

Citizenship, Assimilation, and the Insular Cases: Reversing the Tide of Cultural Protectionism at American Samoa

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Notwithstanding the gravity of American sovereignty, the people of American Samoa have maintained a distinctive way of life: the fa'a Samoa. This resiliency reflects that American Samoa is in many ways the most unique of the five U.S. territories, including the fact that its residents are the only Americans who do not automatically attain birthright citizenship. Although several petitioners have recently sought to challenge this arrangement, the American Samoa Government (ASG) and successive U.S. administrations continue to argue that the judicial imposition of birthright citizenship would not only be against the will of the majority of American Samoans, but would also constitute the tip of a slippery slope that would undermine local culture by flooding the islands with mainland normative values imposed by distant federal judges. For instance, they argue that the local Native Lands Ordinance would face enhanced scrutiny under the U.S. Constitution's Equal Protection Clause, the territory's chieftain-only senate would run afoul of Article I's prohibition on titles of nobility, and the official observation of prayer would violate longstanding Establishment Clause principles. Two recent rulings by separate U.S. courts of appeals found against the petitioners' citizenship claims on these and other grounds. Yet, while acknowledging that the ASG's fears are justified, neither of the courts tested that slippery slope argument in detail. This Article fills that void by considering each of those arguments in the context of existing constitutional jurisprudence. Based on the experiences of other U.S. territories and Indigenous Peoples, ample precedent suggests that an extension of citizenship would be followed by closer scrutiny in all three areas. It is therefore worth considering that the United States ought to improve and enhance its

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ability to govern jurisdictions with the flexibility provided by the Territorial Clause of the U.S. Constitution in order to allow for the preservation of local cultural autonomy. That may or may not mean the extension of citizenship as decided by the people of American Samoa themselves. It also may or may not mean continuance of the Insular Cases precedents, whose checkered legacy the Supreme Court must address in any event. Indeed, this article engages with those precedents on their 100th anniversary and offers commentary on Justice Gorsuch's critical concurrence in the newest case in the line, United States v. Vaello Madero. Ultimately, although there are important improvements to be made in central-local relations, American democracy is sophisticated enough to accommodate unique repertoires of governance so that assimilation need not follow the flag.

I. INTRODUCTION

Notwithstanding the gravity of American sovereignty, the people of American Samoa have maintained a traditional and distinctive way of life: the *fa'a Samoa*.¹ This resiliency reflects that American Samoa is in many ways the most unique of the five unincorporated territories of the United States.² It is the most distant from the mainland, the least populous, the only one not governed under an organic act passed by the U.S. Congress,³ and home to the only Americans who do not automatically attain U.S. citizenship upon birth.⁴

Unlike the residents of the other U.S. territories, American Samoans are classified by statute as "U.S. nationals."⁵ Several plaintiffs have sued to challenge that arrangement in recent years, arguing for

¹ I will italicize Samoan words including *fa'a Samoa*, *matai*, and *Sa* throughout this Article for uniformity, even where the original sources differ.

² The other four unincorporated U.S. territories are Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI).

³ An organic act is act of Congress conferring and defining the governmental powers of a territory. *In re Lane*, 135 U.S. 443, 447 (1890). Unlike the other four unincorporated U.S. territories, American Samoa is governed under a nexus of treaties and a locally adopted constitution rather than an act of Congress. It was the American Samoan Government itself that opted for that arrangement, discussed *infra* Part II.B.

⁴ Whereas persons born in the fifty U.S. states and District of Columbia are granted birthright citizenship under Section 1 of the Fourteenth Amendment to the U.S. Constitution, Native Americans and residents of most U.S. territories are granted birthright citizenship by statute. See 8 U.S.C. § 1402 (1952) (P.R.); 8 U.S.C. § 1406 (1952) (V.I.); 8 U.S.C. § 1407 (1952) (Guam); 48 U.S.C. § 1801 (1976) (CNMI).

⁵ See 8 U.S.C. § 1408, which reads in pertinent part: "[T]he following shall be nationals, but not citizens, of the United States at birth: (1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession"

the automatic extension of birthright citizenship via the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution, but they have been consistently opposed by their own local American Samoa Government (ASG) as well as successive U.S. administrations.⁶ These respondents argue that judicial imposition of U.S. citizenship would not only be against the popular will of the majority of American Samoans, but would also constitute the tip of a slippery slope that would open the floodgates to hegemonic imposition of other mainland constitutional norms by distant federal judges, thereby upending the territory's traditional way of life.⁷ They worry in particular that the local Native Lands Ordinance, which restricts the sale of land to outsiders, would face enhanced scrutiny under the Fourteenth Amendment's Equal Protection Clause; that the territory's *matai* (chieftain) only senate would run afoul of Article I's prohibition on titles of nobility; and that the official observation of *Sa* (a daily period of prayer) would violate the First Amendment's Establishment Clause.⁸

Two recent, yet separate, U.S. courts of appeals rulings found against the petitioners and refused to extend blanket constitutional birthright citizenship to American Samoans for these and other reasons.⁹ Those decisions sparked a new wave of scholarly debate about the so-called Insular Cases:¹⁰ a series of century-old Supreme Court precedents that provide the current framework for territorial

⁶ See *Tuaua v. United States*, 951 F. Supp. 2d 88, 90 (D.D.C. 2013), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015); see also *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1158 (D. Utah 2019), *rev'd*, 1 F.4th 862 (10th Cir. 2021).

⁷ See Defendants' Motion to Dismiss Plaintiffs' Complaint at 8, *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-1143); Reply Brief for Defendants-Appellants at 21, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (No. 20-4019); Intervenor Defendant-Appellants' Reply Brief, *United States v. Fitisemanu*, 20 F.4th 1325 (2020 WL 2832447).

⁸ See *Fitisemanu v. United States*, 1 F.4th 862, 880 (10th Cir. 2021); DOUG MACK, *THE NOT QUITE STATES OF AMERICA* 81–82 (W. W. Norton & Co.) (1st ed. 2017).

⁹ *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015); *Fitisemanu*, 1 F.4th at 864.

¹⁰ See criticism in Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 23 YALE L. & POL'Y REV. 57, 58–59 (2013); Christina Duffy Ponsa, *When Statehood Was Autonomy*, in RECONSIDERING THE INSULAR CASES 25 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); see also GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 119 (Princeton Univ. Press 1996); but see also Arnold Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. WESTERN INT'L L.J. 220–271 (1980); *Developments in the Law—the U.S. Territories*, 130 HARV. L. REV. 1616, 1680–1703 (2017); Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1706–13 (2017).

governance.¹¹ Yet neither of those decisions, nor the scholarship they inspired, have tested the ASG's slippery slope argument in detail. This Article attempts to fill that void by considering each of those arguments in the context of existing constitutional jurisprudence.

Based on the experiences of other U.S. territories and Indigenous Peoples, there is ample precedent to suggest that deeper imposition of mainland constitutional norms would indeed follow an extension of citizenship in all three areas. As it is unlikely to expect the fundamental jurisprudence to favorably change in all of those subject matter areas, it is therefore worth considering that the United States ought to maintain, improve, and enhance its ability to govern jurisdictions with the flexibility provided by the Territorial Clause of the U.S. Constitution in order to better allow for the preservation of local cultural autonomy among discrete and insular communities. The recent track record suggests that preserving Congress' plenary power to extend certain constitutional norms would provide greater space for territorial residents to defend their cultural distinctiveness through political processes rather than against "judicial fiat."¹²

With that said, the renewed attention brought to American Samoa by the plaintiffs in the recent litigations should be channeled into positive action, improving the current repertoires of central-local relations.¹³ That may mean adoption of birthright citizenship if desired, which if chosen in its statutory form would theoretically allow more space for the tailored application of mainland constitutional norms. It also may or may not mean preservation of the Insular Cases,

¹¹ The Insular Cases are a series of U.S. Supreme Court opinions defining the practice of central-local relations between the U.S. federal government and its unincorporated overseas territories after the Spanish-American War. Although scholars differ as to exactly which cases constitute the Insular Cases in their entirety, this author refers to the first wave of Insular Cases as dating between 1901 and 1922, that is, between *Downes v. Bidwell*, 182 U.S. 244 (1901) and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). Coincidentally, that final opinion was published exactly 100 years ago.

¹² *Tuaua*, 788 F.3d at 302.

¹³ In the meantime, necessary improvements include addressing livelihood issues relevant to American Samoans, such as streamlining the path to full U.S. citizenship for those individuals who want it. More federal representation is advised, and existing federal institutions should not blindly defer to the official representations of the ASG about the will of its people given the conservative orientation of elite local politics. All of the existing issues can and should be addressed through political processes that honor the demonstrated will of the American Samoan people. American democracy is sophisticated enough to allow for unique patterns of territorial governance without needing to assimilate the local culture.

whose complex regime of judicially-constructed territorial governance patterns is not demanded by any constitutional text, and whose impact is almost certainly experienced differently across the vastly distant and distinct U.S. territories. If the fundamental design is to be preserved, however, the U.S. Supreme Court should seize this opportunity to affirmatively condemn the strand of racialized reasoning contained within it. Given the unique legal protections afforded to American Samoan culture, the Supreme Court has an opportunity to reverse the polarity of history and declare that their predecessors on the bench—despite themselves—may have ultimately done the right thing for the wrong reasons: that the Insular Cases have operated not to protect the insularity of the United States from cultural contamination, but to protect the insularity of its territorial populations from mainland assimilation.

This Article contains six parts. Following this introduction, Part II discusses American Samoa's historical relationship with the United States and introduces the standards the federal courts have used to extend or withhold direct constitutional norms to the U.S. territories, especially through the "improper and anomalous" standard. Part III surveys the most recent litigations, highlighting the federal judiciary's consideration of local cultural practices. Part IV analyzes the existing jurisprudence that appears applicable to the claims of the ASG, demonstrating that the local native lands ordinance, *matai* system, and religious observances would almost certainly face higher scrutiny if constitutional birthright citizenship were extended. Part V considers the future role of the Insular Cases within the repertoires of territorial governance, especially in light of Justice Gorsuch's critical concurrence in *United States v. Vaello Madero*.¹⁴ Finally, Part VI offers final thoughts and suggestions within a brief conclusion—namely, that while improvements must be made in one form or another, assimilation need not follow the flag.

II. BACKGROUND: THE EDGE OF SOVEREIGNTY

This Part presents the historical background for, and nature of, the legal foundations of U.S. relations with American Samoa. Section A surveys the conditions underlying the treaties that established American sovereignty, Section B discusses the institutionalization of early governance repertoires through local laws and regulations, Section C analyzes the important U.S. Supreme Court jurisprudence

¹⁴ See *United States v. Vaello Madero*, No. 20-303 (U.S. Apr. 21, 2022) (Gorsuch, J., concurring).

that defines central-local relations between the federal government and the territories (i.e., the Insular Cases), and Section D introduces the modern standard derived from the Insular Cases and applied by federal courts to determine to what extent mainland constitutional norms should apply in the U.S. territories.

A. *Cession*

American Samoa encompasses five islands and two coral atolls approximately 2,500 miles southwest of Hawaii in the Pacific Ocean, making it the southernmost territory of the United States.¹⁵ Archeological evidence suggests that humans first inhabited the islands almost 3,000 years ago, while traditional oral history recalls their place within a sprawling Polynesian island confederation ruled by successive dynasties.¹⁶

That indigenous history was interrupted by first contact with American and European forces. Significant Christian missionary work began in the early nineteenth century,¹⁷ aggressive business interests followed,¹⁸ and in 1872 the chieftain with jurisdiction over the strategically located Pago Pago Harbor on Tutuila Island granted permission for the United States to establish a coaling station there

¹⁵ The largest and most populous island is Tutuila, followed by the island of Aunu'u, the three Manu'a Islands (Ta'u, Ofu, and Olosega), and Rose Atoll and Swains Island Atoll within the territory. See MAP OF AMERICAN SAMOA, WORLD ATLAS, <https://www.worldatlas.com/maps/american-samoa> (last visited Nov. 18, 2022).

¹⁶ See Jeffrey T. Clark & David J. Herdrich, *Prehistoric Settlement System in Eastern Tutuila, American Samoa*, 102 J. POLYNESIAN SOC'Y 147 (1993); *History*, NAT'L MAR. SANCTUARY OF AM. SAM., <https://americansamoa.noaa.gov/learn/history.html> (last visited Nov. 20, 2022).

¹⁷ See generally Alan Gavan Daws, *The Great Samoan Awakening of 1839*, 70 J. POLYNESIAN SOC'Y 326 (1961).

¹⁸ As recorded:

As the Samoan civil wars continued, several Americans of the Central Polynesian Land and Commercial Company (CPLCC) bartered and bought 414 square miles—approximately 300,000 acres of land—from the matai of Tutuila, Upolu, Manono, and Savai'i. The CPLCC were notoriously manipulative land agents from San Francisco and Hawai'i who persuaded Samoans to trade or sell tracts of communal lands in return for weapons and ammunition at nominal fees.

LINE-NOUE MEMEA KRUSE, *THE PACIFIC INSULAR CASE OF AMERICAN SAMOA: LAND RIGHTS AND LAW IN UNINCORPORATED U.S. TERRITORIES* 28–29 (Palgrave MacMillan, 1st ed. 2018); Barry Rigby, *The Origins of American Expansion in Hawaii and Samoa, 1865–1900*, 10 INT'L HIST. REV. 221, 223 (1988).

that would, in time, become a major naval base.¹⁹ By the end of the decade, the United States, Germany, and Great Britain all concluded separate treaties with Samoan authorities.²⁰ The three imperial powers divided the islands and established a joint protectorate over the archipelago in 1889, but their appointment of a royal figurehead exacerbated local factional strife and rekindled a latent civil war.²¹ In 1899, Great Britain agreed to withdraw its claim in exchange for German territory elsewhere, and the Samoan archipelago was split between the United States and Germany.²² The eastern Samoan islands would become U.S. territory, while the western islands—annexed by Germany for a time—now constitute the independent nation of Samoa.²³

The acquisition of American Samoa, while a generational project, was consummated at approximately the same time that the United States was consolidating its control of Hawaii and its conquests from the Spanish-American War. Various theories posit that the American ascension to overseas empire was motivated by inspiration from the contemporary European projects, the lingering appeal of “manifest destiny” in domestic politics, and/or the influence of a large but idling military apparatus after the conclusion of the U.S. Civil War and Reconstruction.²⁴ Whatever the impetus, the election of 1896 set the United States on a fateful course. President William McKinley would pursue war with the Spanish Empire, culminating with the American acquisitions of Puerto Rico, Guam, Cuba, and the Philippines.²⁵

¹⁹ S. EXEC. DOC. NO. 53-93, at 4 (1894).

²⁰ The American treaty was concluded in 1878. *Id.* at 3. For a comparative analysis of the three treaties, see SYLVIA MASTERMAN, *THE ORIGINS OF INTERNATIONAL RIVALRY IN SAMOA: 1845–1884* 150–69 (1934).

²¹ General Act Providing for the Neutrality and Autonomous Government of the Samoan Islands art. IV, June 14, 1889, 26 Stat. 1497. For more detail of these imperial intrigues, see MASTERMAN, *supra* note 20; MEMEA KRUSE, *supra* note 18, at 23–35; S. EXEC. DOC. NO. 53-93, at 7.

²² Convention in Respect to the Samoan Group of Islands, Ger-U.S.-U.K., Dec. 2, 1899, 31 Stat. 1878; Jon M. Van Dyke, *The Evolving Legal Relationship between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 49293 (1992).

²³ New Zealand subsequently invaded the western Samoan islands during World War I and held them until they achieved independence in 1962. See *The World Factbook: Explore All Countries—Samoa*, CIA, <https://www.cia.gov/the-world-factbook/countries/samoa> (last visited Nov. 20, 2022).

²⁴ See, e.g., Torruella, *supra* note 10, at 60–61; Rigby, *supra* note 18, at 222–23.

