CASE NOTE: FITISEMANU V. UNITED STATES: U.S. Citizenship in American Sāmoa and the Insular Cases

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Abstract

This article considers the problematic place of individual American Sāmoans who have been denied full membership within the American political community, first due to the colonialist arcane notion of being unfit for full membership in the American community on racial and cultural grounds embodied in the Supreme Court's *Insular Cases*, and second, because these same cases have been repurposed, ostensibly to protect Indigenous culture. To that end, this article reviews the United States Tenth Circuit Court of Appeals' recent decision in *Fitisemanu et al. v. United States*, where a split panel reversed the U.S. District Court recognition of birthright citizenship to those born within American Sāmoa. The Appeals Court's decision determined that American Sāmoa was not within the scope of the 14th Amendment to the U.S. Constitution through a controversial repackaging of the so-called *Insular Cases*, which have been criticized as being emblematic of racialist and colonialist jurisprudence that justified the denial of rights to inhabitants of American colonial territories.

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I. Introduction

Colonialism has left a historic legacy of legal pluralism and various governing arrangements across the Asia-Pacific region. Unsurprisingly, this legacy has affected the legal regimes in each state and territory. The laws that govern the region originate from different sources: local and customary, English common law and equity, colonial legislation, state and introduced legislation, international jurisprudence, and national constitutional provisions. These have given rise to a unique legal pluralism where courts and policymakers are confronted with complex issues relating to the appropriate legal rules, evidence and jurisdiction. This complexity is further muddled as legal systems across the region cope with the changing demands of modernization and globalism.

One legacy of colonialism is found in the extent to which the rights guaranteed under the American constitution extend to American Sāmoa and "American national" status of American Sāmoans born in the territory. In the recently decided case *Fitisemanu v. United States*[1], a split United States Court of Appeals for the Tenth Circuit reversed the district court, which had found that the Citizenship Clause of the 14th Amendment extended to American Sāmoan residents. The plaintiffs had sought American citizenship based on their birth in American Sāmoa. The Appeals Court held that birthright citizenship does not qualify as a fundamental right in American Sāmoa. Despite the territory falling under the jurisdiction of the United States, the territory was not "within the

1. Fitisemanu v. United States, 1 F.4th 862 (2021).

United States" for purposes of the 14th Amendment because it was not an "incorporated territory destined for statehood", but rather an "unincorporated" territory.[2] As such, the plaintiffs, who resided in the state of Utah at the time of the suit, were determined to be American Sāmoan citizens, and were denied U.S. citizenship rights.[3]

This comment argues that the Court of Appeals decision, while arguably well intentioned, unjustifiably narrows the scope of the 14th Amendment's Citizenship Clause. This is contrary to the idea of American citizenship as a fundamental right and effectively abandons the common law basis of citizenship rights that necessarily provides the foundation for examining the scope of the Citizenship Clause. In addition, the decision undermines the broad interpretation of citizenship rights and the concomitant application of American constitutional protections in a range of circumstances.

II. Background

A. *Adding the "American" to Sāmoa: Treaty of Berlin and Cessions of Sovereignty to the United States*

The Southern Pacific island chain of Sāmoa was an object of Great Power conflict among Germany, Great Britain and the United States in the latter half of the 19th century.[4] The American navy had been interested in Pago Pago harbor as a coaling station since the 1870s as the United States sought to extend its influence and protect trans-Pacific trade routes. In 1889 the Treaty of Berlin secured the interests of Great Britain, Germany and the United States over the archipelago. The United States subsequently acquired the eastern islands through two deeds of cession with local chieftains in 1900 and 1904.[5]

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2. *Id.* at 877.

3. The Citizenship Clause reads "All 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." U.S. Const. amend. XIV, § 1, cl. 1.

4. Line-Noue Memea Kruse, The Pacific Insular Case of American Sāmoa: Land Rights and Law in Unincorporated US Territories 29–32 (2018).

5. Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila, *reprinted in* 1 Papers relating to the foreign relations of the United States, 1929, Document 853 (1929) [hereinafter April 17 Instrument]; Instrument of Cession Signed July 14, 1904 by the Representatives of the People of the Islands of Manua, 1 Papers relating to the foreign relations of the United States, 1929, Document 855 (1929) [hereinafter July14 Instrument]. President McKinley issued Executive Order No. 125-A on February 19, 1900, directing that: The island of Tutuila of the Sāmoan Group, and all other islands of the group east of longitude one hundred and seventy-one degrees west of Greenwich, are hereby placed under the control of the Department of the Navy, for a naval station. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States, and to give to the islands the necessary protection. Memea Kruse, *supra* note 4, at 1.

Presently, American Sāmoa is the only US territory that remains politically and legally classified as "unorganized" and "unincorporated."[6] Although it has an elected governor and legislature (*Fono*), the government has not been organized through a Congressional "Organic Act" which has established or "incorporated" civil governments in other territories.[7] Without a Congressional Organic Act, the two 1900 and 1904 ratified Deeds of Cession provide Congress and its delegated authority to the Secretary of the Interior with all governmental power over American Sāmoa.[8] The Secretary of the Interior allowed Sāmoans to draw up their own constitution in 1962, a document later revised in 1967. However, despite this limited self-determination, American Sāmoa remains under the ultimate supervision of the Executive branch.[9]

B. *The Citizenship Dispute in American Sāmoa*

The imperialist impulse that led to the American acquisition of the eastern islands of Sāmoa led to a discussion as to the extent to which constitutional protections and rights would be extended into the new territories. In short, the question was whether the Constitution automatically applied, or "followed the flag," to protect and govern persons residing in the territories acquired by the United States.[10] In this debate, there were essentially three positions. The first position, outlined by Adams and Randolph, argued that the Constitution and all its rights and privileges automatically followed whatever territory was absorbed into the US body-politic.[11] The second position, promoted by Charles Langdell, argued that constitution applied only insofar as Congress in its plenary capacity chose to apply it.[12] Between these two positions a

6. American Sāmoa is governed under the following National statute: "Until Congress shall provide for the government of such islands, 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; and the President shall have power to remove said officers and fill the vacancies so occasioned." 48 U.S.C.A. § 1661(c) (West). Government institutions and civil rights applicable to the territory or found in the Revised Constitution of American Sāmoa. *Revised Constitution of American Samoa*, American Samoa Bar Association https://new.asbar.org/revised-constitution-of-american-Sāmoa [https://perma.cc/YU47–8GYC.] The Revised Constitution provides significant protection to native American Sāmoans against alienation and the destruction of the Sāmoan way of life. Am. Samoa Const., art. I, § 3; *see also* Craddick v. Territorial Registrar, 1 A.S.R.2d 10 (1980).

