

THE ‘IMPRACTICAL AND ANOMALOUS’ CONSEQUENCES OF TERRITORIAL INEQUITY

JAYANTH K. KRISHNAN*

ABSTRACT

Located in the South Pacific Ocean, American Samoa is one of five populated “unincorporated territories” of the United States. It is unique, though, as those born there are not recognized as American citizens at birth and instead are deemed “noncitizen U.S. nationals.” They enjoy some, but not all, constitutional protections. Two federal appellate courts—the D.C. Circuit (in 2015) and the Tenth Circuit (in 2021)—have ruled that this classification does not violate the Fourteenth Amendment’s Citizenship Clause. Both courts have stated that it would be “impractical” and “anomalous” to extend birthright citizenship to the American Samoan community.

Drawing upon a powerful dissent in the Tenth Circuit case, this Article argues that what is actually “impractical” and “anomalous” is excluding American Samoans from this constitutional entitlement. However, there is also a crucial administrative basis for supporting this claim, which to date has received scant attention. For three decades, beginning in 1947, the Board of Immigration Appeals (BIA)—the top court in the immigration court system—delivered a series of precedent-setting judgments that gradually expanded the rights of American Samoans. These decisions were issued namely as a way of curing what otherwise would have been impractical, anomalous, and unjust actions taken by the government. This finding is especially noteworthy given that the BIA has generally been viewed as hostile to noncitizens.

One theory for why the BIA sided with these “discrete and insular” claimants is that the agency’s expertise was not as vulnerable to external pressure then as it is today. Assuming that these cases were decided more squarely on the merits, this Article suggests that it may be worthwhile for the federal courts to consider them when reflecting on whether American Samoans are indeed birthright citizens.

* Milt and Judi Stewart Professor of Law and Director of the Stewart Center of the Global Legal Profession, Indiana University-Bloomington Maurer School of Law. The project would not have been possible without the insights and advice from Fred Aman, Vitor Dias, Luis Fuentes-Rohwer, Ethan Michelson, Christiana Ochoa, Margaret Stock, Neil Weare, and Tung Yin. Finally, great thanks to Melanie Chamberlain, Lara Gose, Margaret Kiel-Morse, and Daniel Schumick who provided important research assistance and editing feedback. © 2022, Jayanth K. Krishnan.

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I. INTRODUCTION

The year 2022 will mark a century since the Supreme Court issued its decision in *Balzac v. Porto (Puerto Rico)*.¹ In short, *Balzac* dealt with whether Puerto Ricans, who had been recognized as U.S. citizens by the Jones Act of 1917, could claim a constitutional right to a jury trial under the Sixth Amendment.² Chief Justice Taft, writing for a unanimous Court, answered that question in the negative.³ In his opinion, because “Congress did not have such an intention”⁴ to incorporate Puerto Rico into the Union, the island’s residents could not assume that they necessarily possessed this constitutional right.⁵

For years, researchers have devoted time to examining *Balzac*.⁶ Interestingly, there is one part of the Court’s decision that has provided some

1. See *Balzac v. Puerto Rico*, 258 U.S. 298 (1922) (alteration in original). Note the official title of the case spells the territory as Porto Rico, which, in 1922, was how the island was titled by the Court.

2. *Id.*

3. *Id.*

4. *Id.* at 306.

5. *Id.* (noting that if Congress wanted to extend this type of right to the residents, it would have to affirmatively do so through legislation).

6. See, e.g., Luis E. Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 168 (2008); Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice*

solace to those disappointed by its continued status as good law. In describing the history of how Puerto Rico moved from being held by Spain to coming “under the dominion of the United States,”⁷ Chief Justice Taft noted that it would be “anomalous”⁸ if the territory’s residents were not “given the same designation and status as those living in the United States.”⁹ Fortunately, as he went on to say, the Jones “[A]ct gave them [i.e., Puerto Ricans] this boon”¹⁰ of citizenship.

This Article will focus on another “unincorporated territory” of the United States: American Samoa. Presently, the United States has fourteen such territories,¹¹ with five of them being inhabited: Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa.¹² For individuals born on four of these territories, they become citizens automatically at birth.¹³

American Samoa is the one territory where birthright citizenship is not recognized.¹⁴ Instead, individuals born there are deemed “noncitizen U.S. nationals”; they enjoy some, but not all, of the protections afforded by the Constitution.¹⁵ For example, noncitizen nationals are precluded from voting

Sotomayor’s Surprising Concurrence in Aurelius, 130 YALE L. J. FORUM 101, 113 (2020); Pedro A. Malavet, *The Inconvenience of a “Constitution [that] Follows the Flag . . . but Doesn’t Quite Catch Up with It”*: From *Downes v. Bidwell* to *Boumediene v. Bush*, 80 MISS. L. J. 181 (2010); Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1659 (2021); John Vlahoplus, *Other Lands and Other Skies: Birthright Citizenship and Self-Government in Unincorporated Territories*, 27 WM. & MARY BILL RTS. J. 401 (2018); Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797 (2010).

7. See Balzac, 258 U.S. at 308.

8. *Id.*

9. *Id.*

10. *Id.*

11. The U.S. government’s National Oceanic and Atmospheric Administration has produced a statistical chart listing these territories. They include, in alphabetical order, American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Puerto Rico, U.S. Virgin Islands, and Wake Island. See NAT’L OCEANIC & ATMOSPHERIC ADMIN., *List of U.S. Territories*, <https://perma.cc/3544-G6XP>.

12. *Id.*

13. It is important to note that for three of the four territories, birthright – or what is called *jus soli* – citizenship is recognized by statutory right under the 1952 Immigration and Nationality Act. For Guam, see 8 U.S.C. § 1407; for Puerto Rico, see 8 U.S.C. § 1402; for the U.S. Virgin Islands, see 8 U.S.C. § 1406. For the Northern Mariana Islands, see NATIONAL LEGISLATIVE BODIES, *Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America*, REFWORLD (Feb. 15, 1975), <https://perma.cc/3ZVB-29FV>.

14. See Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?* 130 YALE L. J. FORUM 284 (Nov. 2, 2020), <https://perma.cc/ASZ4-QS2Z>. Also note, American Samoa is located in the South Pacific Ocean, and it has a population of roughly 55,000 people.

15. *Id.*; see generally Rose Cuison Villazor, *American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673 (2017); Rose Cuison Villazor, *Problematising the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127 (2018); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L. Q. 71 (2013). For a brilliant article that discusses the history of the “invention” of the noncitizen national category, see Veta Schlingens, *The Invention of “Noncitizen American Nationality” and the Meanings of Colonial Subjecthood in the United States*, 89 PAC HIST. REV. 317, 321 (2020) (noting that Congress came up with this term (primarily as it related to Puerto Ricans and Filipinas/os), in order to keep a new group of “eight million people and their island homelands” – acquired through imperial means – at bay and to marginalize their participation in U.S. politics). The passage of the 1900 Foraker Act was also a crucial moment, as was the Supreme Court’s 1901 *Downes v. Bidwell* judgment, which both “were important first steps in inventing noncitizen American nationality as a civil status distinct from U.S. citizenship.” *Id.* at 326.

for members of Congress or the President.¹⁶ They are also ineligible for federally elected positions and can be barred from other federal and state jobs, as well as certain federal and state social welfare benefits.¹⁷ Furthermore, unlike the birthright privileges recognized for “residents of [other] U.S. territories,”¹⁸ noncitizen nationals from American Samoa must go through the naturalization process to be recognized as citizens, similar to what is required of lawful permanent residents.¹⁹ Under the language of *Balzac*, such an arrangement would appear to be clearly anomalous. Yet this has been the state of affairs for well over a century.

Interestingly, though, in 2020, federal district court Judge Clark Waddoups invoked the point regarding anomalousness from *Balzac*. He held that American Samoans had a right to be recognized as U.S. citizens under the Fourteenth Amendment’s Citizenship Clause, which states that “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.”²⁰ The case before Judge Waddoups involved John Fitisemanu, who was born in American Samoa but since 2000 had “been a taxpaying, U.S. passport holding resident of Utah.”²¹ He, together with a group of similarly situated plaintiffs, wished to vote in the 2020 presidential election and claimed they could do so because they were citizens. Judge Waddoups agreed

16. See Cepeda Derieux & Weare, *supra* note 14; ZHANG & ASSOCIATES, P.C., *National Status (Non-Citizen)*, <https://perma.cc/QW7E-Y7VV> (last visited Jan. 24, 2022) (noting that “nationals vote for a delegate to send to the U.S. House of Representatives. This representative provides input but cannot vote on House affairs.”).

17. See Cepeda Derieux & Weare, *supra* note 14; Morrison, *supra* note 15 at 84–86; U.S. IMMIGRATION, *U.S. Citizen v. U.S. National: Differences*, <https://perma.cc/QY9C-NYHA> (last visited Jan. 24, 2022); see also Brief for American Civil Liberties Union and ACLU of Utah at 8–27, *as Amici Curiae Supporting Plaintiffs-Appellees*, *Fitisemanu v. United States*, No. 18-cv-00036-CW (May 12, 2020) (Nos. 20-4017, 20-4019).

18. See CITIZEN PATH, *Differences Between U.S. Nationals and U.S. Citizens* (Feb. 23, 2021), <https://perma.cc/68C2-M4MU>.

19. *Id.* (noting that “a non-citizen national may apply for U.S. citizenship under the same rules as legal permanent residents. [Although the individual must be stateside first; such an application cannot be made from the territory itself.] However, the continuous residence and physical presence requirements are generally met before the applicant decides to naturalize. U.S. nationals do not need to [first] become permanent residents. Instead, they file Form N-400 after becoming residents. Before filing Form N-400, Application for Naturalization, a U.S. national must become a resident of any state of the United States.”).

20. See *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1195–96 (D. Utah 2019) (quoting *Balzac v. United States*, 258 U.S. 298, 312 (1922) (“The Constitution of the United States is in force in [unincorporated territories] as it is wherever and whenever the sovereign power of that government is exerted.”). *But see* Peter H. Schuck & Rogers M. Smith, *The Question of Birthright Citizenship*, NAT’L AFFAIRS (Summer 2018), <https://perma.cc/9DW6-K4JN> (arguing that birthright citizenship for “American-born children of illegal immigrants [in particular] is not mandated by the Constitution.”). While this Article does not deal with the question that Schuck and Smith address (American Samoans have lawful status), my conclusion that birthright citizenship is a right that American Samoans deserve is tied to the larger point that the principle of *jus soli* ought to be one that is followed in the U.S, regardless of whether or not one’s status is lawful. And unlike the position held by Schuck and Smith, as I will discuss, I do believe that the courts have as much standing as Congress to adjudicate this matter.

21. See EQUALLY AMERICAN, *DOJ Seeks to Deny Birthright Citizenship in U.S. Territories in 10th Circuit Argument* (Sept. 21, 2020), <https://perma.cc/G2KS-EP95>; see also Cepeda Derieux & Weare, *supra* note 14.

with their position, finding that the noncitizen national category was anomalous and unacceptable.

However, “[i]n June 2021, a divided, [three-judge] panel of the Tenth Circuit reversed Judge Waddoups’” decision.²² Drawing heavily from a 2015 D.C. Circuit Court of Appeals ruling,²³ two of the three judges held that the responsibility of determining American Samoan citizenship was with Congress, not the judiciary.²⁴ One of these two judges, Judge Carlos Lucero, did something strange: He contended that it would be “anomalous,” as well as “impracticable,” for American Samoans to expect recognition as U.S. citizens from birth.²⁵

In dissent, Judge Robert Bacharach pointed out that the real anomaly, in fact, was that American Samoans were the only people from a U.S. territory without birthright citizenship.²⁶ Professor Steve Vladeck has convincingly echoed these sentiments, explaining that, by making this move, Judge Lucero “misapplied the Supreme Court’s precedents (which ask whether recognition of the right is impractical or anomalous from the *federal government’s perspective*)”²⁷ (italics added).