²⁵ The Spanish-American War was fought for just over three months in the late spring and summer of 1898, concluding in the 1898 Treaty of Paris. See Treaty of Peace, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

McKinley also authorized the official annexation of Hawaii during his first term, and his landslide reelection in 1900 provided political ratification for the imperial project.²⁶

B. Establishing Central-Local Governance

To establish local governance under U.S. sovereignty, President McKinley signed Executive Order 125-A, “[p]lacing Certain Islands of the Samoan Group under the Control of the Navy Department,” in February of 1900.²⁷ An agreement was signed by several Tutuila chieftains on April 17, 1900.²⁸ Styled as an “Instrument of Cession” rather than one of annexation, it included consideration which read in pertinent part:

[F]or the promotion of the peace and welfare of the people of said Islands, for the establishment of a good and sound Government, and for the preservation of the rights and property of the inhabitants of said Islands, the Chiefs, rulers and people thereof are desirous of granting unto the said Government of the United States full power and authority to enact proper legislation for and to control the said Islands²⁹

The U.S. Government further undertook to “respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District” in exchange for their allegiance.³⁰ Though unlikely that the Samoans could have resisted imperial ambitions for much longer, the fact that it was ostensibly a negotiated

²⁶ Republican William McKinley defeated Democrat William Jennings Bryan by an electoral vote count of 292-155. The issue of empire was hotly debated, with the democratic ticket strongly against. McKinley won but was assassinated six months into his second term and succeeded by Vice President Theodore Roosevelt. See for example Henry Borzo, *Imperialism in the Election of 1900 in the United States* (1947) (M.A. Thesis, University of Loyola), https://ecommons.luc.edu/luc_theses/59.

²⁷ See *Executive Order Placing Samoa Under the U.S. Navy: Exec. Order No. 125-A*, AM. SAM. BAR ASS’N, <https://asbar.org/executive-order-placing-samoa-under-the-u-s-navy> (last visited Oct. 29, 2022).

²⁸ Deed of Cession of Tutuila and Aunu’u (Apr. 17, 1900), <https://asbar.org/wp-content/uploads/attachments/cession1.pdf>.

²⁹ *Id.* at 1–2; see also 48 U.S.C. § 1661(a).

³⁰ Deed of Cession of Tutuila and Aunu’u, *supra* note 28, at 2. The existing coaling station was transformed into a full naval station, and the territory itself became known as U.S. Naval Station Tutuila. It was officially renamed American Samoa upon request of tribal leaders in 1911. See Kirisitina Gail Sailiata, *The Samoan Cause: Colonialism, Culture, and the Rule of Law 103* (2014) (Ph.D. dissertation, University of Michigan), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/109062/sailiata_1.pdf?sequence=1 (citation omitted).

settlement still serves as a point of pride in local governance.³¹ A subsequent Deed of Cession for the Manu'a Islands followed in 1904, which contained a unique provision "that the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized."³²

The first leader of the U.S. Navy administration of American Samoa, Commander Benjamin Franklin Tilley, acted to that effect. He promptly signed Regulations Four and Five, which established a zone of autonomy for the continuance of local laws and customs by "strictly limit[ing] land ownership in the region to either Samoans or the government" and applying "U.S. laws to the territory, as long as they did not conflict with Samoan customs," respectively.³³ These norms would become further entrenched after President Truman transferred the administration of American Samoa from the Navy to the Department of the Interior in 1951.³⁴ Shortly thereafter, the American Samoans adopted their own territorial constitution,³⁵ article I, section 3 of which reads:

³¹ *Tuaua v. United States*, 951 F. Supp. 2d 88, 91 (D.D.C. 2013). The ASG has argued that the deeds impose affirmative obligations on the U.S. government in the same manner as treaties, although the United States government does not view them as such. *See* Petition for a Writ of Certiorari at 19, *Territory of Am. Sam. v. Nat'l Mar. Fisheries Serv.* (2021) (No. 20-1180).

³² Deed of Cession of Manu'a Islands (July 26, 1904), <https://asbar.org/wp-content/uploads/attachments/cession2.pdf>; *see also* 48 U.S.C. § 1661(b). Swains Island, which had been "included in the list of guano islands appertaining to the United States" and bonded under the Guano Islands Act, was later annexed by Joint Resolution in 1925. H.R.J. Res. 294, 68th Cong. (1925). The ASG recently sued in an attempt to prove that these treaties establish binding and enforceable obligations on the United States and its agencies. *See* Petition for a Writ of Certiorari at 16, *Territory of Am. Sam. v. Nat'l Mar. Fisheries Serv.* (2021) (No. 20-1180).

³³ JoAnna Poblete-Cross, *Bridging Indigenous and Immigrant Struggles: A Case Study of American Sāmoa*, 62 AM. Q. 501, 502 (2010). For regulations passed by Commander Tilley, *see* United States Naval Station, Tutuila, List of Regulations and Orders forwarded to the Assistant Secretary of the Navy, October 29, 1902, File: Regulations, Proceedings, Orders of the Government of American Samoa: 1900-1906 at Box 1, RG 284, NARA-SB.

³⁴ *See* Exec. Order No. 10,264, 16 Fed. Reg. 6417 (July 3, 1951).

³⁵ The initial Constitution of American Samoa was adopted by a constitutional convention of sixty-eight delegates and signed by U.S. Secretary of the Interior, Fred Andrew Seaton, becoming effective on October 17, 1960. A revised draft was submitted to approval by voter referendum in 1966. The Department of the Interior approved the changes and allowed it to come into force on July 1, 1967. ARNOLD LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF U.S. TERRITORIAL POLICY* 420–21 (2013).

It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor.³⁶

Regarding citizenship, although evidence suggests that many Samoan chiefs believed that their people would receive U.S. citizenship as part of the consideration for ceding their islands, that enthusiasm dissipated by the mid-1940s.³⁷ When local leaders realized that the extension of citizenship might threaten the traditional way of life, they sought to suspend any legislation altering the central-local relationship, which included a proposed Organic Act to that effect.³⁸

Ninety chiefs then asked that congressional bills dealing with the status of their islands be tabled. They realized that an Organic Act that invoked the U.S. Constitution was a double-edged sword: While bestowing citizenship rights, it might also threaten their communal land tenure and chiefly

³⁶ AM. SAM. REV. CONST. art. I, § 3. The phrase “and to encourage business enterprises by such persons” was later added by amendment. Indeed, this provision follows only article I, section 1, which preserves the same rights as the First Amendment of the Bill of Rights, and article I, section 2, which is American Samoa’s Due Process Clause. Similar guarantees also appear in the Constitution of the Independent State of Samoa at article 102. See CONST. OF THE INDEPENDENT STATE OF SAMOA, art. 102.

³⁷ There were protests on the islands in the 1920s after prominent American Samoans organized a political movement known as a *mau* to press for recognition of U.S. citizenship and greater autonomy. See generally David A. Chappell, *The Forgotten Mau: Anti-Navy Protest in American Samoa, 1920–1935*, 69 PAC. HIST. REV. 217 (2000).

³⁸ Organic Act 4500, a U.S. Department of Interior-sponsored attempt to incorporate American Samoa, was introduced to Congress in 1949 but ultimately defeated through the intervention of numerous *matai*. These efforts led to the indigenous development of local government, including the creation of a territorial legislature: the *Fono*. *Id.* at 256; Ivy Yeung, Note, *The Price of Citizenship: Would Citizenship Cost American Samoa Its National Identity?*, 17:2 ASIAN-PAC. L. & POL’Y J. 1, 8 (2016); Arnold H. Leibowitz, *American Samoa: Decline of a Culture*, 10 CAL. W. INT’L L.J. 220, 242 (1980).

system; hence the need for cautious reform rather than U.S. citizenship.³⁹

That has been the official stance of ASG ever since. As such, American Samoa is one of five unincorporated U.S. territories today and, through its own election, remains the only one considered to be both unincorporated and unorganized—unique coordinates in a complex territorial classification scheme devised by the U.S. Supreme Court.⁴⁰

C. *The Insular Cases Framework*

More broadly, there was a practical necessity to determine an overarching system of repertoires for governing all of America's new territories upon the acquisition of an overseas empire.⁴¹ It would ultimately be the U.S. Supreme Court—not the elected branches of the federal government or the territorial governments—that laid the legal foundations for the modern American territorial system by deciding a series of controversies now collectively known as the “Insular Cases.”⁴² Although themselves a remarkable exercise of judicial activism, they by and large confirm the primacy of Congress in governing central-local territorial relations via the Territorial Clause of the U.S. Constitution, which commands that:

Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this

³⁹ Chappell, *supra* note 37, at 256.

⁴⁰ The United States also distinguishes between “organized” and “unorganized” territories under Insular Case precedent. Organized territories are lands under federal sovereignty but not part of any state to which Congress granted a measure of self-governance by passing an organic act subject to the Congress’ plenary powers under the Territorial Clause. The ASG suspended its pursuit of an organic act in the 1950s, and its 1967 Constitution does not qualify it to be organized because it was approved by the Department of the Interior rather than by Congress. See Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 88 (2013); Joseph E. Fallon, *Federal Policy and U.S. Territories: The Political Restructuring of the United States of America*, 64 PAC. AFFS. 23, 24 (1991); Edward J. Michal, *American Samoa or Eastern Samoa? The Potential for American Samoa to be Freely Associated with the United States*, 4 CONTEMP. PAC. 137, 140 (1992).

⁴¹ An insular area is defined as “[a] jurisdiction that is neither a part of one of the several States nor a Federal district.” Off. of Insular Affs., *Definitions of Insular Area Political Organizations*, U.S. DEP’T OF THE INTERIOR, <https://www.doi.gov/oia/islands/politicatypes> (last visited Oct. 16, 2022).

⁴² See sources cited *supra* note 11.

Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.⁴³

On top of that text, however, the Supreme Court would usurp Congress's role by building a superstructure by which to govern the newly acquired territories. As time would tell, the keystone opinion would prove to be Justice Edward Douglas White's concurrence in *Downes v. Bidwell*,⁴⁴ the swing vote in a 5-4 ruling that marked the inception of the Insular Cases precedents.⁴⁵ The specific issue in that case was the importation of oranges from Puerto Rico into New York. Puerto Rico's Organic Act—a federal law also known as the Foraker Act—sought to impose customs duties on those imports,⁴⁶ but Downes disputed the constitutionality of that provision on the grounds that such duties were preempted under the Taxing Clause of the U.S. Constitution, which provides that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁴⁷ Upon White's concurrence, the Court held 5-4 that the Taxing Clause did not preempt the Foraker Act because Puerto Rico—like all of the newly acquired territories—was not fully integrated into the United States for the purposes of revenue collection and other administrative matters.⁴⁸ Upon that decision, a greater question appeared: to what extent do any provisions of the U.S. Constitution apply to the U.S. territories?

⁴³ U.S. CONST. art. IV, § 3. This clause long governed new lands destined to become new states within the Union. Indeed, of the thirty-seven states admitted to the Union by Congress, all but six were originally governed under this clause. Unlike the other contiguous U.S. territories in 1900—New Mexico, Oklahoma, and Arizona—these new overseas holdings were acquired without a commitment to future statehood. See *Simms v. Simms*, 175 U.S. 162, 168 (1899) (“In the Territories of the United States, Congress has the entire dominion and sovereignty . . .”).

⁴⁴ See *Downes v. Bidwell*, 182 U.S. 244, 287–344 (1901) (White, J., concurring).

⁴⁵ *Id.* at 244 n.1. The issue in the Insular Cases is sometimes stated as “whether the Constitution follows the flag.” This decision narrowly held that it does not, as the full text of the U.S. Constitution does not necessarily apply to the U.S. territories. See *id.* at 286.

⁴⁶ The Foraker Act (named for its sponsor, Ohio representative Joseph Benson Foraker) established a civilian government in Puerto Rico. It is also known as the Organic Act of 1900 and “An Act Temporarily to provide revenues and a civil government for Porto Rico, and for other purposes.” Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900).

⁴⁷ U.S. CONST. art. I, § 8, cl. 1.

⁴⁸ *Downes*, 182 U.S. at 287 (“We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.”).

This question has often been rephrased as, “does the Constitution follow the flag?”⁴⁹

To provide a framework for answering that question, Justice White drew upon leading scholarship from the era to assert that there are two types of territories administered by the United States: “incorporated” territories (described as “an integral part of the United States”); and “unincorporated” territories (described as “appurtenant” and “foreign . . . in the domestic sense”).⁵⁰ He also proffered that the extent to which U.S. constitutional norms apply within any given territory depends upon their classification in this scheme. Whereas mainland constitutional norms apply *ex proprio vigore* to incorporated territories—that is, to territories acquired with the intent of ultimate statehood⁵¹—designation as an unincorporated territory allows Congress to selectively incorporate.⁵² Two decades later—and now 100 years ago— a unanimous Supreme Court adopted Justice White’s framework in *Balzac v. Porto Rico*.⁵³

The Supreme Court thus upheld the plain text of the U.S. Constitution’s Territorial Clause insofar as it supports Congress’ plenary control of territorial policy while simultaneously usurping Congress’s leading role in creating and rationalizing the new governance regime. Beyond that, the Supreme Court interlaced its reasoning with language reflecting the undercurrents of imperial ambition and racial superiority that permeated elite contemporary society, as evinced in this passage from Justice White’s *Downes* concurrence:

Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil, and valuable to the United States for

⁴⁹ This phrasing comes from then-Secretary of War Elihu Root’s statement on the case that “the Constitution indeed follows the flag, but it doesn’t quite catch up with it.” See 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 n.1 (Rachel F. Moran & Devon W. Carbado eds., 2008).

⁵⁰ *Downes*, 182 U.S. at 315, 339–42 (White, J., concurring). White drew upon scholarship of the era, including Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899). See *United States v. Vaello Madero*, 142 S.Ct. 1539, 1553 (J. Gorsuch, concurring), citing *Developments in the Law—The U.S. Territories*, 130 HARV. L. REV. 1616, 1617–20 (2017).

⁵¹ *Examining Bd. of Eng’rs v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976); see also *N. Mar. I. v. Atalig*, 723 F.2d 682, 688 (9th Cir. 1984).

⁵² *Downes*, 182 U.S. at 342 (White, J., concurring).

⁵³ See *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922).

commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them not only to local but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory and to inflict grave detriment on the United States to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it?⁵⁴

This rationale has been roundly criticized and deservedly so;⁵⁵ yet, despite itself, the practical disposition of this scheme also provided a zone of insulation for the continuity of indigenous customs.⁵⁶ That Januslike conundrum was on display once again in *Balzac*.⁵⁷ There, the Supreme Court held that certain provisions of the U.S. Constitution (specifically the jury provisions of the Sixth Amendment) need not apply automatically to territories that are not fully incorporated into the Union. The cause of action originated from Jesús Balzac's conviction for criminal libel in the District Court for Arecibo, Puerto Rico, without the option of a jury trial.⁵⁸ On appeal, the Supreme Court affirmed both the local laws and local court judgments that denied Balzac a jury trial.⁵⁹ Justice Taft reasoned that contemporary Puerto Ricans would be unfamiliar and possibly uncomfortable with a sudden introduction of the Anglo-American common law jury system because there had never been juries during the nearly 400 years of imperial Spanish rule before the American takeover.⁶⁰ Against the

⁵⁴ *Downes*, 182 U.S. at 306 (White, J., concurring) (internal citations omitted).

⁵⁵ *E.g.*, *United States v. Vaello Madero*, No. 20-303 (U.S. Apr. 21, 2022) (J. Gorsuch, concurring); *see also* Torruella, *supra* note 10, at 71–72; GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 119 (Princeton Univ. Press, 1996).

⁵⁶ *E.g.*, *Developments in the Law*, *supra* note 10, at 1681; Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1706–13 (2017); Ian Falefuafua Tapu, Note, *Who Really is a Noble?: The Constitutionality of American Samoa's Matai System*, 24 UCLA ASIAN PAC. AM. L.J. 61, 79 (2020).

⁵⁷ *See Balzac*, 258 U.S. at 312–13.

⁵⁸ *Id.* at 300.

⁵⁹ *Id.* at 314.