7. Stanley K. Laughlin, *The Burger Court and the United States Territories*, 36 U. Fla. L. Rev. 755, 781–782 (1984).

8. *Id.*

9. Exec. Order No. 10,264, 16 Fed. Reg. 6417 (June 29, 1951) (transferring supervisory authority from the Secretary of the Navy to the Secretary of the Interior).

10. *Ballentine v. United States*, 2001 U.S. Dist. LEXIS 16856, 2001 WL 1242571, at 18–20 (D.V.I. Oct. 15, 2001).

11. Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 Harv. L. Rev. 291 (1898).

12. C. C. Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365 (1899).

compromise position was promoted by Abbott Lowell. Lowell argued that the Constitution would apply differently based on how the territory was classified. This classification authority was based on the Article V treaty power.[13]

Lowell's position was ultimately adopted by the American government, which exercised sovereign authority as it sought to rule the territories it acquired across the Pacific and Caribbean at the end of the 19th century. On one hand, Congress had the option of creating an "incorporated" territory, as it had done in Hawai'i. Implicit in this classification was the notion that these territories were destined for statehood, and thus they were extended constitutional protections. On the other hand, the territory could be acquired as an "unincorporated" territory. In these territories, which were envisioned as not amenable to statehood, constitutional provisions would not apply unless explicitly legislated upon by Congress. In incorporated territories, the Constitution applies of its own force (*ex proprio vigore*), while in unincorporated territories only "fundamental" constitutional rights and privileges apply.[14] This central distinction, which differentiates the scope and content of American constitutional rights and privileges, was judicially sanctioned in a controversial set of U.S. Supreme Court opinions commonly known as the "*Insular Cases*" issued between 1900 and 1922.[15]

American Sāmoa's unique history of cession and its subsequent legal categorization as an unincorporated territory means that individuals who are born there do not become American citizens at birth. Unlike other American territories and states, American Sāmoans are designated American "Nationals."[16] They are denied the right to vote in American elections, cannot run for elective federal or state office outside American Sāmoa, and are denied the right to serve on federal and state juries. They

13. *Developments in the Law—The U.S. Territories*, 130 Harv. L. Rev. 1616, 1619 (2017).

14. Territory of Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v Bidwell, 182 U.S. 244 (1901); Rassmussen v United States197 U.S. 516 (1905).

15. De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901);; Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*); Armstrong v. United States, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244 (1901); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Dooley v. United States, 183 U.S. 151 (1901) (*Dooley II*); and The Fourteen Diamond Ringsv. United States, 183 U.S. 176 (1901). A second set of cases, decided between 1903 and 1914, further developed the *Insular Cases*: Hawaii v. Mankichi, 23 S. Ct. 787 (1903); Gonzales v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); *Rassmussen*, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. People of Porto Rico, 207 U.S. 113 (1907); People of State of New York *ex rel.* Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914) and Balzac v. Porto Rico, 258 U.S. 298 (1922).

16. "U.S. National" status was created for American Sāmoans in 1940. 8 U.S.C.A. § 1408(1)(West). Nationals owe permanent allegiance to the United States but are not citizens. 8 U.S.C.A. § 1101(a)(22) (West).

are allowed to work and travel freely in the United States and receive certain advantages in the naturalization process. In part, the justification for this status has been the purported incompatibility of American constitutional rights such as due process with American Sāmoan culture including protections for *fa'a Sāmoa* customary land tenures and uses and *fa'amātai* which concerns traditional governance.[17]

The citizenship status of American Sāmoans remains contested, however, most recently in *Fitisemanu v. United States*. In *Fitisemanu*, the plaintiff argued that the various acts by which Congress extended citizenship to residents of the various territories were unconstitutional and unnecessary because, properly interpreted, the Citizenship Clause of the Fourteenth Amendment already guaranteed birthright citizenship to these inhabitants.

III. Fitisemanu v. United States

A. *Introduction*

In 2018, John Fitiseamu, Pale Tuli and Rosavita Tuli, all born in American Sāmoa, along with Southern Utah Pacific Island Coalition, a non-profit organization located in Utah, brought an action in the Federal District Court of Utah. The parties alleged that their status as U.S. Nationals, rather than citizens of the United States, violated the Fourteenth Amendment of the U.S. Constitution.[18] They based their claim on the grounds that American Sāmoa was both "in the United States" and "subject to the jurisdiction thereof" under the Constitution.[19] The

17. This term has been translated to mean "the Sāmoan way." Teichert observes that it is best described as "the essence of being Sāmoan" as well as a "unique attitude toward fellow human beings, unique perceptions of right and wrong, the Sāmoan heritage, and fundamentally the aggregation of everything that the Sāmoans have learned during their experience as a distinct race." Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Sāmoan Custom in the Law of American Sāmoa*, 3 Gonz.. J. Int'l L. 35, 41–42 (2000); Ian Falefuafua Tapu, *Who Really Is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 Asian Pac. Am. L.J. 61, 65 (2020).

18. Fitisemanu v. United States, 426 F.Supp.3d 1155 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021).

19. *Id.* at 1157. This was not the first such attempt by American Sāmoans to claim United States citizenship. Indeed, a similar legal theory was argued a few years earlier in the D.C. Circuit's District Court decision of Tuaua v. United States. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015). The DC Circuit Court in *Tuaua* reasoned that the Fourteenth Amendment's Citizenship Clause was textually ambiguous. And because of this ambiguity, the court must apply the 'impractical and anomalous' test in determining which rights it would extend to overseas territories. The court also considered whether *Downes* and its *Insular Cases* lineage, or rather *Wong Kim Ark* should control. It determined that *Wong Kim Ark* and its progeny did not apply. As the Wong was born in California to foreign parents (who were neither diplomats nor engaged in hostilities with the United States), the court held that his status clearly fell within the scope of the Citizenship Clause. As such he was a citizen of the United States. The court also reasoned that since different countries have made determinations for themselves rather to follow *jus solis* or *jus sanguinis*, this was a

case was before the Tenth Circuit on appeal after the district court had agreed with the plaintiffs' Summary Judgment motion and held that the Citizenship Clause of 14th Amendment extended to American Sāmoa. The U.S. government, joined by the Government of American Sāmoa appealed, arguing that American Sāmoa is not "in the United States" within the meaning of the Citizenship Clause as interpreted by Supreme Court precedent.

