Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

JOHN FITISEMANU, *et al*, Plaintiffs, v. UNITED STATES OF AMERICA, *et. al.*, Defendants.	**MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANTS' MOTION TO DISMISS; AND DENYING INTERVENORS' MOTION TO DISMISS** Case No. 1:18-cv-36 Judge Clark Waddoups

Before the court are three motions—Plaintiffs' Motion for Summary Judgment, (ECF No. 30), Defendant United States of America's (the Government) Motion to Dismiss, (ECF No. 66), and Intervenors American Samoa Government and the Honorable Aumua Amata's (the Intervenors) Motion to Dismiss, (ECF No. 89). As explained below, the court GRANTS Plaintiff's Motion for Summary Judgment and DENIES the Government's and the Intervenors' Motions.

Introduction

Plaintiffs are three individuals born in American Samoa and a nonprofit corporation based in St. George, Utah. The three individual plaintiffs are John Fitisemanu, Pale Tuli, and Rosavita Tuli. The nonprofit corporation is the Southern Utah Pacific Island Coalition.

Unlike those born in the United States' other current territorial possessions, who are statutorily deemed American citizens at birth, 8 U.S.C. § 1408(1) designates the individual plaintiffs as non-citizen nationals. Plaintiffs argue that their designation as nationals, and not

citizens, violates the Fourteenth Amendment. Their position is that because American Samoa is "in the United States," and "subject to the jurisdiction thereof," they are entitled to birthright citizenship under Section 1 of the Fourteenth Amendment.

As explained below, resolution of this case requires the court to choose between two Supreme Court cases and their respective lines of precedent—*Wong Kim Ark* and *Downes v. Bidwell*.

The first Supreme Court case is *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). In *Wong Kim Ark*, the Supreme Court held that a man of Chinese descent, who was born in the state of California to parents who were never employed in any diplomatic capacity by the Chinese government, and who had never renounced his allegiance to the United States, became a citizen at the time of his birth in the United States—by virtue of the Citizenship Clause of the Fourteenth Amendment. In reaching this conclusion, the Supreme Court discussed at length the importance of the English common law rule of citizenship by birth in determining the meaning of the Citizenship Clause. The Court traced the United States' reliance on the common law rule from its origins in *Calvin's Case*.

Calvin's Case, decided in 1608, established a two part rule for acquisition of subject status at birth—(1) birth within the King's dominion and (2) allegiance to the King. The Supreme Court in *Wong Kim Ark* ultimately concluded that "[t]he fourteenth amendment affirms [this] ancient and fundamental rule of citizenship . . . ." *Wong Kim Ark*, 169 U.S. at 693. Plaintiffs argue that *Wong Kim Ark* requires this court to hold that because American Samoa is within the territory of the United States, it is "in the United States" under Section 1 of the Fourteenth Amendment.

The second Supreme Court case, and its line of precedent, which may also provide this court with an answer to the question presented, is *Downes v. Bidwell*, 182 U.S. 244 (1901). The line of cases following *Downes* are known as the *Insular Cases*.

Downes did not concern the Fourteenth Amendment. The question in *Downes* was whether—for purposes of the Tax Uniformity Clause of Article I, Section 8 of the Constitution—Puerto Rico is part of the United States. A splintered majority of the Court ultimately held that Puerto Rico is not part of the United States within the meaning of that provision of the Constitution.

Apart from its holding, *Downes* is relevant here because it represents the origin of the doctrine of "territorial incorporation," "under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (citation omitted). The Government argues that "the Citizenship Clause confers citizenship on those born 'in the United States,'" and argues that the Supreme Court's "decision in *Downes* confirms that the language 'in the United States' excludes unincorporated territories"—like American Samoa. (*See* ECF No. 66 at 22.)

As explained below, this court holds that *Downes*, and the *Insular Cases* more generally, do not control the outcome of this case. *Wong Kim Ark* is binding on this court, however.

The Supreme Court in *Wong Kim Ark* held that the Fourteenth Amendment follows the "established" and "ancient rule of citizenship"—birth within the dominion and allegiance of the sovereign. Because the Supreme Court adopted this rule, and because it has never abrogated it, vertical stare decisis requires this court to apply the rule in this case. As explained below,

application of this rule requires the court to hold that American Samoa is "in the United States" for purposes of the Fourteenth Amendment.

Procedural Background and Relief Sought

Plaintiffs filed their Motion for Summary Judgment on March 30, 2018. (ECF No. 30.) They seek summary judgment on all five claims for relief asserted in their Complaint. (ECF No. 30 at 17.)

First, they seek "[a] declaratory judgment that persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment, and that 8 U.S.C. § 1408(1) is unconstitutional both on its face and as applied to Plaintiffs." (ECF No. 30 at 17.)

Second, they seek "[a]n order enjoining Defendants from enforcing 8 U.S.C. § 1408(1), including enjoining Defendants from imprinting Endorsement Code 09[1] in Plaintiffs' passports and requiring that Defendants issue new passports to Plaintiffs that do not disclaim their U.S. citizenship." (ECF No. 30 at 17–18.)

Third, they seek a "declaratory judgment that the State Department's policy that 'the citizenship provisions of the Constitution do not apply to persons born [in American Samoa],' as reflected in 7 F.A.M. § 1125.1(b) and (d) violates the Fourteenth Amendment . . . ." (ECF No. 30 at 18.)

Fourth, they seek "[a]n order enjoining Defendants from enforcing 7 F.A.M. § 1125.1(b) and (d)." (ECF No. 30 at 18.)

[1] Endorsement Code 09 is a disclaimer that announces that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

Fifth, they seek "[a]n order declaring that Defendants' practice and policy of enforcing 8 U.S.C. § 1408(1) and 7 F.A.M. § 1125.1(b) and (d) through imprinting Endorsement Code 09 in the passports of persons born in American Samoa is contrary to constitutional right and is not in accordance with law . . . ." (ECF No. 30 at 18.)

On June 8, 2018, the Government filed its Motion to Dismiss, arguing that "this action should be dismissed in its entirety for failure to state a claim upon which relief can be granted." (ECF No. 66.)

On that same day, Intervenors filed their Motion to Intervene. (ECF No. 61.) On September 6, 2018, the court held oral argument on the Motion to Intervene. (ECF No. 86). On September 13, 2018, the court entered an order denying intervention of right, but granting permissive intervention. (ECF No. 92.)

In their Motion to Dismiss, Intervenors concurred with the Government's Motion to Dismiss. (ECF No. 89 at 2 n. 1.) They also argued that the court should dismiss the Plaintiff's complaint for two additional reasons. (ECF No. 89 at 7.) First, they argued that it would be impractical and anomalous for the court to impose citizenship "upon American Samoa against its will." (ECF No. 89 at 7.) They also argued that "whether birthright citizenship should extend to the people of American Samoa is a question for the people of America Samoa and its elected representatives, and not for this Court to decide." (ECF No. 89 at 7.)

The court heard argument on the parties' motions on November 14, 2018. (ECF No. 100.)

Undisputed Facts

1. The United States exercises exclusive sovereignty over the U.S. territory of American Samoa.[2]

[2] Intervenors argue that American Samoa's tribal leaders, the *matai*, "voluntarily ceded sovereignty to the United States government . . . ." (ECF No. 89 at 12.) They further argue that "[w]hile the people of American Samoa

2. The U.S. Department of State is an executive department of the United States.
3. The State Department, through its Bureau of Consular Affairs, is responsible for the issuance of United States passports.
4. Mike Pompeo is the current Secretary of State.
5. The Secretary of State or his designee is directly responsible for the execution and administration of the statutes and regulations governing the issuance of U.S. passports.
6. Carl C. Risch is the Assistant Secretary of State for Consular Affairs.
7. Assistant Secretary Risch is responsible for the State Department's Bureau of Consular Affairs and the creation of policies and procedures relating to the issuance of passports. In that capacity, he is Secretary Pompeo's designee as to the execution and administration of the statutes and regulations governing the issuance of U.S. passports.
8. It is the State Department's policy that the Fourteenth Amendment's Citizenship Clause does not apply to persons born in American Samoa. Most individuals born in American Samoa are designated as non-citizen nationals.
9. Generally, U.S. non-citizen nationals are entitled to U.S. passports.
10. Nationals of the United States who are not citizens are entitled only to U.S. passports with appropriate endorsements.
11. Passports issued by the State Department to those born in American Samoa of non-citizen parents contain Endorsement Code 09.
12. The endorsement states "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

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undisputedly owe allegiance to the United States, it is a predominantly self-governing territory." (ECF No. 89 at 12.) The court finds that there is no genuine dispute that American Samoa's tribal leaders ceded the sovereignty of their islands to the United States, and that the United States exercises exclusive sovereignty over the U.S. territory of American Samoa.

13. A U.S. passport is the only federal document for which a member of the general public may apply in order to obtain official federal recognition of U.S. citizenship by virtue of birth in the United States.
14. Plaintiff John Fitisemanu was born in American Samoa in 1965. The Government does not recognize Mr. Fitisemanu as a citizen of the United States. The Government has issued a U.S. passport to Mr. Fitisemanu that is imprinted with Endorsement Code 09.
15. Plaintiff Pale Tuli was born in American Samoa in 1993. The Government does not recognize Mr. Tuli as a citizen of the United States.
16. Plaintiff Rosavita Tuli was born in American Samoa in 1985. The Government does not recognize Ms. Tuli as a citizen of the United States. The Government has issued a U.S. passport to Ms. Tuli that is imprinted with Endorsement Code 09.
17. The individual plaintiffs are members of Plaintiff Southern Utah Pacific Island Coalition.
18. Plaintiffs owe permanent allegiance to the United States.
19. Plaintiffs are residents of Utah.
20. Plaintiffs, as non-citizen nationals, are currently denied the right to vote, the right to run for elective federal of state office, and the right to serve on federal and state juries.

Standard of Review

Summary judgment is proper when the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court must "view the evidence and draw reasonable inferences therefrom in a light most favorable to the nonmoving party." *Commercial Union Ins. Co. v. Sea Harvest Seafood Co.*, 251 F.3d 1294, 1298 (10th Cir. 2001).

Historical Background

Before addressing the arguments presented in this case, it is necessary to examine the historical evidence about the common-law underpinnings of the Citizenship Clause of the Fourteenth Amendment.[3] The fundamental principle of the common law with regard to English nationality was birth within the allegiance. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898). This fundamental principle was clearly stated in the leading case known as *Calvin's Case*, decided in 1608. *Id*. at 655–56.

Calvin's Case—1608

"With the end of the Tudor dynasty following the death of Elizabeth in 1603, James VI of Scotland inherited the throne of England as James I, thereby uniting the two kingdoms . . . ." Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 80 (1997). "The most pressing question of political debate soon became the legal status of James's Scottish subjects in England. According to English law, were Scots aliens or were they subjects, capable of possessing and asserting at least some of the rights of English subjects, including holding land and suing in English courts?" *Id*. at 81.

That question was answered "[i]n June 1608" when "fourteen justices," *id*. at 82, "four lawyers," "and the lord chancellor participated in *Calvin's Case*." James H. Kettner, *The Development of American Citizenship, 1608-1870*, at 17 (1978). "Formally, the litigation involved a dispute over land titles." *Id*. at 16. "Two suits were introduced in the name of Robert

[3] In determining the relevant historical background, the court relies extensively on James Kettner's *The Development of American Citizenship*, 1608-*1870* (1978). Kettner "remains the leading authority on the history of [American] citizenship before the Civil War . . . ." Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 Pepp. L. Rev. 13, 22 (2011). Because the historical background is established from recognized historical sources and not in dispute, the court quotes extensively from those sources. To preserve accuracy the court largely quotes rather than paraphrases the source material.

Calvin, an infant born in Scotland in 1606 after the accession [of King James], (a *postnatus*)." *Id*. Persons born in Scotland after the accession of King James were referred to as the "postnati." *See* Price, 9 Yale J.L. & Human. at 82. The question presented was whether Calvin—as a *postnatus* born in Scotland—was a subject of England or an alien. "All but two of the justices determined that" the postnati "were to be regarded not as aliens in England but as natural-born subjects, qualified to inherit English land." *Id*.

Although fourteen justices participated in the case, the "opinion of Lord Coke, chief justice of Common Pleas, emerged as the definitive statement of the law." Kettner at 17. "Coke's attention focused on the status of the natural-born subject—the individual who was born into the community of Englishmen." *Id*. "Broadly defined, this allegiance was the 'true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born, he oweth by birth-right ligeance and obedience to his sovereign.'" *Id*. at 17–18 (quoting Calvin's Case, 4b.) Ultimately, "*Calvin's Case* established a territorial rule for acquisition of subject status at birth:"

> Every one born within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.

Price, 9 Yale J.L. & Human. at 83 (quoting Herbert Broom, *Constitutional Law Viewed in Relation to Common Law* 31 (London, W. Maxwell & Son, 2d ed. 1885)).

Calvin's Case "would exert a strong influence over the development of attitudes and doctrines concerning the constitutional character of the new imperial community in the eighteenth century." Kettner at 28. "Americans in particular would seize upon elements of *Calvin's Case* to explain and legitimize their special relationship with [England]." *Id*. *Calvin's Case's* "maxims and definitions would survive as guiding imperatives, serving as the source and

inspiration for the ideas of future generations." *Id*.

Pre-Revolution Colonial Period

"Englishmen who left their native country to settle on the far shores of the Atlantic remained subjects of the king." Kettner at 65. "The same common law principles that made subjects of the Scottish *postnati* applied equally well to persons in America." *Id*. "English emigrants lost neither their allegiance nor their status when they left their mother country, and all children born under the king's protection were nautral-born subjects in all the dominions." *Id*; *see also Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. 99, 120–21, 7 L. Ed. 617 (1830) ("It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects, and it must necessarily follow, that that character was changed by the separation of the colonies from the parent state, and the acknowledgement of their independence."). Indeed, that "same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established." *Wong Kim Ark*, 169 U.S. at 658.

The Declaration of Independence

"Americans repudiated the authority of Great Britain not as individuals, but as organized societies." Kettner at 175. "They withdrew their allegiance from George III and severed the connection with England in formal, public, and communal acts passed by representative bodies purporting to speak for a united people." *Id*.

On July 4, 1776, the Continental Congress voted to adopt the Declaration of Independence. The Declaration stated, in part, that "the Representatives of the United States of

America . . . in the Name, and by the Authority of the good People of these Colonies," declared those colonies "Absolved from all Allegiance to the British Crown . . . ." The Declaration of Independence para. 32 (U.S. 1776). It also famously provided that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." *Id*. para. 2.

After the American Revolution, a "perplexing" "question" remained. *See* Kettner at 209. Did the Revolution create "one community of allegiance or many?" *Id*. During the Revolution "[i]t was enough to decide that one was a subject or a citizen." *Id*. "To consider whether ['citizen'] meant membership in a state or in a nation of states seemed unnecessary" at the time. *See id*. "The question would become a critical one in the years after the Revolution." *Id*. "It would appear in many different contexts and in many different guises," including "the status of inhabitants of the American territories, in conflicts between nationalists and advocates of states' rights, and ultimately in the soul-searing crisis of slavery." *Id*.

Confederation Period

America's first constitution, the Articles of Confederation, was ratified in 1781. At that time, the nation was a loose confederation of states, each operating like independent countries. On September 3, 1783, Great Britain formally recognized the independence of the United States in the Treaty of Paris. Soon after America won its independence, it became increasingly evident that the young republic needed a stronger central government to remain stable. In 1786, Alexander Hamilton called for a constitutional convention to discuss the matter. The Confederation Congress, which in February 1787 endorsed the idea, invited all 13 states to send delegates to a meeting in Philadelphia. The Constitutional Convention took place from May 25 to September 17, 1787.

"The framers of the Constitution failed to grapple with the relationship of state and national citizenship, but they did concern themselves with problems involving citizenship status that had become apparent since independence." Kettner at 224. The framers had "debates over the citizenship qualifications for office . . . ." *See id*. at 224–30. "The delegates assumed that citizenship was a prerequisite for high political office and closely contested the length of time that one had to be a citizen, but at no time did they discuss the relationship between state and national citizenship." *Id*. at 230.

The United States Constitution (1789)

The United States Constitution was signed on September 17, 1787, by delegates to the Constitutional Convention. On June 21, 1788, New Hampshire became the ninth and last necessary state to ratify the Constitution. It came into effect on March 4, 1789, by agreement of the Confederation Congress.

The term "citizen" is used in the Constitution. For example, Article IV of the Constitution provided that "[t]he Citizens of each State stall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. Article III gave the federal judiciary jurisdiction in disputes "between a State and Citizens of another State;–between Citizens of different States; –between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. Article I of the Constitution imposed a citizenship requirement for House of Representative Members. U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . ."). And it imposed a citizenship requirement for all senators. U.S. Const. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained

to the Age of thirty Years, and been nine Years a Citizen of the United States . . . ."). Article II of the Constitution imposed a citizenship requirement for the presidency. U.S. Const. art. II, § 1, cl. 4 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . .").

But the Constitution did not define "citizen." *See* William Rawle, *A View of the Constitution of the United States of America* 85 (2d ed. 1829) ("It cannot escape notice, that no definition of the nature and rights of citizens appears in the Constitution."). Indeed, "the Constitution in its final form left critical questions relating to citizenship unanswered." Kettner at 231. "There was an implicit assumption that birth within the United States conferred citizenship—the president was to be a 'natural born citizen' resident in the United States—but did this encompass all persons born within the states and territories of the new nation, or could the states or federal governments distinguish among natives, accepting some as birthright citizens while rejecting others?" *Id*. Questions regarding "the exact relations among the states and between the states and the nation as a whole would remain problematical until the ultimate question of the nature of individual citizenship was confronted directly." *Id*. at 232. "The framers dealt with the question tangentially, and, in consequence, the constitutional provisions involving citizenship contained profound ambiguities that would become apparent only long after the new government went into operation." *Id*.

Early 19th Century

"Judicial rulings on the meaning of the privileges and immunities and of the diversity jurisdiction clauses helped clarify the peculiarly dualistic character of American citizenship." Kettner at 264. "However, they by no means fully determined the political questions that might arise from the definition of that status." *Id*. "Considerable ambiguity thus remained at the heart

of [the] notion of dual citizenship." *Id*. "Perhaps the most crucial unresolved question was whether the individual citizen owed his primary loyalty to his state or to the United States as a whole, and this determination involved the issue of whether the state citizenship flowed from national citizenship or vice versa." *Id* at 264–65.

Dred Scott (1857)

The Supreme Court issued its notorious *Dred Scott* decision on March 6, 1857. "The opinion of the Court by Chief Justice Taney took the occasion to rule that free blacks could never become citizens of the United States, that Congress lacked the power to limit slavery in the territories, and that federal legislation limiting slavery anywhere would violate the Due Process Clause." Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 Pepp. L. Rev. 13, 14 (2011); *see also* Kettner at 326 ("Taney's majority opinion denied that Scott or any other black man could be a citizen of the United States within the meaning of the Constitution.").

"A key issue in Dred Scott—or at least an issue that Taney chose to confront—is the relationship between state and federal citizenship." Farber, 39 Pepp. L. Rev. at 22. "The predominant Southern theory—although not the theory that Southerners found convenient in the context of Dred Scott—was that citizenship stemmed from the states." *Id*. at 23. This result would have been "unpalatable" for Southerners because "the status of blacks as citizens in Northern states" meant that they "would have been entitled to recognition [as citizens] in Southern states." *Id*. at 24. Justice Taney sought to avoid this conclusion.

According to Taney, "'every person and every class and description of persons who were at the time of the Constitution recognized as citizens in the several states,' became national citizens with the creation of the Union; but those locally admitted after 1789 enjoyed no national status." Kettner at 326 (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 406, 15 L. Ed. 691 (1857)).

In other words, according to Taney, those who were citizens of a state prior to the constitution coming into effect in 1789 became national citizens after that date. But for Taney, free blacks were not state citizens before the ratification of the Constitution, so, according to him, they were not entitled to any national status as citizens thereafter.[4] *See* Kettner at 326–27; *see also Dred Scott*, 60 U.S. at 423 ("these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizen in other States."). According to Taney, "[a]s purely local citizens, blacks might have rights at the discretion of the individual state; but once they removed beyond that state's jurisdiction their condition depended absolutely on their new place of residence." Kettner at 327.

In short, *Dred Scott* "held that there was a racial exception to the normal rule of birthright U.S. citizenship," Farber, 39 Pepp. L. Rev. at 24, an exception that was entirely inconsistent with the rule reported by Coke in *Calvin's Case*.

Civil War (1861–1865)

The American Civil War was fought from 1861–1865. "The outbreak of war removed

[4] "Taney's conclusion that blacks could not enjoy the privileges and immunities of citizenship under the Constitution rested upon two premises." *Id*. at 327–28. "First, one had to accept the separation of state and national citizenship not only in theory but in fact." *Id*. at 328; *see also Dred Scott*, 60 U.S. at 405 ("we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States.").) "For Taney, the guarantees made to the 'citizens of each State' in Article IV, section 2, protected only those members of the national community, and the clause must therefore be interpreted to read 'the United citizens of each State.'" *Id*. Second "this national citizenship could not be held to derive automatically from birth 'within the dominion and jurisdiction' of the national government." *Id*. "Rather, those citizens who created the Union in 1789 formed a closed community in which membership was restricted to the descendants of the founders and to aliens co-opted by the process of naturalization." *Id*. As noted below, Taney's conclusion was thoroughly rejected with the adoption of the Fourteenth Amendment.

obstacles that had long prevented Americans from achieving a consistent concept of citizenship." Kettner at 334. In many ways, "the Civil War was a struggle over the nature of the community created in 1789—a bloody contest over allegiance." *Id*. at 340. "The lines were . . . drawn between those who stressed the primacy of the state communities of allegiance and those who insisted that the Union had created one nation and one people." *Id*. "Years of evasion and compromise in Congress and the courts had delayed the confrontation between these two points of view." *Id*. "But now the time of decision was at hand, and open conflict would determine which side would prevail." *Id*.

"In the moment of triumph," "the North sought to impose its own ideas of citizenship and community upon the nation." *Id*. As discussed below, a "succession of laws and constitutional amendments was passed over the objections of the recalcitrant President Johnson and forced upon the southern states as a condition of their readmission to the privileges forfeited by their disloyalty." *Id*. at 340–41.

The Civil Rights Act, the Thirteenth Amendment, and the Fourteenth Amendment

"On December 18, 1865, the Secretary of State certified that the Thirteenth Amendment had been ratified and become part of the Constitution." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 713–14, (1989) (plurality opinion). The Thirteenth Amendment abolished slavery and involuntary servitude. Section 1 of the Thirteenth Amendment provided: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

"Less than three weeks" after the Thirteenth Amendment was ratified, "Senator Lyman Trumbull," of Illinois, "Chairman of the Senate Judiciary Committee, introduced S. 61, which

was to become the Civil Rights Act of 1866." *Jett*, 491 U.S. at 713–14 (citing Cong. Globe, 39th Cong., 1st Sess., 129 (1866)). "In March 1866 Congress passed and sent to . . . [P]resident [Johnson] the Civil Rights Act, based explicitly upon the principle that citizenship derived from birth within the allegiance and entitled persons enjoying the status to basic rights throughout the nation." Kettner at 341. "Johnson vetoed the act." *Id*. at 342. "He . . . pointed out that the proposed rights to be guaranteed by the national government had traditionally fallen within the jurisdiction of the states—a claim that many supporters of the bill would have denied . . . ." *Id*. "But Congress was in no mood for arguments tinged with the stain of antebellum states' rights doctrine." *Id*. "The Senate and the House overrode the president's veto, and on April 9, 1866, the Civil Rights Act became law." *Id*.

"The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). "As such, it constituted an initial blueprint of the Fourteenth Amendment . . . ." *Id*. The Act "declared," in part, that "all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color," "shall have the same right, in every State and Territory in the United States, . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." Ch. 31, § 1, (1866).

But "[w]hat one Congress enacted another could repeal, and the surest guarantee that the view of citizenship embodied in the Civil Rights Act would survive lay not in statutes but in constitutional amendment." Kettner at 342. So, "on April 30, [1866,] the draft of the Fourteenth Amendment was introduced in the House and Senate." *Id*. "[O]ne of the primary purposes of

many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd v. Hodge*, 334 U.S. 24, 32 (1948).

The Senate held debates regarding the Fourteenth Amendment in May, 1866. *See United States v. Wong Kim Ark*, 169 U.S. 649, 698 (1898) ("When it came before the senate in May, 1866 . . . ."). "The fourteenth amendment of the constitution, as originally framed by the house of representatives, lacked the opening sentence." *Wong Kim Ark*, 169 U.S. at 698. Senator "Howard, of Michigan, moved to amend by prefixing the sentence in its present form (less the words 'or naturalized'), and reading: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.'" *Wong Kim Ark*, 169 U.S. at 698. After introducing the proposed language, Senator Howard continued:

> I do not propose to say anything on that subject except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.

Cong. Globe, 1st Sess. 39th Cong. 2890.

Senator Doolittle, of Wisconsin, then moved "to amend [Howard's] amendment," "by inserting after the word 'thereof' the words 'excluding Indians not taxed.'" Cong. Globe, 1st Sess. 39th Cong. 2890. A debate thereafter ensued regarding whether to add the words "excluding Indians not taxed" to Section 1 of the Fourteenth Amendment.