⁶⁰ *Id.* at 310.

prevailing European colonial practices of the era,⁶¹ Taft refused the chauvinistic imposition of the metropole's foreign legal norms upon an unconsenting people by allowing the local polity to determine their own laws:

Congress has thought that a people like the Filipinos or the Porto Ricans [sic], trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, *should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.*⁶²

Then again, this cultural preservation component is not without bounds. Justice White recognized at the outset in *Downes* that there are some rights that ought to be considered fundamental human rights and apply everywhere under U.S. jurisdiction:

Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories . . . it does not follow that there may not be *inherent, although unexpressed, principles which are the basis of all free government* which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be *restrictions of so fundamental a nature that they cannot be transgressed*, although not expressed in so many words in the Constitution.⁶³

Although lacking in precise guidance, the traditional approach set forth in the early Insular Cases holds that only those constitutional provisions that protect such “fundamental” individual rights must

⁶¹ Contemporary French and Iberian colonial policy was focused on the deep integration of the colonies with the metropole, often through policies of legal and cultural assimilation. Reflecting the universalist logic underlying the French Constitution's “Declaration of the Rights of Man,” French laws made for French persons in Paris were applied to the farthest reaches of the empire, often with serious unintended consequences. See, e.g., Alexander Lee & Kenneth A. Schultz, *Comparing British and French Colonial Legacies: A Discontinuity Analysis of Cameroon*, 7 Q.J. POL. SCI. 1, 11 (2012); see also Jason Buhi, THE CONSTITUTIONAL HISTORY OF MACAU, *Chapter IV: The Era of Imperial Consolidation* (New York: Routledge 2021).

⁶² *Balzac*, 258 U.S. at 310 (emphasis added). It is a perfectly valid question to ask if the people of Puerto Rico have made that decision in the subsequent 100 years.

⁶³ *Downes v. Bidwell*, 182 U.S. 244, 290–91 (1901) (White, J., concurring) (emphasis added).

apply overseas.⁶⁴ In doing so, it invites jurists to consider the historical and sociological characteristics of any given territory. The issue is challenging at first approach because of the different definitions of “fundamental” in the mainland and territorial contexts. The traditional Insular Cases approach holds that only those constitutional provisions that protect personal rights that “are the basis of all free government” must extend to unincorporated overseas territories.⁶⁵ Where a court decides that the claim involves a “fundamental” right within that special context, then no departure should be made from mainland jurisprudence. Justice White suggested jurists should adopt a natural rights-based approach to identify which rights are of such a universal character, stating that “there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.”⁶⁶

The resulting ad hoc process of rights incorporation in the U.S. territories thus bears resemblance to the post-war Fourteenth Amendment incorporation doctrine, although it differs territory to territory and remains largely incomplete.⁶⁷ The practical impact of this policy is best illustrated through the development of subsequent jurisprudence. On the one hand, certain guarantees of due process⁶⁸

⁶⁴ See *id.* at 290–91, 297–98.

⁶⁵ *Id.* at 291 (White, J., concurring). Justice White explained that even though unincorporated territories were to receive less than complete constitutional protection, they still benefitted from “inherent, although unexpressed, principles which are the basis of all free government” and “restrictions of so fundamental a nature that they cannot be transgressed.” *Id.*; see also *Am. Sam. Gov’t v. Falefatu*, 17 *Am. Samoa* 2d 114, 129 n.9 (Am. Samoa 1990) (quoting *Dorr v. United States*, 195 U.S. 138, 146 (1922)).

⁶⁶ *Downes*, 182 U.S. at 282; see also Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909, 962 (1991) (arguing that White employed natural law methodology to identify which provisions are “fundamental”).

⁶⁷ This is a phenomenon Professor Merriam coins “excorporation.” See Jesse Merriam, *Establishment Clause-Trophobia: Building a Framework for Escaping the Confines of Domestic Church-State Jurisprudence*, 41 *COLUM. HUM. RTS. L. REV.* 699, 745 (2010).

⁶⁸ *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (“The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.”).

and the prohibitions on ex post facto laws and bills of attainder⁶⁹ have been recognized as universally fundamental across the U.S. territories. On the other, procedural rights to a jury trial,⁷⁰ to grand jury presentment,⁷¹ and to confront witnesses in certain proceedings⁷² have been withheld in settings adjudged historically unaccustomed to—or even opposed to—their practice.⁷³

⁶⁹ *Downes*, 182 U.S. at 277 (“There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several States. Thus, when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill *of that description*. Perhaps, the same remark may apply to the First Amendment. . .”).

⁷⁰ *Balzac*, 258 U.S. at 312–13; *see also* *Dorr v. United States*, 195 U.S. 138, 148 (1904) (“If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice.”).

⁷¹ *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (internal citations omitted) (“Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the Fifth Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force, apply to the [Philippine] Islands. That the requirement of an indictment by grand jury is not included within the guaranty of ‘due process of law’ is of course well settled.”).

⁷² *Dowdell v. United States*, 221 U.S. 325, 331–32 (1911) (“In *Schwab v. Berggren*, 143 U.S. 442, this court held that due process of law did not require the accused to be present in an appellate court, where he was represented by counsel and where the only function of the court is to determine whether there is error in the record to the prejudice of the accused. As we understand the procedure in the Supreme Court of the Philippine Islands, it acts upon the record sent to it upon the appeal and does not take additional testimony, although it has power to modify the sentence. . . . For the reasons we have stated we think this was within the power of the court, and there was no lack of due process of law in making the order as the court did in this case.”).

⁷³ There is a danger of ossification; whereas governance norms should respect local cultural autonomy they should not also permanently freeze development in a premodern state. Democratic processes should be used to reassess and amend local repertoires in keeping with local developments. The author believes this also applies to the deference shown to the ASG on its data regarding popular opinion toward the citizenship issue, discussed *infra* at Part V.

D. *The Modern Standard for Applying Mainland Constitutional Norms to the U.S. Territories*

After a brief jurisprudential hiatus, the Insular Cases regime was further developed by the explication of the “impracticable and anomalous” standard in the late 1950s. The seminal case was *Reid v. Covert*, concerning the murder of a U.S. Air Force sergeant by his spouse at an airbase in England.⁷⁴ Justice Hugo Black wrote for the Court that U.S. citizen civilians residing overseas cannot be tried by courts-martial because they retain their fundamental rights while overseas.⁷⁵ He applied the traditional approach from the previous Insular Cases, reasoning that “it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.”⁷⁶

Justice John Marshall Harlan, writing in concurrence, extrapolated the impact of this ruling upon the U.S. territories:

[I]t seems to me that the basic teaching of . . . the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.⁷⁷

A pair of considerations thus emerge to mark the modern post-*Reid* Insular Cases inquiry: whether the right at issue is “fundamental” (*Downes*), and whether its extension to any territory would be “impracticable and anomalous” (*Reid*). If a court decides that an asserted constitutional right is not “fundamental,” all is not lost for the petitioner. That court may yet assess whether the right should apply anyway by examining the prospective effects of its would-be application in light of the history and culture of a given territory using Justice Harlan’s impractical and anomalous standard.⁷⁸ Harlan counselled

⁷⁴ *Reid v. Covert*, 354 U.S. 1, 3 (1957).

⁷⁵ *Id.* at 9.

⁷⁶ *Id.*

⁷⁷ *Id.* at 74 (Harlan, J., concurring).

⁷⁸ Indeed, this is the two-step approach used by the D.C. Circuit. See *Tuaua v. United States*, 788 F.3d 300, 308 (D.C. Cir. 2015); see also Brief of Amici Curiae Certain

that factors including “the particular local setting, the practical necessities, and the possible alternatives are relevant” to the analysis.⁷⁹ Thus, Harlan’s impractical and anomalous standard marked an evolution in Insular Cases jurisprudence by rejecting Justice White’s categorical, all-or-nothing approach in favor of a more flexible place-by-place analysis.

Although the ambiguity of the impracticable and anomalous standard is the frequent target of critical commentary,⁸⁰ it evades precise explanation by design. Its basic contours have been traced: a right is “impractical” if incapable of easy application to a territory and “anomalous” if its implementation would adversely impact the local culture.⁸¹ This open-ended approach does have several benefits. First, it maintains the ability to avoid the imposition of mainland legal codes in chauvinistic colonial fashion. Second, it attempts to force awareness of and respect for diverse norms upon mainland jurists, who may benefit from that dialectical dynamic. Third, temporal flexibility allows for the idiosyncratic characteristics of any territory to be considered over time via the common law process, during which the local populace acting through their local political processes could take their own measures to adopt and codify new rights and policies if desirable. Absent that, if the imposition of a claimed right is found to be either impractical or anomalous when applied to a territory, it will fail Harlan’s test and be withheld.

Application of the test does not always result in a disposition favorable to local cultural preservation. Indeed, one of its first applications by the lower federal courts occurred in relation to

Members of Congress and Former Governmental Officials in Support of Plaintiff-Appellants and In Support of Reversal at 3, *Tuaua*, 788 F.3d 300 (No. 13-5272).

⁷⁹ *Reid*, 354 U.S. at 75 (Harlan, J., concurring).

⁸⁰ See generally Jesse Merriam, *A Clarification of the Constitution’s Application Abroad: Making the “Impracticable and Anomalous” Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171 (2012); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009).

⁸¹ For Justice Harlan’s initial application of these prongs, see *Reid*, 354 U.S. at 76 n.12 (impracticable) and *id.* at 67 (anomalous). Though less detailed on the anomalous prong, Harlan appeared open to Justice Felix Frankfurter’s description of those provisions that “found an uncongenial soil because [United States laws and customs] ill accorded with the history and habits of [the local] people.” *Id.* at 51 (Frankfurter, J., concurring). Several restatements of the concepts have been offered. “Whereas the ‘impracticable’ prong considers what applying the right would mean *for the United States*, the ‘anomalous’ prong considers what applying the right would mean *for the people residing in the territory in which that right would apply*.” Merriam, *supra* note 80, at 218.

American Samoa in *King v. Morton*.⁸² The *King* case regarded the willful refusal of a U.S. citizen residing in American Samoa to pay his local taxes.⁸³ The High Court of American Samoa upheld King's bench trial under local law, declaring that extending the right to a jury trial would constitute "an arbitrary, illogical, and inappropriate foreign imposition" given the traditional local methods of dispute resolution.⁸⁴ Upon appeal to the federal bench, the Court of Appeals for the D.C. Circuit offered the following guidance to the fact-finding federal district court:

The importance of the constitutional right at stake makes it essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. Specifically, it must be determined whether the Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable. In short, the question is whether in American Samoa "circumstances are such that trial by jury would be impractical and anomalous."⁸⁵

Despite the respect for native institutions suggested by this language and the persuasive authority of the *Balzac* precedent, the district court found decisively for King on remand.⁸⁶ It reasoned that any societal obstacles to the introduction of jury trials had already "eroded in the face of western world encroachment."⁸⁷ The district court also took an instrumentalist view of local development, seemingly equating "impracticable" with "*not having the capacity for*":⁸⁸

From a logistical and administrative point of view, the jury system in American Samoa is entirely feasible. The evidence

⁸² *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

⁸³ *Id.* at 1142.

⁸⁴ Gov't of Am. Sam. v. King, No. App. 63-73 (High Ct. Am. Samoa, App. Div., decided April 1, 1974).

⁸⁵ *Morton*, 520 F.2d at 1147-48 (quoting *Reid*, 354 U.S. at 75).

⁸⁶ *King v. Andrus*, 452 F. Supp. 11, 17 (D.D.C. 1977).

⁸⁷ *Id.* at 14.

⁸⁸ Author's own interpretation.

indicates that there are about 7,000 registered voters with the vast majority of them situated on the main island of Tutuila where the courthouse is located. Available transportation eliminates any problem of access to the courthouse. A roll of registered voters is maintained by the election department of the government and this should provide an adequate pool of prospective jurors who are most likely to be literate and educated. . . . Interpreters provide simultaneous translation in both civil and criminal cases which are tried in the High Court. . . . Finally, the evidence established that the personnel and officers which would make a jury system work effectively are already present in American Samoa, i. e., professional prosecutors, a public defender office, and a number of American Samoan defense attorneys who are graduates of American law schools and are trained in the American judicial system.⁸⁹

For this and other reasons discussed later—namely, the *King* court’s parallel conclusion that technological and pop culture developments had already irreparably undermined the *fa’a Samoa* (i.e., that aforementioned “western world encroachment”)—the initial application of the impracticable and anomalous test to American Samoa did not appeal to proponents of maintaining the distinctiveness of local culture.⁹⁰ Skipping ahead almost forty years, the impracticable and anomalous test remains the standard,⁹¹ although a new iteration by the D.C. Circuit took a more solemn approach toward local culture when considering the consequences of applying the Citizenship Clause to the delicate cultural balance of American Samoa.

III. RECENT LITIGATION AND RENEWED ATTENTION

The issue of citizenship largely laid dormant between the ASG’s suspension of pursuing an organic act in the 1950s until two federal circuits were called upon to decide cases brought by petitioners from American Samoa in the 2010s. In December 2019, the U.S. District Court for the District of Utah found for the plaintiffs by ruling that the residents of American Samoa should be entitled to constitutional

⁸⁹ *Andrus*, 452 F. Supp. at 16–17.

⁹⁰ *See infra* Part IV.B (discussing *Andrus*, 452 F. Supp. at 14).

⁹¹ Justice Kennedy twice applied Harlan’s standard, albeit to locations that are not the five unincorporated territories. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring); *Boumediene v. Bush*, 553 U.S. 723, 760–66 (2008).

birthright citizenship on the basis of the Citizenship Clause.⁹² The U.S. Court of Appeals for the Tenth Circuit overturned that decision in June 2021 (*Fitisemanu*),⁹³ bringing the Tenth Circuit into alignment with a 2015 decision of the U.S. Court of Appeals for the District of Columbia (*Tuaua*).⁹⁴ Both circuits ultimately relied upon the Insular Cases to rule that the question of citizenship should not be decided by judicial decree but rather by popular consensus within American Samoa itself.⁹⁵ With a potential appeal heading to the Supreme Court in the *Fitisemanu* case, the reasoning in these cases is surveyed here for consideration of local cultural preservation as a determining factor.

A. *Tuaua v. United States*

In the first litigation, a group of five American Samoan petitioners sued the Obama administration to recognize their claim to birthright citizenship.⁹⁶ Their specific argument was that the Fourteenth Amendment's Citizenship Clause guarantees that anyone born on U.S. soil is automatically a U.S. citizen, including the residents of unincorporated U.S. territories.⁹⁷ Arrayed against them were representatives of their own local government who argued that the extension of birthright citizenship could lead to the full imposition of mainland constitutional norms on the territory.⁹⁸ The U.S. Court of Appeals for the District of Columbia published its decision in June 2015, unanimously ruling to deny the petitioners' claim.⁹⁹

⁹² See *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1197 (D. Utah 2019); U.S. CONST. amend. XIV, § 1.

⁹³ *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

⁹⁴ *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013), *aff'd*, 788 F.3d 300 (D.C. Cir. 2015).

⁹⁵ *Id.* at Section III.B 309–312; *Fitizemanu*, 426 F. Supp. 3d at Section V.App 879–880.

⁹⁶ One of the five named petitioners also sued on behalf of his three minor children. Complaint for Declaratory and Injunctive Relief at 25–26, *Tuaua v. United States*, 951 F. Supp. 2d 88 (D.D.C. 2013) (No. 12-1143).

⁹⁷ Brief of Plaintiffs-Appellants at 16, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (No. 13-5272).

⁹⁸ Brief for Intervenor or, in the Alternative, Amici Curiae the American Samoa Government and Congressman Eni F.H. Faleomavaega at 37–38, *Tuaua*, 788 F.3d 300 (No. 13-5272).

⁹⁹ *Tuaua*, 788 F.3d at 311–12. The case was originally docketed in the U.S. District Court for the District of Columbia but was dismissed for failure to state a claim upon which relief can be granted. *Tuaua*, 951 F. Supp. 2d at 93–94.