B. *The District Court Decision*

The Plaintiffs sought a declaratory judgment from the district court that persons born in American Sāmoa are "citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment", and that 8 U.S.C. § 1408(1)—the statute that designated native born American Sāmoan as U.S. Nationals—is unconstitutional both on its face and as applied to Plaintiffs."[20] In short, the Plaintiffs argued that the phrase "in the United States" in Section 1 of the Fourteenth Amendment includes both States and American Territories. The decision, authored by U.S. District Court Judge Clark Walddoups, held that the Fourteenth Amendment's Citizenship Clause extended to American Sāmoa; thus, persons born in American Sāmoa are United States citizens. In reaching this conclusion, the court determined that the doctrine of *jus soli* was embodied within the Fourteenth Amendment. This English common law doctrine holds that anyone born within the territory of the sovereign, except children of Ambassadors or those owing allegiance to a hostile foreign power, gains the citizenship of the sovereign.[21] The district court also undertook a lengthy review of the history of American Sāmoan and Congressional views of citizenship throughout the Twentieth Century. For Judge Walddoups, this historical record left little doubt that American Sāmoans have long considered themselves American citizens and wished to be recognized as such.

Since the district court concluded that the Fourteenth Amendment constitutionalized the English common-law rule for birthright, the remaining question left for the court to consider was whether American Sāmoa is located "in the United States" for purposes of the Citizenship clause. The Plaintiffs argued that the phrase includes both States and Territories. The United States and American Sāmoan Governments argued that "[t]he best reading of the Citizenship Clause is that U.S. territories are not 'in the United States' within the meaning of the Clause because 'in the United States' means in the 50 States and the District of Columbia."[22]

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matter of policy and this not a fundamental right. Given this, the court applied the 'impractical and anomalous' test to citizenship and concluded that since, in its view, the people of American Sāmoa had not yet determined by a majority vote that they wished to become citizens, then it was not for the court to forcibly impose citizenship upon them.

20. *Fitisemanu*, 426 F. Supp. 3d, at 1157.
21. *Calvin's Case*, 77 Eng. Rep. 377 (1608).
22. *Fitisemanu*, 426 F. Supp. 3d, at 1176.

They supported this argument based on the text of the Tenth Amendment, and the language of Article IV, Section 3, which draws a general distinction between "the United States' . . . and lands belonging to the United States".[23] They also cited the difference in the language between the 13th and 14th amendments.[24]

The district court concluded that American Sāmoa was "within" the United States for purposes of the Citizenship Clause. It based its conclusion on the geographic scope of the 14th Amendment considering English common law and the historical record that the islands' traditional leaders, the Matai, had by way of the 1900 and 1904 deeds of cession (later accepted by the Congress in 1929 (48 U.S.C. Sec 1661(a)), ceded the islands to the United States. These acts brought American Sāmoa within the "full possession and exercise of the United States" and as such, within the United States for purposes of the Fourteenth Amendment.[25]

C. *Tenth Circuit Court of Appeals Majority Decision*

The United States joined by the American Sāmoan Government appealed the district court's determination to the 10th Circuit Court of Appeals. The Appeals Court, in a 2–1 Decision, authored by Justice Lucero with a concurrence from Chief Judge Tymlovick and a dissent from Justice Bacharach reversed the district court and held that the Citizenship Clause does not apply to American Sāmoa; American Sāmoans were denied birthright citizenship.

Justice Lucero begins his majority opinion with an appeal for judicial deference toward the past Congressional historical practice and the American Sāmoan Government's concern that judicial recognition of birthright citizenship would risk upending certain core traditional practices in the territory. The "text, precedent, and historical practice" relating to the territory's circumstances as well as the "wishes of the territory's democratically elected representatives," Lucero cautions, suggest that the court should not unilaterally impose citizenship "on an unwilling people

23. Article IV, Section 3 reads: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." And Article IV, Section 3, Clause 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. CONST. art. IV, § 3.

24. Fitisemanu 426 F.Supp.3d at 1178 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021). The United States noted that the "more sweeping, disjunctive language" of the Thirteenth Amendment ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction") when compared with the language contained in Section 1 of the Fourteenth Amendment. To argue that "[t]he Thirteenth Amendment's broader language demonstrates that 'there may be places subject to the jurisdiction of the United States" that are not incorporated into it. .U.S. CONST. amend. XIII..

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

from a courthouse thousands of miles away . . . ."[26] Further, he notes that the lack of birthright citizenship is perceived as important in maintaining American Sāmoa's traditional and distinctive way of life, and that if the Citizenship Clause is extended, the American Sāmoan government and other intervenors believe the traditional elements of American Sāmoan culture could "run afoul" of constitutional protections that would then apply to the territory.[27]

The court then sets out a choice of two respective lines of precedent to address the Citizenship Clause. One line, originating from *Wong Kim Ark*, which held a person born in California to foreign-born parents gained U.S. citizenship by virtue of his birth within the United States, explicitly incorporates the common law notion of *jus soli* into the 14th Amendment.[28] This line of precedent would leave the court with only one issue to consider: whether American Sāmoa is "in the United States." The other line of precedent implicates the *Insular Cases* of the late 19th and 20th century, most notably *Downes v Bidwell* and *Reid v. Covert*, which introduced the notion of "incorporated" as opposed to "unincorporated" territories discussed above.[29] The distinction is used to determine the extent to which constitutional rights and privileges would apply within the territory. While deferential to Congressional determinations as to the status of the territory, and the extent to which constitutional rights and privileges are applied, the framework requires that where a court was called upon to determine the extension of a constitutional right or privilege to a territory, the court will apply "impractical and anomalous" standard. Under this standard, "the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[30] This analysis requires an investigation into the local context and the impact the conferral of the right or privilege would have on the territory.[31]

The majority disagrees as to the applicability of *Wong Kim Ark* and the prominence Justice Walddoups gave it in the District Court. First, Justice Lucero undermines the foundation upon which *Wong Kim Ark* is based, finding a "divergence" between the American practice of citizenship and the English common law. "[W]e do not understand *Wong Kim Ark* as commanding that we must apply the English common law rule for citizenship to determine . . . ."[32] For the court, this divergence was underpinned by the American notion of the Lockean social contract,

26. Fitisemanu v. United States, 1 F.4th 862, 864–5 (10th Cir. 2021).

27. *Id.* at 866.