Senator Trumbull, of Illinois, was the "chairman of the Committee on the Judiciary . . . who . . . investigated the civil rights bill." Cong. Globe, 1st Sess. 39th Cong. 2893 (Sen. Fessenden). Senator Trumbull opposed Senator Doolittle's proposed amendment, believing that Native Americans were not subject to the complete jurisdiction of the United States because they

did not owe allegiance to the United States. *See* Cong. Globe, 1st Sess. 39th Cong. 2893 (Sen. Trumbull) ("What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else. That is what it means."); *see also* Cong. Globe, 1st Sess. 39th Cong. 2894 (Sen. Trumbull) ("I have already replied to the suggestion as to the Indians being subject to our jurisdiction. They are not subject to our jurisdiction in the sense of owing allegiance solely to the United States . . . .").

Senator Johnson, of Maryland, then joined in the debate. *See* Cong. Globe, 1st Sess. 39th Cong. 2893. He was in favor of adding the language "excluding Indians not taxed" to Section 1 of the Fourteenth Amendment. *See* Cong. Globe, 1st Sess. 39th Cong. 2893 (Sen. Jonson) ("The amendment proposed by my friend from Wisconsin . . . should be adopted."). Before addressing that proposed amendment, however, he stated the following:

> [T]here is no definition in the Constitution as it now stands as to citizenship. Who is a citizen of the United States is an open question. The decision of the courts and the doctrine of the commentators is, that every man who is a citizen of a State becomes *ipso facto* a citizen of the United States; but there is no definition as to how citizenship can exist in the United States except through the medium of a citizenship in a State.
>
> Now, all that this amendment provides is, that all persons born in the United States and not subject to some foreign Power—for that, no doubt, is the meaning of the committee who have brought this matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States there should be some definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and *I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States*, born of parents who at the time were subject to the authority of the United States. I am, however, by no means prepared to say, as I think I have intimated before, that being born within the United States, independent of any new constitutional provision on the subject, creates the relation of citizen to the United States.

Cong. Globe, 1st Sess. 39th Cong. 2893 (Sen. Jonson) (emphasis added).

Senator Johnson then expressed disagreement with Senator Trumbull regarding whether

Native Americans are subject to the jurisdiction of the United States. Cong. Globe, 1st Sess. 39th Cong. 2893 (Sen. Johnson) ("and he supposes and states very positively that the Indians are not subject to the jurisdiction of the United States. With due deference to my friend from Illinois, I think he is in error."). Senator Johnson then pointed out that Senator Trumbull did not oppose the "excluding Indians not taxed" language in Section II of the (proposed) Fourteenth Amendment. Cong. Globe, 1st Sess. 39th Cong. 2894 (Sen. Johnson) ("I suppose that my friend from Illinois agreed to the second section of this constitutional amendment, and these terms are used in that section."). The following exchange between Senator Trumbull and Senator Johnson then occurred:

> Mr. TRUMBULL: The Senator from Maryland certainly perceives a distinction between the use of the words "excluding Indians not taxed" in the second section and in the first. The second section is confined to the States; it does not embrace the Indians of the plains at all. That is a provision in regard to the apportionment of representation among the several States.
>
> Mr. JOHNSON: The honorable member did not understand me. I did not say it meant the same thing.
>
> Mr. TRUMBULL: I understood the Senator, I think. I know he did not say that the clause in the second section was extended all over the country, but he did say that the words "excluding Indians not taxed" were in the second section, and in as much as I had said that those words were of uncertain meaning, therefore, having gone for the words in the second section I was guilty of a great inconsistency. Now, I merely wish to show the Senator from Maryland that the words in the second section may have a very clear and definite meaning, when in the first section they would have a very uncertain meaning, because they are applied under very different circumstances. *The second section refers to no persons except those in the States of the Union; but the first section refers to persons everywhere, whether in the States or* ***in the territories*** or in the District of Columbia.

Cong. Globe, 1st Sess. 39th Cong. 2894 (emphases added).

"By March 1867 twelve states had refused to ratify the amendment, but Congress made clear its determination to write the principle of national citizenship into the fundamental law." Kettner at 343. "In the Reconstruction Act of March 2, 1867, Congress formally provided that no

state could be restored until it had ratified and until the amendment had become part of the Constitution." *Id*. at 343.[5] "Legislatures in the South now had no choice." *Id*. at 343. The Fourteenth Amendment was adopted on July 9, 1868. Section 1 provides:

> 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1. Section 2 provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV § 2.

Supreme Court Cases Interpreting the Fourteenth Amendment

The Supreme Court has interpreted the Citizenship Clause of the Fourteenth Amendment three times—in (1) the *Slaughter-House Cases*, 83 U.S. 36 (1872); (2) *Elk v. Wilkins*, 112 U.S. 94 (1884); and (3) *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[5] *See also* Reconstruction Act of 1867, Section 5 ("Whereas no legal State governments or adequate protection for life or property now exists in the rebel States . . . and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: Therefore . . . be it further enacted [that] when said State, by a vote of its legislature elected under said constitution, *shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen*, and when such article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law . . . ." (emphasis added).

Slaughter House Cases (1872)

"Four years after the adoption of the Fourteenth Amendment," the Supreme Court "was asked to interpret the Amendment's reference to 'the privileges or immunities of citizens of the United States.'" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 754 (2010). The *Slaughter–House Cases* "involved challenges to a Louisiana law permitting the creation of a state-sanctioned monopoly on the butchering of animals within the city of New Orleans." *Id*. "Justice Samuel Miller's opinion for the Court concluded that the Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'" *Id*. (quoting *Slaughter-House Cases*, 83 U.S. 36, 79 (1872)). "The Court held that other fundamental rights—rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure'—were not protected by the Clause." *Id*. (quoting *Slaughter-House Cases*, 83 U.S. at 76.) "Today, many legal scholars dispute the correctness of the narrow *Slaughter–House* interpretation." *Id*. at 756. Nevertheless, it provides helpful context to the current dispute.

Justice Miller noted that "[t]he first section of the fourteenth article . . . opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States." *Slaughter-House Cases*, 83 U.S. 36, 72 (1872). He then noted that prior to the Fourteenth Amendment, the Constitution did not define citizenship. *See id*. ("No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress."). He noted that historically, one view of citizenship was that one had to be a citizen of a state in order to be a citizen of the nation. *See id*. ("It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union."). Justice Miller then commented that, under this view of citizenship,

those born in the District of Columbia or in the Territories were not citizens. *See id*. ("Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens."). He continued, "[w]hether this proposition was sound or not had never been judicially decided." *Id*. at 72–73. He then commented that the "first clause of the first section" of the Fourteenth Amendment "was framed" in response to the Dred Scott decision to "establish a clear and comprehensive definition of citizenship." *Id*. at 73.

Justice Miller concluded with two observations about the first clause of the first section of the Fourteenth Amendment. *See id*. First, the clause "puts at rest . . . questions which [the Court] ha[d] stated to have been the subject of differences of opinion." *Id*. Relevant here, he stated that "[i]t declares that persons may be citizens of the United States without regard to their citizenship of a particular State . . . ." *Id*. Second, he noted that "the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established." *Id*. That is because "a man" "may" "be a citizen of the United States without being a citizen of a State"—"it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." *Id*. at 74. He then noted that it is "quite clear" "that there is a citizenship of the United States, and a citizenship of a State," and noted this distinction's "explicit recognition in" the Fourteenth Amendment. *See id*.

Elk v. Wilkins (1884)

In *Elk v. Wilkins*, the Supreme Court dealt "with the question [of] whether a native-born American Indian was made a citizen of the United States by the Fourteenth Amendment of the Constitution." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *see also Elk v. Wilkins*, 112 U.S. 94 (1884) ("The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United

States . . . a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution."). The Supreme Court ultimately held that the Plaintiff was not "a citizen of the United States under the fourteenth amendment of the constitution" *id*. at 109, because, like "children born within the United States" "of ambassadors," he was not subject to the jurisdiction of the United States because he owed allegiance to a tribe—not to the United States. *See id.* at 102.[6]

Wong Kim Ark (March 28, 1898)

In *Wong Kim Ark,* the question before the Supreme Court was "whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution." *United States v. Wong Kim Ark*, 169 U.S. 649, 653 (1898). The Court separated its opinion into seven sections. This court discusses *Wong Kim Ark* extensively in its analysis.

Spanish American War (December 10, 1898)

The Spanish-American War was an 1898 conflict between the United States and Spain that ended Spanish colonial rule in the Americas and resulted in U.S. acquisition of territories in the western Pacific and Latin America. On December 10, 1898, the Treaty of Paris was signed.

[6] *Elk*, 112 U.S. at 102 ("Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.").

As a result, Spain renounced all claims to Cuba, ceded Guam and Puerto Rico to the United States, and transferred sovereignty over the Philippines to the United States.

Tutuila and Aunu'u Are Ceded to the United States (1900)

On February 16, 1900, "[i]n a treaty ratified by the United States," "Germany and Great Britain renounced any claims over the eastern Samoan islands, including Tutuila, in favor of the United States." (ECF No. 55 at 11–12; *see also* Cession of Tutuila and Aunu'u, ECF No. 55-2 at 16.[7]). "On April 17, 1900, the Samoan chiefs of the islands of Tutuila and Aunu'u signed a treaty granting the United States government 'full powers and authority to govern the islands.'" (ECF No. 55 at 12; *see also* Cession of Tutuila and Aunu'u, ECF No. 55-2 at 16–17.[8]). This treaty provided that "[t]he Government of the United States of America shall respect and protect the individual rights of all people dwelling [on those islands] to their lands and other property . . . ." (Cession of Tutuila and Aunu'u, ECF No. 55-2 at 17.) The treaty also provided that the Samoan leaders who signed the treaty, and their "heirs and representatives by Samoan Custom," would "obey and owe allegiance to the Government of the United States of America." (Cession of Tutuila and Aunu'u, ECF No. 55-2 at 18.)

Islands of Manu'a Ceded to the United States (July 14, 1904)

"On July 14, 1904, the Tui Manua' (King of Manu'a) and the chiefs of the eastern Samoan island group of Manu'a . . . granted sovereignty to the United States, 'placing the Island's of Manu'a . . . under the complete sovereignty of the United States of America to enable

[7] "AND WHEREAS [the Governments of Germany, Great Britain, and of the United States of America] have on the sixteenth day of February 1900 by mutual agreement determined to partition said State: AND WHEREAS the Islands hereinafter described being part of the said State have by said arrangement amongst the said Governments been severed from the parent State and the Governments of Great Britain and of Germany have withdrawn all rights hitherto . . . in favor of the Government of the United States of America . . . ."

[8] "the Chiefs, rulers, and people . . . thereof are desirous of granting unto the said Government of the United States full power and authority to enact proper legislation for and to control" the "ISLANDS OF TUTUILA and AUNUU . . . ."

said Islands, with Tutuila and Aunuu, to become a part of the territory of said United States.'"[9] (ECF No. 55 at 13 (quoting Cession of Manu'a Islands 2, ECF No. 55-2 at 27.)

American Samoan Mau Movement Begins (1920)

According to the Samoan Federation of America, "[i]n the 1920's, U.S. Naval officers informed the American Samoan people for the first time that they were not recognized as U.S. citizens by the federal government." (ECF No. 55 at 15 (citations omitted).) According to the Samoan Federation of America, "[i]n response, prominent American Samoans organized a new political movement known as the Mau to press for recognition of U.S. citizenship and greater rights to self-government." (ECF No. 55 at 15-16; *see also* David A. Chappell, *The Forgotten Mau*, 69 Pac. His. Rev. 217 (2000), ECF No. 55-2 at 117 ("Gray," a naval historian, "dates the start of the *Mau,* to February 1920 . . . .").) According to the Samoan Federation of America, "[t]he American Samoan Mau movement was separate and distinct from the more well-known Mau movement that formed around the same time in Western Samoa, which laid the foundation for Western Samoa's eventual independence." (ECF No. 55 at 16 n. 4.)

Congress Formally Accepts Deeds of Cession (February 20, 1929)

According to the Samoan Federation of America, "[t]he Mau pushed for recognition of U.S. citizenship, organized public demonstrations, petitioned President Coolidge, and drew significant attention from Congress." (ECF No. 55 at 16; *see also The Forgotten Mau*, ECF No. 55-2 at 136 ("Repeated Samoan protests and petitions to the governor and U.S. President . . . .").) As a result of these efforts, "a U.S. senator from Connecticut," "Hiram Bingham," "introduced a bill in Congress that resulted in Public Resolution No. 89 in February 1929, which ratified at

[9] These islands are now generally known and referred to as American Samoa as distinguished from the independent state of Samoa, sometimes still referred to as Western Samoa.

long last the Deeds of Cession of American Samoa.")

48 U.S.C. § 1661(a), passed on February 20, 1929, provides: "[t]he cessions by certain chiefs of the islands of Tutuila and Manua and certain other islands of the Samoan group . . . herein referred to as the islands of eastern Samoa, are accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904, respectively."

American Samoa Commission (1930)

"The American Samoan Commission [was] created by act of Congress, Public Resolution No. 89," and approved by the President on February 20, 1929 . . . ." (*American Samoa*: *Hearings Before the Comm'n Appointed by the President of the United States* (1931), ECF No. 55-2 at 62.) "President Herbert Hoover" (*The Forgotten Mau*, ECF No. 55-2 at 136) "appointed [the] commission," which consisted of "three Samoan chiefs" and "four Members of Congress," including Bingham, to hold hearings in Honolulu and Samoa "to investigate conditions in Samoa and to make recommendations for legislation to be passed by the Congress of the United States." (*See American Samoa*: *Hearings Before the Comm'n Appointed by the President of the United States* (1931), ECF No. 55-2 at 63.) These hearings resulted in a "document" that "is nearly 400 pages long," and includes "more than seventy testimonies," including "Samoan opinions on the *Mau* . . . ."). (*The Forgotten Mau*, ECF No. 55-2 at 136.)

According to the Samoan Federation of America, "[t]hroughout the hearings, American Samoans repeatedly and uniformly stated their desire to be recognized as U.S. citizens." (ECF No. 55 at 17.) In support, the Samoan Federation of America cites to numerous quotes from the hearing that support their position. (*See* ECF No. 55-2 at 68–79.)

On October 7, 1930, "the Governor of Samoa," "the high chiefs, the talking chiefs, and the chiefs of Tutuila-Manua," assembled "on the shore" of the bay "of Pago Pago" to hear "the

preliminary report of the American Samoan commission." (*See American Samoa*: *Hearings Before the Comm'n Appointed by the President of the United States* (1931), ECF No. 55-2 at 87.) "The seven commissioners . . . unanimously agreed" to "make a report to the Congress of the United States" which would contain, among other things, a recommendation that "full American citizenship be granted to the inhabitants of Tutuila-Manua as of February 20, 1929, and to their children; and also to those inhabitants of Tuituila-Manua who were residing on the mainland of the United States or in the Territory of Hawaii." (ECF No. 55-2 at 87.)

On January 6, 1931, Senator Bingham sent President Hoover, "for transmission to the Congress of the United States, the official report of the American Samoan Commission . . . ." (S. Doc. No. 71-249 (1931), ECF No. 55-2 at 154.) On January 9, 1931, the President sent the official report to Congress. (S. Doc. No. 71-249 (1931), ECF No. 55-2 at 153.)

The official report recommended American citizenship for American Samoans. The report stated that the commission had heard "the opinions of all elements making up the community of American Samoa, the chiefs in particular . . . . No one who expressed a desire to address the commission was denied." (S. Doc. No. 71-249 (1931), ECF No. 55-2 at 159.) The official report further provided:

> Great satisfaction was expressed over the fact of annexation to the United States by the recent act of Congress; sincere, and expressed with deep emotion, were the pleas that the inhabitants of American Samoa be given full recognition as citizens of the United States; these two matters were uppermost, none disagreeing therewith.

(ECF No. 55-2 at 160.) The official report concluded that "the Samoans are capable of accepting and should receive full American citizenship." (ECF No. 55-2 at 160.) This conclusion was based, at least in part, on the following:

> The people of American Samoa freely and without reserve offered the sovereignty of their islands to the United States. This offer Congress has accepted. These

> people owed no allegiance to any foreign government. They were autonomous. For generations they had successfully governed themselves. . . . Their loyalty to the United States and their intense longings to have made certain national status demand recognition.

(ECF No. 55-2 at 162.)

House of Representatives Refuses to Grant Citizenship to American Samoans

According to the Samoan Federation of America, Inc, "[i]n 1931, the U.S. Senate unanimously passed a bill to recognize American Samoans as citizens. (ECF No. 55 at 21 (citing ECF No. 55-2 at 180[10]).) According to the Federation, "the bill was not reported out of the House Committee on Insular Affairs." (ECF No. 55 at 21 (citation omitted).) According to the Federation, "[t]he Senate passed identical legislation in the next session," but "the legislation again failed in the House." (ECF No. 55 at 21 (citations omitted).)

The Samoan Federation of America argues that "House Opposition to recognizing American Samoans as U.S. citizens was fueled by archaic claims of racial inferiority." (ECF No. 55 at 22.) In support, the Federation cites to the statements of Representative Jenkins, who, on the House floor, opposed granting citizenship to American Samoans when he stated: "What I am opposed to is taking American citizenship and flinging it halfway around the world, flinging it out to a group of people who are absolutely unqualified to receive it, who cannot espouse it fully, who do not need it as a prerequisite to their happiness, and who cannot maintain it honestly. This will bring trouble to them and bring trouble to us." (ECF No. 55-3 at 9.) He continued later:

> Let us not load upon them the responsibility of American citizenship. They cannot take it. They do not know anything about trial by jury, and that is very

[10] The Samoan Federation of America, Inc's cited authority is from a Hearing on H.R. 9698, "A Bill to provide a government for American Samoa" before the House Committee on Insular Affairs, 72nd Cong. 26, 32 (1932), and provides, in relevant part:

Mr. Lozier: "What is the status of the Senate bill, has it passed the Senate at this session?"

Senator Bingham: "It has passed. It is the second time that it has passed."

> fundamental and the cornerstone of American civilization and American citizenship. They are not able to espouse trial by jury and they cannot do this in Puerto Rico or in the Virgin Islands, and some believe we made a mistake in giving them full American citizenship. I say to you that this is a right we ought to circumscribe with safeguards and is something that should never be given except as a privilege, and let us not give it to these people until they are able to appreciate the privilege.

(ECF No. 55-3 at 14.)

According to the Samoan Federation of America, "[t]he legislation was again defeated in the House." (ECF No. 55 at 22 (citation omitted). According to the Federation, "[i]n 1934 the Senate again unanimously passed legislation to recognize American Samoans as U.S. citizens," but the "legislation again failed to clear House, and similar bills also failed in 1936 and 1937." (ECF No. 55 at 22–23.)

Statutory Recognition of American Samoans as Non-Citizen Nationals (1940)

According to the American Samoan Federation of America, the "Statutory recognition of American Samoans as 'nationals but not citizens, of the United States' did not occur until 1940." (ECF No. 55 at 15 n. 3 (citing Nationality Act, Pub. L. No. 76–853, 54 Stat. 1137, 1139 (1940)[11] (current version at 8 U.S.C. § 1408(1) (2018)). As nationals, American Samoans owe permanent

[11] That act provides:

> Unless otherwise provided in section 201, the following shall be nationals, but not citizens, of the United States at birth:
>
> (a) A person born in an outlying possession of the United States of parents one of whom is a national, but not a citizen, of the United States ;
>
> (b) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have resided in the United States or one of its outlying possessions prior to the birth of such person ;
>
> (c) A child of unknown parentage found in an outlying possession of the United States, until shown not to have been born in such outlying possession.

allegiance to the United States.[12]

Insular Cases

The *Insular Cases* were a "series of opinions" wherein the Supreme Court "addressed whether the Constitution, by its own force, applies in any territory that is not a State." *Boumediene v. Bush*, 553 U.S. 723, 756 (2008). The court discusses those opinions that are most relevant to the question presented.

Downes v. Bidwell (1901)

In *Downes v. Bidwell,* 182 U.S. 244 (1901) the Court was called on to interpret the Uniformity Clause of Article I, Section 8 of the Constitution. "The Downes case arose out of a dispute over duties charged on a shipment of oranges from Puerto Rico to New York under the Foraker Act, an organic act passed by Congress in 1900 to establish a civil government on the island." Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 807 (2005). "The plaintiffs argued that the duty, which applied specifically to goods from Puerto Rico, violated the Uniformity Clause of the Constitution, which provides that all 'Duties, Imposts and Excises shall be uniform *throughout the United States*.'" *Id*. (emphasis added) (quoting US Const Art I, § 8, cl 1)). A fractured majority agreed that that provision did not apply to Puerto Rico.

Justice Brown delivered the judgment of the court in an opinion in which no other Justice joined. Justice White authored a concurring opinion and was joined by Justices Shiras and McKenna. Justice Gray also authored a concurring opinion. These Justices agreed that Puerto Rico is not part of the United States for purposes of the Tax Uniformity Clause.

[12] *See* 8 U.S.C. § 1101(22) ("The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, *owes permanent allegiance to the United States*.") (emphasis added). .

Justice Brown's Opinion

Justice Brown described the question of the case as "whether the revenue clauses of the Constitution extend of their own force to [the United States'] newly acquired territories." 182 U.S. at 249 (opinion of Brown, J.). Justice Brown ultimately provided that Puerto Rico is "not a part of the United States within the revenue clauses of the Constitution . . . ." 182 U.S. at 287 (opinion of Brown, J.).

In reaching this conclusion, Justice Brown made many statements about citizenship that are relevant to the question presented in this case. Relevant here, Justice Brown wrote that "it can nowhere be inferred that the territories were considered a part of the United States." 182 U.S. at 250–51 (opinion of Brown, J.). He continued: "The 13th Amendment to the Constitution, prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction,' is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union." 182 U.S. at 251 (opinion of Brown, J.). He also weighed in on the Fourteenth Amendment, opining that it places a "limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'" 182 U.S. at 251 (opinion of Brown, J.).

In Justice Brown's view "the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct." 182 U.S. at 279 (opinion of Brown, J.). Justice Brown was of the opinion that "the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in . . . the 'American empire.'" 182 U.S. at 279 (opinion of Brown, J.). He continued:

> There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the

> United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.

182 U.S. at 279–80 (opinion of Brown, J.). Perhaps most relevant here was Justice Brown's view that "there is an implied denial of the right of the inhabitants [of territories] to American citizenship until Congress by further action shall signify its assent thereto." 182 U.S. at 280 (opinion of Brown, J.).

Justice White's Opinion

Justice White's concurring opinion in *Downes* was the origin of the doctrine of territorial incorporation. *See* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 806–07 (2005) ("In the most important of these cases, *Downes*, a concurring opinion by Justice Edward Douglass White set forth the doctrine of territorial incorporation.").

At the outset of Justice White's concurring opinion, he wrote: "Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur." 182 U.S. at 287 (White, J., concurring). He continued: "As, however, the reasons which cause me to do so *are different from*, *if not in conflict with*, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me." 182 U.S. at 287 (White, J., concurring) (emphasis added). Thus, at the outset of his concurring opinion, Justice White made clear that his reasoning for reaching the Court's ultimate result was "different from, if not in conflict with" those of Justice Brown.

Like Justice Brown, Justice White ultimately concluded that the Uniformity Clause did not apply to duties charged to shipments from Puerto Rico. 182 U.S. at 342 (White, J., concurring) ("the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."). In Justice White's opinion, the Uniformity Clause did not apply to Puerto Rico because Puerto Rico "had not been incorporated into the United States, but was merely appurtenant thereto as a possession." 182 U.S. at 342 (White, J., concurring).

In his concurring opinion, Justice White also expressed his view on the right of the government of the United States to acquire territory, and to enjoy the "beneficial existence" of its acquisitions—for "commercial and strategic reasons"—without the risk of "incorporat[ing] an alien and hostile people into the United States." *See* 182 U.S. at 305–08 (White, J., concurring). In Justice White's view, the government of the United States' "right" "to acquire" "territory" "could not be practically exercised if the result would be to endow the [territory's] inhabitants with citizenship of the United States . . . ." 182 U.S. at 306 (White, J., concurring).

Justice Gray's Opinion

Justice Gray "concurr[ed] in the judgment of affirmance in" the case, and "in substance agree[d] with the opinion of Mr. Justice White . . . ." 182 U.S. at 345 (Gray, J., concurring).

Balzac v. Porto Rico, 258 U.S. 298 (1922)

In *Balzac* a unanimous Supreme Court provided that "the opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court." *Balzac*, 258 U.S. at 305.

Analysis

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." U.S. CONST. amend. XIV, § 1, cl. 1. The Government concedes that "persons born in the territories are 'subject to the jurisdiction' of the United States. (ECF No. 66 at 18.) The question is therefore whether American Samoa is "in the United States" for purposes of the Fourteenth Amendment.

Plaintiffs argue that "the phrase 'in the United States' includes both States *and* Territories." (ECF No. 30 at 26 (emphasis in original).) The Government argues that "[t]he best reading of the Citizenship Clause is that U.S. territories are not 'in the United States' within the meaning of the Clause because 'in the United States' means in the 50 States and the District of Columbia." (ECF No. 66 at 19.) Both Plaintiffs and the Government argue—(I) that the Fourteenth Amendment's text, structure, and related historical evidence and (II) Supreme Court precedent—require this court to adopt their interpretation of the Citizenship Clause.