This Article backs the persuasive interpretation of the Citizenship Clause and Supreme Court case law articulated by Judge Bacharach, Judge Waddoups, and Professor Vladeck. As will be discussed, this reasoning, which has prominent scholarly support, is based on clear and sound constitutional analysis. In fact, as of this writing, the plaintiffs have requested the Tenth Circuit to rehear the case *en banc*. But beyond the Fourteenth

22. See *EQUALLY AMERICAN*, *Fitisemanu v. United States—Equal Citizenship in U.S. Territories*, <https://perma.cc/W67L-DXU8> (last visited Jan. 24, 2022); see also Plaintiffs-Appellees’ Petition for Rehearing *en Banc*, *Fitisemanu v. United States*, No. 1:18-CV-00036-CW (July 31, 2021) (Nos. 20-4017, 20-4019).

23. See *Tuaua v. United States*, 788 F.3d 300, 309 (D.C. Cir. 2015).

24. See *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021). A body of scholarship has been growing on *Tuaua* and will be covered later in this Article. For now, however, see, e.g., Cepeda Derieux & Weare, *supra* note 14; Cuison Villazor, *American Nationals*, *supra* note 15; Cuison Villazor, *Problematizing*, *supra* note 15; Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 *GEO. L. J.* 405, 407–08, 421, 432 (2020); see also Morrison, *supra* note 15 (for a detailed analysis of the case at the district court level).

25. See *Fitisemanu v. United States*, 1 F.4th 862, 879–81 (10th Cir. 2021) (citing the D.C. Circuit’s similar rationale); *Tuaua*, 788 F.3d at 301–02, 309–12. Both *Fitisemanu* and *Tuaua* cited the Supreme Court case of *Reid v. Covert*, 354 U.S. 1, 74–75 (1957).

26. See *Fitisemanu*, at 886–90, 898 n.10 (Bacharach, J., dissenting).

27. Steve Vladeck, *American Samoans are the Latest Victims of These Ignorant Supreme Court Rulings*, MSNBC (June 18, 2021), <https://perma.cc/D3WE-JRSA>. Note, while the words here were not italicized in this piece, two of them were in an earlier piece Professor Vladeck wrote regarding the D.C. Circuit’s opinion. See Steve Vladeck, *The D.C. Circuit, Samoan Citizenship, and the Insular Cases*, JUST SECURITY (Feb. 4, 2015), <https://perma.cc/NMG3-4CGA> (noting as it related to the D.C. Circuit case, Supreme Court precedent has always been geared to inquire whether it would be impractical and anomalous “from the perspective of the *federal government* . . . to provide such an extension of rights . . . to the group at issue as compared to other similarly situated groups.”) Also, Professor Vladeck was part of an amicus brief that articulated many of these points. See Brief for Scholars of Constitutional Law and Legal History as Amici Curiae Supporting Appellees’ Petition for Rehearing *en Banc*, *Fitisemanu v. United States* (10th Cir. 2021) (Nos. 20-4019, 20-4017); see also Brief of Citizenship Scholars as Amici Curiae in Support of Rehearing *en Banc*, *Fitisemanu v. United States* (10th Cir. 2021) (Nos. 20-4019, 20-4017).

Amendment justification, this Article will also address a crucial administrative basis for supporting American Samoan birthright citizenship, which to date has received scant attention.

Consider that this case from the Tenth Circuit (as well as that of the D.C. Circuit) began in an Article III district court. Yet the vast majority of litigation involving noncitizens does *not* originate in the federal judiciary. Instead, it is the Department of Justice's (DOJ) immigration court system that hears the bulk of these matters.²⁸ Cases come in front of one of more than 60 immigration courts located throughout the country, where a single immigration judge presides.²⁹ From there, the case can be taken to the DOJ's Board of Immigration Appeals (BIA), and thereafter, petitions can be brought in front of an Article III federal appellate court.³⁰

This Article will highlight an overlooked but empirically significant point. Namely, as a way of curing what otherwise would be anomalous, unjust administrative results, the BIA has had a history of delivering favorable judgments for American Samoans—including rulings on a range of residency and status-based cases dating back to the late 1940s. Given that the BIA is staffed with professional, career civil servants who typically serve across multiple presidential administrations, these officials, in theory, represent what Max Weber might call efficient, rational, and perhaps most importantly, expert bureaucrats.³¹ Under the Weberian framework, their expertise informs their decisions and shapes the public policies that manifest.³² Normatively, in the Weberian vein, this is what *should* be occurring. After all, these officials are well-versed in the subject matter and are closest to the situation on the ground.

For many observers, hearing that the BIA has been positively disposed towards a group of noncitizens will be a surprise. Numerous reports have expressed deep dismay at how the Justice Department has politicized the BIA and how BIA judges have given short shrift to the rights of noncitizens.³³

28. For recent studies on the volume of cases heard by the BIA, see David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1179 (2016); Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, U. ILL. L. REV. (forthcoming 2022).

29. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUST., PANDEMIC RESPONSE REPORT, 21-063, LIMITED-SCOPE REVIEW OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW'S RESPONSE TO THE CORONAVIRUS DISEASE 2019 PANDEMIC 1 (2021), <https://perma.cc/H6G5-MSVY>; Amanda Frost, *Deportation without Disclosure: Immigration Courts Need Transparency*, BL (Feb. 23, 2021), <https://perma.cc/PKA2-42BE>; Jayanth K. Krishnan, *Judicial Power—Immigration-Style*, 73 ADMIN. L. REV. 317, 322 (2021).

30. See Krishnan, *Judicial Power*, *supra* note 29 (noting that the Attorney General has the power to overturn any judgment made by the BIA, and cases that are appealed out of the Justice Department go to that particular federal circuit court that covers the city where the initial immigration court hearing occurred).

31. See MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 87–88 (H.H. Gerth & Wright Mills eds., 2013).

32. *Id.*; see also Susan Hekman, *The Epistemology of Moral Voice: Displacing Hegemony in Moral Discourse*, in *ENGENDERING RATIONALITIES* 291–93 (Nancy Tuana & Sandra Morgen eds., 2001).

33. See AM. IMMIGR. LAWS. ASS'N, *It's Time for Immigration Reform*, YOUTUBE (Jan. 31, 2020), <https://perma.cc/K66W-XWJH> (presenting commentary by Judge Ashley Tabaddor); INNOVATION L. LAB & S. POVERTY L. CTR., *THE ATTORNEY GENERAL'S JUDGES* 10 (2019), <https://perma.cc/G2NT-2TLK>; Catherine

In my own writings, I have been particularly critical of the BIA in terms of how certain immigrants, such as asylum seekers and victims of domestic abuse, among others, have been treated.³⁴

However, for three decades beginning in 1947, the BIA delivered a series of precedent-setting judgments that showed sympathy for the plight of American Samoan litigants.³⁵ Why the BIA sided with this set of “discrete and insular”³⁶ claimants is difficult to know. One possible explanation is that American Samoans were not highly visible then; thus, their claims did not catch the attention of those who were opposed to broadening citizenship rights to disenfranchised communities. If true, then the BIA would not have been as vulnerable to external political pressure, with the results in these cases being made more squarely on the merits. Assuming these decisions were made in an expert-driven and unbiased way, it may be worthwhile for the federal courts to closely examine these past judgments in deciding whether American Samoans are indeed birthright citizens.

The format for this Article is as follows: Section II will outline the history of the recent American Samoan citizenship decision from the Tenth Circuit. Sections III and IV will examine the administrative cases that gradually enhanced the rights of American Samoans. They will also explain how the BIA’s disapproval of the government’s actions can provide lessons for the federal courts, as they currently grapple with the broader Fourteenth Amendment arguments for whether birthright citizenship should be granted to this community. Section V will briefly explore the practical implications of American Samoans lack of birthright citizenship.

To be sure, excellent work has been done on the significant challenges involving citizenship faced by those from the other territories—Puerto Rico in particular.³⁷ Yet the starting point for American Samoans is different.

Y. Kim, *The President’s Immigration Courts*, 68 EMORY L. J. 1, 5–6 (2018); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651, 1665–75 (2010); Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts”*, 33 GEO. IMMIGR. L.J. 261, 314–15 (2019); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 383–87 (2006).

34. See Krishnan, *Immigrant Struggle*, *supra* note 28; Krishnan, *Judicial Power*, *supra* note 29.

35. See *infra* Sections III, IV.

36. Of course, this term comes from footnote four, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

37. See, e.g., Luis E. Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525 (2008); Malavet, *supra* note 6; Cuison Villazor, *supra* note 15; PEDRO A. MALAVET, AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004); Ponsa-Kraus, *supra* note 6; Christina D. Ponsa-Kraus, “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L. L. 659 (2008); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 3 (1998); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181 (2014); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE (2018). In fact, in the fall of 2021, the Supreme Court is scheduled to hear a major case (*United States v. Vaello-Madero*, 20-303 (2021)) involving whether a Congressional program that excluded residents of Puerto Rico from receiving Supplemental Security Income is in violation of the Equal Protection Clause (via the Fifth Amendment). However, this case is distinguishable as it is based on territorial rather than citizenship disparities.

Those from Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands today can make their claims as U.S. citizens who are entitled to protection against unconstitutional government infringements. American Samoans need citizenship before they can demand similar safeguards. The hope here is that this analysis can aid the cause of claimants from America's only inhabited territory where birthright citizenship remains unrecognized.

II. THE RECENT LITIGATION OVER AMERICAN SAMOAN BIRTHRIGHT CITIZENSHIP

A. *Fitisemanu*

In June 2021, the Tenth Circuit issued its ruling in *Fitisemanu v. United States*, which involved an appeal by the government from Judge Waddoup's district court decision holding that the Citizenship Clause covered a group of Utah residents who had been born in American Samoa.³⁸ The appellate court was divided, issuing three separate opinions. Judge Lucero wrote a five-part judgment, with which Judge Timothy Tymkovich concurred on parts one, two, and three. Judge Bacharach filed a detailed dissent.

