RESOLUTION

1 RESOLVED, That the American Bar Association supports an interpretation of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution that recognizes all persons born in the territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as natural-born citizens of the United States; and

6 FURTHER RESOLVED, That the American Bar Association urges the Judiciary to declare 8 U.S.C. § 1408(1) and any other statute or regulation that withholds recognition as natural-born citizens from any persons born in any of the territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as unconstitutional in violation of the Citizenship Clause.
REPORT

For nearly ten years, it has been the policy of the American Bar Association to oppose any laws or proposals that would infringe, in any way, on the right of birthright citizenship guaranteed by the Citizenship Clause of the Fourteenth Amendment of the United States Constitution. 1 The most high-profile and well-publicized measures to outright restrict birthright citizenship over the last decade have failed. 2 Nevertheless, the federal government has succeeded in “create[ing] a large class of stateless persons, children born and raised in the United States but without the rights or obligations of citizenship, and also without strong ties to any other nation.” 3

This class consists of Americans born in territories, possessions, and commonwealths of the United States, who the executive branch and Congress have determined are exempt from the Citizenship Clause and may only become citizens to the extent permitted by Congress. While Congress has, by statute, recognized the birthright citizenship of those born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, it has expressly withheld such recognition for American Samoa. Moreover, the federal government has taken the position that Congress may at any time repeal the birthright citizenship statutorily authorized for those born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

This resolution expands on prior ABA policy by supporting an interpretation of the Citizenship Clause which would recognize that all persons born in all territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as natural-born citizens of the United States. It further urges that the Judiciary declare 8 U.S.C. § 1408(1)—which expressly withholds citizenship from those born in American Samoa—and any other statutes or regulations that decline to recognize such persons as natural-born citizens as unconstitutional under the Citizenship Clause.

I. The Citizenship Clause

Citizenship has often been described as “the right to have rights,” since some of our most fundamental rights, including the right to vote, are restricted only to citizens. Dating back to the earliest days of the Republic, the United States determined citizenship pursuant to the common law doctrine of jus soli—“the right of the soil.” This rule is very straightforward: all persons born within the United States, and owing allegiance to the United States, are citizens of the United States. 4

1 See, e.g., 2011A303.
3 See 2011A303, Report, at 3.
4 See, e.g., Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804); Dawson’s Lessee v. Godfrey, 8 U.S. (4 Cranch) 321, 322–24 (1808); Inglis v. Sailor’s Snug Harbor, 28 U.S. (3 Pet.) 99, 164 (1830); see also Kilham v. Ward, 2 Mass. 236, 239 (1806); Lynch v. Clarke, 1 Sand. Ch. 583, 663 (N.Y. Ch. 1844); Leake v. Gilchrist, 13 N.C. (2 Dev.) 73, 76 (1829).
In the infamous *Dred Scott* decision, the Supreme Court of the United States departed from the well-established rule of *jus soli* and held that African Americans—even those who had been emancipated from slavery—were not citizens of the United States because they were “a subordinate and inferior class of beings who had been subjugated by the dominant race.” This radical and unprecedented race-based exception to *jus soli* was short-lived, for after the conclusion of the Civil War, this portion of the *Dred Scott* decision was reversed through adoption of the Fourteenth Amendment to the United States Constitution. The Citizenship Clause of the Fourteenth Amendment provides 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.

This language was meant to constitutionalize the *jus soli* doctrine, so as to preclude any branch of government from interfering with the principle that those born in and subject to the jurisdiction of the United States are citizens.

In the 152 years since its ratification, the Supreme Court of the United States has steadfastly held that the Citizenship Clause means what it says. Significantly, the United States Supreme Court has on several occasions expressly declined to exclude those born in United States territories from the birthright citizenship conferred on them by the Citizenship Clause. This interpretation is consistent with the legislative history, which reflects that the drafters intended for the Citizenship Clause to refer “to persons everywhere, whether in the States, or in the Territories or in the District of Columbia.” But despite this clear precedent, the federal government continues to refuse to recognize those born in United States territories as birthright citizens by virtue of the Citizenship Clause.

