NEITHER WITHIN NOR WITHOUT: THE CURIOUS CASE OF U.S. CITIZENSHIP IN AMERICAN SAMOA AND THE INSULAR CASES

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Abstract

This Article considers the problematic notion of citizenship rights among colonized Pacific Island Peoples since the nineteenth century. In particular, this Article reviews these rights for American Samoans in light of the recent Tenth Circuit Court of Appeals decision *Fitisemanu v. United States.* In *Fitisemanu*, the Tenth Circuit, relying on a repurposed notion of the Insular Cases, denied American citizenship rights to native born American Samoans despite the guarantees extended to individuals "born or naturalized in the United States" under the Fourteenth Amendment of the U.S. Constitution. The Article argues that this decision inappropriately narrowed the application of the Fourteenth Amendment with its extended application of the Insular Cases' fact-based "impractical and anomalous" inquiry to conclude the federal government's efforts to provide local government and *fa'a Samoa* was in effect a recognition of American Samoa's right of self-determination such that the objections of the territorial government to these citizenship rights militated against the recognition of citizenship. In the process of this discussion, this Article considers how substantially similar issues regarding New Zealand and British citizenship were implicated in the context of Western Samoa in *Lesa v. Attorney General of New Zealand*. The circumstances surrounding these cases involve similar legal and policy arguments which have perpetuated the "subject" status of colonized peoples and the initial denial of equality and citizenship rights. This underscores the historical resistance of colonial states to extend full membership rights to their colonized subjects. We contend that the effect of the Insular Cases' framework, despite claims to the contrary, has not protected Indigenous culture from American cultural and constitutional hegemony but continues to deny full legal membership into the political community that enjoys full sovereignty over the land of their birth.

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INTRODUCTION

The Southern Pacific island chain of Samoa was an object of great power conflict among Germany, Great Britain, and the United States throughout the latter half of the nineteenth century.[1] In this competition, the Americans developed a "blueprint for nation-building," which described American colonial institutions as benevolent and progressive when compared with cruel and exploitative European colonialism—even as it asserted its own imperial ambitions.[2] The American Navy became interested in Pago Pago Harbor as a coaling station since the Grant Administration, as the United States sought to extend its influence and protect trans-Pacific trade routes.[3] In the latter part of this tripartite competition, as the United Kingdom and Germany extended their influence in the Western Samoa archipelago, America acquired the eastern islands through two deeds of cession with local chieftains in 1900 and 1904.[4] These deeds of cession were not submitted to the Senate as treaties but were later affirmed by Congress.[5]

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1. LINE-NOUE MEMEA KRUSE, THE PACIFIC INSULAR CASE OF AMERICAN SAMOA: LAND RIGHTS AND LAW IN UNINCORPORATED US TERRITORIES 29–32 (Palgrave Macmillan 1st ed. 2018).

2. AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE 3–19 (Harvard Univ. Press 2002).

3. David A. Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920-1935*, 69 PAC. HIST. REV. 217, 220 (2000).

4. *American Samoa*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/oia/islands/american-samoa (last visited Mar. 7, 2023).

5. Exec. Order No. 125-A. President McKinley issued Executive Order No. 125-A on February 19, 1900, directing that: "The island of Tutuila of the Samoan Group, and all other islands of the group east of longitude one hundred and seventy-one degrees west of Greenwich

Presently, American Samoa is the only U.S. territory that remains politically and legally classified as "unorganized" and "unincorporated."[6] Although American Samoa has an elected governor and legislature (*Fono*), its government has not been organized through a congressional "Organic Act," which has established or "incorporated" civil governments in other territories.[7] In territories with an organic act, Congress has either "established a government or authorized the inhabitants to adopt a constitution and thereby establish a government."[8] In contrast, an unorganized territory has no organic act and is usually governed by the President or his designee under laws passed by Congress.[9] Without a congressional organic act, the two 1900 and 1904 ratified deeds of cession provide Congress with all governmental power over American Samoa.[10] The Secretary of the Interior allowed Samoans to draw up their own constitution in 1962, which was later revised in 1967.[11] However, despite this limited self-determination, American Samoa remains under the ultimate supervision of the Secretary of the Interior.[12]

In the recently decided case *Fitisemanu v. United States*,[13] a split

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are hereby placed under the control of the Department of the Navy, for a naval station. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States, and to give to the islands the necessary protection." *Executive Order Placing Samoa Under the U.S. Navy*, AM. SAMOA BAR ASS'N, https://asbar.org/executive-order-placing-samoa-under-the-u-s-navy/ (last visited Jan. 28, 2023).

6. *American Samoa*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/american-samoa/ (March 28, 2021). American Samoa is governed under the following national statute:

> Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

48 U.S.C. § 1661(c) (1982). Government institutions and civil rights applicable to the territory are found in the Revised Constitution of American Samoa. *See* REVISED CONSTITUTION OF AMERICAN SAMOA June 2, 1967. The Revised Constitution provides significant protection to native American Samoans against alienation and the destruction of the Samoan way of life. *Id.* art. I, § 3; *see Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (1980).

7. *American Samoa*, *supra* note 4.

8. Stanley K. Laughlin, *The Burger Court and the United States Territories*, 36 FLA. L. REV. 755, 781–82 (1984).

9. *Id.*

10. *Id.*

11. *Id.*

12. Exec. Order No. 10,264, 3 C.F.R. (1949–1953) (transferring supervisory authority from the Secretary of the Navy to the Secretary of the Interior).

13. Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S.Ct. 362 (2022).

