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Unincorporated: A Case for American Samoa Through the Fog of the Insular Cases

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RILEY J. GUTIERREZ

Unincorporated: A Case for American Samoa Through the Fog of the *Insular Cases*

ABSTRACT

For over a century, American Samoa has been an unincorporated territory of the United States. Due to its "unincorporated" status, its inhabitants lack U.S. constitutional citizenship under the Fourteenth Amendment. Congress has further failed to pass legislation granting statutory birthright citizenship to American Samoans, setting American Samoa apart as the only U.S. territory without birthright citizenship.

American Samoan representatives have fought to keep American Samoa from being further incorporated under the Federal Constitution. Despite American Samoa being the largest per capita contributor to the United States military, its people value their way of life, or *fa'a Samoa*, too much to jeopardize it by petitioning for further assimilation into the American way of life. American Samoan land is ninety percent communally owned. Only native-born American Samoans are allowed to serve in local political systems. American Samoans enforce a curfew and are deeply religious. Despite having a Bill of Rights that mirrors the Federal Constitution, American Samoan law does not allow for the vast array of individual rights that the United States guarantees.

It is for these reasons that American Samoa has respectfully asked Congress to table any legislation concerning American Samoan citizenship until the territory has decided for itself that further incorporation into the United States is best for its people. Congress has obliged since 1953. However, for some American activist groups, this unique trait of American Samoa is deeply unfair. These groups have brought multiple lawsuits in the past ten years pushing the Supreme Court to overturn a line of cases—the *Insular Cases*—that, in their view, are the only thing standing in the way of American

Samoans having a constitutional right to citizenship under the Fourteenth Amendment's Citizenship Clause.

Two cases in the past five years have been petitioned for certiorari, asking the Supreme Court to overturn the *Insular Cases*, which cabined constitutional incorporation for non-state territories. Their reasoning for wanting the *Cases* overturned is that they contain ethnocentric and otherwise racist language against the indigenous people of these extra-contiguous territories. The plaintiffs allege that the *Cases* either ought to be overturned due to their racism or that they do not apply to a citizenship issue, and, therefore, American Samoans must be birthright citizens.

The American Samoan government has intervened in these suits multiple times to defend the *Insular Cases* and fight for a right to self-determination. However, as a growing number of scholars back the opposing side, and as even Supreme Court Justices call for the end of the *Insular Cases*, courts have become hesitant in their deference to the *Cases*. In so doing, courts grow dangerously close to repeating the mistakes of the United States in its dealings with other sovereignties who did not want U.S. laws forced upon them, such as Native Americans.

This Comment seeks to show that the *Insular Cases* do not need to be invoked at all under a Citizenship Clause analysis because the text of the Clause defines its own scope, and American Samoa does not fall within it. This Comment supports this proposition by engaging in a textualist, originalist, and judicial pragmatist analysis of the Clause to show that the approach of the judge should not change the outcome. Because the *Cases* should not be invoked at all, if they were to be overturned, there would be no change to the status of American Samoans. Furthermore, this Comment analyzes the test set forth by the *Insular Cases* to show that, even if it is determined the *Cases* must be relied upon, the *Cases* do not include American Samoa in their scope. By doing so, this Comment seeks to set out a rational, fair interpretation of the applicable law without being blinded by the fog of politics that furthers the goals of those who seek to impose citizenship on people who do not want it.

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would like to thank my God for never leaving my side and Eddie Gutierrez for his insights and endless support.

COMMENT

UNINCORPORATED: A CASE FOR AMERICAN SAMOA THROUGH THE FOG OF THE *INSULAR CASES*

Riley J. Gutierrez[†]

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American Samoan representatives have fought to keep American Samoa from being further incorporated under the Federal Constitution. Despite American Samoa being the largest per capita contributor to the United States military, its people value their way of life, or fa'a Samoa*, too much to jeopardize it by petitioning for further assimilation into the American way of life. American Samoan land is ninety percent communally owned. Only native-born American Samoans are allowed to serve in local political systems. American Samoans enforce a curfew and are deeply religious. Despite having a Bill of Rights that mirrors the Federal Constitution, American Samoan law does not allow for the vast array of individual rights that the United States guarantees.*

It is for these reasons that American Samoa has respectfully asked Congress to table any legislation concerning American Samoan citizenship until the territory has decided for itself that further incorporation into the United States is best for its people. Congress has obliged since 1953. However, for some American activist groups, this unique trait of American Samoa is deeply unfair. These groups have brought multiple lawsuits in the past ten years pushing the Supreme Court to overturn a line of cases—the Insular Cases—

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Two cases in the past five years have been petitioned for certiorari, asking the Supreme Court to overturn the Insular Cases*, which cabined constitutional incorporation for non-state territories. Their reasoning for wanting the* Cases *overturned is that they contain ethnocentric and otherwise racist language against the indigenous people of these extra-contiguous territories. The plaintiffs allege that the* Cases *either ought to be overturned due to their racism or that they do not apply to a citizenship issue, and, therefore, American Samoans must be birthright citizens.*

The American Samoan government has intervened in these suits multiple times to defend the Insular Cases *and fight for a right to self-determination. However, as a growing number of scholars back the opposing side, and as even Supreme Court Justices call for the end of the* Insular Cases*, courts have become hesitant in their deference to the* Cases*. In so doing, courts grow dangerously close to repeating the mistakes of the United States in its dealings with other sovereignties who did not want U.S. laws forced upon them, such as Native Americans.*

This Comment seeks to show that the Insular Cases *do not need to be invoked at all under a Citizenship Clause analysis because the text of the Clause defines its own scope, and American Samoa does not fall within it. This Comment supports this proposition by engaging in a textualist, originalist, and judicial pragmatist analysis of the Clause to show that the approach of the judge should not change the outcome. Because the* Cases *should not be invoked at all, if they were to be overturned, there would be no change to the status of American Samoans. Furthermore, this Comment analyzes the test set forth by the* Insular Cases *to show that, even if it is determined the* Cases *must be relied upon, the* Cases *do not include American Samoa in their scope. By doing so, this Comment seeks to set out a rational, fair interpretation of the applicable law without being blinded by the fog of politics that furthers the goals of those who seek to impose citizenship on people who do not want it.*

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I. INTRODUCTION

The laws of the United States guarantee for its citizens a plethora of individual dignities, all of which have made the United States a desirable home for millions of people from around the world.[1] These individual freedoms, however, may not be desirable for all people all of the time. Since the United States has taken on several "unincorporated"[2] territories, the question of what rights can and should be extended to those territories has been subject to extensive debate.[3] Some unincorporated territories have been eager to gain greater acceptance by the Union,[4] while others have severed their tie to the United States in order to become their own country.[5] Some, such as American Samoa, are still deciding for themselves whether to pursue

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[1] The United States is the most immigrated-to country in the world, according to a 2015 study by Pew Research Center. Philip Connor & Gustavo López, *5 Facts About the U.S. Rank in Worldwide Immigration*, PEW RSCH. CTR. (May 18, 2016), https://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/.

[2] "Incorporated" and "unincorporated" refer to the extent a given constitutional provision applies to a state or territory under the Due Process Clause of the Fourteenth Amendment. This Comment focuses primarily on the Citizenship Clause under the Fourteenth Amendment, which definitionally applies to all those born or naturalized "in" the United States and, therefore, does not require due process incorporation for those born or naturalized within that geographic area. U.S. CONST. amend. XIV, § 1, cl. 1. Unincorporated territories have been so deemed because they have not been brought under the *complete* scope of the Constitution and, therefore, the territories lack certain rights and duties that incorporated states possess. *See infra* note 3. Therefore, a territory is "unincorporated" if and to the extent that it is not treated like a state would be under the Constitution or one of its provisions.

[3] *See generally* Downes v. Bidwell, 182 U.S. 244 (1901); United States v. Vaello-Madero, 596 U.S. 159 (2022); Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022); Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

[4] See *infra* Section II.A for a discussion of former territories that have now become states.

[5] Namely, the Philippines, which was recognized by the United States as an independent country in 1946. *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, Since 1776: Philippines*, OFF. OF THE HISTORIAN, https://history.state.gov/countries/philippines (last visited Feb. 13, 2024).

statehood or attempt to become independent.[6] Despite having ceded to the United States voluntarily over one hundred years ago, the American Samoan people have made it clear[7] that they are not ready to be fully incorporated into the United States just yet.[8]

This issue of territorial incorporation for American Samoans reached a boiling point in 2015 when the question of whether American Samoans have a constitutional right to birthright citizenship was litigated.[9] It was litigated again in 2021,[10] and as the argument continues to gain traction in certain circles, it appears evident that the quest for total incorporation of otherwise unincorporated territories is far from over.[11] Since the 1950s, American Samoans have rejected statutory U.S. citizenship and have chosen to remain U.S. nationals.[12] Their motivations for doing so stem from a concern that some of the individual freedoms that the United States Constitution guarantees may negatively impact their way of life, including their ability to disallow individual land ownership.[13] This concern, among many others, prompted American Samoa to deny offers of congressional statutory citizenship as a way of keeping its individuality from the United States and discouraging any further incorporation until the territory determines for itself whether it would like to embark on its own or join the Union.[14]

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6 *See* Brief in Opposition for Respondents American Samoa Government and the Honorable Aumua Amata at 2, 5, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394) [hereinafter Brief in Opposition for American Samoa].

7 That is, they have made it clear through their elected representatives. *Fitisemanu*, 1 F.4th at 865.

8 *See* Brief in Opposition for American Samoa, *supra* note 6, at 10–12 (asserting that the right for a people to determine for themselves their own course is a fundamental right).

9 Tuaua v. United States, 788 F.3d 300, 301 (D.C. Cir. 2015); *see also infra* Section II.B.

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

11 *See generally* Brief *Amici Curiae* of the American Civil Liberties Union and the ACLU of Utah, Supporting Plaintiffs-Appellees Petition for Rehearing En Banc, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019) [hereinafter Brief of the ACLU].

12 *See* discussion *infra* Section II.B.

13 *See Fitisemanu*, 1 F.4th at 866; Brief in Opposition for American Samoa, *supra* note 6, at 12.

14 *See Fitisemanu*, 1 F.4th at 866–67; Brief in Opposition for American Samoa, *supra* note 6, at 19–20.

Despite a growing amount of support for those who seek to impose constitutional citizenship upon American Samoa, U.S. courts have been reluctant to acknowledge birthright citizenship under the Fourteenth Amendment's Citizenship Clause for the territory.[15] Instead, courts defer to Congress's ability to grant citizenship provisionally.[16] The courts' reasoning is premised largely upon a line of cases decided by the Supreme Court in the early 1900s called the *Insular Cases*.[17] These cases created a standard by which to determine whether an extra-contiguous territory, like American Samoa, ought to be incorporated into any particular constitutional provision.[18] The *Insular Cases* themselves, however, have received considerable backlash from scholars and Justices alike because of their ethnocentric motivation and language.[19] Courts have been reluctant to follow the racist, yet binding, precedent of the *Insular Cases*, and as more scholars and Justices call for the *Insular Cases* to be overturned, American Samoan representatives worry that their way of life is at risk.[20] This Comment seeks to cut through the fog of policy and politics to determine whether, under a textualist, originalist, and judicial pragmatist method of constitutional interpretation, the Citizenship Clause of the Fourteenth Amendment applies to extra-contiguous territories, and whether the *Insular Cases* affect their status.

II. BACKGROUND: THE FOURTEENTH AMENDMENT AND AMERICAN SAMOA

For over a century, constitutional birthright citizenship has been denied to persons born in extra-contiguous territorial land situated under the sovereign thumb of the United States.[21] Absent citizenship statutes granted provisionally by Congress, those living in U.S. territories like Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, and Guam would all be

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15 *Compare* Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019), *with Fitisemanu*, 1 F.4th at 881.

16 *See Fitisemanu*, 1 F.4th at 864–65.

17 *See id.* at 878; Tuaua v. United States, 788 F.3d 300, 307 (D.C. Cir. 2015).

18 *See generally, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); *Fitisemanu*, 1 F.4th 862; *Tuaua*, 788 F.3d 300.

19 *See* United States v. Vaello-Madero, 596 U.S. 159, 180 (2022) (Gorsuch, J., concurring); *id.* at 194 n.4 (Sotomayor, J., dissenting).

20 Brief in Opposition for American Samoa, *supra* note 6, at 12.

21 *Id.* at 1–2.

citizens of no nation or state.[22] As citizens of nowhere, inhabitants of U.S. territories without these statutory grants are deemed U.S. nationals.[23] Nationals have nearly every right that a U.S. citizen has, except for the right to vote, serve on juries, hold certain government offices, and work in certain government positions.[24]

Today, only one nation that is considered an "outlying possession of the United States" lacks statutory citizenship: American Samoa.[25] American Samoa, which was ceded to the United States in 1900, has a complex history of seeking out and then rejecting U.S. citizenship.[26] At the time of cession, American Samoan chiefs desired citizenship for American Samoans.[27] However, obtaining citizenship became a fear in the 1940s and '50s as the American Samoan government understood that citizenship could open a door of legislation that may compromise the *fa'a Samoa*, or the Samoan way of life.[28] Citizenship talks have been tabled since 1953, and only in recent

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[22] *See id.*; 8 U.S.C. §§ 1402, 1406–07 (recognizing U.S. citizenship to all born in Puerto Rico, the U.S. Virgin Islands, and Guam, respectively); 48 U.S.C. § 1801; Covenant of the Northern Mariana Islands art. 3, N. Mar. I.-U.S., Nov. 4, 1986, Pub. Law 94-241 (recognizing the Northern Mariana Islands and declaring all born there citizens of the United States).

[23] *See* Reply Brief for Petitioners at 15–16, Fitisemanu v. United States, 143 S. Ct. 362 (No. 21-1394).

[24] *See, e.g.*, *Who Can and Cannot Vote*, USA.GOV, https://www.usa.gov/who-can-vote (last updated Feb. 14, 2023); *What It Takes to Join the FBI*, FBIJOBS, https://www.fbijobs.gov/eligibility (last visited Feb. 14, 2024); *CIA Requirements*, CIA, https://www.cia.gov/careers/cia-requirements/ (last visited Feb. 14, 2024); Gabriela Meléndez Olivera & Adriel I. Cepeda Derieux, *"Nationals" but Not "Citizens": How the U.S. Denies Citizenship to American Samoans*, ACLU, https://www.aclu.org/news/voting-rights/nationals-but-not-citizens-how-the-u-s-denies-citizenship-to-american-samoans (last updated Aug. 6, 2021).

[25] 8 U.S.C. § 1408. Technically, Swains Island is also a U.S. territory that lacks a citizenship statute from Congress. However, because it is often tied closely with American Samoa and its ownership is disputed, it will not be discussed in this Comment. *See generally America Annexes Swain's Island*, PAC. ISLANDS MONTHLY, June 25, 1935, at 26–28; Arnold H. Leibowitz, *America Samoa: Decline of a Culture*, 10 CAL. W. INT'L L. J. 220, 220 (1980).

[26] Ivy Yeung, Note, *The Price of Citizenship: Would Citizenship Cost American Samoa its National Identity?*, 17 ASIAN-PAC. L. & POL'Y J., Spring 2016 at 7–8; Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900, https://asbar.org/cession-of-tutuila-and-aunuu/.