I. Constitution's Text, Structure, and History

Whether American Samoa is "in the United States" under the Fourteenth Amendment requires this court to conduct a "careful examination of the textual, structural, and historical evidence" related to the Amendment. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

A. The Fourteenth Amendment's Text

Plaintiffs argue that "[i]n the 1860s, as now, the word 'in' connoted 'presence in place, time, or state' and was synonymous with 'within' as opposed to 'without.'" (ECF No. 30 at 29.) They further argue that "[t]here is no conceivable reading of the Fourteenth Amendment's text

that would suggest someone born in a U.S. territory was born 'without' the United States." (ECF No. 30 at 29.) For this reason, they argue that "[f]rom the moment the United States exercised sovereignty over American Samoa, American Samoa was 'in the United States' as those words were understood at the time the Fourteenth Amendment was ratified." (ECF No. 30 at 30.)

The Fourteenth Amendment text's alone is insufficient to determine the Citizenship Clause's geographic scope.

B. Constitutional Structure

Plaintiffs contrast the language of Section 1 of the Fourteenth Amendment with Section 2 to support their argument that territories are "in the United States" for purposes of the Citizenship Clause. (*See* ECF No. 30 at 31–32.) They note that "[w]hile Section 1 of the Fourteenth Amendment . . . uses the term 'in the United States,' Section 2 . . . uses the narrower phrase 'among *the several States*' to provide that Representatives are to be apportioned only among States." (ECF No. 30 (emphasis in original) (citations omitted).) Plaintiffs argue that "the Framers' choice of different language in these adjacent, simultaneously adopted constitutional provisions is strong evidence that the provisions' geographic scopes are not coextensive" and argue that " '[i]n the United States' must therefore mean something more extensive than 'among the several states.' " (ECF No. 30 at 31.)

Plaintiffs also argue that the Thirteenth Amendment supports their reading. The Thirteenth Amendment abolished slavery "within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1, cl. 1. Plaintiffs argue that those areas that are not "within the United States," yet subject to U.S. jurisdiction, do not include Territories. (*See* ECF No. 30 at 32.) They argue that those words—"subject to their jurisdiction"—refer to "locations beyond the Nation's sovereign limits but nevertheless under U.S. control," like "vessels outside

U.S. territorial waters, embassies abroad, and military installations on foreign soil . . . ." (ECF No. 30 at 32.)

The Government argues that the Constitution's structure supports its position that American Samoa is not within the United States for purposes of the Citizenship Clause. It makes two primary arguments in support of its position.

First, the Government argues that "the general distinction drawn throughout the Constitution between 'the United States' . . . and lands '*belonging to* the United States' . . . supports the inference that territories are not 'in the United States' for purposes of the Citizenship Clause." (ECF No. 79 at 8 (emphasis in original).) It compares the language of the Tenth Amendment[13] with the language of Article IV Section 3, Clause 2[14] to argue that "[t]he Constitution itself . . . sets out a fundamental distinction between 'the United States' and the territories belonging to the United States." (ECF No. 66 at 19.)

Second, the Government contrasts the "more sweeping, disjunctive language" of the Thirteenth Amendment with the language contained in Section 1 of the Fourteenth Amendment to argue that "[t]he Thirteenth Amendment's broader language demonstrates that 'there may be places subject to the jurisdiction of the United States, but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.'" (ECF No. 66 at 20 (quoting *Downes v. Bidwell*, 182 U.S. 244, 336–37 (1901) (White, J., concurring)).)

Both parties make persuasive arguments for their positions. But like the D.C. Circuit, this

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[13] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[14] "The Congress shall have Power to dispose of and make all needful Rules and Regulations *respecting the Territory* or other Property *belonging to the United States*; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." U.S. Const. art. IV, § 3, cl. 2 (emphases added).

court finds that neither argument "is fully persuasive," and finds that neither argument "squarely resolve[s] the meaning of the ambiguous phrase 'in the United States.'" *Tuaua v. United States*, 788 F.3d 300, 303 (D.C. Cir. 2015). The Constitution's structure alone is "insufficient to divine the Citizenship Clause's geographic scope." *See id*.

C. Historical Evidence

Plaintiffs make four primary arguments in support of their position that "[n]umerous historical sources similarly align and show that the common-sense reading of the Citizenship Clause—that it extends to the Territories—is correct." (ECF No. 30 at 32.) The court discusses Plaintiffs' arguments, and the Government's responses to those arguments, in turn.

First, Plaintiffs argue that "the reason the phrase 'the United States' was understood to encompass U.S. Territories was a result of the common law doctrine of *jus soli*." (ECF No. 30 at 32.) *Jus soli* is "the rule under which nationality is acquired by the mere fact of birth within the territory of a state." Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 77 (1997). Relying on *Wong Kim Ark*, Plaintiffs argue that "[b]ecause the Citizenship Clause was drafted and ratified under the common-law understanding of the term 'citizen,' the Clause '*must* be interpreted in the light of the common law.'" (ECF No. 30 (emphasis in original) (quoting *Wong Kim Ark*, 169 U.S. at 654)). Plaintiffs, again relying on *Wong Kim Ark*, argue that "[t]he common-law rule regarding birthright citizenship was straightforward: 'the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth . . . owe obedience or allegiance to . . . the sovereign.'" (ECF No. 30 at 33 (quoting *Wong Kim Ark*, 169 U.S. at 659).)

In response to Plaintiffs' argument that the Citizenship Clause ratified the common law doctrine of *jus soli*, the Government argues that *Wong Kim Ark's* statements about common law

jus soli principles were dicta. (*See* ECF No. 79 at 21.) It further argues that Plaintiffs fail "to point to any *jus soli* precedent . . . that speaks to birthright citizenship in unincorporated territories." (ECF No. 79 at 21.)

Second, Plaintiffs argue that "the Fourteenth Amendment's repudiation of the Supreme Court's notorious *Dred Scott* decision provides compelling evidence that *jus soli* governs citizenship by birth." (ECF No. 30 at 34.) As noted above, one of *Dred Scott's* holdings was that Congress lacked the power to limit slavery in the territories. Plaintiffs argue that "[i]t is inconceivable that Congress would have left the question of citizenship in U.S. territories to congressional whim, *especially* when Congress's power over the Territories had been a central issue in *Dred Scott*." (ECF No. 30 at 35 (emphasis in original).)

In response to Plaintiffs' argument about *Dred Scott*, the Government states that it has "no quarrel with the proposition that the Citizenship Clause" overturns the *Dred Scott* decision, but argues that the repudiation of that decision says nothing about "whether unincorporated territories are within 'the United States' in the relevant sense." (*See* ECF No. 79 at 20.)

Third, Plaintiffs argue that "contemporaneous statements from the Fourteenth Amendment's Framers provide further evidence of the common understanding that the Citizenship Clause applies to Territories." (ECF No. 30 at 35 (citation omitted).) Plaintiffs point to the statements of three senators who took part in the May 1866 debate regarding the Fourteenth Amendment—Senators Trumbull, Howard, and Johnson—to support their argument. (*See* ECF No. 30 at 35–36.) Plaintiffs argue that "Senator Trumbull, for example, explained that '[t]he second section' of the Fourteenth Amendment—the Apportionment Clause—'refers to no persons except those in the States of the Union; but the first section'—the Citizenship Clause—'refers to persons everywhere, whether in the States *or in the Territories* or in the District of

Columbia.'" (ECF No. No. 30 at 35–36 (emphasis in original) (quoting Cong. Globe, 39th Cong., 1st Sess. 2894).) Plaintiffs argue that two statements made by Senator Howard and Senator Johnson also support their position. (*See* ECF No. 30 at 36.)

The Government makes two arguments in response. First, it argues that "whatever the import of those statements with respect to territories that were destined for statehood, they do not address the application of the Constitution to unincorporated territories, because the United States had no such territories at the time." (ECF No. 66 at 32.) Second, relying on the D.C. Circuit, it argues that the "background to the Fourteenth Amendment 'contains many statements from which conflicting inferences can be drawn,' . . . and 'scattered statements' from three legislators 'are not impressive legislative history' and cannot determine the meaning of the [Citizenship] Clause . . . ." (ECF No. 66 at 31–32 (citation omitted).)

Fourth, Plaintiffs argue that "the 'initial blueprint' for the Amendment—Section 1 of the Civil Rights Act of 1866," further confirms that the original understanding of 'in the United States' included States *and* Territories." (ECF No. 30 at 36 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 721 (1989).) Plaintiffs argue that because that statute indicates that persons born in both states and territories would be deemed citizens at birth, and because "[m]any of the Members of the 39th Congress viewed §1 of the Fourteenth Amendment as 'constitutionalizing' and expanding the protections of the 1866 [Civil Rights Act],' . . . Section 1 of the Fourteenth Amendment cannot be understood to take a geographic reach narrower than 'every State and Territory.'" (ECF No. 30 at 36).

The court addresses the parties' arguments in turn.

Wong Kim Ark

The court agrees with Plaintiffs that the historical evidence supports their position. Their

strongest argument—that the Citizenship Clause must be interpreted in light of English common law—relies heavily on *Wong Kim Ark*. As discussed in Section II below, the court agrees with Plaintiffs that the historical evidence—as established by the Supreme Court—demonstrates that the Fourteenth Amendment must be interpreted in light of the doctrine of *jus soli*.

Repudiation of *Dred Scott* and Relation to Civil War

The court also agrees with Plaintiffs that the Fourteenth Amendment's repudiation of the Supreme Court's *Dred Scott* decision provides evidence that *jus soli* governs citizenship by birth. As discussed above, Justice Taney's opinion that blacks could never be national citizens created a racial exception to birthright citizenship. This exception was inconsistent with the rule of birthright citizenship as explained by Coke in *Calvin's Case*—which required only birth within the allegiance and dominion of the sovereign. The passage of the Fourteenth Amendment, when compared to the holding in *Dred Scott*, represents a change that brings the rule for citizenship in the United States closer to the English common law rule for birthright citizenship.

In examining the historical significance of the passage of the Fourteenth Amendment, this court cannot not overlook the amendment's relation to the American Civil War—and the differing views that the North and the South had regarding citizenship and the location of sovereign power in the United States. The predominant Southern theory was that "sovereignty, community, and citizenship should be defined with reference to the individual states . . . ." Kettner at 335–36; *see also id* at 338 ("The South's position" was that "citizenship was properly defined with reference to the states . . . .").) In contrast, "Unionists in the North" believed that "the Constitution was the creation of the sovereign people in their aggregate capacity and their national character." *Id*. at 339.

The North's victory of the Civil War "establish[ed] the Union's primacy over the

individual states." Kettner at 334. Through that victory, the North was able to "impose its own ideas of citizenship . . . upon the nation." *Id*. at 340. The theory that this nation is composed of a communal association of individuals bound in their allegiance to the national sovereign is obviously very different from the theory of reciprocal obligations discussed in *Calvin's Case*—where a king owed protection to his subject from the moment she was born, and she owed him corresponding allegiance. But the North's view—of both allegiance and citizenship rooted in a *single* national sovereign—is more similar to the theory of allegiance discussed in *Calvin's Case* than is the Southern theory.[15] Thus, the passage of Fourteenth Amendment, and its repudiation of the Southern view of allegiance and citizenship, provides additional evidence that *jus soli* governs citizenship by birth.

Contemporaneous Statements of Fourteenth Amendment's Framers

The court next turns to Plaintiffs' arguments regarding the "contemporaneous statements from the Fourteenth Amendment's Framers . . . ." (ECF No. 30 at 35.) The Supreme Court has already clarified that, when interpreting the meaning of the Fourteenth Amendment, courts must look first to the text of the Amendment to determine its meaning. *See Wong Kim Ark*, 169 U.S. at 699 ("the intention of the congress which framed, and of the states which adopted, this amendment of the constitution, must be sought in the words of the amendment . . . ."). The Supreme Court has also made clear that "the debates in congress are not admissible as evidence to control the meaning of" the words of the Fourteenth Amendment. *See id*. "But the statements"

[15] Lord Coke's resolution of *Calvin's Case* was based in large part on the fact that because "both Scottish and English subjects owed allegiance to *the same sovereign*, Scots who were born into the allegiance of James at the time he was also King of England were natural subjects in England." Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 114 (1997) (emphasis added). The North's victory and the subsequent passage of the Fourteenth Amendment confirm that this nation is composed of a communal association of individuals, whose allegiance is bound in the *same* national sovereign. This is more similar to the theory of allegiance described in *Calvin's Case* than is the Southern view that "stressed the primacy of the state communities of allegiance . . . ." *See* Kettner at 340.

made in the debates in congress "are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves . . . ." *See id* at 699.

The court agrees with Plaintiffs that the Framers' contemporaneous statements that they point to support their position that the Citizenship Clause applies with full force in the territories. Senator Trumbull's statement, that "the first section" of the Fourteenth Amendment "refers to persons everywhere, whether in the States *or in the Territories* or in the District of Columbia" directly supports Plaintiffs' interpretation. The court also finds it significant that, as the Plaintiffs argue, "the government fails to cite a *single* statement from *any* legislator supporting its view." (ECF No. 75 at 19 (emphasis in original).)

While the specific statements from the debates are persuasive evidence in favor of Plaintiffs' position, the court nevertheless holds, based on the Supreme Court's guidance in *Wong Kim Ark*, that those statements do not control the meaning of the Fourteenth Amendment.

Significance of Civil Rights Act of 1866

As noted above, Plaintiffs argue that because the Civil Rights Act indicates that persons born in both states and territories would be deemed citizens at birth, and because "[m]any of the Members of the 39th Congress viewed §1 of the Fourteenth Amendment as 'constitutionalizing' and expanding the protections of the 1866 [Civil Rights Act],' . . . Section 1 of the Fourteenth Amendment cannot be understood to take a geographic reach narrower than 'every State and Territory.'" (ECF No. 30 at 36). The court is not persuaded by this argument. The decision of the 39th Congress to not include, in the Fourteenth Amendment, language related to territories—language that was present in the Civil Rights Act—may by itself constitute evidence that they did not intend for territories to be included within the Citizenship Clause's geographic scope. *C.f. In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991) ("As a

general canon of statutory construction, where the final version of a statute deletes language contained in an earlier draft, a court may presume that the earlier draft is inconsistent with ultimate congressional intentions.").

Summary as to Text, Structure, and Historical Evidence

On balance, the parties' arguments related to the text, structure, and historical evidence of the Citizenship Clause of the Fourteenth Amendment favor the Plaintiffs' position. But the resolution of this case is ultimately governed by the Supreme Court's controlling precedent in *Wong Kim Ark*.

II. Controlling Supreme Court Precedent

The court proceeds in four steps: the court (A) explains why it is bound by *Wong Kim Ark*, (B) explains why *Downes v. Bidwell* does not control, (C) explains how these cases can be read harmoniously, and (D) addresses the Intervenors' arguments.

A. *Wong Kim Ark's* Holding Requires this Court to Rule for Plaintiffs

"Precedents contained in judicial opinions have traditionally been considered 'unwritten law' because long ago judges simply read or announced their decisions from the bench, without writing them down." Bryan A. Garner et al., *The Law of Judicial Precedent* 1 (2016). "It used to be widely thought—until about the end of the 19th century—that judicial precedents were merely *evidence* of the law, as opposed to the *source* of it." *Id*. at 2 (emphasis in original). "No serious legal thinker now believes this." *Id*. "Today, precedents are understood to make up part of the law . . . ." *Id*. "*Black's Law Dictionary* defines" precedent "as a 'decided case that furnishes a basis for determining later cases involving similar facts or issues.'" *Id* at 22 (quoting *Black's Law Dictionary* 1366 (Bryan A. Garner ed., 10th ed. 2014)).

"Of course, not all precedent is created equal: there is a hierarchy." Garner (2016) at 23.

"Chief among the differences between precedents is that some bind future courts, while others merely persuade." *Id*. "Binding precedent is 'very powerful medicine.'" *Id*. (citation omitted). "If it's on point, it '*is* the law' and 'cannot be considered and cast aside,' even if a later court disagrees with it—unless and until it is overruled." *Id*. "All other precedent is merely persuasive or conditional." *Id*. "Lacking the coercive authority of binding precedent, it draws its power mainly from its coherence and logical force." *Id*.

"Judicial precedents come in two flavors: vertical and horizontal." Garner at 27. "Federal . . . courts are absolutely bound by vertical precedents—those delivered by higher courts within the same jurisdiction." *Id*. "This binding tie is often said to be a matter of 'owing obedience.'" *Id*. (citation omitted). "The rule is that courts must adhere not just to the result but also to any reasoning necessary to that result." *Id*.[16]

"The Supreme Court has emphasized that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.'" Garner at 28 (quoting *Hutto v. Davis*, 454 U.S. 370, 375 (1982). "[I]f a Supreme Court decision 'is to be modified, overruled, or disregarded, that will have to be done by the Supreme Court.'" *Id*. (citation omitted). Indeed, "[l]ower courts are bound even by old and crumbling precedent—until the high court itself changes direction." *Id*. at 29.

But, "[n]ot all text within a judicial decision serves as precedent." Garner at 44. "That's a

[16] *See also Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.");

see also United States v. Duvall, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Vertical stare decisis applies to Supreme Court precedent in two ways." *Id*. "First, the *result* in a given Supreme Court case binds all lower courts. Second, the *reasoning* of a Supreme Court case also binds lower courts. So once a rule, test, standard, or interpretation has been adopted by the Supreme Court, that same rule, test, standard, or interpretation must be used by lower courts in later cases.") (emphasis in original).

role generally reserved only for the holding: the parts of a decision that focus on the legal question actually presented to and decided by the court." *Id*. "A holding consists of the 'court's determination of a matter of law pivotal to its decision.'" *Id* (citation omitted). "Everything else amounts to **dicta—**what Francis Bacon in 1617 called the 'vapours and fumes of law.'" *Id*. (bold added). "A witty opening paragraph, the background information on how the law developed, the digressions speculating on how similar hypothetical cases might be resolved—none of those things bind future courts." *Id*. "So the line between holding and dictum . . . matters." *Id*.

"Generally, a *dictum* is a statement in a judicial opinion that is unnecessary to the case's resolution." Garner at 46. "It's a statement that 'does not explain why the court's judgment goes in favor of the winner.'" *Id*. (citation omitted). "In the words of Posner J., it is 'a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.'" *Id*. at 46–47 (citation omitted). "The distinction between a holding and a dictum doesn't depend on whether the point was argued by counsel and deliberately considered by the court . . . but instead on whether the solution of the particular point was more or less necessary to determining the issues involved in the case." *Id*. at 51

The Government argues that "*Wong Kim Ark* . . . contains **dicta** about common-law *jus soli* principles," and argues that Plaintiffs have failed "to point to any *jus soli* precedent . . . that speaks to birthright citizenship in unincorporated territories." (ECF No. 79 at 21 (bold added).) The Government insists that *Wong Kim Ark* does not control the outcome of this case.

Plaintiffs, in contrast, argue that the Supreme "Court unequivocally **held** that the Citizenship Clause 'reaffirmed' the 'fundamental principle of citizenship by birth *within the dominion*'—that is, *jus soli*—using 'the most explicit and comprehensive of terms.'" (ECF No. 75 at 23 (bold added) (quoting *Wong Kim Ark*, 169 U.S. at 675)). Plaintiffs argue that "[b]ecause

Wong Kim Ark authoritatively construed the Citizenship Clause as 'codifying a *pre-existing* right,'—the common law *jus soli* rule—this Court should look to that right's 'historical background' to discern its scope." (ECF No. 75 at 23 (quoting *Heller*, 554 U.S. at 592).) Plaintiffs argue that the Supreme Court's statements in *Wong Kim Ark*—that construed the *Citizenship's Clause's* phrase, "in the United States," as "encompassing *all* of the sovereign's geographic territory" "are not dicta; they were necessary to the reasoning that led to the Supreme Court's holding in each case." (*See* ECF No. 75 at 24 (emphasis in original).) Plaintiffs further argue that "[t]his Court should not follow the court of appeals who have failed to heed this binding precedent.[17]" (*See* ECF No. 75 at 24 n. 2) They argue that "[c]ircuit court decisions that misunderstand and misapply Supreme Court precedent are no substitute for authoritative Supreme Court decisions that speak to the citizenship question presented here." (ECF No. 75 at 24 n. 2.)

As explained below, the court agrees with Plaintiffs that the Supreme Court's discussion in *Wong Kim Ark* that related to the English common-law rule for birthright citizenship was not simply dicta—the Court's discussion of the English common-law rule was a determination of a matter of law that was pivotal to its decision, and is therefore binding on this court.

In *Wong Kim Ark*, Justice Gray—joined by Justices Brewer, Brown, Shiras, White, and Peckham—delivered the opinion of the court. In the beginning of its opinion the Court discussed the facts that bore on the outcome of the case. *See Wong Kim Ark*, 169 U.S. at 652–53. The Court

[17] The Government argues that "every court of appeals to consider the question has agreed that unincorporated territories are not 'in the United States' for purposes of the Citizenship Clause." (ECF No. 79 at 16.) The Government recognizes, however, that "every court of appeals to consider the question has relied on the *Insular Cases* (and in particular on *Downes v. Bidwell*) to reject the claim that Plaintiffs now bring in this Court . . . ." (ECF No. 79 at 10.) Those appellate court decisions are not binding on this court. Because, as the Government recognizes, those cases relied on *Downes v. Bidwell*, this court analyzes *Downes*. As explained below, this court concludes that *Downes* does not control the outcome of this case.

noted that Wong Kim Ark was born in the United States of America.[18] *See id*. at 652. The Court also noted that while his parents, "were persons of Chinese descent and subjects of the emperor of China," they "were never employed in any diplomatic or official capacity under the emperor of China." *Id*. The Court also noted that "neither he, nor his parents acting for him, ever renounced his allegiance to the United States . . . ." *Id*. The Court articulated the question presented:

> [t]he question presented . . . is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment of the constitution . . . .

Wong Kim Ark, 169 U.S. at 653. The Court then separated its opinion into seven sections—concluding, in the seventh section, that Wong Kim Ark was a citizen by virtue of his birth within the United States.

Wong Kim Ark Section I

In Section I, the Court emphasized that the Fourteenth Amendment *must* be interpreted in light of the history of this country—a history that is traced directly to the English common law. *See Wong Kim Ark*, 169 U.S. at 653–54 ("In construing . . . a constitution established by the people as the supreme law of the land, regard is to be had . . . to the condition and to the **history** of the law as previously existing, and in the light of which the new act **must** be read and interpreted.") (bold added); *see also id*. at 654 (The Fourteenth Amendment "**must** be interpreted

[18] The court recognizes that Wong Kim Ark was born in California which had been admitted as a state at the time of his birth. As explained below, that fact does not distinguish the present facts of this case to allow the court to disregard the Supreme Court's holding and direction.

in the light of the **common law**, the principles of **history** of which were familiarly known to the framers of the constitution.") (bold added).

Wong Kim Ark Section II

In Section II, the Court articulated the English common law rule of *jus soli* subjectship. *See Wong Kim Ark*, 169 U.S. at 655 ("The fundamental principle of the common law with regard to English nationality was birth within the allegiance . . . ."). The Court noted that this rule applied not only to "natural-born subjects" but also to children born to "aliens in amity, so long as they were within the kingdom." *Id*. The Court then noted two exceptions to the common law rule—children of ambassadors and children of alien enemies. *See id*. ("But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the king's dominions, were not natural-born subjects . . . .").

The Court then noted that "[t]his fundamental principle . . . was clearly . . . stated in the leading case known as 'Calvin's Case' . . . ." *Id*. at 655–56. Then, after reviewing other "English authorities" *id*. at 656, the Court confirmed that the rule established in *Calvin's Case* was the rule in England for at least three centuries prior to 1898 (the date *Wong Kim Ark* was decided). *See id*. at 658.[19]

Wong Kim Ark Section III

The Court then noted that "[t]he same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States

[19] *Wong Kim Ark*, 169 U.S. at 658 ("It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.").

afterwards, and continued to prevail under the constitution as originally established." *Wong Kim Ark*, 169 U.S. at 658. The Court then discussed case law that supported the position that the English common law rule of citizenship was the law in United States—both before and after the Constitution was signed.[20] The Court also cited favorably to an opinion of the supreme court of North Carolina that provided, in relevant part, that "[t]he term 'citizen' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government." *Id*. at 664 (citation omitted). The Court then discussed opinions of "the executive departments" that "repeatedly affirmed" the "same doctrine" of English common law birthright citizenship. *See id*. at 664–66.

Wong Kim Ark Section IV

In Section IV, the Court addressed an argument raised by the Government that "the rule of the Roman law, by which the citizenship of the child followed that of the parent . . . had superseded the rule of the common law, depending on birth within the realm . . . ." *Wong Kim Ark*, 169 U.S. at 666. After reviewing the citizenship laws of some European countries, the Court concluded that "[t]here is . . . little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule of law generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion." *Id*. at 667.

[20] *See Wong Kim Ark*, 169 U.S. at 659 (Citing *In Inglis v. Sailors' Snug Harbor (1830) 3 Pet. 99* for the proposition that "the justices of this court . . . all agreed that the law of England as to citizenship by birth was the law of the English colonies in America."); *see id*. at 662 (Citing *Levy v. McCartee* (1832) 6 Pet. 102 for the proposition that the Court "held that the case must rest for its decision exclusively upon the principles of the common law, and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject, quoting the statement of Lord Coke . . . ."); *see id*. at 662–63 (quoting a Kentucky Circuit Court opinion that provided, in relevant part "'All persons born in the allegiance of the king are natural born subjects, and all persons born in the allegiance of the United States are natural born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England.'"); *see also id*. at 663 ("The supreme judicial court of Massachusetts . . . early held that the determination of the question whether a man was a citizen or alien was 'to be governed altogether by the principles of the common law' . . . .").

