

# Integral Citizenship

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*Does the Constitution’s promise of birthright citizenship to all born “in the United States” cover the United States Territories? Residents of the Territories have regularly sought judicial recognition of their equal birthright citizenship under the Fourteenth Amendment, most recently in some prominent cases reaching federal appellate courts. When rejecting these claims, the courts have been unable or unwilling to articulate a unified theory of citizenship. Most problematically, judicial decisions have continued relying on the Insular Cases, whose reasoning over a century ago was explicitly based on a policy of racial exclusion.*

*We argue that the time has come for unambiguous judicial recognition that individuals born in the U.S. Territories form an integral part of the United States citizenry. This outcome is the only one that comports with both constitutional structure and historical practice. In analyzing why courts still deny claims for constitutional citizenship in the Territories, we explore the covert norms of belonging that shed light on the otherwise inexplicable logic of the courts’ opinions. For example, there is no legal reason to treat the citizenship of those born in the U.S. Territories differently from that of those born in Washington, D.C. Nevertheless, an asymmetrical perception of belonging has flowed into the courts’ construction of legal status, influencing whose citizenship is questioned and whose is assumed.*

*Although some judges and government officials have recently put forth new arguments that citizenship recognition would risk interfering with indigenous rights and endangering cultural practices, we argue that the opposite is more likely to be true. Attempting to retrofit a doctrine built on the political and social exclusion of racial minorities cannot offer durable cultural protection. By contrast, a unified national civic identity that recognizes the Territories as a fundamental part of the American fabric is more likely to foster the political will to protect indigenous rights. Recognizing the Fourteenth Amendment’s promise of integral citizenship ensures that anyone whose birth location entails allegiance to the United States—be it the U.S. Territories or Washington, D.C.—is equally American.*

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## Introduction

Are people born in the United States Territories covered by the Fourteenth Amendment’s guarantee of birthright citizenship? More than 120 years after the United States expanded its territorial sovereignty in the wake of the Spanish–American War, the Supreme Court still has not provided a definitive answer to that question. But the issue is not going away.

In fact, the citizenship question is becoming increasingly urgent. Twice in the last decade, individuals born in American Samoa have sought judicial recognition of equal birthright citizenship. Both times, the courts denied it.<sup>1</sup> That said, judges have been unable to converge on a single rationale as to why the Citizenship Clause does not cover American Samoans. Most recently, in the summer of 2021, a three-judge panel on the Tenth Circuit issued three separate writings on the question, with two judges concluding that the Constitution did not extend citizenship and one concluding that it

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1. *Fitisemanu v. United States*, 1 F.4th 862, 864 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015).

did.<sup>2</sup> Citizenship status is extremely important to American Samoans, who as U.S. nationals can move freely to the mainland but are restricted in what they can do afterward. Without citizenship, they are precluded from voting, from holding certain jobs, and from ascending to some positions in the military.<sup>3</sup>

Residents of other U.S. Territories also have a strong interest in the constitutional basis of citizenship. Congress has already extended statutory citizenship to the other territories.<sup>4</sup> But if citizenship is only a matter of “legislative grace,” then Congress could choose to retract it at will, in whole or in part.<sup>5</sup> As discussion ramps up about the future of Puerto Rico, its residents want to know whether their citizenship is secure or whether only statehood can guarantee their status. Courts have so far not allowed residents to seek a declaratory judgment to determine their status, finding the claim to be unripe unless or until Congress takes affirmative steps to limit Puerto Ricans’ citizenship status.<sup>6</sup> Depending on the political winds, that time could come. Less than two years ago, the Trump administration issued a rule purporting to limit “birth tourism.”<sup>7</sup> Soon after, a young Japanese woman who lived in the Northern Mariana Islands (and who had lived there for eighteen years) was forced to take a pregnancy test before being allowed to board a plane to return to the islands after a trip abroad.<sup>8</sup> If the Fourteenth Amendment does not guarantee the citizenship of children born in the U.S. Territories, it would be only a small political step for Congress to take away

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2. *Fitisemanu*, 1 F.4th at 864–65 (2–1 decision); *id.* at 881 (Tymkovich, C.J., concurring); *id.* at 883 (Bacharach, J., dissenting).

3. Gabriela Meléndez Olivera & Adriel I. Cepeda Derieux, “Nationals” but not “Citizens”: How the U.S. Denies Citizenship to American Samoans, ACLU (Aug. 6, 2021), <https://www.aclu.org/news/voting-rights/nationals-but-not-citizens-how-the-u-s-denies-citizenship-to-american-samoans/> [<https://perma.cc/T2UX-WA86>].

4. 8 U.S.C. §§ 1402, 1406–07; 48 U.S.C. § 1801.

5. Brief for Amici Curiae Members of Cong. and Former Governmental Offs. in Support of Petitioners at 3, *Tuaua v. United States*, 136 S. Ct. 2461 (2016) (No. 15-981) (“If birthright citizenship really is something that persons born in the Territories enjoy only as a matter of legislative grace, then there is nothing to stop Congress from denying citizenship to persons born in Puerto Rico, Guam, the U.S. Virgin Islands, or the Northern Mariana Islands tomorrow.”).

6. *See, e.g.*, *Efron ex rel. v. United States*, 1 F. Supp. 2d 1468, 1471 (S.D. Fla. 1998), *aff’d sub nom. Efron v. United States*, 189 F.3d 482 (11th Cir. 1999).

7. Visa: Temporary Visitors for Business or Pleasure, 85 Fed. Reg. 4219, 4220 (Jan. 24, 2020) (codified at 22 C.F.R. pt. 41) (establishing a “rebuttable presumption that a B nonimmigrant visa applicant who a consular officer has reason to believe will give birth during her stay in the United States is traveling for the primary purpose of obtaining U.S. citizenship for the child”).

8. Anna North, Nicole Narea & Alex Ward, *The Trump Administration’s New “Birth Tourism” Policy, Explained*, VOX (Jan. 24, 2020, 7:00 AM), <https://www.vox.com/2020/1/24/21077138/trump-birth-tourism-immigration-pregnant-women-saipan> [<https://perma.cc/Y9QZ-P3XS>]; Jon Emont, *An Airline Required a Woman to Take a Pregnancy Test to Fly to This U.S. Island*, WALL ST. J. (Jan. 10, 2020, 10:54 AM), <https://www.wsj.com/articles/ticket-passport-pregnancy-test-flying-to-saipan-can-be-complicated-11578664961> [<https://perma.cc/RXK3-N8E5>].

the citizenship of children born there to parents who lack citizenship or permanent residency status.

At the same time, the legal precedent supporting Fourteenth Amendment exclusion appears to rest on an increasingly precarious base. When the Fourteenth Amendment was ratified, people generally understood citizenship to apply equally to people born in the states, the Territories, and the District of Columbia.<sup>9</sup> But at the dawn of the twentieth century, both Congress and the courts were searching for a way to maintain racial exclusivity even in the wake of territorial expansion. Ultimately, the Supreme Court settled on a doctrine of territorial incorporation in the *Insular Cases*, holding that constitutional provisions did not necessarily extend to territories not destined for statehood.<sup>10</sup> The Court's rationale was explicitly one of racial exclusion.<sup>11</sup> Although the Court adopted the doctrine in a case involving the Constitution's Revenue Clause, issues of citizenship underlay the decision and were made explicit in Justice White's concurrence: there could be no extension of American citizenship to an "uncivilized race" that was "absolutely unfit to receive it," and to hold otherwise would "degrade the whole body of American citizenship."<sup>12</sup>

Although this nineteenth-century vision of racial exclusion still influences courts today, there was a torrent of filings asking the Supreme Court to finally overrule these cases in *Financial Oversight & Management Board for Puerto Rico v. Aurelius*.<sup>13</sup> Although the Court did not reach the issue in *Aurelius*, it hinted that the *Insular Cases* were no longer good law, writing that "whatever their continued validity we will not extend them in these cases."<sup>14</sup>

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9. See *infra* subpart II(A).

10. See Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1034 n.13 (2008) (collecting twenty-three cases "decided between 1901 and 1922 that set out the constitutional posture of Puerto Rico and the other insular territories").

11. See Jonathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 702 (1995) ("[T]he Court implied that the community could deny membership to children born to inhabitants of United States territories based on racial and cultural distinctions. The children of 'alien races,' as with minority groups in the nineteenth century, remained unwelcome in the national community.").

12. *Downes v. Bidwell*, 182 U.S. 244, 306, 315 (1901) (White, J., concurring).

13. 140 S. Ct. 1649 (2020).

14. *Id.* at 1665; see also Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J. F. 284, 306 (2020) ("Although the Supreme Court may have largely cabined the *Insular Cases* in *Aurelius*, that does not mean the Supreme Court should hesitate in a future case to place the *Insular Cases* in the dustbin of history alongside *Plessy* and *Korematsu*, where they belong.").

The validity of the *Insular Cases* came up again in a recent case examining whether the Constitution allowed Congress to authorize different Supplemental Security Income (SSI) benefits for citizens living in Puerto Rico than for citizens living in the fifty states.<sup>15</sup> The Court upheld the distinction without needing to rely on the *Insular Cases*,<sup>16</sup> but Justice Gorsuch in his concurrence nonetheless called for the *Insular Cases* to be overturned.<sup>17</sup> He explained that he joined the majority opinion “[b]ecause no party asks us to overrule the *Insular Cases* to resolve today’s dispute.”<sup>18</sup> However, he condemned the *Insular Cases* in strong terms, writing that “[t]he flaws in the *Insular Cases* are as fundamental as they are shameful,” and that “they have no home in our Constitution or its original understanding.”<sup>19</sup> Justice Gorsuch concluded that “the time has come to recognize that the *Insular Cases* rest on a rotten foundation” and wrote that he “hope[s] the day comes soon when the Court squarely overrules them.”<sup>20</sup>

The Court may soon get another chance to strike the *Insular Cases* down entirely. At the time this Article goes to press, a certiorari petition has been filed in *Fitisemanu v. United States*,<sup>21</sup> giving the Supreme Court a clear path to overrule the *Insular Cases*. And it looks as if there is a coalition on the Court who would do so. In addition to Justice Gorsuch’s explicit call for repudiation,<sup>22</sup> Justice Thomas also wrote separately in *Vaello Madero*. He emphasized the importance of the Citizenship Clause, writing that “[w]hile the historical evidence above is by no means conclusive, it offers substantial support for the proposition that, by conferring citizenship, the Citizenship Clause guarantees citizens equal treatment by the Federal Government with respect to civil rights.”<sup>23</sup> Justice Sotomayor went even further, writing that “[e]qual treatment of citizens should not be left to the vagaries of the political process,” and explaining that a lack of voting representation in Congress means that residents of Puerto Rico (like the residents of other U.S.

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15. *United States v. Vaello Madero*, No. 20-303, 2022 WL 1177499 (U.S. Apr. 21, 2022).

16. *Id.* at \*4 (“The deferential rational-basis test applies. And Puerto Rico’s tax status—in particular, the fact that residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes—supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the Supplemental Security Income benefits program.”).

17. *Id.* at \*15 (Gorsuch, J., concurring).

18. *Id.*

19. *Id.* at \*13.

20. *Id.* at \*15.

21. 1 F.4th 862 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

22. On this point, it is notable that Justice Gorsuch’s concurrence in *Vaello Madero* explicitly criticized the Tenth Circuit’s opinion in *Fitisemanu*, calling it “a revisionist account of the *Insular Cases*.” 2022 WL 1177499, at \*15 n.4 (Gorsuch, J., concurring).

23. *Id.* at \*10 (Thomas, J., concurring).

Territories) “cannot rely on their elected representatives to remedy the punishing disparities” that exist under current law.<sup>24</sup>

Recognition of the Fourteenth Amendment’s guarantee of a single, integral birthright citizenship would offer a strong context to finally jettison the continuing influence of the *Insular Cases*. The United States has “never properly confronted its colonial infrastructure or its imperial legacies, whether at home or abroad.”<sup>25</sup> Vestiges of that legacy still resonate today when elected officials denigrate the citizenship of their political rivals—for example, when Senate candidate and former Ohio Treasurer Josh Mandel tweets that Congress member “Ilhan Omar should be deported not supported”<sup>26</sup> or when Marjorie Taylor Green claims that Alexandria Ocasio-Cortez, her colleague in the House of Representatives, is “not an American.”<sup>27</sup> Omar is a naturalized citizen, and Ocasio-Cortez was born in New York to parents of Puerto Rican descent; both are Americans, and neither is nor can ever become eligible for deportation. But racialized conceptions of citizenship make their status politically vulnerable in ways that their white colleagues do not face. While political opponents find much to criticize about Senator Bernie Sanders, for example, his American citizenship goes largely unquestioned.<sup>28</sup>

Recognizing integral citizenship is a starting point to asking the hard questions about America’s colonial legacy and its history of racial exclusion. Such recognition eliminates the current fractured approach to citizenship and brings the political questions about the relationship of the States and the U.S. Territories to the forefront. The Supreme Court has already explained that security of citizenship is important in the denaturalization context.<sup>29</sup> It has

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24. *Id.* at \*19 (Sotomayor, J., dissenting).

25. Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, 130 *YALE L.J.F.* 312, 331 (2020).

26. Josh Mandel (@JoshMandelOhio), TWITTER (June 18, 2021, 3:05 PM), <https://twitter.com/joshmandelohio/status/1405980032816713728?lang=en> [<https://perma.cc/89BS-U7ET>].

27. Martin Pengelly, *‘First of All, I’m Taller’: AOC Dismisses Greene’s ‘Little Communist’ Attack*, THE GUARDIAN (June 27, 2021, 8:26 AM), <https://www.theguardian.com/us-news/2021/jun/27/aoc-marjorie-taylor-green> [<https://perma.cc/K63X-M9P3>].

28. While Sanders’s American citizenship has not been directly questioned, there have been false rumors that he is a dual citizen with Israel. Amber Phillips, *The Strange, Anti-Semitic Internet Rumor that Bernie Sanders Has Israeli Citizenship*, WASH. POST (June 11, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/06/11/the-strange-anti-semitic-internet-rumor-that-bernie-sanders-has-israeli-citizenship/> [<https://perma.cc/4WAE-ZV5C>]. This, too, is a form of racialized conception of citizenship.

29. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (holding that citizenship cannot be involuntarily taken away by Congress); *see also* Cassandra Burke Robertson & Irina D. Manta, *(Un)Civil Denaturalization*, 94 *N.Y.U. L. REV.* 402, 422–30 (2019) (discussing the history of denaturalization).

not yet extended that rationale into the recognition of territorial birthright citizenship but should do so now.

The Article proceeds as follows: Part I traces the history of courts' approaches to the geographic application of the Fourteenth Amendment's Citizenship Clause. It explores the arguments presented on behalf of individuals born in the U.S. Territories and analyzes how the rationales that courts use to deny constitutional citizenship have shifted over time from overt racial exclusion to cultural paternalism. It delves into recent citizenship challenges and examines the fault lines that have prevented the circuits courts of appeals from reaching a consensus on how to interpret the Citizenship Clause with respect to those born in the U.S. Territories.

Part II sets out our conception of the Fourteenth Amendment's integral citizenship. In subpart II(A), we discuss the historical understanding of citizenship. We explain that cases preceding the *Insular Cases* do not recognize geographic limitations on citizenship. We argue that the *Insular Cases* themselves should not be extended to limit the citizenship of individuals born in the U.S. Territories, as the only rationale that could support such a limitation stems from an explicit goal of racial exclusion.