28. United States. v. Wong Kim Ark, 169 U.S. 649 (1898).

29. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring); see also Downes v. Bidwell, 182 U.S. 244 (1901).

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

31. Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. Cal. L. Rev. 375, 452 (2018).

32. Fitisemanu v. United States, 1 F.4th 862, 871 (10th Cir. 2021).

which is premised on "consent" as a foundational concept for citizenship. "[A]nimating this divergence were not only practical considerations but also the emerging American maxim 'the tie between the individual and the community was contractual and volitional not, natural and perpetual.'"[33] In support of this proposition, the court suggests that the English common law rule found in *Calvin's Case* should not control, because the colonists at the time of the revolution, were moving away from this notion of citizenship towards a contract-based theory of citizenship.

Second, Justice Lucero distinguishes *Wong Kim Ark* by arguing that the issue in that case, as well as in *Calvin's Case*, concerned the requirement of "allegiance" for citizenship while the issue before the court "falls within the category of 'within the dominion,'" an aspect, which the court notes as "a separate requirement for citizenship."[34] From this perspective, *Wong Kim Ark*, while about "a racist denial of citizenship to an American man born in an American state," had little precedential value as to the rights of individuals born or living in unincorporated territories.[35]

As an alternative to the approach taken by the Supreme Court in *Wong Kim Ark* and endorsed by the district court, the majority embraces and repurposes the approach the Supreme Court took in the *Insular Cases*. As mentioned above, these cases established two categories of overseas territories with the status of the territory determining the extent to which constitutional rights and privileges are extended to the territory. These cases, the court notes, apply to the situation of American Sāmoa because the Constitution is ambiguous as to the geographical scope of the 14th amendment, and—rather circularly—because American Sāmoa is an unincorporated territory. Without this ambiguity, the court would apply the Constitution on its own terms. This framework has been derided as racist and discriminatory and for legally rationalizing colonialism.[36] In the early part of the 20th century the reasoning and precedents were used to denied peoples under American colonial jurisdiction various constitutional rights such as the right to a jury trial or due process. Nevertheless, despite this legacy and criticism the Court de-emphasizes these criticisms and the "politically incorrect" rationales found in many of the cases by ironically embracing the "opportunity to re-purpose the

33. *Id.* at 867 (citing James H. Kettner, The Development of American Citizenship, 1608–1870 10 (2014)).

34. *Id.* at 872.

35. *Id.* at 873–4.

36. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 286 (2007) (Torruella argues that outcomes of the Insular Cases "was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience"); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 Chicano-Latino L. Rev. 1, 3 (2001) (arguing that the Insular Cases were decided in the way they were "to a large extent because of the race and non-Anglo-Saxon national origin of the majority of the people living in those places").

insular framework to protect indigenous culture from the imposition of federal scrutiny and oversight."[37] In pertinent part the majority states:

> [T]he flexibility of the Insular Cases frameworks gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the constitution the same flexibility permits courts to defer to the preferences of indigenous peoples so they may charge their own course.[38]

The Majority then describes the *Insular Cases* as providing the conceptual vehicle to defer to this indigenous preference within its "impracticable and anomalous" framework. Put another way, the Insular case framework does not preclude the constitutional protections in the colonized territories. Rather the scope and extent of the constitutional protection provided to colonized populations is determined by a case-by-case factual analysis of whether it is not "impractical and anomalous" to find the right or protection efficacious in the particular territory. Some rights, considered fundamental apply *ex proper vigor* while others rights, not deemed "fundamental" are subject a judicial determination of their "fit" with a particular territorial population. The use of the standard thus empowers a court to make determinations about which cultures and societies are fit to receive rights and freedoms under the U.S. Constitution.

For the majority, the use of the *Insular Cases* framework, under which American Sāmoa is the only remaining "unincorporated territory," continues to be the basis to determine the scope of the Citizenship Clause. Since American Sāmoa is an unincorporated territory, native-born American Sāmoans are not "in the United States." Yet, because residents of unincorporated territories continue to be entitled to certain fundamental rights, the court then discusses whether citizenship is a "fundamental personal right" as that term is defined by the *Insular Cases*. Constitutional provisions, the court notes, that implicate fundamental personal rights apply without regard to the local context. "[G]uaranties of certain fundamental personal rights declared in the Constitution" apply "even in unincorporated Territories."[39] Exactly what the court means by "fundamental personal right" is not clear. However, it is evident that Justice Lucero understands this type of right to be necessary for the exercise of free government while paradoxically are not necessarily co-extensive with all "basic human rights."[40] The court notes that the determination of whether a constitutional right is a fundamental personal right under the *Insular Cases* framework is often at odds with popular notions; for example, trial by jury is not a fundamental right. From this perspective, the court finds that citizenship is not a fundamental right. Rather Justice Lucero observes:

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37. *Fitisemanu*, 1 F.4th at 870.
38. *Id.* at 870–71.
39. *Id.* at 878 (citing *Boumediene v. Bush*, 553 U.S. 723, 758 (2008)).
40. *Id.*

> I also question whether citizenship is properly conceived of as a personal right at all. As I see it, citizenship usually denotes jurisdictional facts, and connotes the Constitutional rights that follow. The district court inverted the proper order of the inquiry. The historic authority of Congress to regulate citizenship in territories—authority we are reluctant to usurp—indicates that the right is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding individual right.[41]

