



## BEING BORN IN AMERICAN SAMOA IS NOT A CRIME

American Samoa is located in the South Pacific and has been a U.S. territory since 1900. American Samoans have proudly served in every U.S. conflict since World War I, and today have a higher rate of U.S. military service than any state or territory. They are even issued U.S. passports.<sup>1</sup> Nonetheless, the federal government currently labels individuals born in American Samoa as “nationals, but not citizens of the United States” unless one of their parents is someone the federal government recognizes as a U.S. citizen.<sup>2</sup> As so-called “non-citizen U.S. nationals,” they owe “permanent allegiance to the United States”<sup>3</sup> and have the full obligations of citizenship – including paying taxes and being eligible to be drafted for war. But they do not enjoy many of the rights that come with U.S. citizenship. This imposition of non-citizen status is not just wrong, it is unconstitutional.

When American Samoa transferred sovereignty to the United States in 1900 and 1904, its leaders had the understanding they would automatically be recognized as U.S. citizens, and that citizenship did not present a threat to their land, culture, or self-determination. They were right. The Citizenship Clause of the Fourteenth Amendment commands that people born in American Samoa have just as much a right to be recognized as U.S. citizens as people born in Alaska or any other part of the United States. The only reason American Samoans have been denied recognition of citizenship by the federal government is a series of racist Supreme Court decisions known as the *Insular Cases*. But those cases did not even involve the Citizenship Clause, and the Supreme Court recently emphasized “that the *Insular Cases* *should not be further extended*.”<sup>4</sup>

Alaska is criminally investigating and prosecuting American Samoans because they were born in American Samoa and are not recognized as U.S. citizens. But as this memo sets out, being born in American Samoa is not a crime. No government official or federal statute can deny what the U.S. constitution guarantees: that American Samoans have the same rights as anyone born under the sovereignty of the United States.

### **Unconstitutional Federal Laws Create Confusion and Criminal Liability**

Because the federal government denies most American Samoans recognition as U.S. citizens, too often they face uncertainty when it comes to their ability to vote in federal, state, and local elections, run for office, serve on juries, receive certain public benefits, or even hold certain state or federal jobs. American Samoans are the *only* individuals born on U.S. soil who

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<sup>1</sup> 7 FAM 1130 Appendix H, Certificate of U.S. Non-Citizen National Status.

<sup>2</sup> 8 U.S.C. § 1408(1); 1101(a)(29).

<sup>3</sup> 8 U.S.C. § 1101(a)(22).

<sup>4</sup> *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S.Ct. 1649, 1665 (2020) (emphasis added) (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

are denied recognition as U.S. citizens – people born in Guam, Puerto Rico, or other U.S. territories are automatically recognized as citizens by the federal government. In the federal government’s view, American Samoans are citizens of nowhere.

Alaska state and local elections officials are themselves confused, often telling these passport-holding “non-citizen U.S. nationals” they are eligible to vote in local and state elections. At times, American Samoans have even been told by state or local officials to check that they are “U.S. citizens” on voter registration applications, since these forms do not have a place to indicate someone is a “non-citizen U.S. national.” American Samoans are also often automatically registered to vote when they apply for certain state benefits like the Permanent Fund Dividend (PFD).<sup>5</sup> This has contributed to confusion in the American Samoan community, where many individuals believe they are eligible to vote, whether as U.S. citizens or as “non-citizen U.S. nationals.”

This uncertainty over citizenship status and how it impacts American Samoans is compounded because Alaska law actually defines American Samoans as “United States citizens” for the purpose of certain state benefits like the Alaska Temporary Assistance Program.<sup>6</sup> Yet Alaska law does not define American Samoans as U.S. citizens for the purposes of other state benefits programs that are limited to U.S. citizens or certain “qualified aliens”, like the Alaska Senior Benefit Program or the Alaska Adult Public Assistance Program, making it unclear whether they are eligible for these programs.