Judge Lucero began his analysis by noting the historical moment when American Samoa became part of the United States³⁹ In 1899, through what was called the Tripartite Convention, the United States and Germany reached a settlement on the disputed Samoan islands, whereby the Americans took the eastern portion while the Germans assumed title to the western group of isles.⁴⁰

Judge Lucero then observed how in 1900, American Samoan political leaders "voluntarily ceded sovereign authority to the United States"⁴¹

38. See *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021). The government appealed its loss at the district court level in *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196–97 (D. Utah 2019). As a result of the win by the plaintiffs, they were eligible to vote in the November 2020 election, but this ruling was stayed while the case was on appeal. Also, the plaintiffs were each members of Southern Utah Pacific Islander Coalition, which was a nonprofit that was also a party to the lawsuit. See also, PACIFIC DAILY NEWS, *Hearing on Birthright Citizenship, in U.S. Territories Wednesday* (Sept. 22, 2020), <https://perma.cc/CEZ6-4A32> (quoting lead plaintiff, John Fitisemanu, saying that: "All my life I've met my obligations as an American, [and] it is time I'm able to exercise my rights as a citizen."). Note, six years earlier, the D.C. Circuit was faced with a similar question and ruled against the American Samoan plaintiffs. See *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

39. See *Fitisemanu*, 1 F.4th at 865. Note, the *Tuaua* court began its discussion in the same way. See *Tuaua*, 788 F.3d at 302; see also Plaintiffs' Petition for Rehearing en Banc, *supra* note 22, at 1; Brief for Scholar of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

40. The third country that was part of this convention was Britain, which took title from and the rights to the island of Tonga from Germany, as well as gaining from Germany control over more of the Solomon Islands and over key parts of West Africa, namely Zanzibar. For background, see H.G.A. HUGHES, *AMERICAN SAMOA, WESTERN SAMOA, SAMOANS ABROAD* (1997); Jeannette Mageo, *American Colonial Mimicry: Cultural Identity Fantasies and Being "Authentic" in Samoa*, in AUTHENTICITY AND AUTHORSHIP IN PACIFIC ISLAND ENCOUNTERS 75 (Jeannette Mageo & Bruce Knauft eds., 2021); Holger Drossler, *Colonialism by Deferral: Samoa Under the Tridominium*, in RETHINKING THE COLONIAL STATE 208 (Søren Rud & Søren Ivarsson eds., 2017).

41. See *Fitisemanu*, 1 F.4th at 866 (noting that "the United States has since provided protection from external interference while largely staying out of the internal affairs of the territory"). An almost identical passage was delivered by the *Tuaua* court. See *Tuaua*, 788 F.3d at 302; see also Plaintiffs' Petition for

(Note, American Samoa has retained a local government; it has a two-house legislative body and a territorial governor, although it is ultimately overseen by the United States Secretary of the Interior.⁴²) From there, he proceeded to discuss how under U.S. law, people born on the territory are “nationals, but not citizens, of the United States.”⁴³

Judge Lucero recognized that the plaintiffs and the government each viewed the Citizenship Clause as having a different meaning. The plaintiffs thought the language plainly granted American Samoans birthright citizenship; the government said the Clause explicitly did not.⁴⁴ Judge Lucero, however, pursued a different path. Namely, he held that this section of the Fourteenth Amendment was ambiguous.⁴⁵ Finding the current state of the debate to “push in opposite directions,”⁴⁶ Judge Lucero explored the historical origins of birthright, or *jus soli*, citizenship. He highlighted the English influence on the United States and acknowledged that “American attitudes toward what we now call citizenship developed in the context of English law regarding the relationship between monarch and subject.”⁴⁷

Judge Lucero, however, hastened to add that under English and American practice *jus soli*, citizenship did not “follow the flag.”⁴⁸ His discussion here involved the “controversial”⁴⁹ *Insular Cases* and “addressed a basic question: when the American flag is raised over an overseas territory, does the Constitution follow?”⁵⁰ This string of cases, which began in 1901, has been analyzed and critiqued in great detail by scholars.⁵¹ In short, the rulings declared that the Constitution applied to those territories deemed to be “incorporated”⁵² into the United States or on a pathway to statehood. By

Rehearing en banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

42. See U.S. DEP’T OF THE INTERIOR, *American Samoa*, <https://perma.cc/7659-288L>; LIBRARY OF CONG., *Guide to Law Online: American Samoa*, <https://perma.cc/BVC5-RXQF>.

43. See 8 U.S.C. § 1408; *Fitisemanu*, 1 F.4th at 865; see also Plaintiffs’ Petition for Rehearing en banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

44. See *Fitisemanu v. United States*, 1 F.4th 862, 865 (10th Cir. 2021).

45. *Id.* at 875 (noting and agreeing that “the *Tuaua* court concluded that the Citizenship Clause leaves its geographic scope ambiguous.”); see also *Tuana*, 788 F.3d at 302.

46. *Fitisemanu*, 1 F.4th at 875; see also *Tuana*, 788 F.3d at 303; Plaintiffs-Appellees’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

47. See *Fitisemanu*, 1 F.4th at 867; see also Plaintiff-Appellees’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

48. *Fitisemanu*, 1 F.4th at 868 (citing KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 46 (2009)).

49. *Id.* at 869.

50. *Id.*; see also Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

51. See, e.g., Fuentes-Rowher, *supra* note 37, at 1532; see also Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

52. See *Fitisemanu v. United States*, 1 F.4th 862, 876 (10th Cir. 2021).

contrast, people from unincorporated territories, like American Samoa, were seen as being entitled to only a limited set of fundamental rights.⁵³

Judge Lucero, because the Citizenship Clause's language was unclear in his opinion and because the *Insular Cases* remained good law, decided to rely on these cases for guidance. Since these cases narrowly defined the concept of fundamental rights to include only those bare entitlements,⁵⁴ he found that birthright citizenship simply did not qualify.⁵⁵ As he explicitly noted, birthright citizenship "is not a prerequisite to a free government,"⁵⁶ "[n]or has . . . [it] proven necessary to safeguard basic human rights in American Samoa."⁵⁷

The final two sections of Judge Lucero's opinion described how disruptive, impractical, and anomalous it would be for the American Samoan population to be granted birthright citizenship.⁵⁸ He acknowledged that there had been a historical push by the American Samoan Commission of 1930, which "subsequently recommended that Congress grant citizenship to the people of the territory."⁵⁹ But he then stated that the "expressed preferences of the American Samoan people"⁶⁰ are not to have citizenship, basing this claim on a vague, unsubstantiated assertion that "representatives of the American Samoan government"⁶¹ oppose it.⁶²

53. See Cepeda Derieux & Weare, *supra* note 14; Fuentes-Rowher, *supra* note 37, at 1535; see also Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

54. See *Fitisemanu*, 1 F.4th at 878 (citing *Dorr v. United States*, 195 U.S. 138, 147 (1904)).

55. *But see* Cepeda Derieux & Weare, *supra* note 14 (discussing Fin. Oversight & Mgt. Bd. for Puerto Rico v. Aurelius Inv., 140 S.Ct. 1649 (2020) and explaining how the Supreme Court noted that the *Insular Cases* should not be extended).

56. See *Fitisemanu*, 1 F.4th at 878; Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

57. *Fitisemanu v. United States*, 1 F.4th 862, 878 (10th Cir. 2021); see Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

58. *Fitisemanu*, 1 F.4th at 880–82 (invoking *Boumediene v. Bush*, 553 U.S. 723 (2008) to argue that the holding provides support for his interpretation of the impractical and anomalous test). *But see Fitisemanu*, 1 F.4th at 902 (Bacharach, J., dissenting) (rebutting the majority's interpretation of *Boumediene*). A similar disagreement occurs with respect to how Judge Lucero sees the case of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and how the dissent sees this precedent.

59. See *Fitisemanu*, 1 F.4th at 867; see also Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

60. *Fitisemanu*, 1 F.4th at 879; see also Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

61. *Fitisemanu*, 1 F.4th at 880; see also Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

62. A similar argument was made by the D.C. Circuit in the *Tuaua* case. For a detailed history of that litigation, see EQUALLY AM., ABOUT TUANA V. UNITED STATES, <https://perma.cc/M2CA-8QTW> (last visited Jan. 26, 2022). For a series of works that have evaluated the issues faced by the *Tuaua* court, see EQUALLY AM., Related Scholarship, <https://perma.cc/4LPF-LTKR> (last visited Jan. 26, 2022). See also Neil Weare, *Citizenship in U.S. Territories: Constitutional Right or Congressional Privilege?*, 29 CENTRO J. 136 (2017); Ivy Yeung, *The Price of Citizenship: Would Citizenship Cost American Samoa its National Identity?*, 17 ASIAN-PAC. L. & POL'Y J. 1 (2016); Vladeck, *supra* note 27; Elizabeth K. Watson,

Judge Tymkovich, who filed a concurring opinion, agreed that deferring to Congress was the best way to resolve the citizenship question.⁶³ However, he refused to sign on to the part of Judge Lucero's opinion relating to the analysis of the *Insular Cases* or to the section that found that it would be impractical and anomalous to qualify American Samoans as citizens.⁶⁴ In addition to these two opinions, there was a lengthy and rich dissent by Judge Bacharach that drew extensively upon the views of federal district court Judge Waddoups. Judge Bacharach's opinion, which will surely be of importance to the plaintiffs' lawyers on appeal or to future litigants, is discussed next.

B. *The Tenth Circuit Dissent and the Influence of a District Court Judge*

For Judge Bacharach, who wrote in dissent, the argument was straightforward: American Samoans were "unambiguously"⁶⁵ citizens under the Fourteenth Amendment. The *Insular Cases* were wrong. And the government's policy of not granting American Samoans birthright citizenship violated the Constitution and was an anomaly, especially considering how the other inhabited territories were treated.⁶⁶

In issuing his opinion, Judge Bacharach spent his opening covering the historical antecedents to the Supreme Court case law on citizenship.⁶⁷ For example, he carefully examined how different geographers, through maps and population records, viewed American territories during the 1800s.⁶⁸ Thereafter, he turned

Citizens Nowhere: The Anomaly of American Samoans' Citizenship Status After *Tuaua v. United States*, 42 DAYTON L. REV. 411 (2017); Joseph E. Sung, *Redressing The Legal Stigmatization of American Samoans*, 89 S. CAL. L. REV. 1309 (2016); Benjamin Wallace Mendelson, *Courts Have Gone off the Map: The Geographic Scope of the Citizenship Clause*, 95 TEX. L. REV. 873 (2017).

63. See *Fitisemanu v. United States*, 1 F.4th 862, 883 (10th Cir. 2021) (Tymkovich, C.J., concurring).

64. *Id.*

65. See *id.* at 884–85 (Bacharach, J., dissenting). Judge Bacharach's opinion drew very heavily on the Judge Waddoups's ruling from the district court. See *Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196–97 (D. Utah 2019); see also "Plaintiffs' Motion for Summary Judgment" and "Plaintiffs' Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss/Cross Motion for Summary Judgment," accessible at <https://perma.cc/ACK2-6KQZ>.

66. See *Fitisemanu*, 1 F.4th at 885–87 (Bacharach, J., dissenting). Judge Bacharach's opinion drew very heavily on the Judge Waddoups's ruling from the district court. See *Fitisemanu*, 426 F. Supp. 3d at 1196–97; see also "Plaintiffs' Motion for Summary Judgment" and "Plaintiffs' Reply in Support of Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss/Cross Motion for Summary Judgment," accessible at <https://perma.cc/ACK2-6KQZ>; Plaintiff-Appellants' Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

67. See *Fitisemanu*, 1 F.4th at 855–56, 888–89 (Bacharach, J., dissenting); *Fitisemanu*, 426 F. Supp. 3d at 1196–97. Indeed, regarding the latter, Judge Waddoups concentrates first on *Calvin's Case* from England, and then from there discusses the views of Lord Coke on citizenship. Next, he focuses on the "[p]re revolutionary colonial period," followed by the "Declaration of Independence," the "Confederation Period," how the 1789 Constitution addressed citizenship, what occurred during the nineteenth century, how citizenship was seen during the Civil War, and what citizenship meant under the 1866 Civil Rights Act, and the Thirteenth and Fourteenth Amendments.