In subpart II(B), we turn to what this Article argues is the central flaw of the recent citizenship cases: a failure to engage with the question of whether the Fourteenth Amendment has already granted birthright citizenship to all people born within the sovereign land of the United States, separate and apart from the normative question of whether it should. Part II argues that the courts' failure to confront this question leads to three logical failings. First, the courts ignore the plenary power that Congress has historically exercised over U.S. Territories and fail to address whether the Fourteenth Amendment stands apart from that power. Second, the courts conflate notions of citizenship and allegiance, suggesting that citizenship cannot exist without the consent of the people as expressed through the elected territorial government, while ignoring the fact that those same people already owe a duty of political allegiance to the United States by virtue of their birth in the U.S. Territories. Finally, the courts' limitation of the Citizenship Clause to only "state-born residents"<sup>30</sup> leaves in question the status of individuals born in Washington, D.C., because there is no historical or textual basis to distinguish those born in the District of Columbia from those born in the U.S. Territories.

Part III shows how examining covert norms of belonging sheds light on the otherwise inexplicable logic of the courts' opinions denying constitutional citizenship. We analyze how a citizen identity is constructed in the American imagination and how recognition of this identity is

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30. *Fitisemanu v. United States*, 1 F.4th 862, 875 n.16 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

asymmetrical. That is, individuals born in the U.S. Territories have a strong American identity, with many even serving in the military in higher proportions than individuals born in the fifty states. But at the same time, the U.S. Territories are often invisible to the larger American public, who may not recognize a shared sense of identity. Part III explores how this asymmetrical sense of belonging has flowed into the courts' construction of legal status, especially influencing when citizenship is questioned and when it is assumed. Finally, Part III considers the issue of protecting indigenous rights and cultural practices. It argues that recognizing citizenship is unlikely to lead to the destruction of indigenous rights. Counterintuitively, recognizing integral citizenship may lead to a stronger sense of shared identity that increases the political will to protect the cultural practices of the U.S. Territories. Recognizing that the Fourteenth Amendment creates an integral citizenship shared by all who are born within the lands subject to U.S. sovereignty ends the reliance on racially exclusive precedent, applies a logically consistent approach that covers everyone, and promotes a national civic identity even in an era of political polarization.

### I. Seeking Legal Recognition of Constitutional Citizenship

Does the Fourteenth Amendment's Citizenship Clause apply to individuals born in U.S. territory outside of state borders? This question has proved controversial ever since the adoption of the Fourteenth Amendment, but it has never been directly answered by the Supreme Court. Litigants have raised the issue with increasing frequency in the last thirty years,<sup>31</sup> but questions surrounding the territorial application of the Citizenship Clause go back to much earlier.

The "era of America's imperialistic expansion" at the start of the twentieth century prompted significant citizenship questions.<sup>32</sup> The United States gained sovereignty over Puerto Rico, the Philippines, and Guam with

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31. *See, e.g., id.* at 864 (holding that American Samoans are not American citizens under the Citizenship Clause); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015) (same); *Thomas v. Lynch*, 796 F.3d 535, 536, 542 (5th Cir. 2015) (holding that birth on a foreign U.S. military base did not grant petitioner birthright citizenship under the Citizenship Clause); *Williams v. Att'y Gen. of U.S.*, 458 F. App'x 148, 152 (3d Cir. 2012) (denying petitioner's argument that he could have derived citizenship under the Fourteenth Amendment from his mother if she was born on a U.S. military installation); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (holding that persons born in the Philippines while it was a U.S. Territory are not citizens); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (same); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998) (same); *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994) (same); *Entines v. United States*, 160 F. Supp. 3d 208, 209–10 (D.D.C. 2016) (same); *Licudine v. Winter*, 603 F. Supp. 2d 129, 135 (D.D.C. 2009) (same).

32. Joseph E. Sung, *Redressing the Legal Stigmatization of American Samoans*, 89 S. CAL. L. REV. 1309, 1317 (2016).



the end of the Spanish–American War in 1898; brought the islands of American Samoa into the fold between 1900 and 1904; and purchased the U.S. Virgin Islands from Denmark in 1917.<sup>33</sup> At the time of this expansion, the idea of constitutionally guaranteed birthright citizenship was still relatively new, with the states having ratified the Fourteenth Amendment in 1868, only three decades earlier. The Fourteenth Amendment’s Citizenship Clause provided that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>34</sup> This provision was intended to overrule the Supreme Court’s holding in *Dred Scott v. Sandford*<sup>35</sup> and ensure that the people of African descent who had formerly been held in slavery would be recognized as fully American.<sup>36</sup> With the advent of territorial expansion, courts had to consider whether individuals born in the new territories were also “born . . . in the United States” for purposes of the Fourteenth Amendment.

Isabella Gonzales was one of the first people to seek recognition of constitutional citizenship.<sup>37</sup> She was born in Puerto Rico and sought entry into New York in 1902, just four years after Puerto Rico was ceded to the United States.<sup>38</sup> When she arrived, however, she was denied entry and detained as an “alien immigrant . . . likely to become a public charge.”<sup>39</sup> Gonzales filed a habeas writ seeking release, ultimately appealing her case to the Supreme Court.<sup>40</sup> Her attorney made two alternative arguments: first, that the Fourteenth Amendment gave Gonzales birthright citizenship in the United States, and second, that if the Court did not recognize the birthright citizenship of individuals born in the territories, then the Court “should hold

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33. Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249, 1255–60 (2019); Rick Baldoz & César Ayala, *The Bordering of America: Colonialism and Citizenship in the Philippines and Puerto Rico*, 25 CENTRO J. 76, 77 (2013).

34. U.S. CONST. amend. XIV.

35. 60 U.S. (19 How.) 393 (1856). In *Dred Scott* the Court explained that the term “citizens” refers to people who “form the sovereignty, and who hold the power and conduct the Government through their representatives,” and suggested that even formerly enslaved people would not qualify, as at the time of the founding they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.” *Id.* at 404–05.

36. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 471 & n.198 (2002) (“The history of court-sanctioned exclusion of African-Americans stems from the Court’s decision in *Dred Scott v. Sandford*, where the United States Supreme Court held that African-Americans, even those born in a free territory, were not United States citizens.”).

37. See generally *Gonzales v. Williams*, 192 U.S. 1 (1904).

38. *Id.* at 7.

39. *Id.*

40. *Id.*

that they occupied a status somewhere between citizenship and alienage.”<sup>41</sup> Gonzales’s counsel suggested the word “national,” which “simply meant the same thing as ‘subject,’ . . . but was an improvement over that term, because it had ‘a less arbitrary sound.’”<sup>42</sup> The Supreme Court accepted the second argument and held that Gonzales was not an “alien” under the immigration statute, and therefore “the commissioner had no jurisdiction to detain and deport her.”<sup>43</sup> By adopting this new “national” concept and applying it to Gonzales, the Court managed to dodge the harder question: did the Fourteenth Amendment make Gonzales a citizen by birth?

Without a clear answer from the Supreme Court, Congress took matters into its own hands. Residents of Puerto Rico, Guam, and the U.S. Virgin Islands were made citizens legislatively during the first half of the twentieth century,<sup>44</sup> as were inhabitants of the Northern Mariana Islands when the United States took administration over it in 1976.<sup>45</sup> Congress also formally enshrined the Supreme Court’s recognition of “national” status in legislation.<sup>46</sup> The Philippines, whose people retained “national” status during its time as a territory, was granted full independence in 1946.<sup>47</sup> Today, only the residents of American Samoa have not been granted statutory citizenship and are legislatively considered to be noncitizen nationals.<sup>48</sup>

Legislative action to grant statutory citizenship to most inhabitants of the territories has not mooted the question of constitutional citizenship. If statutory citizenship is simply a matter of “legislative grace,” then it is easily revocable by an act of Congress.<sup>49</sup> If territorial citizenship is protected under

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41. Christina Duffy Burnett, “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659, 672 (2008).

42. *Id.*

43. *Gonzales*, 192 U.S. at 15.

44. *Shittu v. Elwood*, 204 F. Supp. 2d 876, 879 (E.D. Pa. 2002) (“The numerous inhabitants of Puerto Rico and Guam gained U.S. citizenship in 1940 and 1950, respectively.”); 8 U.S.C. § 1406 (extending U.S. citizenship to residents and natives of the U.S. Virgin Islands as of 1927).

45. *Lin*, *supra* note 33, at 1262.

46. *See Lin v. United States*, 561 F.3d 502, 508 (D.C. Cir. 2009) (“Congress precisely defined a non-citizen national as, inter alia, a person ‘born in an outlying possession of the United States on or after the date of formal acquisition of such possession.’” (citing 8 U.S.C. § 1408)).

47. *Lin*, *supra* note 33, at 1291.

48. *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (“[T]he only remaining noncitizen nationals are residents of American Samoa and Swains Island.”).

49. *See Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, What Is Puerto Rico?*, 94 IND. L.J. 1, 26 (2019) (“[T]he Supreme Court embraced the Department of Justice’s position that Puerto Rico’s putative sovereignty was only a matter of legislative grace without legal substance.”); Joseph Blocher & Mitu Gulati, *What Does Puerto Rican Citizenship Mean for Puerto Rico’s Legal Status?*, 67 DUKE L.J. ONLINE 122, 124 (2018) (“What happens to citizenship rights if Congress decides it is time to give Puerto Rico ‘independence’ against its will?”).

the Constitution (either under the Citizenship Clause or under the Due Process Clause), then it is not so fragile.<sup>50</sup>

In the mid-1990s, plaintiffs born in Puerto Rico sought judicial resolution of their status. They filed an action seeking either to naturalize in the United States or, in the alternative, to obtain a judicial declaration that their citizenship was as irrevocable as that of U.S. citizens born on the mainland.<sup>51</sup> Either route would have given them clear protection under the Fourteenth Amendment.<sup>52</sup> They were unable to obtain an answer, however, as the court dismissed the case based on lack of ripeness. It held that the plaintiffs were “seeking redress for an abstract injury that may never materialize” and that the mere “potential” loss of citizenship “does not come close to warranting intervention by the Court.”<sup>53</sup> To the citizens of Puerto Rico, however, the uncertainty matters, especially in debates about statehood.<sup>54</sup> As scholar Christina D. Ponsa-Kraus has noted, “Lacking the power to answer the question definitively, the opposing sides in Puerto Rico’s status debate argue endlessly over whether, like a mutually binding bilateral compact, guaranteed U.S. citizenship requires statehood.”<sup>55</sup>

But even if the question is not yet ripe for statutory citizens, it is undeniably ripe for noncitizen nationals. Six circuits have now examined whether the Fourteenth Amendment’s Citizenship Clause applies to individuals born in U.S. Territories.<sup>56</sup> There is not yet a circuit split, as each of the cases came out the same way, all holding that the Citizenship Clause

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50. See Christina D. Ponsa-Kraus, *A Perfectly Empty Gift*, 119 MICH. L. REV. 1223, 1243 (2021) (suggesting it is likely “that even when the source of citizenship is statutory . . . the Due Process Clause protects U.S. citizens from denaturalization.”). *But see* Summerfield v. INS, 37 F.3d 1506 (9th Cir. 1994) (unpublished table decision) (emphasizing Congress’ plenary power over the status of individuals in U.S. territories and noting that “we have previously held that national status can be taken away by Congress without consent”).

51. Efron *ex rel.* v. United States, 1 F. Supp. 2d 1468, 1469 (S.D. Fla. 1998), *aff’d sub nom.* Efron v. United States, 189 F.3d 482 (11th Cir. 1999).

52. U.S. CONST. amend. XIV.

53. Efron, 1 F. Supp. 2d at 1471.

54. See, e.g., Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101, 130 (2020) (arguing that compact theory regarding Puerto Rico “creates the illusion of political equality while prolonging the reality of second-class citizenship”); see also JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 159 (1985) (stating that “constitutionally speaking, Puerto Rico remains an unincorporated territory” even though “it has been allowed by Congress to exercise internal autonomy similar to that to which the States are entitled”).

55. Ponsa-Kraus, *supra* note 50, at 1243.

56. The Second, Third, Fifth, Ninth, Tenth, and D.C. Circuit Courts have all heard cases about the application of the Citizenship Clause to individuals in U.S. territories: *Fitisemanu v. United States*, 1 F.4th 862, 864 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022); *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015); *Thomas v. Lynch*, 796 F.3d 535, 536 (5th Cir. 2015); *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998); *Valmonte v. INS*, 136 F.3d 914, 920 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1452 (9th Cir. 1994).

does not cover individuals born in U.S. Territories. This uniformity of result covers up significant underlying disagreement, however. Two of the cases prompted dissenting opinions that would hold that the Fourteenth Amendment applies to the Territories,<sup>57</sup> and one federal district court also took this position before being reversed on appeal.<sup>58</sup>

The Ninth Circuit was the first to consider the issue of territorial citizenship in *Rabang v. INS*, when seven plaintiffs, all either born in the Philippines when it was a U.S. territory or children of such individuals, sought a declaratory judgment affirming their citizenship.<sup>59</sup> The court, in an opinion joined by two of the three judges on the panel, acknowledged that the citizenship question remained unresolved, but it analogized to earlier precedent “uniformly reject[ing] claims that people born in the Philippines during the territorial period retained their ‘national’ status after Philippine independence.”<sup>60</sup> The court specifically relied on the *Insular Cases*, noting that “the Supreme Court decided that the territorial scope of the phrase ‘the United States’ as used in the Constitution is limited to the states of the Union.”<sup>61</sup>

Judge Pregerson, the third judge on the panel, issued a vigorous dissent. He criticized the majority for relying on a case that limited its holding to the application of the Revenue Clause and stated that the court “overlook[ed] principles of common law, readily accepted by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to, and are born within the territory or dominion of, the United States.”<sup>62</sup> Judge Pregerson also relied on Supreme Court authority limiting denaturalization, and he quoted the Court’s statement from *Afroyim v. Rusk*:<sup>63</sup>

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57. *Fitisemanu*, 1 F.4th at 883, 907 (Bacharach, J., dissenting) (“A U.S. territory, like American Samoa, is ‘in the United States.’ So the Citizenship Clause unambiguously covers individuals born in American Samoa.”); *Rabang*, 35 F.3d at 1454–55 (Pregerson, J., dissenting) (“I would hold that persons born in the Philippines during the territorial period . . . should be considered United States citizens within the meaning of the Fourteenth Amendment’s Citizenship Clause.”).

58. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019) (“Persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment.”), *rev’d*, 1 F.4th 862 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

59. *Rabang*, 35 F.3d at 1452 (9th Cir. 1994) (“No court has addressed whether persons born in a United States territory are born ‘in the United States.’”).

60. *Id.*

61. *Id.* (citing *Downes v. Bidwell*, 182 U.S. 244, 287 (1901)).

62. *Rabang*, 35 F.3d at 1454–55 (9th Cir. 1994) (Pregerson, J., dissenting).

63. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

“Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power.”<sup>64</sup>

A few years later, the Second Circuit faced a case in which an individual born in the Philippines (while it was a U.S. territory) entered the United States on a visitor’s visa after Philippine independence and was put into deportation proceedings after overstaying her visa.<sup>65</sup> The court followed *Rabang* and relied on the *Insular Cases* to hold that “persons born in the Philippines during its status as a United States territory were not ‘born . . . in the United States’ under the Fourteenth Amendment.”<sup>66</sup> It concluded that only persons born in “the states of the Union” were covered by the birthright citizenship clause of the Fourteenth Amendment.<sup>67</sup> That same year, the Third Circuit followed similar reasoning when the defendant in a deportation case, whose parents had been born in the Philippines, raised the issue.<sup>68</sup> The Fifth Circuit followed suit in 2010.<sup>69</sup>

In 2015, the issue of Fourteenth Amendment coverage again arose in the Fifth Circuit, this time in the case of Jermaine Amani Thomas, who was born at a U.S. military base in Germany to a U.S. citizen father then serving in the armed forces.<sup>70</sup> After Thomas was convicted of a crime in the United States, the government sought his removal. Thomas resisted, arguing that he qualified for U.S. citizenship.<sup>71</sup> The court concluded that he was not a citizen. It stated that “the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty,” relying on its earlier decision involving the Philippines.<sup>72</sup> The court held that Thomas could not qualify for derived citizenship from his father because the statute in force at the time required his father to have maintained a longer residence in the United States.<sup>73</sup>

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64. *Rabang*, 35 F.3d at 1465 (Pregerson, J., dissenting) (quoting *Afroyim*, 387 U.S. at 267–68).

65. *Valmonte v. INS.*, 136 F.3d 914, 915–17 (2d Cir. 1998).

66. *Id.* at 920.

67. *Id.* at 919.

68. *Lacap v. INS.*, 138 F.3d 518, 518–19 (3d Cir. 1998) (“The . . . Ninth Circuit in *Rabang v. INS* . . . concluded that ‘Supreme Court precedent compels a conclusion that persons born in the Philippines during the territorial period were not ‘born . . . in the United States,’ . . . and are thus not entitled to citizenship by birth.’ We agree with the result and reasoning of the court in *Rabang* . . .”).

69. *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010) (“[G]iven that Nolos’s parents did not acquire United States citizenship by virtue of their birth in the Philippines when it was a United States territory, Nolos could not have derived United States citizenship from them and is therefore removable if he is found to have been convicted of an aggravated felony.”).

70. *Thomas v. Lynch*, 796 F.3d 535, 536 (5th Cir. 2015).

71. *Id.* at 537.

72. *Id.* at 542 (citing *Nolos*, 611 F.3d at 283) (internal quotation marks omitted).

73. *Id.* at 538.

In that same year, the D.C. Circuit decided *Tuaua v. United States*,<sup>74</sup> a case involving plaintiffs from American Samoa who sought a declaration of citizenship.<sup>75</sup> Although the court ultimately ruled against the plaintiffs, the court's rationale was somewhat different than those that had come before, as it relied for the first time on conceptions of territorial "autonomy."<sup>76</sup> As a legal matter, the court still cited to the *Insular Cases* to conclude that the Citizenship Clause's phrase "in the United States" did not include the unincorporated territories.<sup>77</sup> The court also acknowledged that "some aspects of the *Insular Cases*' analysis may now be deemed politically incorrect," but it still concluded that the framework of the *Insular Cases* "remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories."<sup>78</sup> The court held that because the Citizenship Clause was "ambiguous" as to the geographical scope of its coverage, it would continue to follow the *Insular Cases* in excluding unincorporated territories from citizenship.<sup>79</sup>

But even though the court applied the same legal framework as courts in earlier cases had, its rationale for doing so differed considerably. The court explicitly sympathized with the plaintiffs' quest for citizenship, quoting Justice Brandeis's statement that "[i]n our constitutional republic, . . . the title of citizen is superior to the title of President."<sup>80</sup> But the court was persuaded that the desire for citizenship was not universal among American Samoans, noting that "the democratically elected government of the American Samoan people" had opposed the citizenship petition.<sup>81</sup> Citizenship status, the court concluded, could not be unilaterally imposed; instead, "[i]t is no less than the adoption or ascription of an identity," and "[w]e can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will."<sup>82</sup> The court concluded that "[t]o hold the contrary would be to mandate an irregular intrusion into the autonomy of Samoan democratic decision-making; an exercise of

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

75. *Id.* at 301.

76. *Id.* at 312.

77. *Id.* at 302, 307.

78. *Id.* at 307.

79. *Id.* at 303, 307.

80. *Id.* at 301–02 (stating that "[w]e sympathize with Appellants' individual plights, apparently more freighted with duty and sacrifice than benefits and privilege").

81. *Id.* at 301.

82. *Id.* at 311.

paternalism—if not overt cultural imperialism—offensive to the shared democratic traditions of the United States and modern American Samoa.”<sup>83</sup>

In the summer of 2021, the Tenth Circuit decided *Fitisemanu v. United States* and joined five other circuits in holding that the Citizenship Clause does not apply to individuals born in unincorporated territories.<sup>84</sup> The citizenship question had remained in doubt since the Supreme Court denied certiorari in *Tuaua*.<sup>85</sup> The federal district court in *Fitisemanu* had held that the plaintiffs qualified for citizenship.<sup>86</sup> The case therefore appeared to be on track to a potential circuit split and a reasonable probability of a final decision in the Supreme Court. Given the high-profile nature of the case, there was extensive amicus participation in the Tenth Circuit, including briefs from the Samoan Federation of America; the Former Governors of Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; the American Civil Liberties Union; and two sets of scholars.<sup>87</sup> The amicus briefs largely supported the plaintiffs’ claim of citizenship.<sup>88</sup> The government of American Samoa, however, had intervened in the case to argue against recognition of citizenship.<sup>89</sup>

The plaintiffs argued that the lack of citizenship harmed their lives, stating that they were “denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries.”<sup>90</sup> The plaintiffs did not explicitly raise their ability to run for president, but the citizenship question would likely determine that

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83. *Id.* at 312.

84. *See supra* note 56.

85. 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

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

87. Brief of Amicus Curiae Samoan Fed’n of Am., Inc. in Support of Plaintiffs-Appellees and to Affirm, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Amended Brief of Amici Curiae Members of Cong., Former Members of Cong. et al. in Support of Petition for Rehearing En Banc, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Brief Amici Curiae of the ACLU and the ACLU of Utah Supporting Plaintiffs-Appellees’ Petition for Rehearing En Banc, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Brief for Scholars of Const. Law and Legal History as Amici Curiae Supporting Appellees’ Petition for Rehearing En Banc, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019); Brief of Citizenship Scholars as Amici Curiae in Support of Rehearing En Banc, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

88. Brief of Amicus Curiae Samoan Fed’n of Am., Inc., *supra* note 87, at 4; Amended Brief of Amici Curiae Members of Cong. et al., *supra* note 87, at 12; Brief Amici Curiae of the ACLU, *supra* note 87, at 7; Brief for Scholars of Const. Law and Legal History, *supra* note 87, at 11–12 (taking no position on the constitutionality of plaintiffs’ claim); Brief of Citizenship Scholars as Amici Curiae, *supra* note 87, at 1.

89. Intervenor Defendants-Appellants’ Reply Brief, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

90. *Fitisemanu*, 1 F.4th at 865.

as well.<sup>91</sup> Both the United States government and the government of American Samoa, on the other hand, advocated for applying the *Insular Cases* framework. The United States government argued that citizenship could be granted only if the American Samoans “bring that request to Congress through their elected representative in that body.”<sup>92</sup> The American Samoa Government asked the court to “leave it to Congress, the American Samoa Government, and the American Samoan people to decide whether to pursue U.S. citizenship.”<sup>93</sup>

Although the court ultimately ruled in favor of the governments and denied citizenship, the three judges fractured into three different opinions.<sup>94</sup> The two rationales against recognizing citizenship focused on consent and settled historical practice, while the pro-citizenship dissenting view focused on textual analysis and security of citizenship.<sup>95</sup>

Judge Lucero, writing the majority opinion, concluded that citizenship had been a “contested issue” since the United States first claimed sovereignty over American Samoa.<sup>96</sup> At the time, the court acknowledged, many American Samoans thought that they would be granted citizenship once subject to U.S. sovereignty, just as the residents of earlier territories claimed by the United States had been.<sup>97</sup> Later, “[w]hen the American Samoan people first learned they were not considered American citizens, many advocated for citizenship.”<sup>98</sup> The United States Senate passed a bill that would have granted them citizenship, but the bill died in the House of Representatives. Yet nearly a century after that legislation failed, it was not clear that American Samoan

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91. Adam Clanton, *Born to Run: Can an American Samoan Become President?*, 29 UCLA PAC. BASIN L.J. 135, 142 (2012) (acknowledging that the question seems to turn on citizenship, but suggesting that being born within a territory subject to U.S. sovereignty and allegiance might be sufficient to qualify for eligibility).

92. Brief for Defendants-Appellants at 30, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

93. Intervenor Defendants-Appellants’ Opening Brief at 1, *United States v. Fitisemanu*, 1 F.4th 862 (10th Cir. 2021) (Nos. 20-4017, 20-4019).

94. *Fitisemanu*, 1 F.4th at 864 (majority opinion); *id.* at 881 (Tymkovich, C.J., concurring); *id.* at 883 (Bacharach, J., dissenting).

95. *Compare id.* at 864–65 (majority opinion) (“We further understand text, precedent, and historical practice as instructing that the prevailing circumstances in the territory be considered in determining the reach of the Citizenship Clause.”), and *id.* at 883 (Tymkovich, J., concurring) (“I resolve the tie in favor of the historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants.”), with *id.* at 884 (Bacharach, J., dissenting) (relying on contemporary “dictionaries, maps, and censuses,” and the notion that “citizenship is a fundamental right”).

96. *Id.* at 866.

97. *See id.* at 865–66, 865 n.1 (noting that inhabitants of other territories received statehood, and that “[c]itizenship has been a contested issue in American Samoa since its cession”).

98. *Id.*



sentiment still favored citizenship. Without such an expressed desire, the court concluded, it would be wrong to push citizenship on that population. After all, the court noted, “[a] model of citizenship based on consent is imbued in our founding documents.”<sup>99</sup> The court also suggested that “current law authorizes each individual Samoan to seek American citizenship should it be desired”<sup>100</sup> (although they would have to move out of American Samoa to do so).<sup>101</sup>

The court acknowledged that both the “purpose” and “reasoning” of the *Insular Cases* is “disreputable to modern eyes.”<sup>102</sup> The *Insular Cases* rested on an assumption that “differences of race” mattered for citizenship, with disfavored races “absolutely unfit to receive it.”<sup>103</sup> Despite this racist history, the court concluded that the *Insular Cases* can and should be “repurposed to preserve the dignity and autonomy of the peoples of America’s overseas territories.”<sup>104</sup> The court described the *Insular Cases* as “relevant, workable, and, as applied here, just.”<sup>105</sup> They were written “with the type of issue presented by this case in mind,” and they “permit this court to respect the wishes of the American Samoan people.”<sup>106</sup> The court stated that under this framework, “the consistent practice of the American government since our nation’s founding [has been that] citizenship in the territories comes from a specific act of law, not from the Constitution.”<sup>107</sup>

Parts IV and V of Judge Lucero’s opinion were not joined by any other judge. In Part IV, Judge Lucero wrote that the right of citizenship “is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding individual right.”<sup>108</sup> He stated that birthright citizenship is “not a prerequisite to a free government” and therefore not a “fundamental personal right” under the framework of the

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99. *Id.* at 867.

100. *Id.* at 874.

101. Under current naturalization law, a noncitizen national is eligible to naturalize “if he becomes a resident of any State” and otherwise meets eligibility requirements. 8 U.S.C. § 1436. For purposes of the Immigration and Nationality Act, “State” is defined to include “the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.” 8 U.S.C. § 1101(a)(36). Thus, an American Samoan who remained in American Samoa could not naturalize, but one who moved to the Commonwealth of the Northern Mariana Islands or other territory where Congress had extended statutory citizenship could seek naturalization.

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

103. *Id.* (first quoting *Downes v. Bidwell*, 182 U.S. 244, 282; and then quoting *Downes*, 182 U.S. at 306 (White, J., concurring)).

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

105. *Id.* at 873.

106. *Id.*

107. *Id.* at 869.

108. *Id.* at 878 (Lucero, J.).

*Insular Cases*.<sup>109</sup> In Part V, he concluded that recognizing citizenship risked the “undermining of local culture and autonomy” because “[f]undamental elements of the *fa’ a Samoa* [the American Samoan way of life] rest uneasily alongside the American legal system.”<sup>110</sup> In particular, he pointed to the “*matai* chieftain social structure, communal land ownership, and communal regulation of religious practice” as potentially inconsistent with the U.S. Constitution.<sup>111</sup>

Chief Judge Tymkovich joined all but Parts IV and V of Judge Lucero’s opinion. He authored a brief concurrence, stating that “either party’s reading of the Citizenship Clause is plausible, so I resolve the tie in favor of the historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants.”<sup>112</sup> He agreed that “consideration of the wishes of the American Samoan people” was desirable, but he “would leave that consideration to the political branches and not to our court.”<sup>113</sup>

Judge Bacharach dissented. His conclusion rested on three independent bases. First, the text and original meaning of the Fourteenth Amendment supported citizenship because it applied to everyone “born . . . in the United States,”<sup>114</sup> and at the time of ratification “courts, dictionaries, maps, and censuses uniformly regarded territories as land ‘in the United States.’”<sup>115</sup> Second, he concluded, even if the original meaning did not control, “the Citizenship Clause would apply because citizenship is a fundamental right.”<sup>116</sup> And finally, assuming that citizenship were not a fundamental right, in his view it should apply even under the framework of the *Insular Cases*—that is, that the Constitution should apply in the Territories unless it would be “impracticable and anomalous” to do so.<sup>117</sup>

Judge Bacharach looked to *Marbury v. Madison*<sup>118</sup> for its explanation of the importance of judicial review over the constitutionally limited powers of the legislative branch.<sup>119</sup> He drew explicitly on the Supreme Court’s

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109. *Id.*

110. *Id.* at 880–81.

111. *Id.* at 880.

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

113. *Id.*

114. U.S. CONST. amend. XIV.

115. *Fitisemanu*, 1 F.4th at 884 (Bacharach, J., dissenting).

116. *Id.*

117. *Id.* at 902.

118. 5 U.S. (1 Cranch) 137 (1803).

119. *Fitisemanu*, 1 F.4th at 903 (Bacharach, J., dissenting) (“To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” (quoting *Marbury*, 5 U.S. (1 Cranch) at 176)).

denaturalization jurisprudence to explain that the Court had already held that the purpose of the Citizenship Clause in the Fourteenth Amendment was to “put [the] question of citizenship . . . beyond the legislative power.”<sup>120</sup> He wrote that “constitutional rights do not flicker with the practices of political majorities.”<sup>121</sup> He pointed out that even the American Samoan government, in opposing a declaration of citizenship, put forward no evidence of “what American Samoans want,” and that it acknowledged there is no consensus among the American Samoan people.<sup>122</sup> Without such a consensus, deferring to the territorial government made citizenship rights rest on a precarious political base, in contravention of the Constitution, whose role “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>123</sup> Judge Bacharach noted that “here we are addressing recognition of citizenship in the first instance rather than a political choice to strip individuals of their citizenship,” but he concluded that it is “a distinction without a difference.”<sup>124</sup> In either case, he explained, the Supreme Court had held that the Citizenship Clause was intended “to divest legislatures of power over someone’s citizenship” and had recognized that “some rights should not be subject to political preferences.”<sup>125</sup> He quoted *Afroyim v. Rusk*’s famous statement that “[t]he very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship.”<sup>126</sup>

## II. The Fourteenth Amendment’s Integral Citizenship

Six circuits have now held that the Fourteenth Amendment’s Citizenship Clause does not apply to individuals born in the U.S. Territories. Nonetheless, the question is far from settled—and it is not going away.<sup>127</sup>

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120. *Id.* at 903 (quoting *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967)).