This confusion – both over whether American Samoans are U.S. citizens and whether so-called “non-citizen nationals” are eligible to vote in Alaska – creates a dangerous criminal trap for American Samoans. Under Alaska law, only an individual who is a “citizen of the United States” is eligible to vote.<sup>7</sup> Alaska law also provides that a “person commits the crime of voter misconduct” if that person “*intentionally* makes a false affidavit, swears falsely, or falsely affirms under an oath required by this title.”<sup>8</sup>

Based on confusion over the citizenship status of American Samoans, the State of Alaska is criminally prosecuting Tupe Smith for checking the “U.S. citizen” box on her voter registration form, *even though* (1) she had a good-faith belief she was eligible to vote in local/state elections at the time she did, and (2) a local election official told her that in the absence of a box for “non-citizen national” on her voter registration application she should check the box indicating she is a “U.S. citizen.”<sup>9</sup> In October, the trial court ruled that, no matter what she was instructed to do by public officials, if “Ms. Smith knowingly and falsely claimed to be a U.S. citizen” on her voter registration form she could face jail time.<sup>10</sup>

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<sup>5</sup> Alaska law provides that American Samoan “non-citizen nationals” are eligible for the PFD. See <https://pfd.alaska.gov/eligibility/immigration>.

<sup>6</sup> AAC Title 7, § 45.215(g)(1).

<sup>7</sup> Alaska Constitution Art. V., § 1; A.S. § 15.05.010(1) (“A person may vote at any election who is a citizen of the United States.”).

<sup>8</sup> A.S. § 15.56.040(a)(3) (emphasis added).

<sup>9</sup> State of Alaska v. Tupe Smith, Case No. 3AN-23-08873CR, [Motion to Dismiss Indictment](#) (April 12, 2024) at 2-7.

<sup>10</sup> State of Alaska v. Tupe Smith, Case No. 3AN-23-08873CR, [Order Denying Defendants’ Motion to Dismiss Indictment](#) (October 15, 2024) at 11.

The criminal targeting of American Samoans in Alaska is escalating. Last September, more than twenty Alaska State Troopers in a dozen unmarked police vehicles – apparently acting without the knowledge of local law enforcement – [raided](#) the small community of Whittier Alaska to investigate two dozen American Samoans for possible alleged voter misconduct. The costs of this confusion are real. The harms this has placed on the American Samoan community are deeply felt, particularly in the wake of a [tragic officer-involved shooting](#) that led to the death of a 16-year old American Samoan girl whose family had called the police to assist with a domestic family emergency. Instead of feeling like valued members of the community, American Samoans are made to feel like criminals.

### **U.S. Constitution: People Born in American Samoa Are U.S. Citizens**

The U.S. Constitution is “the supreme law of the land.”<sup>11</sup> Any federal law that conflicts with the U.S. Constitution is invalid.<sup>12</sup> Further, “no act or omission of Congress ... can affect citizenship acquired as a birthright, by virtue of the Constitution itself.”<sup>13</sup> So whenever there is a conflict between what a congressional statute or government official says about who is a U.S. citizen and what the U.S. Constitution requires, the U.S. Constitution prevails. Under the text, history, and relevant Supreme Court precedent interpreting the Fourteenth Amendment, people born in American Samoa – like those born on U.S. sovereign soil in the 50 states, the District of Columbia, or other U.S. territories – are constitutionally citizens of the United States.

The Citizenship Clause of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>14</sup> American Samoa has been a territory of the United States for nearly 125 years – fully half the history of the United States itself.<sup>15</sup> The United States has by treaty and statute confirmed “the sovereignty of the United States over American Samoa.”<sup>16</sup> This followed Deeds of Cession in 1900 and 1904 whereby the traditional chiefs of these islands transferred sovereignty to the United States based on the understanding that they would be recognized as citizens and their land and culture protected.<sup>17</sup> American Samoa is not part of any nation except the United States.

A person born in American Samoa is therefore “born ... in the United States” for purposes of the Citizenship Clause. Moreover, because someone born in American Samoa “owes permanent allegiance to the United States,”<sup>18</sup> a person born in American Samoa and living in Alaska is also “subject to the jurisdiction of the United States.” Accordingly, the Fourteenth

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<sup>11</sup> *McCulluch v. Maryland*, 17 U.S. 316, 405-06 (1819).

<sup>12</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>13</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

<sup>14</sup> U.S. Const. amend. XIV.

<sup>15</sup> See Instrument of Cession by Chiefs of Tutuila to U.S. Gov’t, at 2 (Apr. 17, 1900); Instrument of Cession by Chiefs of Manu’a Islands to U.S. Gov’t, at 2 (July 14, 1904).

