Ct. 362 (2022) (No. 21-1394).

208. *See id.* at 6–7.

209. *See id.* at 17.

210. *See id.* at 3–7.

211. *See* Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 5.

*F. Citizenship as a Barrier to Cultural Preservation*

The American Samoan government officials argued that citizenship threatens the Samoan way of life by risking disruption of the political and social structures that allow their culture to survive.<sup>212</sup> They noted that American Samoans are organized in large extended families, ‘aiga, headed by hereditary chiefs, matai.<sup>213</sup> One house of the Samoan legislature is composed of registered matai.<sup>214</sup> Most land is owned in common by the ‘aiga and managed by the matai, and “Samoan law restricts sale of community land to anyone with less than fifty percent Samoan ancestry.”<sup>215</sup> The officials’ fear is that these practices could be declared unconstitutional under the equal protection and due process provisions of the U.S. Constitution.<sup>216</sup> Also, the practice of matai-enforced prayer curfews might be deemed to violate the Establishment Clause of the Constitution.<sup>217</sup> The brief acknowledged that the outcome of any legal challenge is unpredictable but asserted that it is impossible to conclude that citizenship will have no effect on such outcomes.<sup>218</sup>

The petitioners and the Samoan Federation countered that recognizing citizenship does not impair cultural preservation.<sup>219</sup> Applicability of the referenced constitutional provisions does not turn on citizenship.<sup>220</sup> Those provisions already apply to American Samoa and other territories.<sup>221</sup>

The High Court of American Samoa’s decision in *Craddick v. Territorial Registrar*<sup>222</sup> demonstrates an application of equal protection that preserves cultural imperatives. The court confirmed that equal protection and due process applied to American Samoa and applied the compelling state interest test to a challenge to its racially restrictive land-alienation laws.<sup>223</sup> The court determined that American Samoa’s government had a compelling interest in preserving Samoan culture through preserving American Samoan land for American Samoans.<sup>224</sup> It stated that the whole fiber of the social, economic, traditional, and political pattern in American Samoa is connected to land ownership; the compelling need to preserve an entire culture permits the utilization of a racial classification.<sup>225</sup>

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212. See Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata, *supra* note 174, at 14–19.

213. *Id.* at 7.

214. *Id.* at 15.

215. See *id.* at 16–17.

216. See *id.*

217. See *id.* at 18–19.

218. See *id.* at 16.

219. See Reply Brief for Petitioners, *supra* note 175, at 2; Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 21–22.

220. See Reply Brief for Petitioners, *supra* note 175, at 2; Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 21.

221. See Reply Brief for Petitioners, *supra* note 175, at 2; Brief of Amicus Curiae Samoan Federation of America, Inc. in Support of Petitioners, *supra* note 43, at 21–22.

222. 1 Am. Samoa 2d 10 (App. Div. 1980).

223. See *id.* at 12–14.

224. See *id.*

225. See *id.* at 14.

The U.S. Court of Appeals for the Ninth Circuit upheld similar land-alienation restrictions in the Northern Mariana Islands, whose residents are citizens, but under an analysis that applied an impracticable and anomalous standard.<sup>226</sup> Still, the Ninth Circuit's views on equal protection provides a position that supports the preservation of culture.<sup>227</sup> The court stated that the purpose of equal protection was to protect minority rights: "The Bill of Rights was not intended to interfere with the performance of [the United States's] international obligation[]" to preserve cultures, "[n]or was it intended to operate as a genocide pact for diverse native cultures."<sup>228</sup>

Moreover, American Samoans currently have no political power to guarantee the Samoan way of life. Because they are inhabitants of a territory, their lives are subject to congressional and executive determinations that can change with every U.S. election cycle. The current governmental representatives of American Samoa may have calculated that without citizenship, they have a better chance of maintaining their status quo or obtaining their desired changes through requests to Congress and the executive.<sup>229</sup> To the contrary, some have posited that providing constitutional citizenship to those born in the territories would establish an integral American identity that would be better able to promote protection of indigenous rights than trying to repurpose the *Insular Cases*' racially exclusionary foundations.<sup>230</sup>

#### CONCLUSION

With the Supreme Court's denial of certiorari in *Fitisemanu*, the controversy regarding constitutional citizenship will continue to plague the relationship between the United States and its territories, the lives of those born in the territories, and the progress toward meeting the goal of a full American democracy. The Fourteenth Amendment's promise of an American democracy without racial, ethnic, or subordinate subclass discrimination has not been fulfilled. The refusal to recognize even the formal equal citizenship of individuals who are subject to U.S. dominion from birth perpetuates undemocratic, second-class status. Attempting to repurpose the racist *Insular Cases* to justify that refusal only adds to their stain on American democracy.

Recognizing citizenship would not have solved all of the territories' problems, as undemocratic political control of the territories is incorporated into the Constitution. However, it would have been a first step toward acknowledging the dignity of individuals and their membership in the

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226. *Wabot v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1990).

227. *See id.*

228. *See id.*

229. *See, e.g.*, Press Release, Aumua Amata Coleman Radewagen, Rep., U.S. House of Reps., Comments to American Samoa Constitutional Convention Review Committee (June 10, 2022), <https://radewagen.house.gov/media-center/press-releases/comments-american-samoa-constitutional-convention-review-committee> [https://perma.cc/Q25G-2HJR].

230. *See* Cassandra Burke Robertson & Irina D. Manta, *Integral Citizenship*, 100 TEX. L. REV. 1325, 1372 (2022).

American polity, as well as affording them the practical rights that are dependent on citizenship. It also had the potential of strengthening the territories' voices in efforts to recognize their plight and the United States's responsibility for suffered harms.

The American Samoan government officials' objections to citizenship had a strong influence in the Tenth Circuit's denial of citizenship.<sup>231</sup> The officials raised significant and important concerns about the preservation of their culture, but they also made unconvincing arguments that citizenship would undermine it.<sup>232</sup> Their assessment—that there was no firm guarantee that citizenship would not affect their culture—led them to reject the benefits of citizenship not only for those living in American Samoa, but also for the many more American Samoan nationals living in states.<sup>233</sup> The denial of constitutional citizenship also left those born in other territories with only statutory citizenship that can be changed by congressional action.<sup>234</sup>

What, then, is next for American Samoa, the other U.S. territories, and the people born in them? Will there be resolution for those born in colonies that have served U.S. purposes for numerous decades but continually struggle for political and economic agency and fairness? The answers to these questions require that territories and their people gain the serious attention, concern, and cooperation of the political branches of the U.S. government.

Although statutes cannot replace constitutional citizenship, there is significant room for statutes to improve citizenship status and access. For those who hold statutory citizenship, Congress could amend statutes to clarify that continuation of their citizenship is a lifelong guarantee. This is a reasonable solution even if a territory chooses independence, as dual nationality is a reasonable option. For individual nationals who want citizenship, naturalization and other citizenship laws could be amended to provide them with at least the same opportunities for citizenship as permanent residents, but with much-simplified criteria and processes.

Resolving the numerous serious problems that U.S. territories and their people now confront is quite complicated and beyond the scope of this Essay. But there is hope that the citizenship controversy has raised awareness of the urgent need to resolve the long-standing inequities and continuing harms of colonization that not only affect those colonized, but also undermine the American democratic process.

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231. *See supra* Part IV.B.

232. *See supra* Part IV.B.

233. *See supra* Part IV.B.

234. *See supra* Part IV.B.