The final step in the Majority's analysis involves the application of the "impractical and anomalous" test. Despite holding that citizenship is not a "fundamental personal right" [thus extending the right automatically to the territory], the Majority is required to consider whether applying birthright citizenship would be "impractical and anomalous" in the context of American Sāmoa. Under this test, the issue for the court is to decide Constitutional guarantees should apply "in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[42] The majority, without much analysis determines that the imposition of the Citizenship Clause on the territory would be impractical and anomalous under the circumstances. Lucero points to the opposition of the American Sāmoan government as a key basis for this decision. "[T]here can hardly be a more compelling practical concern" Lucero notes, than imposing citizenship that "is not wanted by the people who are to receive it."[43] Agreeing with the submission of the American Sāmoan Government, he extends this Lockean consent notion to argue that "an extension of birthright citizenship without the will of the governed is in essence a form of 'autocratic subjugation' of the American Sāmoan people."[44]

In addition to this consent argument, Lucero points out that there is a tension between American individual rights and the *fa'a Sāmoa*.

> Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Sāmoan practices, such as the matai chieftain social structure, communal land ownership, and communal regulation of religious practice.[45]

As such, partial membership in the American polity and selective incorporation of constitutional rights and privileges protects indigenous Sāmoan interests and culture while militating against the imposition of birthright citizenship under the "impractical and anomalous" test.

Thus the Majority reaches its decision to deny U.S. citizenship to the native-born American Sāmoan petitioners on essentially two theories: First, the Constitution does not support birthright citizenship for an unincorporated territory based on the *Insular Cases* precedents, and

41. *Id.*
42. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).
43. *Fitisemanu*,1 F.4th at 879.
44. *Id.* at 880.
45. *Id.*

second, on policy grounds, because citizenship is not a fundamental constitutional right, it should not be extended by the court since doing so would be "impracticable and anomalous" as conceptualized by Justice Harlan in *Reid v Covert*.[46] The first ground is supported by the historical observation that a constitutional right to citizenship is guaranteed only to those born within the United States, while in every other instance U.S. citizenship has only been granted by statute. Native Americans, (who the Supreme Court held were not entitled to American citizenship because they owed allegiance to a separate tribal sovereign entity)[47] were granted citizenship by statute as were the inhabitants of Puerto Rico, the U.S. Virgin Islands and Commonwealth of the Northern Mariana Islands and Guam. This all supports the notion, the court argues, that citizenship is not an automatic right for those in overseas territories—only Congress can bestow this status. The second ground is supported by the argument that U.S. Citizenship would be impracticable and anomalous for American Sāmoans for two reasons: while it is unclear whether the people of American Sāmoa want citizenship, their political representatives as amici oppose birthright citizenship. As such, the court could be seen as "imposing" citizenship upon the unwilling. Related to this point, the court suggests that there is insufficient case law upon which to determine whether extending citizenship to the territory would open the floodgates to additional litigation under the Fourteenth Amendment and eventually, lead to the destruction of the Indigenous Sāmoan culture.

D. *Concurrence*

Chief Judge Tymkovic in his concurrence significantly narrows the scope of Locarno's judgment. Nevertheless, he agrees with the majority and the district court that "the precise geographic scope of the Citizenship Clause cannot be divined from the text and constitutional structure."[48] As for the historical evidence, Tymkovic is not persuaded that historical evidence supports the view that "in the United States" encompassed all territories under the jurisdiction and sovereignty of the United States.[49] He notes that at the time of the passage of the Amendment the fact that all territories outside of established states were destined to become states undercuts the argument that it was intended to apply to all future acquired territories.

> While we are interested in divining the original meaning of the Citizenship Clause rather than its original expected application, these historical facts diminish the probative weight of legislators' off-the-cuff statements about the geographic scope of the phrase "in the United States."[50]

46. *Reid*, 354 U.S. at 74.
47. Elk v. Wilkins, 112 U.S. 94 (1884).
48. *Fitisemanu*, 1 F.4th at 882.
49. *Id.*
50. *Id.*

He further notes that the Supreme Court precedent in relation to the 14th Amendment, either *Wong Kim Ark* or *Downs*, does not "squarely" address the issue of American Sāmoan citizenship.

Given the "ambiguous constitutional text, equivocal evidence of its original public meaning, and uncertain Supreme Court precedent," Tymkovic holds that historical practice and the judicial deference to the political branches should be the basis to determine the scope of the 14th Amendment.[51]

E. *The Dissent*

In his dissent, Judge Bacharach poses the question that seems to have eluded jurists who have considered birth right citizenship for American Sāmoans: "Natives of American Sāmoa are either born in the United States or they're not," and if they are, then they are United States citizens.[52] Judge Bacharach also disagrees with the apparent prevailing view that citizenship is merely a liberty interest and somehow not fundamental. He presents significant textual evidence from maps, dictionaries and legislative records in support of this view. For Bacharach, everyone born in American Sāmoa since 1900 has been and is a United States citizen under the Constitution.

The Dissent's reasoning avoids the Majority's need to distance itself from the racist and discriminatory taint that comes from relying on the *Insular Cases*. First, Bacharach argues that at the time of the Constitution's adoption, the English common law rule of *jus soli* was the law of citizenship in the United States. It was an accepted, basic principle in the new nation. Given the legacy of slavery, the Fourteenth Amendment was adopted to both codify and entrench this common law principle—a principle, in Bacharach's opinion, so basic to membership in the United States that it should not again be subject to erosion in its understanding and interpretation.

> Senator Howard introduced his proposed language for the Citizenship Clause, regarding it as "simply declaratory of what [he] regard[ed] as the law of the land already." [citations omitted].[53]

For Bacharach, the drafters of the Amendment had the foresight to recognize that instances of exclusion from the American political community might yet again present themselves. And when they did, it would be left to courts to re-assert these rights. Two of the core precepts of the basic rule were thus fleshed out in two leading cases: *Elk v. Wilkins* (holding that while Native Americans were "born within" the United States, they owed allegiance to a foreign sovereign in their individual tribes, a result later addressed by statute granting Native Americans United States citizenship) and *Wong Kim Ark* (holding that a child born in California to Chinese parents that were neither diplomats nor hostile

51. *Id.* at 883.
52. *Id.* at 905.
53. *Id.* at 896.

foreigners, was a United States citizen, not by any judicial fiat but by the Constitution itself).