[27] Yeung, *supra* note 26, at 7–8.

[28] *Id.*

years have individual American Samoans again revived the quest for birthright citizenship.[29] Recent pushes for citizenship have been centered not around enacting a statute recognizing citizenship from Congress but on urging courts to hold that the Citizenship Clause in the Fourteenth Amendment applies to those born in U.S. territories.[30]

United States courts have been reluctant to recognize constitutional birthright citizenship of American Samoans for a number of policy reasons, such as American Samoa's own resistance to citizenship and the courts' hesitancy to infringe upon Congress's power to determine citizenship.[31] Those arguing for American Samoan incorporation under the scope of the Citizenship Clause reason that doing so may overturn a particular line of cases, the *Insular Cases*, which were premised on racist ideology.[32] However, a careful analysis of the Fourteenth Amendment's history and purpose proves that courts need not worry about expanding the currently-recognized scope of the Citizenship Clause because the Fourteenth Amendment should not be interpreted as inclusive of American Samoans. Before analyzing the current application and purpose of the Citizenship Clause, an understanding of where it came from is necessary.

A. The Creation and Evolution of the Fourteenth Amendment's Citizenship Clause

Before the Fourteenth Amendment, citizenship was assumed for many of those born in the United States, but it was undefined and unsystematic.[33] The unamended Constitution mentioned citizenship in its discussion of qualifications required for those holding political offices but did not clarify

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[29] David A. Chappell, *The Forgotten* Mau*: Anti-Navy Protest in American Samoa, 1920–1935*, PAC. HIST. REV. 217, 256 (2000); *see generally* Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2022); Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015).

[30] *See, e.g.*, *Fitisemanu*, 1 F.4th 862; *Tuaua*, 788 F.3d 300.

[31] *See Fitisemanu*, 1 F.4th at 878; *Tuaua*, 788 F.3d at 307.

[32] *Tuaua*, 788 F.3d at 307 ("Amici Curiae suggest territorial incorporation doctrine should not be expanded to the Citizenship Clause because the doctrine rests on anachronistic views of race and imperialism.").

[33] *See* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405, 410–12 (2020).

its nature or scope.[34] This created some confusion as to who was a citizen and whether a person was a citizen of a state or of the United States.[35] As a result of the ambiguity, Congress began passing naturalization laws, and states began using combinations of both common law and statutes to develop terms under which one could be considered a citizen.[36] Debate sparked among the states in the 1800s regarding how to settle this question as it pertained to African Americans, coming to a head with the drafting and ratification of the Fourteenth Amendment.[37]

1. A Historical Backdrop: The Fourteenth Amendment Was a Reaction by Congress to Discriminatory State Laws Harming Former Slaves

The Fourteenth Amendment was a direct response to the horrors of the Civil War.[38] It was passed in close succession with the Thirteenth Amendment, the Civil Rights Act of 1866, and the Fifteenth Amendment—all securing rights for African Americans.[39] This original purpose and the subsequent rights the Fourteenth Amendment created are critical to understanding the scope of the Citizenship Clause today.

Because of the vague and tenuous nature of American citizenship prior to the Fourteenth Amendment's passing, some controversy arose during the 1800s concerning the citizenship status of African Americans. In 1857, the Supreme Court held in *Dred Scott v. Sandford* that an African American could not be a citizen.[40] Justice Taney's opinion in *Dred Scott v. Sandford* proved shocking not only to its present-day readers but even to Justice Taney's colleagues on the Court.[41] In his dissent, Justice Mclean noted solemnly that for Scott, "[b]eing born under our Constitution and laws, no

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[34] *Id.* at 410–11; U.S. CONST. art. I, §§ 2–3.

[35] Ramsey, *supra* note 33, at 411.

[36] *Id.* at 411–12.

[37] U.S. CONST. amend. XIV, § 1, cl. 1; Ramsey, *supra* note 33, at 417; *see also* Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[38] Ramsey, *supra* note 33, at 417.

[39] *See* U.S. CONST. amends. XIII–XV; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

[40] Dred Scott v. Sandford, 60 U.S. 393, 454 (1857).

[41] *See id.* at 531 (Mclean, J., dissenting).

naturalization is required, as one of foreign birth, to make him a citizen."[42] This statement, now seen as a matter of course, was a reaction to the majority's holding that neither Congress nor the states had the authority to grant citizenship to African Americans.[43] A few short years later, the Civil War began and, as the War ended, so did the enslavement of African Americans.[44]

Following the ratification of the Thirteenth Amendment, the Fourteenth Amendment was enacted to ensure there were no doubts that all African Americans born in the United States were citizens.[45] The Fourteenth Amendment swept with its scope, declaring "[a]ll persons born or naturalized in the United States" to be citizens.[46] This Amendment overruled what was left of Justice Taney's opinion in *Dred Scott*.[47] However, it opened the door to many new questions for those who may not fit cleanly under its terms.

2. The Citizenship Clause's Historical Scope

The Citizenship Clause states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[48] Historically speaking, this has been *almost* entirely true. While the Citizenship Clause had drastic effects on many African Americans and those of other nationalities born in the states and contiguous territories,[49] its scope did not include those born into other sovereignties.[50] Constitutional citizenship was granted to those born in the contiguous states and incorporated territories and denied to those

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42 *Id.* at 529, 531.

43 *Id.* at 410, 415, 421 (majority opinion).

44 U.S. CONST. amend. XIII. This Amendment, abolishing slavery, was passed the same year the Civil War ended.

45 U.S. CONST. amend. XIII; *id.* amend. XIV, § 1; Ramsey, *supra* note 33, at 417.

46 U.S. CONST. amend. XIV, § 1.

47 *Id.*; *see Dred Scott*, 60 U.S. at 454.

48 U.S. CONST. amend. XIV, § 1.

49 *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

50 *See* discussion *infra* Section II.A.2.b. Native American people were not considered citizens of the United States until 1924. *See* discussion *infra* Section II.A.2.b.

who were born beyond those borders.[51] The Fourteenth Amendment's approach to citizenship was Blackstonian—territorial and based upon allegiance.[52] Early United States scholars acknowledged that the physical *place* of one's birth was dispositive in determining citizenship, rather than the nationality of one's parents.[53] While this principle has been true in most scenarios, it has been subject to some debate concerning Native Americans and those born into extra-contiguous territories.

a. The Citizenship Clause applied to United States territories positioned within the contiguous United States region

Generally, those residing in the contiguous territories fell easily within the scope of the Fourteenth Amendment.[54] Many territories acquired by the United States contained in their deeds of cession a right both to be incorporated under the Constitution and to have their inhabitants admitted as citizens of the United States.[55] Furthermore, these contiguous territories were seen as "ultimately destined for statehood" anyway, so their inclusion under the Citizenship Clause went uncontested.[56] At the time of the Fourteenth Amendment's enactment, the United States had not yet granted

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[51] The single exception to this is for those born outside the borders of the United States, but to a U.S. citizen parent. 8 U.S.C. § 1431.

[52] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *354–55.

[53] Ramsey, *supra* note 33, at 413–14; *see also Wong Kim Ark*, 169 U.S. at 705. *See* Justice Mclean's dissent in *Dred Scott v. Sandford* for his opinion that those born under the United States Constitution and its laws were citizens. Dred Scott v. Sandford, 60 U.S. 393, 529, 531 (1857) (Mclean, J., dissenting).

[54] The term "contiguous territories" in this section means all of those territories that existed at the time of the passage of the Fourteenth Amendment that are now considered part of the forty-eight contiguous States.

[55] *See* Louisiana Purchase Treaty, Fr.-U.S., art. 3, April 30, 1803, https://www.archives.gov/milestone-documents/louisiana-purchase-treaty; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Spain-U.S., art. 6, Feb. 22, 1819, 8 Stat. 252; Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, art. 9, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

[56] Ramsey, *supra* note 33, at 418.

statehood to several contiguous territories.[57] These territories included Arizona, Colorado, the Dakotas, Idaho, Montana, New Mexico, Oklahoma, Utah, Washington, and Wyoming.[58] The United States' introduction into expansionism and its treatment of various territorial acquisitions raised several issues concerning the constitutional legitimacy of these acquisitions.[59] These uncertain beginnings shaped the foundation for what would eventually become the contemporary stance on the Fourteenth Amendment's scope.[60]

The first significant move made by the United States to acquire new territory was the Louisiana Purchase in 1803.[61] The territory, bought from France, doubled the size of the United States.[62] It included major portions of Arkansas, Colorado, the Dakotas, Iowa, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, and Wyoming.[63] The purchase, however, was not without controversy. There were some doubts over France's authority to sell the land because it had not acquired the land from Spain properly, though these doubts quickly subsided as Spain dropped its objections to the purchase.[64] Controversy persisted, however, over whether the United States had the authority to enter into the Louisiana Purchase.[65] President Jefferson expressed concerns that the Constitution did not grant the Federal Government the "power of holding foreign territory, and still less

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57 *See* Martin Kelly, *States and Their Admission to the Union*, THOUGHTCO, https://www.thoughtco.com/states-admission-to-the-union-104903 (Jul. 8, 2019).

58 *Id.* Of these territories, Wyoming and Oklahoma had not been founded until after the passage of the Fourteenth Amendment; they were established as territories in 1868 and 1890, respectively. *Id.*

59 *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 103–05 (2004).

60 See Downes v. Bidwell, 182 U.S. 244, 268–82 (1901) for a discussion on the history of U.S.–territorial relations as a basis for the incorporation doctrine; *see also supra* discussion Section II.A.2. for an explanation of these relationships.

61 Louisiana Purchase Treaty, *supra* note 55; LAWSON & SEIDMAN, *supra* note 59, at 20–21.

62 LAWSON & SEIDMAN, *supra* note 59, at 20.

63 *Id.*

64 *Id.* at 21.

65 *Id.* This controversy persists today. However, the legitimacy of the territorial acquisitions made by the United States is assumed for the purposes of this Comment.

of incorporating it into the Union."[66] Jefferson went on to suggest a constitutional amendment in order to grant the United States government power to acquire territories.[67] Such amendments were never passed. Jefferson went through with the purchase despite his doubts, and, in 1828, Chief Justice John Marshall validated the Federal Government's power to make territorial acquisitions in a case concerning the cession of Florida from Spain.[68] The Chief Justice declared that because the Constitution grants the Federal Government the power to declare war and ratify treaties, the United States has the power to acquire territories by treaty or cession.[69] The Louisiana Purchase and, now, the cession of Florida from Spain were both successful contracts between the United States and foreign countries, so the legitimacy of their acquisition became widely accepted.[70]

Importantly, the cession documents for the Louisiana Purchase and Florida both contained provisions addressing the citizenship status of the people living in those territories.[71] The Louisiana Purchase stated that "[t]he inhabitants of the ceded territory shall be *incorporated in the Union* of the United States and admitted . . . to the enjoyment of all these rights, advantages and immunities of *citizens of the United States* . . . ."[72] Article VI

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[66] *Id.* (quoting Letter from Thomas Jefferson to John Dickinson (Aug. 9, 1803), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 262 (Paul L. Ford ed., 1895)).

[67] *Id. But see* Am. Ins. Co. v. 365 Bales of Cotton, 26 U.S. 511, 542 (1828); U.S. CONST. art. II, § 2, cl. 2.

[68] *365 Bales of Cotton*, 26 U.S. at 542; U.S. CONST. art. II, § 2, cl. 2; LAWSON & SEIDMAN, *supra* note 59, at 21.

[69] *365 Bales of Cotton*, 26 U.S. at 542; U.S. CONST. art. II, § 2, cl. 2.

[70] LAWSON & SEIDMAN, *supra* note 59, at 21–33. Certain members of Congress tried to find justifications for territorial acquisition from other provisions in the Constitution other than the Treaty Clause. U.S. CONST. art. II, § 2, cl. 2. Interestingly, Chief Justice Marshall also stated for the majority in *American Insurance Co. v. 365 Bales of Cotton* that the federal government had the authority to acquire territory by conquest. 26 U.S. at 542. At this time, the United States had not yet attempted to take territory through force. However, the truth of Marshall's assertion would be tested after the United States declared war on Mexico in 1846, taking substantial portions of Arizona, New Mexico, California, and Texas from Mexico. LAWSON & SEIDMAN, *supra* note 59, at 103.

[71] Louisiana Purchase Treaty, *supra* note 55; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 55.

[72] Louisiana Purchase Treaty, *supra* note 55 (emphases added).

of the cession document for Florida provided that the residents of "the [ceded] territories . . . *shall be incorporated into the Union* of the United States . . . and admitted to the enjoyment of all the privileges, rights, and immunities *of the citizens of the United States*."[73] Therefore, even before these territories became "States" for the purposes of the Constitution,[74] their inhabitants were considered U.S. citizens.[75] Furthermore, the Treaty of Guadalupe-Hidalgo, ending the Mexican–American War in 1848, specifically provided that those persons residing in the ceded territory would have the right to elect whether to be Mexican or United States citizens.[76] The Treaty ceded all or part of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.[77] All those residents of the territory who either elected to be United States citizens or who did not elect any citizenship designation were fully incorporated as citizens under the Constitution one year after the treaty was ratified.[78]

When the Citizenship Clause was ratified, there was no question that those residing in these "incorporated" territories were citizens.[79] Because the Fourteenth Amendment was passed primarily to protect African Americans,[80] and the United States did not at the time have any territories in its possession that it did not intend to make a state one day, serious concerns about the scope of the Citizenship Clause did not develop until thirty years

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[73] Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 55 (emphases added).

[74] U.S. CONST. amend. XIV § 1.

[75] Louisiana Purchase Treaty, *supra* note 55; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 55.

[76] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, *supra* note 55, art. 8.

[77] LAWSON & SEIDMAN, *supra* note 59, at 103–04.

[78] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, *supra* note 55, art. 8.

[79] *See* Louisiana Purchase Treaty, *supra* note 55; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 55; Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, *supra* note 55.

[80] *See* discussion *supra* II.A.1.

after its ratification.[81] The broad territorial reach of the Clause and the cession documents of many contiguous territories allowed citizenship to anyone born in the geographical scope of the Union.[82] This geographic limitation allowed the United States to grant citizenship rights generously to all those born in or naturalized within the borders of its incorporated territories.[83] Despite all of this progress in incorporating territories into the Union, issues arose when the United States denied citizenship rights to Native Americans and to extra-contiguous territories.

b. The Citizenship Clause did not apply to Native Americans

After its ratification, the Citizenship Clause was not considered to apply to citizens of other sovereigns, even if they were within the borders of incorporated states and territories.[84] Native Americans and indigenous people of other later-acquired territories, such as Hawaii and Alaska, were not considered U.S. citizens under the original Constitution or the Fourteenth Amendment.[85] Congress began granting citizenship to Native Americans in 1924 through statutes.[86] A constitutional right to citizenship for all Native Americans has never been formally acknowledged.[87]

The reasons for denying Native Americans citizenship are significant for purposes of evaluating the scope of the Fourteenth Amendment. In his opinion, in *Worcester v. Georgia*, Chief Justice John Marshall discussed the

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[81] The Fourteenth Amendment was ratified in 1868. U.S. CONST. amend. XIV. The United States acquired its first island territories in 1898 after the Spanish–American War. *See* Robert M. Utley & Barry Mackintosh, *The Department of Everything Else: Highlights of Interior History*, NAT'L PARK SERV. (May 17, 2001, 10:08 PM), https://www.nps.gov/parkhistory/online_books/utley-mackintosh/interior12.htm.