The parties presented holistic textualist arguments disagreeing as to whether American Samoa is within the U.S. Constitution's definition of the "United States."¹⁰⁰ The Petitioner-Appellants compared the first and second clauses of the Fourteenth Amendment, emphasizing that the Citizenship Clause (Section 1) is framed more broadly by using the term "in the United States," whereas the Apportionment Clause (Section 2) refers more narrowly to jurisdiction "among the several States."¹⁰¹ On the other hand, the Defendant-Appellee governments highlighted textual differences between the Thirteenth and Fourteenth Amendments, noting that the Thirteenth Amendment includes an extra clause prohibiting slavery "within the United States, or any place subject to their jurisdiction."¹⁰² The Obama administration argued that the Thirteenth Amendment's phraseology contemplates areas "not a part of the Union, [which] [a]re still subject to the jurisdiction of the United States," while the Fourteenth Amendment's does not.¹⁰³ The D.C. Circuit dismissed both textual arguments as inconclusive,¹⁰⁴ and similarly dismissed the "conflicting inferences" to be drawn from available legislative history.¹⁰⁵

The court next shifted attention to the meaning of the word "citizen." Petitioner-Appellants contended that the Citizenship Clause must be read in light of the Supreme Court's important *United States v. Wong Kim Ark* precedent, which upheld the citizenship rights of a person born in California to two noncitizen immigrant parents.¹⁰⁶ In that case, immigration officials attempted to deny the petitioner reentry after a visit to China, asserting that he was not a U.S. citizen on account of his parents' non-citizenship. The *Wong* court declared the exclusion unconstitutional, explaining that the Citizenship Clause "must be interpreted in the light of the common law," under which the

¹⁰⁰ *Tuaua*, 788 F.3d at 303. U.S. CONST. amend. XIV, § 1 reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

¹⁰¹ *Tuaua*, 788 F.3d at 303; U.S. CONST. amend. XIV, §§ 1–2.

¹⁰² *Tuaua*, 788 F.3d at 303; U.S. CONST. amend. XIII, § 1 (emphasis added).

¹⁰³ *Tuaua*, 788 F.3d at 303 (quoting *Downes v. Bidwell*, 182 U.S. 244, 251 (1901)).

¹⁰⁴ *Id.* ("Neither argument is fully persuasive, nor does it squarely resolve the meaning of the ambiguous phrase 'in the United States.' The text and structure alone are insufficient to divine the Citizenship Clause's geographic scope.").

¹⁰⁵ *Id.* at 304 (internal citations omitted) ("[T]he legislative history of the Fourteenth Amendment . . . like most other legislative history, contains many statements from which conflicting inferences can be drawn. . . . Here, and as a general matter, '[i]solated statements . . . are not impressive legislative history.'").

¹⁰⁶ *Id.*; *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).

doctrine of *jus soli* (i.e., “right of soil,” or automatic citizenship based on birth within the jurisdiction) applies.¹⁰⁷

The D.C. Circuit distinguished the facts of that case, concluding that “*Wong Kim Ark* must be read with the understanding that the case ‘involved a person born in San Francisco, California’” which is, simply put, a state and not a territory.¹⁰⁸ Instead, it accepted the Defendant-Appellees argument that *jus soli* citizenship is inapplicable to “distinct, significantly self-governing political territories within the United States’s sphere of sovereignty.”¹⁰⁹ To support this proposition, the Obama administration analogized the present status of American Samoa to the history of withholding constitutional citizenship to members of Native American tribes as described in *Elk v. Wilkins*, although Congress later extended statutory birthright citizenship to Native Americans in 1924.¹¹⁰

Having rejected those claims, the *Tuaua* court ultimately channeled the Insular Cases line of precedent by asserting that it would be “‘impractical and anomalous’ . . . to impose citizenship [upon American Samoans] by judicial fiat.”¹¹¹ In stark contrast to the D.C. Circuit’s decision in *King* decades before, the *Tuaua* court specifically concluded that the Citizenship Clause would be anomalous as applied to American Samoa after accepting evidence that the majority of American Samoans do not favor citizenship,¹¹² stating:

At base Appellants ask that we forcibly impose a compact of citizenship—with its concomitant rights, obligations, and implications for cultural identity—on a distinct and unincorporated territory of people, in the absence of evidence that a majority of the territory’s inhabitants endorse such a tie and where the territory’s democratically elected representatives actively oppose such a compact. We can envision little that is more anomalous, under modern

¹⁰⁷ *Wong Kim Ark*, 169 U.S. at 654.

¹⁰⁸ *Tuaua*, 788 F.3d at 305.

¹⁰⁹ *Id.* at 306.

¹¹⁰ *Id.* at 305–06 (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)). Citizenship was extended via the Indian Citizenship Act of 1924, (43 Stat. 253, enacted June 2, 1924).

¹¹¹ *Id.* at 302 (quoting *Reid v. Covert*, 354 U.S. 1, 75 (1957)).

¹¹² “We hold it anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives.” *Id.* at 310. The court also cited the Amici Curiae of the ASG and Congressman Eni F.H. Faleomavaega as evidence of this fact. *Id.*

standards, than the forcible imposition of citizenship against the majoritarian will.¹¹³

That specific line of cultural impact analysis was relatively short,¹¹⁴ and another court would provide thicker consideration of the same arguments in subsequent litigation.

B. *Fitisemanu v. United States*

Four years later, a new set of American Samoan plaintiffs filed suit in the U.S. District Court for the District of Utah.¹¹⁵ In December 2019, Judge Clark Waddoups delivered a surprising opinion that would extend constitutional birthright citizenship to all American Samoans.¹¹⁶ Holding as the D.C. Circuit did that the textual arguments were inclusive,¹¹⁷ he framed the issue as a choice between two lines of binding precedent: *Wong Kim Ark* and the Insular Cases.¹¹⁸ He ultimately held that *Wong Kim Ark* both applied and was controlling,¹¹⁹ thereby extending constitutional birthright citizenship. To reach that conclusion he shirked the issue of any potential negative impacts on Samoan culture, stating only, “[i]t is not this court’s role to weigh in on what effect, if any, a ruling in Plaintiffs’ favor may have on *fa’a Samoa*.”¹²⁰

The U.S. Court of Appeals for the Tenth Circuit reversed that decision in June 2021.¹²¹ Though that court accepted Judge Waddoups’ framing as a choice between those two lines of precedent, it preferred to emphasize “the relevant history and characteristics of American Samoa.”¹²² In response to Judge Waddoups’ assertion that the Fourteenth Amendment codified the common law *jus soli* doctrine—and indeed noting that the *Wong* court itself stated that the Citizenship Clause “must be interpreted in the light of the common

¹¹³ *Id.* at 311.

¹¹⁴ *Id.* at 308-309.

¹¹⁵ See Complaint for Declaratory and Injunctive Relief, *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019) (No. 1:18-cv-00036-EJF).

¹¹⁶ See *Fitisemanu*, 426 F. Supp. 3d at 1197.

¹¹⁷ *Id.* at 1178.

¹¹⁸ *Id.* at 1157.

¹¹⁹ *Id.* at 1181–91. Waddoups reasoned that *Wong Kim Ark*’s conclusion that the Fourteenth Amendment affirms the English common law rule of *jus soli* citizenship is binding. *Id.* at 1179.

¹²⁰ *Id.* at 1196.

¹²¹ *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021).

¹²² *Id.* at 865.

law”¹²³—Judge Lucero focused the Tenth Circuit’s inquiry on distinguishing the common law origins of the *jus soli* doctrine.¹²⁴ He reasoned that at the time the seminal English case was decided in 1608, Scotland was held through inheritance and Ireland by conquest.¹²⁵ Neither acquisition was considered analogous to the case at hand because the Tenth Circuit accepted the ASG’s characterization of the establishment of central-local relations as a negotiated process: although “shrouded in history, our dominion over American Samoa stems from voluntary cession.”¹²⁶ As a result, the Tenth Circuit interpreted *Wong Kim Ark*’s discussion of English common law to be only persuasive authority in the case at hand.¹²⁷

Instead, Judge Lucero applied the Insular Cases line of precedent. He began by adopting a comparative approach, thus reasoning that birthright citizenship is not a fundamental right within the meaning of that concept as applied to U.S. territories—i.e., not a principle which forms “the basis of all free government”.¹²⁸

Birthright citizenship, like the right to a trial by jury, is an important element of the American legal system, but it is not a prerequisite to a free government. Numerous free countries do not practice birthright citizenship, or practice it with significant restrictions, including Australia, France, and Germany. The United States, for its part, does not apply birthright citizenship to children of American citizens born abroad.¹²⁹

Following that, Judge Lucero reasoned that judicial imposition of citizenship would be “impracticable and anomalous” under the actual conditions of American Samoa.¹³⁰ He agreed with the D.C. Circuit’s reasoning in *Tuaua*, which emphasized the anomalousness of deviating from the principle of free association:

Public opinion among American Samoans appears to have shifted [from the early twentieth century], with the elected government of American Samoa intervening in this case to

¹²³ *Id.* at 871 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898)).

¹²⁴ *Id.* at 871 (citing *Calvin’s Case*, 77 Eng. Rep. 377 (1608)).

¹²⁵ *Id.*

¹²⁶ *Id.* at 872–73. Indeed, the ASG agrees with the historical statement of voluntary cession. See Reply Brief for Defendants-Appellants at 13, *Fitisemanu*, 1 F.4th 862 (No. 20-4019).

¹²⁷ *Fitisemanu*, 1 F.4th at 872–73.

¹²⁸ *Id.* at 878 (quoting *Dorr v. United States*, 195 U.S. 138, 147 (1904)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 881.

argue against “citizenship by judicial fiat.” . . . According to a 2007 report commissioned by the American Samoan government, “Public views expressed to the Commission indicate the anti-citizenship attitude remain[s] strong” The position taken by the American Samoan elected representatives appears to be a reliable expression of their people’s attitude toward citizenship.¹³¹

Lucero’s opinion placed this representation-reinforcement consideration squarely within the framework of Insular Case jurisprudence. As such, the Tenth Circuit concluded that the Insular Cases framework “better upholds the goals of cultural autonomy and self-direction.”¹³² “[E]ven if the contrary conclusion were tenable,” Lucero explained, “it is not the role of this court to second-guess the political judgment of the American Samoan people . . . the Insular Cases permit this court to respect [their wishes], whereas *Wong Kim Ark* would support the imposition of citizenship on unwilling recipients.”¹³³

Beyond that, Judge Lucero paid greater respect to the arguments brought by the ASG and its amici regarding the potential deleterious impacts that deeper application of mainland constitutional norms would have upon the institutions of American Samoa:

A further concern of extending birthright citizenship to American Samoa is the tension between individual constitutional rights and the American Samoan way of life (the *fa’a Samoa*). Fundamental elements of the *fa’a Samoa* rest uneasily alongside the American legal system. Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as the *matai* chieftain social structure, communal land ownership, and communal regulation of religious practice.¹³⁴

¹³¹ *Id.* at 867 (quoting THE FUTURE POL. STATUS STUDY COMM. OF AM. SAM., FINAL REPORT 64 (2007)) (internal citations omitted).

¹³² *Id.* at 874.

No circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives. . . . To impose citizenship in such a situation would violate a basic principle of republican association: that “governments . . . deriv[e] their [] powers from the consent of the governed.”

Fitisemanu, 1 F.4th at 879 (quoting *Kennett v. Chambers*, 55 U.S. 38, 41 (1852)).

¹³³ *Id.* at 873, 881.

¹³⁴ *Id.* at 880.

Despite the weight of this argument, Judge Lucero's consideration of the cultural protection of American Samoa—still the longest iteration to date within a judicial opinion—spanned just two pages of text.¹³⁵ Indeed the common thread, acknowledged but barely grasped by all three courts faced with the citizenship question, was the application of the impractical and anomalous standard to the *fa'a Samoa*.¹³⁶ Unfortunately the aforementioned cases do not explore this matter in depth, despite it being key to their reasoning.¹³⁷ The next section of this Article considers the ASG's slippery slope argument in greater detail, should it emerge again in the course of subsequent litigation.

IV. THE ARGUMENT FOR INSULARITY

As stated, there are several reasons why the ASG does not want more enhanced constitutional scrutiny to apply locally, where native customs would be hard to square with mainland normative values projected through federal jurisprudence. The most often cited issues concern the local Native Lands Ordinance (vs. the Equal Protection Clause); the *matai*-only senate (vs. Article I's prohibition on titles of nobility); and the official religious observation of *Sa* (vs. the First Amendment Establishment of Religion).¹³⁸

All things considered, the U.S. political authorities have perhaps shown more sensitivity to these issues within the specific context of American Samoa than in other territories.¹³⁹ This may be partially

¹³⁵ See *id.* at 879–81.

¹³⁶ Nonetheless, the standard was applied here much as it was in *Reid v. Covert*, 354 U.S. at 74–75 (Harlan, J., concurring), *Boumediene v. Bush*, 553 U.S. 723, 756–64 (2008), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277–78 (1990) (Kennedy, J., concurring).

¹³⁷ Judge Lucero writes in pertinent part:

Citizenship's legal consequences for American Samoa are less certain than Plaintiffs and the dissent suggest, and the American Samoans' cautious approach should be respected regardless. There is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa'a Samoa*. The constitutional issues that would arise in the context of American Samoa's unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable.

Fitisemanu, 1 F.4th at 881.

¹³⁸ See *id.* at 880; see also Mack, *supra* note 8, at 81–82.

¹³⁹ Continue *infra* this section for a comparison of specific points of autonomy between American Samoans, on the one hand, and other Indigenous Peoples including those of Guam, Hawaii, and the Native American Tribes, on the other. See also Lowell D. Holmes, *Factors Contributing to the Cultural Stability of Samoa*, 53 ANTHROPOLOGICAL Q. 188, 188–89 (1980).

related to the unique mode of formalizing relations. Unlike the territories acquired by sudden conquest during the Spanish-American War, the establishment of U.S. sovereignty in American Samoa was a negotiated and incremental process pondered for decades, and the earliest documents establishing central-local relations made provisions for a zone of cultural autonomy. While no previous case considers the ASG's claims in detail, there is sufficient precedent available to suggest its fears are not unfounded, as greater imposition of mainland constitutional norms has followed the introduction of U.S. citizenship elsewhere. That jurisprudence is considered here.

A. *Native Lands Ordinance*

Fa'a Samoa is tied to the land of the village itself.¹⁴⁰ American Samoa features an ancient communal land system in which over 90 percent of the land is communally owned by extended families called *'aiga*, and covenants restrict ownership to persons of Samoan ancestry.¹⁴¹ The legal principle of preserving ancestral land began before the establishment of U.S. sovereignty.¹⁴² Stemming from antiquity, the imperial powers first codified nonalienation of native lands in the 1889 Act of Berlin,¹⁴³ and U.S. authorities agreed to honor the preexisting laws and customs in both the 1900 and 1904 Deeds of Cession, although the phrasings differ. The Preamble of the 1900 Deed of Cession states consideration “for the establishment of a good and sound government, and for the preservation of the rights and property of the inhabitants of said islands,” while its operative clauses promise that “[t]he Government of the United States of America shall

¹⁴⁰ “Communal ownership of land is the cornerstone of the traditional Samoan way of life—the ‘*fa'a Samoa*.’” Corp. of the Presiding Bishop v. Hodel, 830 F.2d 374, 377; see also MEMEA KRUSE, *supra* note 18, at 2, stating “[c]ultural identity is the core basis of the Sāmoan people, and communally owned lands are the central foundation that will allow our cultural identity to survive in today’s world.”

¹⁴¹ Daniel E. Hall, *Curfews, Culture and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to the U.S. Territories*, 2 ASIAN-PAC. L. & POL’Y J. 69, 72 (2001); see also Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 828 (2008).

¹⁴² The High Court of American Samoa, Land and Titles Division notes: “Prior to 1899, land in American Samoa was subject to similar laws and customs as in that which is now Western Samoa, for as most readers of this opinion know, for many thousands of years, there was only one Samoa.” *Leuma v. Willis*, 1 Am. Samoa 2d 48, 49 (Am. Samoa 1980).

¹⁴³ Merrily Stover, *Individual Land Tenure in American Samoa*, 11 CONTEMP. PAC. 69, 75–76 (1999); M.D. Olson, *Regulating Custom: Land, Law and Central Judiciary in Samoa*, 32 J. PAC. HIST. 153, 153–56 (1997); AM. SAMOA CODE ANN. § 37.0204 (2021).

respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property”¹⁴⁴ The 1904 Deed expresses the same concept in stronger terms, that “the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.”¹⁴⁵

Contemporary jurisprudence suggests that this preservation of local land management rules was a matter of deep resolve at the time, even among the various colonial powers, as Justice White’s *Downes* opinion cited a leading contemporary treatise on international law:

As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced [upon transfer to a new sovereign]. . . . *But with respect to other laws affecting the possession, use and transfer of property*, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed.¹⁴⁶

As stated, the first leader of the U.S. Navy administration, Commander Benjamin Franklin Tilley, promptly signed Regulations Four and Five, which continued local laws and customs by “strictly limit[ing] land ownership in the region to either Samoans or the government” and applying “U.S. laws to the territory, as long as they did not conflict with Samoan customs,” respectively.¹⁴⁷ American Samoans further entrenched these norms when they adopted their own constitution:

It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family

¹⁴⁴ Deed of Cession of Tutuila and Aunu’u, *supra* note 28.