68. See *Fitisemanu v. United States*, 1 F.4th 862, 884–88 (10th Cir. 2021) (Bacharach, J., dissenting).

his attention to the drafting history of the Citizenship Clause,⁶⁹ and then to the 1898 case of *United States v. Wong Kim Ark*.⁷⁰ In that decision, the Supreme Court held that a child born in San Francisco to parents of Chinese descent, who were not American citizens but who resided permanently in the United States, was deemed to have birthright citizenship.⁷¹

For Judge Bacharach, *Wong Kim Ark* provided direct, on-point support for why the *jus soli* principle should be applied to American Samoa. The Court in *Wong Kim Ark*, he explains, emphasized that “[t]he Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory”⁷² Judge Waddoups noted in his district court opinion that the British Empire long recognized that anyone born within its vast imperial kingdom were “natural born subjects,”⁷³ and that this “was the rule . . . for at least three centuries prior to”⁷⁴ *Wong Kim Ark*. Judge Bacharach’s dissent urged that a similar principle must apply to the United States.⁷⁵

Judge Bacharach evaluated additional pieces of evidence as well. For example, he rejected the government’s position that the way the term “United States” was used in other parts of the Constitution necessarily meant that the territories could not be covered.⁷⁶ Furthermore, he did not accept that the plenary power doctrine gave Congress the authority to refuse birthright citizenship for those from the territories.⁷⁷ Finally, he focused on the language of the Fourteenth Amendment’s Citizenship Clause itself,⁷⁸ criticizing the majority for unnecessarily muddying the waters with irrelevant arguments⁷⁹ and

69. *Id.* at 884–85.

70. *Id.* at 890–94. Note, prior to discussing the *Wong Kim Ark* case, Judge Bacharach briefly covered the 1872 *Slaughterhouse Cases* and the 1884 case of *Elk v. Wilkins*. *See id.* at 893–94.

71. *Id.* at 894 (citing *United States v. Wong Kim Ark*, 169 U.S. 649 (1898); *see also* Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27).

72. *Fitisemanu*, 1 F.4th at 894 (Bacharach, J., dissenting) (citing *Wong Kim Ark*, 169 U.S. at 655, 693).

73. *See Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1196–97 n.20 (D. Utah 2019).

74. *Id.* at 1185.

75. *See Fitisemanu*, 1 F.4th at 894 (Bacharach, J., dissenting) (criticizing “[t]he majority and the federal government [for] dismissing this language as irrelevant dicta because Mr. Wong was born in a state (California)”; *see also* Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27).

76. *Fitisemanu*, 1 F.4th at 895–97 (Bacharach, J., dissenting) (noting that the government’s argument that a reading of the Thirteenth Amendment, Fourteenth Amendment (Section 2), and Eighteenth Amendment necessarily result in a limited interpretation of the term “United States,” has no merit. The dissent also, though, did not embrace the plaintiffs’ one argument that the Fourteenth Amendment, Section 2’s “phrase “in the United States” must include all the territories).

77. *Id.* at 897. Interestingly, in the district court opinion, Judge Waddoups supplemented this point by noting that Roman law, the way American colonies were treated by the King of England, and then how different state courts (e.g., North Carolina, Kentucky, and Massachusetts) all had written judgments privileging *jus soli* thereby supporting the notion of American Samoans being granted birthright citizenship. *See Fitisemanu*, 426 F. Supp. 3d at 1185 n.20.

78. *Fitisemanu v. United States*, 1 F.4th 862, 898 (10th Cir. 2021) (Bacharach, J., dissenting); *see also* Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

79. Specifically, the majority argued that 50 years after the Clause was put into the Constitution, Congress affirmatively gave Puerto Rico a statutory right to citizenship. By analogy, the majority said

finding that the meaning of this part of the Constitution “wasn’t accidental”⁸⁰ or unclear in the slightest.

At the heart of Judge Bacharach’s dissent were the following five points. First, the American Samoan plaintiffs were born within a territory under U.S. sovereignty.⁸¹ Second, case law from the federal courts has repeatedly “included the territories as part of the United States.”⁸² Third, the archival records show that Congress intended the Citizenship Clause to cover the territories.⁸³ Fourth, the obligation of the government towards such individuals should be to enable them to participate fully in the political process.⁸⁴ Fifth and lastly, an essential way of accomplishing this objective is through voting; and “[b]ecause citizenship unlocks the fundamental right of voting,”⁸⁵ it must be “beyond the control of ordinary governmental [or political] powers.”⁸⁶

Furthermore, Judge Bacharach explained, the signature *Insular Case*—*Downes vs. Bidwell*—was inapplicable because its focus was not on the Citizenship Clause.⁸⁷ A majority of the *Downes* Court noted that, with respect to the territories, “the decision to afford citizenship is to be made by Congress.”⁸⁸ As Judge Bacharach asserted, however, the *Downes* Court was “splintered,”⁸⁹ with only a plurality opinion and a concurring opinion emerging, and with each having different rationales for arriving at their respective outcomes. As such, *Downes* was “unhelpful”⁹⁰ for purposes of the *Fitisemanu* case

that this meant that the Clause did not automatically grant birthright citizenship to people from the territories. The dissent rejected this argument by looking at the plain meaning and contextual history of what the term the “United States” meant when the Clause was adopted. See *Fitisemanu*, 1 F.4th at 898 (Bacharach, J., dissenting).

80. *Id.* at 883.

81. *Id.* at 885.

82. *Id.*

83. *Fitisemanu v. United States*, 1 F.4th 862, 886–90 (10th Cir. 2021).

84. *Id.* at 901.

85. *Id.*

86. *Id.* (noting that: “Citizenship for everyone born in American Samoa is neither impracticable nor anomalous” and that there is no real convincing evidence that the American Samoan people do not want to be citizens); see also Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

87. *Downes* dealt with whether the U.S. government could place a duty on oranges being imported to the mainland from Puerto Rico. The idea would be that importing merchants would pay the levy, and the revenue would then be used to help fund civil services in Puerto Rico. *Downes*, an importer, challenged this scheme and the Court agreed holding it to be contrary to U.S. Const. art. I, § 8, cl. 1, which states that “all duties, imposts, and excises shall be uniform throughout the United States.” See *Downes v. Bidwell*, 182 U.S. 244 (1901).

88. See *Fitisemanu v. United States*, 426 F. Supp. 1155, 1191 (D. Utah 2019).

89. See *Fitisemanu v. United States*, 1 F.4th 862, 899 (10th Cir. 2021) (Bacharach, J. dissenting).

90. *Id.*; see also Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

and thus should be “limited”⁹¹ in its application and interpreted “on the narrowest grounds.”⁹²

Therefore, Judge Bacharach concluded that *Fitisemanu* and his co-plaintiffs easily qualified as *jus soli* citizens and that, based on precedent, it was impractical and anomalous not to recognize them as such.⁹³ To be sure, his 55-page dissent was long, detailed, and filled with ‘high theory’ constitutional analysis rather than administrative law. The opinion shows that Judge Bacharach was persuaded, as well, by the coalition of lawyers who brought forth the case, and by academics who supported the cause.⁹⁴ One such expert, cited considerably by Judge Bacharach, was Professor Michael Ramsey, who has written broadly on the issue of the Citizenship Clause’s application to U.S. territories, including American Samoa.⁹⁵ In his scholarship, Professor Ramsey has rightly suggested that through the use of an “original meaning”⁹⁶ approach, the result necessarily leads to viewing the Citizenship Clause in “a broad scope, both as to places “in” the United States and persons “subject to [its] jurisdiction.”⁹⁷

As the plaintiffs ponder their next steps, it may be useful to know that, quite remarkably, there has been a federal immigration agency that has had a history of quietly sympathizing with American Samoans in a range of matters. Such a finding is noteworthy because it prompts us to ask whether there may be an additional argument to consider for why *jus soli* citizenship should be granted to this population.

91. *Fitisemanu*, 1 F.4th at 899 (Bacharach, J., dissenting); see also Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

92. *Fitisemanu*, 1 F.4th at 900 (Bacharach, J., dissenting). Note, both Judge Bacharach and Judge Waddoups each saw the *Downes* discussion “relating to citizenship” to be “dicta . . . not binding on this court.” See *Fitisemanu*, 426 F. Supp. 3d 1194; see also *Fitisemanu*, 1 F.4th at 900 (Bacharach, J., dissenting); Plaintiff-Appellants’ Petition for Rehearing en Banc, *supra* note 22; Brief for Scholars of Constitutional Law and Legal History, *supra* note 27; Brief of Citizenship Scholars, *supra* note 27.

93. See *Fitisemanu*, 1 F.4th at 907–08 (Bacharach, J., dissenting) (citing both *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) and *Reid v. Covert*, 354 U.S. 1 (1957)).

94. *Fitisemanu v. United States*, 1 F.4th 862, 907–08 (10th Cir. 2021) (linking to “Insular Cases Scholars Amicus Brief” and “Citizenship Scholars Amicus Brief,” and linking to the various petitions from “Citizenship Scholars,” “Scholars of Constitutional Law and Legal History,” “American Civil Liberties Union and ACLU of Utah,” “Virgin Islands Bar Association”). The plaintiffs’ case was argued and led by an organization known as *Equally American*, headed by Neil Weare. Mr. Weare assembled and coordinated “a team of attorneys at Gibson, Dunn, & Crutcher LLP, and Charles V. Ala’ilima, a prominent American Samoan attorney,” all of whom participated in this litigation. See *EQUALLY AM., Fitisemanu v. United States—Equal Citizenship in U.S. Territories*, <https://perma.cc/ZE86-E38M> (last visited Jan. 27, 2022).

95. See Ramsey, *supra* note 24 at 407–08, 419, 421–26. Other scholars have also paid close attention to this matter, of course, as noted by Ramsey. See *id.* at 407 n.5 (citing Cuison Villazor, *Problematizing*, *supra* note 15, at 130–31, 134–36 (describing the American Samoa citizenship litigation) and Vlahoplus, *supra* note 6, at 401–02).

96. See Ramsey, *supra* note 24 at 461–71.

97. *Id.* at 410.

III. IMMIGRATION ADJUDICATION AND THE THEORY OF EXPERTISE

A. *Background*

Before delving further into the issue at hand, it is first important to outline briefly how the immigration adjudication system operates. In 1952, Congress passed the Immigration and Nationality Act (INA), which currently serves as the underlying framework for immigration law in the United States.⁹⁸ Within the Act, there is a provision known as §101(b)(4) that establishes the position of an immigration judge.⁹⁹ There are “approximately 535 immigration judges located in 68 immigration courts”¹⁰⁰ across the country who preside as sole adjudicators over these forums of first resort, which are officially part of the Department of Justice (DOJ).¹⁰¹ The body which hears appeals from these cases is the Board of Immigration Appeals, and it is also located within the DOJ.¹⁰² While there are “23 Appellate Immigration Judges”¹⁰³ on the BIA, it is not unusual to have appeals heard by just one judge, although, historically, panels of three have been the norm and can still occur today.¹⁰⁴

98. See Immigration and Nationality Act (INA), Pub. L. 82-414, 66 Stat. 163 (1952).

99. See *id.* § 101(b)(4).

100. *Office of the Chief Immigration Judge*, DEP’T OF JUST., <https://perma.cc/8FCT-AVTT> (last updated Dec. 27, 2021).