121. *Id.* at 904.

122. *Id.*

123. *Id.* at 904–05 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015)).

124. *Id.* at 905–06.

125. *Id.* at 906.

126. *Id.* (quoting *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967)).

127. In the last few years, there has been a wealth of public discussion on this issue, including legal scholarship, social science research, articles in the popular press, and substantial amicus participation in recent lawsuits. *See, e.g.*, SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* (2019); DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019); Ross Dardani, *Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960*, 60 *AM. J. LEGAL HIST.* 311 (2020); Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 *YALE J. INT’L L.* 229 (2018); Carlos Iván Gorrín Peralta, *Past, Present, and Future of U.S. Territories: Expansion, Colonialism,*

Continued attention to this issue comes in part from the importance of citizenship itself. As the Supreme Court has stated, American citizenship “is one of the most valuable rights in the world today.”<sup>128</sup> Those who feel a personal and political allegiance to the country are likely to continue their quest for recognition of citizenship status.

Security of citizenship also matters to individuals who are granted statutory citizenship, who share in this allegiance and seek permanency of status. The people of Puerto Rico continue to debate both statehood and independence as potential avenues for the future. The political risks of seeking statehood and the potential fragility of their citizenship are both highly salient in that debate.<sup>129</sup>

Moreover, the circuit courts’ opinions have not done a good job of satisfying the “classic benefits of appellate review” by stabilizing and unifying legal doctrine.<sup>130</sup> This Part examines some of the opinions’ weaknesses, including their feeble ties to historical practice, their reliance on precedent “exemplifying the anti-canon,”<sup>131</sup> and their logical flaws. These underlying weaknesses have prevented the courts from developing a coherent and agreed-upon rationale as to why the Fourteenth Amendment does not apply to individuals born in the U.S. Territories. A closer examination of both the history and the logic underlying the opinions suggests a very different conclusion: that is, that the Fourteenth Amendment created a single, integral

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*and Self-Determination*, 46 STETSON L. REV. 233 (2017); Neil Weare, *Equally American: Amending the Constitution to Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259 (2017); Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017); Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587 (2017); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71 (2013); Joseph E. Sung, Note, *Redressing the Legal Stigmatization of American Samoans*, 89 S. CAL. L. REV. 1309 (2016).

128. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (internal quotation marks omitted).

129. See Lisa Maria Perez, *supra* note 10, at 1080 (explaining that “even if statehood wins in Puerto Rico over the increasingly popular choice of free association, a petition for statehood could be rejected in Congress, and independence would present the only remaining option” and that “a petition for Puerto Rican statehood may face significant opposition among nativists in Congress, in view of the substantial differences in language and culture between Puerto Rico and the continental United States”); see also Tamara Valcarcel, *Interpreting the Fourteenth Amendment and How It Extends to Unincorporated Territories such as Puerto Rico*, 52 REV. JURÍDICA UNIV. INTERAMERICANA P.R. 355, 375 (2018) (“[O]ne thing is for certain, Puerto Rico’s current statutory citizenship is unreliable, given that Congress can decide at any given point whether to break all ties with the Island.”).

130. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1254 (2013).

131. Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 244 (2000) (internal quotation marks omitted).

form of citizenship that applied to all individuals born within territory subject to the sovereignty of the U.S. Government.

*A. Historical Practice Does Not Support Citizenship Exclusion*

The idea of citizenship was fundamental to the founding of the United States and to the constitutional order.<sup>132</sup> Writing in 1789, historian David Ramsay explained that the American Revolution “radically changed” principles of government, and that “the political character of the people was also changed from subjects to citizens.”<sup>133</sup> In his view, the difference was “immense.”<sup>134</sup> Of course, one of the great failings of the Constitution as initially enacted was that it did not recognize all Americans as citizens, but instead accommodated the practice of enslavement. That would change with the Civil War and the ratification of the Reconstruction amendments. Ultimately, the Thirteenth Amendment abolished slavery, and the Fourteenth Amendment—ratified three years after the Thirteenth—provided that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>135</sup> The question that the courts would have to address is what geographical meaning should be given to “in the United States.”

*1. The Original Understanding of Citizenship.*—None of the courts examining territorial citizenship so far have adopted an originalist approach to the question. Put simply, an originalist approach cannot support the exclusion of the U.S. Territories.<sup>136</sup> Scholars have concluded that both at the time of the Founding and at the time of ratification of the Fourteenth Amendment, the geographical scope of birthright citizenship was understood to apply to places “under formal permanent U.S. sovereignty.”<sup>137</sup> The early Territories were seen as an integral part of the United States. In 1820, for

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132. See Irina D. Manta & Cassandra Burke Robertson, *Inalienable Citizenship*, 99 N.C. L. REV. 1425, 1429 (2021) (arguing that “citizenship precarity is inconsistent with the fundamental principles of the U.S. Constitution”); see also Josh Blackman, *Original Citizenship*, 159 U. PA. L. REV. PENNUMBRA 95, 95 (2010) (citing the U.S. Constitution’s use of the phrase “citizen of the United States . . . to set the qualifications for representatives, senators, and the president”).

133. DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 3 (1789), <https://quod.lib.umich.edu/e/evans/N17114.0001.001?rgn=main;view=fulltext> [<https://perma.cc/TJ9K-QES7>].

134. *Id.*

135. U.S. CONST. amend. XIV.

136. See generally Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 GEO. L.J. 405 (2020) (conducting an extensive inquiry into the original public meaning of the Citizenship Clause).

137. *Id.* at 471; see also Benjamin Wallace Mendelson, Note, *Courts Have Gone Off the Map: The Geographic Scope of the Citizenship Clause*, 95 TEXAS L. REV. 873, 887 (2017) (explaining that the concept of birthright citizenship dates back to the English common law, which applied a “concept of birth anywhere within the dominion, or sovereignty, of the King”).

example, the Supreme Court wrote that the United States “is the name given to our great republic, which is composed of States and territories.”<sup>138</sup> During the debate over adoption of the Fourteenth Amendment, Senator Trumbull asserted that the Citizenship Clause “refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia.”<sup>139</sup> And once the amendment was ratified, the Supreme Court was quick to conclude that it “puts at rest” the argument that those “who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens.”<sup>140</sup>

It is true that the courts have been less persuaded than scholars that an originalist approach requires recognizing territorial citizenship.<sup>141</sup> Yet there is no affirmative evidence compelling exclusion—the most that can be said is that the originalist evidence in favor of inclusion is not dispositive.<sup>142</sup> It is true that the territorial context was different in the eighteenth and nineteenth centuries. At that time there was an “unbroken, and still influential tradition that all inhabited U.S. lands would eventually become states.”<sup>143</sup> Of course, this would change in the early twentieth century, when the United States was unwilling to admit newly acquired territories onto the path to statehood. It was this problem that the *Insular Cases* sought to address in the early twentieth century—how would the new territories be integrated into the fabric of the nation?

2. *Stare Decisis and Racist Precedent.*—To the extent that the citizenship cases rely on history at all, they rely on the *Insular Cases*, a series of cases

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138. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).

139. CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866); see also *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1680, 1692 & n.108 (2017) (noting that Senator Trumbull’s quote “suggested a broad reading of the clause”).

140. *Slaughter-House Cases*, 83 U.S. 36, 72–73 (1872).

141. See *Fitisemanu v. United States*, 1 F.4th 862, 876 (10th Cir. 2021) (“[I]solated statements . . . are not impressive legislative history”) (quoting *Garcia v. United States*, 469 U.S. 70, 78 (1984)). The dissenting judges in both *Fitisemanu* and *Rabang*, however, gave significant weight to the historical record. See *Fitisemanu*, 1 F.4th at 885 (Bacharach, J., dissenting) (considering the lenses of the “1866 Congress, which drafted the Citizenship Clause, and the state legislatures . . . which ratified the clause”); see also *Rabang v. INS*, 35 F.3d 1449, 1455 (9th Cir. 1994) (Pregerson, J., dissenting) (noting the Supreme Court’s reliance on “numerous common law sources and authorities which indicate that all persons born within the *territory* of a sovereign nation and who owe complete allegiance to that nation are deemed ‘natural born’ for purposes of citizenship”).

142. See *Fitisemanu*, 1 F.4th at 876 (declining to find the argument that the “framers of the Fourteenth Amendment understood the Citizenship Clause to apply to the territories dispositive”).

143. Sam Erman, “*The Constitutional Lion in the Path*”: *The Reconstruction Constitution as a Restraint on Empire*, 91 S. CAL. L. REV. 1197, 1206–07 (2018).

decided early in the twentieth century.<sup>144</sup> These cases developed a system of constitutional exclusion for Territories not deemed to be on a path to statehood, creating categories of “incorporated” Territories destined for statehood and “unincorporated” Territories not so destined.<sup>145</sup> In *Downes v. Bidwell*,<sup>146</sup> the Supreme Court held that the Revenue Clauses did not apply to Puerto Rico as an unincorporated territory.<sup>147</sup> Three years later, *Gonzales* established the “national” category—creating a new and interstitial status that was neither citizen nor alien.<sup>148</sup>

On its face, this distinction perhaps did not appear obviously problematic. As one court concluded, “[t]he Court reached this sensible result because unincorporated territories are not on a path to statehood.”<sup>149</sup> But digging only an inch deeper into why these territories were not on a path to statehood reveals that racism played the motivating force in spurring the Court to divide the categories of U.S. territory—and with that decision, to fracture the previously integral definition of citizenship established under the Fourteenth Amendment.<sup>150</sup>

The *Downes* decision was, on the surface, about applying the Revenue Clauses. But the justices were well aware that how they handled the extension of U.S. law into the newly acquired territories would have long-term consequences well outside of revenue issues. At the time that the cases were decided, there were racial restrictions on immigration and naturalization that

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144. *Fitisemanu*, 1 F.4th at 869 (“Issued between 1900 and 1922, the Insular Cases were a string of Supreme Court opinions that addressed a basic question: when the American flag is raised over an overseas territory, does the Constitution follow?”); *id.* at 883 (Tymkovich, C.J., concurring) (“Faced with an ambiguous constitutional text, equivocal evidence of its original public meaning, and uncertain Supreme Court precedent, we are left with historical practice. The settled understanding and practice over the past century is that Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants.”); *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015) (“Although some aspects of the Insular Cases’ analysis may now be deemed politically incorrect, the framework remains both applicable and of pragmatic use in assessing the applicability of rights to unincorporated territories.”).

145. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244, 280 (1901).

146. 182 U.S. 244 (1901).

147. *Id.* at 287.

148. *See supra* notes 37–42 and accompanying text; *see also* Villazor, *supra* note 127, at 1681 (“[I]nterstitial citizenship reframes our view of citizenship away from a binary citizen/alien paradigm toward a flexible conception of citizenship in which citizenship rights may be unbundled.”).

149. *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012) (citing *Boumediene v. Bush*, 553 U.S. 723, 757–58 (2008)).

150. *Derieux & Weare, supra* note 14, at 296 (“[F]ew, if any, doctrines remaining on the books today so squarely spring from such unabashedly racist assumptions.”); John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 425 (2018) (“What remains of the *Insular Cases* is their barely covert narrative of racism in general and Anglo-Saxon juridical ethnocentrism in particular, which cannot support the continuing colonization of unincorporated territories.”).

largely excluded Asians from the United States.<sup>151</sup> The Supreme Court had held only three years earlier in *United States v. Wong Kim Ark*<sup>152</sup> that racial exclusion laws must give way to the Fourteenth Amendment's Citizenship Clause, which granted birthright citizenship to individuals born in the United States even when they would have been otherwise racially ineligible for naturalization.<sup>153</sup>

The *Downes* Court expressed doubt that “possessions . . . inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought” could share in the administration of government, as they would if the newly acquired territories gained statehood.<sup>154</sup> But at the same time, the Court did not want to discourage the acquisition of new territories; to do so “might be fatal to the development of what Chief Justice Marshall called the American empire.”<sup>155</sup> The compromise, then, was to allow for the acquisition of territories without extending the full panoply of constitutional rights to them.

Justice White's concurrence made the racial link to civil and political rights even more explicit. Perhaps the emphasis on racial exclusion was to be expected, given the membership of the Court at that time. The *Downes* Court had largely the same makeup as the Court that upheld racial segregation in *Plessy v. Ferguson*<sup>156</sup>—only Justice Joseph McKenna was appointed to the Court between the two decisions.<sup>157</sup> Justice White raised a hypothetical: what would happen if the United States were to “discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United

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151. Villazor, *supra* note 127, at 1715 (explaining that “between 1900 and 1952, . . . various immigration laws made different groups of Asians racially inadmissible to the United States”); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2171 (2014) (“In this fiercely anti-Asian context, exclusionists vigorously challenged the citizenship status of American-born individuals of Chinese descent, and immigration officials attempted to use the exclusion laws to bar the entry of American-born citizens of Chinese descent returning from sojourns abroad.”).

152. 169 U.S. 649 (1898).

153. *Id.* at 693 (“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.”); *see id.* at 703–04 (detailing racial restrictions on naturalization).

154. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

155. *Id.* at 286.

156. 163 U.S. 537 (1896).

157. Rick Baldoz & César Ayala, *The Bordering of America: Colonialism and Citizenship in the Philippines and Puerto Rico*, 25 CENTRO J. 76, 85, 101 n.15 (2013); Pedro A. Malavet, “The Constitution Follows the Flag . . . but Doesn't Quite Catch Up with It”: The Story of *Downes v. Bidwell*, in RACE LAW STORIES 111, 144 (Rachel F. Moran & Devon W. Carbado eds., 2008).



States for commercial and strategic reasons”<sup>158</sup> He argued that the United States would have “the right to ratify such acquisition,” but he worried that if the United States were required to “endow the inhabitants with citizenship of the United States” it would inflict a “grave detriment on the United States” arising from the “immediate bestowal of citizenship on those absolutely unfit to receive it.”<sup>159</sup>

Justice Harlan, in an uncompromising dissent reminiscent of his earlier dissent in *Plessy*, argued that the concept of unincorporated territory conflicted with the fundamental guarantees of the Constitution.<sup>160</sup> In his dissent in *Downes*, he wrote that “[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,” leaving “the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,” was “wholly inconsistent with the spirit and genius as well as with the words of the Constitution.”<sup>161</sup> He argued that the foundation of the Constitution was to limit governmental power over the people, wryly noting that the Founders had “proceeded upon the theory—the wisdom of which experience has vindicated—that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress.”<sup>162</sup> He reminded his fellow Justices of their judicial obligation, writing that “[n]o higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.”<sup>163</sup>

Given the explicitly racist history of the *Insular Cases* (particularly the categorization of “incorporated” versus “unincorporated” territories and the creation of a noncitizen national status), to what extent should these holdings be accorded stare decisis status or granted other deference?<sup>164</sup> Although the courts have pointed to the cases’ longevity, inertia alone is not a good reason to continue to follow an explicitly race-based division. As scholar Bennett Capers has pointed out, “law is haunted by race, even when it doesn’t realize it.”<sup>165</sup> The courts following the *Insular Cases* have not fully reckoned with this haunting in the *Insular Cases*. The *Tuaua* court deemed the cases

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158. *Downes*, 182 U.S. at 306 (1901) (White, J., concurring).