¹⁴⁵ Deed of Cession of Manu’a Islands, *supra* note 32.

¹⁴⁶ *Downes v. Bidwell*, 182 U.S. 244, 298 (1901) (White, J., concurring) (quoting *Chicago, Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546 (1885)) (emphasis added).

¹⁴⁷ JoAnna Poblete-Cross, *Bridging Indigenous and Immigrant Struggles: A Case Study of American Sāmoa*, 62 AM. Q. 501, 502 (2010). For regulations passed by Commander Tilley, see United States Naval Station, Tutuila, List of Regulations and Orders forwarded to the Assistant Secretary of the Navy, October 29, 1902, File: Regulations, Proceedings, Orders of the Government of American Samoa: 1900-1906, at Box 1, RG 284, NARA-SB.

organization of persons of Samoan ancestry, and to encourage business enterprises by such persons.¹⁴⁸

To this end, the American Samoa Code promulgates the Native Lands Ordinance.¹⁴⁹ This act contains restrictive land alienation rules which may be endangered by applying deeper mainland jurisprudence to American Samoa. For example, it reads in part:

(a) It is prohibited for any *matai* of a Samoan family who is, as such, in control of the communal family lands or any part thereof, to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa.¹⁵⁰

(b) It is prohibited to alienate any lands except freehold lands to any person who has less than one-half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan family, lives with Samoans as a Samoan, lived in American Samoa for more than 5 years and has officially declared his intention of making American Samoa his home for life.

(c) If a person who has any nonnative blood marries another person who has any nonnative blood, the children of such marriage cannot inherit land unless they are of at least one-half native blood.¹⁵¹

The local legislature eventually passed laws recognizing the existence of individually-owned land, but also restricted its ownership to Samoan persons as described above.¹⁵² Within a few years of codification, the High Court of American Samoa opined that:

¹⁴⁸ AM. SAM. REV. CONST. art. 1, §3. The final clause, “and to encourage business enterprises by such persons,” was added by amendment. Similar guarantees still appear in the Constitution of the Independent State of Samoa. *See* CONST. OF THE INDEPENDENT STATE OF SAMOA, art. 102.

¹⁴⁹ *See* AM. SAMOA. CODE ANN. §37.0204 (2021).

¹⁵⁰ A *matai*’s alienation of land must comply with certain statutory procedures, including the approval of the Governor of American Samoa and the local Land Commission. *See id.*; *see also* *Alaimalo v. Sivia*, 17 Am. Samoa 2d 25 (Am. Samoa 1990); *Maggie v. Atualevao*, 19 Am. Samoa 2d 86 (Am. Samoa 1991). As a result, relatively few transfers occur, although conveyances to recognized religious societies have been permitted. *See Reid v. Tavete*, 1 Am. Samoa 2d 85, 88 (Am. Samoa 1983).

¹⁵¹ AM. SAMOA CODE ANN. § 37.0204. As used in this section, “Samoan” includes Western Samoans and is not limited to American Samoans. *See Moon v. Falemalama*, 4 Am. Samoa 836, 840 (Am. Samoa 1975) (reasoning that “A ‘native’ is defined in the Code as a ‘full-blooded Samoan,’ not as a full-blooded American Samoan.”).

¹⁵² Even then, there is a strong public policy against individual land ownership. Diminution of family land base by parceling out communal lands to individuals is

Land to the American Samoan is life itself . . . The whole fiber of the social, economic, traditional and political pattern in American Samoa is woven fully by the strong thread which the American Samoan places in the ownership of land. Once this protection for the benefit of American Samoans is broken, once this thread signifying the ownership of land is pulled, the whole fiber, the whole pattern of the American Samoan way of life will be forever destroyed.¹⁵³

The islands' elected leaders still echo this sentiment today.¹⁵⁴ Not surprisingly, the High Court of American Samoa has therefore repeatedly upheld the constitutionality of these restrictions as a valid exercise of the territorial police power,¹⁵⁵ and justified by a compelling governmental interest that survives the application of strict scrutiny.¹⁵⁶ Their practice has thus far served as a bulwark against such takings concerns and permitted American Samoa freedom from being overrun by outside developers.

At the same time, it is deeply entrenched in American jurisprudence that racialized distinctions trigger heightened scrutiny.¹⁵⁷ The Fourteenth Amendment commands that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵⁸ That principle thus demands that any statute discriminating on the basis of race be subject to the strictest judicial scrutiny.¹⁵⁹ While the text of the Fourteenth

considered not "in keeping with the Samoan custom of retention of land in the family for the support and maintenance of the family and under the control of the head of the family." *Aumoeualogo v. Mamoe*, 4 Am. Samoa 742, 746 (Am. Samoa 1967).

¹⁵³ *Haleck v. Lee*, 4 Am. Samoa 519, 551 (Am. Samoa 1964). The full passage is much lengthier but equally convicted in its reasoning and worthy of a complete read by any jurist addressing these issues.

¹⁵⁴ According to one local official, "[c]ultural identity is the core basis of the Sāmoan people, and communally owned lands are the central foundation that will allow our cultural identity to survive in today's world." MEMEA KRUSE, *supra* note 18, at 2.

¹⁵⁵ *Haleck v. Tiumala*, 3 ASR 380, 392 (Am. Samoa 1959).

¹⁵⁶ *Craddick v. Territorial Registrar*, 1 ASR2d 10, 12 (Am. Samoa 1980).

¹⁵⁷ This extends back to footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 151–54 n.4 (1938) (speaking of "discrete and insular minorities").

¹⁵⁸ U.S. CONST. amend XIV, §1.

¹⁵⁹ See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("At the very least, the Equal Protection Clause demands that racial classifications [. . .] be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U.S. 214 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate").

Amendment speaks directly to the states as states, the ASG does not seek to distinguish itself on the basis of its territorial status. Rather, the ASG acknowledges that equal protection applies as a fundamental right and asserts that a compelling state interest in preserving *fa'a Samoa* justifies its policy.¹⁶⁰

In *Craddick v. Territorial Registrar*, the High Court of American Samoa asserted that the protection of Samoan lands is a permissible state objective “independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”¹⁶¹ After restating the importance of land rights within Samoan society, the court emphasized the uninterrupted history of central-local legal relations—including the foundational governing documents—as demonstrating understanding “from the very beginning of the compelling nature of the governmental interest in restricting alienation.”¹⁶² Six years later, the U.S. District Court for the District of Columbia cited this rationale in a separate opinion, *Corp. of the Presiding Bishop v. Hodel*,¹⁶³ holding that “[c]ommunal ownership of land is the cornerstone of the traditional Samoan way of life—the ‘*fa'a Samoa*.’”¹⁶⁴

In *Fitisemanu*, the Tenth Circuit Court of Appeals noted the unpredictable but potentially seismic shifts that extending constitutional citizenship may have upon *fa'a Samoa*,¹⁶⁵ including the native lands policy. While impossible to definitively predict how jurisprudence would play out generationally, it is possible to analogize to and extrapolate from similar experiences within the American orbit. Indeed, the American Samoan land system bears features similar to those of the indigenous peoples of Hawaii, Guam, and the Commonwealth of the Northern Marianas Islands (CNMI), described

¹⁶⁰ *Craddick*, 1 ASR2d at 12.

¹⁶¹ *Id.* at 13 (quoting *Loving*, 388 U.S. at 11).

¹⁶² *Id.* at 12–13.

¹⁶³ *Corp. of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398, 1411 n.23 (D.D.C. 1986); *aff'd*, 830 F.2d 374 (D.C. Cir. 1987). This case involved the validity of an assignment of land from the widow of a *matai* to a religious institution. The High Court ruled that the widow had no valid title to transfer, and the D.C. Court agreed. While the D.C. Circuit did not need to address the equal protection issue in upholding the ruling, it nevertheless took detailed notice of the *Craddick* rationale.

¹⁶⁴ *Corp. of the Presiding Bishop*, 830 F.2d at 377.

¹⁶⁵ “The constitutional issues that would arise in the context of America Samoa’s unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable.” *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021).

below. While the view from the CNMI is agreeable, the examples of Guam and Hawaii provide cautionary tales.

1. Commonwealth of the Northern Marianas Islands

The Commonwealth of the Northern Marianas Islands (“CNMI”), is also one of the United States’ five unincorporated territories. The United States established a trusteeship over the CNMI pursuant to a United Nations Security Council resolution after Imperial Japan’s defeat in World War II,¹⁶⁶ and a local referendum approved a covenant to create a commonwealth in political union with the United States in 1975.¹⁶⁷ The Commonwealth Constitution became effective in 1978,¹⁶⁸ and the islanders became U.S. citizens via statute when the UN trusteeship officially ended in 1986.¹⁶⁹ A plurality of local residents descend from the native Chamorro and Carolinian peoples.¹⁷⁰

The Ninth Circuit upheld the provision of the CNMI Constitution restricting the acquisition of “long-term interests to persons of Northern Mariana Islands descent” in *Wabol v. Villacrusis*.¹⁷¹ The court tested that provision by asking whether the right to acquire property free from such racial classifications “is one which would be impractical or anomalous in NMI.”¹⁷² In doing so, the court favored an analysis under the Territorial Clause instead of the analysis demanded by the Equal Protection Clause.¹⁷³ The Ninth Circuit concluded that the

¹⁶⁶ See S.C. Res. 21 (July 18, 1947) (establishing the Trust Territory of the Pacific Islands).

¹⁶⁷ The proposal was approved by approximately 79 percent of voters. See *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America* (Feb. 15, 1975), <https://www.refworld.org/docid/3ae6b54e4.html>.

¹⁶⁸ See CNMI CONST. (Jan. 9, 1978), <https://cnmilaw.org/cons.php#gsc.tab=0>.

¹⁶⁹ CNMI COVENANT art. III § 301, codified (as amended) at 48 U.S.C. §§ 1801-1805.

¹⁷⁰ III.B. OVERVIEW OF THE STATE-NORTHERN MARIANA ISLANDS-2020, U.S. DEP’T. OF HEALTH AND HUM. SERV., <https://mchb.tvisdata.hrsa.gov/Narratives/Overview/ad48c169-b39e-4883-84a0-ea7e5bcf9695> (last visited Nov. 20, 2022).

¹⁷¹ *Wabol v. Villacrusis*, 958 F.2d 1450, 1452 (9th Cir. 1990). See also CNMI CONST. art. 12 § 4 (stating in part that “[a] person of Northern Marianas descent is a person who is a citizen or national of the United States and who has at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof.”).

¹⁷² *Wabol*, 958 F.2d at 1461.

¹⁷³ *Id.* at 1460 (the court defined the issue as: “Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a

territorial government carried its burden of demonstrating that this constitutional guarantee would be impractical and anomalous there, and therefore should not be applied:

Land is the only significant asset of the Commonwealth people and “is the basis of family organization in the islands.” . . . It appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives’ social system. The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. *The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions.*¹⁷⁴

Considering that evidence, the Ninth Circuit concluded that “free alienation is impractical in this situation not because it would not work, but because it would work too well,” exposing locals to exploitation by wealthy outside investors.¹⁷⁵ Beyond that, the *Wabot* court concluded “it would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property[,]” a promise made upon assumption of trusteeship and establishment of an American commonwealth.¹⁷⁶ In the undaunted words of the court:

The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders’ vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition.¹⁷⁷

fundamental one which is beyond Congress’ power to exclude from operation in the territory under Article IV, section 3?”).

¹⁷⁴ *Id.* at 1461 (emphasis added).

¹⁷⁵ *Id.* at 1462 n.21.

¹⁷⁶ *Id.* at 1462.

¹⁷⁷ *Id.*

It is perhaps worth noting here that the CNMI possesses a land mass of 179 square miles while American Samoa possesses just 77 square miles, which provides all the more reason to protect American Samoa's land tenure system. While this precedent bodes well for American Samoa's claimed interests, it must be noted that the CNMI residents are U.S. citizens via statute, not via the citizenship clause. Governance under the Territorial Clause is what allowed the flexible approach of the impractical and anomalous standard to stand in for the full-blown strict scrutiny analysis demanded by Fourteenth Amendment jurisprudence. Even then, when considering the experiences of other U.S. territories, it is apparent that there are no guarantees.

2. Guam

Guam became a U.S. territory in 1898 during the Spanish-American War, and U.S. citizenship was granted to its inhabitants under the Organic Act of 1950.¹⁷⁸ Since World War II, the United States military has controlled approximately 28 percent of all available land.¹⁷⁹ Guam has not yet adopted a local constitution,¹⁸⁰ and although the indigenous Chamorro people have inhabited the island for thousands of years, its Organic Act does not specifically provide for ancestral land protection.¹⁸¹

Instead, local authorities attempted to make provisions for the land rights of indigenous peoples by creating the Chamorro Land Trust Commission in 1975.¹⁸² The CLTC intends to ensure that "Chamorro Homelands are awarded to native Chamorros as defined by the Organic Act of Guam."¹⁸³ The program it administers grants leases to native Chamorros for agricultural, commercial, or residential purposes in one-acre plots for one dollar per year.¹⁸⁴ "Based on Census 2010 data, Chamorros make up approximately 37.3% of the

¹⁷⁸ 48 U.S.C. § 1421.

¹⁷⁹ Jon Letman, *Guam: Where the U.S. Military is Revered and Reviled*, DIPLOMAT, (Aug. 29, 2016), <https://thediplomat.com/2016/08/guam-where-the-us-military-is-revered-and-reviled>.

¹⁸⁰ Guam is governed not by a constitution but rather by the Organic Act passed by Congress in 1950. 48 U.S.C. §§ 1421–24b.

¹⁸¹ Instead, it refers to due process for those persons deprived of their land by the United States between July 21, 1944, and August 23, 1963, that is, mostly through military acquisitions. *See* 48 U.S.C. § 1424c (a).

¹⁸² Created via the Chamorro Land Trust Act, 21 Guam Code Ann. § 75102 (2020).

¹⁸³ CHAMORRO LAND TRUST COMM'N, A REPORT TO THE CITIZENS OF GUAM FISCAL YEAR 2014, 1 https://www.opaguam.org/sites/default/files/cltc_ccr14.pdf.

¹⁸⁴ *Id.*

population of Guam,” and the Chamorro Land Trust Commission “administers approximately 20,000 acres, or 15% of Guam’s total land area.”¹⁸⁵

That concession came under assault from federal authorities in 2017 when the Trump administration’s Department of Justice filed a lawsuit against the land trust and the local government.¹⁸⁶ The suit alleged that the Chamorro Land Trust violated the Federal Fair Housing Act by discriminating against non-Chamorros on the basis of race or national origin.¹⁸⁷ Guam agreed to a settlement in June 2020 that required it to cease taking race and national origin into account in awarding the land leases.¹⁸⁸ Instead, the CLTC pledged to award favorable leases where claimants can prove a taking of their land occurred,¹⁸⁹ as well as acquiescing to enhanced record-keeping, Fair Housing Act training, and additional injunctive relief requirements.¹⁹⁰

While unclear exactly why the Guam Government decided to settle, a distinguishing factor seems to be that the original documents of central-local relations between Guam and Washington D.C. do not acknowledge ancestral land rights as they do in American Samoa and the CNMI. Furthermore, the federal government’s prayer for relief included the award of unspecified compensatory and punitive damages to all persons harmed by Guam’s alleged discriminatory practices.¹⁹¹ Thus intimidated into settlement, the contemporary existence of this pending litigation may explain why Guam was the only

¹⁸⁵ *United States v. Government of Guam (D. Guam)*, U.S. DEP’T OF JUST. (June 4, 2020), <https://www.justice.gov/crt/case/united-states-v-government-guam-et-al-d-guam>.