Second, disagreeing with both the Majority and the district court, the Dissent argues that the language "in the United States" found in the Citizenship Clause is not ambiguous. Rather he argues that "as shown by contemporary judicial opinions, dictionaries, maps, and censuses, U.S. territories were uniformly considered 'in the United States.'"[54] As such, Justice Bacharach argues that American Sāmoa is an American Territory for purposes of the 14th Amendment and that the *Insular Cases* distinction between incorporated and unincorporated territories is a *post hoc* judicial delimitation of the original meaning of text.

He looks to the 1867 acquisition of Alaska from Russia as evidence of the proposition that all territories (contiguous and non-contiguous) were within the United States and individuals were assumed to benefit from constitutional rights and privileges. In the Alaska circumstance, Bacharach argues, the issue of what constitutional rights and protections would apply to a territory destined for statehood as opposed to a territory that would not accede to statehood was not considered.[55] Bacharach reads the historical record as not supporting the statehood/non-statehood distinction. This non-ambiguity in the Citizenship Clause moreover, is unaffected by the different contemporaneous references to the United States and American territories found in the 13th Amendment (which banned slavery "within the United States, or any place subject to their jurisdiction.") and Clause 2 of the 14th Amendment (which uses the phrase "among the several States.").[56]

Finally, Bacharach finds that the extension of birthright citizenship would not be "impracticable and anomalous" as understood under the *Insular Cases* framework. He observes that American Sāmoans already enjoy equal protection, due process and other constitutional protections. Moreover, even in the event citizenship would be granted, the Insular framework would nevertheless preclude an automatic extension of other rights and privileges thus minimizing the potential the extension of other rights and protections may pose to *fa'a Sāmoa*. These other rights, notwithstanding the conferral of citizenship status, would still need to be considered by the court under the "impracticable and anomalous" test. Bachrach observes:

> If another right is asserted, the court would need to separately decide the applicability of that right in American Sāmoa. This inquiry would turn not on citizenship, but on (1) whether the right is fundamental and (2) if not, whether application of the Citizenship Clause in American Sāmoa would be impracticable or anomalous.[57]

54. *Id.* at 890.
55. *Id.* at 891–92.
56. *Id.* at 895–96.
57. *Id.* at 903.

Bacharach vigorously disagrees with the Majority's position that conferral of citizenship would be a non-consensual "imposition" of judicial authority, undermining democratic governance and indigenous self-determination.

> Our job is to interpret the Constitution regardless of the popularity of our interpretation in American Sāmoa, and the application of constitutional rights does not become impracticable or anomalous because of disagreement . . . . As long as America Sāmoa remains a U.S. territory and the U.S. Constitution contains the Citizenship Clause, consent plays no role in applying the Citizenship Clause under the "impracticable or anomalous" test.[58]

Finally, the Dissent notes that Citizenship would not impair the individual plaintiff's cultural traditions in American Sāmoa because they live in Utah and do not live on communal land or vote for the legislative *Fono*.

IV. Discussion

There is much to consider in the three opinions written by the Court of Appeals: history, historiography, colonialism, judicial reasoning and separation of power issues run through the opinions. Given the ongoing migration situations in the United States and nation-wide protests against police mistreatment and discrimination, it is evident that the promise of the 14th Amendment and post-Civil War Reconstruction period remains unfulfilled. At the same time, the deference to the elected branches as to determination of rights is curious considering the Judiciary's longstanding role in rights jurisprudence and ongoing assault on the electoral processes and enfranchisement occurring across the United States today.

As an initial matter, the 10th Circuit majority makes some interesting and deliberate choices in language in penning its opinion. First, the petitioners are referred to, not as U.S Nationals, which they have been so designated by U.S. law and the status to which they would be returned by the end of the decision, but as "citizens of American Sāmoa."[59] This legerdemain signals the majority's reasoning prior to its textual and historical analysis. Second, in another portion of the decision, the court does something remarkable in in its acknowledgement of American Sāmoa's status as an American colony when it observes that "not unlike other colonial relationships the nature of the relationship between American Sāmoa and the United States is contested."[60] This brings the judiciary into agreement with the United Nations General Assembly, which has for 60 years considered American Sāmoa a colony—or a "non-self-governing territory."[61]

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58. *Id.* at 904–05.
59. *Id.* at 864.
60. *Id.* at 866.
61. G.A. Res. 75/107, at 1 (Dec. 10, 2020),

A. *Self-Determination and the Insular Cases*

Indigenous law and discourse have increasingly accepted the notion of "self-determination" as a ground or basic condition for the effectuation of human and indigenous rights. This right has been voiced in international legal instruments such as the United Nations Declaration on the Rights of Indigenous Peoples.[62] This notion has been anticipated by American Indian Law jurisprudence which holds that Native American Tribes retain residual sovereignty due to their governmental existence prior to the formation of the American polity. This sovereignty has been incorporated in a legally efficacious way (i.e., tribal immunity from suit) into the American federation through the various treaties and executive agreements.[63] This pre-existing sovereignty and the recognition of legal possession established a framework of inter-governmental relations where Indian-American relations operate across different spheres of authority and sovereignty.

Using these international and domestic notions of self-determination, the majority opinion notes that the *Insular Cases*, despite their ethnocentric and racist penumbras, can be "repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories."[64] Thus, enabling the American Sāmoan people to preserve *fa'a Sāmoa*, customary land tenures and *fa'amatai*. This notion of the colonial relationship preserving traditional elements with the American polity has been embraced by several scholars.[65]

The underlying ethos of the *Insular Cases* is beyond the scope of this note. However, it is evident that using the Insular framework to argue that Sāmoan self-determination is enhanced inappropriately conceptualizes the notion of self-determination. First, it inappropriately equates the Territory's governmental autonomy and organizational capacity with the individual rights of native-born American Sāmoans. Given the plenary authority of Congress and the Executive over the territory which enables Federal Government can alter the constitutional structure and rights of the population of American Sāmoa as it deems fit, it is arguable that a grant of citizenship is likely more important to the "dignity" and "autonomy" of individuals in the territory than local autonomy subject to Congressional oversight. The precariousness of American Sāmoan rights

62. Article 3 states, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007),

63. These concepts are reflected in the seminal American Indian cases Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823*);* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) written by Chief Justice Marshall. For a recent discussion of the relationship, see United States v. Wheeler, 435 U.S. 313 (1978) and United States v. Cooley, 141 S. Ct. 1638 (2021).