II. Birthright Citizenship in United States Territories

At the end of the 19th Century and the start of the 20th century, the United States became a colonial power. In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain at the conclusion of the Spanish-American War. The following year, the islands comprising the Samoan archipelago were partitioned between Germany and the United States, resulting in the transfer of sovereignty over the islands of Tutuila and Aunu’u to the United States on April 17, 1900, which thereafter would collectively be known as American Samoa. Shortly thereafter, in 1903, the United States acquired the

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5 *Scott v. Sandford*, 60 U.S. 393, 404-05 (1856).
6 The United States Supreme Court has held that the phrase “subject to the jurisdiction thereof” only precludes birthright citizenship for children of foreign diplomatic personnel, those born on foreign ships, and those born to a hostile foreign military that has occupied American territory. *Wong Kim Ark*, 169 U.S. at 693.
8 See *United States v. Wong Kim Ark*, 169 U.S. 649, 677 (1898) (“[A] man [may] be a citizen of the United States without being a citizen of a state... [I]t is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.”); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1872) (holding that the Citizenship Clause “puts at rest” any question whether persons “born... in the territories” are citizens.”).
9 CONG. GLOBE, 39TH CONG., 1ST SESS. 2890, 2894 (1866).
Panama Canal Zone from Panama through the Hay-Bunau-Varilla Treaty. And effective March 31, 1917, the United States purchased from Denmark the islands of St. Croix, St. John, and St. Thomas, as well as many surrounding minor islands, which collectively became the U.S. Virgin Islands.

Unlike other territories acquired by the United States in the late 18th and early-to-mid 19th Century, these new territories were both non-contiguous with the mainland United States, and had overwhelmingly non-white populations. Notwithstanding the multiple decisions of the Supreme Court of the United States expressly holding that those born in territories are natural-born citizens under the Citizenship Clause, as well as the past practice of collectively naturalizing inhabitants of a newly-annexed territory transferred from a foreign power, the federal government took the position that the Citizenship Clause did not apply to the members of the “alien races” born in these non-contiguous territories. Rather, according to the federal government, United States citizenship could only be granted to those born in these territories through an affirmative act of Congress.

Congress initially did not pass laws granting United States citizenship to those in the non-contiguous territories. With respect to Puerto Rico, Congress passed the Foraker Act of 1900, which provided that the inhabitants of Puerto Rico, as well as those subsequently born in Puerto Rico, were United States nationals—individuals entitled to the protection of the United States, but who were not United States citizens. However, Congress passed no laws at all on the subject of citizenship with respect to the inhabitants of and those subsequently born in American Samoa, the Canal Zone, Guam, the Philippines, and the U.S. Virgin Islands, as United States nationals. The United States Department of State, therefore, took the position that in the absence of an act of Congress, those individuals were also United States nationals, but not United States citizens unless they were entitled to citizenship pursuant to a different law, such as having parents who were United States citizens.

Several decades after first acquiring these territories, Congress, in response to changing social attitudes and other considerations, enacted several pieces of legislation pertaining to the territories that conferred many rights that had previously been withheld. With respect to citizenship, Congress extended a statutory form of birthright citizenship to the U.S. Virgin Islands, Puerto Rico, and Guam. And when the United States acquired the Commonwealth of the Northern Mariana Islands as a territory in 1976, Congress immediately conferred it with this same statutory form of birthright citizenship. However, Congress never enacted similar legislation for American Samoa.

10 See, e.g., Wong Kim Ark, 169 U.S. at 677; Slaughterhouse Cases, 83 U.S. at 72-73.
12 Public Law 56-191, Art. VII.
13 See 8 FAM §§ 302.3-2 (U.S. Virgin Islands); 302.5-2 (American Samoa); 302.7-3 (Canal Zone); 302.12-2 (Philippines); 304.4-2(A) (Guam).
17 See Public Law 94-241.
Instead, it provided through section 204(a) of the Nationality Act of 1940—subsequently codified at 8 U.S.C. § 1408(1)—which provided that persons born in American Samoa “shall be recognized as nationals, but not citizens, of the United States at birth.” As a result, the federal government has taken the position that those born in American Samoa are only eligible for birthright citizenship if born to parents who are already United States citizens.18

III. The Effect of Withholding Constitutional Citizenship

The effect of the federal government’s position that the Citizenship Clause does not apply to the territories is most visibly seen in American Samoa. Because American Samoa is part of the United States, those born in American Samoa are not citizens of any other foreign country. Therefore, a person born in American Samoa to parents who are not United States citizens are citizens of no country, and are for all intents and purposes stateless unless they undergo the naturalization process. However, American Samoans who pursue naturalization are largely treated as if they were foreign nationals and are even required to relocate from American Samoa to the mainland United States for a three-month period before being permitted to apply to naturalize. Moreover, American Samoans who undergo the naturalization process must submit to fingerprinting, a character investigation, and other intrusions. And as with foreign nationals, the ultimate citizenship determination is made on a case-by-case basis with no guarantee of success.

