

## **The *Insular Cases* “Deserve No Place In Our Law”**

The U.S. Justice Department [took historic action](#) in 2023 to “unequivocally condemn[] the racist rhetoric and reasoning of the *Insular Cases*,” calling them “irreconcilable with foundational American principles of equality, justice, and democracy.” In [guidance](#) to its more than 10,000 attorneys, it concluded that “the racist language and logic of the *Insular Cases* deserve no place in our law.” This followed a [campaign](#) led by [Right to Democracy](#), which brought together territorial leaders, civil rights organizations, bar associations, and others to press all three branches of the federal government to turn the page on these racist Supreme Court decisions. Congresswoman Uifa’atali Amata Radewagen from American Samoa spoke out in support of DOJ taking action to condemn the *Insular Cases*, [stating](#) that “[w]e support Congressional and DOJ repudiation of race prejudice in 1901-1922 *Insular Cases*.” This came after 43 members of Congress, including Gregorio Kilili Sablan (D-NMI), James C. Moylan (R-Guam), Stacey E. Plaskett (D-VI), and Jenniffer González-Colón (R-PR), also [called on DOJ](#) to take action.

Nonetheless, some elected officials in American Samoa have [opposed](#) efforts to overrule the *Insular Cases* on the mistaken grounds that doing so “will hasten the destruction of unique cultures within U.S. Territories and Insular Areas,” and “destroy the right of the people of American Samoa to democratic self-determination.” Responding to these concerns, Northern Mariana Islands Congressman Gregorio Kilili Sablan [cautioned](#) “if anyone is holding on to these racist *Insular Cases* as a way of keeping [land and cultural preservation laws] afloat, they may be holding on to an anchor, not a life preserver.” American Samoan Attorney Charles Ala’ilima – who serves on the Board of Right to Democracy – similarly [warned](#) that “attempts to rely on the *Insular Cases* to protect American Samoa’s land and culture are not just unnecessary, but ultimately self-defeating and dangerous to the cause of American Samoan cultural preservation and self-determination.”

### **The *Insular Cases*, like *Plessy v. Ferguson*, were grounded in racism and white supremacy.**

The *Insular Cases* are a [series of racist decisions](#) decided in the early 1900s by the same Justices who justified racial segregation in *Plessy v. Ferguson*. They held that people living in so-called “unincorporated” territories are not entitled to the same constitutional rights or democratic participation because they were “half-civilized,” “savage,” “alien races” who were “unfit” and could not understand “Anglo-Saxon principles.” While *Plessy* has long since been overruled, the *Insular Cases* remain the constitutional framework governing American Samoa and 3.5 million other residents of U.S. territories. Today, the *Insular Cases* serve to justify inaction by all three branches of the federal government towards addressing issues of democracy, equity, and self-determination in U.S. territories, normalizing the undemocratic status quo. Just as overruling *Plessy* helped create new political spaces that helped advance the African-American civil rights movement, overruling the *Insular Cases* could open the door to new political possibilities for self-determination in U.S. territories.

### **Relying on the *Insular Cases* is unnecessary to protect land and culture in American Samoa.**

Court decisions upholding American Samoa’s land and cultural preservation laws [have not ever](#) relied on the *Insular Cases*. Instead they have applied a traditional equal protection analysis to [recognize](#) “a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving

the Fa'a Samoa, or Samoan culture." The best argument to protect American Samoa's land and cultural preservation laws is that they already comply with the U.S. constitution.

Congress already has broad powers to create unique arrangements for people in the territories – separate and apart from the *Insular Cases*. The Supreme Court recently recognized that Congress can account for "the unique histories, economic conditions, social circumstances, independent policy views, and relative autonomy of the individual Territories" by using its Territory Clause powers, without any reference or reliance on the *Insular Cases*. This is how Congress enacts special tax rules, creates unique structures for legislative bodies, sets a different minimum wage, delegates authority over immigration to American Samoa, and much more. In short, the *Insular Cases* are simply unnecessary as a legal matter for allowing Congress to make special accommodations for American Samoa.

**Relying on the *Insular Cases* is unwise because the Supreme Court has ruled that they should not be expanded and that Equal Protection fully applies in U.S. territories.**

In 2020, the Supreme Court reasserted "that the *Insular Cases* should not be further extended" beyond their narrow legal and factual context, questioning "their continued validity." In 2022, the Supreme Court reaffirmed that Equal Protection fully applies even in so-called "unincorporated" territories like American Samoa. In that same case, Justice Gorsuch and Justice Sotomayor both criticized the "misguided framework of the *Insular Cases*." Gorsuch declared that "[t]he *Insular Cases* have no foundation in the Constitution and rest instead on racial stereotypes." Sotomayor recognized that they "were premised on beliefs both odious and wrong." The Supreme Court thus continues to narrow the *Insular Cases*, and may one day overrule them altogether. So continued reliance on the *Insular Cases* is just bad legal strategy.

**Relying on the *Insular Cases* is dangerous because it implies that laws protecting land and culture in American Samoa are constitutionally infirm to begin with.**

Arguing that laws protecting land and culture in American Samoa are only permissible because the U.S. Constitution does not fully apply under the *Insular Cases* creates a dangerous framing and assumption that these laws would be unconstitutional if subject to traditional constitutional analysis. The starting point for defending these laws should be that they can be justified under Congress's broad powers under the Territorial Clause and are consistent with Equal Protection based on the compelling purposes they serve, both domestically and under international law. Arguing these laws can only survive constitutional scrutiny if the courts say the constitution doesn't apply is a risky legal strategy.