Tenth Circuit Court of Appeals reversed the lower court, which had found that the Citizenship Clause of the Fourteenth Amendment extended to American Samoan residents. The plaintiffs sought American citizenship based on their birth in American Samoa.[14] On appeal, the majority held that birthright citizenship does not qualify as a fundamental right in American Samoa under Supreme Court precedent.[15] Despite the territory falling under the jurisdiction of the United States, the territory was not "within the United States" for purposes of the Fourteenth Amendment because it was not an "incorporated territory destined for statehood" under the Insular Cases framework. [16] As such, the plaintiffs, who resided in the State of Utah at the time, were determined to be American Samoan citizens and were denied U.S. citizenship rights.[17]

The question of citizenship status of Samoans has been an issue for another former colonial state: Aotearoa New Zealand. Aotearoa New Zealand controlled Western Samoa under a League of Nations mandate until 1962, when Western Samoa re-established its independence.[18] Judicially, this issue was settled by the 1982 Privy Council Decision *Lesa v. Attorney General of New Zealand*,[19] which reversed the New Zealand Court of Appeals and held that Western Samoans born between 1928 and 1984 were New Zealand citizens. While this case created significant political and social turmoil in Aotearoa New Zealand, its impacts were quickly minimized by the government's enactment of legislation essentially undoing the Privy Council's grant.[20]

Drawing parallels from the *Lesa* decision, this Article argues that the court of appeals decision, while arguably well intentioned, has essentially arrived at the same outcome as the political machinations subsequent to *Lesa* that deprived the colonial subjects of Western Samoa New Zealand citizenship. The judicial support for perpetuation of a notion of "colonial peoples," such as in the Insular Cases, do violence to counteracting liberal values that support notions of citizenship. In the United States context, *Fitisemanu* unjustifiably narrows the scope of the Fourteenth Amendment's Citizenship Clause. This is contrary to the idea of American citizenship as a fundamental right and effectively abandons the common law basis of citizenship rights that provides the foundation for

14. *Id.* at 865.

15. *Id.* at 878.

16. *Id.* at 876.

17. *Id.* at 864–65. *See generally* U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

18. *New Zealand in Samoa Page 1 – Introduction*, N.Z. HIST. (Apr. 30, 2020), https://nzhistory.govt.nz/politics/samoa; *New Zealand in Samoa Page 8 – Towards Independence*, N.Z. HIST. (Apr. 30, 2020), https://nzhistory.govt.nz/politics/samoa/towards-independence.

19. *Lesa v. Attorney-General of New Zealand* [1982] 1 NZLR 165 (PC).

20. *Id.*

examining the scope of the Citizenship Clause. Additionally, the decision undermines the broad interpretation of citizenship rights and the concomitant application of American constitutional protections in a range of circumstances.

I. FITISEMANU V. UNITED STATES

In 2018, John Fitisemanu, Pale Tuli, and Rosavita Tuli, all born in American Samoa, brought an action in the Utah federal district court alleging that their status as U.S. nationals, rather than citizens of the United States, violated the Fourteenth Amendment of the U.S. Constitution.[21] They based their claim on the grounds that American Samoa was both "in the United States" and "subject to the jurisdiction thereof" under the Constitution.[22] The case was before the appeals court after the district court agreed with the plaintiffs' summary judgment motion and held that the Citizenship Clause of the Fourteenth Amendment extended to American Samoa.[23] The U.S. government, joined by the Government of American Samoa, appealed, arguing that American Samoa is not "in the United States" within the meaning of the Citizenship Clause as interpreted by Supreme Court precedent.[24]

Judge Lucero, writing for the 2-1 majority, set out a choice of two respective lines of precedent to address the Citizenship Clause. One line, originating from *Wong Kim Ark*,[25] which held a person born in California to foreign-born parents gained U.S. citizenship by virtue of their birth within the United States, explicitly incorporates the common law notion of *jus soli* as understood in 1608 *Calvin's Case* into the Fourteenth Amendment. This line would mean that the sole issue to be considered is whether American Samoa is "in the United States."[26] The other line of precedent implicates the Insular Cases of the late nineteenth and early twentieth century, most notably *Downes v. Bidwell*, which introduced the notion of "incorporated" as opposed to "unincorporated" territories discussed above.[27] The distinction is used to determine the extent to which constitutional rights and privileges would apply within the territory. Under these cases, the courts—while deferential to Congressional determinations as to the status of the territory and the extent to which constitutional rights and privileges are applied—will determine the extension of a constitutional right or privilege through the

21. Fitisemanu v. United States, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019).
22. *Id.* at 1157.
23. Fitisemanu v. United States, 1 F.4th 862, 864 (10th Cir. 2021).
24. *Id.*
25. United States v. Wong Kim Ark, 169 U.S. 649, 705 (1898).
26. *Fitisemanu*, 462 F. Supp. 3d at 1179.
27. *Id.* at 1157.

application of the "impractical and anomalous" standard.[28] Under this standard, "the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it."[29] This analysis requires an investigation into the local context and the impact that conferring a right or privilege would have on the territory.[30]

The court majority disagreed as to the applicability of *Wong Kim Ark* and the prominence given it before the district court.[31] First, Judge Lucero undermined the foundation upon which *Wong Ark Kim* is based, finding a "divergence" between the American practice of citizenship and the English common law. "[W]e do not understand *Wong Kim Ark* as commanding that we 'must apply the English common law rule for citizenship to determine' the outcome of this case."[32] For the court, this divergence was underpinned by the American notion of the Lockean social contract, which is premised on "consent" as a foundational concept for citizenship.[33] "Animating this divergence were not only practical considerations but also the emerging American maxim 'the tie between the individual and the community was contractual and volitional not, natural and perpetual.'"[34]

In support of this proposition, the court suggested that the English common law rule found in *Calvin's Case* should not control, because the colonists, at the time of the revolution, were moving away from this notion of citizenship towards a contract-based theory of citizenship.[35]

Second, Judge Lucero distinguished *Wong Kim Ark* by arguing that the issue in that case, as well as in *Calvin's Case*, concerned the requirement of "allegiance" for citizenship, while the issue before the court "falls within the category of 'within the dominion,'" an aspect the court notes is "a separate requirement for citizenship."[36] From this perspective, *Wong Kim Ark*, while about "a racist denial of citizenship to an American man born in an American state," had little precedential value as to the rights of individuals born or living in unincorporated territories.[37]

As an alternative to the approach taken by the Supreme Court in *Wong*

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28. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

29. *Reid*, 354 U.S. at 75.

30. Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 383–452 (2018).

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

32. *Id.*

33. *Id.* at 879.

34. *Id.* at 867 (citing JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870 10 (1978)).

35. *Id.* at 879.

36. *Id.* at 872.

37. Fitisemanu v. United States, 1 F.4th 862, 873 (10th Cir. 2021).

Kim Ark and endorsed by the district court, the majority embraces and repurposes the Insular Cases. As mentioned above, these cases established two categories of overseas territories; a categorization then used to determine the extent to which constitutional rights and privileges are extended to the territory. These cases, the court notes, apply to the situation of American Samoa because the Constitution is ambiguous as to the geographical scope of the Fourteenth Amendment, and rather syllogistically, by observing that American Samoa is an unincorporated territory.[38] Without this ambiguity, the court would apply the Constitution on its own terms.

The Insular Cases have been derided as racist and discriminatory and for "legally rationalizing colonialism."[39] Nevertheless, the court de-emphasizes these criticisms and the "politically incorrect" rationales found in many of the cases by ironically embracing the "opportunity to re-purpose the insular framework to protect indigenous culture from the imposition of federal scrutiny and oversight."[40] The flexibility of the Insular Cases frameworks gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution; the same flexibility permits courts to defer to the preferences of indigenous peoples so they may charge their own course.[41]

The majority then describes the Insular Cases as providing the conceptual vehicle to defer to this indigenous preference within its "impracticable and anomalous" framework.[42] This standard empowers a court to make determinations (historically often based on surmise, scant evidence, and racial prejudice) about which cultures and societies are fit to receive rights and freedoms under the U.S. Constitution.

The result of this reasoning is that for the majority, the Insular Case framework, under which American Samoa is the only remaining "unincorporated territory," continues to determine the scope of the Citizenship Clause. As an unincorporated territory, native-born American Samoans are not "in the United States." Yet, because residents of unincorporated territories continue to be entitled to certain fundamental

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38. *Id.* at 865, 875.

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

40. *Fitisemanu*, 1 F.4th at 870.

41. *Id.* at 870–71.

42. *Id.* at 877.

rights, the court then discusses whether citizenship is a "fundamental personal right" as that term is defined by the Insular Cases.[43] Such rights would extend to the territory automatically. The court notes that various Constitutional provisions that implicate fundamental personal rights apply without regard to local context.[44] "[G]uarantees of certain fundamental personal rights declared in the Constitution" apply "even in unincorporated Territories,"[45] as the rights are not justified "by their instrumental value but rather as ends unto themselves."[46] Exactly what the court means by "fundamental personal right" is not clear. However, it is evident that Judge Lucero understands "fundamental" rights as those rights which are necessary for the exercise of free government; without paradoxically being necessarily co-extensive with all "basic human rights."[47] The court notes that the determination of whether a constitutional right is a "fundamental personal right under the Insular Case framework is often at odds with popular notions; for example, trial by jury is not a fundamental right."[48] Noting the difficulty of elucidating the nature of fundamental rights and the dearth of Supreme Court precedent, the majority finds that citizenship is not a fundamental right under the Insular Framework.[49] In the process, the majority suggested that citizenship would never qualify as a fundamental right.

We also question whether citizenship is properly conceived of as a personal right at all. As we see it, citizenship usually denotes jurisdictional facts and connotes the constitutional rights that follow. The district court inverted the proper order of the inquiry. The historic authority of Congress to regulate citizenship in territories—authority we are reluctant to usurp—indicates that the right is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding individual right.[50]

The final step in the Majority's analysis involves the application of the "impractical and anomalous" test.[51] Despite holding that citizenship is not a "fundamental right," the Insular Cases mandate the consideration of whether applying birthright citizenship would be "impracticable and anomalous" in the context of American Samoa.[52] Under this test, the court should extend constitutional guarantees "in view of the particular circumstances, the practical necessities, and the possible alternatives

43. *Id.* at 885.
44. *Id.* at 878.
45. *Id.* at 880.
46. Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 879.
52. Fitisemanu v. United States, 1 F.4th 862, 879 (10th Cir. 2021).

which Congress had before it."[53] The majority, without much analysis, determines that the imposition of the Citizenship Clause on the territory would be impractical and anomalous under the circumstances.[54] Judge Lucero points to the opposition of the American Samoan government as a basis for this decision. "[T]here can hardly be a more compelling practical concern," Lucero notes, than imposing citizenship "that it is not wanted by the people who are to receive it."[55] Agreeing with the submission of the American Samoan Government, he extends this Lockean consent notion to argue that that "an extension of birthright citizenship without the will of the governed is in essence a form of 'autocratic subjugation' of the American Samoan people."[56]

In addition to this consent argument, Judge Lucero points out that there is tension between American individual rights and the *fa'a Samoa*.[57] "Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as the matai chieftain social structure, communal land ownership, and communal regulation of religious practice."[58] As such, partial membership in the American polity and selective incorporation of constitutional rights and privileges protects indigenous Samoan interests and culture while militating against the imposition of birthright citizenship under the "impractical and anomalous" test.

In his dissent, Judge Bacharach poses the question that seems to have alluded jurists who have considered birth-right citizenship for American Samoans: "Natives of American Samoa are either born in the United States or they're not," and if they are, then they are U.S. citizens.[59] Judge Bacharach also disagrees with the apparent prevailing view that citizenship is merely a liberty interest and somehow not fundamental.[60] The judge presents significant textual evidence from maps, dictionaries, and legislative record in support of this view. For Judge Bacharach, everyone born in American Samoa since 1900 has been and is a U.S. citizen under the Constitution.[61]

First, Judge Bacharach argues that at the time of the Constitution's adoption, the English common law rule of *jus soli* was the law of

53. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

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

55. *Id.* at 879.