64. Fitisemanu v. United States, 1 F.4th 862, 870 (10th Cir. 2021).

65. Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Sāmoan Custom in the Law of American Sāmoa*, 3 Gonz. J. Int'l L. 35, 41–42 (2000).

under the Plenary Power doctrine, rather than exhibiting self-determination and dignity, seemingly reinforces the "subject" status of American Sāmoans as colonized peoples.

Second, the decision inappropriately analogizes to the treaty relationships Native American tribes have with the Federal Government without recognizing any residual sovereignty or reserved rights in the Sāmoans by virtue of the 1900 and 1904 cessions. This notion is anticipated by *Elk v. Wilkins* which holds that the Citizenship Clause does not apply to Native American born within the territorial limits of the United States because they owe allegiance to their tribe. In Sāmoa there is not an "entity" to which American Sāmoans owe allegiance arising out of or pre-existing the Deeds of Cession. In such a circumstance, it is difficult to conceptualize to what entity other than the American government would American Sāmoans owe allegiance.

Third, the idea goes against the spirit of the UN Declaration in that it maintains discriminatory treatment for non-citizen American Sāmoans located in North America and Hawai'i. At the same time, it violates Article 5 which provides that indigenous groups have the right to maintain their "distinct political, legal, economic, social and cultural institutions," while at the same time retaining "their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[66]

B. *Consent to Citizenship*

The Majority opinion observes that the American Sāmoan Government is opposed to the extension of citizenship to native-born American Sāmoans. The American Sāmoan Government argued that "an extension of birthright citizenship without the will of the governed is in essence a form of 'autocratic subjugation' of the American Sāmoan people."[67] In these circumstances, the majority opinion describes the *Insular Cases* as providing the conceptual vehicle to defer to this indigenous preference with its "impracticable and anomalous" framework. This standard empowers a court to make determinations—often based on scant evidence and racialist prejudice—about which cultures and societies are fit to receive rights and freedoms under the U.S. Constitution. In this sense at least, the Appeals Court might have moved away from the "politically incorrect" language of the *Insular Cases* but not far from its intent. It seems that whilst the judiciary is powerless to "impose citizenship," it has granted to itself considerable powers to withhold those constitutional protections from individuals owing allegiance to the United States. This, perhaps above all else, illustrates why a new standard, without such a tainted historical context, is required to obviate the need for juridical contortions.

The Dissent's analysis avoids many of the shortcomings that might be found in the Majority opinion. Most notably, it avoids the notion that citizenship should be a question left for legislative or even electoral majorities.

66. G.A. Res. 61/295, *supra* note 61.
67. *Fitisemanu*, 1 F.4th at 880.

The U.S. Constitution, including the Fourteenth Amendment, was the law of the land when the *matai* (chiefs) of Tutuila, Aunu'u and later Manu'a entered into agreements with United States Navy officials. These deeds of session provided that the United States would be granted use of the islands, and in exchange, the islands and their inhabitants would come "under the full and complete sovereignty of the United States of America," would "become a part of the territory of said United States" and that "there should be no discrimination in the suffrages and political privileges" of Sāmoans living on the islands and "citizens of the United States dwelling there."[68] The deeds also guaranteed to Sāmoans their culture when 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."[69]

It is clear from the instruments themselves that Sāmoans sought to enjoy rights equal to the U.S. Citizens present on their islands. And that to secure these rights, there was an exchange of the thing most precious to Sāmoans: their land. The land that was and remains so central to a Sāmoan's view of belonging to a community. Without the grant of U.S. citizenship, for what was this valuable resource exchanged? As the record reflects, when thirty years had passed from the cession to America, American Sāmoans first sought to claim their citizenship and were first denied their citizenship rights. They sought to right this wrong by appeal to the same democratic process the Majority opinion now holds as the gatekeeper to U.S. citizenship. Ironically, these institutions saw to it that these gates remained closed to American Sāmoans.

In this sense, again, the Dissent gets it right: the Constitution provided birthright citizenship to all of those born within the United States in the Citizenship Clause. The Sāmoan deeds of cession from 1900 were created and acted upon within this context. American Sāmoans believed this to be the case and acted, affirmatively, to claim their birthright citizenship but were denied. Fitisemanu and the other plaintiffs petitioned the court to recognize their birthright—not to "impose citizenship by judicial fiat" as the majority opinion maintains. U.S. Citizenship for American Sāmoans arguably was the objective and result of the Indigenous *fa'amatai* process when the High Chiefs of Tutuila and later Manu'a exchanged sovereignty for it beginning in 1900. The question of whether American Sāmoa wishes to continue to be part of the United States is rightly a political question but this question is not relevant to the determination of individual rights flowing from United States Citizenship; after all, the cession itself was not the outcome of any democratic process but was instead the creation of the *fa'amatai* in entering the deeds of cession with the United States of America.

If the "contract-based" logic was ever applicable, it was as a tool of rhetorical convenience used to justify the severance of the colonists' own British citizenship in favor of founding a new one. Once U.S. citizenship

68. April 17 Instrument, *supra* note 5.
69. July 14 Instrument *supra* note 5.

had been established, how it would be passed on from generation to generation required some mechanism and that mechanism reverted to type: birthright citizenship again prevailed.

C. *Citizenship as a Non-Fundamental Right*

The court next addresses the question as to whether citizenship should be considered a fundamental right and answers itself in the negative. To reach this result, the court reasons that "fundamental has a distinct and narrow meaning," and includes within this narrow band only those "principles which are the basis of all free government."[70] The irony that this determination seemingly ignores is that the American Civil War was precipitated by a dispute over the definition of whom should be considered a citizen, which—after the fratricidal fighting—led to the adoption of an explicit clause on citizenship being added to the Constitution. Instead, the court indicates that citizenship is merely a "means of conveying membership in the American political system rather than a freestanding individual right." This interpretation somehow manages to conceive of "citizenship" as something nice to have but not essential, or harkens back to older colonial notion of citizenship where different legal systems impose different duties and liabilities depending upon the citizenship of the persons in the territory.