[82] *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

[83] *Id.*

[84] *See* Ramsey, *supra* note 33, at 408–09.

[85] Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 556–60, 567–69 (2000).

[86] Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (granting citizenship to Native Americans); 8 U.S.C. §§ 1404–05.

[87] *See* Maltz, *supra* note 85, at 571–72 (discussing the history of Native American citizenship under the Fourteenth Amendment and how the issue of citizenship for Native Americans was resolved).

history of Euro–American relations with Native Americans.[88] In determining that Georgia did not have the authority to redraw Cherokee territorial lines that had been established in a treaty between the Federal Government and the tribe, Justice Marshall validated the distinctness of Native American sovereignty.[89] Chief Justice Marshall held that these treaties considered "the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[90] This characterization of United States–Native American relations was broad and deferential in its scope.[91] It implied that Native Americans living under tribal governments were citizens of their tribes and not the United States.[92]

Unsurprisingly, Justice Taney, who also authored the majority opinion in *Dred Scott*, was uncomfortable with Marshall's hands-off approach to Native American governance.[93] He wrote in *United States v. Rogers* that Congress had the authority to exercise jurisdiction over Native American affairs; it merely chose not to exercise that authority.[94] Taney stated that Native Americans had "never been acknowledged or treated as independent nations . . . . [T]he Indians [were] continually held to be, and treated as, subject to [European] dominion and control."[95] This implied that Native Americans were subject to the United States' dominion and control but were not citizens.[96]

This tension was mirrored in the constitutional treatment of Native Americans. While the Constitution allowed Native Americans to be counted for the purposes of Congressional representation, it distinguished between "Indians not taxed" and Native Americans who became citizens of their

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88 Worcester v. Georgia, 31 U.S. 515, 536, 551–53 (1832).

89 *See id.* at 536, 552, 561.

90 *Id.* at 557. The *Worcester* opinion is one of three affirming this stance concerning Native American sovereignty. *See* Johnson v. M'Intosh, 21 U.S. 543 (1823) (discussing the federal government's authority over Native American affairs); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (discussing the federal government's authority over Native American affairs).

91 *See* Maltz, *supra* note 85, at 557; *see also Worcester*, 31 U.S. at 557.

92 Maltz, *supra* note 85, at 557.

93 *Id.* at 557–58; Dred Scott v. Sandford, 60 U.S. 393, 399 (1857).

94 Maltz, *supra* note 85, at 557–58 (quoting United States v. Rogers, 45 U.S. 567 (1846)).

95 *Id.* at 558 (quoting *Rogers*, 45 U.S. at 572).

96 *Id.*

state.[97] In drafting the Civil Rights Act of 1866, there were bipartisan concerns that the language of the Citizenship Clause would affect the status of Native Americans.[98] After much debate, the final draft of the Civil Rights Act explicitly excluded those "Indians not taxed" from the scope of citizenship.[99]

By contrast, the Fourteenth Amendment, passed shortly after, purposefully contained no mention of Native Americans in its definition of citizenship.[100] By excluding mention of Native Americans at all, the consensus of its interpreters was that the Amendment "ha[d] no effect whatever upon the status of the Indian tribes."[101] Significantly, the distinction between Native American citizens and Native American non-citizens was whether they were living exclusively on tribal land and under the authority of their tribe or whether they had "straggl[ed]" from their tribes.[102]

In *Elk v. Wilkins*, a Native American who had voluntarily separated from his tribe attempted to vote in Nebraska.[103] Nebraska denied him the ability to vote because he was not a citizen.[104] Justice Gray, writing for the majority of the Supreme Court, held that because Elk had not become naturalized after leaving his tribe, he was not a citizen of the United States.[105] This decision rested on the principle that for those not *born* both in the United States *and* under the jurisdiction thereof, the exclusive path to citizenship was through

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97 U.S. CONST. art. I, § 2, cl. 3.

98 *See* Maltz, *supra* note 85, at 565 (examining discussions concerning the wording of the Fourteenth Amendment during its drafting stages included which Native Americans were citizens, to what extent they should be considered citizens, and whether and how to avoid conferring citizenship to those under tribal authority).

99 *Id.* at 567.

100 *Id.* at 568. This exclusion was in part due to fear that states may try to apply citizenship requirements unequally between Native Americans on the basis of whether they pay taxes or assimilate "completely" to white society. *See id.* (citations omitted).

101 *Id.* at 569 (quoting S. Rep. No. 41-268, at 1 (1870)).

102 *Id.*

103 Elk v. Wilkins, 112 U.S. 94, 98 (1884).

104 *Id.* at 98, 109.

105 *Id.* (holding that a Native American born into a tribe is not subject to the jurisdiction of the United States and, therefore, could only become a citizen through the naturalization process).

the formal naturalization process.[106] After the decision in *Wong Kim Ark*, however, children of Native Americans had birthright citizenship as long as they were born outside of a reservation.[107] This suggests that the geographical limitations on the Citizenship Clause were and are weightier in determining citizenship than the jurisdictional limitations.[108]

In 1924, the United States naturalized all Native Americans born within the United States.[109] The Indian Citizenship Act of 1924 is a uniform rule granting citizenship rights to all Native Americans, regardless of whether they were born on a reservation or elsewhere within the United States' borders.[110] This statutory grant of citizenship is distinct from the Citizenship Clause of the Fourteenth Amendment and is founded in Congress's power to deal with foreign affairs.[111] As a result, the Citizenship Clause is still not recognized as applicable to Native Americans due to the distinctness of their sovereignty and land.[112] The rationale used in determining that Native Americans are not citizens under the Constitution is similar to the rationale used in determining that those residing in extra-contiguous foreign territories are not citizens.

c. The Citizenship Clause did not apply to foreign territories

At the time of the Citizenship Clause's ratification, the United States' only extra-contiguous territory was Alaska, which was purchased in 1867 as a

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106 *See id.* at 110–11 (Harlan, J., dissenting).

107 *United States v. Wong Kim Ark* held that any person born in the United States, even to foreign or alien parents, was a citizen by birthright under the Citizenship Clause. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898). The generally accepted principle going forward was, therefore, that Native Americans born outside of a reservation were born "in" the United States, thus including them under the Citizenship Clause.

108 *See id.*; Maltz, *supra* note 85, at 571–72.

109 Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C § 1401). It is worth noting that the right to vote was still denied to many Native Americans until 1957. *See, e.g.*, Allen v. Merrell, 305 P.2d 490, 495 (1956), *vacated as moot per stipulation*, 353 U.S. 932 (1957).

110 *See* 8 U.S.C. § 1401.

111 *See generally* 8 U.S.C. (dealing with aliens and nationality); U.S. CONST. art. I, § 8, cl. 4.

112 *See generally* Elk v. Wilkins, 112 U.S. 94, 109 (1884).

territory and did not obtain statehood until 1959.[113] The indigenous population was not granted citizenship, in part because the non-native population was thought to be very small and not expected to grow and in part because Alaska did not appear to be thought of as a candidate for statehood.[114] After all, "Alaska was the first acquired territory by the United States that was not contiguous with the rest of the [Union] . . . ."[115] Not only that, it was also different in its geography and climate from any other state.[116] The acquisition of Alaska was described as a "'new phase' of American territorial dominion."[117]

The United States' "new phase" did not stop with Alaska. In 1898, the United States succeeded in annexing Hawaii as a territory.[118] Unlike prior contiguous territories, Hawaii entered American history as a territory with a seemingly doubtful shot at ever becoming a state.[119] Doubts over its legitimate prospects for statehood originated in the fact that Hawaii's annexation appeared to be forced,[120] and its annexation documents made no provision for it being an incorporated member of the Union, unlike prior cession deeds from different territories.[121] At the time, it was understood that

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113 Ramsey, *supra* note 33, at 418; Kelly, *supra* note 57.

114 Ramsey, *supra* note 33, at 418; LAWSON & SEIDMAN, *supra* note 59, at 106.

115 LAWSON & SEIDMAN, *supra* note 59, at 106.

116 *Id.*

117 *Id.*

118 *Id.* at 108.

119 *See id.* at 109. Hawaii, like Alaska, was distinct in its geography and culture enough that its annexation, while passed off as a promise for statehood candidacy, was dubious to many scholars and politicians. *Id.*

120 While throughout the last century there has been some debate and historical confusion over the exact history of Hawaii, the modern consensus is that Hawaii, once an independent nation, was involuntarily taken by the United States. *See generally* Williamson Chang, *Darkness over Hawai'i: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70 (2015) (discussing the invalidity of the joint resolution used to annex Hawaii and how the treaty made with Hawaii was never ratified); Avis Kuuipoleialoha Poai, *Tales from the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537 (2017) (detailing the tensions between the Navy and the Samoans).

121 *Compare* Resolution of the Senate of Hawaii Ratifying the Treaty of Annexation, Sep. 9, 1897, *and* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United

territories annexed by the United States would eventually have to become states and be accepted into the Union entirely.[122] However, many believed that Congress's intentions with Hawaii looked less like state acquisition and more like imperialism.[123] The United States understood how to draft a citizenship clause into a treaty of cession—it had done so successfully many times before, yet Hawaii's documents copiously lacked any language indicating its acceptance into the Union.[124] The conclusion many began to draw, then, was that perhaps the United States did not ever intend to grant constitutional rights and citizenship to these territories.[125]

This conclusion sparked some debate among the states, and, in 1898, Senator George Vest openly opposed the imperialist-like ambitions of the United States regarding the Philippines (acquired the same year as Hawaii).[126] He said: "I have not controverted, and do not propose to controvert, the power of the Federal Government to acquire and govern territory, but I do deny that territory can be acquired to be held as colonies . . . with no hope or prospect of its ever becoming a State . . . ."[127] As the United States began to quickly acquire territories that were clearly not granted citizenship provisions or incorporation, as other territories had been

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States, 30 Stat. 750, 750–51, 55 Pub. Res. 55, Jul. 7, 1898, *with* Louisiana Purchase Treaty, *supra* note 55, at art. III, *and* Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, *supra* note 55, at art. VI, *and* Treaty of Peace, Friendship, Limits, and Settlement, *supra* note 55, at art. IX.

[122] *See* LAWSON & SEIDMAN, *supra* note 59, at 113. This was in part because the annexation documents did not provide for citizenship or incorporation into the United States. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750, 55 Pub. Res. 55, Jul. 7, 1898.

[123] LAWSON & SEIDMAN, *supra* note 59, at 109–10.

[124] *See* discussion of treaty phrasing *supra* Section II.A.2.a.

[125] *See* LAWSON & SEIDMAN, *supra* note 59, at 109–113.

[126] *Id.* Like Hawaii, the Philippines, Puerto Rico, and Guam were not incorporated into the United States when the United States acquired them from Spain. *See* Treaty of Peace (Treaty of Paris), Spain-U.S., Dec. 10, 1898, T.S. No. 343 (generally ceding the Philippines, Puerto Rico, and Guam with no mention of incorporation or citizenship); Cession of Outlying Islands of Philippines, Spain-U.S., Nov. 7, 1900, T.S. No. 345 (supplementing the Treaty of Paris and specifically ceding the Philippines, but still not granting incorporation or citizenship to the Philippines).

[127] LAWSON & SEIDMAN, *supra* note 59, at 113.

in the past, concerns about United States imperialism circulated more and more.[128] When the United States acquired Puerto Rico, Guam, and the Philippines after the Spanish–American War,[129] the United States' global prospects, and its constitutional problems, started getting bigger.[130]

Not long after the acquisition of Puerto Rico, Guam, the Philippines, and American Samoa, the United States Supreme Court decided a series of cases that ensured foreign territories would be treated differently than the states.[131] These cases became known collectively as the *Insular Cases.*[132] The *Insular Cases* developed a line of reasoning holding that extra-contiguous territories without explicit incorporation provisions would be "unincorporated" as to nearly all constitutional provisions except for those Congress incorporated to them.[133] As Justice Brown famously stated in *Downes v. Bidwell*, the island territories of the Philippines, Puerto Rico, and Gaum "belong[] to . . . but [are] not a part of the United States."[134] The people from these territories only gained birthright citizenship through statutory provisions.[135] While the Supreme Court in *United States v. Wong Kim Ark* held that *all* those born in the United States are "subject to the jurisdiction thereof," these extra-contiguous territories were not considered "in" the United States.[136] The result of differentiating states and incorporated territories from extra-contiguous, unincorporated territories left much ambiguity as to what constitutional provisions applied to those residing in unincorporated territories.[137] Such territories themselves were each distinct and acquired

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[128] *See id.* at 109–10.

[129] All were acquired in the same year as Hawaii. *See id.* at 111.

[130] *See* Ramsey, *supra* note 33, at 418–19.

[131] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); *see generally* Ramsey, *supra* note 33, at 419 (discussing the post-war *Insular Cases* in which the Supreme Court decided that only "incorporated" territories were subject to the Constitution).

[132] *See* Ramsey, *supra* note 33, at 419.

[133] *See id.*; Downes v. Bidwell, 182 U.S. 244, 344, 346 (1901) (Gray, J., concurring).

[134] *Downes*, 182 U.S. at 287.

[135] Ramsey, *supra* note 33, at 419.

[136] *See id.*; United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898). It is worth noting that this case still excluded Native Americans as citizens because they were not considered to be under the jurisdiction of the United States. *See Wong Kim Ark*, 169 U.S. at 702.

[137] *See, e.g.*, *Downes*, 182 U.S. at 247–49; Gonzales v. Williams, 192 U.S. 1 (1904).

through increasingly diverse methods.[138] With the influx of diverse territories under United States jurisdiction, some territories were seen as more state-like, while others were considered more other-country-like.[139] This was particularly true of the island territories.[140]

B. *American Samoa's Historical Confusion Surrounding Its Place in American Expansionism*

American Samoa is a perfect example of how an extra-contiguous territory held by the United States was treated during the era of the *Insular Cases*. The history of American Samoa reveals the significance of its citizenship dreams and how the *Insular Case*'s framework of stingy incorporation may have worked to American Samoa's advantage in the long run. However, a brief history of American Samoa's relationship with the United States is pertinent to understanding why incorporation is not ideal for these islands.

1. American Samoan Cession and Initial Assumptions

American Samoa ceded to the United States in 1900 to resolve territorial disputes surrounding it.[141] The Samoans wished to be annexed by the United States to protect themselves from German and British imperialism and had requested annexation before Congress agreed.[142] Congress hesitated because, at the time, it was believed that annexation would mean that, at some point, the territory would have to become a state.[143] This was undesirable for the United States, in part due to a racist fear that Samoans would be unable to

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[138] LAWSON & SEIDMAN, *supra* note 59, at 105, 110–11. The Louisiana Purchase was acquired by buying the territory from France, while much of the West was acquired by defeating Mexico in the Mexican–American War. The Philippines, Puerto Rico, and Guam were acquired by defeating Spain in the Spanish–American War. American Samoa voluntarily surrendered itself. The constitutionality of these acquisitions is discussed in further depth in their respective chapters in The Constitution of Empire. *Id.*

[139] *See id.* at 111.