159. *Id.*

160. *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (“But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.”).

161. *Downes*, 182 U.S. at 380 (Harlan, J., dissenting).

162. *Id.* at 381.

163. *Id.* at 382.

164. Of course, the Supreme Court’s approach in the *Insular Cases* did not stand alone—Congress, at this time, continued in its racially exclusive approach to citizenship. *See Villazor, supra* note 127, at 1702–06 (detailing congressional hearings that “exposed some of the political leaders’ ideologies about which racial groups were deserving of citizenship”).

165. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 56 (2021).

“politically incorrect,”<sup>166</sup> and the *Fitisemanu* court described both the “purpose” and “reasoning” of the cases as “disreputable to modern eyes.”<sup>167</sup> Both characterizations underplay the explicit, invidious racism that formed the very core of the incorporation doctrine.

The Supreme Court has stated that stare decisis is “‘at its weakest when we interpret the Constitution’ because a mistaken judicial interpretation of that supreme law is often ‘practically impossible’ to correct through other means.”<sup>168</sup> That condition certainly applies here; the Supreme Court upheld the denial of civil and political rights to the Territories under an explicitly racist ideology that the Court has since disavowed in other contexts. As Justice Kavanaugh asked in a case addressing jury-trial rights, “[w]hy stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law . . . and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?”<sup>169</sup> The *Insular Cases* were products of the same Court that upheld both racial segregation and Asian exclusion.<sup>170</sup> The Supreme Court can and should disavow the *Insular Cases* when an appropriate case is brought before the Court—perhaps *Fitisemanu*.<sup>171</sup> But in the meantime, it is a mistake for circuit courts to rely on these cases as an aid to interpreting the Citizenship Clause. The Supreme Court itself has never extended the doctrine this far, and applying the incorporation doctrine without reckoning with its history abets the “haunting” of racial animus.<sup>172</sup>

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166. *Tuaua v. United States*, 788 F.3d 300, 307 (D.C. Cir. 2015).

167. *Fitisemanu v. United States*, 1 F.4th 862, 870 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

168. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (first citing *Agostini v. Felton*, 521 U.S. 203, 235 (1997), then citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)); *see also* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1075 (2003) (“Reliance interests count, but they count far less when precedent clearly exceeds a court’s interpretive authority than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court’s discretion.”).

169. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part).

170. Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) (noting that the Supreme Court of this time “gave their imprimatur to racial segregation in *Plessy v. Ferguson*,” “held that resident aliens returning from overseas visits could be excluded on the basis of their race,” and ruled “that aliens lawfully living in the United States could be deported if Congress determined that their race was undesirable”).

171. As this Article goes to press, a petition for certiorari in this case is currently pending before the Supreme Court. *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

172. *See* Capers, *supra* note 165.

*B. Recognizing Citizenship Versus Imposing Citizenship*

The last subpart argued that historical practice does not support excluding the U.S. Territories from the scope of the Citizenship Clause. This subpart argues that there is a deeper structural problem. Even if we ignore the historical bases of this approach and accept the courts' modern views on their own terms, there are fundamental problems with the internal logic of the opinions that make their approach to citizenship impossible to apply in a neutral fashion. Much of this difficulty stems from a simple but important error: that is, the courts talk about "imposing citizenship" rather than recognizing citizenship that already exists. This difference is much more than just semantics—it elides important issues of governmental power.

*1. Congress' Plenary Power.*—Both *Fitisemanu* and *Tuaua* relied on the idea of consent to citizenship—and both strongly implied that consent was central to the constitutional order. The *Fitisemanu* court wrote that "[a] model of citizenship based on consent is imbued in our founding documents."<sup>173</sup> The *Tuaua* court quoted the *Federalist Papers* for the proposition that "[t]he fabric of American empire ought to rest on the solid basis of the consent of the People,"<sup>174</sup> and wrote that "[w]e can envision little that is more anomalous, under modern standards, than the forcible imposition of citizenship against the majoritarian will."<sup>175</sup>

This rhetoric sounds as if it defers to the wishes of the inhabitants of the U.S. Territories. But by failing to recognize that the Fourteenth Amendment applies to the U.S. Territories, the courts are leaving the primary power to control citizenship to Congress, not to the people born there. The Supreme Court has earlier held that the U.S. Territories, whether Congress had legislatively provided for citizenship or not, are "subject to the plenary power of Congress" without "any independent sovereign authority, whether of a quasi-sovereign nature or otherwise."<sup>176</sup> Puerto Rico's constitution, for

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173. *Fitisemanu*, 1 F.4th at 867.

174. *Tuaua v. United States*, 788 F.3d 300, 310 n.11 (D.C. Cir. 2015) (quoting THE FEDERALIST NO. 22 (Alexander Hamilton) (emphasis omitted)).

175. *Id.* at 311.

176. Lisa Maria Perez, *supra* note 10, at 1057; *see also* Glidden Co. v. Zdanok, 370 U.S. 530, 546 (1962) (stating that "the territories were not ruled immediately from Washington . . . Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto"); *Davis v. Guam*, 932 F.3d 822, 825 (9th Cir. 2019) (explaining that Congress exercised "plenary power" over Guam), *cert. denied sub nom. Territory of Guam v. Davis*, 140 S. Ct. 2739 (2020); *United States v. Santiago*, 998 F. Supp. 2d 1, 2 (D.P.R. 2014) ("United States citizens residing in Puerto Rico . . . have historically lived under a system of federal laws in which the constitutional principle of *consent of the governed* is a fallacy."); Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1239 (2021) (reviewing DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE

example, “was established in 1952 pursuant to an ordinary congressional statute, and it is subject to repeal at any time.”<sup>177</sup> Even if consent to citizenship were clearly established, that consent would give the residents of an unincorporated territory the power only to ask Congress for citizenship, which Congress could then choose to bestow, maintain, or withdraw at its whim.<sup>178</sup>

By holding that the Fourteenth Amendment’s Citizenship Clause can’t apply because the people of American Samoa have not consented to citizenship, the courts are leaving in place a system of legislative primacy—that is, Congress could grant citizenship unilaterally without requiring the consent of the people (as it has to the people of other territories), or it could grant independence and unilaterally take away American nationality altogether.<sup>179</sup> This was one of the points made by the political representatives of other Territories in *Fitisemanu*—that if citizenship were only a matter of “legislative grace” and “not entitled to the same protections as Fourteenth Amendment birthright citizenship,” then “the millions of current U.S. citizens born in the Territories . . . would remain citizens only at the pleasure of Congress, a status that could be revoked at the whim of a temporary legislative majority.”<sup>180</sup>

What the plaintiffs were asking the court for was not the imposition of a new citizenship that had never before existed. Instead, what they sought was recognition of a citizenship that was already established by the Fourteenth Amendment but had gone stubbornly unrecognized as a matter of racial prejudice. If the Fourteenth Amendment applied to the Territories, then the plaintiffs were already citizens by virtue of their birth on land subject to United States sovereignty, and it was the ratification of that amendment—not a judicial decision interpreting the amendment—that granted citizenship

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GREATER UNITED STATES (2019)) (“For Puerto Rico to actually hold sovereignty that Congress could not reclaim would violate the constitutional rule that a prior congress may generally not bind a future one as a result of a novel constitutional status.”).

177. Perez, *supra* note 10, at 1057.

178. See U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

179. See *Manlangit v. U.S. Dep’t of Just. Immigr. & Naturalization Serv.*, 488 F.2d 1073, 1073–74 (4th Cir. 1973) (finding that petitioner from the Philippines had been a U.S. national but was now an alien under section 14 of the Independence Act).

180. Amended Brief of Amici Curiae Members of Cong. et al., *supra* note 87, at 4; see also *Rogers v. Bellei*, 401 U.S. 815, 835 (1971) (explaining that Congress can “take away an American citizen’s citizenship without his assent” when citizenship is “not based upon the Fourteenth Amendment”).

status. If the Citizenship Clause did not apply, then citizenship would require congressional action. Judicially imposed citizenship was never an option.

Moreover, if it would be “un-American” (and therefore inconsistent with the liberty guarantees of the Constitution) for courts to recognize territorial citizenship, then what should we make of Congress’s earlier unilateral grants of legislative citizenship to other Territories—were those actions unconstitutional or similarly “un-American”? The logic of the *Fitisemanu* and *Tuaua* courts’ holdings suggests that the Fourteenth Amendment’s Citizenship Clause does not apply to unincorporated Territories because the people of the U.S. Territories did not consent to it and that if the people do consent to citizenship, then they should ask Congress to extend it. But this logic is backward—Congress cannot have a unilateral power to extend citizenship rights that is greater than the Constitution itself.

2. *Illusory Consent and Allegiance.*—Chasing consent, at least as the *Fitisemanu* and *Tuaua* courts characterized it, is an illusory goal. This does not mean that consent is irrelevant or that the people’s desires should be ignored,<sup>181</sup> but focusing on gaining consent overlooks the fact that the notion of consent is already baked into the allegiance owed to the government by virtue of birth in the United States. As others have explained, the notion of consent is not particularly relevant to the question of birthright citizenship.<sup>182</sup>

The Founders’ notion of consent spoke directly to allegiance. The Declaration of Independence asserted that government’s “just Powers” arise from the “Consent of the Governed” and therefore declared that the colonies were “absolved from all Allegiance to the British Crown.”<sup>183</sup> Consent thereby flows into allegiance, and allegiance into legitimacy. Citizenship is the status that results from allegiance to a just government.<sup>184</sup> Naturalized citizens

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181. See Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 152 (2018) (“*Tuaua* suggests the need to explore the other side of the citizenship coin—those who refuse to become permanent members of the United States and the normative and theoretical implications of their repudiation of citizenship.”).

182. See Mae M. Ngai, *Birthright Citizenship and the Alien Citizen*, 75 FORDHAM L. REV. 2521, 2526 (2007) (explaining that “[n]o person has control over the circumstances of her birth,” and that “[n]either type of American birth-citizenship [by place of birth or by parentage] involves consent . . . there is no general ‘consent requirement’ upon reaching the age of majority,” and “naturalized citizens and only naturalized citizens give explicit consent to citizenship and its obligations”).

183. THE DECLARATION OF INDEPENDENCE para. 2–3 (U.S. 1776); see also Jack M. Balkin & Sanford Levinson, *To Alter or Abolish*, 89 S. CAL. L. REV. 399, 426 (2016) (“[T]he Declaration of Independence was more than an invitation to discuss rights. It was, quite literally, a declaration of independence—an assertion of the right to alter and abolish government and institute new government. This right was its very reason for being.”).

184. See Alexander N. Li, Note, *Prospective Allegiance*, 87 N.Y.U. L. REV. 515, 541 (2012) (“In modern legal parlance, however, allegiance refers to a sentiment of loyalty or to specific commitments associated with the voluntary assumption of citizenship.”).

consent explicitly to this allegiance; individuals born in the United States are born into it.

When it comes to allegiance, an individual born in the U.S. Territories is no different from one born in the states. A U.S. national, whether a citizen or not, “owes permanent allegiance to the United States” by virtue of birth within U.S. territory.<sup>185</sup> The very rationale for the *Gonzales* court not treating Puerto Ricans as aliens was that the “citizens of Porto Rico”<sup>186</sup> are people “whose permanent allegiance is due to the United States.”<sup>187</sup>

It is true that the nationality statute “recognizes that the permanence of allegiance may be illusory by specifying that a permanent relationship is one that is continuous or lasting, as distinguished from temporary, even though the relationship may be dissolved eventually at the instance either of the State or of the individual, in accordance with law.”<sup>188</sup> Permanent allegiance in this sense is something less than the ancient doctrine of “perpetual allegiance,” which prevailed in Britain at the time of the Founding.<sup>189</sup> That doctrine is what allowed British subjects who became naturalized American citizens to be tried for treason when they later traveled to Britain—they “carried their status as British subjects for the rest of their lives.”<sup>190</sup>

Under the American approach set out in the Declaration of Independence, individuals had the right to change their allegiance. Americans still have this right, but exercising it generally requires leaving the country.<sup>191</sup> An individual can renounce their nationality outside of wartime only by going to a foreign country to make a formal renunciation.<sup>192</sup> Giving up nationality means giving up one’s right to reside in land under U.S.

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185. 8 U.S.C. § 1101(a)(22).

186. Congress spelled the name of the island as “Porto Rico” in the Foraker Act in 1900, and “it took 32 years to persuade Congress that ‘Porto’ is Portuguese and that the correct Spanish name should be restored.” *United States v. Lebrón-Caceres*, 157 F. Supp. 3d 80, 84 n.1 (D.P.R. 2016).

187. *Gonzales v. Williams*, 192 U.S. 177, 179 (1904).

188. CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, 7 IMMIGRATION LAW AND PROCEDURE § 91.01[3][b] (2021).

189. See LUCY E. SALYER, UNDER THE STARRY FLAG: HOW A BAND OF IRISH AMERICANS JOINED THE FENIAN REVOLT AND SPARKED A CRISIS OVER CITIZENSHIP 3 (2018) (discussing the Irish’s permanent allegiance to the English king).

190. *Id.*

191. See 8 U.S.C. § 1481(a) (outlining the ways in which a national of the United States can voluntarily lose their nationality).

192. See 8 U.S.C. § 1481(a)(5) (providing that U.S. nationality may be lost by “making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State”).

sovereignty.<sup>193</sup> Thus, the fundamental contradiction of the *Insular Cases* was that the Supreme Court was trying to have it both ways: the country would obtain the mandatory allegiance of individuals residing in the Territories and maintain it for as long as the country chose to do so, without recognizing those individuals as equals or integrating them into the larger polity, and without committing in return to bestow permanency of status.

3. *What About Washington, D.C.?*—Finally, one of the biggest gaps in the logic of the *Fitisemanu* and *Tuaua* opinions is where their approach would leave the District of Columbia.<sup>194</sup> The *Fitisemanu* court suggested that the Citizenship Clause applies only to “state-born residents”: “Another textual consideration suggesting the Citizenship Clause’s exclusive application to state-born residents is its effect of rendering persons born in the United States ‘citizens of the United States and of the State wherein they reside.’”<sup>195</sup> The *Tuaua* opinion was less explicit, but the same logical gap is inherent in the opinion.<sup>196</sup> That is, if the Citizenship Clause does not apply to the entirety of the United States’ geographic sovereignty, then why should it apply to Washington, D.C.?<sup>197</sup>

Historically, the states, the District of Columbia, and the U.S. Territories were treated together as an integral whole. But to the extent that they were separated, the states as political entities with representation in Congress were treated differently from the District of Columbia and the U.S. Territories, both of which were directly governed by Congress. The government’s own

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193. See *Colon v. U.S. Dep’t of State*, 2 F. Supp. 2d 43, 45–46 (D.D.C. 1998) (holding that the plaintiff could not renounce his citizenship and continue to live in Puerto Rico); see also Joseph W. Dellapenna, *Constitutional Citizenship Under Attack*, 61 VILL. L. REV. 477, 499 (2016) (explaining that for “those whose citizenship was not acquired under the Fourteenth Amendment, . . . citizenship can be terminated by a simple act of Congress, even against their will,” whereas “[f]or those citizens who obtained their citizenship under the Fourteenth Amendment either by birth in the United States or by naturalization in the United States . . . the only way they can lose their citizenship is to voluntarily renounce it”).