101. Note, immigration judges are not administrative law judges who are governed by the Administrative Procedure Act. See generally *EOIR Guidance on the Meaning of the Judicial Robe Worn by Immigration Judges*, THE L. OFF. OF GRINBERG & SEGAK, PLLC, <https://perma.cc/Z2V4-RMGE> (last visited Jan. 19, 2022); *AILA Policy Brief: Restoring Integrity and Independence to America’s Immigration Courts*, AM. IMMIGR. L. ASS’N (Jan. 24, 2020), <https://perma.cc/4U6V-JL8G>. For a brief history on immigration adjudication and how the process started with the creation of the Immigration and Naturalization Services agency in 1933 (where it was first located within the Department of Labor and then moved to the Department of Justice), see Krishnan, *Judicial Power*, *supra* note 29, at 45, 47–49 (noting also how immigration judges were formally brought into existence by a Nixon executive order in 1973, and how they worked within the INS until 1983, when they were moved into another agency, the Executive Office of Immigration Review, within the DOJ in 1983. Of course, after the 9/11 attacks, the INS was eliminated, and the Department of Homeland Security came into existence. However, the EOIR stayed within the DOJ, with this office also housing the BIA.) See T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 237, 251-52; *Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP’T OF JUST., <https://perma.cc/M7VX-GPXH> (last updated Apr. 30, 2015); *Overview of INS History*, USCIS, HIST. OFF. & LIBR. 7 (2012), <https://perma.cc/WGL3-8754>.

102. See *Organization Chart*, U.S. DEP’T OF JUST., EOIR, <https://perma.cc/X6QM-5URN> (last updated Jan. 27, 2015).

103. *Board of Immigration Appeals*, U.S. DEP’T OF JUST., EOIR, <https://perma.cc/A53Q-DC6H> (last updated Sept. 14, 2021).

104. See Hausman, *supra* note 28, at 1202–07 (noting how in 2002, during the George W. Bush presidency, changes occurred by then Attorney General Ashcroft, which resulted in moving more to the one judge appeals panel. Note, Ashcroft also began encouraging more cases to be affirmed without even an opinion being written to accompany the final judgment).

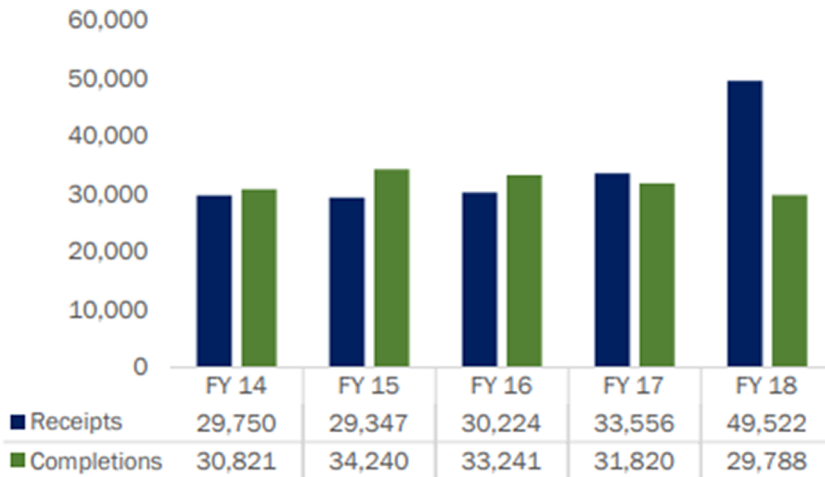


Figure 1. “Total BIA Cases Received and Completed”¹⁰⁵

The BIA is deemed to be the expert agency with the power to issue precedent-setting decisions. To say that the BIA has a heavy docket would be an understatement. Note Figure 1 below, which shows the most recent statistics.

This latest data illustrates that from 2014 through 2018, the BIA received, on average, nearly 35,000 cases per year.¹⁰⁶ In terms of matters resolved, on average, the agency completed approximately 32,000 cases per year.¹⁰⁷

For researchers, one issue that has been challenging when it comes to studying the BIA is that only a fraction of its rulings are publicly available. One study recently found that the legal database Lexis had less than 14 percent of the BIA’s cases, while Westlaw had less than 2 percent.¹⁰⁸

It is unclear why the DOJ limits the number of BIA decisions available to the public, and it is equally unclear what the process is that determines which ones are released. Further, the BIA, which has been in existence since 1940,¹⁰⁹ has heard hundreds of thousands of cases, but only a small percentage has been classified as having precedent status. According to the BIA’s website, which starts its tracking from 1958, that number is just 3,078, and according to Lexis, going back to 1940, the number is 3,970.¹¹⁰ (All precedential decisions are made public.)

105. *Statistics Yearbook, Fiscal Year 2018*, U.S. DEP’T OF JUST., EOIR 35, <https://perma.cc/X7VA-2436> (last visited Jan. 27, 2022).

106. *See id.* The specific number of cases the BIA received was 34,479.80, which was calculated by adding the five years (with the total being 172,399) and then dividing the sum by 5.

107. *See id.* Here, the average number of matters resolved by the BIA was 31,982, which was calculated by adding the five years (with the total being 159,910) and then dividing the sum by 5.

108. *See Krishnan, Immigrant Struggle*, *supra* note 28.

109. *See Krishnan, Judicial Power*, *supra* note 29, at 326 n.43.

110. Ascertaining the BIA’s overall workload before 1983 – and going back to when it came into existence in 1940 – is difficult. On the BIA’s website, the first precedential case comes from June 25, 1958, and it is entitled *Matter of C-R*. *See Agency Decisions*, U.S. DEP’T OF JUST., EOIR, <https://perma.cc/U396-NYML>. The most recent case is from April 14, 2021, and it is entitled *Matter of Mavis Nyarko*

Today, the sub-agency within the DOJ that collects data on the number of cases the BIA hears and resolves is the Executive Office of Immigration Review (EOIR), which came into existence in 1983. Statistics from that initial year show that there were 5,757 cases filed with the BIA, with 902 completed.¹¹¹ That same year, the BIA classified only three cases as precedential.¹¹² Using Figure 1's 2014-2018 timeframe, according to the BIA's website, only 155 cases, or roughly 0.005%, were categorized as precedent-worthy during this period.¹¹³

This background is important because it relates to the situation of American Samoan litigation: between 1947 and 1975, the BIA handed down several favorable judgments siding with American Samoans—with each receiving precedential status.¹¹⁴

B. *Agency Specialists and Deference*

This section will offer a discussion of the way immigration cases are adjudicated within the Justice Department and how the integrity of this adjudication has been put into question as of late. Consider that when the BIA was created in 1940 by a DOJ regulation, it was deemed to be answerable and “responsible solely to the Attorney General.”¹¹⁵ At the same time, however, the BIA was empowered to be independent and to render decisions that had a

Mensah. The number of available precedential cases during this time frame is 3,078, and that number comes from subtracting #4016 from #939, (and then adding #939 to the total), which are the two assigned case numbers that represent the last available 2021 case and the first available 1958 case, respectively. Otherwise put, the cases that are listed from 1958 until 2021 go in order from #939 to #4016.) For the Lexis number, this was arrived by conducting the following steps: going to the immigration database, in particular. Then from there, Lexis allows both non-precedential and precedential cases to be searched. For the sake of simplicity, and to capture the highest number of cases possible, the word “immigration” was typed in the search engine and only precedential cases were searched. Furthermore, because cases, inexplicably from the Administrative Appeals Unit and Administrative Appeals Board (located within the Department of Homeland Security) are part of this database, these were excluded from the search.

111. See Exec. Off. for Immigr. Rev., U.S. DEP'T OF JUST., Adjudication Statistics: New Cases and Total Completions – Historical (2021).

112. The three cases were: Matter of Hernandez, 19 I. & N. Dec. 14 (B.I.A. 1983); Matter of Cardoso, 19 I. & N. Dec. 5 (B.I.A. 1983); Matter of Laureano, 19 I. & N. Dec. 1 (B.I.A. 1983).

113. See Exec. Off. for Immigr. Rev., U.S. DEP'T OF JUST., Agency Decisions. The last case in 2018 was specifically from Dec. 20, 2018, entitled *Matter of Valdez*, and it was assigned the case number #3948. The first case of 2014 was specifically from February 7, 2014, entitled Matter of W-G-R, and it was assigned the case number #3794. In subtracting these two cases numbers (since the list of cases between them runs numerically in order), the total is 154, but in adding in case #3794 to that total, it becomes 155.

114. Between January 1, 1947, and December 31, 1975—the timespan for which the discussion of the American Samoa cases in the next section will take place—there were 2,409 precedential decisions delivered by the BIA. As to why, proportionately, so many cases overall were denoted as precedential during these years, as opposed to now, that too is hard to answer with certainty. One theory is that the BIA may have been trying to establish itself in those early years as a serious lawmaking institution and believed that issuing precedents was one way to do so. Another is that because it was hearing fewer cases, compared with today, it was able to be more deliberative in its decision-making and thus felt more comfortable classifying more of its opinions as precedential. Regardless, that the American Samoan decisions were part of this wave is a point to note in the analysis.

115. See Title 8—Aliens and Citizenship, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

binding effect on all issues “relating to . . . the administration of the Immigration and Naturalization Laws.”¹¹⁶ It was clear from the regulation that because the charge of this agency was going to be technical and complex, the people who were to staff the BIA needed to have expertise and familiarity with immigration law.¹¹⁷ Importantly, the agency was given wide-ranging “discretion”¹¹⁸ to carry out its duties. And, unless otherwise decided by the Attorney General, its decisions were to be binding on the parties, and if the BIA so decided, upon future cases as well.¹¹⁹

As the BIA has developed and grown over the years, so too has its docket, as seen above. Given its location within the DOJ, there has been an increase in scrutiny of how independent the BIA really is, especially since the early 2000s. Groups from the American Bar Association to the American Immigration Lawyers Association have spoken out directly about the politicization of the agency, noting that invariably there exists a “fundamental flaw of having a court system that is structured within the Justice Department.”¹²⁰ Others have argued that because BIA board members are subject to having their decisions overturned and their jobs terminated by the Attorney General, it is virtually impossible for this agency to act in an impartial, independent manner.¹²¹

Still, the federal judiciary has continued to rely on the Supreme Court’s 1984 *Chevron* precedent when examining rulings issued by the BIA.¹²² *Chevron* established a two-part examination to evaluate an agency’s interpretation of a statute being challenged. The first step is to ask whether the meaning of the relevant statutory provision is clear and if so, then “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹²³ Where there is a lack of clarity (or silence) in the statute, the Court’s second step is to ascertain

116. *Id.*

117. *See id.* For example, under §90.2, the Board’s members had “the authority to promulgate . . . rules of practice governing the proceedings before it, including rules as to admission and conduct of attorneys practicing before it.” Relatedly, it could “disbar” any lawyer deemed unfit. The immigration policy areas that it was responsible for, are listed under §90.3(a)–(d).

118. *Id.*

119. This point highlights what we might see as the distinction between non-precedential and precedential opinions reached by the BIA. As 90.11 notes, unless objections are made by counsel for the losing party and taken to the Attorney General, per 90.12, “conclusions and order[s] of the Board of Immigration Appeals shall . . . hereof, be made final.” *Id.* at 3504.

120. *See, e.g.,* AM. IMMIGR. LAW. ASS’N, *It’s Time for Immigration Court Reform*, YOUTUBE (Jan. 31, 2020), <https://perma.cc/UDW2-ZSR9> (Judge Ashley Tabaddor’s views).

121. For statements by Judge Paul W. Schmidt on this point, as well as a critique on the structure of the BIA from speaker Shoba Sivaprasad Wadhia, *see id.*; *see also* Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997, 1004 (2018); Dana Leigh Marks, *I’m an Immigration Judge: Here’s How We Can Fix Our Courts*, WASH. POST (Apr. 12, 2019), <https://perma.cc/72NB-29E4>; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1667–71 (2010); Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 5–6 (2018); Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 21 (2013).

122. *See Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

123. *Id.* at 842–43.