[140] *See Downes*, 182 U.S. at 283–84; LAWSON & SEIDMAN, *supra* note 59, at 111. No island territorial cession included a citizenship or incorporation provision in the original documents.

[141] Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899–1960*, 60 AM. J. LEGAL HIST. 311, 315, 321 (2020).

[142] *See, e.g.*, *id.* at 315; GEORGE HERBERT RYDEN, THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA, EXTENDING TO THE BERLIN CONFERENCE OF 1889 189–90 (1928).

[143] Dardani, supra note 141, at 315–16.

assimilate into an ethnocentric America.[144] As with the *Insular Cases*, motivations for avoiding admitting territories into the Union as States were ethnocentric.[145] In its prior dealings with Samoa, the United States sought to manipulate and gain an upper hand over the territory's inhabitants by attempting to centralize their government and control their leader.[146]

Right around this time in the 1880s, the United States was getting used to the idea that it could engage in imperialism without the worry of needing to incorporate territories as States into the Union at any point.[147] Searching for opportunities to expand its overseas trade, the United States found value in American Samoa's location as a trade hub for Asian markets.[148] The Samoans hoped that the United States would be a kinder sovereign than Germany and Great Britain and convinced the United States to annex certain Samoan islands in 1900.[149] The deeds of cession, though signed in 1900, were not ratified by Congress until 1929.[150] The United States delayed ratification because it was reluctant to fully embrace American Samoa and was satisfied to allow its Navy to rule over the islands.[151] The American Samoans, who thought they would become citizens of the United States after ceding, pushed for the ratification of the deeds.[152]

American Samoans desired citizenship because they believed the United States would protect them if they were a part of the Union—what is now the

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144 *Id.*; *see Downes*, 182 U.S. at 279–80 (stating that if all those who inhabited acquired territories became citizens immediately upon annexation, "whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. . . . [It is unlikely that Congress would want inhabitants of territories,] however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States.").

145 *See Downes*, 182 U.S. at 279–80; Ramsey, *supra* note 33, at 419.

146 Chappell, *supra* note 29, at 220 (first citing R.P. BERKING, THE CYCLOPEDIA OF SAMOA 25 (1907); and then citing J.A.C. GRAY, AMERIKA SAMOA: A HISTORY OF AMERICAN SAMOA AND ITS UNITED STATES NAVAL ADMINISTRATION 58 (1960)).

147 *See, e.g.*, Chappell, *supra* note 29, at 220; *supra* Section II.A.2.c.

148 Dardani, *supra* note 141, at 319.

149 *Id.* at 315 & n.19, 318, 321.

150 *Id.* at 322; Chappell, *supra* note 29, at 223.

151 Dardani, *supra* note 141, at 322.

152 *See id.* The Mau movement (*"O le Mau"*) was responsible for the ratification of the deeds. *Id.*

group of fifty states and the District of Columbia that make up the modern United States.[153] American Samoans believed that the United States did not invest in the territory properly and failed to protect it from market exploitation over its copra (dried coconut) crops.[154] Though they feared being trampled by larger governments, the Samoans prioritized their own way of life, or *fa'a Samoa*.[155] The Samoan deeds of cession specifically explained that the purpose of cession was for the "promotion of the peace and welfare of the people" of American Samoa and for the "preservation of the rights and property of said Islands."[156] Many aspects of American Samoan law have been shaped by *fa'a Samoa* for generations, including determinations concerning who may be considered Samoan, the communal land system dynamics, and even the *fonos*, which are Samoan lawmaking assemblies.[157] Some of these aspects of American Samoan life and law directly conflicted with the U.S. Naval regime set up over it, such as the imposed copra tax and use, and so American Samoans pushed to ensure that the deeds would become ratified.[158] American Samoan chiefs further believed that when the deeds were ratified,[159] they would receive U.S. citizenship in return.[160] In fact, many American Samoans believed they were citizens and

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153 *Id.* at 315, 317.

154 *Id.* at 330. Congress had repeatedly denied funding to American Samoa, despite requests from the Navy. *Id.*

155 Brief in Opposition by Respondents American Samoa Government and the Office of Congresswoman Aumua Amata of American Samoa at 1–2, Tuaua v. United States, 579 U.S. 902 (2016) (No. 15-981) [hereinafter *Tuaua* Brief in Opposition by American Samoa].

156 Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900.

157 Dardani, *supra* note 141, at 334; Yeung, *supra* note 26, at 9; Corp. of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel, 830 F.2d 374, 377 (1987).

158 Yeung, *supra* note 26, at 6–8; Chappell, *supra* note 29, at 228–29.

159 It is worth noting here that there have been suggestions that the chiefs who signed the deeds of cession believed they were signing a treaty with the United States, rather than title to their land. The difference this would make, according to some, is that it would not give the United States the power to directly rule American Samoa. *Historical Record of Political Status Issue in American Samoa*, 160 CONG. REC. E1698 (2014) (statement of Hon. Eni F.H. Faleomavaega).

160 Erva Williams, *Letters From the People: Status of Samoans in Hawaii and Right to Citizenship*, HONOLULU ADVERTISER, Oct. 10, 1937; *Samoans Want Citizenship*, HONOLULU ADVERTISER, Nov. 14, 1943; Yeung, *supra* note 26, at 7.

tried to vote before discovering that they were unable to because they were inhabitants of a U.S. territory, not U.S. citizens.[161]

2. American Samoa's Denial of the Opportunity to Obtain Birthright Citizenship and Current Relationship with the United States

American Samoans continued to seek citizenship through representation in Congress until the late 1940s when the island territory decided that its previous reasons for desiring citizenship had largely disappeared[162] and that being granted citizenship may have undesirable consequences on its land and governing systems.[163] While "a federal territory 'has no inherent right to govern itself,'" the United States had largely taken a hands-off approach to governing American Samoa.[164] To this day, ninety percent of American Samoan land is communal, and no one is allowed to own land individually unless they are at least fifty percent native.[165] In the 1960s, Congress ratified the American Samoan Constitution, allowing American Samoa to democratically elect its own representatives.[166] Congress also launched a committee to review American Samoa's "current state."[167] This committee, along with American Samoa, was concerned about how citizenship might disrupt the *fa'a Samoa*.[168] Shortly after the committee's formation, a group of ninety chiefs petitioned the United States to stall the bills dealing with their citizenship status for ten years.[169]

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161 Williams, *supra* note 160 (stating in part that "[u]ntil a year or two ago it was erroneously supposed that [American Samoans] were citizens and we were permitted to register and vote . . . .").

162 The imperialist threat from Germany and Great Britain had ceased after its cession to the United States.

163 Yeung, *supra* note 26, at 8.

164 LAWSON & SEIDMAN, *supra* note 59, at 123; *see generally* AM. SAM. CONST. (1962).

165 Yeung, *supra* note 26, at 9.

166 *See* AM. SAM. CONST. art. II, §§ 1, 4, 5 (1962); Yeung, *supra* note 26, at 10.

167 Yeung, *supra* note 26, at 11; *see generally* Riley H. Allen, *Glimpses of American Samoa: A Paradise That Presents a Problem*, HONOLULU STAR BULL., Sep. 16, 1948.

168 Yeung, *supra* note 26, at 11.

169 *Id.* at 8.

Subsequently, talks of citizenship for American Samoans were tabled until 2015, when a budding American Samoan police officer living in California brought a lawsuit alleging that the Citizenship Clause of the Fourteenth Amendment granted citizenship status to all people born in the United States and its territories.[170] Certiorari was denied in 2016, and the case was followed by *Fitisemanu v. United States*, an almost identical case.[171] These plaintiffs sought to overturn the *Insular Cases*, or, at least the effects of the *Insular Cases*,[172] and recognize American Samoan birthright citizenship through the Constitution.[173] In both cases, the government of American Samoa intervened and joined the United States Government in arguing that the Citizenship Clause does not, and should not, apply to U.S. territories.[174]

The Honorable Aumua Amata points out that incorporating more provisions of the Constitution to American Samoans threatens their way of life, would be an unjust result of an understandable desire to overturn the *Insular Cases*, and, therefore, should be avoided.[175] However, courts need not overly wrestle with the potential implications of expanding the current scope of the Fourteenth Amendment, though it is granted that such an expansion would have the potential to harm American Samoans. The history and present understanding of the vast history of the Citizenship Clause and U.S.–American Samoan relations both show that the Citizenship Clause does not apply to American Samoa.

III. PROBLEM: THE *INSULAR CASES* AND THE SCOPE OF THE CITIZENSHIP CLAUSE

Territorial acquisition gave rise to several constitutional debates over exactly what the limits on congressional power to acquire territory were, what the acquired territory could be used for, whether acquisition required the

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170 Tuaua v. United States, 788 F.3d 300, 301 (D.C. Cir. 2015).

171 Tuana v. United States, 579 U.S. 902 (2016); Fitisemanu v. United States, 1 F.4th 862, 864 (10th Cir. 2022).

172 The *Insular Cases* did not deal directly with the question of citizenship.

173 *See Tuaua*, 288 F.3d at 301; *Fitisemanu*, 1 F.4th at 864.

174 *See Tuaua* Brief in Opposition by American Samoa, *supra* note 155, at 2; Brief in Opposition for American Samoa, *supra* note 6, at 1–2.

175 *See Tuaua* Brief in Opposition by American Samoa, *supra* note 155, at 2; Brief in Opposition for American Samoa, *supra* note 6, at 1–2.

consent of the governed people of the territory, and whether the acquired territories would be protected under the United States Constitution.[176] The Federal Government's answer to these issues has been that Congress has the power to acquire territory for any reason, with at least apparent consent from the territory's government, and that constitutional protections extend to non-state territories only on a case-by-case basis.[177] Two primary issues then remain:[178] (1) whether the Fourteenth Amendment encompasses American Samoa under the current *Insular* framework and (2) whether the *Insular Cases* even need to be invoked during a Citizenship Clause issue because the Clause textually defines its own scope. A clearer articulation of each issue follows.

A. *"Within the United States": Debates Over the Scope of the Fourteenth Amendment Cause Hesitation to Incorporate It Under the* Insular *Framework*

First, the *Insular Cases* set up a framework by which to evaluate whether a constitutional provision applies to an unincorporated territory.[179] This Comment will address whether the Citizenship Clause should apply to American Samoa under this framework. The method used by the *Insular Cases* is a two-pronged test.[180] First, the reviewing court must analyze the text of the constitutional provision itself to see whether the provision, by the

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[176] *See supra* Section II.

[177] *See supra* Section II. It is likely that the only true way to challenge a partial-incorporation doctrine is to require all territories to become states or to challenge the validity of their acquisition to begin with. This Comment will not grapple with the ramifications of such a stance.

[178] This Comment will, for the sake of efficiency, assume that this answer concerning the Federal Government's current relationship to extra-contiguous territories is valid. Doing so is necessary. The issues raised in Section II concerning the legitimacy of territorial acquisition and whether certain acquisitions, such as that of Hawaii, were truly a matter of consent and not of conquest must be presumed to be valid in order to engage in a fruitful discussion of the current state of affairs. *See supra* Section II.A.2. The backdrop is useful in examining the historical purpose and scope of the Citizenship Clause, but it will not be used in this Comment to attempt to invalidate the Federal Government's title to U.S. non-state territories.

[179] *See* Fitisemanu v. United States, 1 F.4th 862, 869 (10th Cir. 2021); *see, e.g.*, Downes v. Bidwell, 182 U.S. 244, 278–79 (1901).

[180] *Fitisemanu*, 1 F.4th at 875, 877–78.

substance of its text, applies to both states and territories.[181] Second, the reviewing court must determine whether the right at issue is one of the fundamental personal rights that make up "the basis of *all* free government."[182] These two prongs have been applied with varying results when it comes to the Citizenship Clause's application to American Samoans.[183] The absence of a confident consensus based on more than mere—and reluctant—deference to the *Insular Cases* creates a need for a thorough analysis and a bright-line rule, which this Comment will propose.

The two foremost decisions interpreting the *Cases* this way come from the last eight years. First, the D.C. Circuit Court of Appeals in *Tuaua v. United States* analyzed the Citizenship Clause under the *Insular* framework.[184] It held that the text of the Citizenship Clause on its own was insufficient to determine whether citizenship inherently applied to all territories.[185] Second, in *Fitisemanu*, the Tenth Circuit held, like the *Tuaua* court, that the Citizenship Clause's "historical evidence cannot resolve the meaning of the constitutional text."[186] It caveated this remark by noting that if it needed to resolve the meaning, it would do so by construing the Citizenship Clause narrowly and as exclusive of the extra-contiguous territories.[187] In contrast, the *Tuaua* court bypassed a thorough analysis of the scope of the Citizenship Clause and instead jumped straight into the second issue of whether citizenship is a fundamental personal right that must be afforded to those living in extra-contiguous territories.[188] These tentative approaches have received considerable backlash as proponents of American Samoan constitutional citizenship point out that the reasoning behind the *Tuaua* and

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181 *Id.* at 875.

182 Tuaua v. United States, 788 F.3d 300, 308 (D.C. Cir. 2015) (quoting Dorr v. United States, 195 U.S. 138, 147 (1904)) (citing Downes v. Bidwell, 182 U.S. 244, 283 (1901)).

183 *Compare* Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1195–96 (D. Utah 2019), *and* Fitisemanu v. United States, 1 F.4th 862, 883–907 (10th Cir. 2021) (Bacharach, J., dissenting), *with Fitisemanu*, 1 F.4th 862 (majority opinion), *and Tuaua*, 788 F.3d 300.

184 *Tuaua*, 788 F.3d at 306.

185 *Id.*

186 *Fitisemanu*, 1 F.4th at 876–77.

187 *Id.* at 876–77 (interpreting the Citizenship Clause narrowly is necessary because of unbroken historical practice).

188 *Tuaua*, 788 F.3d at 307–08.

Fitisemanu opinions is unsatisfying[189] and further accuse its results of being unfair.[190] Because of this, a thorough analysis of both the text of the Citizenship Clause and the *Insular Cases* is critical to determining whether, without consideration as to the *importance* of the right, birthright citizenship ought to be recognized for American Samoans.

Whether citizenship is truly a fundamental personal right has also been subject to conflicting views. The prevailing reasoning appears to be that while courts are not entirely sure why citizenship is not a fundamental right, it must not be a fundamental right under the *Insular Case* framework because it is not of the type of right that is fundamental to the "basis of all free government."[191] The *Tuaua* court distinguished having no citizenship rights at all from being a non-citizen national.[192] Its holding suggests that a national still has enough rights within the country that the distinction between a national and a citizen is not so great as to be truly "fundamental."[193] This reasoning tests the distinction between whether it is citizenship that is a fundamental right, or whether it is the freedom to participate in society, which is a characteristic of citizenship, that is a fundamental right. This reasoning is problematic, and Judge Lucero for the majority in the Tenth Circuit's *Fitisemanu* opinion took a different route and opined about

> whether citizenship is properly conceived of as a personal right at all. . . . 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

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[189] These proponents find the deference to the *Insular Cases* unsatisfying because of the *Cases'* distasteful, ethnocentric motivation. *See* Brief of the ACLU, *supra* note 11.