<sup>16</sup> 48 U.S.C. §§ 1661-1662.

<sup>17</sup> *Fitisemanu v. United States*, [Brief of Samoan Federation of America](#), U.S. Court of Appeals for the Tenth Circuit (May 12, 2020) at 5-11.

<sup>18</sup> 8 U.S.C. § 1101(a)(22).

Amendment provides that someone born in American Samoa, just like someone born anywhere else on U.S. soil, is a U.S. citizen and a citizen of the state they reside.

### Supreme Court Precedent

Supreme Court precedent confirms that the phrase “the United States” as used in the Citizenship Clause includes states, the District of Columbia, *and* each territory, including territories like American Samoa. As Chief Justice John Marshall explained prior to ratification of the Fourteenth Amendment, “the United States” was “the name given to our great republic, which is composed of states *and territories*.”<sup>19</sup> Five years after the Fourteenth Amendment was ratified, the Supreme Court confirmed that the Citizenship Clause “put[] at rest” the proposition that “[t]hose who had been born and resided always in the District of Columbia *or in the Territories*, though within the United States, were not citizens.”<sup>20</sup> Just two years before American Samoa became a territory of the United States, the Supreme Court reaffirmed in its seminal decision in *United States v. Won Kim Ark* that the Citizenship Clause codified the “ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection of the country.”<sup>21</sup>

### Text and Ratification History

The Supreme Court’s understanding is supported by a textual analysis of the Fourteenth Amendment as a whole. Section 1 of the Fourteenth Amendment states that “all persons . . . born *in the United States* . . .” are citizens, while Section 2 states that “[r]epresentatives shall be apportioned *among the several states*.”<sup>22</sup> During the Congressional debate over the Citizenship Clause, Senator Lyman Trumbull, then-Chairman of the Senate Judiciary Committee, confirmed that while “[t]he second section [of the Fourteenth Amendment] refers to no persons except those in the States of the union . . . the first section refers to *persons everywhere*, whether in the States *or in the Territories* or in the District of Columbia.”<sup>23</sup>

### Purpose and Historical Context of the Citizenship Clause

The Citizenship Clause’s broad geographic scope is consistent with its purpose and the historical context in which it was ratified. The Citizenship Clause was adopted to constitutionalize the well-settled common-law principle of *jus soli*, or “the right of the soil,” that extended birthright citizenship “within the dominion” of the sovereign, long understood in England and the United States to include territories.<sup>24</sup> The only time the Supreme Court did not follow the *jus soli* rule was its infamous ruling in *Dred Scott v. Sandford*.<sup>25</sup> Significantly, the Citizenship Clause was adopted to “overtur[n] the *Dred Scott* decision.”<sup>26</sup> The Fourteenth

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<sup>19</sup> *Loughborough v. Blake*, 18 U.S. 317, 319 (1820) (Marshall, C.J.) (emphasis added).

<sup>20</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1873) (emphasis added).

<sup>21</sup> *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (emphasis added).

<sup>22</sup> U.S. Const. amend. XIV (emphasis added).

<sup>23</sup> Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull) (emphasis added).

<sup>24</sup> See *United States v. Wong Kim Ark*, 169 U.S. at 675-705; *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828) (Story, J.) (“A citizen of one of our territories is a citizen of the United States.”).

<sup>25</sup> 60 U.S. (19 How.) 393 (1857).

<sup>26</sup> *Slaughter-House Cases*, 83 U.S. at 72.

Amendment’s Framers sought “‘to put th[e] question of citizenship and the rights of citizens . . . beyond the legislative power’” and to restore and cement the settled *jus soli* rule.<sup>27</sup> In short, “[t]he Fourteenth Amendment . . . has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.”<sup>28</sup>