“whether the agency’s answer is based on a permissible construction of the statute.”¹²⁴

In a relatively recent case, the Supreme Court reiterated its commitment to following *Chevron* with respect to the BIA. In *Scialabba v. Cuellar de Osorio*, the Court grappled with how to interpret §203(h)(3) of the INA.¹²⁵ This rather technical case involved whether the statute allowed noncitizen children seeking visas to retain their original application filing date, even if they “aged-out”¹²⁶ by turning 21 during the process.

At the lower BIA level, because of its earlier precedent (*Matter of Wang*), the agency had found that such an aged-out applicant would have to start over, in terms of the visa filing process. The petitioners disagreed and wanted this “larger universe of aged-out children”¹²⁷ to be able to continue with the process in an uninterrupted fashion. The Supreme Court, in a five-to-four decision, deferred to the BIA’s interpretation of the statute, applying a *Chevron* analysis. Citing the importance of the BIA’s specialization and expertise, Justice Kagan wrote that “[w]ere we to overturn the Board in that circumstance, we would assume as our own the responsible and expert agency’s role. We decline that path, and defer to the Board.”¹²⁸

Of course, volumes of scholarship have been written on *Chevron*—namely, where it stands today, whether it is on the decline, and what the future holds for the doctrine.¹²⁹ Yet when it comes to immigration, *Chevron* is still relied upon by the federal judiciary. Unfortunately for the plaintiffs in *Cuellar de Osorio*, such deference resulted in a loss. But what if the agency had delivered a series of precedent-setting judgments that were sympathetic to a historically marginalized community? Might the federal judiciary exhibit similar deference? These questions are explored below.

124. *Id.* at 843.

125. *See Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (interpreting §203(h)(3) of the INA, which states that “if the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section, the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.”).

126. *See* Brief for Immigration Advocacy Organizations as Amici Curiae Supporting Respondents, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (No. 12-930).

127. *See id.*

128. *See Scialabba*, 134 S. Ct. at 33.

129. *See, e.g.*, ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON & STUMPF, *SUPRA* NOTE 101 AT 292-296 (noting how the 2001 decision by the Court in *United States v. Mead Corporation*, 533 U.S. 218 (2001) “limited the application of the *Chevron* doctrine.” Under *Mead*, there had to be Congressional delegation specifying the agency had rule/law making powers; and that the promulgated rules were being done with this imprimatur. *See also* *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967 (2005), where the Supreme Court reinjected the importance of *Chevron*. It held that even if a federal court of appeals had earlier made a ruling on a statute, that in a subsequent case where the agency was grappling with, for example, another ambiguous provision or question within it, the *Chevron* two-step analysis had to be performed by the federal court. And Professor Carol Chomsky and the University of Minnesota Law Library have compiled a work-in-progress bibliography of *Chevron* articles, which can be found at <https://perma.cc/L5FB-VT23>. This excellent resource lists many significant publications that discuss where *Chevron* deference stands today (cited with permission of Prof. Chomsky).

IV. THE BIA AND AMERICAN SAMOANS—1947–1975

A. *The Pre-INA Cases*

Prior to the passage of the 1952 INA, the BIA issued three important decisions involving noncitizen nationals, all of which were given precedential value and remain good law to this day. First, in *Matter of W-*, the Board heard a case of a woman who “was born at Pago Pago, American Samoa, on September 5, 1911.”¹³⁰ In 1946, she sought admission into Hawai’i but was denied entry.¹³¹

She appealed to the BIA, noting that between 1925 and 1929, and then again between 1939 and 1946, she had lawfully resided in Hawai’i.¹³² During these years, she would occasionally return to American Samoa for visits, and upon seeking re-entry to Hawai’i, “she was admitted as a *citizen*”¹³³ (emphasis added). Immigration officials made this determination because “she presented a birth certificate . . . and a United States passport issued at American Samoa.”¹³⁴ Additionally, her grandfather had been born in the United States, so she claimed that he had derivatively passed on citizenship to her Samoan-born father, who then passed it on to her.¹³⁵

At the BIA, the government responded that the petitioner was properly denied entry,¹³⁶ pointing to the 1922 Cable Act. That law stated that “any woman citizen who marries”¹³⁷ a foreign national, who was ineligible for U.S. citizenship, would be stripped of her own citizenship. In this case, the petitioner’s spouse was a half-indigenous Samoan, which, at the time, disqualified him from being able to apply for American citizenship.¹³⁸ Because of this, the petitioner could no longer claim to be a U.S. citizen.

In its ruling, the BIA took issue with how the government framed the case. By looking at the historical record, it determined that there was not enough evidence that the petitioner’s grandfather had been born in the United States.¹³⁹ As such, the BIA held that the petitioner had “failed to sustain the burden of proof regarding her claim to United States citizenship.”¹⁴⁰ It then concluded by noting that she “certainly could not lose citizenship which . . . she never had”¹⁴¹ in the first place.

130. See *Matter of W*, 2 I. & N. Dec. 778, 778 (B.I.A. 1947).

131. *Id.* at 778. Note, Hawai’i at the time was still a territory. It became a state in 1959.

132. *Id.*

133. *Id.*

134. *Id.* at 778–79.

135. *Matter of W*, 2 I. & N. Dec. 778, 779 (B.I.A. 1947) (noting that a statutory provision at the time, R.S. 1993, allowed for this derivative acquisition of citizenship).

136. *Id.*

137. *Id.* at 780.

138. *Id.* at 779. The petitioner and her husband divorced in 1939, and thereafter she married an American citizen in 1942. This marriage lasted one year, and then in 1943, she married again, and her spouse was a U.S. citizen. These facts are important, because the government argued that her first marriage resulted in her loss of citizenship, regardless of what happened subsequently.

139. *Id.*

140. *Matter of W*, 2 I. & N. Dec. 778, 779 (B.I.A. 1947).

141. *Id.* at 781.

On its face, it may seem that this judgment was an unmitigated defeat for the petitioner. But what is telling is *how* the BIA ultimately categorized her status. As an addendum to its main position, the government argued that because of her marriage, the petitioner also lost any claim of being a U.S. national. The government once again pointed to the Cable Act for support, as well as statements by then-Secretary of State Henry Stimson that “any woman having American nationality”¹⁴² who marries a noncitizen loses all legal ties to the United States, including that of being a U.S. national.

It was here where the BIA stood firm and defended the rights of the petitioner. It found that a) by its own statutory language, the Cable Act did not de-nationalize someone like the petitioner, and b) Stimson’s statements were irrelevant to the case at hand.¹⁴³ When having to decide whether to defer fully to the government’s position or protect the rights of the American Samoan claimant, the BIA opted for the latter.

Next, consider the 1949 case of *In Matter of S*.¹⁴⁴ The facts here involved a petitioner who “was born in American Samoa in 1920 . . . [and was] a veteran of 3 years in the Marines.”¹⁴⁵ He wanted to enter Hawai’i for educational purposes, but he was denied admission.¹⁴⁶ The immigration authorities determined that he could not enjoy this privilege because he did not qualify as a national. Under existing law at the time, an American Samoan became a national by being born in the territory *and* by either having a parent who possessed noncitizen U.S. national status “or by the grant of [a] letter of identity from the Governor of American Samoa.”¹⁴⁷ According to the government, the petitioner could not satisfy these requirements.¹⁴⁸

The result of this determination, however, was that the petitioner was left “stateless,”¹⁴⁹ a sobering fact that was not lost on the BIA. As it evaluated its options, it saw a solution. It found that those “who assisted in drafting the Nationality Act of 1940 [an influential predecessor to the 1952 INA] informally professed an intention to assign a status to everyone.”¹⁵⁰ Leveraging this point, the BIA proceeded to continue adhering to the *Insular Cases*, as well as the strictures of the laws present at the time, in finding for the government. But it simultaneously and affirmatively “requested the State

142. *Id.* at 780.

143. *Id.* at 780–81.

144. *Matter of S*, 31 I. & N. Dec. 589 (B.I.A. 1947).

145. *Id.* at 589.

146. *Id.* at 589–90.

147. *Id.* at 604. Note, in 1940, the Nationality Act was passed, which seemed to provide national status to anyone born in the territory, regardless of these provisions. However, the BIA remarked that it was not so sure, mentioning “two obstacles. The first is that it generally has been considered that the principle of *jus soli* does not obtain in the outlying possessions of the United States. The second is that section 204 of the Nationality Act of 1940 is not considered to be retroactive.” (*Id.* at 591) (recall, the petitioner here had been born in 1920).

148. *Id.* at 591, 603–04.

149. *Matter of S*, 31 I. & N. Dec. 589, 591 (B.I.A. 1947).

150. *Id.*

Department for a waiver,¹⁵¹ so that the petitioner could qualify as “a temporary visitor and . . . be admitted as such.”¹⁵² Perhaps most importantly, it also found that after his temporary status expired, he could continue to “apply for and be granted an extension of his stay.”¹⁵³

This type of solution epitomized the BIA’s ruling in the last of the pre-1952 INA cases: *In the Matter of B-*. In that case, a twenty-year-old woman born in American Samoa sought entry into Hawai’i together with her daughter.¹⁵⁴ They were refused admission by the immigration authorities. At the BIA, the government defended its actions by saying that neither the mother nor the daughter qualified because they had no ties to the United States.¹⁵⁵ The government argued that they were not citizens, and furthermore, they were not eligible to be noncitizen nationals.¹⁵⁶

On the latter, the government pointed to the “racial test provided in the Nationality Act [1940], section 303.”¹⁵⁷ Its interpretation of this provision was that for American Samoans to be deemed noncitizen nationals, “more than half of [their] blood”¹⁵⁸ had to be indigenous. In this situation, the petitioner did not satisfy the requirement, according to the government, because her lineage had an excess of German blood in it.¹⁵⁹

In its analysis, the BIA rejected the government’s argument for three reasons. First, statutorily, the racial test outlined in section 303 did not deal with national status but rather with citizenship, so it was inapplicable to this situation.¹⁶⁰ Second, the BIA again worried that, under the government’s position, someone such as the petitioner would effectively be left “stateless,”¹⁶¹ which, like in the previous case, it found unacceptable and unjust. Third, and most significantly, the BIA brought into its discussion what had occurred previously in Alaska and Hawai’i. At the time, both were U.S. territories and were not accepted as states until 1959. However, Congress had authorized residents of each to become citizens well before they were incorporated into the

151. *Id.* at 604.

152. *Id.* (“[E]ven without this waiver it would appear that appellant comes within the standing waiver provided by Title 8, Code of Federal Regulations, 176.107 (n), in that he is ‘a resident of remote Pacific islands, who, after arrival at a port of entry in Hawai’i or on the mainland, is found to be a *bona fide* temporary visitor under Section 3 (2) of the act”).

153. *Id.*

154. *In the Matter of B*, 3 I. & N. Dec. 729 (B.I.A. 1949).

155. *Id.*

156. *Id.* at 729–31.

157. *Id.* at 733; see also Marian L. Smith, *INS Administration of Racial Provisions in U.S. Immigration and Nationality Law Since 1898*, 34 PROLOGUE MAG. (2002) (showing that “[t]he history of U.S. immigration and nationality law demonstrates how race became a factor in determining who could come to America and who could not.”).

158. *In the Matter of B*, 3 I. & N. Dec. 729 at 733 (quoting from the “Acting Commissioner’s memorandum, issued on October 28, 1948”).

159. Specifically, according to the government, the petitioner’s father was one-half German and one-half Samoan. (His father, the petitioner’s grandfather, was German, and the father’s mother, the petitioner’s grandmother, was Samoan.) As such, the petitioner could not thereby qualify, because her father did not qualify himself as a noncitizen national. *Id.* at 730–31.