[190] Brief of the ACLU, *supra* note 11, at 12–15; *see also* Gabriela Meléndez Olivera & Adriel I. Cepeda Derieux, *"Nationals" but not "Citizens": How the U.S. Denies Citizenship to American Samoans*, ACLU, https://www.aclu.org/news/voting-rights/nationals-but-not-citizens-how-the-u-s-denies-citizenship-to-american-samoans (Aug. 6, 2021).

[191] *Tuaua*, 788 F.3d at 307–08 (quoting Dorr v. United States, 195 U.S. 138, 147 (1904)) (citing Downes v. Bidwell, 182 U.S. 244, 283 (1901)).

[192] *Id.* at 308.

[193] *See id.*

> American political system rather than a freestanding individual right.[194]

Judge Lucero went on to say that this proposition notwithstanding, citizenship is not a fundamental right for the purposes of incorporation.[195] The holdings of *Tuaua* and *Fitisemanu*, while illustrative of the general jurisprudential trend, do little to set a hard and fast rule as to whether citizenship is a fundamental right. Therefore, it will be this Comment's primary focus to determine whether the text of the Citizenship Clause includes American Samoa in its geographic scope and whether citizenship is a fundamental right regardless.[196] Because the answer to both of these inquiries is no, this Comment concludes that the *Insular* framework does not call for incorporation of citizenship rights to extra-contiguous territories.

B. *The* Insular *Cases Are Invoked in Evaluating Citizenship Clause Issues Without First Engaging in A Statutory Analysis of the Citizenship Clause's Scope*

Second, this Comment will test the claim that the *Insular Cases* need not be invoked during a Citizenship Clause evaluation because the Clause textually defines its own scope.[197] This claim was brought in *Tuaua* by the appellants and a group of amici, and its logic was echoed in the Utah District Court's decision in *Fitisemanu* and in Judge Tymkovich's concurrence in the Tenth Circuit's *Fitisemanu* opinion (reversing the Utah District Court's decision).[198] The Utah District Court in *Fitisemanu* held that the Clause did apply to American Samoans under the same logic set out in *United States v. Wong Kim Ark*.[199] *Wong Kim Ark* held that because a child of Chinese

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[194] Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021) (emphasis added).

[195] *Id.* at 879.

[196] This Comment will not determine whether the *Insular Cases* should be overturned. Rather, it will evaluate both if under the current test set up by the *Insular Cases*, the Citizenship Clause applies to American Samoan *and* whether the Citizenship Clause applies to American Samoa regardless of whether the *Insular Cases* are ever invoked.

[197] *Tuaua*, 788 F.3d at 306 ("Appellants and Amici contend the Insular Cases have no application [here] because the Citizenship Clause textually defines its own scope.").

[198] *Id.*; *Fitisemanu*, 1 F.4th at 881–83 (Tymkovich, C.J., concurring).

[199] *See* discussion of *United States v. Wong Kim Ark supra* note 107.

immigrants was born inside the United States, the child was a United States citizen under the Fourteenth Amendment.[200] In *Fitisemanu*, the district court held that *Wong Kim Ark* and *Downes* were incompatible in their implications and that because *Wong Kim Ark* dealt directly with the Fourteenth Amendment and *Downes* did not, the *Wong Kim Ark* holding was the correct precedent to be applied.[201] This analysis indicates that the *Insular Cases* need not always be invoked during a constitutional rights issue involving territories.[202] Judge Tymkovich, in his concurrence, agreed that the *Insular Cases* need not be the guiding source of interpretation and began his analysis by using statutory interpretation tools to examine the Citizenship Clause rather than resorting straight to any precedent, including *Wong Kim Ark*.[203] He asserted that an analysis under the *Insular Cases* or *Wong Kim Ark* is only necessary if the tools of statutory interpretation fail when examining the Citizenship Clause for the expanse of its own scope.[204] Using this interpretive path of analysis, the Citizenship Clause still may or may not apply simply by its own text, even if the *Insular Cases* were overturned at some point.

Analyzing whether the *Insular Cases* are even necessary to a constitutional claim brought by a territory is critical because in the event that the *Insular Cases* are overturned, there is concern that American Samoans may be left with little defense against total incorporation.[205] The practical statutory interpretation method set out by amici in *Tuaua* and Judge Tymkovich's concurrence in *Fitisemanu* point out that, using traditional tools of

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200 United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).

201 Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1157 (D. Utah 2019). *Compare Wong Kim Ark*, 169 U.S. at 693, *with* Downes v. Bidwell, 182 U.S. 244, 251 (1901).

202 *See Fitisemanu*, 426 F. Supp. 3d at 1157; *Fitisemanu*, 1 F.4th at 881–83 (Tymkovich, C.J., concurring).

203 *Fitisemanu*, 1 F.4th at 881–83 (Tymkovich, C.J., concurring).

204 *Id.* at 882.

205 *See* Brief For Amici Curiae Northern Marianas Descent Corporation And United Carolinians Ass'n In Support Of Respondents at 11–12, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394) [hereinafter Brief for Northern Marianas Descent Corporation]; Brief in Opposition for American Samoa, *supra* note 6, at 35–36.

interpretation, the *Insular Cases* are not needed to determine the Clause's applicability to American Samoa if the Clause defines its own scope.[206]

This Comment will analyze the textual, historical, and present scope of the Citizenship Clause for the purposes of both the first and second issues. In determining that the Citizenship Clause does not include American Samoans, this Comment proposes that it is improper to incorporate it to American Samoans under the *Insular* framework. This Comment further suggests that, by implication, incorporation of the Citizenship Clause to the American Samoan people is not needed to overturn the *Insular Cases*. In fact, such an overturning would not affect whether American Samoans are citizens under the Fourteenth Amendment. This analysis leads to the proposal that the Citizenship Clause should not be applied to American Samoa, and, consequently, the fate of the *Insular Cases* is immaterial to American Samoa's citizenship status. Because the Citizenship Clause does not apply to American Samoa, and because the *Cases* do not demand incorporation even if they were to be invoked, constitutional birthright citizenship should not be forced upon American Samoa.[207]

IV. ANALYSIS

A. An Analysis of the Citizenship Clause Shows That Birthright Citizenship for People of Foreign Territories Is Neither the Literal Meaning Nor the Intended Meaning of the Citizenship Clause

Considering the expansive history of the Fourteenth Amendment and American colonialism, it is apparent that the Fourteenth Amendment was not originally *intended* to include extra-contiguous territories.[208] Initial considerations show that no such territories existed or were contemplated at

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[206] *Fitisemanu*, 1 F.4th at 882 (Tymkovich, C.J., concurring); Tuaua v. United States, 788 F.3d 300, 306 (D.C. Cir. 2015).

[207] There are other policy concerns that American Samoa has regarding larger-scale incorporation if the *Insular Cases* were to be overturned. These issues are important and must be considered. However, this Comment will focus only on whether the Citizenship Clause ought to be incorporated based on past and current understandings of its scope.

[208] Provided, of course, that those acquisitions were valid to begin with. As discussed in Section III, this Comment will presume they were.

the time of the Fourteenth Amendment's drafting.[209] Despite the lack of historical consideration, scholars have presented arguments for why the text of the Citizenship Clause ought to be construed to include otherwise unincorporated territories.[210] These arguments have been persuasive to many scholars and some courts and show no sign of going away, even after the Supreme Court denied certiorari to *Fitisemanu* in October of 2022.[211] Therefore, a focused analysis of the meaning of the *words* of the Fourteenth Amendment—without regard to any long-term consequences—ought to be conducted in order to answer whether the text of the Citizenship Clause defines its own scope and whether citizenship is truly a fundamental right. The three primary methods of constitutional interpretation: textualism, originalism, and judicial pragmatism,[212] will be used to examine the Citizenship Clause in order to address these concerns.

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[209] See discussion *supra* Section II for a timeline. Alaska, the first extra-contiguous territory acquired by the U.S., was acquired in 1867, a year after the Clause's initial drafting and a year before its ratification. *Supra* Section II.A.2.c. Furthermore, the purchase documents indicated that all except Native Alaskans born in Alaska would be U.S. citizens, so the issue was somewhat void.

[210] *See, e.g.*, Brief of the ACLU, *supra* note 11, at 7.

[211] *Fitisemanu*, 1 F.4th 862, *cert. denied*, 143 S. Ct. 362 (2022); *see also* Brief of the ACLU, *supra* note 11. If anything, since the denial of certiorari, American Samoan citizenship has become more prevalent in the news. *See generally* Natasha Frost, *The Only U.S. Territory Without U.S. Birthright Citizenship*, N.Y. TIMES (Nov. 25, 2022), https://www.nytimes.com/2022/11/25/world/australia/american-samoa-birthright-citizenship.html; Mark Sherman, *Court Rejects Appeal to Give American Samoans Citizenship*, AP (Oct. 17, 2022, 8:08 P.M.), https://apnews.com/article/united-states-court-decisions-neil-gorsuch-american-samoa-government-and-politics-f89629168889f28e76ff0279d15bb469; Maite Knorr-Evans, *Why are American Samoans not Considered US Citizens at Birth?*, AS, https://en.as.com/latest_news/why-are-american-samoans-not-considered-us-citizens-at-birth-n/ (Oct. 19, 2022, 6:11 P.M.); *US Citizenship Issue Divides American Samoans*, RNZ (Nov. 16, 2022), https://www.rnz.co.nz/international/pacific-news/478853/us-citizenship-issue-divides-american-samoans.

[212] There are many divisions and crossovers within these groups. This Comment will use only the core philosophies of each to avoid being caught up in the nuances. For textualism, this Comment will determine whether the words themselves imply that citizenship extends to more territory than that which makes up the Union. For originalism, this Comment will determine whether the drafters of the Clause intended citizenship to be a broad and sweeping right and will further examine whether citizenship has been treated as such in years since. And,

1. An Examination of the Words of the Citizenship Clause Shows that Foreign Territories Are Excluded from Its Scope

Before invoking the *Insular Cases*, an examination of the text of the Citizenship Clause is imperative to determine whether the Clause textually defines its own scope.[213] If it does, then there is no need to invoke precedent at all. The Citizenship Clause's much-discussed phrasing states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[214] To have constitutional birthright citizenship, one must have been born or naturalized *in* the United States *and* subject to its jurisdiction.

Whether one is born in the United States is, of course, dependent on how far the United States extends. An initial consideration of the wording of the Citizenship Clause reveals that "in" is the critical word and that its meaning must be settled to determine its scope. The two competing views of this word are that "in" means either a state that has been accepted into the Union or any territory that the United States has jurisdiction over.[215] The second interpretation is doubtful because there is another phrase in the clause that *adds* the requirement that the United States have jurisdiction over the place where one was born or naturalized.[216] The implication is that there may be places that are in the United States but that the United States does not have jurisdiction over and vice versa.[217] Otherwise, it is likely that the drafters would have echoed the language of the Thirteenth Amendment[218] or simply omitted the first clause "in the United States."[219]

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for judicial pragmatism, or living constitutionalism, this Comment will examine if new circumstances justify a judicial expansion of the scope of the Citizenship Clause.

[213] *See* Section III.B.; Tuaua v. United States, 788 F.3d 300, 306 (D.C. Cir. 2015) ("Appellants and Amici contend the Insular Cases have no application [here] because the Citizenship Clause textually defines its own scope.").

[214] U.S. CONST. amend. XIV, § 1.

[215] *Tuaua*, 788 F.3d at 303–04.

[216] U.S. CONST. amend. XIV, § 1, cl. 1.

[217] See *infra* Section IV.A.2 for a discussion on why the distinction was likely made.

[218] The Thirteenth Amendment abolishes slavery "within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII.

[219] U.S. CONST. amend. XIV, § 1.

Regardless, this analysis likely will not settle the meaning of "in" by itself. A definition of "in" from Webster's American Dictionary of the English Language from 1828,[220] however, shows that "in" meant "present or inclosed, surrounded by limits."[221] The current Merriam-Webster Dictionary defines "in" as "a function word to indicate inclusion, location, or position within limits."[222] American Samoa does not fit within either of these definitions. It is not "present or inclosed" in the United States, because the United States is comprised of the Union, to which American Samoa does not belong.[223] In fact, no extra-contiguous territory that has not been made a state, such as Hawaii and Alaska, is a part of the Union—the Union being those states and territories which make up the United States.[224] The U.S. Government defines the United States as "[t]he 50 States and the District of Columbia."[225] This official definition includes only states and one territory, despite the United States possessing several extra-contiguous territories.[226] The District of Columbia is, as it stands, the only territory that has been accepted as part of the Union—and it was created from part of two already existing states with the specific purpose of being the U.S. Capitol.[227] Therefore, American Samoa is also not included, located, or positioned within the borders of the United States, because it is not one of the fifty states or the District of Columbia. Therefore, under the literal meaning of the phrase "in the United States," American Samoa and other extra-contiguous territories are excluded.

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[220] 1828 was forty years before the Fourteenth Amendment was ratified. *See* U.S. CONST. amend. XIV.

[221] *In*, AM. DICTIONARY ENGLISH LANGUAGE (1st ed. 1828).

[222] *In*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/in (last visited Jan. 20, 2024).

[223] *See What Constitutes the United States? What Are the Official Definitions?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/what-constitutes-united-states-what-are-official-definitions (last visited Jan. 19, 2024).

[224] *Id.*

[225] *Id.*

[226] See *supra* Section II.A.2.a for a breakdown of the current territories and how they were acquired.

[227] *The History of Washington, DC*, WASHINGTON DC, https://washington.org/DC-information/washington-dc-history (last visited Jan. 19, 2024). Virginia and Maryland ceded land in 1790 in order to have a place to put the U.S. Capitol. *Id.*

However, the textual considerations do not end with mere contemplation of the literal meaning of the phrase "in the United States." The D.C. Circuit Court of Appeals in *Tuaua* and the Tenth Circuit in *Fitisemanu* looked beyond the plain language and compared the phrase to other constitutional texts.[228] They both briefly discussed what "in the United States" could mean and did not settle on a conclusion.[229] Instead, both courts rested their decisions on the second phrase: "subject to the jurisdiction thereof."[230] The courts determined that this phrase in the clause was ambiguous because of two competing arguments that, they concluded, equally pulled the argument in opposite directions.[231]

The first argument is that the Citizenship Clause's text ought to be compared to the Thirteenth Amendment's phrasing, which distinguishes places that are "subject to the jurisdiction" of the United States but are not "within the United States" in its abolishment of slavery.[232] Because the two qualifications are differentiated in one clause and joined in another, the implication is that there are some places that are subject to the jurisdiction of the United States but are not a part of the Union.[233] Under this reasoning, while no state nor territory may legalize slavery, only those born in a state may be citizens by birthright without Congress's interference.[234] This is likely the correct interpretation of the Citizenship Clause, for the historical reasons explained *infra* in the next Section.[235]

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[228] Tuaua v. United States, 788 F.3d 300, 303–04 (D.C. Cir. 2015); Fitisemanu v. United States, 1 F.4th 862, 875 (10th Cir. 2021).

[229] *Tuaua*, 788 F.3d at 303–04; *Fitisemanu*, 1 F.4th at 875.

[230] *Fitisemanu*, 1 F.4th at 875; *Tuaua*, 788 F.3d at 304–05.