¹⁸⁶ See Complaint, *United States v. Gov’t of Guam*, No. 3:17-CV-00371, 2017 WL 11582030 (D. Conn. Oct. 27, 2017).

¹⁸⁷ *Id.* at 10.

¹⁸⁸ See Settlement Agreement between the United States of America and the Government of Guam, Chamorro Land Trust Commission & Administrative Director of the Chamorro Land Trust Commission, *United States v. Government of Guam (D. Guam)*, Civil No. 17-CV-00113, 3-4 (June 4, 2020).

¹⁸⁹ Many native lands were annexed for the development of U.S. military installations. See generally Chris Gelardi, *Guam: Resisting Empire at the “Tip of the Spear,”* NATION, (Nov. 2, 2021), <https://www.thenation.com/article/world/guam-resistance-empire/#:~:text=To%20build%20a%20magazine%20to,now%20the%20island’s%20largest%20reservoir.>

¹⁹⁰ Settlement Agreement, *supra* note 188, ¶¶ 14–27, at 3–13.

¹⁹¹ 42 U.S.C. § 3614(d)(1)(B)–(C).

territorial government not to join an amicus brief in favor of the plaintiffs' position in *Fitisemanu v. United States*.¹⁹²

3. Hawaii

Native Hawaiians are the indigenous Polynesian people of the Hawaiian Islands. American forces conspired to overthrow the native government in 1883, and the United States annexed Hawaii in 1898.¹⁹³ The United States Congress later recognized that the annexation occurred "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government."¹⁹⁴ Subsequent official proclamations have apologized for that coup and the displacement of Native Hawaiian institutions.¹⁹⁵

The Admission Act admitting Hawaii into the Union required Hawaii to adopt the Hawaiian Homes Commission Act as part of its state constitution.¹⁹⁶ Under this Act, Congress placed 1.2 million acres of land ceded to the United States in 1898 into the care of the trust for the benefit of Native Hawaiians.¹⁹⁷ The Admission Act thus affirmed a trust relationship between the United States and Native Hawaiians and transferred some of the responsibility for that trust to the State of Hawaii.¹⁹⁸ A 1978 amendment to the Hawaiian Constitution created the Office of Hawaiian Affairs (OHA) and allocated a pro rata share of

¹⁹² Brief for Members of Congress et al. as Amici Curiae Supporting Plaintiffs-Appellees and Affirmance, *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021) (No. 20-4017).

¹⁹³ Rigby, *supra* note 18, at 221.

¹⁹⁴ Although the 1898 annexation document speaks in terms of Hawaiian consent, see H.R.J. Res. 259, 55th Cong., 30 Stat. 750 (1898) (enacted); *but see* S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993) (enacted) which twice refers to the lack of Hawaiian consent ("Whereas the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law" and "Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.").

¹⁹⁵ S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

¹⁹⁶ An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959).

¹⁹⁷ *See id.* § 5(f).

¹⁹⁸ *Id.*

the revenues from the Public Land Trust to OHA to be used, once again, for the betterment of Native Hawaiians.¹⁹⁹

Despite the history, documents, and practices that supported the unique recognition of the rights of Native Hawaiians, the United States Supreme Court ruled in *Rice v. Cayetano* that the election procedure for the OHA Board of Trustees ran afoul of the Fifteenth Amendment because only persons of Native Hawaiian ancestry were allowed to vote.²⁰⁰ The Court did not accept Hawaii's argument that this was an ancestral rather than a race-based requirement.²⁰¹ Carefully distinguishing the case at hand from a previous case granting similar benefits to members of Native American Indian tribes,²⁰² the Court held that the OHA election process did not qualify for the same dispensation because it elected statewide "public officials" rather than being an internal election of a native group to select its leaders, i.e., "the internal affair of a quasi-sovereign."²⁰³

The Court dismissed Hawaii's central argument on the preservation of local culture in the penultimate paragraph of its opinion, stating:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning

¹⁹⁹ HAW. CONST. art. XII, §§ 5, 6 (The term "Native Hawaiian" in this provision refers to those entitled to benefit under the Hawaiian Homes Commission Act, primarily those with 50 percent or more Hawaiian blood).

²⁰⁰ *Rice v. Cayetano*, 528 U.S. 495, 524 (2000); see also U.S. CONST. amend. XV, § 1 (The Fifteenth Amendment to the Constitution states "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

²⁰¹ *Rice*, 528 U.S. at 495–496 ("The ancestral inquiry in this case implicates the same grave concerns as a classification specifying a particular race by name, for it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities.").

²⁰² *Id.* at 518–22 (discussing *Morton v. Mancari*, 417 U.S. 535, 537 (1974)).

²⁰³ *Rice*, 528 U.S. at 520; see Jeffrey Marchesseault, *Guam Tribal Lands: Hold 'Em or Fold 'Em?*, PNC GUAM (Oct. 14, 2018), <https://www.pncguam.com/guam-tribal-lands-hold-em-or-fold-em> (Both the Native Hawaiians and the Chamorro of Guam have considered—and thus far rejected—the idea of seeking to reclassify themselves as Native American Indian tribes in order to secure the benefits of limited sovereignty granted those tribes under the U.S. Constitution).

points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.²⁰⁴

In this manner, the introduction of federal constitutional norms overrode local custom and enabled massive demographic change. Today, just 10 percent of Hawaii's population is of sole "Native Hawaiian and Other Pacific Islander" ancestry.²⁰⁵ *Rice* was decided despite the fact that Congress passed a resolution "to offer an apology to the Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii" in 1993.²⁰⁶

While American Samoa seems to have the most in common with CNMI (as far as both being territories with entrenched protections for native lands in their establishing documents under United States sovereignty), the examples of Guam and Hawaii cannot be ignored. Indeed, the treatment of native land protections is split. Protections for native land ownership are more greatly entrenched in jurisdictions where statutory birthright citizenship is applied (i.e., the CNMI and Guam), while similar arrangements have fallen before the more rigid scrutiny of mainland legal norms in the only jurisdiction that features constitutional birthright citizenship (i.e., Hawaii). With full knowledge of these precedents, the ASG expresses the apparent wish of the majority of American Samoans not to be "Hawaii'ed,"²⁰⁷ and if this record is not a warning sign, then what is?

B. *Matai System*

Interlinked with the land preservation system, the leadership of the *matai* is considered fundamental to *fa'a Samoa*. The traditional Samoan household consisted of a large extended family, or '*aiga*, numbering up to as many as fifty people.²⁰⁸ Each household was responsible for its own economic needs as well as fulfilling its

²⁰⁴ *Rice*, 528 U.S. at 524.

²⁰⁵ America Counts Staff, *Hawaii Added More Than 94,000 People Since 2010*, CENSUS.GOV (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/hawaii-population-change-between-census-decade.html>.

²⁰⁶ S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993) (enacted).

²⁰⁷ *Fitisemanu v. United States*, 1 F.4th 862, 867 (10th Cir. 2021) (citing FUTURE POL. STATUS STUDY COMM'N. OF AM. SAM., FINAL REPORT 64 (2007)); see also Michelle Broder Van Dyke, *Why Some American Samoans Don't Want U.S. Citizenship*, NBC NEWS (Dec. 17, 2019, 1:04 PM), <https://www.nbcnews.com/news/asian-america/why-some-american-samoans-don-t-want-u-s-citizenship-n1103256>.

²⁰⁸ Margaret Mead, *The Samoans, in COOPERATION AND COMPETITION AMONG PRIMITIVE PEOPLES* 284 (Margaret Mead ed., McGraw Hill Book Co. 1937).

obligations to the village as a whole.²⁰⁹ To this end, the ‘*aiga* own their land in communal form and select a *matai*—variously translated to “titled chief” or “leader”—to represent them in public life.²¹⁰ “The *matais* are the trustees of the land, the political leaders, the disseminators of information, the power brokers . . . even the law enforcement.”²¹¹

Matai titles are chosen via household election, subject to birthright requirements and political consensus.²¹² Their ascension was traditionally based on heredity alone, but the law now provides a list of eligibility requirements, which include:

- (a) Must be at least one-half Samoan blood.
- (b) Must have resided continuously within the limits of American Samoa for five years either immediately preceding the vacancy of the title, or before he becomes eligible for the title.
- (c) Must live with Samoans as a Samoan.
- (d) Must be a descendant of a Samoan family and chosen by his family for the title.²¹³

Further, the Land and Titles Division of the High Court of American Samoa possesses significant oversight over the grant of titles.²¹⁴ That court considers four factors in any grant: (1) hereditary rights; (2) level of familial support; (3) the strength of the individual’s character; and (4) the individual’s perceived “value of the holder of the title to the family, village, and country.”²¹⁵

Indeed, *matai* enjoy prominence throughout local government. Village councils comprised of *matai* meet frequently to assess the basic needs of their villages, including law and order.²¹⁶ The upper house of

²⁰⁹ LEIBOWITZ, *supra* note 38, at 389.

²¹⁰ See A.P. Lutali & William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the Matai System in the Territory of American Samoa*, 4:2 GA. J. INT’L & COMP. L. 387, 388–89 (1974).

²¹¹ MACK, *supra* note 8, at 81.

²¹² Tapu, *supra* note 56, at 87.

²¹³ Although the majority are male, gender is not a limitation. See generally Saliemanu Lilomaiava-Doktor, *Women Matai (Chiefs): Navigating and Negotiating the Paradox of Boundaries and Responsibilities*, 43 PAC. STUD. 61 (2020); LEIBOWITZ, *supra* note 38, at 390.

²¹⁴ 1 AM. SAMOA CODE ANN. § 1.0409 (1993); see also William E. H. Tagupa, *Judicial Intervention in Matai Title Succession Disputes in American Samoa*, 54 OCEANIA 23–31 (1983).

²¹⁵ *Id.* The law proclaims these to be in order of importance.

²¹⁶ Hall, *supra* note 141, at 74–76.

American Samoa's insular legislature, the *Fono*, is reserved only for select *matai*.²¹⁷ The United States Department of the Interior often appoints local judges from the ranks of the *matai* based on their knowledge of custom, even though many lack formal legal training.²¹⁸

Matai manage and protect their households and villages through a lifestyle of *fa'aaloalo*, emphasizing respect and service to others.²¹⁹ As both the title and the land associated with it are vested in the corresponding 'aiga, their central role involves ensuring that 'aiga land is properly allocated and maintained, including by managing the division of labor within the household.²²⁰ As the High Court of American Samoa states, a *matai* is "trustee of family lands for the use and benefit of the members of his matai family."²²¹

At least two possible constitutional challenges to the *matai* system have been voiced. The first—and more common—is that the existence of the *matai* title would contravene the United States Constitution's two Nobility Clauses.²²² The second is that aspects of the 'aiga system might run afoul of the Thirteenth Amendment prohibition against indentured servitude.

The question of title would essentially be an issue of first impression at the United States Supreme Court, as it has treated the nobility clauses as self-evident on the rare occasions they have been encountered at all.²²³ While the lower federal courts have upheld some state-recognized academic and professional honors (such as the "esquire" used by lawyers),²²⁴ the occasionally on-point state court

²¹⁷ *Id.* at 74. At present, the Senate has eighteen seats, and the House of Representatives has twenty-one seats. As argued later, this conservative alignment of domestic politics means that federal authorities should treat their claims with a grain of salt, placing greater weight upon independent research or the wishes expressed by the lower, directly-elected house of the insular legislature.

²¹⁸ All judges report to, and can be dismissed by, the U.S. Department of the Interior.

²¹⁹ Ivy Yeung, *supra* note 38, at 9.

²²⁰ Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 826 (2008).

²²¹ *Talo v. Tavai*, 2 Am. Samoa 63, 70 (Am. Samoa 1939).

²²² See U.S. CONST. art. I, § 9, cl. 8; see also *id.* § 10, cl. 1.

²²³ See, e.g., *Briscoe v. President & Dirs. of Bank of Ky.*, 36 U.S. 257, 287 (1837). Almost 150 years later, Justice Stevens wrote of them obliquely in his dissent in *Fullilove v. Klutznick*, a case involving a federal attempt to force state and local governments to purchase goods and services from minority-owned businesses. *Fullilove v. Klutznick*, 448 U.S. 448, 532–33 (1980) (Stevens, J., dissenting).

²²⁴ E.g., *Williams v. Florida*, No. 18-cv-389-FtM-29UAM, 2019 WL 858024, at *2 (M.D. Fla. Feb. 2, 2019).

ruling would seem to negatively impact the *matai*. For instance, the Alabama Supreme Court once interpreted the nobility clause of its own constitution stating:

To confer a title of nobility, is to nominate to an order of persons to whom privileges are granted at the expense of the rest of the people. It is not necessarily hereditary, and the objection to it arises more from the privileges supposed to be attached . . . [The prohibition] is to preserve the equality of citizens in respect to their public and private rights.²²⁵

Absent binding precedent, the federal courts would likely consider history and the Framers' original intent.²²⁶ As the United States was founded in rebellion to monarchy, the Nobility Clauses made their way from the Articles of Confederation into the early state constitutions and the United States Constitution.²²⁷ Alexander Hamilton, writing in Federalist Paper 84, stated:

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.²²⁸

Although it appears that direct application of the United States Constitution would dissolve the *matai* titles, it is questionable whether a court would find the Nobility Clauses "fundamental."²²⁹ From the perspective of the ASG, it would be safer to assume that applying the Nobility Clauses to American Samoa would be impractical and anomalous under the present Territorial Clause analysis demanded by the Insular Cases. It would be impractical in the sense that agents of the U.S. Government would need to police social and familial relations in American Samoa, perhaps raising substantive due process

²²⁵ Horst v. Moses, 48 Ala. 129, 142 (Ala. 1872).

²²⁶ See, e.g., New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111, 2122, 2130 n.6 (2022).

²²⁷ See ARTICLES OF CONFEDERATION of 1781, art. VI; see also U.S. CONST. art. I, §9, cl. 8.

²²⁸ THE FEDERALIST NO. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

²²⁹ Article I, Section 10, clause 1 declares that "[n]o State shall . . . grant any Title of Nobility," while Section 9, clause 8 prohibits the granting of titles "by the United States." U.S. CONST. art. I, § 10, cl. 1; *id.* § 9, cl. 8. A prospective argument to avoid direct application may be to assert that is the '*aiga* units who grant those indigenous title while the U.S. merely countenances the practice, but its reception is uncertain.

considerations.²³⁰ That disruption would clearly constitute an anomalous imposition upon the social fabric of the traditional lifestyle:

When analyzing the impractical standard, the matai system is wholly unique from any other political or leadership structure found in a territory or state. Even attempting to draw similarities between the matai system and an American form of government as a way to minimize this uniqueness would be incomplete and overly expansive.²³¹

Nonetheless, in 1977 the District Court for the District of Columbia essentially buried the *matai* system in *King v. Andrus*,²³² using the testimony of singular witnesses to justify its judgment that the *fa'a Samoa* had long since given way to modern technological conveniences:

A defense witness, Mrs. Van Cleave, attributes this [undermining of the *fa'a Samoa*] in large measure to influence of the U.S. military in World War II which introduced the Samoans to a wage economy hitherto unknown to them. According to this witness, the Samoans found the wage economy more attractive than the bartering system, and very few dollars are passed on to the *matai*. With the wage economy came the notion of personal property; and as Delegate Lutali put it, the Samoans, particularly the young couples, have houses, cars, television sets, and other personal items, along with the education of their children to pay for, and are thus more concerned with these obligations than with rendering service to a *matai*.²³³

Foregoing warnings from the D.C. Circuit Court of Appeals that the imposition of jury trials would undermine local dispute resolution mechanisms,²³⁴ the district court found this technological progress a sufficient reason to proceed. Yet, despite this chauvinistic judgment upon a distant culture, the *matai* system survives over forty years later.²³⁵ It may be worth noting here that American Samoa is the only U.S. territory that does not host a federal court, leaving it at the mercy of

²³⁰ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (utilizing substantive due process in not allowing a city government to dictate who could be regarded as family among blood relations for administrative convenience).

²³¹ *Falefuafua Tapu*, *supra* note 56, at 84.

²³² *King v. Andrus*, 452 F. Supp. 11 (D.D.C. 1977).

²³³ *Id.* at 14 (D.D.C. 1977).