56. *Id.* at 880.

57. *Id.*

58. *Id.*

59. *Id.* at 905 (Bacharach, J., dissenting).

60. Fitisemanu v. United States, 1 F.4th 862, 901–02 (10th Cir. 2021) (Bacharach, J., dissenting).

61. *Id.* at 905.

citizenship in the United States.[62] It was an accepted, basic principle in the new nation. Given the unique stain of slavery, the Fourteenth Amendment was adopted to both codify and entrench this common law principle—a principle so basic to membership in the United States that it should not again be subject to erosion in its understanding and interpretation. He argued that the drafters of the amendment had the foresight to recognize that instances of exclusion from the American political community might yet again present themselves.[63] When they did, it would be left to courts to re-assert these rights.[64] Two of the core precepts of the basic rule were thus fleshed out in two leading cases: *Elk v Wilkins* (holding that while Native Americans were "born within" the United States, they owed allegiance to a foreign sovereign, in their individual tribes, a result later addressed by statute granting Native Americans United States citizenship) and *Wong Kim Ark* (holding that a child born in California to Chinese parents that were neither diplomats nor hostile foreigners, was a U.S. citizen, not by any judicial fiat but by the Constitution itself).[65]

Second, disagreeing with both the majority and the district court, Judge Bacharach argues that the language "in the United States" found in the Citizenship Clause is not ambiguous.[66] Rather he argues that "as shown by contemporary judicial opinions, dictionaries, maps, and censuses, U.S. territories were uniformly considered 'in the United States.'"[67] As such, Justice Bacharach argues that American Samoa is an American territory for purposes of the Fourteenth Amendment and that the Insular Cases' distinction between incorporated and unincorporated territories is a post hoc judicial delimitation of the original meaning of the text.[68] To support this position, he looks to the 1867 acquisition of Alaska from Russia to support the proposition that all territories (contiguous and non-contiguous) were within the United States and individuals were assumed to benefit from constitutional rights and privileges. In the Alaska circumstance, the concern of whether of territory would be destined for statehood, the triggering category to provide for the extension of constitutional rights, Bacharach argues, was not considered.[69] This non-ambiguity of the term in the Citizenship Clause, moreover, is unaffected by the different contemporaneous references to the United States and American territories found in the Thirteenth

62. *Id.* at 893 (majority opinion).
63. *Id.* at 892.
64. *Id.* at 892–93.
65. *Id.* at 893–94.
66. Fitisemanu v. United States, 1 F.4th 862, 897 (10th Cir. 2021).
67. *Id.* at 890.
68. *Id.* at 891–92.
69. *Id.* at 892.

Amendment, which banned slavery "within the United States, or any place subject to their jurisdiction," and Clause 2 of the Fourteenth Amendment, which uses the phrase "among the several States."[70]

Finally, the dissent argued that the extension of native-born citizenship would not be impracticable and anomalous in American Samoa.[71] It observed that American Samoans already enjoy equal protection, due process, and other constitutional protections.[72] Moreover, even in the event that citizenship would be granted, the extension of other rights and privileges would need to be considered by the court under the "impracticable and anomalous" test.[73] Judge Bachrach observed that:

> If another right is asserted, the court would need to separately decide the applicability of that right in American Samoa. This inquiry would turn not on citizenship, but on (1) whether the right is fundamental and (2) if not, whether application of the Citizenship Clause in American Samoa would be impracticable or anomalous.[74]

Judge Bacharach vigorously disagrees with the majority's position that conferral of citizenship would be a non-consensual "imposition" of judicial authority, undermining democratic governance and indigenous self-determination. He observes that the proper analysis involved an

> interpret[ation of] the Constitution regardless of the popularity of our interpretation in American Samoa, and the application of constitutional rights does not become impracticable or anomalous because of disagreement. . . . As long as America Samoa remains a U.S. territory and the U.S. Constitution contains the Citizenship Clause, consent plays no role in applying the Citizenship Clause under the "impracticable or anomalous" test.[75]

In addition, the dissent notes that citizenship would not impair the individual plaintiff's cultural traditions in American Samoa because they live in Utah and do not live on communal land or vote for the legislative *Fono*.[76]

The majority's decision thus denied American Samoans a right to American citizenship.[77] Reading the Fourteenth Amendment narrowly and rejecting the *Wong Kim Ark* logic recognizing the *jus soli* foundations

70. *Id.* at 895–96.
71. *Id.* at 884.
72. Fitisemanu v. United States, 1 F.4th 862, 884 (10th Cir. 2021).
73. *Id.* at 902.
74. *Id.* at 903.
75. *Id.* at 904 (internal citations omitted).
76. *Id.* at 906.
77. *Id.* at 865.

of British common law, the court denied the plaintiffs full membership in the American community. In reaching this conclusion, the court went to considerable efforts to recognize and elevate the prerogatives of the American Samoan government. This was an explicit effort to apply a contemporary interpretation of the Insular Cases framework to this question of citizenship: a purpose for which the Insular Cases had not yet been applied and one to which, we contend, it is wholly inadequate. But what would happen if a court waded into such a sensitive area of policymaking as this? What repercussions might there be from a court decree recognizing citizenship rights for tens of thousands of people all at once? For this, we are not without precedent in this region. In fact, as the next section will consider, such a case was decided implicating these rights for Western Samoans in 1982. As will be seen, however, even with a radically different judicial outcome, the political process would kick into motion to settle the citizenship question both definitively and with finality.

