**Fitisemanu v. United States**—Divided Tenth Circuit panel rejects claim of three American Samoans to citizenship under section 1 of the Fourteenth Amendment

The first sentence in the Fourteenth Amendment, known as the Citizenship Clause, 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.” The United States possesses several unincorporated territories, e.g., the Virgin Islands and Guam, and Congress has granted birthright citizenship to their residents with the exception of American Samoa. *See* 8 U.S.C. § 1408(1). In 2018, three American Samoans and a Utah-based nonprofit corporation filed suit alleging that the Citizenship Clause applied to that territory and that § 1408(1) was unconstitutional. The American Samoan government intervened as a defendant in support of the statute’s validity. The district court agreed with the plaintiffs and granted their summary judgment motion. *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019). A Tenth Circuit three-judge panel reversed in a splintered opinion*. Fitisemanu v. United States*, Nos. 20-4017 & 20-4019, 2021 WL 2431536 (10th Cir. June 15, 2021). The reversal was consistent with other Circuit courts that have ruled on application of the Citizenship Clause to an unincorporated territory, including one case involving American Samoa. *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015).

Judge Lucero authored the lengthy principal opinion that relied on the Insular Cases, a series of United States Supreme Court opinions issued between 1900 and 1922, which, as he explained, “addressed a basic question: when the American flag is raised over an overseas territory, does the Constitution follow?” Judge Lucero further explained:

In his concurrence in what became Insular's seminal case, *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901), Justice Edward White wrote, “[T]he determination of what particular provision of the Constitution is applicable [in an unincorporated territory] ... involves an inquiry into the situation of the territory and its relations to the United States.” … Though not the issue in *Downes*, Justice White specifically mentioned citizenship as the type of constitutional right that should not be extended automatically to unincorporated territories. … This flexible and pragmatic approach to the extension of the Constitution to America's overseas territories “bec[a]me the settled law of the court.”

In applying the Insular Cases’ analytical framework, “courts first consider whether a constitutional provision applies to unincorporated territories ‘by its own terms.’” Judge Lucero found no textually dispositive resolution of this issue because although “[a] constitutional provision may ‘apply by its own terms’ to an unincorporated territory, … the text of the Citizenship Clause does not require such application.” Under these circumstances, “[c]onsistent historical practice suggests this textual ambiguity be resolved so as to leave the citizenship status of American Samoans in the hands of Congress.” Notwithstanding the implicit suggestion that no further analysis was necessary, Judge Lucero continued on to the framework’s next consideration: “whether citizenship is a ‘fundamental personal right’ as that term is defined by the Insular Cases.” He resolved this consideration in the negative, reasoning that “[b]irthright citizenship, like the right to a trial by jury, is an important element of the American legal system, but it is not a prerequisite to a free government. Numerous free countries do not practice birthright citizenship, or practice it with significant restrictions, including Australia, France, and Germany.” Ultimately, however, Judge Lucero placed the most weight on what he characterized as “the lodestar of the Insular framework[:] … the ‘impracticable and anomalous’ standard.” He interpretated this consideration to allow giving weight to “the preference against citizenship expressed by the American Samoan people through their elected representatives.” He thus

agree[d] with the representatives of the American Samoan government that “an extension of birthright citizenship without the will of the governed is in essence a form of ‘autocratic subjugation’ of the American Samoan people.” While I am sympathetic to Plaintiffs’ desire for citizenship, to accept their position would be to impose citizenship over the expressed preferences of the American Samoan people. Such a result would be anomalous to our history and our understanding of the Constitution.

Chief Judge Tymkovich concurred briefly. He deemed both parties’ interpretations of the Citizenship Clause “plausible” but recognized “[t]he settled understanding and practice over the past century is that Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants. On this basis, I would reverse.” He added that “although I agree with much of Judge Lucero’s reasoning endorsing consideration of the wishes of the American Samoan people, I would leave that consideration to the political branches and not to our court.”

Judge Bacharach dissented. His opinion is longer than Judge Lucero’s but, in the main, argues that *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), rather than the Insular Cases, controls. There, the son of non-citizen Chinese immigrants born in California was denied readmission to the United States under the Chinese Exclusion statutes upon return from a visit to China. The Supreme Court held the reentry denial violated the Citizenship Clause. Judge Bacharach summarized the decision’s relevance from his perspective:

The Supreme Court decided that the nationality of Mr. Wong’s parents didn’t matter because citizenship under the new constitutional amendment stemmed from the common-law principle of birth within the sovereign’s dominion. Given the Court’s focus on the common-law principle of birth within the sovereign’s dominion, the Court observed that the Citizenship Clause “in clear words and in manifest intent, includes the children born *within the territory of the United States*[,] ... of whatever race or color, domiciled within the United States.”

Relying on what he saw as the “common-law rule of birthright citizenship” developed during the nineteenth century prior to *Wong Kim Ark* and congressional debates preceding the Fourteenth Amendment’s adoption, Judge Bacharach deemed “the individual plaintiffs—born in the U.S. territory of American Samoa—as U.S. citizens.” He also argued that the Citizenship Clause recognized a fundamental right “because political participation … lies at the core of our government and … turns on citizenship.” Nor did he concur with Judge Lucero on the “impractical and anomalous” standard since “America American Samoa can always choose independence. But while Samoa remains joined with the United States, birthright citizenship respects the promises underlying the political union with the United States.” Lastly, Judge Bacharach acknowledged that accepting his view would create a circuit split but believed that “we must interpret the Constitution correctly when convinced that other circuit courts haven’t.”