²³⁴ *King v. Morton*, 520 F.2d 1140, 1147–1148 (D.C. Cir. 1975).

²³⁵ See generally *Falefuafua Tapu*, *supra* note 56.

mainland judges who can only project their own views of progress upon the island.²³⁶

A recent case from the United States District Court for the Central District of California reflects the possibly flippant way in which the mainland's federal bench might treat traditional Samoan culture.²³⁷ This action arose over the disputed conveyance of a 240-acre parcel of land in the independent country of Samoa (formerly Western Samoa).²³⁸ Plaintiff Frances Kneubuhl Opelle (one-sixth owner) filed suit against her brother, Mike Kneubuhl (five-sixths owner), for allegedly selling the property without providing her notice or her fair share of the proceeds.²³⁹ The plaintiff argued a fiduciary relationship existed by virtue of the defendant's status as a *matai*.²⁴⁰ The California court applied California law and held that the formation of a real property trust must be evinced by either written instruments or the operation of formal law.²⁴¹ Unable to meet this evidentiary standard, the plaintiff's claim for breach of fiduciary duty failed.²⁴² While factually distinguishable, this case indicates a possibility that granting constitutional citizenship may lead to the proliferation of more cases before the lower federal courts of the mainland United States, where the application of mainland legal normative perspectives may overwhelm the customary practice of the islands.

Nonetheless, assuming the *matai* system survives challenges under the nobility prohibitions, the lesser discussed Thirteenth Amendment claim may impact the household system. That fateful amendment reads:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, *or any place subject to their jurisdiction*.²⁴³

²³⁶ Because American Samoa does not host a federal court unlike the CNMI, Guam, or USVI, matters of federal law arising in American Samoa have generally been adjudicated in U.S. district courts in Hawaii or the District of Columbia.

²³⁷ See *Opelle v. Kneubuhl*, No. SACV170961DOCKESX, 2019 WL 410805, at *1, *4 (C.D. Cal. Feb. 1, 2019).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.*

²⁴² *Id.* at 5.

²⁴³ U.S. CONST. amend XIII (emphasis added).

The prospective basis of such a claim would be that the communal land is managed by the *matai*, placing the *matai* in a feudal relationship with individual members of the ‘*aiga*, to some of whom he or she gives permission to build a homestead in exchange for services.²⁴⁴ The extension of citizenship, however, should have no impact upon the possibility of such a claim, which could for all purposes be brought now. The Thirteenth Amendment is not limited to the States or United States citizens, but by its text applies everywhere and to everyone subject to U.S. jurisdiction.²⁴⁵

Indeed, the High Court of American Samoa held that the Thirteenth Amendment and its implementing federal legislation were fully incorporated into local law in *Purcell v. Schirmer*.²⁴⁶ The court further opined, “[g]iven that these rights are so fundamental, it is no surprise that they are safeguarded by our own Constitution,”²⁴⁷ and that “it would not be impractical or anomalous to apply these rights in the Territory.”²⁴⁸

In reality, though once pondered by *matai* as a challenge to their traditional authority,²⁴⁹ this Thirteenth Amendment claim does not appear to have been made before a court. Were a plaintiff to file a legitimate claim, he or she would certainly be entitled to exit the ‘*aiga* system and recover damages. The claim is more likely to be raised in conjunction with the foreign laborers brought in by some *matai*. This unfortunate practice has been described as “very much like indentured servitude upon foreigners working in the territory.”²⁵⁰ Sadly, the facts underlying the largest human trafficking case in U.S. history took place in a garment factory in American Samoa that operated from 1998 to 2001.²⁵¹ For better or worse, its tailored territorial status also allows

²⁴⁴ LEIBOWITZ, *supra* note 38, at 413.

²⁴⁵ U.S. CONST. amend XIII; *Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. 2015) (No. 13-5272).

²⁴⁶ *Purcell v. Schirmer*, 6 Am. Samoa 3d 287, 297 (Am. Samoa 2002).

²⁴⁷ AM. SAM. REV. CONST. art. I, § 10 (“Neither slavery, nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in American Samoa.”)

²⁴⁸ *Purcell*, 6 Am. Samoa at 297.

²⁴⁹ LEIBOWITZ, *supra* note 38, at 410 (citing “Pacific Island Reports,” Hearings Before a Subcomm. of Interior and Insular Affairs, U.S. Sen., 81st Cong., 2nd Sess., on S.185, S.1892, and H.R. 7273, April 19, 1950, 61–65).

²⁵⁰ MACK, *supra* note 8, at 99.

²⁵¹ The owner, a South Korean businessman named Kil Soo Lee, was sentenced to forty years in prison after being convicted of luring about 300 women from China and Vietnam to work in his factory. *Id.*, citing a report in Seattle Post-Intelligencer report

American Samoa to be the only U.S. territory with autonomous control of its own immigration system.²⁵²

C. Religious Curfew

The ASG and its villages officially observe a daily evening prayer curfew called *Sa* as part of the *fa'a Samoa*.²⁵³ The curfew is announced by the ringing of a bell or blowing of a conch shell, and usually occurs in the evening between 6:00–7:00 p.m.²⁵⁴ Locals are expected to be inside of their houses with their families, presumptively in quiet prayer. Only village police (*aumaga*) patrol outdoors, ensuring observance.²⁵⁵ The *matai* have expressed their concern that this tradition would be diluted and destroyed by deeper application of mainland constitutional norms, particularly the First Amendment's Establishment Clause.²⁵⁶

The First Amendment provides in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”²⁵⁷ As Congress can make law for the U.S. territories, this provision applies literally; indeed, because the text only limits congressional action, the states were allowed to establish or carry over their official religions at the founding.²⁵⁸ That officially came to an end in *Everson v. Board of Education*, the case which incorporated the Establishment Clause to the states via the Fourteenth Amendment's Due Process Clause.²⁵⁹ In his majority opinion, Justice Hugo Black

entitled “Made in Misery: How 12 Women Escaped Sweatshop Slavery.” Mack, *supra* note 8, at 99.

²⁵² U.S. DEP'T OF THE INTERIOR: OFFICE OF INSULAR AFFAIRS, AMERICAN SAMOA, <https://www.doi.gov/oia/islands/american-samoa#:~:text=American%20Samoa%20came%20under%20Federal,own%20immigration%20and%20border%20matters> (last visited June 14, 2022).

²⁵³ Samoa News Staff, *Vaitogi Village Imposes Strict Regulations on Residents and Visitors*, SAMOA NEWS (July 6, 2020, 7:28 AM), <https://www.samoanews.com/local-news/vaitogi-village-imposes-strict-regulations-residents-and-visitors>.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Fitisemanu v. United States*, 1 F.4th 862, 880 (10th Cir. 2021).

²⁵⁷ The First Amendment reads “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend I.

²⁵⁸ See John R. Vile, *Established Churches in Early America*, THE FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/801/established-churches-in-early-america> (last visited Nov. 1, 2022).

²⁵⁹ See generally *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947).

provided a non-exhaustive list of acts that would violate the Establishment Clause, declaring:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.²⁶⁰

It should seem apparent to most law students that *Sa* would tend to violate all of these baseline prohibitions. Nor until very recently would subsequent jurisprudence indicate a likely exemption for *Sa*. At least two separate tests for Establishment Clause compliance adopted since *Everson* would seem to bar the practice of *Sa* as it is now known. The long-standing *Lemon* test from *Lemon v. Kurtzman* asked three questions of any law passed by any level of government that seems to invoke the establishment of religion: (1) Does the law have a secular purpose; (2) Is its primary effect to either advance or inhibit religion; and (3) Does the law foster an excessive governmental entanglement with religion?²⁶¹ This was not a balancing test, and the failure of any one factor would render the government’s law unconstitutional.²⁶² One could clearly have argued that the observation of *Sa* violates at least prongs two and three—by causing the non-faithful to pause their business dealings (two), and using police forces to implement the curfew (three). Although the *Lemon* test was discarded last term in *Kennedy v. Bremerton School District*, the shape of Establishment Clause jurisprudence to come is largely still undefined.²⁶³ Meanwhile, as an alternative, the coercion test from *Lee v. Weisman* asks whether a bystander would feel compelled to participate in any given religious

²⁶⁰ *Id.* at 15–16.

²⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁶² The *Lemon* Court found against the two state programs at issue solely under the entanglement prong. *Id.* at 615–620.

²⁶³ The *Kennedy* majority writes “In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022). This may bode well for local cultural preservation interests, provided that the issues are decided by a court with knowledge of local affairs.

observance.²⁶⁴ The courts have typically applied this test in school prayer cases and have used it to prevent the reading of religious invocations at the start of ceremonies.²⁶⁵ For example, it has prohibited the use of state-funded instrumentalities such as loudspeaker systems to broadcast a prayer before a high school football game, even if the students themselves initiated and voted in favor of the prayer.²⁶⁶ Once again, passersby would feel influenced to observe *Sa*, with conch shells standing in for loudspeakers as the instrumentality.²⁶⁷

To succeed under these precedents as long understood, the ASG would need to convince a court that the curfew is for entirely secular purposes (i.e., encouraging family bonds) and free from state-owned instrumentalities (no police enforcement, and perhaps no use of state-owned bells or conchs). Unless they could invoke the protection of the state action doctrine by arguing the villages are organized around ‘*aiga*’ (i.e., private families) rather than municipal governments—a long shot at best—the villages would need to render the observance entirely voluntary to pass First Amendment muster. Even then, there could be challenges brought under the secular line of cases that address curfews imposed by U.S. cities asking whether the restriction of movement violates a liberty interest protected by the Fourteenth Amendment.²⁶⁸

Dicta from *Downes v. Bidwell* strongly implied that the First Amendment applies in unincorporated territories.²⁶⁹ More recently,

²⁶⁴ *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

²⁶⁵ *See id.*

²⁶⁶ *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

²⁶⁷ The fate of *Lee v. Weisman* is uncertain following the 2022 *Kennedy* decision. *See Kennedy*, 142 S. Ct. at 2429–2432. Justice Sotomayor criticizes the majority opinion for “appl[ying] a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities.” *Id.* at 2434. Justice Thomas has elsewhere stated that he would limit the definition of “coercion” in this context to actions which contain “force of law or threat of penalty.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (J. Thomas, concurring), *citing Lee*, 505 U.S. at 640–641 (J. Scalia, dissenting).

²⁶⁸ *See Hall, supra* note 141, at 98.

²⁶⁹ The opinion stated:

Thus, when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill *of that description*. Perhaps the same remark may apply to the 1st Amendment, that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a

the Second Circuit concluded that the Establishment Clause does apply to “governmental activities having extraterritorial dimensions.”²⁷⁰ In *Lamont v. Woods*, federal taxpayers challenged the appropriation and expenditure of public funds for the construction, maintenance, and operation of religious schools abroad.²⁷¹ Although that case involved the provisions of funds from the U.S. Treasury to foreign institutions, the court held that the Establishment Clause “should apply extraterritorially,” concluding that “general principles of Establishment Clause jurisprudence provide no basis for distinguishing between foreign and domestic establishments of religion,”²⁷² a statement broad enough to certainly encompass the U.S. territories in its universal ambit.

In the absence of on-point binding precedent, the best analogy here would be to occurrences in the other “distinct, significantly self-governing political territories within the United States’s sphere of sovereignty[.]”²⁷³ Despite the fact that both religious freedom and minority rights are hot-button political issues today, the application of First Amendment norms to protect the practices of the Native American Indian Tribes has been inconsistent at best.

Congress has adopted numerous laws relevant to Native American religious practices. During the late nineteenth and early twentieth centuries, the official policy was assimilation.²⁷⁴ That policy was only relaxed in 1934,²⁷⁵ a decade after Congress granted statutory birthright

redress of grievances.’ We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Downes v. Bidwell, 182 U.S. 244, 277 (1901) (emphasis in original).

²⁷⁰ *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991).

²⁷¹ *Id.* at 828. Taxpayers brought suit against federal agencies for providing grants to eleven Israeli schools and to nine schools affiliated with Roman Catholic religious orders, located in the Philippines, Egypt, Jamaica, Micronesia and South Korea. *Id.*

²⁷² *Id.* at 835, 840.

²⁷³ *Tuaua v. United States*, 788 F.3d 300, 306 (D.C. Cir. 2015).

²⁷⁴ For example, *United States v. Clapox*, 35 F. 575, 577 (1888) which ratified the creation of the courts of Indian offenses and their use as “educational and disciplinary instrumentalities” to reshape tribal cultures.

²⁷⁵ These policies would remain in effect until at least 1934, when Commissioner of Indian Affairs, John Collier, issued Circular No. 2970, which mandated that “[n]o interference with Indian religious life or ceremonial expression will hereafter be tolerated. The cultural liberty of Indians is in all respects to be considered equal to that of any non-Indian group.” JOHN COLLIER, U.S. DEP’T OF THE INTERIOR, OFF. OF INDIAN AFFS., Circular No. 2970, Indian Religious Freedom and Indian Culture (1934).

citizenship to the Native Americans.²⁷⁶ Formal autonomy arrived later when the Indian Civil Rights Act of 1968 extended all of the provisions of the First Amendment to the tribes except for the Establishment Clause, noting that it would disadvantage tribal religions.²⁷⁷ Congress also adopted the American Indian Religious Freedom Act in 1978, ordering governmental agencies to eliminate interference with the free exercise of Native American, Inuit, Aleut, and Native Hawaiians religions.²⁷⁸

Despite these federal statutes containing free exercise clauses, the religious practices of many tribes have since been encroached upon. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, the Supreme Court rejected the claims of three tribes that building a road through their sacred land would violate the Free Exercise Clause.²⁷⁹ Justice O'Connor wrote for the majority:

Even if we assume that [the government's] road will “virtually destroy the . . . Indians’ ability to practice their religion,” the Constitution simply does not provide a principle that could justify upholding respondents’ legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.²⁸⁰

Courts applied this precedent as recently as 2021, when a federal district court in Arizona denied temporary injunctive relief to Apache plaintiffs who wanted to stop the federal government’s plan to transfer sacred lands to a foreign mining company, despite arguing violations of the First Amendment and Religious Freedom Restoration Act.²⁸¹

Shortly after *Lyng*, the Supreme Court decided another watershed case in *Employment Division, Department of Human Resources of Oregon v. Smith*, ruling that states were not required to exempt Native Americans who ingested peyote as part of their religious practice from the impact

²⁷⁶ Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924).

²⁷⁷ The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304. Section 1302 states in part: “No Indian tribe in exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances . . .” excluding an establishment clause. *Id.* § 1302.

²⁷⁸ American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

²⁷⁹ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 442 (1988).

²⁸⁰ *Id.* at 451–52 (citation omitted).

²⁸¹ *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 604, 611 (D. Ariz. 2021).

of “neutral laws of general applicability.”²⁸² A public backlash from across the religious spectrum led to the adoption of the Religious Freedom Restoration Act,²⁸³ and Congress also amended the American Indian Religious Freedom Act to allow Native Americans to ingest peyote for religious purposes.²⁸⁴ Without the broader social backlash, it is not certain that favorable amendment for Native Americans would have followed. Furthermore, the exception does not undo *Smith*’s potentially broader impact on any other Indigenous religious practices.

Thus, there is little in the overall track record to provide confidence that the religious aspects of *fa’a Samoa* would be respected any more than other Indigenous practices under long-standing First Amendment jurisprudence. While the Court’s instruction in *Kennedy v. Bremerton School District* that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings’” portends that local religious practices will be more respected moving forward,²⁸⁵ the lack of a federal district court in American Samoa leaves that analysis to non-local jurists. For now, it would be naïve to expect that the extension of citizenship would not result in more searching judicial scrutiny of the traditional way of life.

V. ON THE UNCERTAIN FUTURE OF THE INSULAR CASES

The relevant experiences of other U.S. states, territories, and Native American tribes surveyed above demonstrate that American Samoans have reason to be concerned about the impact that greater application of mainland constitutional norms may bring. The specific experiences of Hawaii, Guam, and the Native American tribes do not bode well for the protection of land rights. The *matai* system appears fundamentally at odds with the text, original understanding, and occasional rulings on the Nobility Clauses. And the daily observation of *Sa* seems nearly indefensible before long-standing First Amendment jurisprudence, with—once again—a poor track record of regard for Native American and Indigenous practices.