[231] *Tuaua*, 788 F.3d at 303–05 (holding that neither of the two arguments "is fully persuasive, nor does it squarely resolve the meaning of the ambiguous phrase 'in the United States'"); *Fitisemanu*, 1 F.4th at 875 ("Both the district court and the *Tuaua* court concluded that the Citizenship Clause leaves its geographic scope ambiguous. We agree.").

[232] U.S. CONST. amend. XIII, § 1; *Tuaua*, 788 F.3d at 303.

[233] *Tuaua*, 788 F.3d at 303. *Compare* U.S. CONST. amend. XIII, § 1, *with* U.S. CONST. amend. XIV, § 1.

[234] *Tuaua*, 788 F.3d at 303. *Compare* U.S. CONST. amend. XIII, § 1, *with* U.S. CONST. amend. XIV, § 1.

[235] *See* discussion of the word "in" *infra* Section IV.A.2.

The second argument, which courts have found to be equally persuasive, derives from the second section of the Fourteenth Amendment in the Enumeration Clause.[236] The Enumeration Clause discusses the apportionment of state representatives "among the several States which may be included within this Union."[237] The implication that follows from this is that because one clause of the Fourteenth Amendment uses the term "in the United States" and another "among the several States," the first is meant to include more than just the states while the latter is meant to be limited only to the states.[238] This argument is faulty for a number of reasons.

First, the argument ignores the context of the Citizenship Clause, the Enumeration Clause, and the Thirteenth Amendment. It does this by comparing the wording from an entirely administrative clause—the Enumeration Clause—to a clause that is meant to convey a substantive right.[239] The Enumeration Clause deals with the number of representatives that ought to apportioned to each state, while the Citizenship Clause ensures a social and political right for those born in the United States.[240] This is important because the Enumeration Clause is dealing with specifically what number of representatives may come from what states.[241] Using the same phrasing as the Fourteenth Amendment would make the Enumeration Clause confusing—it would read: "Representatives and direct Taxes shall be

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[236] *Tuaua*, 788 F.3d at 303. *Compare* U.S. CONST. amend. XIV, § 2, cl. 3, *with* U.S. CONST. amend. XIV, § 1.

[237] U.S. CONST. art. 1, § 2, cl. 3.

[238] *Tuaua*, 788 F.3d at 303.

[239] Compare the message of the two clauses: the Citizenship Clause was drafted in order to ensure citizenship for African Americans. *See* discussion *supra* Section II.A. This constitutional affirmation of a political right and privilege to those who previously did not have it is a great deal different from the Enumeration Clause, which was drafted in order to promote "a strong constitutional interest in accuracy." *Artl.S2.C3.1 Enumeration Clause and Apportioning Seats in the House of Representatives*, CONST. ANNOTATED (quoting Utah v. Evans, 536 U.S. 452, 476 (2002)), https://constitution.congress.gov/browse/essay/artI-S2-C3-1/ALDE_00001034/#ALDF_00000358 (last visited Dec. 30, 2022).

[240] *Compare* U.S. CONST. amend. XIV, § 2, cl. 3, *with* U.S. CONST. amend. XIV, § 1, cl. 1.

[241] U.S. CONST. amend. XIV, § 2, cl. 3.

apportioned in the United States according to their respective Numbers."[242] Further clarification would be needed to show that "their" is referencing the individual states, as opposed to the country as a whole. Therefore, the current phrasing is more accurate. Second, this argument ignores the fact that the Citizenship Clause mirrors the phrasing of the Thirteenth Amendment, which was drafted just three years before the Citizenship Clause.[243] This repetition was likely not unintentional, given that both clauses were designed to serve the same group of people—African Americans[244]—concerning a similar set of rights—the right to be free and the right to participate in society equally.[245] While the United States wanted to outlaw slavery everywhere it could, it did not want to grant citizenship everywhere it had influence over.[246] Its historical reasons for this are clear[247] and will be discussed further in the next section.

2. Historical Evidence Shows That the Citizenship Clause Was Not Meant to Include Foreign Territories

The distinction between the Thirteenth and Fourteenth Amendment's phrasing is logical, given the historical context.[248] While American Samoa and other island territories had not yet been ceded to the United States, sovereignty questions were still being debated for another group—the Native Americans.[249] Since Justice Marshall's opinion in *Worcester*, the approach to

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[242] Of course, the same logic applies to the inverse. If the Fourteenth Amendment used the phrasing of the Apportionment Clause, it would read "All persons born or naturalized among the several States, and subject to the jurisdiction thereof . . . ." This would exclude from its scope all of those territories that the United States had acquired that had not yet become states, yet contained citizenship grants in their cession deeds. The phrasing "among" would also be awkward and might imply citizenship for Native Americans, who lived among the states, due to its deviation in phrasing from the Civil Rights Act of 1866. Such a deviation could easily be interpreted as a modification of the original rule. Therefore, the current phrasing is a more accurate depiction of the intentions of the drafters. *See supra* Section II.A.2.b.

[243] *Compare* U.S. CONST. amend. XIII, § 1, *with* U.S. CONST. amend. XIV, § 1.

[244] *Supra* Section II.A.1.

[245] *Compare* U.S. CONST. amend. XIII, § 1, *with* U.S. CONST. amend. XIV, § 1.

[246] *Infra* Section IV.A.2.

[247] *Supra* Sections II, IV.A.3.

[248] *See supra* Section II.A.2.b.

[249] *Supra* Section II.A.2.b.

Native American governance had been that tribes were their own sovereigns entirely—distinct from the United States in both land and in jurisdiction.[250] About twenty years before the Civil War, however, Justice Taney wrote that Native Americans had always been subject to the dominion of the United States, but the United States was simply refraining from exercising its powers over them.[251] After the War, in the drafting of the Civil Rights Act of 1866 and the Fourteenth Amendment, there was some debate over whether or not to include Native Americans.[252] The drafters intentionally did not include Native Americans in the scope of the Civil Rights Act and left specific reference to them out of the Citizenship Clause because Native Americans were either not "in the United States"[253] because they were born on reservations or were not "subject to the jurisdiction thereof"[254] due to their sovereignty over themselves.

When it came time to decide whether Native Americans were included in the scope of the Fourteenth Amendment, it was found that Native Americans were only citizens by birthright if they were born outside of a reservation.[255] Under the still-binding decision of Justice Taney in *United States v. Rogers*, Native Americans were considered to be subject to the jurisdiction of the United States at the time of the Amendment's drafting.[256] However, Taney acknowledged that the land was Cherokee land, "assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority."[257] The *United States v. Rogers* position was still the law at the time of the Citizenship Clause's passing.[258]

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250 Worcester v. Georgia, 31 U.S. 515 (1832).

251 United States v. Rogers, 45 U.S. 567, 571–73 (1846).

252 *Supra* Section II.A.2.b.

253 *See* the *Elk v. Wilkins* approach discussed *supra* Section II.A.2.b.

254 *See* John Marshall's approach in *Worcester v. Georgia* as discussed *supra* Section IV.A.2; *see also* U.S. CONST. amend. XIV, § 1.

255 *Supra* Section II.A.2.b.

256 *Rogers*, 45 U.S. 567. This opinion was written more than twenty years before the Fourteenth Amendment was passed.

257 *Id.* at 572.

258 *See* U.S. CONST. amend. XIV, § 1; *Rogers*, 45 U.S. 567.

It is clear from the historical evidence that the drafters of the Citizenship Clause intended for there to not only be a distinction between lands "in the United States" and those "subject to the jurisdiction thereof," but also for that distinction to be so material so as to make citizenship only available to those born or naturalized in territories admitted to the Union.[259] The Supreme Court in *Wong Kim Ark* affirmed this in its historical overview of the British common law, which the Court used to guide its interpretation of the Citizenship Clause.[260] The Court found British common law to be a useful tool, though not dispositive, in uncovering the meaning of the word "citizen."[261] The Court noted that under British law, any person born in any "British dominions" would, with limited exceptions, be a British citizen.[262] It continued in saying that several United States cases had acknowledged these common law roots in recognizing that a person born in the original colonies was a British citizen.[263] The Court noted that in order to be a citizen at English common law, "the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience . . . [to] the sovereign."[264] The *Wong Kim Ark* Court recognized that Native Americans are excluded from citizenship under the Fourteenth Amendment because they owe direct allegiance to their tribes and not to the U.S. Government.[265] That said, after the *Wong Kim Ark* decision, Native Americans had a constitutional right to citizenship "so long as they were born outside the reservation."[266] This geographical requirement placed them in the correct geographic location to infer upon them direct allegiance.

Using the same reasoning, historical evidence indicates that American Samoans are not "in" the United States. As discussed, there were many territories acquired by the United States before and after the passing of the

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[259] *See generally* United States v. Wong Kim Ark, 169 U.S. 649, 655–68 (1898).

[260] *Id.*

[261] *Id.* at 655.

[262] *Id.* at 658.

[263] *Id.* at 659 (citing Inglis v. Sailors' Snug Harbor, 3 Pet. 99 (1830)).

[264] *Id.*

[265] United States v. Wong Kim Ark, 169 U.S. 649, 681–82.

[266] Maltz, *supra* note 85, at 572.

Fourteenth Amendment.[267] Most of these territories contained in their cession documents specific provisions concerning the citizenship of the people born or living in those territories at that time.[268] These cession documents even went so far as to exclude citizenship for Native Alaskans, while granting citizenship to anyone else born on Alaskan land.[269]

However, notably absent from American Samoa's deeds of cession is any mention of the citizenship status of the American Samoan people.[270] While that was certainly problematic for the American Samoan people initially,[271] it became clear over time that in order to better honor the deeds, which required the United States to preserve "the rights and property of the inhabitants" of American Samoa, it would be necessary to maintain a healthy distance from total incorporation into the United States.[272] That realization aside, the absence of an affirmative grant of citizenship or other constitutional incorporations distinguishes the relationship between the United States and American Samoa from that of the United States and its other acquisitions, such as the Louisiana Purchase.[273]

There are some similarities between the American Samoan people and Native Americans.[274] The Honorable Aumua Amata pointed out in the Respondent's Brief in Opposition in *Fitisemanu* that American Samoans owe allegiance to the United States as a statutory matter.[275] However, they retain their "'independent political community' with its own political and social traditions and practices, which mediate the relationship between the

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267 *Supra* Section II.A.

268 *Supra* Section II.A.

269 *Supra* Section II.A.2.b.

270 *See* Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900, https://asbar.org/cession-of-tutuila-and-aunuu/; Cession of Manu'a Islands, Manu'a Samoa-U.S., Jul. 16, 1904, https://asbar.org/cession-of-manua-islands/.

271 *See, e.g.*, Hiram Bingham, *American Samoans: Further Delay Is Protested in Granting Them Citizenship*, N.Y. TIMES, Nov. 12, 1946.

272 Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900, https://asbar.org/cession-of-tutuila-and-aunuu/; *see* Brief in Opposition for American Samoa, *supra* note 6, at 33.

273 Or the other similarly situated territorial acquisitions. *See supra* Section II.A.

274 Brief in Opposition for American Samoa, *supra* note 6, at 31.

275 *Id.* at 31.

American Samoan people and the United States."[276] They have their own constitution and govern themselves largely without any interference by the United States.[277] This means that despite having the power to exercise control over American Samoa, the United States has taken a hands-off approach. Under the English common law, American Samoa is therefore not "in full possession and exercise of [the United States'] power."[278] This independence shows that American Samoa, a primarily self-governing community, is neither geographically "in" the United States for the purposes of the Citizenship Clause nor is it "subject to the jurisdiction thereof" under an English common law analysis.[279]

Because the Citizenship Clause defines its own scope textually, and because it was not the original intent of the drafters of the Clause or the cession deeds to include American Samoa within the Clause's scope, [280] the Citizenship Clause's meaning can be determined without invoking the *Insular Cases*. However, if the *Insular Cases* were to be invoked, these same issues of textual interpretation would need to be considered and decided.[281] This is because the first prong of the two-pronged *Insular* standard is whether the text of a provision itself defines its own scope.[282] Therefore, because the text defines its own scope, there is not a need to invoke the *Insular Cases* and, even if they were brought in prematurely, the first prong of the *Insular* standard would be satisfied.

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[276] *Id.* (quoting Elk v. Wilkins, 112 U.S. 94, 109 (1884)).

[277] *See* REV. CONST. OF AM. SAM. There was not always such deference to American Samoan self-governance, however, since the removal of the Naval regime over the territory and the ratification of their constitution, the United States has deferred to American Samoa governance in most areas. *See* Brief in Opposition for American Samoa, *supra* note 6, at 20–21.

[278] United States v. Wong Kim Ark, 169 U.S. 649, 659 (1898).

[279] It is worth noting that even *Wong Kim Ark* viewed an English common law analysis as merely illustrative of intent, rather than the actual law. The text of the Fourteenth Amendment supersedes any common law expectations. Furthermore, the British do not recognize those born in their extra-contiguous territories as having birthright British citizenship as of the mid-20th Century. *Types of British Nationality*, GOV.UK, https://www.gov.uk/types-of-british-nationality/british-overseas-territories-citizen (last visited Jan. 19, 2024).

[280] *See supra* Section IV.A.1.

[281] *Supra* Section III.

[282] *Supra* Section III.

3. A History and Tradition Analysis Shows That People of Foreign Territories Do Not Have Birthright Citizenship

So far, it has been proposed that a textual approach to the words "in the United States" and "subject to the jurisdiction thereof" reveals that American Samoa is not within the scope of the Citizenship Clause.[283] It has also been suggested that the original intent of the drafters was not to include territories like American Samoa in the scope of the Citizenship Clause due to its geographical and jurisdictional independence.[284] These considerations indicate that the *Insular Cases* do not need to be invoked to settle the meaning of the Citizenship Clause.

The next consideration then is whether the drafters of the Clause or early scholars treated extra-contiguous territories wrongfully by excluding them from the scope of the Citizenship Clause. Both of their views may be tested by engaging in a history and tradition analysis, thereby evaluating how the United States has dealt with extra-contiguous territories since their acquisitions to see if early approaches have been consistent with the text and original intent of the Citizenship Clause.[285] This analysis, along with Section IV.B, will demonstrate that, even if the *Insular Cases* were to be invoked and the first prong of the two-pronged test satisfied, citizenship may be found to be a fundamental right.[286]

Since the acquisition of the island territories after the Spanish–American War and, later, American Samoa, Congress has determined the

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[283] U.S. CONST. amend. XIV, § 1; *see supra* Section IV.A.1–2.

[284] *Supra* Section IV.A.2.

[285] A history and tradition analysis has been more favored in the recent Court terms. *See, e.g.*, R. George Wright, *On the Logic of History and Tradition in Constitutional Rights Cases*, 32 S. CAL. INTERDISC. L.J. 1, 2 (2022) ("The Supreme Court has recently emphasized the importance, and the indispensability, of a showing of sufficient supportive history and tradition across a range of constitutional rights contexts"). It is useful for determining the fairness of the law, for determining whether Congress or the states have been abusing the relationship with American Samoa, and for determining how other future territorial acquisitions may be treated.