But the question of whether those born in United States territories are natural-born citizens by virtue of the Citizenship Clause has implications well beyond American Samoa. Although the millions of Americans born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are recognized as birthright citizens by statute, the federal government has taken the position that this birthright citizenship has been conferred solely by statute, and not by the Citizenship Clause of the Fourteenth Amendment.19 In other words, the federal government has drawn a distinction between “constitutional citizens,” those entitled to birthright citizenship as a matter of right in accordance with the Citizenship Clause, and “statutory citizens,” those who receive birthright citizenship not because it is mandated, but solely due to Congressional grace and discretion.

The distinction between a “constitutional citizen” and a “statutory citizen” is not merely academic. The Supreme Court of the United States has held that Congress has the power to revoke the citizenship of individuals who become citizens at birth pursuant to a statute rather than the Citizenship Clause of the Fourteenth Amendment. Rogers v. Bellei, 401 U.S. 815 (1971). Significantly, the federal government has interpreted Bellei as authority for the proposition that “the Fourteenth Amendment would not restrain Congress’ discretion in legislating about the citizenship status of Puerto Rico.”20 While

18 See, e.g., Defendant United States’ motion to dismiss, filed in Fitisemanu v. United States, No. 1:18-cv-00036-CW (D. Utah).
19 See, e.g., Matter of S---, 3 I & N Dec. 589, 593 (BIA Apr. 26, 1949) (“The principle of jus soli . . . does not obtain in the outlying possessions of the United States . . . presumably because the Constitution does not extend to outlying possessions.”).
one may think it unlikely that Congress would choose to exercise such authority, legislation that would have the effect of revoking United States citizenship given to Puerto Ricans has been introduced on at least one occasion. See H.R. 856, 105th Cong. (1997).

In addition, those born in United States territories may have their eligibility for certain rights questioned or withheld from them if they are not considered natural-born citizens by virtue of the United States Constitution but instead are viewed as mere “statutory citizens.” One recent example is former Senator John McCain, who had his eligibility to serve as President of the United States questioned during the 2008 presidential campaign because he had been born in the Panama Canal Zone, which at the time had been a territory of the United States.21 While the matter was never conclusively resolved as a result of Senator McCain losing the election, proponents of the “McCain birther” movement often cited provisions of the State Department Foreign Affairs Manual that—like similar provisions pertaining to American Samoa—took the position that those born in the Panama Canal Zone were not entitled to birthright citizenship.22 Similar concerns about eligibility continue to be raised against other presidential candidates born in United States territories.23

IV. Contemporary Legal Justifications

The federal government justifies its position that those born in United States territories are not natural-born citizens under the Citizenship Clause birthright citizenship on the Insular Cases, a series of decisions rendered more than a century ago which denied certain constitutional rights to residents of America’s insular territories—who were described as “alien races,” “savage,” “half-civilized,” and “ignorant or lawless”—based on conceptions of racial inferiority.24 While the reasoning of the Insular Cases has been emphatically repudiated by all corners of the legal community (the Insular Cases have been described as having “nary a friend in the world”)25 the result has not been formally overturned by the United States Supreme Court. Nevertheless, the Court has cautioned that “[n]either the [Insular Cases] nor their reasoning should be given any further

22 8 FAM § 302.7.
23 For example, Rep. Tulsi Gabbard, a candidate for the Democratic Party’s nomination in the 2020 presidential campaign, has been accused of not being a natural-born citizen due to being born in American Samoa, even though she qualified for statutory birthright citizenship due to her mother being a United States citizen. See Michelle Broder Van Dyke, Tulsi Gabbard Was Born in American Samoa. Her Presidential Run Could Raise Eligibility Questions, Buzzfeed News (Jan. 11, 2019), https://www.buzzfeednews.com/article/mvbdt/tulsi-gabbard-president-2020-born-american-samoa.
expansion.”