160. *In the Matter of B*, 3 I. & N. Dec. 729, 733 (B.I.A. 1949).

161. *Id.* at 735.

Union.¹⁶² Moreover, there were no racial tests mandated for such citizenship to take effect.¹⁶³

For the BIA, this comparison was of enormous import. As it bluntly asked: “Why has the “indigenous” requirement been established only in respect to inhabitants of American Samoa?”¹⁶⁴ It noted that, historically, when the Germans and Brits ceded the Samoan Islands to the Americans in 1899, under U.S. Supreme Court precedent dating back to Chief Justice Marshall, the recipient country was to inherit “the allegiance of those who remain in it.”¹⁶⁵ While acknowledging that its options were limited in terms of granting the petitioner citizenship directly, the BIA did the most it could—holding that it was nonsensical to have a higher preclusive bar to gain noncitizen national status than citizenship.¹⁶⁶ Hence, it found against the government and allowed the petitioner and the daughter to enter Hawai’i as U.S. nationals.¹⁶⁷

In sum, these three precedent-setting cases highlight how even before there was a major restructuring of immigration policy in 1952, the BIA was issuing rulings that were progressive for its time on the rights of American Samoans. Following the enactment of the INA, this trend only continued.

B. *The Post-INA Cases*

One year after the passage of the INA, the BIA heard an important case entitled *In the Matter of A*.¹⁶⁸ Here, the petitioner had been born in American Samoa in 1926.¹⁶⁹ As in the cases described above, the petitioner sought to enter Hawai’i (in 1951) but was declared excludable by immigration authorities.¹⁷⁰ She appealed this ruling, and the case eventually reached the BIA.¹⁷¹

162. See the Government of Hawai’i website that discusses this point, <https://perma.cc/L975-L73D>; Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (as it relates to Alaska).

163. In the Matter of B, 3 I. & N. Dec. 729 at 735 (although noting “that in the case of Alaska, our treaty with Russia (15 Stat. 542) excepted (*sic*) the so-called uncivilized tribes from the privilege of admission to citizenship. But even as to these uncivilized tribes, the Immigration Service ruled that they acquired noncitizen nationality of the United States (Malloy, *Treaties*, vol. 2, p. 1521)”).

164. *Id.* It is important to note that as part of its question, the Board also included the Swains Island and Guam. But since then, Guam has allowed for birthright citizenship, and the Swains Island has, as of the 2010 census numbers, a population of 17 people.

165. In the Matter of B, 3 I. & N. Dec. 729, 731 (B.I.A. 1949) (citing *American Ins. Co. v. Canter*, 1, Peters, 511, 542, as well as *Boyd v. Nebraska*, 143 U.S. 135, 36 L. Ed. 103 (1892); *Gonzales v. Williams*, 192 U.S. 1 (1903); Moore, *International Law Digest*, Vol. III, p. 311; and Hackworth, *Digest of International Law*, Vol. III, p. 155).

166. *Id.* at 735.

167. *Id.*

168. In the Matter of A, 5 I. & N. Dec. 144 (B.I.A. 1953).

169. *Id.*

170. *Id.*

171. *Id.* In this case, as with the ones described above, the procedure for appeal, during this time, included first having the petitioner’s case heard by an official known as the “Commissioner.” Eventually, from there, cases then proceeded to the BIA.

The main argument by the government was that the petitioner failed to possess a proper visa required to enter Hawai'i.¹⁷² It did, however, point to the Immigration Act of 1917—specifically, section 19(c)(2) of that statute—as a possible avenue that the petitioner could pursue in order “to seek adjustment of her immigration status”¹⁷³ from unlawful to lawful. (Curiously, though, before her case reached the BIA, “her parole status was terminated”¹⁷⁴ by the immigration authorities below, so it was unclear how she might have invoked this section.)

Nevertheless, in its judgment, the BIA began by quashing the order of exclusion. In a brief but firm ruling, it said that the 1952 INA was now the appropriate statute to apply.¹⁷⁵ It quoted sections 101(a)(29) and 308, which each set forth the rights that people from the “outlying possessions of the United States”¹⁷⁶ held. One of these rights was that, as a noncitizen national, a visa was not required of the petitioner before entering the United States.¹⁷⁷ And more broadly, the BIA’s judgment could be interpreted as an indication that it would not tolerate the government once again trying to leave someone stateless.

In the 1975 case of *Matter of Ah San*, the BIA reiterated this sentiment.¹⁷⁸ Here, it heard an appeal from the government, which had lost in front of an immigration judge below. The question involved whether a citizen of the country of Western Samoa, who was the daughter of a U.S. national mother from American Samoa, could be covered under section 203(a)(2) of the INA.¹⁷⁹ This provision allowed lawful permanent residents to sponsor their children for permanent residency in the United States.¹⁸⁰

The government contended that because the American Samoan mother had never actually lived within any of the fifty states, she was not permitted to invoke (a)(2).¹⁸¹ It also argued that the statutory language and legislative

172. *Id.*

173. In the *Matter of A*, 5 I. & N. Dec. 144 (B.I.A. 1953).

174. *Id.*

175. *Id.*

176. *Id.* (quoting from the statute directly and noting that under 308 “A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession *** Section 101(a)(29) defines ‘outlying possessions’ of the United States as including American Samoa and Swains Island. The United States, acquired what is now American Samoa by Treaty of December 2, 1899, ratified on February 16, 1900”).

177. *Id.* at 145 (noting that the last time she entered she did not need nor was “in possession of a valid immigration visa and was not exempted from the presentation thereof by said act or regulations made thereunder”).

178. *Matter of Ah San*, 15 I. & N. 315 (1975).

179. *Id.*

180. The provision itself reads: “Spouses and unmarried sons and unmarried daughters of permanent resident aliens – Qualified immigrants— (A) who are the spouses or children of an alien lawfully admitted for permanent residence, or (B) who are the unmarried sons or unmarried daughters (but are not the children) of an alien lawfully admitted for permanent residence, shall be allocated visas in a number not to exceed 114,200, plus the number (if any) by which such worldwide level exceeds 226,000, plus any visas not required for the class specified in paragraph (1); except that not less than 77 percent of such visa numbers shall be allocated to aliens described in subparagraph (A).” 8 U.S.C. § 1153 (2006).

181. *Matter of Ah San*, 15 I. & N. at 316.

history intended the law to be applied only to foreign nationals holding green cards.¹⁸² This position was confounding not just to the immigration judge but also to the BIA. Because the INA did not have a provision that spoke to the rights of people like the American Samoan mother, the logical conclusion of the government's argument was that foreign nationals ultimately had greater sponsorship rights for their children than noncitizen U.S. nationals.

In its ruling, the Board stated that it was unwilling to allow this inconsistency to stand. It acknowledged that there was "little by way of legal authority with respect to the rights of nationals of the United States."¹⁸³ As a result, it drew upon a 1955 BIA decision involving the Virgin Islands to support its judgment.¹⁸⁴

But in doing so, it concluded that the legal protections and rights of someone like the American Samoan mother must be "greater than those of a lawful permanent resident."¹⁸⁵ After all, noncitizen nationals were not immigrants; nor, given the precedent of *Matter of A-*, was it possible to exclude or deport them.¹⁸⁶ The BIA thus again rejected the government's attempt to disappear the rights of American Samoans. It also went further, explicitly enhancing the status of American Samoans *above* those (i.e., lawful permanent residents) who had been statutorily recognized by Congress—a noteworthy move by an agency located within the Executive Branch.

In that same year of *Matter of Ah San*, the BIA also ruled in a case called *Matter of Lui*.¹⁸⁷ Here, the petitioner was a citizen of the country of Tonga who had overstayed his visa and was ordered to be deported by the immigration judge.¹⁸⁸ On appeal to the BIA, the petitioner argued that he should be able to adjust his status (under INA section 245) to that of a lawful "investor."¹⁸⁹ The immigration judge had declined his request, but the BIA ordered the case to be remanded for further consideration.¹⁹⁰

The significance of this ruling is that the BIA made specific mention of the petitioner living in American Samoa and wanting to travel to a U.S. state in order "to obtain medical treatment for his son,"¹⁹¹ who was an American

182. *Id.* at 316–17.

183. *Matter of Ah San*, 15 I. & N. 315, 316 (1975). For reaffirmation of this point, see Schlingen, *supra* note 15.

184. This case was called *Matter of B*, 6 I. & N. 555 (1955), and it involved the question of whether an individual born in St. Thomas, Virgin Islands, who was a U.S. national at the time, could sponsor her noncitizen/noncitizen national children for lawful permanent residency. The Board held that she could. (Note, at the time of this case, the BIA was looking at provisions 203(a)(3) and (a)(4) of the INA. The former, at the time, dealt with the sponsorship rights of lawful permanent residents, regarding their children, while the latter dealt with those who were U.S. citizens looking to sponsor their sons and daughters (i.e., those individuals who were 21 or older). Since then, the statute has been updated, in terms of its numbering of the provisions within it.

185. *See Matter of Ah San*, 15 I. & N. at 318.

186. *Id.*

187. *In re Lui*, 15 I. & N. Dec. 206 (1975).

188. *Id.* at 206.

189. *Id.* at 207 (seeking to do this logistically via regulatory rule 8 C.F.R. 212.8(b)(4)).

190. *Id.* at 208.

191. *Id.* at 207.

Samoan national. Given the opinion's brevity, it is difficult to know for certain why the BIA returned the matter to the immigration judge. However, based on its previous decisions, it might well be that the BIA continued its pattern of sympathizing with those who had close ties to American Samoa and, simply put, wished to be of assistance.

The BIA cases that spanned nearly three decades, between 1947 and 1975, highlight a frequently overlooked reality. Namely, to avoid impractical and anomalous outcomes as a result of the government's actions, this agency stepped in and provided American Samoans with rights to which they would not have otherwise been entitled.

At the same time, the BIA did not take the next step of finding that any of the American Samoan petitioners had *jus soli* citizenship. The obvious reason is that such a declaration would have been beyond the scope of the BIA's powers. As Congressional action to enhance the status of American Samoans remained absent, the stark reality was that there was only so far that the BIA could push.¹⁹² Through its rulings, though, the BIA did signal two important points. First, when ambiguity was present, it would decide cases in favor of the American Samoan petitioner. Second, while these cases were technical and statutory in nature, they each involved American Samoans being treated in an anomalous, unequal manner, which the BIA did not tolerate, instead doing what it could to improve the situation.

This last point is especially important because now there is an opportunity for the Supreme Court to enter the debate over whether the noncitizen national category is constitutionally permissible under the Fourteenth Amendment. As the concluding section will argue, the Court should pick up where the BIA has left off by moving to recognize American Samoans as birthright citizens once and for all.