[286] *See infra* Section IV.B.

naturalization process for those born outside of the Union.[287] Congress set out the statutory requirements and procedures that those who are born of U.S. citizen parents but outside the country, those born on military bases, and those born in territories without a citizenship grant must adhere to.[288] Congress has used this power to grant citizenship to the people in nearly all extra-contiguous territories,[289] to Native Americans and Native Alaskans,[290] and to certain people born outside of the United States to U.S. citizen parents.[291]

Of the current extra-contiguous territories, Puerto Rico was the first to be granted U.S. citizenship for its people in 1917, just eighteen years after its acquisition in the Spanish–American War.[292] Guam gained its people's citizenship in 1950 under the Organic Act of Guam in 1950,[293] and the Northern Mariana Islands followed in 1986, another thirty-six years later.[294] Motivations for not granting citizenship more quickly for territories like Guam and American Samoa included the hesitancy to incorporate the territories too quickly, the desire to urge the territories to start their own countries separate from the United States, and the disappearance of territorial citizenship from the public eye as the World Wars began.[295]

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287 Fitisemanu v. United States, 1 F.4th 862, 864 (10th Cir. 2021) ("We instead recognize that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process.").

288 *See* Thomas v. Lynch, 796 F.3d 535 (5th Ct. App. 2015) (about the deportation of a man born on a military base to one citizen and one non-citizen parent); 8 U.S.C. § 1401.

289 Other than American Samoa, the last extra-contiguous territory to receive citizenship was the Commonwealth of the Northern Mariana Islands in 1986. 8 F.A.M. § 302.2.

290 The Indian Citizenship Act was passed in 1924, granting citizenship to Native Americans. Act of June 2, 1924, ch. 233, 43 Stat. 253.

291 8 U.S.C. § 1401.

292 *Supra* Section II.A.2.c; H.R. 9533, An Act to provide a civil government for Porto Rico, June 30, 1916 (Jones-Shafroth Act). The Act also dramatically changed the structure of the Puerto Rican government from the Spaniard ruling, and, before that, the native systems indigenous to Puerto Rico. *See* JOSÉ R. OLIVER, CACIQUES AND CEMI IDOLS: THE WEB SPUN BY TAÍNO RULERS BETWEEN HISPANIOLA AND PUERTO RICO 6, 9 (2009).

293 Organic Act of Guam, ch. 512, § 1, 64 Stat. 384 (1950) (codified at 8 U.S.C. § 1407).

294 8 F.A.M. § 302.2.

295 *See* Timothy P. Maga, *The Citizenship Movement in Guam, 1946–1950*, 53 PAC. HIST. REV. 59, 59–61 (1984).

Throughout history, however, Congress's approach to territorial citizenship has been the same: case by case.[296] Courts, in comparison, have played a minor, if any, role in the process of ensuring citizenship rights for inhabitants of unincorporated territories.[297] There has been no point in the 155 years since the passing of the Fourteenth Amendment where the courts' determinations of citizenship rights in unincorporated territories has opposed the statutory process that Congress has laid out.[298] This shows a uniform interpretation of the Citizenship Clause until the more recent cases of the past ten years.[299]

B. *New or Changed Circumstances Do Not Justify a Judicial Expansion of the Citizenship Clause's Scope*

The final consideration that must be analyzed under the Citizenship Clause and the *Insular Case* framework is if, under a judicial pragmatist approach, new circumstances necessitate further incorporation of American Samoa, or if the right to citizenship is fundamental.[300] This Section will evaluate whether the right to citizenship is fundamental and if it is prudent to reach beyond the meaning of the original text of the Citizenship Clause in order to accommodate a new group of people who have voluntarily ceded to the governance of the United States.

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[296] *See* Brief in Opposition for American Samoa, *supra* note 6, at 5. This principle also applies to citizenship for Native Americans, who for a long time greatly opposed citizenship due to the fear that it would accelerate Native American cultural decline. Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. LAW. J. 126, 129 (2004). Even now, the applicable citizenship statute caveats the grant of citizenship for Native Americans so as to allow Native Americans to avoid citizenship if it conflicts with tribal practices. 8 U.S.C. § 1401;

[297] *See* Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021); *id.* at 864 ("We instead recognize that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process.").

[298] Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021) (holding that American Samoans are citizens under the Fourteenth Amendment).

[299] *Id.*

[300] *Supra* Section III.

1. It Would Be Unwise to Force Citizenship Upon American Samoa Against Its Will

First and foremost, it would be unwise to force citizenship upon a group of people who do not want it.[301] Such a forceful imposition of loyalty to a sovereign other than American Samoa would likely have detrimental consequences on the American Samoan people and, perhaps, on the inhabitants of other unincorporated territories as well.[302] The fear that incorporation will lead to the demise of an indigenous culture is what drove many Native Americans to protest citizenship,[303] and it is what drives the American Samoans and their *amici* in the Commonwealth of the Northern Mariana Islands now.[304]

The apprehension toward constitutional incorporation for the American Samoans is based in an understanding that further incorporation may result in the deterioration of *fa'a Samoa*.[305] *Fa'a Samoa* is "the essence of being Samoan, and includes a unique attitude toward fellow human beings, unique perceptions of right and wrong, the Samoan heritage, and fundamentally the aggregation of everything that the Samoans have learned during their experience as a distinct race."[306] The American Samoans suggest that *fa'a Samoa* is so critical to the American Samoan existence that an intentional deterioration of it may violate the original deeds of cession of American Samoa, in which the United States promised to "respect and protect the individual rights of all people dwelling in Tutuila" and that "[t]he Chiefs of the towns will be entitled to retain their individual control of the separate

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301 In fact, the United States has historically allowed those who reside in territories that subsequently receive citizenship to choose whether to accept that citizenship or not. See discussion *supra* Section II.A. for a more detailed look at which treaties allowed inhabitants to elect into one nationality over another upon cession.

302 *See* Brief For Northern Marianas Descent Corporation, *supra* note 205; Brief in Opposition for American Samoa, *supra* note 6.

303 Rollings, *supra* note 296.

304 *See* Brief For Northern Marianas Descent Corporation, *supra* note 205; Brief in Opposition for American Samoa, *supra* note 6.

305 Brief in Opposition for American Samoa, *supra* note 6, at 12.

306 *Id.* at 6 (quoting Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. 35, 37 (1999)).

towns, if that control is in accordance with the laws of the United States of America concerning Tutuila, and if not obstructive to the peace of the people."[307] Similarly, its sister treaty, the Treaty of Cession of Manu'a Islands, states that "the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized."[308] Furthermore, the American Samoan Constitution, which the United States Government ratified, protects American Samoans "against alienation of their lands and the destruction of the Samoan way of life and language."[309] These documents suggest not only that the United States ought not to interfere directly with *fa'a Samoa*, but also that the Federal Government has a positive obligation to protect the American Samoan way of life. A violation of these documents may result in a decline of the American Samoan–United States relationship.[310]

As discussed earlier, it is not necessarily the direct consequences of *citizenship* that worry the American Samoan government. Rather, it is the continuing trend of incorporation that would follow an acknowledgement of constitutional birthright citizenship that holds American Samoans back from embracing United States citizenship.[311] American Samoa goes so far, however, as to assert the existence of a fundamental right not to citizenship, but to self-determination that the United States must respect due to its relationship to the American Samoan people.[312] Aumua Amata notes in her brief on behalf of the American Samoan government that "[t]here is nothing American Samoa treasures more than *fa'a Samoa* . . . . [B]y imposing birthright citizenship on the American Samoan people regardless of their wishes, petitioners' position would deprive the American Samoan people of

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[307] Cession of Tutuila and Aunu'u, Tutuila Samoa-U.S., Apr. 17, 1900, https://asbar.org/cession-of-tutuila-and-aunuu/.

[308] Cession of Manu'a Islands, Manu'a Samoa-U.S., Jul. 16, 1904, *Cession of Manu'a Islands*, https://asbar.org/cession-of-manua-islands/.

[309] REV. CONST. OF AM. SAM. art. 1, § 3.

[310] See Brief For Northern Marianas Descent Corporation, *supra* note 205, at 5–8 for a suggestion that a violation of the covenant between the United States and the Commonwealth of the Northern Mariana Islands may result in a deterioration of the Commonwealth itself. The principle may be analogized here.

[311] *See* Brief in Opposition for American Samoa, *supra* note 6, at 10–11.

[312] *Id.*

their basic right to determine their own status through the democratic process."[313] Regardless of the existence of any such right, the United States walks a fine line with American Samoa that, if they were to cross the boundaries set up by the deeds of cession and the American Samoan Constitution, would risk a repetition of their mistakes with the Native Americans that resulted in the angry decline of many aspects of indigenous cultures.[314] The United States ought to be cautious of such a repetition.

2. Citizenship Is Not a Fundamental Right and the *Insular Cases* Are Not Determinative of American Samoa's Citizenship

The right to citizenship has had a mixed history regarding its recognition as fundamental.[315] While generally considered to be fundamental to those it is afforded to under the Fourteenth Amendment, it is discriminatory by its nature because it gives some people greater political presence than others based upon where they were born (or naturalized, if they renounce their prior allegiance).[316] Judge Lucero has opined that it seems unlikely that citizenship is a personal right at all,[317] while others suggest that citizenship is not only personal, but fundamental to all people under the governance of the United

313 *Id.* at 12.

314 *See generally* Denezpi v. United States, 142 S. Ct. 1838, 1849–50 (Gorsuch, J., dissenting) (discussing the origin of the Court of Indian Offenses and its intentions); Eric Hemenway, *Native Nations Face the Loss of Land and Traditions*, NAT'L PARK SERV., https://www.nps.gov/articles/negotiating-identity.htm (last updated Sept. 13, 2022) (on the forced assimilation of many Native Americans); *supra* Section II.A.1.b (on conflicting desires regarding citizenship from Native Americans).

315 *See generally* Trop v. Dulles, 356 U.S. 86, 92–93, 97 (1958) (plurality opinion) (noting that constitutional citizenship, once granted, cannot be easily meddled with by Congress); *OHCHR and the Right to a Nationality*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/nationality-and-statelessness (June 12, 2020) (the right to have a nationality is a human right); *Birthright Citizenship: A Fundamental Right for America's Children*, CTR. FOR THE CHILD. OF IMMIGRANTS, https://firstfocus.org/wp-content/uploads/2015/08/Birthright-Citizenship-A-Fundamental-Right-for-Americas-Children.pdf (Sept. 2015) (birthright citizenship is a fundamental right for those born in the United States); Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2022) (the distinction between a citizen and a national is not so great as to be fundamental).

316 *See generally* U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1448.

317 *Fitisemanu*, 1 F.4th at 878.

States.[318] Proponents of the broader view defer to case precedent dealing with clear native-born citizens, such as the plurality Supreme Court decision in *Trop v. Dulles*[319] or the Court's landmark opinion in *United States v. Wong Kim Ark*.[320] However, as discussed earlier, rather than supporting the view that citizenship applies to any person born under the jurisdiction of the United States, these opinions suggest that the Fourteenth Amendment means what it says, including that those born inside the United States are citizens[321] and that, if a citizen, that citizenship cannot be revoked at the whim of Congress.[322]

For those born outside the United States,[323] however, citizenship has not been recognized as a fundamental right.[324] The current test is whether the alleged right is fundamental for "the basis of all free government."[325] For those not already included by birthright under the Citizenship Clause, the Constitution grants citizenship to those who are naturalized into the United States.[326] Congress, therefore, remains free to establish naturalization procedures.[327] This lack of universal citizenship suggests that the question of

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318 Plaintiffs-Appellees' Petition for Rehearing En Banc, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019).

319 *Trop*, 356 U.S. at 87.

320 *See* Plaintiffs-Appellees' Petition for Rehearing En Banc at 12, *Fitisemanu*, 1 F.4th 862 (Nos. 20-4017, 20-4019); United States v. Wong Kim Ark, 169 U.S. 649 (1898).

321 *Supra* Section IV.A.2; *Wong Kim Ark*, 169 U.S. at 676–79.

322 *Trop*, 365 U.S. at 92–93.

323 Again, meaning outside of the Union, which is comprised of the fifty states and the District of Columbia. *What Constitutes the United States? What Are the Official Definitions?*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/faqs/what-constitutes-united-states-what-are-official-definitions (last visited Jan. 19, 2024).

324 *See supra* Section IV.A.1.

325 *See, e.g.*, Dorr v. United States, 195 U.S. 138, 147 (1904)); *see* Brief For Northern Marianas Descent Corporation, *supra* note 205, at 11–12 (quoting Duncan v. Louisiana, 391 U.S. 145 (1968)) (contrasting the standard from the *Insular Cases* with the current standard used for incorporation to the States, which is whether a right is fundamental to "an Anglo-American regime." The Commonwealth of the Northern Mariana Islands suggest that it is the *new* standard, not the *Insular Case* standard, that is racist.).

326 U.S. CONST. amend. XIV, § 1.

327 U.S. CONST. art. I, § 8, cl. 4; *supra* Section IV.A.1. Once naturalized, however, the citizen is protected by the Fourteenth Amendment and Congress may not revoke that status.

whether the right to be a citizen is fundamental is, once again, one of geography and jurisdiction.[328] Whether one has a fundamental right to citizenship depends on where one is born.[329] This proposition is supported by the language of the Citizenship Clause,[330] by over one hundred and fifty-five years of history,[331] and by many precedents[332]: mere allegiance to the United States is insufficient to acquire birthright citizenship under the Fourteenth Amendment.

The question then must be: *should* citizenship be considered a fundamental right for all who are under the jurisdiction of the United States? As the Commonwealth of the Northern Mariana Islands points out in an *amicus* brief in *Fitisemanu*, the United States has included in their covenants with unincorporated territories acquiescence for laws that conflict with the Federal Constitution.[333] For the Commonwealth of the Northern Mariana Islands, the existence of their commonwealth rests on the inclusion of certain "integral" provisions in their treaty with the United States that conflict with the Federal Constitution.[334] The Islands suggest that an erosion of the differences between states and territories would "evaporate overnight" the

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[328] *Supra* Section IV.A.1–2.

[329] *Supra* Section IV.A.1.

[330] *Supra* Section IV.A.1; U.S. CONST. amend. XIV, § 1, cl.1.

[331] *See* Brief For Northern Marianas Descent Corporation, *supra* note 205, at 2–8 (discussing the reliance placed on the *Insular Cases* and how they have survived since 1901); U.S. CONST. amend. XIV, § 1, cl.1 (adopted in 1868).

[332] *See generally* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (U.S. territories are not "in" the United States); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) (affirming the *Insular Cases*); Reid v. Covert, 354 U.S. 1, 14 (1957) (distinguishing *Reid* from the *Insular Cases*).

[333] Brief For Northern Marianas Descent Corporation, *supra* note 205, at 3.

[334] *Id.* at 4.

> The overruling of [the *Insular Cases*] would therefore endanger key Covenant provisions on which the [Commonwealth of the Northern Mariana Islands'] existence rests. In particular, it would endanger the land alienation restriction, which enables the people of the Northern Marianas "to retain the ownership of their most precious asset: their land.