The position taken by the federal government constitutes an unwarranted expansion of the *Insular Cases*. The Citizenship Clause is a structural provision of the United States Constitution, much like the provisions setting forth how a bill becomes a law, or how the President of the United States is elected. The question of who is a citizen of the United States is not to each individual state or territory to decide. It is unquestionably a federal question that is within the exclusive purview of Congress, which cannot exercise those powers contrary to the Citizenship Clause. Neither the *Insular Cases*, the Territorial Clause, nor any other provision of the United States Constitution permits Congress to enact a law of the United States that violates the very structure of the Constitution itself.

Nevertheless, courts are split on this issue. In 2015, the United States Court of Appeals for the District of Columbia Circuit, in *Tuaua v. United States*, agreed with the federal government that the Citizenship Clause did not apply to American Samoa. In reaching this decision, the panel of the D.C. Circuit acknowledged that the United States Supreme Court had previously expressly held that the Citizenship Clause applies to United States territories. However, the panel reasoned that the territories at issue in those prior Supreme Court cases were not “outlying territories,” and applied the *Insular Cases*—notwithstanding the Supreme Court’s instruction that those cases should not be given any further expansion—to conclude that birthright citizenship is not a “fundamental right.”

More recently, on December 12, 2019, in *Fitisemanu v. United States*, the United States District Court for the District of Utah reached the opposite conclusion of the *Tuaua* litigation.

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26 Reid v. Covert, 354 U.S. 1, 14 (1957).
27 788 F.3d 300 (D.C. Cir. 2015).
28 It is interesting to note that the executive branch of the government of American Samoa intervened in the *Tuaua* litigation on the side of the federal government. The gravamen of its argument, however, was that application of the Citizenship Clause of the Fourteenth Amendment to American Samoa could theoretically result in other portions of the Fourteenth Amendment being extended to American Samoa, which the administration believed could be used to declare as unconstitutional other laws and practices unique to American Samoa, such as its “system of communal land ownership” and its *matai* system, where family chiefs “have authority over which family members work what family land and where the nuclear families within the extended family will live.” *Tuaua*, 788 F.3d at 378. However, it is well-established in our system of government that states and territories cannot nullify otherwise-applicable parts of the United States Constitution. This principle was most recently illustrated in *Puerto Rico v. Sanchez-Valle*, 136 S. Ct. 1863 (2015), in which the United States Supreme Court held that the Double Jeopardy Clause of the United States Constitution applies to Puerto Rico notwithstanding the opposition of Puerto Rico’s government. Moreover, as explained above, the issue of whether the Citizenship Clause extends to United States territories is an issue that affects all territories, not just American Samoa, in that the federal government has asserted that Congress has the power to alter the citizenship status of those born in Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands at any time. Consequently, current and former government officials from the other territories filed *amicus curiae* briefs in support of the plaintiffs in the *Tuaua* litigation.
29 Wong Kim Ark, 169 U.S. at 677; *Slaughterhouse Cases*, 83 U.S. at 72-73.
30 Reid, 354 U.S. at 14.
31 *Tuaua*, 788 F.3d at 307-08.
panel, rejected the federal government’s reliance on the *Insular Cases*, and declared 8 U.S.C. § 1408(1) unconstitutional under the Citizenship Clause. The *Fitisemanu* court concluded that the Supreme Court of the United States had already conclusively held that those born in United States territories are natural-born citizens, and that nothing in the Insular Cases purported to overturn those precedents. However, that decision has not brought finality to the issue, as the decision is being appealed to the United States Court of Appeals for the Tenth Circuit, and may be further appealed to the Supreme Court of the United States.

V. The Need for Action

It is the mission of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, and to work for just laws, including human rights. As the voice of the legal profession in the United States, the ABA is uniquely situated to advocate for all branches of the United States government to honor the letter and intent of the Citizenship Clause.

The ABA has previously expressed its support for the principle of birthright citizen at the 2011 Annual Meeting, when it passed Resolution No. 303. In that resolution, the ABA opposed any proposals that would seek to alter the right to United States citizenship under the Citizenship Clause of the Fourteenth Amendment.