This analysis is deeply flawed and for a very simple reason: citizenship is fundamental, perhaps the most fundamental right a person can have when residing within a particular community as they are a constituent member of the community. A citizen is not a subject. This is because no matter what other rights are infringed upon by government, the state cannot exclude its own citizens. It cannot simply banish someone to some distant place for an administrative or other reason. In other words, there is a limit, a check on the powers of government in the recognition of the obligations that a state owes to its own citizens. American Sāmoans, considered as they are by the court to be non-citizens, cannot be said to enjoy such rights. They are neither foreign not domestic.

D. *Recognition of birthright citizenship for American Sāmoans would not be impracticable and anomalous*

Having determined citizenship a non-fundamental right, the court proceeds to determine whether extension of citizenship to American Sāmoa would be impracticable and anomalous. The court writes that the "*Insular* framework demands a holistic review of the prevailing circumstances in a territory" and that the court must "consider the totality of the relevant factors and concerns in the territory."[71] They identify two circumstances that would make an extension impracticable and anomalous: 1) an extension against the "express preferences of the American Sāmoan people" and 2) where American citizenship would lead to the he

70. *Fitisemanu*, 1 F.4th at 878.
71. *Id.* at 880.

potential erosion of the *Fa'a Sāmoa* and *Fa'amatai* should it be extended to the territory—or in the court's words extended through "judicial imposition."[72] It is worth noting that a court's "holistic review" to investigate the "totality of the circumstances" is apparently limited to amici briefs, since no other evidence was taken to establish the actual "preferences" of the American Sāmoan people.[73]

Yet, the record by which this determination is made is limited and underdeveloped. Based on the very limited record before it, the court makes findings that the people of American Sāmoa, acting through their elected officials, have presented the court with a "compelling" statement that the people there do not wish to have birthright citizenship by judicial imposition. To otherwise decide the question of citizenship, would be to violate a basic "principle of Republican association."[74] The court also concludes that birthright citizenship would create a "tension between individual constitutional rights and the American Sāmoan way of life (the *Fa'a Sāmoa*)."[75] This is taken wholly on the representations of amici to be correct in regards to the court's second finding that, "[i]n American Sāmoa's case partial membership works to protect the customary institutions and traditions and so a push for full equality as American citizens is not readily embraced by the American Sāmoan citizenry."[76] And in a mind-boggling coda to this analysis the court notes that, "[t]here is simply insufficient case law to conclude with certainty that citizenship will have no effect on the legal status of *Fa'a Sāmoa*."[77]

As is noted in the above discussion of the dissent's reasoning, the question of citizenship should hinge on the understanding that American Sāmoa is part of America ("America" is even in the name), and doing so removes the need for the analysis made in this section. In addition, it is also an important procedural point to consider is examining the persuasiveness of the opinion. The case was before the Appellate Court after summary judgment was granted in favor of the plaintiffs, three individuals, who claimed actual harm. If the court has determined that fact-based investigation into the circumstances of the territory are critical to the decision to extend or withhold this non-fundamental right, then the case should have been remanded for trial, where evidence could have been presented for a court to make an informed, holistic consideration of the actual circumstances in American Sāmoa. Indeed, if courts are not meant to engage in this type of political process, why then engage in this limited analysis at all?

As a final point, the concurring opinion affirms that this area of law is unresolved. Judge Tymkovich finds that there is ambiguity in the Citizenship Clause and, owing to that ambiguity, either party's interpretation

72. *Id.* at 879–80.

73. Other than, of course, the actual opinions of the plaintiffs, who are American Sāmoans and are claiming U.S. citizenship.

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

75. *Id.* at 880.

76. *Id.* at 880 (citing Memea Kruse, *supra* note 4, at 79).

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

is plausible. To "resolve the tie," the concurring opinion falls back on "the historical practice, undisturbed over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants."[78] Given this outcome, the surest solution at this stage would be for Congress to act on legislation that would automatically grant residents of American Sāmoa U.S. citizenship upon application, as opposed to birthright citizenship. This would seem to at least balance the court's deference to historical precedent (if not judicial precedent) and allow for the protection of individual rights while affirming American Sāmoa's place as part of the United States of America.

V. Conclusion

In sum, the *Fitisemanu* decision continues a tradition by the U.S. courts of general reluctance to recognize birthright citizenship based on the 14th Amendment of the U.S. Constitution. The judiciary has determined that Congress is best placed to award such grants to people born in overseas American territories. At the same time, the judiciary's affirmation of the status quo perpetuates the status of American Sāmoans as essentially "stateless" people within the international community. Denied citizenship by the American Government, American Sāmoans have been reduced to the status of quasi-Denizens—individuals who have granted their sovereignty to the United States of America by virtue of their forefather's treaties with the United States but have been somehow denied formal recognition and full protection by that same government for now over a century. This denial comes both from Congress, which has failed to take up repeated attempts to legislate a right to this historic wrong, as well as from the courts which have failed to recognize a constitutional right to citizenship.

The U.S. judiciary has determined yet again in *Fitisemanu* that American Sāmoans are neither within nor outside the national boundary of the United States of America. Yet, in addition to declaring sovereignty over the land, the United States continues to exercise sovereign and exclusive control of overfishing and other rights in American Sāmoa's territorial seas and has even established a National Park within the territory. American Sāmoans have been among the most reliable and dedicated soldiers answering the call of a government who, whether acting through its representative or judicial branches, has long denied them the rights of citizenship and membership within the body politic. This denial, at least from the judicial perspective, has not gone uncontested as both the district court and dissenting opinions in *Fitisemanu* demonstrate. Alas, it seems likely that the Plaintiffs as well as countless other Sāmoans born centuries after the principle of birthright became a well-settled part of the common law, will need to await a legislative grant for this most fundamental of rights: the right to fully belong.

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