II. *LESA V. ATTORNEY GENERAL OF NEW ZEALAND*: FALLOUT FROM A CITIZENSHIP CONSTITUTIONAL "BOMBSHELL"

As set out in the introduction to this Article, colonial powers and citizenship legacies have long been at issue in Oceania. One such example of these dynamics at play is provided by contexts not terribly dissimilar to that of American Samoa, involving Western Samoa, and the successor-in-interest to the German claim to it, Aotearoa New Zealand. The issue as it related to Western Samoa was whether Western Samoans were granted New Zealand citizenship during the time that New Zealand replaced Germany as colonial ruler after the First World War.[78] This unexpected ruling, which granted New Zealand citizenship to approximately 100,000 Samoans,[79] provides important lessons for American courts and policymakers when considering the ramifications for the grant of U.S. citizenship to American Samoans.

Western Samoa was designated a German possession by the Treaty of Berlin, the same instrument that granted American control over the islands that would come to be known as American Samoa.[80] Germany held Western Samoa until 1914 when, with the outbreak of the First World War, New Zealand took control of the colony.[81] After the war, the newly created League of Nations issued a mandate to New Zealand to administer Western Samoa, which it did until independence was achieved

78. *Lesa v. Attorney-General of New Zealand* [1982] 1 NZLR 165 (PC).

79. Paul Spoonley et al., *Divided Loyalties and Fractured Sovereignty: Transnationalism and the Nation-State in Aotearoa/New Zealand*, 29 J. ETHNIC & MIGRATION STUD. 27, 32 (2003).

80. Guy Powles, *Western Samoa*, ASIA-PAC. CONST. Y.B. 306, 307 (1993).

81. *Id.*

in 1962.[82] During these years, several important events happened for New Zealand, most notably the transition from a British Dominion to an independent nation in 1948.[83] Prior to 1948, those living in New Zealand were considered British subjects, after which they became New Zealanders.[84] Earlier citizenship acts were passed to localize British citizenship and immigration measures. Some of these acts also implicated the territorial areas of the Cook Islands, Tokelau, and Western Samoa.[85] The former areas were designated as part of the realm whilst Western Samoa was, under the terms of the League Mandate, administered in a more arms-length manner.

Throughout this period, Western Samoan citizens did not enjoy visa free travel to New Zealand, but were given some immigration preferences, including a quota system to permit Samoans to live and work in New Zealand.[86] Still others came under seasonal and temporary worker schemes. As with most countries, most migrants returned home at the end of their visa period, but some remained and became overstayers. The issue of overstayers began to present a policy problem to the New Zealand government in the 1970s as it grappled with economic downturn and the impacts of the global oil crisis.[87] This, in turn, led to an aggressive push by government to identify, locate, and deport visa overstayers; many of whom were Polynesian and many of these, Samoan.[88] It is within this context that the case of Falema'i Lesa made its way to British Privy Council in 1982.

In brief, Lesa's claim was simple: she could not be subject to deportation as an overstayer because, by virtue of the 1928 British Nationality and Status of Aliens (in New Zealand) Act, she was born in Western Samoa as a British subject and was, since January 1, 1949, a citizen of New Zealand.[89] The 1928 Act adopted earlier British law that established a mechanism for the naturalization of aliens.[90] In doing so it had set forth those areas which were within the empire. As a citizen, she

82. *Samoan History*, U.S. EMBASSY IN SAMOA, https://ws.usembassy.gov/our-relationship/policy-history/samoan-history/ (last visited Jan. 28, 2023).

83. W. David McIntyre, *Story: Self-Government and Independence*, TEARA (June 20, 2012), https://teara.govt.nz/en/self-government-and-independence.

84. *Id.*

85. KATE MCMILLAN & ANNA HOOD, REPORT ON CITIZENSHIP LAW: NEW ZEALAND 3–6 (July 2016).

86. *Id.* at 12–13.

87. John Singleton, *An Economic History of New Zealand in the Nineteenth and Twentieth Centuries*, EH.NET (Feb. 10, 2008), https://eh.net/encyclopedia/an-economic-history-of-new-zealand-in-the-nineteenth-and-twentieth-centuries/.

88. Ricky Prebble, *The Dawn Raids: Causes, Impacts and Legacy*, NZ HIST., https://nzhistory.govt.nz/culture/dawn-raids (last visited Oct. 27, 2022).

89. *Lesa v. Attorney-General of New Zealand* [1982] 1 NZLR 165 (PC) at 165.

90. *Id.* at 166–70.

could not by definition be an "overstayer" and could not be deported.[91] Against this simple argument, was a historical record that clearly established that the New Zealand Parliament had never intended that Western Samoans be New Zealand citizens. An interpretation, moreover, that was consistent with the course of relations between the two countries since Samoa's independence in 1962. Indeed, there had never been any serious claim that New Zealand citizenship extended to Samoans at any time from 1914 to 1982.

Despite this historical record and voluminous extrinsic evidence that the New Zealand Parliament never intended to grant citizenship to get this evidence before the Privy Council, it was necessary for the language used in the 1928 Act to be ambiguous. This textual ambiguity, like the textual ambiguity in the Fourteenth Amendment found by the appeals court in *Fitisemanu*, in effect opened the door to this extrinsic evidence. However, unlike the finding of the American court, the Privy Council found no ambiguity in the wording of the 1928 Act.[92] To the contrary, the court held that the statute unambiguously stated that the 1928 Act clearly included Western Samoa to be within "His Majesty's Dominions" as an integral part of New Zealand.[93] As such, Lesa was a British citizen who became a New Zealand citizen at the effective date of the British Nationality and New Zealand Citizenship Act 1948.[94]

The *Lesa* decision in 1982 was nothing short of a seismic shift and understanding citizenship relations between New Zealand and Samoa. Prime Minister Robert Muldoon who strongly objected to the decision stated: "[T]the decision has . . . created an anomalous situation for both New Zealand and Western Samoa. It declares the assumptions on which both governments and parliament have acted in their legislation in administrative practice over a period of nearly sixty years to have been wrong."[95]

An important institutional reality for Aotearoa New Zealand lawmakers is that the legislature is unencumbered by a codified and entrenched constitution. This allowed Parliament to quickly reverse the Privy Council's decision. In an effort that would stand as a leading case study in what one former Prime Minister Sir Geoffrey Palmer has described as the "fastest law-makers in the West," the impact of the

91. *Id.* at 169–72.