²⁸² Emp. Div., Dep’t of Hum. Res. v. Smith, 494 U.S. 872, 879, 890 (1990).

²⁸³ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–bb-4).

²⁸⁴ American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996).

²⁸⁵ Kennedy v. Bremerton School District, No. 21-418, slip op. at 2428 (U.S. June 27, 2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

As applied, the zone of autonomy provided to American Samoa's native customs has thus far proven fairly resilient. Notwithstanding its checkered beginnings, the approach to territorial governance outlined in the Insular Cases and carried forward in recent federal court decisions served a laudable purpose there: not to insulate the contiguous United States from cultural contamination, but to protect the insularity of its territorial peoples from mainland assimilation.²⁸⁶ Whether intended or not, that framework for governance under the Territorial Clause provided the federal authorities space to allow traditional cultural practices in American Samoa to breathe, persist, and develop according to the democratic wishes of the local people. Indeed, the *Fitisemanu* court concluded, "[n]o circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives."²⁸⁷

Much modern critical commentary surrounding the Insular Cases comes from the perspective of financial inequalities in the U.S. territories, particularly Puerto Rico.²⁸⁸ The Supreme Court has repeatedly used the Insular Cases to affirm that Congress can maintain different schemes of federal taxation and benefits programs for residents of the U.S. territories than for residents of the fifty states.²⁸⁹ The most recent case to do so was *United States v. Vaello Madero*, dealing with the denial of Supplemental Security Income (SSI) to the residents of Puerto Rico.²⁹⁰ That case resulted in an 8-1 decision upholding the tax-benefit status quo, with only Justice Sotomayor writing in dissent.²⁹¹

Although Justice Gorsuch agreed with the result that Congress could deny such benefits under deferential rational basis

²⁸⁶ See also *American Samoa and the Citizenship Clause: A Study in Insular Cases Revisionism*, 130 HARV. L. REV. 1680, 1697 (2017); Falefuafua Tapu, *supra* note 56, at 79; Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1706–13 (2017).

²⁸⁷ *Fitisemanu v. United States*, 1 F.4th 862, 879 (10th Cir. 2021).

²⁸⁸ See, e.g., Torruella, *supra* note 10.

²⁸⁹ See *United States v. Vaello Madero*, No. 20-303 (U.S. Apr. 21, 2022) (Gorsuch J., concurring); *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

²⁹⁰ *Vaello Madero*, No. 20-303.

²⁹¹ While addressing the issue presented in terms of both Congressional authority under the Territorial Clause and equal protection norms, Justice Sotomayor also writes that "I share the concurrence's 'hope that the Court will soon recognize that the Constitution's application should never depend on the government's concession or the misguided framework of the Insular Cases.'" *Id.* at 6 n.4 (Sotomayor, J., dissenting).

considerations, his concurrence offered a blistering assault upon the Insular Cases themselves.²⁹² His introduction summarized his position:

A century ago in the Insular Cases, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.²⁹³

In taking this stand, Justice Gorsuch correctly blasts the racist legacy. Yet, while decrying the Insular Cases as one manifestation of American imperialism,²⁹⁴ he did not write in consideration of the other form of imperialism that universal application of mainland constitutional norms would have upon local cultures. Indeed, he suggests that jurists should not place much emphasis on that point in two separate passages:

To be sure, settling this question right would raise difficult new ones Disputes are sure to arise about exactly which of its individual provisions applies in the Territories and how. Some of these new questions may prove hard to resolve. But at least they would be the right questions. *And at least courts would apply legally justified tools to answer them, including not just the Constitution's text and its original understanding but the Nation's historical practices . . .*²⁹⁵

And:

At bottom, the Constitution's restraints on federal power do not turn on a court's unschooled assessment of a Territory's local customs or contemporary currents in public opinion or academic theory.²⁹⁶

Thus, Justice Gorsuch's attack on the Insular Cases as presently articulated likely serves to reinforce the very fears of the ASG that its zone of cultural autonomy remains at risk, especially when keeping in mind that there are no federal courts located in American Samoa itself. Thus, the prospect of more hegemonic opinions such as the Supreme Court's in *Rice*, or of the D.C. Circuit in *King*, or of the District Court for the Central District of California in *Opelle* looms large.

²⁹² *Id.* at 1 (Gorsuch, J., concurring).

²⁹³ *Id.*

²⁹⁴ He cites their origin in "theories by which Congress could permanently rule the country's new acquisitions as a European power might. . . ." *Id.* at 2.

²⁹⁵ *Id.* at 9 (emphasis added).

²⁹⁶ *Id.* at 10 n.4 (emphasis added).

Every U.S. territory is different, possessing different endowments and challenges, and deserving tailored repertoires of central-local relations or ultimate statehood. It is entirely certain that the overall impacts of the Insular Cases are felt differently in Atlantic Puerto Rico than they are in Pacific American Samoa, just as any federal law may have a different impact in California than it does in Florida. Indeed, there were at least two different models of imperialism present in the world when the Insular Cases were adopted, each with its own specific sins. Those are too long to explore within the confines of this Article but, at the risk of vast oversimplification, whereas the British model compartmentalized the ruled and ruling classes, the French model idealized the universal application of all metropole's norms throughout the empire regardless of local characteristics.²⁹⁷ Justice Gorsuch's anti-imperialist rhetoric attacks the British shadows while ignoring the French. The issues here are of complexity escaping a zero-sum approach.

Justice Gorsuch is absolutely correct that the Constitution does not require the Insular Cases, but that alone does not automatically invalidate them; to do so on that basis alone would expose a lot of keystone jurisprudence to cancellation. They too constitute a nexus of repertoires deriving from judicial interpretations of the Territorial Clause, just as Miranda rights derive from judicial interpretations of the Fifth and Sixth Amendments, and the tiers of scrutiny derive from judicial interpretations of the Equal Protection Clause; however, in agreeing with him that they are neither constitutionally required nor equally beneficial to all concerned, the largest question raised by Justice Gorsuch's concurrence regards what legal regime would replace them if they are overturned.

Perhaps parsing his words from the passage quoted above can help to extrapolate his vision. Justice Gorsuch speaks of overturning the Insular Cases, but not of extending constitutional citizenship to Puerto Rico, or even extending welfare benefits on par with those available in the mainland (and thus his concurrence in the result). Importantly, he seems hesitant to demand a procrustean application of mainland constitutional norms, stating as he did that "[t]o be sure, settling this question right would raise difficult new ones. . . . Disputes are sure to arise about exactly which of its individual provisions applies

²⁹⁷ *Downes v. Bidwell*, 182 U.S. 244, 290–91 (1901) (White, J., concurring) (emphasis added).

in the Territories and how.”²⁹⁸ Although he never directly cites the Territorial Clause in his concurrence, Justice Gorsuch identifies himself as a textualist,²⁹⁹ and his reasoning suggests it remains the relevant constitutional text by which the territories shall be governed and that disparate repertoires of governance may apply to different territories.³⁰⁰ This is not the promise of enhanced benefits but rather a sudden and summary return of territorial governance to Congress, which might result in a lengthy period of instability.

At the end of the day, we know that Justice Gorsuch is willing to strike down the Insular Cases on account of their ghastliest rationales, and yet he concurs in the result that the territories can be treated differently—presumptively with even wider latitude for Congress to do so, as it would need to assume the design of a successor regime.³⁰¹ This is a nascent vision of the future, one in which no guarantees are yet secure, and one to which serious discussion must now turn.³⁰² In the meantime, legal practitioners must still debate these issues within the confines of the Insular Case framework, which itself does not always result in a disposition favorable to local cultural preservation.³⁰³

VI. CONCLUSIONS

In *Fitisemanu*, the Tenth Circuit Court of Appeals concluded: There is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the *fa’a Samoa*. The constitutional issues that would arise in the context of America Samoa’s unique culture and social

²⁹⁸ *United States v. Vaello Madero*, No. 20-303, slip op. at 9 (U.S. Apr. 21, 2022) (Gorsuch, J., concurring).

²⁹⁹ See, for example, his opinion in *Bostock v. Clayton County*, No. 17-1618 (U.S. June 15, 2020).

³⁰⁰ It may therefore be fair to ask, given the language of the Territorial Clause, if he envisions Congress taking the leading role in establishing and enforcing a replacement regime.

³⁰¹ At present, three options appear possible: (1) to continue the Insular Case governance regime as it is, with the possibility of future tweaks and adjustments; (2) to discard the Insular Cases regime but continue governance under the Territorial Clause, presumptively with Congress assigned the duty of codifying a successor regime; and (3) to discard the Insular Cases regime by declaring the U.S. Constitution fully applicable in the territories, thereby essentially dissolving the territorial option that exists between full statehood and free association.

³⁰² One author has suggested that American Samoa should further distance itself from U.S. sovereignty in order to protect its local initiative. See Michal, *supra* note 40, at 154.

³⁰³ *E.g.*, *King v. Morton*, 520 F.2d 1140, 1143 (D.C. Cir. 1975).

structure would be unusual, if not entirely novel, and therefore unpredictable.³⁰⁴

On the contrary, the experiences of other U.S. states, territories, and Native American Tribes demonstrate that American Samoans have great reason to be concerned about the impact that greater application of mainland constitutional norms may bring. The experiences of Hawaii, Guam, and the Native American tribes do not bode well for the protection of land rights. The *matai* system appears fundamentally at odds with the text, original understanding, and occasional rulings on the Nobility Clauses. And the daily observation of *Sa* seems nearly indefensible before long-standing First Amendment jurisprudence, with—once again—a poor track record of regard for Native American and Indigenous practices. One cannot naïvely assume otherwise.

The United States is sophisticated enough to govern diverse territories without assimilating them, and it must maintain that agility for its own sake as well as an example to the world.³⁰⁵ Even if the Insular Cases were to be overturned as Justice Gorsuch suggests,³⁰⁶ the United States must abide by the treaty promises it made to respect local cultural autonomy at the time of American Samoa's inclusion unless and until those understandings are revised via renegotiation with the American Samoan people themselves. One way or another, this moment—the hundredth anniversary of the last original Insular Case—presents the nation with tasks that must be done.

First, if the basic structure of territorial governance provided by the Insular Cases is to be preserved, the Supreme Court must seize this opportunity to declare that the racist logic underlying their original rationale was devastatingly wrong. Perhaps as an accident of history, however, there has been a beneficial aspect in practice, namely protecting a greater zone of social and cultural autonomy. That admission will not erase the negative legacy. The record of the original logic of the Insular Cases will remain upon the historical edifice attesting to the moral bankruptcy of the contemporaneous *Plessy*-era Court and federal institutions. It will, however, be an important step toward erasing the stigma of second-class citizenship that remains due to their not being addressed by proper authority.

³⁰⁴ *Fitisemanu v. United States*, 1 F.4th 862, 881 (10th Cir. 2021).

³⁰⁵ When one looks at how autonomy has been crushed in regions such as Tibet and Hong Kong, the United States must stand in contrast.

³⁰⁶ See discussion *supra* Part V.

Second, the renewed attention brought to this issue by the brave plaintiffs in the *Tuaua* and *Fitisemanu* cases should be channeled into new legislative action. It has been observed that:

Out in the South Pacific is a speck of the United States which Americans seldom, if ever, think about. But occasionally American Samoa is rediscovered by a congressional group and some social reforms are instituted. Then the territory is forgotten by almost everyone until another rediscovery occurs.³⁰⁷

We stand again at such a moment thanks to the petitioners. They raise valid complaints. Being classified as a “national” means they have more limited visa eligibility when traveling abroad, cannot serve on mainland juries, and cannot vote in mainland elections.³⁰⁸ To gain these rights, they must become naturalized, which requires passing a civics test at the nearest U.S. embassy (now in the independent nation of Samoa) and paying a nearly \$700 fee.³⁰⁹ Those obstacles to citizenship should be waived for any American Samoan who wants it, especially veterans, to permit them access to all of the rights and privileges of U.S. citizenship while allowing the islands to maintain their traditional culture—if that is indeed the wish of the resident islanders. A stronger voice in federal affairs is suggested to maintain this momentum. It has been stated elsewhere that “just as the European Union came to realize the importance of sub-national input at the federal level by creating the European Union’s Committee of the Regions, so too should the U.S. House of Representatives create a Permanent Select Committee on Territorial Affairs chaired by a Territorial Delegate,” and this author agrees that would be a long overdue, basic starting point in enhancing governance of the U.S. territories.³¹⁰

Third, even if that suggestion comes to pass, it must be remembered that it is hard to gauge the true sentiment of American Samoans due to the limited democracy there. A cynic might say most local officials resist because any change will likely weaken their established position of power. Creating a zone for cultural preservation must not become blind support for political stagnation or

³⁰⁷ William Van Til, *Looking from Abroad: American Samoa*, 55 PHI DELTA KAPPAN 633, 633 (1974).

³⁰⁸ Mack, *supra* note 8, at 70.

³⁰⁹ *Id.* at 71.

³¹⁰ Michael J. Kelley, *Quiescent Sovereignty of the U.S. Territories*, 105 MARQUETTE L. REV. 3, 501 (2022).

ossifying a moribund regime. The American Samoan people have the ability to amend their local constitution, but “[t]he delegates to the convention shall be selected by their respective county councils.”³¹¹ Those “respective county councils” are the same ones that select the *matai* senators—the most conservative force in local politics. Furthermore, the ASG itself commissioned the report on popular will relied on by the Tenth Circuit in *Fitisemanu*, and that report dates from 2007.³¹² U.S. courts or the U.S. Congress should not blindly follow these findings.³¹³ At the least, the findings should be updated through independent research or deference to the elected house of the American Samoan *Fono*. At most, they should lead to popular referendums where the true voices of the American Samoan people are heard and honored. If in fact a referendum were to prove that a majority of local residents desire citizenship, then extension should be granted. Under current practice, statutory extension would appear to permit a greater zone of opportunity for concerned locals to defend the preservation of local customs through democratic processes.

At the end of the day, it is unquestioned that self-determination is a highly valued principle in American Samoa.³¹⁴ The islands’ vast distance from the mainland and early legal recognition of the traditional lifestyle have thus far provided American Samoa a degree of insulation from hegemonic mainland cultural influences despite U.S. political sovereignty. But, over time, as the world becomes smaller, conscious decisions need to be made regarding the future status of American Samoa, its people, and its traditional way of life. As the experience of insular populations across the United States and the world attests time and again, authorities sitting in distant metropolises are not in the best position to pass judgment.

³¹¹ REV. CONST. OF AM. SAM. art. V, § 4.

³¹² *Fitisemanu v. United States*, 1 F.4th 862, 867 (10th Cir. 2021) (citing FUTURE POL. STATUS STUDY COMM’N OF AM. SAM., FINAL REPORT 64 (2007)). Indeed, the evidentiary bar accepted by the federal courts to represent happenings in American Samoa—from the testimony of a singular witness in *King* to the proffered report in *Fitisemanu*—is disturbingly low.

³¹³ Indeed, such judicial scrutiny is applied to congressional findings proffered by the U.S. Congress. For example, *United States v. Lopez*, 514 U.S. 549, 564–569 (1995).

³¹⁴ See Kruse, *supra* note 140, at 188; *Tuaua v. United States*, 788 F.3d 300, 311 (D.C. Cir. 2015) (“[R]ecognizing self-determination of people as a guiding principle and obliging members to ‘take due account of the political aspirations of the peoples’ inhabiting non-self-governing territories . . .” (citing U.N. Charter art. 1, ¶ 1, art. 73, ¶ 3)).

In sum, governance of American Samoa has thus far managed to strike a delicate balance between cultural preservation and individual liberty. While the full benefits of U.S. citizenship should be made available to every American Samoan who wants them, that process should be streamlined but optional. Should the majority of American Samoans decide in favor of birthright citizenship, the option of statutory extension may be considered to the extent it would reaffirm the promises made by federal authorities to preserve and protect the local lands and lifestyle, thereby not exceeding the terms of the treaties that brought American Samoa into union with the United States in the first place. Absent a demonstrable political change in American Samoa, its governance should continue to be managed in such a manner as to allow it the flexibility to be governed according to the repertoires desired by the majority of persons who actually reside there. The alternatives risk assimilation, and assimilation should not follow the flag.