194. For a longer discussion of the constitutional implications of D.C.’s position, see generally Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEORGETOWN L.J. (forthcoming 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4009101](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4009101) [<https://perma.cc/H84R-X6ZF>].

195. *Fitisemanu v. United States*, 1 F.4th 862, 875 n.16 (10th Cir. 2021) (quoting U.S. CONST. amend. XIV, § 1, cl. 1), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022).

196. See *Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. 2015) (“Even if ‘United States’ is broader than ‘among the several States,’ it remains ambiguous whether territories situated like American Samoa are ‘within’ the United States for purposes of the clause.”).

197. See Michael Ramsey, *Originalism and Birthright Citizenship (Again)*, THE ORIGINALISM BLOG (Nov. 21, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/11/originalism-and-birthright-citizenship-again-michael-ramsey.html> [<https://perma.cc/RL45-25TW>] (“[I]t’s extremely unlikely that the drafters would have wanted to exclude from constitutional citizenship people born in U.S. territories. I can think of no reason for doing so. Why would they want, for example, to exclude people born in Washington D.C. from constitutional citizenship?”).

10th Circuit brief in *Fitisemanu* makes this distinction, specifying that the “states were to exercise concurrent sovereignty with the federal government,” whereas “Territory and other Property belonging to the United States” were subject to the “general and plenary” authority of Congress.<sup>198</sup>

The Supreme Court in 1820 wrote that “[t]he district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania.”<sup>199</sup> But in the *Slaughter-House Cases*, the Supreme Court also acknowledged that before ratification of the Fourteenth Amendment, some judges believed that only state citizens could be citizens of the United States:

It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens.<sup>200</sup>

In the Court’s view, however, the Fourteenth Amendment “puts at rest” the question of citizenship for both residents of D.C. and of the U.S. Territories because it “declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the *Dred Scott* decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States.”<sup>201</sup> The implication, of course, was that the Fourteenth Amendment applied to Washington, D.C., and to the U.S. Territories.

The idea that individuals born in Washington, D.C., are not birthright citizens sounds silly. As one scholar has pointed out, “[T]he District of Columbia seems clearly in the United States even though it is not part of any state.”<sup>202</sup> Likewise, the government’s 10th Circuit brief in *Fitisemanu* stated dismissively that “no one disputes that the District of Columbia is ‘in the United States.’”<sup>203</sup> It is, after all, the seat of our government. How could it not be “in the United States”?<sup>204</sup> The Court in *Downes v. Bidwell*, in setting up the original idea of incorporation, tried to distinguish D.C. by stating that although “[t]he mere cession of the District of Columbia to the Federal

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198. Brief for Defendants-Appellants, *supra* note 92, at 15 (citing U.S. CONST. art. IV, § 3, cl. 2).

199. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820).

200. *Slaughter-House Cases*, 83 U.S. 36, 72 (1872).

201. *Id.* at 73.

202. Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1193–94 (2011).

203. Brief for Defendants-Appellants, *supra* note 92, at 27.

204. *Id.*



government relinquished the authority of the States,” it did not thereby “take it out of the United States or from under the ægis of the Constitution.”<sup>205</sup>

But the very obviousness of the question should give us pause. There is no textual reason why the Fourteenth Amendment should apply to the District of Columbia but not to other territories within the sovereignty of the United States. And the historical rationale for refusing to extend constitutional rights, of course, was that the newly acquired territories were filled with people of “alien races” who were “utterly unfit for American citizenship.”<sup>206</sup> Holding that the Constitution’s guarantee of birthright citizenship is deemed to apply to Washington, D.C., but not to the U.S. Territories perpetuates a system where constitutional rights depend on covert norms of belonging and majoritarian acceptance.

### III. Identity, Belonging, and Indigenous Rights

Some of the logical inconsistencies in the courts’ citizenship opinions make more sense when covert norms of belonging are brought out into the open and exposed to greater scrutiny. Citizenship, after all, has always been about identity as well as legal status.<sup>207</sup> This Part looks at the citizen identity from two sides. First, it examines the construction of a “citizenship” identity both as an individual identity and as a form of membership in the larger polity, arguing that covert norms of belonging influence how the law of citizenship is both understood and applied. Second, it explores how conceptions of identity and citizenship might interact with cultural preservation. Finally, it argues that the Fourteenth Amendment is best understood as a guarantee of integral citizenship applying to everyone born on land within United States sovereignty, and that this understanding of the citizenship guarantee is best positioned to protect both individual rights and indigenous cultures.

#### A. *Citizenship, Identity, and Belonging*

Although the concept of “citizenship as identity” is well-accepted in the scholarly literature, the ways that identity and belonging shape the legal status of citizenship are still too often overlooked.<sup>208</sup> Of course, some aspects of identity and belonging have been well-documented, including the race-

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205. 182 U.S. 244, 261 (1901).

206. *Id.* at 287, 311.

207. See generally Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 479–88 (2000) (describing the various dimensions of citizenship, including legal status, rights, political activity, and identity).

208. See MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* 2, 5 (2020) (explaining that “focusing only on the formal rights of citizenship misses a key component” in why people seek citizenship, and arguing that the discussion “should be reframed as a *spectrum* of citizenship” that includes aspects of both formal legal status and informal social belonging).

based immigration restrictions that were first imposed in 1790, continued for more than a century, and influenced the development of the “incorporated” and “unincorporated” territory binary.<sup>209</sup> What is harder to see is how concepts of identity might also affect the development of law by influencing what questions are never asked. Why is it taken for granted that individuals born in the District of Columbia, but not individuals born in the U.S. Territories, are “born in the United States”?<sup>210</sup>

That question (like the rest of the open questions affecting territorial citizenship) is on the surface a question about legal status. Just below the surface, concepts of identity and belonging operate at an unconscious level.<sup>211</sup> Citizenship, after all, is “the standard legal mechanism” by which countries “bind individuals to the polity.”<sup>212</sup> Conceptions of identity and norms of belonging are not separate from legal status but rather influence what questions are asked within the legal system and what answers are ultimately agreed upon.

*1. The Citizen Identity.*—Social psychology research suggests that at least two processes influence identity formation.<sup>213</sup> A person’s social identity looks at membership and belonging—who is “us”?<sup>214</sup> The social identity almost certainly includes a national identity, and may also include

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209. See *supra* Part II; see also Leti Volpp, “Obnoxious to Their Very Nature”: *Asian Americans and Constitutional Citizenship*, 8 *ASIAN L.J.* 71, 73 (2001) (“The first federal citizenship statute, passed by Congress in 1790, limited naturalization to ‘free white’ aliens . . . . From 1870 until 1952, the racial bars led to much litigation.”).

210. See *Fitisemanu v. United States*, 1 F.4th 862, 875 n.16 (10th Cir. 2021) (quoting U.S. CONST. amend. XIV, § 1, cl. 1), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022); see also *supra* section II(B)(3).

211. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 202 (1996) (“[N]ational identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology.”).

212. Mabel Berezin, *Identity through a Glass Darkly*, 73 *SOCIO. PSYCH. Q.* 220, 221 (2010) (reviewing PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* (2009)) (discussing the relationship between law, identity, and citizenship).

213. See Cassandra Burke Robertson, *Due Process in the American Identity*, 64 *ALA. L. REV.* 255, 276 (2012) (“Individuals perform an ‘American’ or ‘citizen’ role identity when they participate in the United States democratic process—for example, by making decisions about which candidates to support, by debating friends and colleagues about policy choices, or by answering political polling questions.”); see also Ian Long, Note, “Have You Been an Un-American?”: *Personal Identification and Americanizing the Noncitizen Self-Concept*, 81 *TEMP. L. REV.* 571, 589 (2008) (“In the field of social psychology, there are two prominent theories used to describe self-concept and explain how this concept of self is either altered or reinforced by one’s existence within society.”).

214. See PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* 118–19 (2009) (discussing how social identities are based on a person’s identification with a social group and describing the process of depersonalization that occurs with the embodiment of ingroup prototypes).

membership in other social groups, whether tied together by religion, ethnicity and race, occupation, education, or even favorite sports team.<sup>215</sup> Role identities, on the other hand, focus more on the individual, arising from the roles that individuals play in the daily life of society and how they relate to the people around them.<sup>216</sup> One person, for example, may be an “attorney, parent, friend, and committed voter.”<sup>217</sup>

Citizenship can be both a social identity and a role identity.<sup>218</sup> At the social level, a sense of allegiance to the country gives rise to patriotism and a sentiment of responsibility to the country’s future.<sup>219</sup> The role identity influences individual behavior in accordance with this role—for example, agreeing to serve in the military and even to give one’s life to protect the future security of the nation to which one belongs.<sup>220</sup>

Identity is not solely an individual process. How a person is seen by others affects how they define themselves.<sup>221</sup> When these views are

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215. See Holning Lau, *An Introduction to Intragroup Dissent and Its Legal Implications*, 89 CHI.-KENT L. REV. 537, 539 (2014) (“[R]acial, ethnic, and religious groups are identity groups because these groups frequently play a role in shaping people’s self-concept. To be sure, not all individuals feel a strong sense of membership in racial, ethnic, and religious groups, but these groups have been socially constructed in such a way that they are often salient to people’s identity.”); Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1527–28 (2013) (discussing challenges faced when African-American lawyers share one social identity with clients (race) but not another (class)); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 283 (1995) (“As the notions of outing and passing remind us, a person’s interior sense of his or her own race or sexual orientation may or may not be enacted in public. Yet, public or not, each of these identities is social, carrying a conventional name that defines someone as a particular kind of person, a member of one of society’s categories of identity.”).

216. Manta & Robertson, *supra* note 132, at 1441.

217. *Id.* at 1440.

218. *Id.* at 1441.

219. See *id.* (“Security of citizenship encourages such group commitments by strengthening an ‘American’ social identity. And it encourages cooperative democratic role-taking by allowing the self-verification of an American role-identity, which is enacted by voting and engaging in other forms of civic participation.”).

220. See Benjamin E. Mannion, Note, “*A People Distinct from Others*”: *Service, Sacrifice, and Extending Naturalized Citizenship to American Samoans*, 27 TRANSNAT’L L. & CONTEMP. PROBS. 477, 512 (2018) (“Few events shape or reform someone’s sense of culture and belonging [more] than participating in the military or armed conflict, and deferring American citizenship for individuals who have historically answered the call to service while being treated legally as second-class Americans is an insult to their sacrifice.”).

221. See BURKE & STETS, *supra* note 214, at 116–19 (explaining how individuals go through the process of identity-verification); see also Jessie K. Finch & Robin Stryker, *Competing Identity Standards and Managing Identity Verification*, in IDENTITY AND SYMBOLIC INTERACTION: DEEPENING FOUNDATIONS, BUILDING BRIDGES 119, 140 (Richard T. Serpe, Robin Stryker & Brian Powell eds., 2020) (quoting a Latino judge whose participation in streamlined immigration hearings was challenged: “People say, ‘Well how can you do that?’ Like to me, as a judge, sentence these people to time. I look at them and I say, ‘I’m an American. The problem is this: you think I’m Mexican.”).

reciprocal—the person understands that they are seen in the same way they see themselves—that identity is strengthened. When the reflected feedback is not symmetrical and it becomes clear that the individual’s self-conception does not match how others see them, emotional distress can result in the short term.<sup>222</sup> In the long term, the individual may become “less inclined to remain in the group.”<sup>223</sup>

2. *Asymmetrical Belonging*.—At the macro level, there is an asymmetric sense of belonging between the U.S. Territories and the rest of the United States. That is, individuals in the U.S. Territories (whether they are formally considered to be U.S. nationals or U.S. citizens) have a strong American identity. One of the strongest indicia of national belonging is putting one’s life on the line for the sake of national defense.<sup>224</sup> American Samoans are leaders in this regard. Soldiers from American Samoa “incurred the highest per capita death toll of any state or territory in the United States,” during the conflict in Iraq, and “American Samoa ranks first, per capita, among all U.S. states and territories in the number of its residents that have volunteered to serve in the U.S. Army.”<sup>225</sup>

Most mainlanders, however, know little if anything about American Samoa—so much so that “when its delegate, Eni Faleomavega, visited Congress, he was introduced as the representative from ‘American Samolia.’”<sup>226</sup> This asymmetry holds true for the other Territories as well. According to one poll, fifty-four percent of Americans polled “did not know that Puerto Ricans are U.S. citizens.”<sup>227</sup> Scholars have remarked that the U.S. Territories have been rendered “essentially invisible” to mainland U.S.

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222. See BURKE & STETS, *supra* note 214, at 116–18 (“[A] lack of identity-verification occurs when the perceptions about the person in the situation disconfirm the person’s identity-standard meanings . . . . Persons who have low levels of self-efficacy are more likely to shy away from problematic situations . . . . [S]elf-efficacy arises from the successful verification of role identities.”).

223. *Id.* at 117.

224. See *supra* note 220 and accompanying text.

225. Clanton, *supra* note 91, at 139.

226. Sarene Leeds, *John Oliver Gives Voice to Citizens of U.S. Territories*, WALL ST. J. (Mar. 9, 2015, 9:00 AM), <https://www.wsj.com/articles/BL-SEB-87160> [<https://perma.cc/2NRM-LTRQ>].

227. Villazor, *supra* note 181, at 137.

citizens.<sup>228</sup> Even when territorial issues are brought up, they are sometimes dismissed as insignificant.<sup>229</sup>

One scholar became interested in writing about the U.S. Territories when he realized that even as a doctoral student in U.S. foreign relations, “nobody ever expected me to know even the most elementary facts about the territories. They just didn’t feel important.”<sup>230</sup> But in traveling to the Philippines, he realized that its history as part of the United States was highly influential and could still be seen in the street names of Manila, where “streets are named after U.S. colleges (Yale, Columbia, Stanford, Notre Dame), states and cities (Chicago, Detroit, New York, Brooklyn, Denver), and presidents (Jefferson, Van Buren, Roosevelt, Eisenhower).”<sup>231</sup> This difference in perspective is what popular culture calls the “But for me, it was Tuesday” trope.<sup>232</sup> From the perspective of the less powerful, a relationship or event may be world-changing.<sup>233</sup> From the perspective of the more powerful, that same event or relationship may be one of many and utterly forgettable: just another Tuesday.<sup>234</sup>

This asymmetrical sense of belonging goes back to the first acquisition of overseas territory. When the Philippines was still a U.S. territory, for example, Filipino children studied the Declaration of Independence in school and believed themselves to be fully American.<sup>235</sup> According to one scholar, “Filipinos who moved to the US, especially in the early years, nurtured the expectation that they would be considered American citizens, with citizenship understood as more than just a legal status but a social practice that respected human dignity.”<sup>236</sup> Filipino migrants at the time reported that “[i]n school in the Islands we learn from the Declaration of Independence

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228. See Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (explaining that the legal treatment of the territories had rendered them “essentially invisible”).

229. See, e.g., *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (stating in dicta that the “distinction [between citizen and national] has little practical impact today” because “the only remaining noncitizen nationals are residents of American Samoa and Swains Island”).

230. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* 15 (2019).

231. *Id.*

232. See *But for Me, It Was Tuesday*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/ButForMeItWasTuesday> [<https://perma.cc/9S9S-634R>] (illustrating the trope of a critical event affecting the protagonist merely being a “mundane activity” to the antagonist).

233. *Id.*

234. *Id.* (quoting *STREET FIGHTER* (Capcom 1994)).