92. *Compare* Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021) (finding that the U.S. Constitution's language is not explicit about the citizenship of people from territories), *with Lesa*, 1 NZLR 165 at 169–170, 172 (finding that the language of New Zealand law explicitly includes people from the Western Samoa islands as citizens).

93. *Lesa*, 1 NZLR 165 at 170–172.

94. *Id.* at 165, 174.

95. Press Statement, Rt. Hon. Robert Muldoon (July 29, 1982) (on file with author).

decision was quickly blunted.[96] The Privy Council issued its decision in July 1982. By August, then Attorney General Jim McLay met with the Prime Minister of Samoa and negotiated a protocol to the two countries' Treaty of Friendship that memorialized the special relationship between the two nations.[97] The protocol was signed in August 1982 and in early September the New Zealand Parliament enacted the Citizenship (Western Samoa) Act.[98] The law reversed much of the *Lesa* decision while allowing Samoans in New Zealand to apply for citizenship. Unusually, it named Lesa for a special grant of citizenship.[99]

III. DISCUSSION

New Zealand's citizenship problem with Western Samoa underscored by the *Lesa* decision, as well as the political steps taken to reverse it, bear many similarities to the problem that the United States currently faces with American Samoa. The plaintiffs in both *Fitisemanu v. United States* and earlier *Tuaua v. United States*, sought a declaration of their birthright citizenship to enjoy the full benefits of membership within the American political community, something they had been and remain denied by the government.[100] Lesa faced the deprivation of her right to remain and work in Aotearoa New Zealand because of her citizenship status.[101] In both cases, an imperfect solution was sought: the intervention of courts in an executive action being taken against the parties. The courts in both *Fitisemanu* and *Tuaua* determined that citizenship should not be granted both for historical and contemporary reasons.[102] It was not part of the initial exchange of sovereignty from the American Samoa matai to the U.S. government. Furthermore, the imposition of citizenship onto the territory of American Samoa would be impracticable and anomalous, and could potentially lead to unintended consequences such as erosion of Indigenous prerogatives of the *fa'amatai*.[103] This more policy-oriented approach was taken by the lower New Zealand courts in the *Lesa* decision. The British Privy Council, however, took a narrower view: the question before them was one of statutory interpretation. The statute should be interpreted consistent with its plain language unless there is some ambiguity requiring reference to extraneous matters necessary to

96. Geoffrey Palmer, *The Fastest Law-Makers in the West*, N.Z. LISTENER, May 28, 1977, at 13–15.

97. Protocol to the Treaty of Friendship Between the Government of New Zealand and the Government of Western Samoa, N.Z.-W. SAMOA, Aug. 21, 1982, 1324 U.N.T.S. 373.

98. Citizenship (Western Samoa) Act 1982 (N.Z.).

99. *Id.*

100. Fitisemanu v. United States, 1 F.4th 862, 864–65 (10th Cir. 2021); Tuaua v. United States, 788 F.3d 300, 301 (D.C. Cir. 2015).

101. *Lesa v. Attorney-General of New Zealand* [1982] 1 NZLR 165 (PC).

102. *Fitisemanu*, 1 F.4th at 862; *Tuaua*, 788 F.3d at 300.

103. *Fitisemanu*, 1 F.4th at 870; *Tuaua*, 788 F.3d at 307.

give the statute meaning.[104] Since the language was clear and unambiguous, there was no need to review this outside matter and Lesa's status as a New Zealand citizen was recognized.[105]

Setting aside the cultural preservation argument, it is striking how similar many of the arguments in these two contexts are. Essentially, the opponents of the *Lesa* decision in Aotearoa, New Zealand argued that the League of Nations Mandate emphatically instructed New Zealand and other mandate countries against granting domestic citizenship onto inhabitants of mandate territories.[106] This is another form of the argument the U.S. Court of Appeals raised in its decision: that a grant of American citizenship would, in essence, burden many American Samoans with unwanted American citizenship.[107] Of course, the *Lesa* Privy Council did not have regard for either the political and normative context that existed since 1914 between Western Samoa and Aotearoa New Zealand, in the League of Nations nor the wishes of the government of Western Samoa, since it based its decision on only a question of statutory interpretation. This objection is like the logic employed in *Fitisemanu* when the Tenth Circuit determined that American Samoa's government was opposed to a blanket grant of citizenship, that the historical record tended towards a status quo where American Samoans were content to be neither within, nor outside of the United States.[108] Yet, had the *Fitisemanu* court adopted a narrower view of the plaintiff's claims, they might have reached a different conclusion: that whether American Samoa wished to maintain the political and institutional status quo vis-à-vis the United States, it could, of course, do so notwithstanding determination of the plaintiffs' citizenship rights under the U.S. Constitution.

As an initial matter, the Tenth Circuit majority opinion makes some interesting and deliberate choices in language in penning its opinion. First, the petitioners are cleverly referred to, not as U.S. Nationals, which they have been so designated by U.S. law and the status to which they would be returned by the end of the decision, but as "citizens of American Samoa."[109] In another portion of the decision, the court does something remarkable in acknowledging American Samoa's status as a colony of the United States, when it observes that "[n]ot unlike other colonial relationships, the nature of the relationship between American Samoa and the United States is contested."[110] This brings the judiciary into

104. *Lesa*, 1 NZLR 165 at 170.

105. *Id.* at 172.

106. *See Levave v. Immigration Department* (1979) 2 NZLR 74 at 79 (a lower court decision accepted by the NZCA).

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

108. *Id.* at 865.

109. *Id.* at 864.