This resolution builds on the foundation established by Resolution No. 303. It supports an interpretation of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution that recognizes all persons born in the territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as natural-born citizens of the United States, and urges the Judiciary to recognize 8 U.S.C. § 1408(1) as unconstitutional in violation of the Citizenship Clause. If adopted as ABA policy, this will authorize the ABA to lobby the relevant entities, including submission of an *amicus curiae* brief in *Fitisemanu* or another appropriate case.

VI. Conclusion

Language, history, United States Supreme Court precedent, and longstanding nationwide practice regarding the Citizenship Clause of the Fourteenth Amendment all support the recognition of United States citizenship for all persons born in the United States, including its territories, possessions, and commonwealths, except those born to foreign diplomatic personnel or otherwise expressly excluded by the Citizenship Clause. The current practice of denying constitutional birthright citizenship to those born in United States territories, and denying birthright citizenship outright to those born in American Samoa, is not only unjust and violative of basic human rights, but undermines the Citizenship Clause itself, and if sustained may encourage further efforts to restrict birthright citizenship to others born in the United States. This resolution highlights the ABA’s strong support for those born in United States territories, including those in American Samoa who have had citizenship denied, and its continued unwavering commitment to and support for the nation’s post-Civil War amendments, and opposition

33 See 2008A121.
to any practice or procedure that undermines those guarantees.

Respectfully submitted,

Nesha R. Christian-Hendrickson, Esq.
President, Virgin Islands Bar Association
February 2020
GENERAL INFORMATION FORM

1. **Summary of Resolution**

This resolution supports an interpretation of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution that recognizes all persons born in the territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as natural-born citizens of the United States; and further urges the Judiciary to declare 8 U.S.C. § 1408(1) as unconstitutional in violation of the Citizenship Clause.

2. **Approval by Submitting Body**

Approved by the Virgin Islands Bar Association Board of Governors on January 25, 2020.

3. **Has this or a similar Resolution been submitted to the House or Board previously?**

No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**

The ABA at its Annual 2011 Annual Meeting:

1. urged Congress to reject any resolution proposing an amendment to the United States Constitution that would alter, in any way, the grant of United States citizenship under the Fourteenth Amendment to any persons born in the United States (including territories, possessions, and commonwealths);
2. further urged Congress and all state territorial and local legislative bodies to reject any proposal that seeks to alter the right to United States citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution through the enactment of legislation or adoption of an interstate compact; and
3. further urged Congress, all state, territorial and local legislative bodies and governmental entities to reject any proposal that seeks to impose limits, based upon the citizenship or immigration status of one or both parents at the time of the person’s birth, on the right of any person born in the United States (including its territories, possessions, and commonwealths) to claim or prove United States citizenship under the Citizenship Clause of the Fourteenth Amendment to the United States Constitution.

See 2011A303.
5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.


N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

Transmittal of resolution to the President, the Secretary of State, and other relevant stakeholders, and authorization of the filing of an amicus curiae brief in an appropriate case.

8. Cost to the Association (both indirect and direct costs).

None.


None.

10. Referrals

ABA Coalition on Racial and Ethnic Justice
ABA Commission on Hispanic Legal Rights & Responsibilities
ABA Section on Civil Rights & Social Justice
ABA Section on International Law
ABA Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Anthony M. Ciolli
Past President, Virgin Islands Bar
PO Box 590
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340-774-2237
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12. Contact Name and Address Information. (Who will present the Resolution with Report to the House?)
EXECUTIVE SUMMARY

1. Summary of Resolution.

This resolution supports an interpretation of the Citizenship Clause of the Fourteenth Amendment to the United States Constitution that recognizes all persons born in the territories, possessions, and commonwealths of the United States, and who are subject to the jurisdiction of the United States, as natural-born citizens of the United States; and further urges the Judiciary to declare 8 U.S.C. § 1408(1) as unconstitutional in violation of the Citizenship Clause.

2. Summary of the Issue which the Resolution addresses.

This resolution responds to the policy of the federal government to deny constitutional birthright citizenship to those born in United States territories.

3. An explanation of how the proposed policy position will address the issue.

To accomplish these objectives, the resolution encourages the American Bar Association to lobby Congress and the Executive Branch to recognize the birthright citizenship of those born in all United States territories by virtue of the Citizenship Clause of the United States Constitution, and to authorize the filing of an amicus curiae brief in an appropriate case that addresses this issue.

4. A summary of any minority views or opposition internal and/or external to the ABA which have been identified.

No minority or opposing views have been identified.