The Court then discussed whether statutes conferring citizenship to children born abroad to American citizens affected the ancient rule of citizenship by birth within the dominion. *See id*. at 668. The Court concluded that "there is no authority . . . in England or America which maintains or intimates that the statutes . . . conferring citizenship on foreign-born children of citizens have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion." *Id*. at 674.

The court then provided that "it is beyond doubt that, before the enactment of the civil rights act of 1866 or the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States." *Wong Kim Ark*, 169 U.S. at 674–75.

Wong Kim Ark Section V

The Court then provided that "[i]n the forefront . . . of the fourteenth amendment of the constitution . . . the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms." *Wong Kim Ark*, 169 U.S. at 675.

In addressing the first section of the Fourteenth Amendment, the Court provided, in relevant part, that: "[a]s appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption." *Id*. at 676.

The Court then discussed the *Slaughter House Cases* and *Elk v. Wilkins*. *Id*. at 676–82. The Court noted that the Fourteenth Amendment contained the same two exceptions to *jus soli* citizenship that existed at common law—that children of diplomats and children of alien enemies

are not entitled to citizenship. *See id*. at 682.[21] The Court then discussed two of its previous cases—*United States v. Rice*, 17 U.S. 246 (1819) and *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812)—that confirmed the validity of these two exceptions to birthright citizenship. *See id*. at 683–86 ("The principles upon which each of those exceptions rests were long ago distinctly stated by this court."). After discussing those cases, the Court provided that "[t]hese considerations confirm the view, already expressed in this opinion, that the opening sentence of the fourteenth amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship." *Wong Kim Ark*, 169 U.S. at 687–88. The Court then discussed "opinions of the executive departments" that confirmed "the fundamental rule of citizenship by birth within the dominion of the United States . . . ." *See id*. at 688–692.

The Court then provided a conclusion to Section V:

> The foregoing considerations and authorities irresistibly lead us to these **conclusions**: *The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth* within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.
>
> The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and

[21] *Wong Kim Ark*, 169 U.S. at 682 ("The real object of the fourteenth amendment of the constitution, in qualifying the words 'all persons born in the United States' by the addition 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—*children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state*,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America, *had been recognized exceptions to the fundamental rule of citizenship by birth within the country*.") (emphasis added).

> consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke in Calvin's Case, 7 Coke, 6a, 'strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject';
>
> and his child, as said by Mr. Binney in his essay before quoted, 'If born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle.' It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides, seeing that, as said by Mr. Webster, when secretary of state, in his report to the president on Thrasher's case in 1851, and since repeated by this court: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance, or of renouncing any former allegiance,—it is well known that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulations.'
>
> To hold that the fourteenth amendment of the constitution excludes from citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

Wong Kim Ark, 169 U.S. at 693–94. (emphases added).

Wong Kim Ark Section VI

In Section VI the Court stated that the Fourteenth Amendment "contemplates two sources of citizenship, and two only,–birth and naturalization," and held that while the Constitution grants Congress the power to regulate requirements for naturalization, it has no power to restrict birthright citizenship. *See Wong Kim Ark*, 169 U.S. at 703 ("The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, 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.").

More specific to the facts before it, the Supreme Court held that "[t]he fact . . . that acts of congress or treaties ha[d] not [at that time] permitted Chinese persons born out of this country

to become citizens by naturalization, [could not] exclude Chinese persons born in this country from the operation of the broad and clear words" of the Fourteenth Amendment. *See Wong Kim Ark*, 169 U.S. at 703; *see id*. at 699 ("The acts of congress, known as the 'Chinese Exclusion Acts,' the earliest of which was passed some 14 years after the adoption of the constitutional amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions.").

In short, Section VI of the opinion established the supremacy of the constitutional right of birthright citizenship over the ability of Congress to restrict that right—and confirmed the authority of the judiciary to give effect to that right. *See Wong Kim Ark*, 169 U.S. at 694.[22]

Wong Kim Ark Section VII

In Section VII the Court held that Wong Kim Ark was a citizen of the United States. *See Wong Kim Ark*, 169 U.S. at 704–05. In reaching this holding, the Court discussed the specific facts of the case necessary to reach that conclusion. For example, the Court noted that Wong Kim Ark had been born within the United States. *See id*. at 704 ("Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired **by birth within the United States** has not been lost or taken away by anything happening since his birth." (bold added).) The court also noted that "Wong Kim Ark ha[d] not, either by himself or his parents acting for him, ever renounced his allegiance to the United States." *Id*.

The Court then affirmed the question presented at the outset of the opinion:

[22] *Wong Kim Ark*, 169 U.S. at 694 ("Whatever considerations, in the absence of a controlling provision of the constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the fourteenth amendment, which declares and ordains that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'").

> The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, **whether a child born in the United States**, of parents of Chinese descent, who, at the time of his birth, are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and **are not employed in any diplomatic or official capacity under the emperor of China**, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Wong Kim Ark, 169 U.S. at 704–05 (bold added).

In short, in Section VII the Court held that Wong Kim Ark was a citizen of the United States because (1) he was born within the United States; (2) he had never renounced his allegiance to the United States; and (3) one of the historical exceptions to birthright citizenship—a child's birth to foreign minister parents—did not apply because his parents were not Chinese diplomats.

Wong Kim Ark's Conclusion That the Fourteenth Amendment Affirms the English Common-Law Rule of Citizenship is Binding on This Court

The question for this court is whether the Supreme Court's "conclusion" that "[t]he fourteenth amendment affirms" the English common-law rule for birthright citizenship is dicta, as the Government argues, or a holding, as Plaintiffs argue. The Tenth Circuit has "defined dicta as 'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" *United States v. Barela*, 797 F.3d 1186, 1190 (10th Cir. 2015) (citation omitted). If the Supreme Court's discussion of the English common law rule for citizenship was reasoning that was essential to the question presented, it is not dicta, it is a holding.

The relevance of the English common-law to the Supreme Court's outcome in *Wong Kim Ark* cannot be overstated. In the introduction of its opinion, the Court provided the relevant facts

necessary for Wong Kim Ark to satisfy his status as a citizen under the English rule: (1) he was born in the United States; (2) he had never renounced his allegiance to the United States; and (3) his parents were not diplomats. In Section I, the Court stated, in no uncertain terms, that the Fourteenth Amendment "**must** be interpreted in the light of the common law . . . ." *Wong Kim Ark*, 169 U.S. at 654 (bold added). The Court then proceeded to discuss the relevance of English Common Law to the question presented in Section II[23], Section III[24], Section IV,[25] and Section V.[26] In Section VII, the Court then again reiterated that Wong Kim Ark was born in the United States and had not renounced his allegiance to the United States. *See Wong Kim Ark*, 169 U.S. at 704–05. Then, in restating the question presented, the Court again mentioned that Wong Kim Ark's parents were not diplomats of China. *See id*. at 705.

The Supreme Court's statement that our nation's Constitution "**must** be interpreted in light of the common law," and its "conclusion" that "the fourteenth amendment affirms the ancient and fundamental rule of citizenship by **birth** within the territory, **in the allegiance**" *Wong Kim Ark*, 169 U.S. at 654; 693 (bold added), was not simply dicta. The text of the Citizenship Clause of the Fourteenth Amendment does not include the word "allegiance." Nor

[23] *Wong Kim Ark*, 169 U.S. at 655 ("The fundamental principle of the common law with regard to English nationality was birth within the allegiance . . . .").

[24] *See Wong Kim Ark*, 169 U.S. at 659 ("In Inglis v. Sailors' Snug Harbor (1830) . . . the justices of this court . . . all agreed that the law of England as to citizenship by birth was the law of the English colonies in America.").

[25] *See Wong Kim Ark*, 169 U.S. at 674 ("So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes . . . have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion.").

[26] *See Wong Kim Ark*, 169 U.S. at 675 ("the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms."); *see id*. at 693 ("Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, **in the words of Lord Coke in Calvin's Case**, . . . 'strong enough to make a natural subject, for, if he hath issue here, that issue is a natural-born subject' . . . .") (bold added);

does the text of the Citizenship Clause mention foreign ministers or foreign diplomats. Yet the Supreme Court emphasized—in both the introduction and the conclusion—that Wong Kim Ark had not renounced his allegiance and that his parents were not foreign diplomats. These facts are only relevant to the ultimate resolution of the case—that he was a citizen by virtue of his birth in the United States—if the Fourteenth Amendment adopted the English rule for citizenship. The Supreme Court's discussion of the relevant facts reveals that its discussion of the English common-law was essential to the determination of the question presented.

This court cannot ignore the fact that the Supreme Court discussed the relevance of the English common-law rule to the meaning of the Fourteenth Amendment at length—in five of the opinion's seven sections. The Supreme Court's discussion was not simply "[a] witty opening paragraph." Garner at 44. The Court's discussion was not simply "background information on how the law developed." *Id*. It was not a "digression[] speculating on how similar hypothetical cases might be resolved" in the future. *Id*.

It was a dictate to future courts. A mandate that this court is duty-bound to follow. The Fourteenth Amendment constitutionalized the English common-law rule for birthright citizenship, and it *must* be interpreted in light of that rule. The holding of *Wong Kim Ark* was that the Fourteenth Amendment adopted the English common-law rule for citizenship.

"[O]nce a rule, test, standard, or interpretation has been adopted by the Supreme Court, that same rule, test, standard, or interpretation **must** be used by lower courts in later cases." *United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (bold added) (Kavanaugh, J., concurring in the denial of rehearing en banc).

The question is whether, under the Citizenship Clause—interpreting it in light of the English common rule for birthright citizenship as this court must—American Samoa is "in the

United States." As discussed at length above, the English rule required birth within the dominion and allegiance of the sovereign. Thus, if American Samoa is within the "dominion" of the United States under the English rule, it is "within the United States" under the Fourteenth Amendment.

Relying on *Calvin's Case*, Amici Curiae Citizenship Scholars argue that "[u]nder the English common law rule that the Fourteenth Amendment codified, the doctrine extended beyond the boundaries of England to encompass any territory under the sovereignty of the King of England: 'whosoever was born within the fee of the King of England, though it be another kingdom, was a natural-born subject.'" (ECF No. 52 at 18 (quoting *Calvin's Case*, 77 Eng. Rep. at 403).) Plaintiffs similarly argue that "*jus soli* encompassed *all* of the sovereign's soil and nothing in the doctrine's history indicates that some territorial outposts counted and others did not." (ECF No. 75 at 23 (emphasis in original).) Plaintiffs argue that the Citizenship Clause's phrase "in the United States" encompasses all of the sovereign's geographic territory. (*See* ECF No. 75 at 24.) The Government does not make any argument to dispute that, at common law, the geographic scope of England's dominion extended to any territory under the sovereignty of the king.

Interpreting the Fourteenth Amendment in light of the English common-law, this court holds that American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States—that is, American Samoa is within the "full possession and exercise of [the United States'] power." *Wong Kim Ark*, 169 U.S. at 659. American Samoa is therefore "in the United States" for purposes of the Fourteenth Amendment.

B. *Downes v. Bidwell* Does Not Control the Outcome of this Case

As discussed above, *Downes v. Bidwell* represents the origin of the doctrine of territorial incorporation, "under which the Constitution applies in full in incorporated Territories surely

destined for statehood but only in part in unincorporated Territories." *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (citation omitted). The Government argues that "the Citizenship Clause confers citizenship on those born 'in the United States,'" and argues that the Supreme Court's "decision in *Downes* confirms that the language 'in the United States' excludes unincorporated territories"—like American Samoa. (*See* ECF No. 66 at 22.)

The Government acknowledges that the Court in *Downes* was not interpreting the Citizenship Clause of the Fourteenth Amendment—it was interpreting the Uniformity Clause. (*See* ECF No. 79 at 11 ("To be sure, this case is not about the Tax Uniformity Clause."); *see also* ECF No. 66 at 22 ("The Court held that Puerto Rico is not part 'of the United States' for purposes of" the Uniformity Clause.).) But the Government argues that "the Supreme Court recognized in *Downes* that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories" because "the Justices in the majority" "recognized that when the United States acquires various territories, the decision to afford citizenship is to be made by Congress." (ECF No. 66 at 23 (citations omitted).)

Plaintiffs[27] and the Government[28] both acknowledge that no opinion in *Downes v. Bidwell* commanded a majority of the Court. As discussed above, Justice Brown delivered the judgment of the court in an opinion in which no other Justice joined. Justice White authored a concurring opinion—joined by Justices Shiras and McKenna. Justice Gray authored a concurring opinion as well.

Because the Government relies so heavily on *Downes*—and because this court owes

[27] *See* ECF No. 75 at 26 ("the members of the majority [in *Downes*] 'agreed on little other than the case's ultimate result.'") (citation omitted).)

[28] *See* ECF No. 66 at 22 n. 6 ("Although Justice Brown's opinion was designated an 'opinion of the Court' . . . a reporter's note indicates that no opinion commanded a majority of the Court . . . .") (citations omitted).)

absolute obedience to Supreme Court holdings—this court must determine which opinion in *Downes* controls. "A plurality opinion is one that doesn't garner enough appellate judges' votes to constitute a majority, 'but has received the greatest number of votes of any opinion filed,' among those opinions supporting the mandate." Garner at 195. The opinion of Justice White is the plurality opinion in *Downes* because, of those supporting the result, it accumulated the most votes. Justice White's plurality opinion "isn't necessarily the opinion entitled to precedential effect, however." Garner at 196.

"Ordinarily, where 'a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds.'" *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (quoting *Marks v. United States,* 430 U.S. 188, 193 (1977)); *see also* Garner at 199 ("The prevailing approach for determining the rule that emerges from a plurality decision was established in the 1977 case of *Marks v. United States*."). This rule, known as the *Marks* rule, is important for lower courts because "vertical precedent is absolute, making it important that lower courts properly understand and apply this essential rule." Garner at 202.

But "[w]hen the plurality and concurring opinions take distinct approaches, and there is no 'narrowest opinion' representing the 'common denominator of the Court's reasoning,' then *Marks* becomes 'problematic.'" *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (citations omitted). As discussed above, at the outset of his opinion, Justice White noted that his reasons for concurring with Justice Brown were "different from, if not in conflict with those expressed in" Justice Brown's opinion. *Downes*, 182 U.S. at 287 (White, J., concurring). Determining *Downes*' narrowest opinion would be difficult in this case. But as

explained below, the court need not determine which of *Downes*' opinions is the narrowest because the Supreme Court has, since *Downes*, provided authoritative guidance regarding which opinion controls.

The *Marks* rule is less important for the Supreme Court than it is for lower courts. *See* Garner at 202 ("The *Marks* rule is somewhat less important for the Supreme Court itself that it is for lower courts."). "The Supreme Court—applying horizontal precedent—has flexibility to interpret, clarify, or refashion its precedents . . . ." *Id*. Approximately twenty-one years after *Downes* was decided, a unanimous Supreme Court clarified that "the opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

Based on the Supreme Court's guidance in *Balzac*, this court accepts that Justice White's opinion has been elevated to the controlling opinion of the splintered *Downes* decision. *See* Garner at 233 ("Approval by a higher court can enhance the authority of an opinion that probably wouldn't otherwise be followed, such as . . . an opinion that simply appears weak in its reasoning."); *see id*. ("To justify reliance on a case, a court may note that other courts have cited it approvingly."). This court finds it unnecessary to engage in the *Marks* analysis. The court therefore examines Justice White's concurring opinion to determine if it controls the outcome of this case.

In his concurring opinion, Justice White articulated the "sole and only issue:" "whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" *Downes*, 182 U.S. at 299 (White, J., concurring). Before reaching the answer to the

question presented, he expressed his view that it "is self-evident" that "the Constitution is operative" "[i]n the case of the territories." *See id*. at 292. For Justice White, the question was not whether the Constitution applies to Puerto Rico, but whether the *specific* provision of the Constitution "relied on is applicable." *See id*.[29]

Justice White's holding was limited to the specific Constitutional provision at issue—the Uniformity Clause. *See Downes*, 182 U.S. at 341–42 (White, J. concurring). He held that because Puerto Rico "had not been incorporated into the United States," it was within Congress' authority to pass an act taxing goods coming from Puerto Rico because Congress was not bound by the Uniformity Clause. *See id*. This is so, he held, because that specific "provision of the Constitution"—the Uniformity Clause "was not applicable to Congress in legislating Porto Rico." *Id*. at 342.[30] Thus, it is undisputed that Justice White's holding was limited to the Uniformity Clause.

Despite the limited question presented, and Justice White's limited holding, the Government relies on Justice White's statements related to citizenship.[31] More specifically, the

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[29] *Downes*, 182 U.S. at 292 (White, J. concurring) ("In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.").

[30] *See Downes*, 182 U.S. at 341–42 ("The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, **the provision of the Constitution just referred** to was not applicable to Congress in legislating for Porto Rico." (bold added).).

[31] The Government also relies extensively on the opinion of Justice Brown. (*See* ECF No. 66 at 20; 22–23; 25–26; 31; 36.) As explained above, the opinion of Justice Brown does not control this court. But even if it did, his commentary on citizenship would amount to mere dicta. His discussion on citizenship is not legal reasoning that is necessary to his ultimate conclusion. Apart from Justice Brown's agreement with the Supreme Court's ultimate conclusion, this court owes no obedience to his opinion. Justice Brown's digression related to citizenship is largely premised on notions of white supremacy that the Supreme Court has long ago rejected. Unbounded by the strict requirements of vertical stare decisis, this court rejects Justice Brown's opinion.

Government quotes Justice White's statement that "[t]he right to acquire territory 'could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States.'" (ECF No. 66 at 23 (quoting *Downes*, 182 U.S. at 306 (White, J., concurring)); *see also* ECF No. 66 at 22 n. 6). As explained below, Justice White's statement relating to citizenship is dicta—and as such, this court is not bound to follow its reasoning.

Justice White's statement relating to citizenship must be read in context. Justice White was addressing an argument that all territory acquired by the United States is automatically fully incorporated into the United States—meaning "every provision" of the Constitution would apply in full. *See Downes*, 182 U.S. at 305–06 (White, J. concurring).[32] He rejected that argument, insisting that "acquired territory," in the absence of" an agreement to the contrary, bears "such relation to the acquiring government" as determined by the acquiring government. *Id*. at 306. He then stated that the United States, as a member of "the family of nations" possesses full authority to acquire territory. *See id*. He then continued:

> ***Let me illustrate the accuracy of this statement***. Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an *uncivilized race*, yet rich in soil, and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States.
>
> *Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States* and to subject them, not only to local, but also to an equal proportion of national, taxes, even although the consequence would be to entail ruin on the discovered territory, and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and *the immediate bestowal of citizenship on those absolutely unfit to receive it*?

[32] *Downes*, 182 U.S. at 305–06 (White, J. concurring) ("It is insisted, however, conceding the right of the government of the United States to acquire territory, as all such territory when acquired becomes absolutely incorporated into the United States, every provision of the Constitution which would apply under that situation is controlling in such acquired territory. This, however, is but to admit the power to acquire, and immediately to deny its beneficial existence.").

The practice of the government has been otherwise.

Downes, 182 U.S. at 305–06 (White, J. concurring) (emphases added).

Justice White's "illustration" relating to citizenship was a digression concerning a "legal proposition not necessarily involved nor essential to determination of the case in hand." *United States v. Barela*, 797 F.3d 1186, 1190 (10th Cir. 2015). Justice White's "illustration" was dicta. It was "merely [a] remark[] made in the course of a decision, but not essential to the reasoning behind that decision." Garner at 44. As dicta, it is not binding on this court.

To be sure, the Tenth Circuit has "previously held" that it is "'bound by Supreme Court dicta *almost* as firmly as by the Courts' outright holdings, particularly when the dicta is recent and not enfeebled by later statements.'" *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (emphasis added) (citation omitted). But this court is not bound by *Downes*' dicta because the principles of vertical stare decisis require this court to give priority to the Supreme Court's holdings over its dicta—and, explained above, *Wong Kim Ark's* holding is binding. Second, *Downes*' dicta do not squarely relate to the holding itself and are therefore "assuredly . . . gratuitous." *See id*. Third, the Supreme Court has, since *Downes*, thoroughly rejected the bigoted premise upon which Justice White's dicta is founded—that some groups are inferior to others based simply on their race. *See e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 272 (1995) ("the Constitution and [the Supreme] Court . . . abide no measure 'designed to maintain White Supremacy.'") (citation omitted).

To summarize, because *Downes* did not construe the Citizenship Clause, and because the controlling opinion's statements in *Downes* related to citizenship are not binding on this court, *Downes* does not control the outcome of this case.

C. This Court Must Read *Wong Kim Ark* and *Downes* Harmoniously

At oral argument Plaintiffs did not dispute that, under the *Insular Cases*, American Samoa is considered an unincorporated territory. Justice White's controlling opinion in *Downes* that Puerto Rico, having "not been incorporated into the United States," could not be considered to be "an integral part of the United States" for purposes of the Uniformity Clause is a persuasive argument that American Samoa, as an unincorporated territory, is not "in the United States" for purposes of the Citizenship Clause.

But as explained above, under *Wong Kim Ark* this court *must* apply the English common law rule for citizenship to determine whether American Samoa is "in the United States" for purposes of the Citizenship Clause. And, as explained above, the application of that rule requires this court to hold that American Samoa is in the United States. This outcome results in an incongruity that the Government has identified in its briefing. (*See* ECF No. 79 at 11 ("Plaintiffs have provided no principled justification for holding that unincorporated territories are 'in the United States' for purposes of the Citizenship Clause, even though the Supreme Court has held that unincorporated territories are *not* a part of 'the United States,' for purposes of the Tax Uniformity Clause.") (emphasis in original).) It is not for this court to explain this incongruity. That is a task for the Supreme Court. This court's role is simply to faithfully apply binding precedent.

"A court considering discordant decisions must first determine whether the perceived conflict between them is real." Garner at 300. "If at all possible, the opinions should be harmonized." *Id*. "Lower courts almost uniformly adhere to the rule that the most recent opinion of the high court within the jurisdiction is to be followed." *Id*. at 301. "The lower court will examine whether the later case overruled all or part of an earlier case." *Id*. "If the overruling was

express, then its task is easy." *Id*. "If the overruling was thought to be tacit, things get more difficult." *Id*. "Before a lower court makes the assumption of a tacit overruling, it will want to exhaust all possibilities of reconciling the two decisions—perhaps even assuming that the highest court may not adopt just one of the decisions if confronted with the question but may instead reconcile the decisions by thoughtfully distinguishing them." *Id*. at 301–02.

None of the *Insular Cases* ever expressly overruled *Wong Kim Ark*. This court declines to assume that *Wong Kim Ark* was tacitly overruled. Instead, this court, in pursuit of its duty-bound obedience to Supreme Court precedent, harmonizes *Wong Kim Ark* and the *Insular Cases*. This court concludes that whether an unincorporated territory is "in the United States" for purposes of the Citizenship Clause is a different question than whether an unincorporated territory is "part of the United States" for purposes of the Uniformity Clause.

This outcome is not foreclosed by the *Insular Cases*. "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." *See Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). "The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to [unincorporated territories] when we went there, but *which ones of its* ***provisions*** *were applicable* by way of limitation upon the exercise of . . . legislative power in dealing with new conditions and requirements." *See id*. (emphases added). As discussed above, Justice White's controlling opinion in *Downes* was limited to the specific provision at issue in that case. This court, harmonizing the *Insular Cases* with *Wong Kim Ark*, holds that the Citizenship Clause of the Fourteenth Amendment is a Constitutional provision that is applicable to American Samoa.

American Samoans owe permanent allegiance to the United States. They are therefore "subject to the jurisdiction" of the United States. American Samoa is a territory that is within the dominion of the United States. It is therefore "in the United States." Plaintiffs, 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.

Because the Citizenship Clause applies to Plaintiffs, Congress has no authority to deny them citizenship. *C.f. Wong Kim Ark*, 169 U.S. at 703 ("The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, 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.").

D. *Wong Kim Ark's* Holding Requires this Court to Reject the Intervenors' Arguments

As discussed above, in addition to the arguments the Government makes, Intervenors argue that this court "should dismiss the complaint for at least two additional reasons . . . ." (ECF No. 89 at 7.) First, Intervenors argue that "imposition of citizenship by judicial fiat would fail to recognize American Samoa's sovereignty and the importance of the *fa'a Samoa*. (ECF No. 89 at 15.) *Fa'a Samoa* is "the Samoan way of life." (ECF No. 89 at 7.) Second, they argue that "imposition of citizenship over American Samoan's objections violates fundamental principles of self-determination." (ECF No. 89 at 15.) They argue that the "imposition of a compact of citizenship, directly conflicting with the will of the American Samoan people," would intrude upon the autonomy of American Samoa. (*See* ECF No. 89 at 21.)

In response, this court is not imposing "citizenship by judicial fiat." The action is required by the mandate of the Fourteenth Amendment as construed and applied by Supreme Court precedent. Further, Plaintiffs are American Samoans. They brought this action seeking to

realize their rights to citizenship under the Fourteenth Amendment. Intervenors cannot be said to represent the will of all American Samoans. Additionally, in its amicus brief, the Samoan Federation of America, Inc. argues that the American Samoan government's "elected officials' concerns that birthright citizenship presents a threat to American Samoan self-determination or cultural preservation are misplaced." (ECF No. 55 at 29.)