Id. (quoting Marianas Political Status Commission, *Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands* at 116 (1975)).

relationship between the Islands and United States.[335] They go on to say that "[p]erhaps no relationship agreeable to both sides could be constructed now at all, particularly if the [Northern Mariana Island] people are to be told, 'You can have your land, or you can have your citizenship, but not both.'"[336] The Islands warn that overturning the *Insular Cases* poses a serious threat to the status of the Northern Mariana Islands.[337]

American Samoa presents some of the same concerns,[338] except that, unlike the Commonwealth of the Northern Mariana Islands,[339] American Samoa prioritizes its way of life at the expense of its people's citizenship status.[340] American Samoa and the Commonwealth of the Northern Mariana Islands share a similar approach to the *Insular Cases*, however, because, even though the Islands embrace their citizenship and American Samoa does not, both believe that further constitutional incorporation will threaten their territorial status.[341] On the other side, those pushing for further constitutional incorporation claim that "[e]xtending citizenship has not impaired cultural preservation or self-determination in any other U.S. Territory" and that "[i]f anything, ongoing uncertainty over the constitutional status of 'unincorporated' territories and the continuing viability of the *Insular Cases* serve as obstacles to self-determination."[342] These assertions ignore the ramifications that further *constitutional* incorporation would have on the territories—rather than the effects of statutory citizenship, which is what has been granted to all other U.S.

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[335] *Id.* at 5.

[336] *Id.* at 7.

[337] *Id.* at 6–7.

[338] Brief in Opposition for American Samoa, *supra* note 6, at 14–19.

[339] The Commonwealth of the Northern Mariana Islands has accepted statutory citizenship from Congress, unlike American Samoa. They pose the issue that being forced to choose between citizenship and their land would likely end in the deterioration of their relationship with the United States. *See* Brief For Northern Marianas Descent Corporation, *supra* note 205, at 7.

[340] *See* Brief in Opposition for American Samoa, *supra* note 6, at 12, *and* supra Section II.B.1; Brief For Northern Marianas Descent Corporation, *supra* note 205, at 10.

[341] *See* Brief in Opposition for American Samoa, *supra* note 6, at 6–7; *supra* Section II.B; Brief For Northern Marianas Descent Corporation, *supra* note 205, at 6–7.

[342] Reply Brief for Petitioners, *supra* note 23, at 2–3.

territories.[343] Furthermore, other *amici* in support of the petitioners in *Fitisemanu* propose that there is no reason for there to be distinctions in constitutional application between states and territories.[344] This indicates that merely overturning the *Insular Cases* and granting citizenship to American Samoans would not end the movement seeking to force American Samoa into assimilation.[345]

The other problems with the arguments presented by the proponents of incorporation aside, and even assuming that the problems are true, they bear no effect on whether citizenship ought to be regarded as a fundamental right. That further incorporation of the Fourteenth Amendment may not immediately destroy American Samoa's land-use system does not indicate that citizenship is a fundamental right or that such incorporation will not be detrimental to the territories in the long run.[346] The petitioners in *Fitisemanu* alleged that not having citizenship prohibits American Samoans who wish to

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[343] See *supra* Section II for a history of territorial incorporation. American Samoa has also requested to not be granted citizenship through congressional statutes. *Supra* Section II.B. These claims also ignore that forcing citizenship on a territory that does not want it intuitively "impair[s] cultural preservation or self-determination." Reply Brief for Petitioners, *supra* note 23, at 2.

[344] See Brief of Former Federal and Local Judges as *Amicus Curiae* Supporting the Petitioners at 15, *Fitisemanu*, 143 S. Ct. 362 (No. 21-1394) [hereinafter Brief of Former Federal and Local Judges] for a discussion on how the *Insular Cases*' "assumptions that the territories have 'wholly dissimilar traditions and institutions'" are flawed and that there is no justification for "a carve-out [in constitutional incorporation to U.S. territories] for the Citizenship Clause specifically, let alone the Constitution's provisions *en masse*." *Id.* This argument denies that American Samoa has a right to not have the entire Constitution forced upon them simply because their lifestyle is different than that of those living in the States. The policy issues with such a stance are apparent when considering its similarity to the stance that the Federal Government took regarding Native Americans in compelling assimilation. *See* Maria Conversa, Comment, *Righting the Wrongs of Native American Removal and Advocating for Tribal Recognition: A Binding Promise, the Trail of Tears, and the Philosophy of Restorative Justice*, 54 UIC LAW. REV. 933, 937–39 (2021); *see, e.g.,* Denezpi v. United States, 142 S. Ct. 1838, 1850 (2022) (discussing efforts to "civilize" Native Americans in 1883).

[345] Such assimilation may or may not be successful, given that it would contravene the treaty documents signed with the American Samoan chiefs. *Supra* Section II.B.1. Rather, as the Commonwealth of the Northern Mariana Islands points out, it may result in a breakdown of the relationship between the territory and the United States. Brief For Northern Marianas Descent Corporation, *supra* note 205, at 6–7.

[346] Brief in Opposition for American Samoa, *supra* note 6, at 17–18.

participate politically in the United States from doing so.[347] U.S. nationals have the right to travel freely, work, and live in the United States, but are denied the right to vote and run for certain political offices unless they naturalize.[348] These U.S. nationals may request citizenship through a streamlined application process[349]—a process that promises to become easier as more legislation works its way through Congress.[350]

Given that the people, through their elected government, who are being denied the alleged "fundamental" right are the same people advocating for that denial indicates that citizenship may not be as fundamental as proponents of overturning the *Insular Cases* suggest.[351] The petitioners in *Fitisemanu* even acknowledged that the culture of American Samoa should not be affected by overturning the *Insular Cases*, thereby indicating a respect for the value of American Samoa's autonomy.[352] Yet, in alleging that overturning the *Insular Cases* would end the discussion as to American Samoa's incorporation under the Fourteenth Amendment, the petitioners overlook the fact that a one-size-fits-all method of constitutional incorporation to the territories ignores the historical nuances central to why American Samoa ceded to the United States in the first place.[353] That American Samoa desires a different treatment from the United States Government than the States[354] or the Commonwealth of the Northern Mariana Islands[355] is unsurprising, given the Samoans' motivations for ceding to the United States and their interactions with the United States since.[356] Simply put, citizenship has not been recognized as a fundamental

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[347] *See* Brief of Former Federal and Local Judges, *supra* note 344, at 16.

[348] *See* discussion *infra* Section V.B.

[349] 8 U.S.C. § 1436.

[350] *Infra* Section V.B.

[351] Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2022).

[352] Reply Brief for Petitioners, *supra* note 23, at 2.

[353] *See* discussion *supra* Section II.B.1.

[354] Who have joined the Union.

[355] Who value their U.S. citizenship highly, yet do not want further incorporation. Brief For Northern Marianas Descent Corporation, *supra* note 205, at 7.

[356] Brief in Opposition for American Samoa, *supra* note 6, at 8 ("In light of the unique and irreplaceable nature of Samoan cultural practices, and the obligations it accepted under the instruments of cession, the United States has repeatedly vowed to protect *fa'a Samoa*.").

right for those born in U.S. territories, and there are sufficient differences between the United States and its territories to warrant territory-by-territory treatment to best work with the people and governments of each.

V. PROPOSAL

Considering that the text of the Citizenship Clause defines its own scope, that this scope is exclusive of American Samoa, and, because there is no reason to interpret it otherwise, courts should refrain from using American Samoans as an excuse to overturn the *Insular Cases*. Instead, courts should avoid using the *Insular Cases* as a guide at all because the Citizenship Clause does not require invocation of such precedent, and the *Cases* do not change the outcome of American Samoan citizenship. Furthermore, those American Samoans who are seeking to become citizens of the United States should pursue other options through the streamlined naturalization process available to them statutorily and wait on Congress to pass H.R. 1941, which promises to make naturalization for American Samoans even easier than ever.[357] In so doing, the United States can continue its one hundred and twenty year-long relationship with American Samoa in harmony and without threatening what American Samoa treasures most.[358]

A. *Courts Should Not Disregard a Proper Interpretation of the Fourteenth Amendment's Citizenship Clause in Order to Overturn the* Insular *Cases*

Now that it is apparent that the text of the Citizenship Clause does not apply to American Samoa on its face or under the *Insular Case* framework, and, because forcing citizenship on an unwilling group of people is unwise and may result in oppression, courts should not be eager to buy into the rhetoric that American Samoa needs constitutional birthright citizenship. Granting that the *Insular Cases* are at least partially based in ethnocentricity,[359] their rule is relatively consistent with the Court's approach

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[357] H.R. 1941, 117th Cong. (2021).

[358] *See* Brief in Opposition for American Samoa, *supra* note 6, at 20–22.

[359] *Supra* Section II.B.1.

to substantive due process today[360] and the *Cases* do not deal with citizenship directly.[361] Because the Citizenship Clause defines its own scope, there is no need to invoke any precedent at all in an analysis of the Clause's breadth.[362] Therefore, the demise of the *Insular Cases* should not affect the status of American Samoans.

Because the *Insular Cases* do not need to be invoked at all in a Citizenship Clause analysis, forcing citizenship on American Samoa is certainly not necessary in order to overturn the *Cases*. Not only is it textually and logically unnecessary, but imposed citizenship would likely be harmful to the American Samoan people, as further constitutional incorporation threatens to destroy *fa'a Samoa*.[363] Therefore, despite the appeal of overturning racist precedent, courts should not disregard a proper interpretation of the Fourteenth Amendment simply to overrule a line of cases that are irrelevant and similar in reasoning to that used by the Court today.[364]

B. Proposed Bill H.R. 1941 is the Best Way to Grant Citizenship to Those Who Desire It While Abstaining from Judicial Expansion of the Citizenship Clause

Fortunately for those in positions like the plaintiffs in *Tuaua v. United States* and *Fitisemanu v. United States*, the path to citizenship for U.S. nationals is becoming increasingly easier. Because nationals are free to travel, live, and work in the United States, they do not need to go through any immigration proceeding other than the naturalization application in order to

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360 The Court begins many substantive due process cases with first an analysis of the text itself and then of whether there is some fundamental right that must be acknowledged. *See* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 834, 836 (2003).

361 Plaintiffs-Appellees' Petition for Rehearing En Banc at 3–4, Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021) (20-4017, 20-4019) (indicating the *Insular Cases* did not directly deal with citizenship and the trend has been to not extend their reach).

362 *Supra* Section IV.A.2.

363 *Supra* Section IV.B.1.

364 Brief For Northern Marianas Descent Corporation, *supra* note 205, at 8–17 (suggesting that the *Insular Cases* were correctly decided and their rule of law is fair).

take the step to citizenship.[365] The application is identical to the one for Green Card holders applying for U.S. citizenship—which is the last step for a foreign immigrant seeking naturalization.[366] It requires proficiency in English, residency in the United States as a legal permanent resident for at least five years, and an oath renouncing allegiance to any former country and affirming allegiance to the United States.[367] Naturalization also requires fingerprinting, an interview process, and proof of good moral character.[368] It further requires the completion of a Form N-400 prior to both taking the Naturalization Test and completing the above interview requirements.[369] For foreign immigrants, this naturalization process is the last and perhaps least difficult step in a long line of applications, interviews, forms, and visas.[370]

However, even this application process is presently being modified by Congress.[371] A proposed bill, if passed as legislation, would eliminate certain naturalization requirements listed above—set out in 8 U.S.C. §§ 1423, 1427, 1436, and 1448—for American Samoans seeking to become citizens.[372] American Samoans would not need to prove, prior to applying for citizenship, proficiency in English, permanent residency for at least five

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[365] *See U.S. Citizenship*, USA.GOV, https://www.usa.gov/become-us-citizen (last visited Feb. 11 2024).

[366] *Become a U.S. Citizen Through Naturalization,* USA.GOV, https://www.usa.gov/naturalization (last visited Jan. 20, 2024). Foreign immigrants must first acquire a Green Card and then hold the Green Card for five years before becoming eligible for citizenship. *Id.*

[367] 8 U.S.C. §§ 1423, 1427, 1448.

[368] *10 Steps to Naturalization*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/citizenship/learn-about-citizenship/10-steps-to-naturalization (last visited Jan. 20, 2024); 8 U.S.C. §§ 1424–45 (on eligibility for naturalization and proof of intentions).

[369] *10 Steps to Naturalization*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/citizenship/learn-about-citizenship/10-steps-to-naturalization (last visited Jan. 20, 2024).

[370] See *Green Card Eligibility Categories*, U.S. CITIZENSHIP AND IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-eligibility-categories (last visited Jan. 20, 2024) for a list of those who are eligible to apply for a Green Card and the requirements for those who wish to be eligible to be eligible to apply for a Green Card.

[371] H.R. 1941, 117th Cong. (2021).

[372] *Id.*; 8 U.S.C. §§ 1423, 1427, 1436, 1448.

years,[373] or renunciation of their loyalty to American Samoa.[374] Proposed Bill 1941 would make an already streamlined application process considerably easier, particularly when it comes to the time requirements.

This bill is the best solution for American Samoans who wish to live in the United States and participate more fully in its political economy. While U.S. nationals are free to participate in society, the few limitations on them—their abilities to vote, hold public office, and serve on juries—may inspire many to obtain citizenship. Such a bill is ideal because it allows Congress to continue to work individually with American Samoa to further the common goal that Congress and American Samoa share: the flourishment of the American Samoan people. It allows American Samoans to choose their destiny as a people, rather than having their destiny chosen for them. With this bill, American Samoans may preserve their respect for their heritage while also pursuing greater participation in United States politics.

VI. CONCLUSION

In conclusion, American Samoa has a three-thousand-year long history that has filled its people with deep cultural reverence for their way of life.[375] In their attempts to right the wrongs of the *Insular Cases*, courts have threatened to infringe upon American Samoa's *fa'a Samoa* against the American Samoans' will. Not only is this not called for by the literal meaning of the text of the Constitution, but it is far from the intent of its drafters, who sought to acknowledge a greater, rather than a lesser, amount respect for people.[376] The American Samoans' push for a right to self-determination indicates that the federal government's current hands-off, case-by-case approach to territorial governments is the correct and most respectful method of handling territorial incorporation for non-fundamental rights. Furthermore, the *Insular Cases*, which have framed the decisions of the two

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[373] This requirement has already been eliminated for U.S. nationals under 8 U.S.C. § 1436. It states that any U.S. national may apply for citizenship if, complying with all other naturalization requirements, they live in any state or territory of the United States. 8 U.S.C. § 1436.

[374] *Compare* 8 U.S.C. §§ 1423, 1427, 1448, *with* H.R. 1941, 117th Cong. (2021).

[375] Brief in Opposition for American Samoa, *supra* note 6, at 1.

[376] *Supra* Sections II.A.2, IV.A.1.

seminal cases on the issue, sit on the brink of being overturned.[377] However, these *Cases* do not need to be invoked when considering territorial citizenship because the text of the Citizenship Clause is clear on its own: in order to be "in" the United States, a territory must be admitted to the United States in its entirety.[378] Because American Samoa is not a part of the Union, it is excluded from the scope of the Citizenship Clause and ought to remain as it is until its people decide whether to petition for further inclusion into the United States or to embark on their own as their own country. Through the fog of politics decrying the racist language of the *Insular Cases* and the misleading presentation of citizenship as fundamental to the human experience, it is imperative for courts to read the Citizenship Clause for what it is and to respect the decision of the American Samoan people.

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[377] United States v. Vaello-Madero, 596 U.S. 159, 179 (2022) (Gorsuch, J., concurring).

[378] *Supra* Section IV.A.1.