110. *Id.* at 866.

agreement with the United Nations General Assembly, which has for 60 years considered American Samoa a colony—or in their terms a "non-self-governing territor[y]."[111]

A. *Arguing from Precedent*

The majority opinion in *Fitisemanu* embraced the "Incorporated/Unincorporated" framework derived from the Insular Cases' precedents, but paradoxically, this required that the court distinguish and ignore contrary precedent on birth right citizenship and how the Fourteenth Amendment incorporated the common law notion *jus soli*.[112] The Court's decision is completely at odds with *Wong Kim Ark.* As noted by Justice Gray for the *Wong Kim Ark* majority:

> The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States.[113]

If the contract-based logic used to justify the *Fitisemanu* decision to dispense with *Wong Kim Ark* was ever applicable, it was a tool of rhetorical convenience used historically to justify the severance of the colonists' own British citizenship during the revolution. Once U.S. citizenship had been established, the rhetorical need passed, and birthright citizenship again prevailed.

B. *On the Question of Consent*

The *Fitisemanu* opinion describes the Insular Cases as providing the conceptual vehicle to defer to indigenous preference with its "impracticable and anomalous" framework.[114] This test empowers a

111. G.A. Res. 75/107, at 1 (Dec. 10, 2020).
112. *Fitisemanu*, 1 F.4th at 871–73.
113. United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898).
114. *Fitisemanu*, 1 F.4th 862 at 870.

court to make determinations, often based on scant evidence and racist prejudice, about which cultures and societies are fit to receive rights and freedoms under the U.S. Constitution. Nevertheless, the court implies that the issue of whether a territory's population has "consented" to citizenship or the extension of non-fundamental rights under the test would be relevant or dispositive to the extension of the rights under the test.[115] The paradoxical result of including these considerations is that the *Fitisemanu* court held itself to be powerless to "impose citizenship" and reaffirmed its considerable power to withhold constitutional protections to individuals owing allegiance to the United States.[116] This, perhaps above all else, illustrates why a new standard without such a tainted historical context is required to obviate the need for juridical contortions.

The dissent's analysis avoids many of the shortcomings that might be found in the majority opinion. Most notably, the notion that citizenship should appropriately be a question left for legislative or even electoral majorities rather than the courts. The U.S. Constitution, including the Fourteenth Amendment was the law when the *matai* (chiefs) of Tutuila, Aunu'u, and later Manu'a entered into agreements with U.S. Navy officials.[117] These deeds of cession provided that the United States would be granted use of the islands.[118] In exchange for coming under "the full and complete sovereignty of the United States of America" and becoming "a part of the territory of said United States," the future American Samoans were promised that "there shall be no discrimination in the suffrages and political privileges" of Samoans living on the islands and "citizens of the United States dwelling therein."[119] The deeds also guaranteed Samoans their culture when it provided that "the rights of the Chiefs in each village and of all people concerning their property according to their custom shall be recognized."[120]

It is clear from the instruments that Samoans sought to enjoy rights equal to the U.S. citizens present on their islands. And that to secure those rights, there was an exchange of the thing most precious to Samoans: their land. The land that was and remains so central to a Samoan's view of belonging to a community.[121] Without the grant of U.S. citizenship, for what was this valuable resource exchanged? As the historical record

115. *Id.* at 880.

116. *Id.*

117. *Id.* at 885.

118. *Id.* at 883–85.

119. INSTRUMENT OF CESSION SIGNED JULY 14, 1904 BY THE REPRESENTATIVES OF THE PEOPLE OF THE ISLANDS OF MANUA (1904), *reprinted in* 1 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1013, 1014 (Joseph V. Fuller ed., 1943) (1929) [hereinafter INSTRUMENT OF CESSION].

120. *Id.*

121. MINISTRY NAT. RES. & ENV'T, SAMOA'S ALIGNED NATIONAL ACTION PROGRAMME TO COMBAT LAND DEGRADATION AND MITIGATE THE EFFECTS OF DROUGHT 2015 – 2020 3 (2015).

reflects, when thirty years had passed from the cession, American Samoans first asserted their citizenship, a claim that was denied at the time.[122] Thus, the Court's determination that an appeal to majoritarian democratic processes reverses the notion of consent and rights to privilege majoritarian preferences. These institutions saw to it that these gates remained closed to them.

In this sense, again, the dissent gets this right: the Constitution provided, in the Citizenship Clause, birthright citizenship to all of those born within the United States.[123] The Samoan deeds of cession from 1900 were created and acted upon within this context. American Samoans believed this to be the case and acted affirmatively to claim their birth right citizenship but were denied. Fitisemanu and the other plaintiffs petitioned the court to recognize their birth right, not to "impose citizenship by judicial fiat," as the majority opinion maintains.[124] U.S. Citizenship for American Samoans was the result of the Indigenous *fa'amatai* process when the High Chiefs of Tutuila and later Manu'a exchanged sovereignty for it beginning in 1900.[125] If American Samoa no longer wishes to be part of the United States, then that is a political question for it to consider. After all, the cessions were not the outcrop of a democratic process, but were instead the creation of the *fa'amatai* through the deeds of cession to the United States of America.

C. *Citizenship as a Non-Fundamental Right*

The court also addresses the question as to whether citizenship should be considered a fundamental right and answers in the negative. To reach this result, the court reasons that "fundamental has a distinct and narrow meaning" and that it includes, within this narrow band, only those "principles which are the basis of all free government."[126] The irony of this reasoning, of course, is that the American Civil War was precipitated by a dispute over the definition of who should be considered a citizen. The adoption of the Citizenship Clause of the Fourteenth Amendment was enacted to affirm citizenship as a fundamental right and to take such determinations out of the realm of majoritarian politics. Instead, the court indicates that citizenship is merely a "means of conveying membership in the American political system rather than a freestanding individual right."[127] This interpretation seriously derogates from the notion espoused in the U.S. Constitution and jurisprudence. Citizenship is

122. Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 AM. J. OF LEGAL HIST. 311, 344–45 (2020).