It is not this court's role to weigh in on what effect, if any, a ruling in Plaintiffs' favor may have on *Fa'a Samoa*. This court must apply binding precedent. As explained in length above, *Wong Kim Ark*'s holding is binding on this court. This court has no choice but to deny Intervenors' Motion.

Conclusion

I. The Government's Motion to Dismiss, (ECF No. 66) is DENIED.

II. The Intervenors' Motion to Dismiss, (ECF No. 89) is DENIED.

III. Plaintiffs' Motion for Summary Judgment, (ECF No. 30) is GRANTED.

a. Persons born in American Samoa are citizens of the United States by virtue of the Citizenship Clause of the Fourteenth Amendment. 8 U.S.C. § 1408(1) is unconstitutional both on its face and as applied to Plaintiffs.

b. The court enjoins Defendants from enforcing 8 U.S.C. § 1408(1). Defendants shall not imprint Endorsement Code 09 in Plaintiffs' passports. Defendants shall issue new passports to Plaintiffs that do not disclaim their U.S. citizenship.

c. Any State Department policy that provides that the citizenship provisions of the Constitution do not apply to persons born in American Samoa violates the Fourteenth Amendment.

d. Defendants are enjoined from enforcing any Department of State Foreign Affairs Manual provision that provides that the citizenship provisions of the Constitution do not apply to persons born in American Samoa.

e. Defendants' practice and policy of enforcing 8 U.S.C. § 1408(1) through imprinting Endorsement Code 09 in the passports of persons born in American Samoa is contrary to constitutional right and is not in accordance with law. Pursuant to 5 U.S.C. § 706(2), Defendants are enjoined from further enforcement of that practice and policy.

SO ORDERED this 12th day of December, 2019.

BY THE COURT:

Clark Waddoups
United States District Judge

Exhibit B

FILED
United States Court of Appeals
Tenth Circuit

June 15, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN FITISEMANU; PALE TULI; ROSAVITA TULI; SOUTHERN UTAH PACIFIC ISLANDER COALITION,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; ANTONY BLINKEN, in his official capacity as Secretary of the U.S. Department of State; IAN G. BROWNLEE, in his official capacity as Assistant Secretary of State for Consular Affairs,*

Defendants - Appellants,

and

THE HONORABLE AUMUA AMATA; AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants - Appellants.

VIRGIN ISLANDS BAR ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION; ACLU OF UTAH; LINDA S. BOSNIAK; KRISTIN COLLINS; STELLA BURCH ELIAS; SAM ERMAN; TORRIE

Nos. 20-4017 & 20-4019

* Pursuant to Fed. R. App. P. 43(c)(2) Rex W. Tillerson is replaced by Antony Blinken, and Carl C. Risch is replaced by Ian G. Brownlee as appellants in this case.

HESTER; POLLY J. PRICE; MICHAEL RAMSEY; NATHAN PERL-ROSENTHAL; LUCY E. SALYER; KATHERINE R. UNTERMAN; CHARLES R. VENATOR-SANTIAGO; SAMOAN FEDERATION OF AMERICA, INC.; RAFAEL COX ALOMAR; J. ANDREW KENT; GARY S. LAWSON; SANFORD V. LEVINSON; CHRISTINA DUFFY PONSA-KRAUS; STEPHEN I. VLADECK; CONGRESSWOMAN STACEY PLASKETT; CONGRESSMAN MICHAEL F.Q. SAN NICOLAS; CARL GUTIERREZ; FELIX P. CAMACHO; JUAN BABAUTA; DR. PEDRO ROSSELLO; ANIBAL ACEVEDO VILA; LUIS FORTUNO; JOHN DE JONGH; KENNETH MAPP; DONNA M. CHRISTIAN-CHRISTENSEN,

Amici Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 1:18-CV-00036-CW)

Joseph H. Hunt, Assistant Attorney General, Washington, DC (John W. Huber, United States Attorney, Salt Lake City, UT, Sharon Swingle, Attorney, and Brad Hinshelwood, Attorney, United States Department of Justice, Washington, DC with him on the briefs) for Defendants-Appellants.

Michael F. Williams, Kirkland & Ellis LLP, Washington, DC (Kathleen A. Brogan, Britney A. Lewis, Lauren N. Beebe, and Thomas S. Vaseliou, Kirkland & Ellis LLP, Washington, DC with him on the briefs) for Intervenor Defendants-Appellants.

Matthew D. McGill, Gibson, Dunn & Crutcher LLP, Washington, DC (Jacob T. Spencer, Jeremy M. Christiansen, and John H. Heyburn, Gibson, Dunn & Crutcher LLP, Washington, DC, Steven S. Rosenthal and Neil C. Weare, Loeb & Loeb LLP, Washington, DC, and Charles V. Ala'ilima, The Law Offices of Charles V. Ala'ilima, PLLC, Nu'uuli, AS with him on the brief) for Plaintiffs-Appellees.

David M. Zionts, Covington & Burling LLP, Washington, DC (Patricio Martínez-Llompart, Cristina Álvarez, and Nandini Singh, Covington & Burling LLP, Washington, DC with him on the brief) for *amici curiae* Representatives of Guam, the Northern Mariana Islands, Puerto Rico, and the US Virgin Islands.

Paul R.Q. Wolfson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC (Andres C. Salinas, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC with him on the brief) for *amici curiae* Constitutional Law Scholars.

Adriel I. Cepeda Derieux, American Civil Liberties Union, New York, NY (Alejandro A. Ortiz and Celso Javier Perez, American Civil Liberties Union, New York, NY, and John Mejia, Brittney Nystrom, and Valentina De Fex, ACLU of Utah, Salt Lake City, UT with him on the brief) for *amici curiae* American Civil Liberties Union and ACLU of Utah.

David A. Perez, Perkins Coie LLP, Seattle, WA (Aaron J. Ver, Perkins Coie LLP, San Francisco, CA with him on the brief) for *amicus curiae* Samoan Federation of America, Inc.

Dwyer Arce, Kutak Rock LLP, Omaha, NE for *amicus curiae* Virgin Islands Bar Association.

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge, and **BACHARACH**, Circuit Judge.

LUCERO, Senior Circuit Judge.

For over a century, the land of American Samoa has been an American territory, but its people have never been considered American citizens. Plaintiffs, three citizens of American Samoa, asked the district court in Utah to upend this long-standing arrangement and declare that American Samoans have been citizens from the start. The district court agreed and so declared. Appellants, the United States federal government joined by the American Samoan government and an individual representative acting as intervenors, ask us to reverse the district court's decision.

We conclude that neither constitutional text nor Supreme Court precedent demands the district court's interpretation of the Citizenship Clause of the Fourteenth Amendment.

We instead recognize that Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands, and that the courts play but a subordinate role in the process. We further understand text, precedent, and historical practice as instructing that the prevailing circumstances in the territory be considered in determining the reach of the Citizenship Clause. It is evident that the wishes of the territory's democratically elected representatives, who remind us that their people have not formed a consensus in favor of American citizenship and urge us not to impose citizenship on an unwilling people from a courthouse thousands of miles away, have not been taken into adequate consideration. Such consideration properly falls under the purview of Congress, a point on which we fully agree with the concurrence. These circumstances advise against the extension of birthright citizenship to American Samoa. We reverse.

I

American Samoa is one of several unincorporated territories[1] of the United States. It is the only one whose inhabitants are not birthright American citizens.

[1] An "unincorporated territory" is a territory "not intended for statehood." Commonwealth of N. Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984). These unincorporated territories have received separate and distinct legal treatment as compared to incorporated territories from the outset. It is precisely at this initial phase of territorial evaluation where my respected colleague in the dissent goes astray in

Congress has conferred American citizenship on the peoples of all other inhabited unincorporated territories—Puerto Rico, Guam, the U.S. Virgin Islands, and others—but not the people of American Samoa. American Samoans are instead designated by statute "nationals, but not citizens, of the United States." 8 U.S.C. § 1408.

As a result, American Samoans are denied the right to vote, the right to run for elective federal or state office outside American Samoa, and the right to serve on federal and state juries. They are, however, entitled to work and travel freely in the United States and receive certain advantages in the naturalization process. Plaintiffs, three American Samoans who are now residents of Utah but remain "non-citizen nationals" of the United States, contend that this arrangement violates the Citizenship Clause of the Fourteenth Amendment.[2] They seek American citizenship on the basis of their birth in American Samoa. Opposing them is the United States government, which argues the Citizenship Clause does not extend so broadly as to encompass unincorporated territories. Also in opposition are the intervenor-defendants ("Intervenors"), elected officials representing the government of American Samoa, who argue that not only is the current arrangement constitutional, but that imposition

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conflating incorporated territories destined for statehood with unincorporated territories. The distinction between incorporated and unincorporated territories was announced in Downes v. Bidwell, 182 U.S. 244 (1901) and carried forward in subsequent Supreme Court cases. See id. at 311-13 (White, J., concurring); see also, e.g., Dorr v. United States, 195 U.S. 138, 143 (1904); United States v. Verdugo-Urquidez, 494 U.S. 259, 268-69 (1990).

[2] The Citizenship Clause states, "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." U.S. Const. amend. XIV, § 1, cl. 1.

of birthright citizenship would be against their people's will and would risk upending certain core traditional practices.

We preliminarily review two topics in more depth: A) the relevant history and characteristics of American Samoa; and B) the history of American citizenship as it has been applied to American territories.

A

American Samoa encompasses the eastern islands of an archipelago located in the South Pacific, approximately 2,500 miles due south of Hawaii. Its current population is 49,437; another 204,640 individuals of Samoan descent live in the United States. In 1900, its tribal leaders ceded sovereignty to the American government. See 48 U.S.C. § 1661. The documents effectuating this cession did not specify how the territory would be governed, and were silent on whether American Samoans were, or would ever be, American citizens.[3] Since then, American Samoans have owed "permanent allegiance" to the United States but have never been American citizens. 8 U.S.C. § 1101(21), (22).

Not unlike other colonial relationships, the nature of the relationship between American Samoa and the United States is contested. The traditional view is that the relationship has been largely amicable. According to this narrative, American Samoa voluntarily ceded sovereignty to the United States, and the United States has since provided protection from external interference while largely staying out of the

[3] See Cession of Tutuila and Aunu'u, Apr. 17, 1900, in Papers Relating to the Foreign Relations of the United States, 1929, vol. I, doc. 853 (1943).

internal affairs of the territory. See, e.g., U.S. Dep't of State, U.S. Relations with American Samoa (2020). More recent scholarship has questioned this account, arguing that the relationship has been built more on domination than friendship. See, e.g., Kirisitina Gail Sailiata, The Samoan Cause: Colonialism, Culture, and the Rule of Law (2014) (Ph.D. dissertation, University of Michigan). Whatever the origin, there is no doubt that the relationship has profoundly influenced the culture of American Samoa. American Samoans have particularly high enlistment rates in the American military, for example, and its constitution recognizes freedom of speech, freedom of religion, due process of law, and other basic civil rights. Revised Const. of Am. Samoa art. I, §§ 1–16.

Notwithstanding these cultural imprints, the people of American Samoa have maintained a traditional and distinctive way of life: the fa'a Samoa. It is this amalgam of customs and practices that Intervenors argue would be threatened if birthright citizenship were imposed. For example, the social structure of American Samoa is organized around large, extended families called 'aiga. These families are led by matai, holders of hereditary chieftain titles. The matai regulate the village life of their 'aiga and are the only individuals permitted to serve in the upper house of the American Samoan legislature. Land ownership is predominantly communal, with more than 90% of American Samoan land belonging to the 'aiga rather than to any one individual. According to one local official, "Cultural identity is the core basis of the Sāmoan people, and communally owned lands are the central foundation that will allow our cultural identity to survive in today's world." Line-Noue Memea Kruse,

The Pacific Insular Case of American Sāmoa 2 (2018). There are also racial restrictions on land ownership requiring landowners to be at least 50% American Samoan. Am. Samoa Code Ann. § 37.0204(a)–(b). Intervenors worry that these and other traditional elements of the American Samoan culture could run afoul of constitutional protections should the plaintiffs in this case prevail.

Citizenship has been a contested issue in American Samoa since its cession to the United States. When the American Samoan people first learned they were not considered American citizens, many advocated for citizenship. This effort culminated in the creation of the American Samoan Commission in 1930, which subsequently recommended that Congress grant citizenship to the people of the territory. The United States Senate passed legislation to this effect, but the effort failed in the House.

Public opinion among American Samoans appears to have shifted, with the elected government of American Samoa intervening in this case to argue against "citizenship by judicial fiat." Limited evidence exists regarding American Samoan public opinion on the question of birthright citizenship, but what little evidence there is suggests Intervenors are not out of step with the people they represent. According to a 2007 report commissioned by the American Samoan government, "Public views expressed to the Commission indicate the anti-citizenship attitude remain[s] strong . . . ." The Future Political Status Study Comm. of Am. Sam., Final Report 64 (Jan. 2007) (on file with Tenth Circuit Library). The position taken by the American

Samoan elected representatives appears to be a reliable expression of their people's attitude toward citizenship.

B

Early American attitudes toward what we now call citizenship developed in the context of English law regarding the relationship between monarch and subject. "England's law envisioned various types of subjectship, . . . all [of which] mirrored permanent hierarchical principles of the natural order." James H. Kettner, The Development of American Citizenship, 1608-1870 8 (1978). "The conceptual analogue of the subject-king relationship was the natural bond between parent and child." Id. Due to concerns that were "preeminently practical," "colonial attitudes slowly diverged from those of Coke[4] and his English successors," with "little attention [ ] paid to doctrinal consistency." Id. at 8–9. Animating this divergence were not only practical considerations but also the emerging American maxim that "the tie between the individual and the community was contractual and volitional, not natural and perpetual." Id. at 10. The colonists "ultimately concluded that all allegiance ought to be considered the result of a contract resting on consent." Id. at 9. "This idea shaped their response to the claims of Parliament and the king, legitimized their withdrawal from the British empire, . . . and underwrote their creation of independent governments." Id. at 10. A model of citizenship based on consent is imbued in our founding documents.

[4] "Coke" refers to Sir Edward Coke, whose opinion in Calvin's Case, 77 Eng. Rep. 377 (1608) would shape the English law of subjectship for centuries to come.

The precise scope of citizenship was left unclear. Though the term "citizen" was used repeatedly, the Constitution did not define its meaning. See William Rawle, A View of the Constitution of the United States of America 85 (2d ed. 1829). This left two competing views. According to one, national citizenship was predicated on state citizenship—a person had to be a citizen of a state in order to be a citizen of the United States. See Slaughter-House Cases, 83 U.S. 36, 72–73 (1872). Under the contrary view, national citizenship attached to people born in the United States directly, meaning people born in the territories as the country pushed westward were American citizens. See id. The way courts approached citizenship vacillated, with neither view becoming dominant until the Citizenship Clause ended the debate in favor of national citizenship as a standalone guarantee not requiring state citizenship. See id.

But while the legal question remained murky, one aspect of the nation's approach to American citizenship in the territories was always clear: it was not extended by operation of the Constitution. While "there was no consistent policy to define the nationality status of the inhabitants of U.S. territories and possessions," citizenship generally came from some kind of ad hoc legal procedure—"treaties, acts of Congress, administrative rulings, and judicial decisions"—rather than as an automatic individual right guaranteed by the Constitution. Charles Gordon et al., 7

Immigration Law and Procedure § 92.04[1][a] (2020).[5] This flexibility in the territories with regards to citizenship was but one example of the broader approach the political and judicial branches applied to the territories. "[E]arly decisions on territorial acquisition seemed to assert that whether a particular geographic location was within or without the United States was a question that had, in essence, two answers. . . . [T]erritory could be sovereign American soil for some purposes, yet still be foreign for others." Kal Raustiala, Does the Constitution Follow the Flag? 46 (2009). The 1848 Treaty of Guadalupe Hidalgo and the 1867 Cession of Alaska, the country's most recent territorial acquisitions at the time of the ratification of the Fourteenth Amendment, show that citizenship was not assumed to automatically extend with sovereignty. See Treaty of Peace, Friendship, Limits and Settlement

[5] See, e.g., American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828). In this case, the Supreme Court addressed the status of Florida's inhabitants upon Spain's cession of Florida to the United States via treaty. Following the cession, Florida's inhabitants were "admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States," but only because the treaty effectuating that cession so provided. Id. at 542 (quotation omitted). The inhabitants "[would] not, however participate in political power" or "share in the government, till Florida shall become a state." Id. In the United States' most significant territorial expansions of the nineteenth century, citizenship was typically decided by treaty provisions. See, e.g., Cession of Louisiana, Fr.-U.S., art. III, Apr. 30, 1803, 8 Stat. 200; Treaty of Peace, Friendship, Limits and Settlement (Treaty of Guadalupe Hidalgo), Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922 (providing that Mexican citizens remaining in lands ceded to the United States must elect either American or Mexican citizenship within one year of the treaty's ratification); Cession of Alaska, U.S.-Russ., art. III, Mar. 30, 1867, 15 Stat. 539 ("The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States . . . .").

(Treaty of Guadalupe Hidalgo), Mex.-U.S., art. VIII, Feb. 2, 1848, 9 Stat. 922; Cession of Alaska, U.S.-Russ., art. III, Mar. 30, 1867, 15 Stat. 539.

In 1898, the United States acquired significant overseas territories in the wake of the Spanish-American War. There was quickly a practical necessity to determine the citizenship status of the inhabitants of these territories. See Boumediene v. Bush, 553 U.S. 723, 756 (2008). Congress filled the void. Ever since, every extension of citizenship to inhabitants of an overseas territory has come by an act of Congress. See Tuaua v. United States, 788 F.3d 300, 308 n.7 (D.C. Cir. 2015). Without such an act, no inhabitant of an overseas territory has ever been deemed an American citizen by dint of birth in that territory.[6] Plaintiffs in this case argue these acts of Congress were unnecessary because, properly interpreted, the Citizenship Clause of the Fourteenth Amendment already guaranteed birthright citizenship to these territorial inhabitants. But it cannot be disputed that this interpretation would contradict the consistent practice of the American government since our nation's founding: citizenship in the territories comes from a specific act of law, not from the Constitution.

II

At the outset, we must decide which of two lines of precedent will guide our analysis. The choices before us are the Insular Cases, a string of Supreme Court

[6] See Rogers M. Smith, The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century, in Reconsidering the Insular Cases 103, 110–13 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (reviewing the history of citizenship in American territories).

decisions issued at the turn of the twentieth century that addressed how the Constitution applies to unincorporated territories, and United States v. Wong Kim Ark, 169 U.S. 649 (1898), a case in which the Supreme Court considered the Citizenship Clause's guarantee of birthright citizenship to those born in the United States.

We proceed in three parts. Part A discusses the Insular Cases from their origin to their modern interpretation and application. Part B reviews Wong Kim Ark, the precedent principally relied on by the district court in its analysis. Part C explains why the Insular Cases supply the correct framework for application of constitutional provisions to the unincorporated territories, and therefore why the district court erred by relying on Wong Kim Ark.

A

Issued between 1900 and 1922, the Insular Cases[7] were a string of Supreme Court opinions that addressed a basic question: when the American flag is raised over an overseas territory, does the Constitution follow?[8] In his concurrence in what became Insular's seminal case, Downes v. Bidwell, 182 U.S. 244 (1901), Justice

[7] A name derived from the Department of War's Bureau of Insular Affairs, which administered the relevant islands at the time. For a list of the opinions that comprise the Insular Cases, see Ballentine v. United States, 2001 WL 1242571, at *5 n.11 (D.V.I. Oct. 15, 2001).

[8] Raustiala, supra, at 80. With the United States' entry into the imperial arena following its 1898 acquisition of the Philippines after the Spanish-American War, this question was suddenly pressing and of significant popular interest. See id. at 81 ("Reports of the time describe that unprecedented crowds gathered before the Supreme Court when the [first Insular] decision was announced.").

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." Id. at 293. 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. See id. at 306. 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." Balzac v. Porto Rico, 258 U.S. 298, 305 (1922). The proposition the Insular Cases came to stand for is that constitutional provisions apply only if the circumstances of the territory warrant their application.

The Insular Cases have become controversial. They are criticized as amounting to a license for further imperial expansion and having been based at least in part on racist ideology. These cases "facilitated the imperial ambitions of turn of the century America while retaining a veneer of commitment to constitutional self-government." Raustiala, supra, at 86. See also Igartúa de la Rosa v. United States, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting) (describing the Insular Cases as "anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda"). This facilitation was an explicit concern of the Court in the Insular Cases. See, e.g., Downes, 182 U.S. at 286 ("A false step at this time might be fatal to the development of . . . the American Empire.").

Not only is the purpose of the Insular Cases disreputable to modern eyes, so too is their reasoning. The Court repeatedly voiced concern that native inhabitants of the unincorporated territories were simply unfit for the American constitutional regime. For example, in Downes, Justice White found it self-evident that citizenship could not be automatically extended to "those absolutely unfit to receive it." Id. at 306. Justice Brown, meanwhile, suggested that "differences of race" raised "grave questions" about the rights that ought to be afforded to native inhabitants. Id. at 282, 287. Plaintiffs and their supporting amici view this ignominious history as militating against application of the Insular Cases to the case before us.

Yet the Supreme Court has continued to invoke the Insular framework when it has grappled with questions of constitutional applicability to unincorporated territories. In Reid v. Covert, 354 U.S. 1 (1957), Justice Harlan "read the Insular Cases to teach that whether a constitutional provision has extraterritorial effect depends upon the 'particular circumstances, the practical necessities, and the possible alternatives which Congress had before it' and, in particular, whether judicial enforcement of the provision would be 'impracticable and anomalous.'" Boumediene, 553 U.S. at 759 (quoting id. at 74-75). "Impracticable and anomalous" has since been employed as the standard for determining whether a particular constitutional guarantee is applicable abroad. See United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring). More recently, in Boumediene, Justice Kennedy summarized the lessons of the Insular Cases as follows: "[T]he Court devised in the Insular Cases a doctrine that allowed it to use

its power sparingly and where it would be most needed." 553 U.S. at 759. Insular's framework was not to be left in the past; instead, "[t]his century-old doctrine informs our analysis in the present matter." Id. Tying together the Insular precedents, wrote Justice Kennedy, is "a common thread": "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id. at 764.

Notwithstanding its beginnings, the approach developed in the Insular Cases and carried forward in recent Supreme Court decisions can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories. "[S]cholars, and increasingly federal judges, have lately recognized the opportunity to repurpose the [Insular] framework in order to protect indigenous culture from the imposition of federal scrutiny and oversight." Developments in the Law – The U.S. Territories, 130 Harv. L. Rev. 1616, 1680 (2017). See also Ian Falefuafua Tapu, Comment, Who Really is a Noble? The Constitutionality of American Samoa's Matai System, 24 U.C.L.A. As. Pac. Am. L.J. 61, 79 (2020); Russell Rennie, Note, A Qualified Defense of the Insular Cases, 92 N.Y.U. L. Rev. 1683, 1706-13 (2017). The flexibility of the Insular Cases' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution. This same flexibility permits courts to defer to the preferences of indigenous peoples, so that they may chart their own course.

B

Published just three years before the first of the Insular Cases, United States v. Wong Kim Ark, 169 U.S. 649 (1898) is the alternative candidate for a governing precedent in this case. Wong Kim Ark concerned a man who was born in the state of California to two non-citizen parents who had immigrated from China. After Wong tried to return to San Francisco following a visit to China, he was denied reentry because he was deemed not a citizen on account of his parents' Chinese citizenship. The Supreme Court declared the denial unconstitutional. It explained that the Citizenship Clause of the Fourteenth Amendment "must be interpreted in the light of the common law," under which the doctrine of jus soli ("right of soil"), rather than jus sanguinis ("right of blood"), applies. Id. at 654. "The fundamental principle of the common law with regard to English nationality was birth within the allegiance. . . . The principle embraced all persons born within the king's allegiance, and subject to his protection." Id. at 655. Determining Wong was a citizen, the Supreme Court held, "The fourteenth amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country . . . ." Id. at 693.

Though Wong Kim Ark was about a man born in California, the district court below considered its holding binding on the applicability of the Citizenship Clause to unincorporated territories such as American Samoa. It reached this conclusion by way of two predicates. First, Wong Kim Ark instructed that the Constitution "must be interpreted in the light of the common law." Id. at 654. Second, under the

English common law and as expounded in the leading case on the issue, Calvin's Case, 77 Eng. Rep. 377 (1608),[9] all persons born "within the king's allegiance, [ ] subject to his protection, . . . [and] within the kingdom" were "natural-born subjects." Wong Kim Ark, 169 U.S. at 655. From these predicates, the district court reasoned, "American Samoa is within the dominion of the United States because it is a territory under the full sovereignty of the United States," and so American Samoa is "'in the United States' for purposes of the Fourteenth Amendment."

Our interpretation of Wong Kim Ark differs in several respects from that of the district court's. Most notably, we do not understand Wong Kim Ark as commanding that we "must apply the English common law rule for citizenship to determine" the outcome of this case, as the district court phrased it. Wong Kim Ark never went so far. Instead, Wong Kim Ark instructs us that the Citizenship Clause, as with the rest of the Constitution, "must be interpreted in the light of the common law." 169 U.S. at 654 (emphasis added). We take the general meaning of "in the light of" to mean "in context, through the lens of, or taking into consideration." It is a phrase that introduces persuasive, not binding, authority. Wong Kim Ark therefore tells us to consider the common law in hopes that it sheds light on the constitutional question before us. It does not incorporate wholesale the entirety of English common law as governing precedent.