235. See Filomeno V. Aguilar Jr., *The Riddle of the Alien-Citizen: Filipino Migrants as US Nationals and the Anomalies of Citizenship, 1900s–1930s*, 19 *ASIAN & PAC. MIGRATION J.* 203, 206–07 (2010) (describing how school lessons “from the Declaration of Independence that all men are created equal” contributed to the unrealized expectations of Filipinos who moved to the U.S. in the early twentieth century that they would be considered and treated equally as American citizens).

236. *Id.* at 206.

that all men are created equal. But when we get over here we find people treated us as if we were inferior.”<sup>237</sup>

Identity salience can also shift as a person moves between the U.S. Territories and the states. As one scholar explained:

Although I self-identify as Samoan-American, in this cultural dissonance I was viewed as a Samoan in Hawai’i and yet simply as an American in Samoa. This conflict between how I identify and how others perceive me directly reflect[s] the internal tug-of-war that is at the center of the Samoan politic.<sup>238</sup>

These types of moves are common. The Samoan Federation of America reports that “[m]ore American Samoans now live in the fifty states than in American Samoa,” citing to census numbers from 2010 showing 184,440 Samoans living in the fifty states and 55,519 living in American Samoa.<sup>239</sup> The identity issue is especially acute for American Samoa, whose people are not considered citizens when they move to the mainland and are therefore barred from certain rights, including employment in a number of capacities and the receipt of some military promotions.<sup>240</sup> But the mainland/territory diaspora exists for other territories as well. There are more Puerto Ricans living in Florida alone, for example, than living in Puerto Rico.<sup>241</sup>

The lack of borders between the U.S. Territories and the fifty states has allowed the free flow of people, a robust diaspora, and deep economic and social ties. These factors, combined with more than a century of U.S. governance, have given rise to a strong American identity. But because this identity has not been reciprocal, with the U.S. Territories remaining “invisible” to most Americans, they have not shared equally in political power—regardless of citizenship status.<sup>242</sup> As a result, the U.S. Territories are “frequently subjected to legislation, executive action, and regulation that damage their interests without their consent or input.”<sup>243</sup> U.S. citizens residing in the Territories are “denied certain federal benefits simply because

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237. *Id.* at 207.

238. Ian Falefuafua Tapu, Comment, *Who Really Is a Noble?: The Constitutionality of American Samoa’s Matai System*, 24 ASIAN PAC. AM. L.J. 61, 62 (2020).

239. Brief of Amicus Curiae Samoan Fed’n of Am., Inc., *supra* note 87, at 26.

240. *Id.* at 27.

241. *Puerto Ricans on the Mainland United States*, THE ECONOMIST (Oct. 5, 2017), <https://www.economist.com/united-states/2017/10/05/puerto-ricans-on-the-mainland-united-states> [<https://perma.cc/4UY4-ZZHT>] (“There are about 5m Puerto Ricans on the mainland now, a fifth of them in Florida—more than remain on the island.”).

242. Lin, *supra* note 33, at 1269 (“[T]he lack of political power is a serious affliction for the Territories and their people.”).

243. *Id.* at 1266.

of their residence in a territory.”<sup>244</sup> In one case, an individual was denied disability benefits because of her residence on Guam, though her twin sister qualified for the same benefit while residing in Pennsylvania.<sup>245</sup> Despite their status as Americans, residents of the U.S. Territories have neither a direct voice in governance nor a shared sense of allegiance from the rest of the American public.<sup>246</sup>

3. *Belonging and Legal Status.*—A shared sense of identity does not just shape how political power is distributed. It also affects legal status and legal rights. As other scholars have noted, the legal status of citizenship is “constituent of identity” and “provides the mechanisms that support institutions and the identities that they define.”<sup>247</sup> Thus, people’s beliefs about who is a “real” American and who “deserves” to be American flow into the law.<sup>248</sup> Even the case of *Wong Kim Ark*, where the Supreme Court first applied the Fourteenth Amendment to protect the birthright citizenship of an Asian-American individual, arose when the plaintiff was not seen as worthy of citizenship, “[b]ecause the said Wong Kim Ark has been at all times, by reason of his race, language, color and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.”<sup>249</sup> Citizenship, as it was construed by those who sought to exclude Wong Kim Ark, depended on these characteristics together: race, language, and even occupation and clothing choice.<sup>250</sup>

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244. *Id.* at 1267.

245. *Id.*; see also Derieux & Weare, *supra* note 14, at 304 (explaining a Puerto Rican resident’s legal challenge against the Social Security Administration that raised the argument that “SSI discrimination against residents of U.S. territories violated the Constitution’s guarantee of Equal Protection”) (citing *United States v. Vaello Madero*, 956 F.3d 12, 15 (1st Cir. 2020)). The Supreme Court ultimately upheld the variance in SSI benefits in its decision in *Vaello Madero*. *United States v. Vaello Madero*, No. 20-303, 2022 WL 1177499 (U.S. Apr. 21, 2022).

246. Justice Sotomayor made exactly this point in her dissent to the Court’s decision in *Vaello Madero*, writing that “[b]ecause residents of Puerto Rico do not have voting representation in Congress, they cannot rely on their elected representatives to remedy the punishing disparities suffered by citizen residents of Puerto Rico under Congress’ unequal treatment.” *United States v. Vaello Madero*, No. 20-303, 2022 WL 1177499, at \*19 (U.S. Apr. 21, 2022) (Sotomayor, J., dissenting).

247. Berezin, *supra* note 212, at 221.

248. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 468 n.183 (2002) (noting that “citizenship is subjective and is to be applied depending upon whether the collective psyche believes an individual or group deserves the status”).

249. 169 U.S. 649, 650 (1898).

250. *Id.*

The intersection between identity and legal status has never gone away.<sup>251</sup> As discussed earlier, Fourteenth Amendment citizenship is contested for those born in the U.S. Territories—but not for those born in the District of Columbia, although there is no plausible rationale to distinguish between the two statuses.<sup>252</sup> This pattern of whose citizenship is challenged and whose is not repeats itself in other contexts.

As discussed in Part I, the Fifth Circuit has held that an individual born on a U.S. military base to a U.S. citizen father serving in the armed forces was not a citizen.<sup>253</sup> But former Senator John McCain, born in nearly identical circumstances, was the presidential nominee of one of the two major parties. Scholars have argued that McCain was not constitutionally eligible to be president: “Because persons born in unincorporated territories such as the Canal Zone were out of the United States but within its jurisdiction, section 1993 did not apply. Since there was no other law granting citizenship in effect, children of citizens born before 1937 in the Canal Zone were not citizens at birth.”<sup>254</sup> That scholarly view, however, was not adopted either by Congress (who entered a resolution supporting his eligibility)<sup>255</sup> or by the American public (who spent more energy questioning President Obama’s eligibility).<sup>256</sup> That difference may come down to perceived belonging: those who questioned Obama’s eligibility may have focused on his mixed-race heritage and Kenyan father, while they viewed McCain as “patently American” without “even a whiff of a competing foreign tie.”<sup>257</sup>

Notions of belonging and deserving also underlie the courts’ interpretation of nationality. As discussed above, Congress adopted a nationality statute in the wake of *Gonzales*.<sup>258</sup> The United States Code now defines a “national of the United States” as “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes

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251. See, e.g., MICHAEL KAGAN, *THE BATTLE TO STAY IN AMERICA: IMMIGRATION’S HIDDEN FRONT LINE* 2–3 (2020) (recounting how hearing anti-immigrant rhetoric made the author’s adopted child born abroad feel anxious about the security of her own citizenship status).

252. See *supra* section II(B)(3).

253. *Thomas v. Lynch*, 796 F.3d 535, 542 (5th Cir. 2015).

254. Gabriel Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 11 (2008).

255. S. Res. 511, 110th Cong. (2008) (enacted).

256. Joseph W. Dellapenna, *Constitutional Citizenship Under Attack*, 61 VILL. L. REV. 477, 506 (2016) (“There is a certain irony, given the campaign against President Obama’s eligibility to be President, that the ineligible candidate in 2008 was not Barack Obama.”).

257. Peter J. Spiro, *McCain’s Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 45 (2008).

258. See *supra* Part I.



permanent allegiance to the United States.”<sup>259</sup> Thus, all citizens are also U.S. nationals, but not all nationals are citizens. In a series of cases, the federal courts have had to apply this statute to individuals who were in the process of seeking citizenship.

Voluntary allegiance alone is usually held to be insufficient to create national status.<sup>260</sup> Whether “national” status can apply at all before the grant of formal citizenship is not entirely clear. In one removal case, *Perdomo-Padilla v. Ashcroft*,<sup>261</sup> the defendant argued that he should qualify as a U.S. national.<sup>262</sup> He had begun the naturalization process to gain citizenship, but he had not completed it when he was arrested for a marijuana offense.<sup>263</sup> The government sought his removal from the country, and the defendant argued that because he had gotten far enough along in the naturalization process to submit “an application for naturalization that contained a statement of allegiance to the United States,” he should qualify as a U.S. national and therefore have a right to remain in the country.<sup>264</sup> The court, however, disagreed and ordered him removed.<sup>265</sup> Other circuits subsequently followed this decision.<sup>266</sup>

But when the same argument had been made earlier about a much more sympathetic individual who was the victim of a crime, the Fourth Circuit accepted this reasoning. In the earlier case, a defendant was on trial for the murder for hire of the individual in question.<sup>267</sup> The charges would be

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259. 8 U.S.C. § 1101(a)(22).

260. For example, an individual who was brought to the United States as a child, whose “devotion and the center of his allegiance became the United States,” and who maintained no memory of, or ties to, the country of his birth could not qualify as a U.S. national. *See United States v. Sotelo*, 109 F.3d 1446, 1448 (9th Cir. 1997) (“Without setting forth a precise and definitive definition of national, the term certainly does not include a person who illegally enters the United States and subjectively considers himself a person who owes permanent allegiance to this country.”); *see also Ramos-Garcia v. Holder*, 483 F. App’x 926, 933 (5th Cir. 2012) (“This Court, like several of our sister circuits, has rejected the argument that military service and the taking of the oath of allegiance make a person a national of the United States.”); *Dragenice v. Gonzales*, 470 F.3d 183, 189 (4th Cir. 2006) (“[T]he oath administered in connection with military service cannot alone confer national status . . . .”); *Reyes-Alcaraz v. Ashcroft*, 363 F.3d 937, 938 (9th Cir. 2004) (holding that “service in the armed forces of the United States, along with the taking of the standard military oath, does not alter an alien’s status to that of a ‘national’”).

261. 333 F.3d 964 (9th Cir. 2003).

262. *Id.* at 965.

263. *Id.* at 966.

264. *Id.*

265. *Id.* at 965.

266. *See Salim v. Ashcroft*, 350 F.3d 307, 310 (3d Cir. 2003) (“[W]e now join the Court of Appeals for the Ninth Circuit in holding that simply filing an application for naturalization does not prove that one ‘owes a permanent allegiance to the United States’”); *United States v. Jimenez-Alcala*, 353 F.3d 858, 861 (10th Cir. 2003) (“[T]he term ‘national,’ when used to describe non-citizens, refers only to those born in territories of the United States.”) (quoting *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 968 (9th Cir. 2003)).

267. *United States v. Morin*, 80 F.3d 124, 125–26 (4th Cir. 1996).

enhanced if the intended murder was of “a national of the United States, while such national is outside the United States.”<sup>268</sup> When the crime was committed, the intended victim had been in a similar liminal state where he had applied for citizenship but had not yet obtained it.<sup>269</sup> The Fourth Circuit held that the heightened charge could stand, concluding that “an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself.”<sup>270</sup>

Later, a federal district court in Pennsylvania reconciled these holdings in another removal case. Like the *Perdomo-Padilla* defendant, the petitioner in *Shittu v. Elwood*<sup>271</sup> was convicted of a crime in between filing his naturalization application and becoming naturalized.<sup>272</sup> The court accepted the idea that an individual in this liminal status could qualify as a “national,” but concluded that even if so, the petitioner’s “aggravated felony conviction was sufficient by itself to refute any other evidence of his permanent allegiance to this country.”<sup>273</sup> Because the petitioner’s “felony conviction objectively demonstrated his lack of allegiance to the United States and its laws, and negated any possible inference of permanent allegiance from his naturalization application,” the court held that he was subject to removal after his conviction.<sup>274</sup>

The Fourth Circuit later followed this rationale in limiting its own earlier holding, writing that the murder charge in that case had occurred in a “different context” and therefore would not control the question of immigration removal.<sup>275</sup> A dissenting judge criticized the court’s reliance on “different contexts,” writing that although he agreed that the earlier case was wrongly decided, only the Supreme Court or the Fourth Circuit sitting en banc was empowered to overrule the earlier holding.<sup>276</sup> He criticized the panel for “interpret[ing] the exact language in the same statute differently in different cases,”<sup>277</sup> quoting the Supreme Court’s language that:

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268. *Id.* at 126.

269. *Id.*

270. *Id.*

271. 204 F. Supp. 2d 876 (E.D. Pa. 2002).

272. *Id.* at 877.

273. *Id.* at 880.

274. *Id.* at 880–81.

275. *Daly v. Gonzales*, 129 F. App’x 837, 840 & n.3 (4th Cir. 2005) (“*Morin* concerned the reach of a federal murder statute and is not controlling where, as here, a person’s nationality status determines whether he can enjoy the rights and benefits of United States nationality and avoid deportation.”).

276. *Id.* at 845–46 (Duncan, J., dissenting).

277. *Id.* at 845.

It would be an extraordinary principle of construction that would authorize or permit a court to give the same statute wholly different meanings in different cases, and it would require a stronger showing of congressional intent than has been made in this case to justify the assumption of such unconfined power.<sup>278</sup>

The courts have therefore come to different conclusions about whether the nationality statute applies when the individual claiming the statute's protection is a defendant convicted of a crime (and resisting exclusion from the U.S.) or a crime victim whose nationality might serve to enhance the sentence imposed for the crime. In this line of cases, as with the status of people born on military bases or in the District of Columbia, the cases do not overtly rely on notions of identity or belonging, but those concepts nonetheless affect legal status. The legal development of citizenship law, after all, depends on whose citizenship is challenged (often criminal defendants, racial minorities, or persons perceived as foreign) and whose citizenship is assumed (often those who are wealthy, powerful, English-speaking, and white).<sup>279</sup>

#### B. *Constitutional Guarantees and Indigenous Rights*

In recent years, people have begun to ask whether the vision of exclusionary citizenship found in the *Insular Cases* could be repurposed to protect the cultural practices indigenous to the territories.<sup>280</sup> Scholars have suggested that “given that conventional frameworks appear to be hostile to laws that may be viewed as protective of the rights of indigenous groups,” repurposing the *Insular Cases* may be “at this juncture, the primary means through which some territorial peoples might be able to push for protection of certain cultural and political rights that they believe they would not be able to achieve under traditional constitutional analysis.”<sup>281</sup> The courts in *Tuaua* and *Fitisemanu* jumped on this idea, suggesting that it would be inappropriate to apply the Citizenship Clause to individuals born in American Samoa in

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278. *Id.* at 845–46 (quoting *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 34 (1969)).

279. See Peter Halewood, *Citizenship as Accumulated Racial Capital*, 1 COLUM. J. RACE & L. 313, 321 (2012) (“The universality model of American citizenship is false—race and class are always already historically embedded in American nationalism.”).