V. CONCLUSION: THE IMPLICATIONS OF TERRITORIAL INEQUITY

This Article has shown that the government has repeatedly sought to minimize—and occasionally outright erase—the basic rights of American

192. For example, in the *Matter of Ah San* case, the Board asserted that, “We do note, however, that the immigration judge’s statement that he does not believe “that a national of the United States can ever forfeit his right to enter the United States or to be considered as a permanent resident of the United States unless he voluntarily relinquishes his allegiance to the United States as a national of the United States,” should be qualified with the observation that Congress can undoubtedly deprive a noncitizen national of his status by legislation without regard to voluntariness on the noncitizen national’s part.” See *Matter of Ah San*, 15 I. & N. 315, 318–19 (1975). For two other cases where the BIA showed such deference, see *In re T*, 5 I. & N. Dec. 380 (B.I.A. 1953) (holding that a British Samoan citizen who had two U.S. national American Samoan parents could not qualify as a U.S. national, because, according to the Board, Congress’s statute under which the case was being heard, the 1940 Nationality Act did not allow it. However, the Board did allow her to still apply for a nonimmigrant student visa). See also *In re Tuitasi*, 15 I. & N. 102 (1974) (holding that under section 308 of the INA, Congress strictly set for the ways to qualify as a noncitizen national. Here, a person born in another country (Western Samoa) and adopted by American Samoan nationals was deemed not to qualify as a U.S. noncitizen national by the BIA, deferring to the government’s interpretation of Congress’s intent).

Samoans through various immigration restrictions. However, the BIA, which has been justifiably chastised for ignoring the rights of noncitizens in other contexts, surprisingly attempted to protect American Samoans from such government overreach for nearly three decades, beginning in the 1940s. Given its previous decisions, perhaps the federal courts ought to ask: what might the BIA do on the birthright citizenship question if it had a say?

In one sense, the immigration approach proposed in this Article supplements Judge Bacharach and Judge Waddoups' decisions in *Fitisemanu*, which primarily focused on the constitutional and theoretical incongruity of not treating American Samoans as birthright citizens. Yet the immigration angle is important to reflect upon as well. There are practical, tangible reasons for why this lack of citizenship recognition is a substantive hindrance.

For example, along with not being permitted "to vote in federal, state or local elections . . . [American Samoans cannot] run for elected office, serve on a jury or apply for certain government jobs that require the candidates to be U.S. citizens."¹⁹³ Moreover, while 10 U.S.C. Sec. 504(b)(1)(A) expressly provides that "a national of the United States" can qualify to "be enlisted in any armed force,"¹⁹⁴ advancing up the ladder is a different story. Stewart Smith notes that in the Army:

*. . . regulations prohibit granting a security clearance, to non-U.S. citizens. Additionally, some Army jobs may only be performed by U.S. citizens, regardless of Security Clearance requirements. There are many jobs in the military that require a security clearance, such as Special Operations, Armor, Air Defense Artillery, Military Police, Intelligence, Chemical, Biological, Radiological, and Nuclear Specialist as well as the Officer Corps. These are the types of jobs that require Secret to Top Secret Security Clearances that only citizens may hold.*¹⁹⁵

Similarly, Rose Cuison Villazor has discussed how "[m]any public sector jobs require U.S. citizenship as a condition of employment, a prerequisite that has been declared constitutional"¹⁹⁶ by the Supreme Court. In fact, one such sector was the focus of a 2016 Department of Justice report that found that "[m]any law enforcement agencies also require candidates to be U.S. citizens . . . [and that] more than 40 states have statutes, regulations, or

193. See Ann N. Simmons, *American Samoans Aren't Actually U.S. Citizens. Does That Violate the Constitution?*, L.A. TIMES (Apr. 6, 2018), <https://perma.cc/FA77-VPYC>; see also Villazor, *American Nationals*, *supra* note 15, at 1676–81.

194. See 10 U.S.C. § 504(b)(1)(A) (2006).

195. See Stewart Smith, *Army Jobs for U.S. Citizens*, BALANCE CAREERS (June 7, 2019), <https://perma.cc/F2AW-WNVV>. I am also grateful to Margaret Stock, a prominent immigration lawyer based in Alaska, who is an expert on cases involving American Samoan litigation. She provided the author detailed background on the difficulties that American Samoans have living as noncitizen U.S. nationals. Author conversation with M. Stock, April 29, 2021 [hereinafter Conversation with M. Stock].

196. See Villazor, *American Nationals*, *supra* note 15, at n.15. (She also notes that non-U.S. citizens hold "ambiguous Second Amendment rights," and cites Pratheepan Gulasekaram, "The People" of the Second Amendment: Citizenship and the Right to Bear Arms, 85 N.Y.U. L. REV. 1521 (2010)).

administrative rules in place that restrict the ability of law enforcement agencies to employ non-citizens.”¹⁹⁷

There are other adverse effects. Because the category of noncitizen national is often not part of the lexicon of bureaucrats, nor part of the architecture around bureaucratic processes, those who are American Samoans find themselves in perilous legal situations through no fault of their own with some regularity. For instance, the National Voter Registration Act mandates that “most states . . . provide citizens with an opportunity to register to vote when applying for or renewing a driver’s license at a department of motor vehicles (DMV) or other designated state agencies.”¹⁹⁸ In “January 2021, 20 states and the District of Columbia . . . [implemented] automatic voter registration”¹⁹⁹ (AVR). Three of these AVR states—Alaska, California, and Washington—have among the largest percentage of American Samoans in the United States.²⁰⁰

The difficulty arises because American Samoans, as discussed above, are ineligible to vote for state or federal officials. Yet when an individual is automatically registered to do so as part of obtaining a driver’s license in one of these AVR states, that person may be viewed as having committed a crime,²⁰¹ and the ramifications can be significant.

For starters, noncitizens seeking to naturalize, including American Samoans, must complete a form known as the N-400, which states that “good moral character”²⁰² is a requirement for whether or not citizenship will be granted. This phrase is defined within the INA,²⁰³ and given the history, it is not difficult to see the government arguing that someone who has unlawfully registered to vote fails to possess this trait.²⁰⁴ When this happens to noncitizens who are also not U.S. nationals, a frequent outcome is that the individual

197. See *Advancing Diversity in Law Enforcement*, U.S. DEP’T OF JUSTICE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 22 (Oct. 2016), <https://perma.cc/V3HJ-CDQL>; see also Carl F. Matthies, Kirsten M. Keller & Nelson Lim, *Identifying Barriers to Diversity in Law Enforcement Agencies*, RAND CTR. QUALITY POLICING (2012), <https://perma.cc/2ARM-TZ4R>; Simone Weichselbaum, *Desperate for Recruits, More Police Departments Looking at Non-Citizens*, USA TODAY (Feb. 15, 2019), <https://perma.cc/WBC3-QNNF>.

198. See *Automatic Voter Registration*, NAT’L CONF. ST. LEGISLATURES (Feb. 8, 2021), <https://perma.cc/YCQ7-LMGJ>.

199. *Id.*

200. The other state is Hawai’i. Conversation with M. Stock, *supra* note 195.

201. *Id.*; see also Pam Fessler, *Some Noncitizens Do Wind Up Registered to Vote, but Usually Not on Purpose*, NPR MORNING ED. (Feb. 26, 2019), <https://perma.cc/59GW-QWAS>; *Voter Registration Error Risks Deportation for Immigration*, PBS NEWS HOUR (Feb. 10, 2020), <https://perma.cc/Y8P3-7G9U>.

202. See *Naturalization Eligibility Worksheet*, DEP’T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/LR2Y-RC62>. Also note, there are relevant provisions within the INA, including Sec. 101(f) (discussing “good moral character”) and Sec. 316 (discussing the “requirements of naturalization,” with sub-provision (d) focusing on “moral character” and sub-provision (e) focusing on “determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship”).

203. See DEP’T OF HOMELAND SEC. & U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 202; INA, *supra* note 202.

204. See Immigration and Nationality Act § 101(f)(9), 8 U.S.C. 1101 (2021) (noting that “[t]he fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”).

is denied citizenship and thereafter deported. American Samoans, however, cannot be deported.²⁰⁵ Rather, their application for naturalization may be significantly delayed or denied, which can lead to exclusion from certain sectors of the labor market, continued political isolation, and social marginalization from communities which they are seeking to be a part of.²⁰⁶

Looking at the BIA's immigration approach to past American Samoan concerns offers a distinct insight. The BIA's previous cases have involved claims for more equitable treatment in receiving different government benefits. As demonstrated, the BIA has done what it could to show its sympathy and support. Yet because it cannot directly bestow citizenship, a range of other entitlements remains beyond the reach of American Samoans.

For example, U.S. citizens generally "can travel with one of the most powerful passports in the world, . . . [including going] to more than 180 countries for short-term trips without a visa."²⁰⁷ For American Samoans, while they can apply for this same privilege, whether they receive it is determined on a case-by-case basis by the hosting country. In addition, certain federal financial assistance opportunities for college and other educational purposes are only open to citizens.²⁰⁸ Also, "U.S. citizens generally get priority when petitioning to bring family members permanently to this country."²⁰⁹ Many more important privileges of citizenship exist as well.²¹⁰

Thus, if the Supreme Court decides to weigh in on birthright citizenship for American Samoans, it may wish to reflect on how the agency charged with immigration adjudication has handled previous relevant cases as well. Recall that as it was originally conceived, *Chevron* was premised on the idea that bureaucracies are staffed with experts tasked with making both efficient and just decisions. While many have seen the BIA's actions as generally

205. Conversation with M. Stock, *supra* note 195.

206. *See id.* For one prominent story, see Courtney Teague, *GOP Candidate Challenges Citizenship Ruling*, HONOLULU CIVIL BEAT (Aug. 8, 2018), <https://perma.cc/TSN2-AM6D>.

207. *Is Citizenship Right for You?*, BOUNDLESS, <https://perma.cc/QBR9-PC7Q>; *Should I Consider U.S. Citizenship?*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://perma.cc/4E7L-WVWV>; *see also* Teague, *supra* note 206.

208. *See* Boundless, *supra* note 207; U.S. CITIZENSHIP & IMMIGR. SERV., *supra* note 207; Teague, *supra* note 206. (Although, here too, American Samoans can sometimes be included, but sometimes not, and where it is the latter, they can apply, and whether they are eligible is determined on a case-by-case basis.)

209. U.S. CITIZENSHIP & IMMIGR. SERV., *supra* note 207.

210. BOUNDLESS, *supra* note 207; U.S. CITIZENSHIP & IMMIGR. SERV., *supra* note 207; *see also* Conversation with M. Stock, *supra* note 195. During this conversation, Lt. Colonel Stock provided a stark example of one such privilege that exists in Alaska known as the Permanent Fund Dividend Division. Under this program, residents of Alaska, under AS 43.23.005(a)(5) are "eligible to receive a permanent fund dividend, [but] the individual must be: A) a citizen of the United States; B) an alien lawfully admitted for permanent residence in the United States; C) an alien with refugee status under federal law; or D) an alien that has been granted asylum under federal law." Note, there is no mention of where a noncitizen U.S. national would fit under this program. Indeed, under 15 AAC 23.154, which "provides additional guidance on eligibility of alien applicants," "[i]ndividuals from American Samoa are considered US Nationals (non-naturalized) and must provide an original birth certificate before the Division can determine eligibility." Here, not only do American Samoans fall under the category of being an "alien," but even where they can provide a certificate, the state official still has discretion on whether to grant this benefit.

antithetical to this notion, the story has been curiously different with respect to American Samoans.

Why? The answer, for now, can only be speculative. But perhaps it was because politics did not infect the adjudication of cases to the extent we see today. In fact, imagine a scenario where outside interference was minimized, and the BIA had the opportunity to deliberate on the citizenship question. With its past support for claims made by American Samoans, the BIA might well find in favor of recognizing this right. If it did, its decision likely would be based less on ‘high constitutional’ theory and more on how the category of noncitizen national is both impractical and anomalous, given that federal and state laws generally do not account for this status. In other words, were it to stay true to its past rulings, the BIA would see continuing such inequity as running counter to its own precedent, and it would likely take issue with the government’s actions, especially since they would be directed at a community that has been disadvantaged for so long.