**Defending the *Insular Cases* is counterproductive to advancing self-determination: they are part of the problem, not part of the solution.**

Legal scholars have made clear that the *Insular Cases* serve to "entrench federal power while prolonging the subordination of territorial inhabitants" while only "[c]reating the illusion of solicitude toward territorial self-determination." True self-determination for the people of American Samoa is to be able to decide for themselves what they want their relationship with the United States to look like – whether as a full and equal part of the United States or through independence or free association with the United States. Overruling the *Insular Cases* would not preference a particular status outcome or make statehood the only option - the choice would remain up to the people of Guam and Congress to

decide together. Ultimately, the *Insular Cases* serve as an obstacle to self-determination by giving Congress a pass on having to actually address these important questions.

**Overruling the *Insular Cases* would not trigger federal income taxes, revoke control of immigration, impose a federal minimum wage, or change the structure of local government.**

Under the Territory Clause, these issues would remain policy decisions to be made by Congress in consultation with American Samoa.

**The *Insular Cases* contribute to discrimination and criminal targeting of American Samoans.**

In September, more than 20 Alaska State Troopers raided an American Samoan community in Whittier, Alaska to investigate their “immigration status” and allegations of voter fraud. This came after Alaska indicted a woman born in American Samoa who voted after a local official told her she should check the “U.S. Citizen” box on her voter registration form since there was no box for “non-citizen U.S. national.” She is now facing up to five years in prison because the federal government does not recognize her as a U.S. citizen. American Samoans in other states could face similar charges, since there is broad confusion over whether so-called “non-citizen U.S. nationals” can vote in local elections.

The United States has consistently relied on the *Insular Cases* to argue that Congress has the power to deny U.S. citizenship to people born in American Samoa. In doing so, the Justice Department cited passages from Justice Brown, the author of *Plessy v. Ferguson*, expressing concern that the “children” of “savages” born in island territories would “immediately” be “entitled to all the rights, privileges and immunities of citizens.”

**Relying on the *Insular Cases*, the United States imposed “non-citizen national” status over American Samoans objections.**

When the United States flag rose over American Samoa in 1900, the American Samoan chiefs who signed the Deeds of Cession reasonably believed that they would be recognized as full U.S. citizens following the transfer of sovereignty to the United States. But after the Supreme Court decided the *Insular Cases*, the federal government decided that people born in island territories would not be recognized as U.S. citizens. When the U.S. Navy informed American Samoan leaders in the 1920s that the federal government labeled them “non-citizen U.S. nationals,” they pushed for decades to be recognized as full U.S. citizens. These efforts ultimately 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.”

**Denying American Samoans recognition as U.S. citizens based on the *Insular Cases* is contrary to the U.S. Constitution.**

The Constitution guarantees citizenship to “[a]ll persons born ... in the United States.” American Samoa has been under U.S. sovereignty for nearly 125 years, fully half the history of the United States itself. The text, history, and relevant Supreme Court precedent confirm American Samoans have a constitutional and human right to be recognized as U.S. citizens, although the issue remains unresolved by the courts. The *Insular Cases* never addressed, much less answered, the citizenship question.

## **Recognition of U.S. citizenship would not threaten American Samoan land or culture.**

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. [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*. 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.

### **About Right to Democracy**

[Right to Democracy](#) is a non-profit that works to advance democracy, equity, and self-determination for people in U.S. territories. It seeks to overcome historic obstacles to change by building a movement focused on uniting around common ground rather than highlighting divisions. RtD believes that people in U.S. territories should have power and agency over the decisions that impact their lives - there should be no colonies or second-class citizens in the United States. RtD does not take a position on political status and works with individuals and groups whose views span the spectrum from statehood to independence. Its approach and work is set forth in [Building a Movement: Democracy, Equity, and Self-Determination in U.S. Territories](#).

Right to Democracy is co-founded and co-led by Adi Martínez-Román and Neil Weare. Adi lives in Puerto Rico and has focused her career on empowering communities in Puerto Rico and its diaspora. Neil is from Guam, and has worked to build cross-territorial coalitions focused on influencing the courts, Congress, and the White House. RtD's Board and Advisory Board include residents of all five U.S. territories and their diaspora. Its Board includes Charles V. Ala'ilima from American Samoa. Its Advisory Board includes Andra Samoa from American Samoa.

### **Additional Resources**

- [Letter from Charles v. Ala'ilima to Chairman Grijalva and Ranking Member Westerman](#) (May 26, 2021)
- Ross Dardani, [Citizenship in Empire: The Legal History of U.S. Citizenship in American Samoa, 1899-1960](#), American Journal of Legal History (2020).
- [House Resources Hearing on H.Res. 279](#), a Resolution to Condemn the Insular Cases (May 12, 2021)
- Christina Ponsa-Kraus, [The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories](#), 131 Yale L.J. 2449 (2022)
- Cassandra Burke Robertson and Irina D. Manta, [Integral Citizenship](#), 100 Texas L. Rev. 325 (2022)
- Guy C. Charlton & Tim Fadgen, [Case Note: Fitisemanu v. United States: U.S. Citizenship in American Sāmoa and the Insular Cases](#), 39 UCLA Pacific Basin Law Journal 25 (2022)
- Adriel I. Cepeda Derieux & Neil C. Weare, [After Aurelius: What Future for the Insular Cases?](#), 130 YALE L.J. F. 284 (2020)