280. See Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1717–18 (2017) (acknowledging that “[t]he *Insular Cases* bear the unmistakable taint of racism and the apologetics of empire, and the doctrines offer little in the way of coherence or consistency,” but suggesting that “[s]o long as we have territories awkwardly bundled into the folds of the republic yet maintain committed to affording them any measure of self-determination, the *Insular Cases* may provide the way”).

281. Villazor, *supra* note 181, at 145.

part because doing so would risk invalidating cultural practices perceived as inconsistent with the Constitution.<sup>282</sup>

The government of American Samoa intervened in *Fitisemanu* and *Tuaua* to make just this case. It pointed to three practices in particular that could be viewed as incompatible with constitutional guarantees. First, the government pointed to a practice of “limiting eligibility to serve in the upper house of the territorial legislature” to registered *matai*, or “[c]hiefs of Samoan extended families.”<sup>283</sup> Second, “Samoan law restricts the sale of community land to anyone with less than fifty percent racial Samoan ancestry and the governor must approve each sale.”<sup>284</sup> And third, American Samoa “has an exceptionally homogenous culture of religion” where “[r]eligious observance is not only a social norm, but it is also enforced by local leaders, the village *matai*.”<sup>285</sup>

The theory for how the denial of citizenship would preserve these cultural practices is one of practicality, not formalism. That is, at this time there is no affirmative legal authority suggesting that citizenship would play any role in deciding the legality of these practices. The practical argument, in fact, relies on the fact that the U.S. Territories have been “essentially invisible” to the larger polity.<sup>286</sup> Specifically, “Congressman Faleomavaega and the American Samoan Government posit the extension of citizenship could result in greater scrutiny under the Equal Protection Clause of the Fourteenth Amendment,” which could threaten cultural practices.<sup>287</sup> This comes down to a form of identity: that is, if it becomes undeniable that American Samoans are U.S. citizens, then courts might feel compelled to extend other constitutional guarantees.

Of course, without precedent to this effect, there is no way to know whether that perspective is true. Other Territorial officials who filed an amicus brief supporting the recognition of Fourteenth Amendment

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282. *Fitisemanu v. United States*, 1 F.4th 862, 870–71 (10th Cir. 2021), *petition for cert. filed*, No. 21-1394 (U.S. Apr. 27, 2022); *Tuaua v. United States*, 788 F.3d 300, 310 (D.C. Cir. 2015).

283. Intervenor Defendants-Appellants’ Reply Brief, *supra* note 89, at vi, 5; Brief for Intervenor or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 32, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272).

284. Intervenor Defendants-Appellants’ Reply Brief, *supra* note 89, at 7.

285. Intervenor Defendants-Appellants’ Opening Brief, *supra* note 93, at 22.

286. Ponsa, *supra* note 228, at 2 (“The Insular Cases . . . rendered [the unincorporated U.S. territories] essentially invisible.”).

287. *Tuaua*, 788 F.3d at 310.

citizenship disagree that this is a likely outcome.<sup>288</sup> As a former president of the American Samoa Bar Association stated, “[t]he argument that Equal Protection is a threat to the culture rests on two assumptions: (1) that the Equal Protection clause does not already apply to American Samoa; and (2) that no cultural protections could survive Equal Protection analysis.”<sup>289</sup> Both propositions are somewhat dubious.<sup>290</sup>

When courts directly faced constitutional challenges to practices rooted in territorial culture, judges did not hesitate to strike down those practices without relying on citizenship status. As early as 1910, the Supreme Court struck down under the Eighth Amendment a Philippine punishment of hard labor for conviction of falsification of an official document, holding that the sentence violated “constitutional limitations formed to establish justice.”<sup>291</sup> More recently, Guam was unable to use the *Insular Cases* as a shield to create an “indigenous plebiscite registry for self-determination by ‘Native Inhabitants of Guam.’”<sup>292</sup> The Ninth Circuit concluded that “[h]istory and context confirm that the ‘Native Inhabitants of Guam’ voter eligibility restriction so closely parallels a racial classification as to be a proxy for race.”<sup>293</sup> The court therefore struck down the referendum plan.<sup>294</sup>

A district court judge in Puerto Rico also tried to use the *Insular Cases* as a shield to uphold Puerto Rico’s law forbidding same-sex marriage, concluding “that the fundamental right to marry, as recognized by the Supreme Court in *Obergefell*, has not been incorporated to the juridical reality of Puerto Rico.”<sup>295</sup> The First Circuit did not even wait for a final judgment to reverse this decision; instead, it granted a writ of mandamus, writing that “[t]he district court’s ruling errs in so many respects that it is hard to know where to begin. The constitutional rights at issue here are the

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288. Brief of Amici Curiae Members of Cong. et al., *supra* note 87, at 5 (arguing that the people of other U.S. Territories “have enjoyed U.S. citizenship for decades without sacrificing their cultural heritage or ability to alter the terms of their political relationship with the United States. There is no reason to think that the experience of American Samoans would be any different”).

289. Morrison, *supra* note 127, at 141.

290. See, e.g., Brendan McCloskey, *Granting Samoans American Citizenship While Protecting Samoan Land and Culture*, 10 DREXEL L. REV. 497, 533 (2018) (arguing that “the application of birthright U.S. citizenship threatens neither the territory’s culture nor communal land system”).

291. *Weems v. United States*, 217 U.S. 349, 381 (1910) (holding that sentencing differentials showed “more than different exercises of legislative judgment,” and that the differential “condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice”); see also Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 CASE W. RES. L. REV. 147, 178 (2006) (noting that “the territories have been applying the ‘substantive’ rights protected for the last century with no problems”).

292. James T. Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1941 (2020).

293. *Davis v. Guam*, 932 F.3d 822, 825 (9th Cir. 2019), *cert. denied sub nom. Territory of Guam v. Davis*, 140 S. Ct. 2739 (2020).

294. *Id.* at 843.

295. *Conde Vidal v. Garcia-Padilla*, 167 F. Supp. 3d 279, 288–87 (D.P.R. 2016).

rights to due process and equal protection, as protected by both the Fourteenth and Fifth Amendments to the United States Constitution.”<sup>296</sup> The appellate court concluded that “[t]hose rights have already been incorporated as to Puerto Rico” by the Supreme Court in *Examining Board of Engineers Architects & Surveyors v. Flores de Otero*, and it remanded the case, ordering that it be assigned to a different judge.<sup>297</sup>

The Supreme Court would not likely hold that rights analyzed in *Flores de Otero* apply only in Puerto Rico and not also in the other Territories.<sup>298</sup> The decision did not rest on citizenship status, but rather on a nineteenth-century statute pre-dating the *Insular Cases* and providing that “[t]he Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.”<sup>299</sup> Thus, even though the Supreme Court has not yet formally overruled the *Insular Cases*, both the Supreme Court and the courts of appeals have been unwilling to recognize the incorporation doctrine set out in those cases as a shield against the application of constitutional guarantees.

But what about the flip side: could the Court recognize that constitutional guarantees of both citizenship and liberty apply in the U.S. Territories, but also hold that indigenous cultural practices satisfy strict scrutiny? There is no legal reason why not. In rare cases, the Supreme Court has found compelling-enough state interests that justify some restrictions even of fundamental rights.<sup>300</sup> And the Ninth Circuit has upheld land-

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296. *In re Conde Vidal*, 818 F.3d 765, 766 (1st Cir. 2016).

297. *Id.* at 766–67 (citing *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976)).

298. Cody Sargeant, Note, *Misplaced Fear: Tuaua and the False Link Between Citizenship and Equal Protection*, 27 S. CAL. REV. L. & SOC. JUST. 145, 161–62 (2018) (explaining that “equal protection already applies in American Samoa,” and arguing that “[i]f the land rules *do* violate equal protection, the Supreme Court should not be turning a blind eye to this. Issues of citizenship should not be necessary to prompt the Supreme Court to address constitutional violations”).

299. *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 585 (1976) (quoting Rev. Stat. § 1891 (1874)); *see also* *Boumediene v. Bush*, 553 U.S. 723, 755–56 (2008) (“When Congress exercised its power to create new territories, it guaranteed constitutional protections to the inhabitants by statute.”).

300. *See* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (upholding a law forbidding material support of terrorist organizations); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1673 (2015) (plurality opinion) (upholding restrictions on judicial fundraising); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding restrictions on, *inter alia*, the distribution of campaign materials within 100 feet of the entrance to a polling place); *see also* Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1428 & n.3 (2017) (explaining that “in only one modern case [*Humanitarian Law Project*] has a majority of the Court unambiguously upheld a content-based law under strict scrutiny” (footnote omitted)).

alienation restrictions in the Northern Mariana Islands based on indigenous status, writing that, “The Bill of Rights was not intended . . . to operate as a genocide pact for diverse native cultures.”<sup>301</sup> Citizenship, again, did not play a role in that decision, as Congress has extended citizenship to the inhabitants of the Northern Mariana Islands.<sup>302</sup>

Direct constitutional evaluation of the practices at issue does not guarantee that the cultural practices would survive strict scrutiny. Indeed, a number of scholars have argued that at least some of the practices should not.<sup>303</sup> The interests of cultural preservation and compliance with United States guarantees of such preservation are certainly strong ones and may well be compelling enough to directly uphold the practices at issue.<sup>304</sup>

### C. *Toward a Legal Recognition of Integral Citizenship*

If courts recognize the constitutional rights of people born in the U.S. Territories, then the conversation about rights will shift from individual status to group rights and the relationship between Congress and territorial governments.<sup>305</sup> It is unlikely that recognizing constitutional citizenship in the U.S. Territories would increase the risk that the indigenous rights in the U.S. Territories would be circumscribed.<sup>306</sup> In fact, just the opposite may be true—recognizing citizenship as an integral part of the American identity may increase the likelihood that Congress and the courts will take steps to protect cultural practices.

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

302. *Developments in the Law: The U.S. Territories*, *supra* note 139, at 1698 (“*Wabon*’s result, and the authorities on which it relied, arguably undermine the force of the *Tuaua* court’s reasoning.”).

303. *See, e.g.*, Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 753 (1995) (“Employing a race-based limit on one aspect of the cultural ecosystem—land ownership—failed to achieve its goal and diverted attention from many other aspects that define and support a culture.”).

304. *See* Ivy Yeung, *The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?*, ASIAN-PAC. L. & POL’Y J., Spring 2016, at 1, 30 (“During the negotiation of its territorial status, the United States agreed to honor its commitment to protect Samoan autonomy through its land and culture.”).

305. *See* John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401, 426 (2018) (“What constitutional restrictions might be incorporated against [territories] and under what interpretive theory remains to be determined . . . . Some restrictions like the Thirteenth Amendment’s prohibition on slavery would certainly apply. Others would not, or would not apply with the same rigor as they do against states.” (footnote omitted)); *see also* Deborah D. Herrera, *Unincorporated and Exploited: Differential Treatment for Trust Territory Claimants—Why Doesn’t the Constitution Follow the Flag?*, 2 SETON HALL CONST. L.J. 593, 642 (1992) (“It is not that the inhabitants of Micronesia cannot be subjected to race or national origin discrimination, it is that the United States government, and its delegates, are constitutionally prohibited from engaging in such discriminatory behavior.”).

306. *See supra* subpart III(B).

As discussed above, there is currently an asymmetric relationship between the U.S. Territories and the States, in which residents of the U.S. Territories feel a strong connection to the United States but are often overlooked and ignored by the American polity.<sup>307</sup> But a strong social identity recognizing a shared citizenship can help counteract that invisibility. Social science research has shown that “civic nationalism champions egalitarian values, law abidance, and building strong emotional ties with the recipient society.”<sup>308</sup> Scholars have found that this shared sense of “civic nationalism” in Canada “may precipitate acceptance of cultural plurality and support for heritage maintenance among minority groups.”<sup>309</sup> Similarly, in the Netherlands, scholars have detected a “greater acceptance of Muslim immigrants when national identity is framed as a historical narrative on the country’s tolerance of diversity.”<sup>310</sup>

Scholar Peter Callero has also found a connection between identity and democratic participation, concluding that “cooperation for the common good is also motivated by role-taking, group commitments, and altruistic identities.”<sup>311</sup> Others, as well, have explained that individuals’ cognitive framing tends to reinforce uniformity and enhance group members’ self-esteem.<sup>312</sup> Thus, recognizing the constitutional citizenship of individuals in the U.S. Territories may bolster cultural preservation. Legally recognizing citizenship can solidify a sense of social identity and of shared aims, increasing political support for the maintenance of cultural practices and making it more likely that these interests will be recognized as ones worthy of constitutional protection.

As a legal matter, recognizing integral citizenship also avoids reliance on the worst history of the *Insular Cases* and closes the logical gaps raised by the courts’ denial of citizenship rights. It offers consistency to the people born in the District of Columbia and in the U.S. Territories. It also gives

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307. See *supra* section III(A)(2).

308. Chan-Hoong Leong, Adam Komisarof, Justine Dandy, Inga Jasinskaja-Lahti, Saba Safdar, Katja Hanke & Eugene Teng, *What Does It Take to Become “One of Us?” Redefining Ethnic-Civic Citizenship Using Markers of Everyday Nationhood*, 78 INT’L J. INTERCULTURAL REL. 10, 11 (2020).

309. *Id.*

310. *Id.*

311. Peter L. Callero, *Identity and Social Capital: How to Advance Democracy at the Level of Interaction*, in NEW DIRECTIONS IN IDENTITY THEORY AND RESEARCH 75, 99 (Jan E. Stets & Richard T. Serpe eds., 2016).

312. See Michael A. Hogg, *Social Identity and Misuse of Power: The Dark Side of Leadership*, 70 BROOK. L. REV. 1239, 1242 (2005) (“Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.”).



protection to members of the territorial diaspora on the mainland; after all, there are more American Samoans now living on the mainland than in American Samoa.<sup>313</sup> It is not surprising, perhaps, that the Samoan Federation of America and the government of American Samoa would stake out opposite positions on the citizenship question—individuals in the diaspora find their civic and political rights limited and are unable to qualify for certain government jobs and military positions because of their lack of citizenship, while governmental officials in American Samoa may be more concerned about maintaining cultural practices on the island. Professor Steve Vladeck has pointed out that allowing the citizenship question “to be resolved based upon majoritarian sentiment” is problematic, because it “fundamentally devalues the importance of constitutional *rights* in the territories—where the rights that *aren't* supported by a majority are perhaps the *most* in need of judicial incorporation.”<sup>314</sup> Recognizing an integral citizenship founded in the Fourteenth Amendment can protect individual rights, strengthen national ties, and offer a more secure base from which to work toward a larger preservation of culture.

### Conclusion

Recent court decisions show that confusion reigns about the citizenship status of the residents of the U.S. Territories. Only one judicial interpretation respects the structure of the Constitution and has the power to provide a legally as well as socially unified outcome: the understanding that the Fourteenth Amendment’s guarantee of birthright citizenship covers, without any reservation, individuals born in the U.S. Territories. Precedent based on explicitly racist rationales—to the extent it suggests a different answer—cannot stand in the way of that conclusion. An integral American identity is better able to create the willingness to protect indigenous rights than does a doctrine founded on political and social exclusion. Rather than being relegated to the status of a footnote, the residents of American Samoa and of the other U.S. Territories deserve to be recognized as equal citizens.

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313. See *supra* note 239 and accompanying text.

314. See Steve Vladeck, *Three Problems with Justice Brown's Opinion in Tuaua*, JUST SECURITY (June 7, 2015), <https://www.justsecurity.org/23572/three-problems-tuaua/> [<https://perma.cc/5497-B4EE>].