123. U.S. CONST. amend. XIV, § 1.

124. Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021).

125. INSTRUMENT OF CESSION, *supra* note 119.

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

127. *Id.*

something nice to have but not essential.

This analysis is deeply flawed for one very simple reason: citizenship is fundamental, perhaps the most fundamental right a person can have when residing within a particular community. This is because no matter what other rights are infringed upon by the government, the state cannot exclude its own citizens. Moreover, in a liberal society, citizenship implies the right to participate in governmental processes and signifies that the individual is a "constituent" member of the political society rather than simply a ruled subject.[128] In other words, there is a limit, a check on the near infinite powers of government in the recognition of the obligations a state owes to its own citizens. American Samoans, considered as they are by the court to be non-citizens, cannot be said to enjoy such rights. They are neither foreign nor domestic. The question is not whether a simple majority of American Samoans might prefer citizenship today, but what did the constitution provide to their ancestors in exchange for their sovereignty? If citizenship is worth as little as the majority seems to suggest that it is, then American Samoans should have acquired it in exchange for American sovereignty in perpetuity over their islands. A very small price indeed.

D. *On Whether Extension of the Birth Right to Citizenship to American Samoa Would be Impracticable and Anomalous*

Having determined citizenship as a non-fundamental right, the court proceeds to determine whether extension of citizenship to American Samoa would be impracticable and anomalous. The majority writes that the "Insular framework demands a holistic review of the prevailing circumstances in a territory" and that the court must "consider the totality of the relevant factors and concerns in the territory."[129] They identify two such circumstances that would make extension impracticable and anomalous: the "expressed preferences of the American Samoan people" and the slippery slope possible to erosion of the *fa'a Samoa* and *fa'amatai* should U.S. citizenship be extended through "judicial imposition."[130] It is worth noting that a court's "holistic review" to reveal the "totality of the relevant factors" is apparently limited to amici briefs, since no other evidence was taken to establish the actual "preferences" of the American Samoan people.[131]

Based on the very limited record before it, the court makes findings that the people of American Samoa, acting through their elected officials,

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128. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 482 (2000).

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

130. *Id.* at 879.

131. *Id.* at 870. Other than, of course, the actual opinions of the plaintiffs, who are American Samoans and are claiming U.S. citizenship.

have presented the court with a compelling statement that the people there do not wish to have birth right citizenship by judicial imposition.[132] To decide the constitution otherwise, would be to violate a basic "principle of republican association."[133] The court also concludes that birth right citizenship would create a "tension between individual constitutional rights and the American Samoan way of life (the fa'a Samoa)."[134] This is taken on the representations of amici to be true, as is their second finding that "[i]n American Samoa's case partial membership works to protect the customary institutions and traditions and, so a push for full equality [as American citizens] is not readily embraced by the American Samoan citizenry."[135] And in a rather baffling coda to this analysis the court notes that, "[t]here is simply insufficient case law to conclude with certainty that citizenship will have no effect on the legal status of *fa'a Samoa*."[136]

As is noted above in the discussion of the dissent, the question of citizenship should hinge on the understanding that American Samoa is part of America ("America" is even in the name), doing so removes the need for the "impractical and anomalous" analysis. It is also relevant that such findings are procedurally inappropriate, as the case was before the appellate court after summary judgment was granted in favor of the plaintiffs. If the court has determined that fact-based circumstances are critical to the decision to extend or withhold this non-fundamental right, then the case should have been remanded for trial where actual evidence could have been presented for a court to make an informed, holistic consideration of the actual circumstances in American Samoa and the individual plaintiffs before rendering judgment. If courts are not meant to engage in this type of political process, why then engage in this limited analysis at all? The fact that the court does so again reveals the flawed reasoning and legacy of the Insular Cases.

As a final point, the concurring opinion affirms that this area of law is unresolved.[137] Judge Tymkovich finds that there is ambiguity in the Citizenship Clause and owing to that ambiguity, either party's interpretation is plausible.[138] To "resolve the tie," the concurring opinion falls back on "the historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants."[139] Given this outcome, the surest solution at this stage would be simply for Congress to act on legislation

132. *Id.* at 879.

133. *Id.*

134. *Id.* at 880.

135. Fitisemanu v. United States, 1 F.4th 862, 880 (10th Cir. 2021) (citing KRUSE, *supra* note 1, at 2).

136. *Id.* at 881.

137. *Id.* at 881–82 (Tymkovich, J., concurring).

138. *Id.* at 883.

139. *Id.*

that would automatically grant residents of American Samoa U.S. citizenship upon application, as opposed to birthright citizenship. This would seem to at least balance the court's deference to historical precedent (if not judicial precedent) and allow for the protection of individual rights while affirming American Samoa's place as part of the United States of America.

CONCLUSION

Just as the New Zealand government when confronted by an unexpected "bombshell" lobbed by the Privy Council, the American Samoa and U.S. governments could take remedial steps to clarify their political relationship within the American system of government. American Samoa could maintain its current status, neither fully within nor outside of the United States, having natural born U.S. citizenship for all of its inhabitants alongside a government dedicated to the protection of the collectivist *fa'a Samoa* and *fa'amatai* as protected customary governance institutions.

Unlike Aotearoa New Zealand, however, the U.S. Congress could not undo a U.S. Supreme Court recognition of citizenship to American Samoans. It could only, in collaboration with the American Samoa government, change the political relationship between the two by rescission of the grant of cession, making American Samoa an independent nation-state. Should American Samoa choose to become an independent state, then it could decide, as Western Samoa has done, to create its own citizenship and either recognize (or not) dual American citizenship among its citizens. This approach would best balance the constitutional right to citizenship that individuals born within and owing allegiance to the United States have as their birthright. This may well be the proper balance of the American with the Samoan: recognizing individual rights of American citizenship alongside American treaty obligations to American Samoa to protect its traditional way of life.