[9] Calvin's Case held that, following the unification of the kingdoms of England and Scotland, the Scottish had become full subjects of the English kingdom: "[W]hosoever is born within the fee of England, though it be another kingdom, was a natural-born subject." 77 Eng. Rep. at 403.

English common law, especially Calvin's Case, was apparently persuasive to the Supreme Court in Wong Kim Ark, but there is reason to question its applicability to this case. Both Calvin's Case and Wong Kim Ark centered around the requirement of "allegiance" for citizenship; the crux of this case concerns what falls within the category of "within the dominion," a separate requirement for citizenship. The essence of Lord Coke's reasoning in Calvin's Case concerned whether it mattered for subjectship purposes that Scotsmen owed allegiance to King James as the King of Scotland rather than in his capacity as the King of England. Lord Coke concluded that this distinction did not matter, that a Scotsman was an English subject once he owed allegiance to King James in any of his royal capacities. See Kettner, supra, at 20-22. Wong Kim Ark likewise only concerned allegiance—there could have been no argument that Wong was born outside American territory, having been born in the state of California. The only argument made against Wong's American citizenship was that Wong did not owe allegiance to the United States because of his parents' Chinese citizenship. In rejecting this argument, the Supreme Court looked to Lord Coke's analysis of the concept of allegiance. It had no occasion to consider, much less endorse, any aspect of the English common law's approach to defining the scope of the monarch's dominion.[10]

[10] Furthermore, English law came to make some of the same distinctions between the citizenship status of its imperial subjects that Plaintiffs now contend violate bedrock principles of English common law. As the British empire expanded to more distant territories, the simple maxim that birth within the allegiance and dominion of the empire conferred full subjectship gave way to a more variegated

That scope is precisely the crux of this case. The gravamen of what we must consider is whether birth in American Samoa constitutes birth within the United States for purposes of the Fourteenth Amendment. On this point, we conclude English common law has much less to say. English conceptions regarding territorial acquisition from that era differ markedly from any we would accept today. Scotland was within the dominion of King James because he inherited it; Ireland was within his dominion, and indeed subject to his "power of life and death," due to military conquest. Id. at 24. While shrouded in history, our dominion over American Samoa stems from voluntary cession. It is difficult to see what lessons are to be drawn for the relationship between the United States and its unincorporated territories from the development of the British Empire.

Subsequent developments in the American law of citizenship cast further doubt on the dispositive role the district court believes Calvin's Case plays in the matter before us. In the colonies, as noted above, the role of consent to subjectship came to play a prominent role in the early American understanding of what it meant

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approach. "British imperial citizenship was . . . inclusive in the formal sense, [but] stratified in reality." Niraja Gopal Jayal, Citizenship and Its Discontents 30 (2013). While "all those born within the British Empire shared the common status of being subjects of the king-emperor," that "was pretty much all that was shared or common" among British-born subjects and those born in the far reaches of the empire. Id.; see also Clive Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland 72 (1957) (noting "the frequent instances in which the apparently hard-and-fast rules laid down in Calvin's Case seem to have been ignored or much modified" by the British Empire). English law, then, is only superficially an exemplar of the rule laid down in Calvin's Case, a rule not faithfully followed by the English in their own empire. Even if English common law were a persuasive model for us to follow, it is not so clear in what direction it would ultimately lead.

to be a subject or citizen. "The Revolution . . . produced an expression of the general principles that ought to govern membership in a free society: republican citizenship ought to rest on consent . . . ." Kettner, supra, at 10. Those general principles were often carried forward in the major territorial acquisition treaties of the nineteenth century, which repeatedly gave inhabitants a choice regarding whether they would become American citizens. See supra Part I.B. The Supreme Court, having never addressed the extension of citizenship to a people lacking the desire to receive it, has not clarified the role of consent in this area of American law. But in our view, the role ascribed to consent to citizenship by the Founders and by our young country as it expanded westward undermines the persuasive force of a common law that paid it no mind.

In sum, we interpret Wong Kim Ark's discussion of English common law as an invocation of persuasive authority rather than an incorporation of binding caselaw. We take up Wong Kim Ark's instruction to consider English common law in analyzing the extraterritorial application of the Citizenship Clause, but find little light shed by this endeavor.

C

Between these competing frameworks, the Insular Cases provide the more relevant, workable, and, as applied here, just standard. This is so for several reasons: 1) the Insular Cases were written with the type of issue presented by this case in mind, whereas Wong Kim Ark was not; 2) the district court overread the weight accorded English common law by Wong Kim Ark; and 3) the Insular Cases permit

this court to respect the wishes of the American Samoan people, whereas Wong Kim Ark would support the imposition of citizenship on unwilling recipients.

1) The Insular Cases contemplate the issue of constitutional extension to unincorporated territories; Wong Kim Ark does not.

The Insular Cases grapple with the thorny question at the heart of this case: how does the Constitution apply to unincorporated territories? From the Uniformity Clause[11] to the Sixth Amendment,[12] the Supreme Court wrestled with which constitutional provisions would extend to the new territories and which would be left behind. These are issues that federal courts have continued to address, and in doing so have continued to apply the Insular framework.[13] This case falls squarely in that line of caselaw. It calls for the extension of another constitutional provision to another unincorporated territory. The Insular Cases are plainly relevant.

Wong Kim Ark, in contrast, was not about the unincorporated territories at all. It was about a racist denial of citizenship to an American man born in an American state. Not only was it not about unincorporated territories, it was published months before the United States had even acquired its first unincorporated territory. Moreover, its holding interprets a Constitutional provision—which ignores the logically prior issue of whether the provision even applies to an unincorporated territory in the first place, the issue addressed by the Insular Cases.

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[11] Downes, 182 U.S. 244.

[12] Balzac, 258 U.S. 298.

[13] See Boumediene, 553 U.S. at 764.

Nor does it appear that the Supreme Court that wrote Wong Kim Ark understood its holding to govern the citizenship status of the peoples of the unincorporated territories. Recall that Downes, published a mere three years after Wong Kim Ark, contains dicta, unchallenged by any Justice, casting doubt on the constitutional extension of citizenship to the peoples of the new American territories. See, e.g., 182 U.S. at 279-80 ("We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be . . . ."). It is quite difficult to reconcile these dicta with the interpretation of Wong Kim Ark urged by the district court. The Justices who issued Wong Kim Ark clearly did not understand it as deciding the issue they opined on just three years later in Downes. Of course, it is possible for a court that issues a holding to remain ignorant of the full panoply of its implications. But Downes' discussion of territorial citizenship without any mention of Wong Kim Ark suggests Wong Kim Ark stood for a more limited proposition than the one assigned it by the district court.

For Wong Kim Ark to govern its analysis, the district court had to rely on the very general rule that the Fourteenth Amendment must be interpreted in light of English common law. Yet Wong Kim Ark itself advised: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when

the very point is presented for decision." 169 U.S. at 679 (quotation omitted).[14] That maxim is one this court will heed.

2) *The district court overread the weight accorded English common law by Wong Kim Ark.*

As explained in Part II.B, we reject the district court's interpretation of Wong Kim Ark insofar as it treats the English common law regarding subjectship as authoritative precedent for all questions concerning American citizenship. The text of Wong Kim Ark does not suggest this breathtakingly broad holding, and the Supreme Court's omission of Wong Kim Ark in its discussion of citizenship in Downes further undercuts such an interpretation. All that Wong Kim Ark's invocation of English common law suggests is its ordinary use as persuasive precedent. In this case, that historical context does little to edify our analysis.

3) *The Insular framework better upholds the goals of cultural autonomy and self-direction.*

We have grave misgivings about forcing the American Samoan people to become American citizens against their wishes. They are fully capable of making their own decision on this issue, and current law authorizes each individual Samoan to seek American citizenship should it be desired. The Insular Cases, despite their origins, allow us to respect the wishes of the American Samoan people within the framework of century-old precedent. It follows that they are not only the most

[14] See also United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him . . . .").

relevant precedents, but also the ones that lead to the most respectful and just outcome.

III

Under the Insular Cases' framework, courts first consider whether a constitutional provision applies to unincorporated territories "by its own terms." Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 589 n.21 (1976). We interpret this as erecting something of a plain-language standard: if the text of the constitutional provision states that it applies to unincorporated territories, courts have no discretion to hold otherwise. See Tuaua, 788 F.3d at 306 (explaining the Citizenship Clause does not apply to American Samoa by its own terms because its "scope . . . may not be readily discerned from the plain text or other indicia of the framers' intent"). The Citizenship Clause's applicability hinges on a geographic scope clause—"in the United States"—and a jurisdictional clause—"subject to the jurisdiction thereof." Both the district court and the Tuaua court concluded that the Citizenship Clause leaves its geographic scope ambiguous.[15] We agree.

[15] The Tuaua court also concluded that American Samoa does not meet the jurisdictional criterion because, as a "significantly self-governing political territor[y]," it was not "'completely subject to [the United States'] political jurisdiction." Id. at 305, 306 (quoting Elk, 112 U.S. at 102) (emphasis added in Tuaua quotation). On this point our analysis departs from that of our sibling circuit. By statute, American Samoans "owe[ ] permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B). Furthermore, as the only populated territory for which Congress has not passed an organic act, American Samoa is "unorganized" and therefore especially subject to American political control. Amendments to the

Two textual considerations push in opposite directions. The first compares the Fourteenth Amendment's Citizenship Clause—"in the United States, and subject to the jurisdiction thereof"—to the Thirteenth Amendment's prohibition of slavery—"within the United States, or any place subject to their jurisdiction." U.S. Const. amends. XIII, XIV (emphases added). The "or" in the Thirteenth Amendment seems to contemplate places subject to American jurisdiction that are not within the United States, whereas the Citizenship Clause requires persons to be born in places that are both in the United States "and" subject to American jurisdiction. Because the Thirteenth Amendment seems to apply more broadly than the Citizenship Clause, it is plausible to conclude territories are covered by the Thirteenth Amendment but not the Citizenship Clause. This argument therefore supports a reading of the Citizenship Clause that does not encompass the territories.[16]

By comparison, the competing argument juxtaposes the Fourteenth Amendment's Citizenship Clause in Section One with its apportionment provisions in Section Two. The former uses the broad term "in the United States," whereas the latter apportions representatives "among the several States." Because the Citizenship

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American Samoan Constitution, for example, require ratification by an act of Congress. 48 U.S.C. § 1662a. In our view, the statutory and practical control exercised by the United States over American Samoa render American Samoa subject to the jurisdiction of the United States.

[16] Another textual consideration suggesting the Citizenship Clause's exclusive application to state-born residents is its effect of rendering persons born in the United States "citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1, cl. 1 (emphasis added).

Clause's geographic term is broader than that of the apportionment provisions, it seems the Citizenship Clause's geographic scope is broader than "the several States."

Neither of these arguments is entirely persuasive, with each depending on uncertain inferences.[17] Nor is the legislative history cited by Plaintiffs purporting to show that the framers of the Fourteenth Amendment understood the Citizenship Clause to apply to the territories dispositive. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 2894 (Senator Trumbull's statement that the Citizenship Clause "refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia"). "[T]he legislative history of the Fourteenth Amendment . . . like most other legislative history, contains many statements from which conflicting inferences can be drawn . . . ." Afroyim v. Rusk, 387 U.S. 253, 267 (1967). Moreover, "[i]solated statements . . . are not impressive legislative history." Garcia v. United States, 469 U.S. 70, 78 (1984) (quotation omitted). This is especially true given that the Fourteenth Amendment's authors could only have been speaking of incorporated territories destined for statehood, not the unincorporated territories around which this case revolves.

The analysis offered by the dissent rests entirely on eliding the distinction between incorporated and unincorporated territories. In the view presented by the

[17] The dissent concludes the same. See Dissent at 29 ("From the Territories Clause and the Eighteenth Amendment, we can safely conclude that the term 'United States' doesn't always include territories.").

dissent, because territories on their way to becoming states were often[18] considered part of the United States in the nineteenth century, so too must unincorporated territories like American Samoa be considered "in the United States" for purposes of the Citizenship Clause. This argument requires rejecting the distinction between incorporated and unincorporated territories. Such a rejection is not ours to make. The Supreme Court established the distinction and relied on it repeatedly in the Insular Cases and thereafter. See, e.g., Dorr v. United States, 195 U.S. 138, 143 (1904); Balzac, 258 U.S. at 304-06; Verdugo-Urquidez, 494 U.S. at 268-69. The dissent does not adequately explain on what grounds it casts aside this long-settled distinction. It simply assumes that all territories are alike, making evidence about incorporated territories in the nineteenth century sufficiently conclusive to resolve any ambiguity about the text of the Citizenship Clause. Because the dissent does not justify conflating incorporated and unincorporated territories, its historical evidence cannot resolve the meaning of the constitutional text.

Not only is the distinction between incorporated and unincorporated territories firmly established in caselaw, it also undercuts the relevance of the evidence offered

[18] The dissent characterizes available historical evidence as "uniformly" supporting its conclusion. Dissent at 2, 14. This seems an overstatement. A map published in the 1830s, for example, is titled "A map of the United States and part of Louisiana," despite Louisiana having been a territory under one name or another since 1805. Mary Van Schaack, A Map of the United States and Part of Louisiana (c. 1830), www.loc.gov/resource/g3700.ct000876/ (on file with the Library of Congress). And a dictionary cited by the dissent omits the territory of Alaska from its definition of the United States, an omission that the dissent speculates was "inadvertent." Dissent at 9 n.6.

by the dissent. The dissent's historical evidence merely suggests that the United States often, though not always, conceived of itself as including both states and the territories on their way to becoming states. This observation only carries us so far. It is no surprise that Americans from the era preceding the ratification of the Fourteenth Amendment, animated by an ideology of manifest destiny and in the throes of continuous territorial expansion, harbored an expansive understanding of the geographical scope of their country. But the territories those Americans had in mind are different than those around which this case turns. Those territories were generally geographically contiguous, in the process of being settled by American citizens, and destined for statehood. There is thus a meaningful distinction between such territories and overseas territories like American Samoa, one grounded in a sensible recognition of the dissimilar situations that prevailed in each category of territory. Only by entirely ignoring the differences between these two types of territories can the dissent find certainty. We are not prepared to cast aside this distinction, backed by both binding precedent and over a century of unbroken historical practice, to deem the text in question unambiguous.

Were we to resolve the remaining ambiguity about the geographic scope of the Citizenship Clause, consistent historical practice would recommend a narrow interpretation. When faced with textual ambiguity, evidence of an unbroken understanding of the meaning of the text, confirmed by longstanding practice, is persuasive. "[A]n unbroken practice . . . openly [conducted] . . . by affirmative state action . . . is not something to be lightly cast aside." Walz v. Tax Comm'n of City of

New York, 397 U.S. 664, 678 (1970). Congress has always wielded plenary authority over the citizenship status of unincorporated territories, a practice that itself harked back to territorial administration in the nineteenth century. See supra Part I.B. Residents of Puerto Rico, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands each enjoy birthright citizenship by an act of Congress.[19] Moreover, Congress' discretionary authority in this area has been upheld by every circuit court to have addressed the issue.[20] We resolve this case by application of the Insular Cases' "impracticable and anomalous" framework rather than by relying on ambiguous constitutional text. Yet if the text were the decisive issue, then its consistent historical interpretation would counsel a narrow reading.

A constitutional provision may "apply by its own terms" to an unincorporated territory, but the text of the Citizenship Clause does not require such application. The constitutional text alone is therefore not a sound basis on which to decide this case. Consistent historical practice suggests this textual ambiguity be resolved so as to leave the citizenship status of American Samoans in the hands of Congress, as the concurrence concludes. See Concurrence at 4.

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[19] Article IV vests authority over the territories squarely in the hands of Congress. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory . . . ." U.S. Const. art. IV, § 3, cl. 2; see also Simms v. Simms, 175 U.S. 162, 168 (1899) ("In the territories of the United States, Congress has the entire dominion and sovereignty . . . .").

[20] See Tuaua, 788 F.3d at 302; Nolos v. Holder, 611 F.3d 279, 282-284 (5th Cir. 2010) (per curiam); Lacap v. INS, 138 F.3d 518,519 (3d Cir. 1998); Valmonte v. INS, 136 F.3d 914, 917-20 (2d Cir. 1998); Rabang v. INS, 35 F.3d 1449, 1451-53 (9th Cir. 1994).

IV

In light of the textual ambiguity, I proceed to the next stage of the Insular analysis: whether citizenship is a "fundamental personal right" as that term is defined by the Insular Cases.[21]

Under the Insular Cases, constitutional provisions that implicate fundamental personal rights apply without regard to local context. "[G]uaranties of certain fundamental personal rights declared in the Constitution" apply "even in unincorporated Territories." Boumediene, 553 U.S. at 758 (quotation omitted). But "'[f]undamental' has a distinct and narrow meaning in the context of territorial rights." Tuaua, 788 F.3d at 308. Even rights that we would normally think of as fundamental, such as the constitutional right to a jury trial,[22] are not "fundamental" under the framework of the Insular Cases. Instead, only those "principles which are the basis of all free government" establish the rights that are "fundamental" for Insular purposes. Dorr, 195 U.S. at 147 (quotation omitted).

Several difficulties attend this step of the analysis. As an initial matter, parsing rights to determine whether they are truly necessary to free government is a somewhat uncomfortable inquiry. Assessing whether a personal right meets some instrumental threshold to qualify for fundamental status under the Insular framework

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[21] Because the concurrence does not join Parts IV and V of the analysis, the opinion shifts from "we" to "I" to make clear that these Parts do not command a majority.

[22] Balzac, 258 U.S. 298.

is not only an unusual mode of inquiry, but one that is in some tension with the nature of individual rights, which we generally do not justify by their instrumental value but rather as ends unto themselves. I prefer the Hohfeldian use of the terms "rights" and "fundamental rights" and their correlatives, which would disallow such parsing. See generally Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 Yale L.J. 710 (1917). Exacerbating the challenge is the dearth of Supreme Court precedent from the Insular lineage to guide the analysis. I also question whether citizenship is properly conceived of as a personal right at all. As I see it, citizenship usually denotes jurisdictional facts, and connotes the Constitutional rights that follow. The district court inverted the proper order of the inquiry. The historic authority of Congress to regulate citizenship in territories—authority we are reluctant to usurp—indicates that the right is more jurisdictional than personal, a means of conveying membership in the American political system rather than a freestanding individual right.

Even setting these conceptual difficulties aside, birthright citizenship does not qualify as a fundamental right under the Insular framework. Birthright 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.[23] The United States, for its part, does not apply birthright citizenship to children of American citizens born abroad.[24] Nor has birthright citizenship proven necessary to safeguard basic human rights in American Samoa, where the rights to freedom of speech, freedom of religion, and due process of law are constitutionally guaranteed.[25] Under the particular definition supplied by the Insular Cases, birthright citizenship is not a fundamental right that would preclude application of the "impracticable and anomalous" standard.

V

Though its articulation postdates the Insular Cases, the lodestar of the Insular framework has come to be the "impracticable and anomalous" standard. Under this standard, "the question is which guarantees of the Constitution should apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it." Reid, 354 U.S. at 75 (Harlan, J., concurring). As with all extraterritoriality questions, the answer turns on "objective factors and practical concerns." Boumediene, 533 U.S. at 764. "In sum, we must ask whether the circumstances are such that recognition of the right to birthright citizenship

[23] See Graziella Bertocchi & Chiara Strozzi, The Evolution of Citizenship: Economic and Institutional Determinants, 53 J. L. & Econ. 95, 99–100 (2010).

[24] In such circumstances, the child becomes an American citizen due to the citizenship status of the parents. See, e.g., 8 U.S.C. § 1401(c).

[25] See Revised Const. of Am. Samoa art. I, §§ 1-2.

would prove impracticable and anomalous, as applied to contemporary American Samoa." Tuaua, 788 F.3d at 309 (quotation omitted).

Two characteristics of contemporary American Samoa guide my analysis: the expressed preferences of the American Samoan people, and the potential disruption of their way of life by judicial imposition of citizenship.

A

No circumstance is more persuasive to me than the preference against citizenship expressed by the American Samoan people through their elected representatives.

In the context of citizenship, there can hardly be a more compelling practical concern than that it is not wanted by the people who are to receive it. To impose citizenship in such a situation would violate a basic principle of republican association: that "governments . . . deriv[e] their [] powers from the consent of the governed." Kennett v. Chambers, 55 U.S. (14 How.) 38, 41 (1852). This is a principle that animated the Founders' rejection of their status as colonial subjects of the British empire. See supra Part I.B. "[T]he notion . . . that the tie between the individual and the community was contractual and volitional . . . shaped their response to the claims of Parliament and the king, legitimized their withdrawal from the British empire, . . . and underwrote their creation of independent governments." Kettner, supra, at 10. This history undergirds what is a fundamental and timeless truth: a people's incorporation into the citizenry of another nation ought to be done with their consent or not done at all.

Respect for this principle should be at its zenith in the case of territories born from American imperial expansion, a project that was always in significant tension with our aspirations toward representative democracy. "The fabric of American empire ought to rest on the solid basis of the consent of the People." The Federalist No. 22 (Alexander Hamilton). We have sometimes failed to live up to Hamilton's admonition. It is for this reason "that sovereignty and membership need to be reconceptualized in less rigid terms if we are to establish a political regime that overcomes historical subordination and justly rules over the territory and inhabitants of the United States." T. Alexander Aleinikoff, Semblances of Sovereignty 183 (2002). Recognizing consent as a cornerstone of a flexible approach to the extension of citizenship to the unincorporated territories is a step toward rectifying those mistakes.

Though consent to citizenship is important among the "objective factors and practical concerns" that must be considered, Boumediene, 553 U.S. at 764, it need not be dispositive. Contrary to the dissent, my analysis certainly does not "require" a change in outcome for "every change in the popular will" of American Samoa. Dissent at 48. The Insular framework demands a holistic review of the prevailing circumstances in a territory; any future case would consider the totality of the relevant factors and concerns in the territory. "Ping-ponging" judicial outcomes are neither a necessary nor even a likely consequence of my reasoning. Id. I likewise would not expect such oscillation in congressional consideration of the will of American Samoans. The nature of citizenship makes consent an important

consideration for application of the "impracticable and anomalous" standard, but nothing in this opinion suggests consent must eclipse other factors.

I agree 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."[26] 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.

B

A further concern of extending birthright citizenship to American Samoa is the tension between individual constitutional rights and the American Samoan way of life (the fa'a Samoa). Fundamental elements of the fa'a Samoa rest uneasily

[26] Plaintiffs counter that concerns about the wishes of the American Samoan people are wrongheaded for two reasons. First, such concerns "fundamentally misunderstand[] the nature of a written constitution," which removed the scope of the Citizenship Clause beyond democratic influence. I disagree for the reasons explained above. Second, Plaintiffs argue the current preferences of American Samoans is "ephemeral," and "history on this subject shows that they very well could change their minds." This may be so. Circumstances may indeed change in the future. In that event, American Samoans retain the political remedy of requesting that Congress grant them American citizenship akin to that of Puerto Rico and the U.S. Virgin Islands. Congress has repeatedly done so with respect to other territories. The concurrence suggests the political branches rather than the courts are best positioned to consider the wishes of the American Samoan people. See Concurrence at 4. On this point I do not disagree. Those wishes are relevant for purposes of the Insular framework, but they are best acted upon by Congress, as has been the consistent historical practice.

alongside the American legal system. Constitutional provisions such as the Equal Protection Clause, the Takings Clause, and the Establishment Clause are difficult to reconcile with several traditional American Samoan practices, such as the matai chieftain social structure, communal land ownership, and communal regulation of religious practice. "In American Sāmoa's case, 'partial membership' works to protect the customary institutions and traditions, and so a push for full equality [as American citizens] is not readily embraced by the American Sāmoan citizenry." Kruse, supra, at 79.

Plaintiffs, the dissent, and the amicus brief filed by the governments of other unincorporated territories question whether any of these harms are likely to befall American Samoa upon the extension of citizenship. They point out that, for example, the First Amendment and the Equal Protection Clause already apply to the unincorporated territories, regardless of anyone's citizenship status. See Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 331 n.1 (1986); Flores de Otero, 426 U.S. at 600. The amicus brief filed by other unincorporated territories asserts that, in their experience, American citizenship need not result in the undermining of local culture and autonomy.[27] Because the American Samoan aversion to citizenship is not founded on plausible concerns, they argue, it should receive less weight. The dissent echoes this argument. See Dissent at 43-44.

[27] The American Samoan government replies that the comparison is inapposite because of differences between American Samoa's cultural practices and those of other unincorporated territories.

Citizenship's legal consequences for American Samoa are less certain than Plaintiffs and the dissent suggest, and the American Samoans' cautious approach should be respected regardless. There is simply insufficient caselaw to conclude with certainty that citizenship will have no effect on the legal status of the fa'a Samoa. The constitutional issues that would arise in the context of America Samoa's unique culture and social structure would be unusual, if not entirely novel, and therefore unpredictable. Citizenship status has often been an important factor in determining how the Constitution applies to the unincorporated territories. For example, the "most common interpretation of Reid," the 1957 case that introduced the "impracticable and anomalous" standard, was that "citizenship [was] the fundamental variable" in determining the constitutional rights afforded to inhabitants of unincorporated territories. Raustiala, supra, at 150. Citizenship simply cannot be confidently declared irrelevant to how the Constitution will affect American Samoa. And even if the contrary conclusion were tenable, it is not the role of this court to second-guess the political judgment of the American Samoan people. As stated throughout, the considerations discussed in this section belong most properly to Congress at the initial stage, not to us.