### Cross-Ideological Scholarly Consensus

Prominent legal scholars across the ideological spectrum agree that people born in American Samoa or other U.S. territories have a constitutional right to U.S. citizenship. For example, Professor Michael Ramsey, who clerked for Justice Antonin Scalia and serves as a member of the Center for the Study of Constitutional Originalism at the University of San Diego School of Law, explained in a recent law review article cited by Justice Gorsuch that “the original meaning [of the Fourteenth Amendment] would apply the Citizenship Clause to persons born in Puerto Rico, Guam, American Samoa, and the U.S. Virgin Islands—all of which are under permanent U.S. sovereignty pursuant to formal acquisitions and thus are ‘in the United States.’”<sup>29</sup> A cross-ideological group of distinguished academics joined Professor Ramsey to present the consensus scholarly view that “the ‘non-citizen national’ designation imposed on American Samoans . . . is an unconstitutional exception to the principle of *jus soli* citizenship, invented by administrators and legislators operating under racist presuppositions during America’s territorial expansion at the turn of the twentieth century.”<sup>30</sup>

### U.S. Supreme Court: “[T]he *Insular Cases* should not be further extended.”

Nonetheless, federal judges who have considered the question of citizenship in American Samoa have reached differing conclusions, with some relying on the Supreme Court’s racist *Insular Cases* to reinterpret the intended geographic scope of the Citizenship Clause.

In 2019, U.S. District Court Judge Clark Waddoups properly relied on the Supreme Court’s binding precedent in *Wong Kim Ark* to hold in *Fitisemanu v. United States* that American Samoans, “having been born in the United States, and owing allegiance to the United States, **are citizens** by virtue of the Citizenship Clause of the Fourteenth Amendment,” and that “Congress has no authority to deny them citizenship.”<sup>31</sup> That decision was reversed by a divided panel of the Tenth Circuit. Rather than rely on the text and history of the Citizenship Clause, the two judges in the majority relied instead on the Supreme Court’s controversial and racist decisions in the *Insular Cases* – none of which actually addressed or interpreted the Citizenship Clause.<sup>32</sup> The dissenting judge disagreed that the *Insular Cases* should be extended in this way and would have upheld the district court decision on the grounds that “[w]hen the Fourteenth Amendment was ratified, courts, dictionaries, maps, and censuses uniformly regarded territories as land ‘in the

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<sup>27</sup> *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (Sen. Howard) (1866)).

<sup>28</sup> *Wong Kim Ark*, 169 U.S. 703.

<sup>29</sup> M. Ramsey, [Originalism and Birthright Citizenship](#), 109 Geo. L. J. 405, 436 (2020).

<sup>30</sup> *Fitisemanu v. United States*, [Brief by Citizenship Scholars in Support of Petitioners](#), May 31, 2022, at 1-2.

<sup>31</sup> *Fitisemanu v. United States*, 426 F. Supp. 3d 1144, 1196 (D.Utah 2019) (emphasis added).

<sup>32</sup> *Fitisemanu v. United States*, 1 F.4th 862, 873 (10th Cir. 2021).

United States.”<sup>33</sup> A cross-ideological group of prominent legal scholars agreed the *Insular Cases* “do not provide guidance on whether the Citizenship Clause applies to individuals born in the unincorporated territories.”<sup>34</sup>

Following the Tenth Circuit’s decision, Supreme Court Justice Neil Gorsuch criticized the Tenth Circuit’s continued reliance on the *Insular Cases*.<sup>35</sup> In his view: “The *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”<sup>36</sup> He and Justice Sonia Sotomayor agreed that “the Constitution’s application [in U.S. territories] should never depend on the government’s concession or the misguided framework of the *Insular Cases*.” She further observed that the *Insular Cases* “were premised on beliefs both odious and wrong.”<sup>37</sup> These statements by Justices Gorsuch and Sotomayor followed action by the Supreme Court in 2020 when it emphasized “that the *Insular Cases* *should not be further extended*.”<sup>38</sup> Nonetheless, the Supreme Court did not grant review in *Fitisemanu*, leaving the question of citizenship for people born in American Samoa unresolved.

Confusion over the *Insular Cases* has also led other Circuit Courts to improperly extend their logic when addressing claims for citizenship from people who were born in *former* U.S. territories like the Philippines.<sup>39</sup> Ultimately, the question of how the Citizenship Clause applies to *former* U.S. territories is analytically separate from the question of how it applies to *current* ones.<sup>40</sup> The United States made clear that the Philippines was never intended to be a permanent part of the United States, and Congress determined that federal laws did not apply there in full. Dicta in those decisions, especially language purporting to rely on extending the racist logic of the *Insular Cases*, holds little precedential value for understanding what the Citizenship Clause requires in U.S. territories *today*. Indeed, it is now the formal policy of the U.S. Justice Department that “the racist language and logic of the *Insular Cases* deserve no place in our law.”<sup>41</sup>