Required by the Insular framework to weigh the practical considerations concerning the extension of the constitutional right to birthright citizenship to American Samoa, I would hold that the extension of United States birthright citizenship is impracticable and anomalous.

VI

The judgment of the district court is **REVERSED**.

20-4017, 20-4019, *Fitisemanu v. United States*
TYMKOVICH, Chief Judge, concurring.

This case calls upon us to determine whether an individual born in a United States territory is "born . . . in the United States" within the meaning of the Citizenship Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."). Curiously, the question of whether individuals born in U.S. territories are citizens by virtue of the Citizenship Clause has been neglected in the century and a half since the Fourteenth Amendment was ratified.[1]

Because the Supreme Court has never defined the territorial scope of the Citizenship Clause, we must start by using traditional tools of constitutional interpretation: text, structure, and history. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("[C]onstitutional interpretation . . . demands careful examination of the textual, structural, and historical evidence."). Only if those tools fail us, and the meaning of "in the United States" is indeterminate, do we turn to Supreme Court authorities such as *Wong Kim Ark* or the *Insular Cases* for guidance.

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[1] Recent scholarship is stepping into the void. *See e.g.* Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405 (2020) (arguing the original public meaning of the Citizenship Clause extends birthright citizenship to territorial residents); *Developments in the Law The U.S. Territories*, 130 Harv. L. Rev. 1616, 1680 (2017) (arguing courts should not extend the reach of the Citizenship Clause to unwilling territories).

Though I might weigh the inter-textual evidence differently, I ultimately agree with the majority (and the district court) that the precise geographic scope of the Citizenship Clause cannot be divined from the text and constitutional structure. *Accord Tuaua v. United States*, 788 F.2d 300, 303 (D.C. Cir. 2015) ("The text and structure alone are insufficient to divine the Citizenship Clause's geographic scope.").[2]

Nor am I persuaded that historical evidence of the Clause's original public meaning resolves this case. To be sure, some evidence supports the view that "in the United States" encompassed "the territories." But the evidence supporting Fitisemanu's position largely consists of floor statements by individual legislators, which may not have aligned with common public understanding. *Cf. N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.").

At the time of ratification, moreover, the United States lacked material overseas possessions or territories.[3] Any mention of "the territories" referred to

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[2] Other constitutional provisions used more precision. *See, e.g.*, U.S. Const. amend. XVIII (prohibiting the sale and manufacture of alcohol in "the United States and *all territory subject to the jurisdiction thereof*") (emphasis added).

[3] The sole exception is Alaska. But the Alaska Purchase Treaty, by its express terms, extended U.S. citizenship to all non-Native inhabitants of the newly-annexed territory, unless they returned to Russia within three years of the (continued...)

contiguous United States territories destined for statehood, and statehood resolved citizenship concerns. No new territories were acquired during the thirty years between ratification in 1868 and the Spanish-American War in 1898. While we are interested in divining the original *meaning* of the Citizenship Clause rather than its original expected *application,* these historical facts diminish the probative weight of legislators' off-the-cuff statements about the geographic scope of the phrase "in the United States." *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. Rev. 1621, 1637 (2017) ("The meaning of a text is one thing; expectations about how the text will or should be applied to particular cases or issues is another." But "original expected applications . . . can provide *evidence* of original public meaning."). And interestingly enough, more than a century after ratification, no case has yet reached the Supreme Court that applies the Citizenship Clause to the extended territories or, for that matter, the United States proper.

The cases, unfortunately, are not much help either. As the majority explains, *Wong Kim Ark did* concern a dispute over citizenship and was decided at the dawn of the twentieth century, when the nation had just acquired significant insular possessions. But while its reasoning suggests birthright citizenship would

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[3](...continued)
treaty's ratification.

extend to those territories, the case does not squarely address the question because the plaintiff was born in the State of California. *See United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898). And, although a plurality in *Downes* pronounced that American citizenship does not extend to "non-incorporated" territories, that case was not brought squarely under the Citizenship Clause. *Downes v. Bidwell*, 182 U.S. 244, 279 80 (1901).

Faced with an ambiguous constitutional text, equivocal evidence of its original public meaning, and uncertain Supreme Court precedent, we are left with historical practice. The 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.

In my view, either party's reading of the Citizenship Clause is plausible, so I resolve the tie in favor of the historical practice, undisturbed for over a century, that Congress has the authority to determine the citizenship status of unincorporated territorial inhabitants. Finally, 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.

Accordingly, I join the majority except for Parts IV and V.

Fitisemanu, et al. v. United States of America, et al., Nos. 20-4017, 20-4019
BACHARACH, J., dissenting.

As Justice Brandeis once observed, "the only title in our democracy superior to that of President is the title of citizen." U.S. Dep't of Homeland Sec. & U.S. Citizenship & Immigr. Servs., *The Citizen's Almanac* 2 (2007) (cleaned up). The district court concluded that this title extends to the people of American Samoa, and I agree.[1]

The Fourteenth Amendment's Citizenship Clause extends birthright citizenship to every person "born . . . in the United States." U.S. Const. amend. XIV, § 1, cl. 1.[2] For three reasons, this clause provides citizenship to the three individual plaintiffs.

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[1] The district court enjoined the defendants from denying citizenship to anyone born in American Samoa. The parties agree that if we were to affirm, we should order the district court to narrow its injunction. I too agree. *See* Part V(B), below.

[2] The clause is also limited to individuals "subject to the [United States'] jurisdiction." U.S. Const. Amend. XIV, § 1, cl. 1. The majority acknowledges that natives of American Samoa are subject to the United States' jurisdiction. But in my view, the American Samoan government forfeited this issue.

For the first time on appeal, the American Samoan government argues that American Samoa isn't "subject to the jurisdiction" of the United States. Because the issue wasn't raised in district court, the argument is forfeited. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011).

The American Samoan government asserts that this Court can decide the issue because the district court decided the issue. This assertion is

First, all were born in American Samoa, which is a territory "in the United States." When the Fourteenth Amendment was ratified, courts, dictionaries, maps, and censuses uniformly regarded territories as land "in the United States."

Second, even if the territory of American Samoa lay outside the United States, the Citizenship Clause would apply because citizenship is a fundamental right.

Third, even if the right were not fundamental, applying the Citizenship Clause to the three American Samoan plaintiffs would not be impracticable or anomalous.

Because the plaintiffs are U.S. citizens, I would affirm.

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incorrect. The district court stated only in passing that American Samoans are subject to the jurisdiction of the United States. Appellants' App'x vol. 3, at 627. The court didn't discuss the issue in greater detail because

- the American Samoan government hadn't raised the issue and
- the U.S. Government had conceded the issue.

Id. at 595. We thus consider the argument forfeited. Given the forfeiture, we'd ordinarily apply the plain-error standard. *Richison*, 634 F.3d at 1130–31. But the American Samoan government hasn't discussed the plain-error standard, which we treat as a waiver. *See id.*

I. The issue arises from a challenge brought by three American Samoan natives residing in Utah.

This appeal stems from a suit by three individuals: John Fitisemanu, Pale Tuli, and Rosavita Tuli.[3] All were born in American Samoa and currently live in Utah.

Though the three individuals were born in the United States, the U.S. government considers them non-citizen "nationals." 8 U.S.C. § 1408(1). Because they are not classified as citizens, they cannot vote (Utah Const. art. IV, § 5; Utah Code Ann. § 20A-2-101(1)(a)), run for federal or state office (U.S. Const. art. I, § 2, cl. 2; *id.* art. II, § 1, cl. 5; Utah Code Ann. § 20A-9-201(1)(a)), serve as military officers (10 U.S.C. § 532(a)(1)),[4] or serve on a jury (28 U.S.C. § 1865(b)(1); Utah Code Ann. § 78B-1-105(1)(a)).

The three individuals claim U.S. citizenship. The district court agreed and granted them summary judgment. The federal government has appealed, with the support of the American Samoan government.

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[3] A nonprofit corporation, the Southern Utah Pacific Island Coalition, also appears as a plaintiff. This corporation is based in Utah.

[4] But they can fight our wars, and American Samoans have enlisted in our military at a greater rate, per capita, than citizens of any other state or territory. U.S. Army Reserve, *American Samoa At A Glance* (2014), available at https://www.usar.army.mil/Portals/98/Documents/At%20A%20Glance%20Prints/Samoa_ataglance.pdf (last visited May 17, 2021).

II. We conduct de novo review, applying the summary-judgment standard.

Our review is de novo. *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1280 (10th Cir. 2019). In applying de novo review, we view the evidence in the light most favorable to the federal and American Samoan governments. *Stender v. Archstone-Smith Operating Trust*, 910 F.3d 1107, 1111 (10th Cir. 2018). With this view of the evidence, we consider whether the plaintiffs have shown (1) the lack of a genuine dispute of material fact and (2) entitlement to judgment as a matter of law. *Zahourek Sys., Inc. v. Balanced Body Univ., LLC*, 965 F.3d 1141, 1143 (10th Cir. 2020).

III. The Citizenship Clause unambiguously applies to natives of American Samoa.

The Citizenship Clause of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ." U.S. Const. amend. XIV, § 1, cl. 1. The threshold issue is the meaning of "in the United States."

A. We interpret the Citizenship Clause based on its text, its purpose, and our national experience.

"[W]e interpret the Constitution in light of its text, purposes, and 'our whole experience' as a Nation." *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). To learn the meaning of the text, we consider the lens of the

- 1866 Congress, which drafted the Citizenship Clause, and
- the state legislatures, which ratified the clause from 1866 to 1868.

See District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008).

B. The phrase "in the United States" unambiguously includes United States territories like American Samoa.

To determine the meaning of the Citizenship Clause, we first consider the public understanding of the phrase "in the United States" from 1866 to 1868. *NLRB*, 573 U.S. at 526–27. At that time, Congress and ordinary Americans understood that U.S. citizenship extended to everyone born within the nation's territorial limits who did not owe allegiance to another sovereign entity. This understanding is reflected in (1) the judicial opinions decided by 1868, (2) the dictionaries, maps, and censuses from the era, (3) the debates surrounding the Citizenship Clause, and (4) the common law's conception of a citizen.

1. American Samoa is a United States territory.

Over a century ago, the chiefs of American Samoa's seven islands ceded their territory to the United States. *See* Instrument of Cession, Chiefs of Tutuila-U.S., April 17, 1900 (Tutuila and Aunu'u Islands), available at https://history.state.gov/historicaldocuments/frus1929v01/d853 (last visited May 17, 2021); Instrument of Cession, Chiefs of Manu'a-U.S., July 14, 1904 (Ta'u, Olosega, Ofu, and Rose Islands), available at https://history.state.gov/historicaldocuments/frus1929v01/d855 (last

visited May 21, 2021). In return, the United States promised to respect American Samoans' property rights. Instrument of Cession: Chiefs of Tutuila to United States Government; Instrument of Cession: Chiefs of Manu'a to United States Government. Congress ratified these cessions. 48 U.S.C. § 1661(a); *see also* 48 U.S.C. § 1662 (providing U.S. sovereignty over Swains Island). Upon ratification, American Samoa became a territory of the United States. *See, e.g.*, 48 U.S.C. §§ 1731–33 (identifying American Samoa as the "Territory of American Samoa").

2. Contemporary judicial opinions included the territories as part of the United States.

To discern what ordinary Americans meant in 1866 to 1868 by the phrase "in the United States," we can consider contemporary judicial opinions. In the nineteenth century, "[c]ourts . . . commonly referred to U.S. territories as 'in' the United States." Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 426 (2020).

For example, in the early part of the century, the Supreme Court observed that

- "the United States" "is the name given to our great republic, which is composed of States and territories" and
- "the territory west of the Missouri [was] not less within the United States . . . than Maryland or Pennsylvania."

Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.).

Justice Story, riding Circuit, also explained that "[a] citizen of one of our territories is a citizen of the United States." *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828).

About 25 years later, the Court considered whether U.S. tariffs had been properly applied to products coming from outside the United States into the Territory of California after its cession by treaty. *Cross v. Harrison*, 57 U.S. (16 How.) 164, 181, 197 (1853). The Court answered "yes," considering the Territory of California as "part of the United States." *Id.* at 197–98.

And in 1867, the Supreme Court observed that U.S. citizens included inhabitants of "the most remote States or territories." *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35, 48–49 (1867) (quoting *Smith v. Turner* (*The Passenger Cases*), 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).[5]

The American Samoan government points out that in *Fleming v. Page*, the Supreme Court held that Tampico (a port in Tamaulipas, Mexico)

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[5] A leading attorney of the era, William Rawle, also observed that "every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the [c]onstitution . . . ." William Rawle, *A View of the Constitution of the United States of America* 86 (Philip H. Nicklin, 2d ed. 1829); *see* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 826–27 (1989) (stating that Mr. Rawle was a U.S. Attorney and a leading attorney of the period).

was not "in the United States" even though the port was occupied by the U.S. military during the Mexican-American war. 50 U.S. 603, 614–16 (1850). But the Court clarified that even though other nations had to regard Tampico as U.S. territory, the port was not "territory included in our established boundaries" without a formal cession or annexation. *Id.* So the opinion doesn't address whether territories of the United States are "in the United States."

3. Contemporary dictionaries, maps, and censuses included the territories as part of the United States.

We may also consider contemporary dictionaries, maps, and censuses. *See NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (looking to contemporary dictionaries to interpret the Recess Appointments Clause); *New Jersey v. New York*, 523 U.S. 767, 797–803, 810 (1998) (looking to historical censuses and maps to allocate Ellis Island between New York and New Jersey); *Michigan v. Wisconsin*, 270 U.S. 295, 301–07, 316–17 (1926) (using the same method to establish state boundaries).

Like judicial opinions, dictionaries of the era regarded territories as land "in the United States."

For example, the 1867 edition of *Webster's Dictionary* defined "Territory" as "2. A distant tract of land belonging to a prince or state. 3. In the United States, a portion of the country not yet admitted as a State into the Union, but organized with a separate legislature, a governor."

William G. Webster & William A. Wheeler, *Academic Edition. A Dictionary of the English Language, explanatory, pronouncing, etymological, and synonymous. Mainly abridged from the latest edition of the quarto dictionary of Noah Webster* at 434 (1867).

The next year, Judge John Bouvier's legal dictionary defined "Territory" even more broadly as "[a] portion of the country subject to and belonging to the United States which is not within the boundary of any of the States." II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 587 (George W. Childs 12th ed. rev. 1868).

Fifteen years later, this dictionary defined "United States of America" to include Alaska—an unincorporated territory—in the definition of "United States of America." II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 765 (J. P. Lippincott and Co., 15th ed. rev. 1883);[6] *see* note 8, below (discussing Alaska's unincorporated

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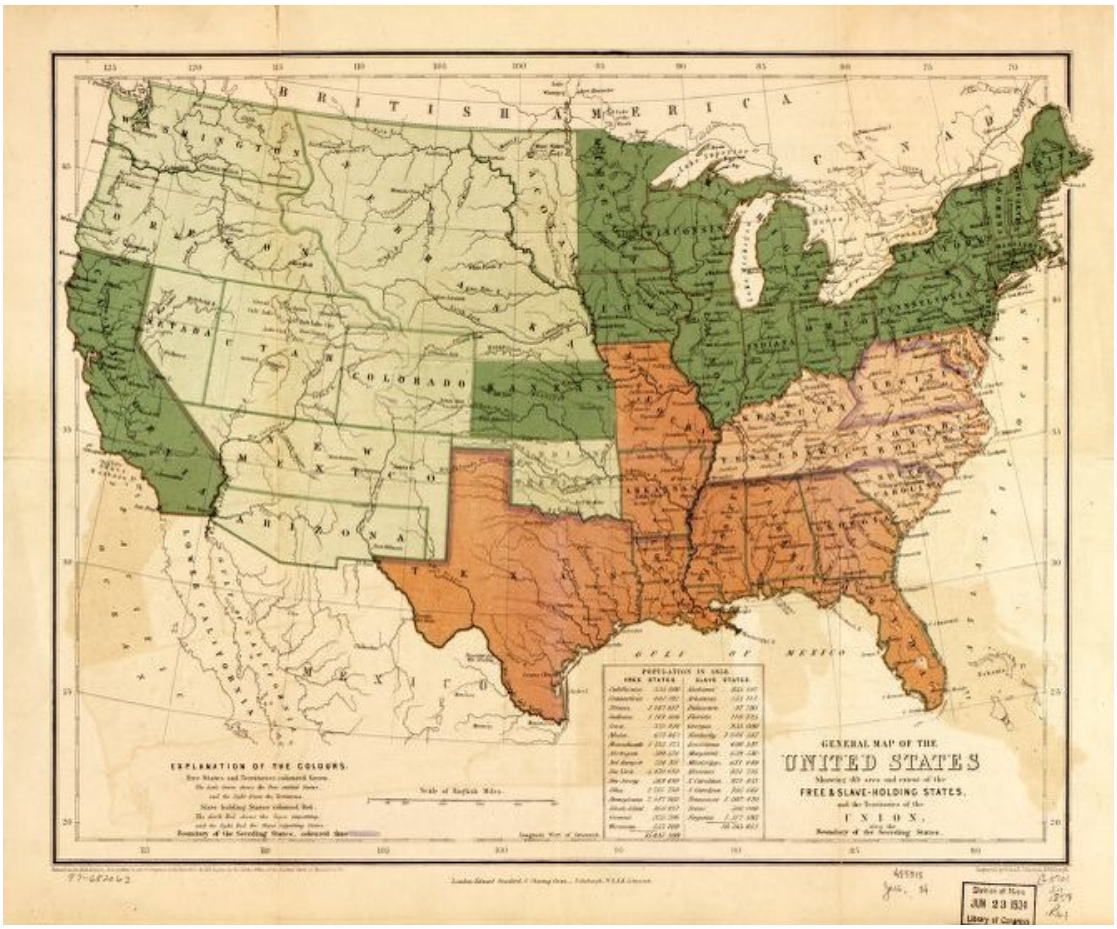
[6] The American Samoan government points out that Alaska is omitted from the definition of the "United States of America" in the 1868 edition of this dictionary. *See* II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 622 (George W. Childs 12th ed. rev. 1868). But later editions of the same dictionary added Alaska (even while it remained unincorporated), suggesting that the omission had been inadvertent. *See* text accompanying note. In any event, omission of Alaska in the 1868 edition sheds little insight into the meaning of the "United

status prior to 1891). So contemporary dictionaries regarded territories as "in the United States."

This understanding is also apparent in contemporary maps and census records. For example, the 1857 map of the United States included the territories of Washington, Oregon, Nebraska, Nevada, Utah, New Mexico, Arizona, Dakota, and Indian Territory (later Oklahoma):



States" during the drafting and ratification of the Citizenship Clause. Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 295 (2020).

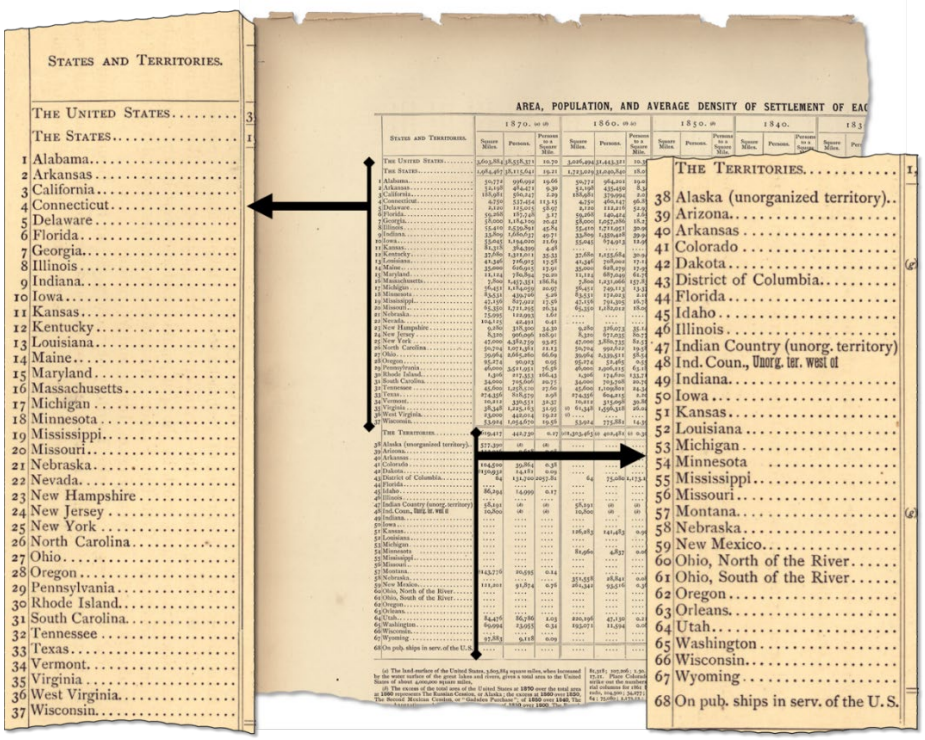
Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General map of the United States, showing the area and extent of the free & slave-holding states & the territories of the Union: also the boundary of the seceding states* (1857), available at https://www.loc.gov/resource/g3701e.cw1020000/ (last visited on May 13, 2021) (on file at the Library of Congress). Similarly, the 1868 map of the United States contained the territories, including the new unincorporated territory of Alaska:

H. H. Lloyd & Co., *The Washington map of the United States* (1868), available at https://www.loc.gov/resources/g3700.ct002969/ (last visited May 13, 2021) (on file at the Library of Congress).

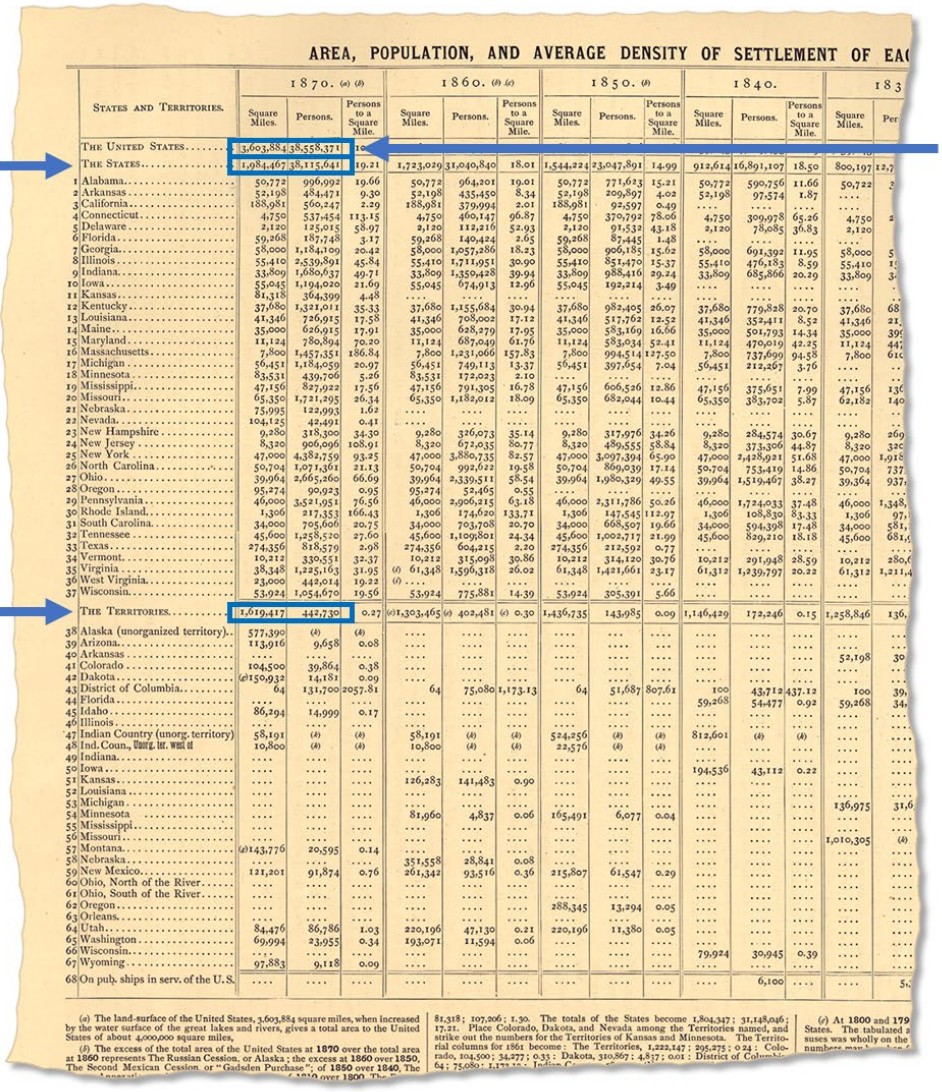
Like contemporary maps, the censuses of the era showed territories as part of the United States. For example, the 1854 census stated that "[t]he United States consist at the present time (1st July 1854,) of thirty-one independent States and nine Territories . . . ." J.D.B. De Bow, Superintendent of the U.S. Census, *Statistical View of the United States* 35–36 (A.O.P. Nicholson, 1854).