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<sup>33</sup> *Id.* at 884 (Bacharach J., dissenting). Judge Bacharach, joined by Judge Moritz, also dissented to the denial of en banc review by the Tenth Circuit, stating that the panel decision should have been reviewed because the approaches taken by both judges in the majority “skirt our obligation to determine the meaning of the constitutional language,” and concluding that “[w]e bear an obligation to interpret the geographic scope of the Citizenship Clause based on the text and its historical context. When we do, there is only one answer: The Territory of American Samoa lies within the United States.” *Fitisemanu v. United States*, 20 F.4th 1325, 1327 (10th Cir. 2021).

<sup>34</sup> *Fitisemanu v. United States*, [Brief for Scholars of Constitutional Law and History](#), May 2022, at 4.

<sup>35</sup> *United States v. Vaello Madero*, 142 S.Ct. 1539, 1555-56 (2022) (Gorsuch, J., concurring).

<sup>36</sup> *Id.* at 1552.

<sup>37</sup> *Id.* at 1560, FN 4 (Sotomayor, J., dissenting).

<sup>38</sup> *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S.Ct. 1649, 1665 (2020) (emphasis added) (citing *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion)).

<sup>39</sup> *Nolos v. Holder*, 611 F.3d 279, 284 (5th Cir. 2010); *Lacap v. I.N.S.*, 138 F.3d 518, 519 (3d Cir. 1998); *Valmonte v. I.N.S.*, 136 F.3d 914, 920 (2d Cir. 1998); *Rabang v. I.N.S.*, 35 F.3d 1449, 1452 (9th Cir. 1994).

<sup>40</sup> *Fitisemanu v. United States*, [Brief by Citizenship Scholars in Support of Petitioners](#), May 31, 2022, at 18-21.

<sup>41</sup> U.S. Department of Justice, Justice Manual title 1-21.000 - Applicability of Constitutional Provisions to U.S. Territories.



## **Congress Imposed “Non-Citizen National” Status Over the Objections of American Samoan Leaders, Who Did Not View Citizenship as a Threat to Their Land, Culture, or Right to Self-Determination**

When the United States flag rose over American Samoa in 1900, those who signed the Deeds of Cession reasonably believed that American Samoans would be recognized as full U.S. citizens. When the U.S. Navy told them in the 1920s that the federal government did not recognize American Samoans as U.S. citizens, American Samoan leaders pushed for decades to be recognized as citizens.<sup>42</sup> These efforts failed based on racist opposition from the Navy and Members of Congress, who called American Samoans “primitive” “savage[s],” “absolutely unqualified” and “poor unsophisticated people.”<sup>43</sup>

The American Samoan leaders who signed the Deeds of Cession did not see a conflict between U.S. citizenship and the preservation of their land and culture.<sup>44</sup> They were right. Opposition to legal recognition of U.S. citizenship by elected officials in American Samoa today repeats unsupported arguments made by the U.S. Navy in the 1940s that U.S. citizenship would risk threatening local laws and practices protecting *Fa’a Samoa*, the Samoan way of life. Recognition of citizenship is unrelated to questions about the constitutionality of these laws and practices. Nor would recognition of U.S. citizenship change American Samoa’s political status or prevent it from determining its future political status through a process of self-determination.

### **Conclusion**

American Samoa’s leaders had it right in 1900 when they believed that the transfer of sovereignty to the United States would mean they had a right to be recognized as citizens. That is what the Citizenship Clause of the Fourteenth Amendment required then, and what it requires today. No government official or federal statute has the power to deny that or to impose a second-class status of “non-citizen U.S. national.” Simply put, being born in American Samoa is not a crime. The only violation of law present here is the ongoing denial of U.S. citizenship and accompanying rights to people born in American Samoa.

More information about these issues can be found [here](#). Questions? Write us at [info@righttodemocracy.us](mailto:info@righttodemocracy.us).

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<sup>42</sup> *Fitisemanu v. United States*, [Brief of the Samoan Federation of America](#), May 12, 2020, at 5-10.

<sup>43</sup> *Id.* at 18-22.

<sup>44</sup> *Id.* at 17-18.