In 1870, the government conducted another census, again

- listing both states and territories as the region constituting the United States and
- including the unincorporated territory of Alaska:



Francis A. Walker, *Statistical atlas of the United States based on the results of the ninth census 1870 with contributions from many eminent men of science and several departments of the government* (image 32) (1874), available at https://www.loc.gov/loc.gmd/g3701gm.gct00008 (last visited May 13, 2021) (on file at the Library of Congress). The census thus derived the area of "the United States" by including the territories as well as the states.



AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EAC

States and Territories.	1870. (a) (d) Square Miles.	1870. Persons.	1870. Persons to a Square Mile.	1860. (b) (c) Square Miles.	1860. Persons.	1860. Persons to a Square Mile.	1850. (b) Square Miles.	1850. Persons.	1850. Persons to a Square Mile.	1840. Square Miles.	1840. Persons.	1840. Persons to a Square Mile.	183 Square Miles.	183 Per
The United States	3,603,884	38,558,371	10											
The States	1,984,467	38,115,641	19.21	1,723,029	31,040,840	18.01	1,544,224	23,047,891	14.99	912,614	16,891,107	18.50	800,197	12,7
1 Alabama	50,772	996,992	19.66	50,772	964,201	19.01	50,772	771,623	15.21	50,772	590,756	11.66	50,722	2
2 Arkansas	52,198	484,471	9.30	52,198	435,450	8.34	52,198	209,897	4.02	52,198	97,574	1.87	....	
3 California	188,981	560,247	2.29	188,981	379,994	2.01	188,981	92,597	0.49	....	....	....	....	
4 Connecticut	4,750	537,454	113.15	4,750	460,147	96.87	4,750	370,792	78.06	4,750	309,978	65.26	4,750	2
5 Delaware	2,120	125,015	58.97	2,120	112,216	52.93	2,120	91,532	43.18	2,120	78,085	36.83	2,120	
6 Florida	59,268	187,748	3.17	59,268	140,424	2.65	59,268	87,445	1.48	....	....	....	....	
7 Georgia	58,000	1,184,109	20.42	58,000	1,057,286	18.23	58,000	906,185	15.62	58,000	691,392	11.95	58,000	5
8 Illinois	55,410	2,539,891	45.84	55,410	1,711,951	30.90	55,410	851,470	15.37	55,410	476,183	8.59	55,410	1
9 Indiana	33,809	1,680,637	49.71	33,809	1,350,428	39.94	33,809	988,416	29.24	33,809	685,866	20.29	33,809	3
10 Iowa	55,045	1,194,020	21.69	55,045	674,913	12.96	55,045	192,214	3.49	....	....	....	....	
11 Kansas	81,318	364,399	4.48	....	....	....	....	....	....	....	....	....	....	
12 Kentucky	37,680	1,321,011	35.33	37,680	1,155,684	30.94	37,680	982,405	26.07	37,680	779,828	20.70	37,680	68
13 Louisiana	41,346	726,915	17.58	41,346	708,002	17.12	41,346	517,762	12.52	41,346	352,411	8.52	41,346	21
14 Maine	35,000	626,915	17.91	35,000	628,279	17.95	35,000	583,169	16.66	35,000	501,793	14.34	35,000	39
15 Maryland	11,124	780,894	70.20	11,124	687,049	61.76	11,124	583,034	52.41	11,124	470,019	42.25	11,124	44
16 Massachusetts	7,800	1,457,351	186.84	7,800	1,231,066	157.83	7,800	994,514	127.50	7,800	737,699	94.58	7,800	61
17 Michigan	56,451	1,184,059	20.97	56,451	749,113	13.37	56,451	397,654	7.04	56,451	212,267	3.76	....	
18 Minnesota	83,531	439,706	5.26	83,531	172,023	2.10	....	....	....	....	....	....	....	
19 Mississippi	47,156	827,922	17.56	47,156	791,305	16.78	47,156	606,526	12.86	47,156	375,651	7.99	47,156	13
20 Missouri	65,350	1,721,295	26.34	65,350	1,182,012	18.09	65,350	682,044	10.44	65,350	383,702	5.87	62,182	14
21 Nebraska	75,995	122,993	1.62	....	....	....	....	....	....	....	....	....	....	
22 Nevada	104,125	42,491	0.41	....	....	....	....	....	....	....	....	....	....	
23 New Hampshire	9,280	318,300	34.30	9,280	326,073	35.14	9,280	317,976	34.26	9,280	284,574	30.67	9,280	26
24 New Jersey	8,320	906,096	108.91	8,320	672,035	80.77	8,320	489,555	58.84	8,320	373,306	44.87	8,320	32
25 New York	47,000	4,382,759	93.25	47,000	3,880,735	82.57	47,000	3,097,394	65.90	47,000	2,428,921	51.68	47,000	1,91
26 North Carolina	50,704	1,071,361	21.13	50,704	992,622	19.58	50,704	869,039	17.14	50,704	753,419	14.86	50,704	737
27 Ohio	39,964	2,665,260	66.69	39,964	2,339,511	58.54	39,964	1,980,329	49.55	39,964	1,519,467	38.27	39,364	937
28 Oregon	95,274	90,923	0.95	95,274	52,465	0.55	....	....	....	....	....	....	....	
29 Pennsylvania	46,000	3,521,951	76.56	46,000	2,906,215	63.18	46,000	2,311,786	50.26	46,000	1,724,033	37.48	46,000	1,348,
30 Rhode Island	1,306	217,353	166.43	1,306	174,620	133.71	1,306	147,545	112.97	1,306	108,830	83.33	1,306	97,
31 South Carolina	34,000	705,606	20.75	34,000	703,708	20.70	34,000	668,507	19.66	34,000	594,398	17.48	34,000	581,
32 Tennessee	45,600	1,258,520	27.60	45,600	1,109,801	24.34	45,600	1,002,717	21.99	45,600	829,210	18.18	45,600	681,
33 Texas	274,356	818,579	2.98	274,356	604,215	2.20	274,356	212,592	0.77	....	....	....	....	
34 Vermont	10,212	330,551	32.37	10,212	315,098	30.86	10,212	314,120	30.76	10,212	291,948	28.59	10,212	280,
35 Virginia	38,348	1,225,163	31.95	(f) 61,348	1,596,318	26.02	61,348	1,421,661	23.17	61,312	1,239,797	20.22	61,312	1,211,
36 West Virginia	23,000	442,014	19.22	(f)	....	....	....	....	....	....	....	....	....	
37 Wisconsin	53,924	1,054,670	19.56	53,924	775,881	14.39	53,924	305,391	5.66	....	....	....	....	
The Territories	1,619,417	442,730	0.27	(e) 1,303,465	(e) 402,481	(e) 0.30	1,436,735	143,985	0.09	1,146,429	172,246	0.15	1,258,846	136,
38 Alaska (unorganized territory)	577,390	(d)	(d)	....	....	....	....	....	....	....	....	....	....	
39 Arizona	113,916	9,658	0.08	....	....	....	....	....	....	....	....	....	....	
40 Arkansas	....	....	....	....	....	....	....	....	....	....	....	....	52,198	30
41 Colorado	104,500	39,864	0.38	....	....	....	....	....	....	....	....	....	....	
42 Dakota	(e) 150,932	14,181	0.09	....	....	....	....	....	....	....	....	....	....	
43 District of Columbia	64	131,700	2057.81	64	75,080	1,173.13	64	51,687	807.61	100	43,712	437.12	100	39,
44 Florida	....	....	....	....	....	....	....	....	....	59,268	54,477	0.92	59,268	34,
45 Idaho	86,294	14,999	0.17	....	....	....	....	....	....	....	....	....	....	
46 Illinois	....	....	....	....	....	....	....	....	....	....	....	....	....	
47 Indian Country (unorg. territory)	58,191	(d)	(d)	58,191	(d)	(d)	524,256	(d)	(d)	812,601	(d)	(d)	....	
48 Ind. Coun., Unorg. Ter. west of	10,800	(d)	(d)	10,800	(d)	(d)	22,576	(d)	(d)	....	....	....	....	
49 Indiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
50 Iowa	....	....	....	....	....	....	....	....	....	194,536	43,112	0.22	....	
51 Kansas	....	....	....	126,283	141,483	0.90	....	....	....	....	....	....	....	
52 Louisiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
53 Michigan	....	....	....	....	....	....	....	....	....	....	....	....	136,975	31,
54 Minnesota	....	....	....	81,960	4,837	0.06	165,491	6,077	0.04	....	....	....	....	
55 Mississippi	....	....	....	....	....	....	....	....	....	....	....	....	....	
56 Missouri	....	....	....	....	....	....	....	....	....	....	....	....	1,010,305	(d)
57 Montana	(e) 143,776	20,595	0.14	....	....	....	....	....	....	....	....	....	....	
58 Nebraska	....	....	....	351,558	28,841	0.08	....	....	....	....	....	....	....	
59 New Mexico	121,201	91,874	0.76	261,342	93,516	0.36	215,807	61,547	0.29	....	....	....	....	
60 Ohio, North of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
61 Ohio, South of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
62 Oregon	....	....	....	....	....	....	288,345	13,294	0.05	....	....	....	....	
63 Orleans	....	....	....	....	....	....	....	....	....	....	....	....	....	
64 Utah	84,476	86,786	1.03	220,196	47,130	0.21	220,196	11,380	0.05	....	....	....	....	
65 Washington	69,994	23,955	0.34	193,071	11,594	0.06	....	....	....	....	....	....	....	
66 Wisconsin	....	....	....	....	....	....	....	....	....	79,924	30,945	0.39	....	
67 Wyoming	97,883	9,118	0.09	....	....	....	....	....	....	....	....	....	....	
68 On pub. ships in serv. of the U.S.	....	....	....	....	....	....	....	....	....	....	6,100	....	....	5

(a) The land-surface of the United States, 3,603,884 square miles, when increased by the water surface of the great lakes and rivers, gives a total area to the United States of about 4,000,000 square miles.

(b) The excess of the total area of the United States at 1870 over the total area at 1860 represents The Russian Cession, or Alaska; the excess at 1860 over 1850, The Second Mexican Cession, or "Gadsden Purchase"; of 1850 over 1840, The

81,318; 107,206; 1.30. The totals of the States become 1,804,347; 31,148,046; 17.21. Place Colorado, Dakota, and Nevada among the Territories named, and strike out the numbers for the Territories of Kansas and Minnesota. The Territorial columns for 1861 become: The Territories, 1,222,147; 295,375; 0.24; Colorado, 104,500; 34,277; 0.33; Dakota, 310,867; 4,837; 0.01; District of Colu

(f) At 1800 and 179 States. The tabulated a suses was wholly on the numbers may

Area and population of "The States"

Area and population of "The Territories"

Area and population of "The United States," the sum of the States and the Territories

As shown by contemporary judicial opinions, dictionaries, maps, and censuses, U.S. territories were uniformly considered "in the United States." There was nothing uncertain or ambiguous about the application of the Citizenship Clause to the territories. So when the United States acquired American Samoa as a territory, everyone born in the territory became a U.S. citizen. We need not look beyond the text of the Citizenship Clause to determine the plaintiffs' citizenship.

4. The drafters and ratifiers interpreted the Citizenship Clause to encompass territories.

Even if we were to look beyond the constitutional text, however, we would find confirmation of the unambiguous meaning of the Citizenship Clause. One meaningful source is the congressional debates leading to the enactment of the Citizenship Clause; the statements in these debates provide "valuable" input on what "contemporaneous opinions of jurists and statesmen" regarded as the "legal meaning" of the Citizenship Clause. *United States v. Wong Kim Ark*, 169 U.S. 649, 699 (1898).[7] These

[7] Chief Judge Tymkovich discounts the historical value of these floor statements, suggesting that they "may not have aligned with common public understanding." Tymkovich, C.J. Concurrence at 2. But the Supreme Court thought differently, relying on the legislators' floor statements on the meaning of the Citizenship Clause as "valuable" "contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves." *Wong Kim Ark*, 169 U.S. at 699.

Disregarding the Supreme Court's own reliance on these floor statements, the concurrence points to a law review article by Professor

statements can also provide evidence of the people's understanding, especially if "there is evidence that these statements were disseminated to the public." *McDonald v. City of Chicago*, 561 U.S. 742, 828 (2010) (Thomas, J., concurring in part & concurring in the judgment).

Senator Jacob Howard proposed amending the Constitution to include the Citizenship Clause. Cong. Globe, 39th Cong., 1st Sess. 2869 (1866). The Senate adopted his proposed amendment after considering whether its language extended citizenship to the children of American Indians and Chinese immigrants. *Id.* at 2890–97.

In wording the amendment, Senator Howard drew from Senator Lyman Trumbull's draft of the 1866 Civil Rights Act. *Id.* at 2894. Given the reliance on the Civil Rights Act, Senator Trumbull commented on his understanding of the phrase "in the United States," stating that it "refers to persons everywhere, whether in the States or in the Territories or in the District of Columbia." *Id.* at 2894.

Eleven other Senators spoke, all agreeing with Senator Trumbull. *Id.* at 2890–97. For example, in discussing the extension of citizenship to children of American Indians, the Senators considered the Ojibwe

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Michael Ramsey. Tymkovich, C.J. Concurrence at 1 n.1. But Professor Ramsey thinks it clear that the drafters and public had viewed the Citizenship Clause as applicable to everyone born in territories subject to permanent U.S. sovereignty. Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 427–28, 432 (2020).

(Chippewa) people in the state of Wisconsin, the Navajo Nation in the then-territory of New Mexico, and the Tribes in the unorganized "region of the country within the territorial limits of the United States." *Id.* at 2892, 2894. No Senator questioned whether residents of the American Indian tribes were "in the United States." *Id.* at 2890–97; Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 427–29 (2020). Each "knew and properly respected the old and revered decision in the *Loughborough-Blake* case," where Chief Justice Marshall had referred to "the United States" as "the name given to our great Republic which is composed of States and territories." Letter from J.B. Henderson to Hon. C.E. Littlefield (June 28, 1901), reproduced in Charles E. Littlefield, *The Insular Cases (II: Dred Scott v. Sandford)*, 15 Harv. L. Rev. 281, 299 (1901) (quoting *Loughborough v. Blake*, 18 U.S. 317, 319 (1820)).

News of this debate was carried the next day in the New York Herald, the country's best-selling newspaper, and other papers. *See* N.Y. Herald, May 31, 1866, at 1; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 187 (Yale Univ. Press, 2008); *see also* N. Y. Times, May 31, 1866, at 1 (carrying the debate); Chi. Trib., May 31, 1866, at 1 (carrying the debate). So the Citizenship Clause was understood to apply to the territories.

5. The ratifiers had fresh experience in acquiring Alaska through a treaty silent on incorporation or statehood.

The majority says that the drafters of the Fourteenth Amendment "could only have been speaking of incorporated territories destined for statehood, not the unincorporated territories around which this case revolves." Maj. Op. at 27. But this distinction would have meant nothing from 1866 to 1868, because the term "unincorporated territory" had no meaning. The term would not be coined for another 35 years. *Downes v. Bidwell*, 182 U.S. 244, 311–14 (1901) (White, J., concurring).

And the ratifiers had fresh experience with acquiring territory not yet destined for statehood. Only a year before ratification, the United States acquired the Territory of Alaska. This acquisition was memorialized in a treaty, which didn't mention statehood or incorporation. Cession of Alaska, Russ.-U.S., T.S. No. 301, Mar. 30, 1867. By contrast, the United States' other treaties had "specifically provided that the inhabitants of the ceded territories should be incorporated into the Union." Max Farrand, *Territory and District*, 5 Am. Hist. Rev. 676, 678 (1900). So it is not clear that Congress and the public anticipated Alaska's inclusion as a state. *See id.* at 679–80 (stating over 30 years later that "there is no intention [among representative institutions] of incorporating [Alaska] as a state" and "no immediate probability that it [would] be so incorporated").

Despite the lack of any mention of statehood or incorporation of Alaska, the treaty said:

> The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all of the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property, and religion.

Cession of Alaska, Russ.-U.S., T.S. No. 301, art. III, Mar. 30, 1867 (Alaska).

At the time, no one considered Alaska either incorporated or unincorporated because the terms hadn't yet been coined. But the United States accepted the Territory of Alaska through a treaty requiring equal treatment with U.S. citizens.[8]

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[8] The Supreme Court later suggested in *Rassmussen v. United States*, 197 U.S. 516 (1905), that Alaska had become incorporated in 1891. There the Supreme Court held that Alaska had been incorporated based on "the text of the treaty by which Alaska was acquired, . . . the action of Congress thereunder, and the reiterated decisions of this Court." *Id.* at 525. Along with the treaty's "purpose to incorporate," the *Rassmussen* Court relied on

- 1868 Congressional acts,
- 1891 Congressional and Court actions,
- an 1896 Supreme Court opinion recognizing the import of those 1891 actions (*Coquitlam v. United States*, 163 U.S. 346 (1896)), and
- a 1904 Supreme Court opinion recognizing the import of the 1896 opinion (*Binns v. United States*, 194 U.S. 486 (1904)).

Roughly four decades later, Manu'a—a substantial part of American Samoa—ceded itself to the United States, obtaining the same assurance of equal treatment with U.S. citizens:

> [T]here [would] be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein, and also that the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.

Instrument of Cession, Chiefs of Manu'a-U.S., July 14, 1904 (Ta'u, Olosega, Ofu, and Rose Islands), available at https://history.state.gov/historicaldocuments/frus1929v01/d855.

Though the drafters and ratifiers of the Fourteenth Amendment couldn't have had American Samoa in mind, the country had just acquired the territory of Alaska, promising no discrimination in the political privileges enjoyed by U.S. citizens—the same promise extended in 1904 in the second cession of American Samoan land. And Alaska was considered "in the United States." *See* Part III(B)(3), above.

Even if we were to look beyond the unambiguous constitutional text, we'd find that the Citizenship Clause's plain language wasn't accidental:

See Rassmussen, 197 U.S. at 523–25. So *Rassmussen* suggests that Alaska was unincorporated prior to 1891. *Id.*; *cf.* Max Farrand, *Territory and District*, 5 Am. Hist. Rev. 676, 679–80 (1900) (noting even by 1900, incorporation of Alaska seemed unlikely in the near future).

The drafters intended the clause to extend birthright citizenship to everyone born in the U.S. territories as well as the states.

6. The Fourteenth Amendment re-inscribed the common-law application of *jus soli* to the states and the territories.

From the Founding, Congress had viewed the new nation to include the territories. Before adopting the Constitution, Congress had called the Northwest Territory "part" of the "Confederacy of the United States of America." Northwest Ordinance of 1787, § 14, art. 4, 1 Stat. 51 (July 13, 1787); Northwest Ordinance of 1789, ch. 8, 1 Stat. 50, 50–53 (1789).

But the U.S. Constitution did not initially define the "United States" or say who would be considered its citizens. U.S. Const. (1791). Given this omission in the Constitution, courts defined the citizenry based on the common law. *See, e.g.*, *Dawson's Lessee v. Godfrey*, 8 U.S. (4 Cranch) 321, 322–24 (1808); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 167–68 (1874).

The common law viewed everyone born in the sovereign's dominion as subjects of the sovereign. *Inglis v. Trs. of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring). "Dominion" was a broad concept that included "colonies and dependencies." *Calvin's Case* (1608), 77 Eng. Rep. 377, 409; *see also Inglis*, 28 U.S. at 120 (stating that "all persons born within the colonies of North America, whilst subject to the crown of Great Britain, were natural born British subjects"). The sovereign

changed with the American Revolution, but the common-law concept of citizenship remained, continuing "the fundamental rule of citizenship by birth" within the dominion of the United States. *United States v. Wong Kim Ark*, 169 U.S. 649, 658–64, 674 (1898). The territories, the Supreme Court explained, are "political subdivisions of the outlying dominion of the United States." *First Nat'l Bank v. Yankton Cty.*, 101 U.S. 129, 133 (1879).

Despite the common law's broad conception of birthright citizenship, which extended to individuals born in the territories, the Supreme Court concluded in *Dred Scott v. Sandford* that African Americans couldn't become citizens even if they had been born in the United States. 60 U.S. (19 How.) 393, 404–05 (1857). This conclusion struck many as a repudiation of the common law's recognition of birthright citizenship, known as the doctrine of *jus soli*.

Invoking this doctrine, Senator Howard proposed the Citizenship Clause, stating that it was "simply declaratory of what [he] regard[ed] as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, [was] by virtue of the natural and national law a citizen of the United States." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866). Through the Citizenship Clause, Congress tried to squelch the notion that persons born "in the District of Columbia *or in the Territories*, though within the United States, were not citizens." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72–73 (1872) (emphasis

added). A person "may . . . be a citizen of the United States without being a citizen of a State . . . ." *Id.* at 74.

Roughly 20 years after ratification, the Supreme Court considered the meaning of the Citizenship Clause in *Elk v. Wilkins*, 112 U.S. 94 (1884). There the Court considered whether the plaintiff, who was born as a member of an American Indian tribe, was a U.S. citizen by virtue of his birth "within the territorial limits of the United States." *Id.* at 98–99, 102. Though the plaintiff was born in the territories, the Supreme Court observed that he was "in a geographical sense born in the United States." *Id.* at 102.[9]

The Supreme Court soon returned to the meaning of the Citizenship Clause in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). That case involved the citizenship of Mr. Wong Kim Ark, who was born in a state (California) to Chinese nationals. To decide whether Mr. Wong was a U.S. citizen, the Court relied on the common-law recognition that everyone born within the sovereign's dominion was a subject of the sovereign: "The fourteenth amendment affirms the ancient and fundamental rule of

[9] The Court held that although the plaintiff had been born in the United States, he was not a U.S. citizen under the Fourteenth Amendment because he owed allegiance to his tribe rather than to the United States. *Elk*, 112 U.S. at 98–99, 109.

citizenship by birth within the territory, in the allegiance and under the protection of the country . . . .” *Id.* at 655, 693.

The majority and the federal government dismiss this language as irrelevant dicta because Mr. Wong was born in a state (California). Maj. Op. at Part II(B)–(C). Though he was born in a state, rather than a territory, the Court had to decide how to define citizenship because Mr. Wong’s parents were Chinese nationals. *Wong Kim Ark*, 169 U.S. at 652, 693–94. 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.” *Id.* at 693 (emphasis added); *see also Gonzales v. Williams*, 192 U.S. 1, 13 (1904) (stating only a few years later that the territory of Puerto Rico lies within “the dominion of the United States”).

Even if this discussion were dicta, it would carry great weight, as the Supreme Court recently observed: “Some have referred to this part of [*Wong Kim Ark*] as a holding, while others have referred to it as obiter dictum. Whichever it was, the statement was evidently the result of serious

consideration and is *entitled to great weight*." *Afroyim v. Rusk*, 387 U.S. 253, 266 n.22 (1967) (citations omitted) (emphasis added). So we should apply the methodology of *Wong Kim Ark*. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (stating that when the Constitution "codified a *pre-existing* right," courts must derive the scope of this right by considering its "historical background" (emphasis in original)).

Applying the common-law rule of birthright citizenship, I would consider the individual plaintiffs—born in the U.S. territory of American Samoa—as U.S. citizens.

7. Other constitutional references to "the United States" do not affect the meaning of the term in the Citizenship Clause.

The Supreme Court has recognized that the term "the United States" may refer either to the sovereign, the territory subject to the sovereign's control, or the collective name for the states and the District of Columbia. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671–72 (1945), *overruled on other grounds by Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984). Although we consider other constitutional references to "the United States," they provide little guidance.

In focusing on the constitutional structure, the parties point to two other constitutional provisions adopted at or about the same time as the Citizenship Clause: Section 2 of the Fourteenth Amendment and the Thirteenth Amendment.

The plaintiffs point to Section 2 of the Fourteenth Amendment, which uses the phrase "among the several States." U.S. Const. amend. XIV, § 2. This clause appears narrower than the clause "in the United States," suggesting that "the United States" might extend beyond the combination of states.

But the different terminology doesn't reveal how much further the phrase "in the United States" extends beyond the combination of states. The plaintiffs theorize that the phrase "in the United States" must encompass all the territories, including American Samoa. The federal government posits that the phrase "in the United States" includes the District of Columbia but not the territories. Both interpretations are possible; neither is decisive.

For its part, the federal government points to the Thirteenth Amendment, adopted roughly 1-½ years before the Citizenship Clause. The Thirteenth Amendment banned slavery "within the United States, *or* any place subject to *their* jurisdiction." U.S. Const. amend. XIII (emphases added). The federal government argues that this language shows that "the United States" must not include the territories because

- the disjunctive ("or") shows that some places lie outside the United States but are subject to U.S. jurisdiction and
- the use of "their" in reference to the "United States" suggests that the term "United States" refers only to the combination of states, excluding the territories.

These arguments are not persuasive for two reasons.

First, the Thirteenth Amendment's reference to "any place subject to their jurisdiction" need not encompass territories; this reference may instead pertain to locations like U.S. military bases located overseas. *See In re Chung Fat*, 96 F. 202, 203–04 (D. Wash. 1899) (concluding that slavery aboard a U.S. vessel would violate the Thirteenth Amendment).

Second, the Fourteenth Amendment's Citizenship Clause was designed to make explicit what the Thirteenth Amendment had implied. So the Citizenship Clause must extend at least as far as the Thirteenth Amendment.

The drafters of the Citizenship Clause believed that the Thirteenth Amendment had already overturned *Dred Scott* and re-established the natural law of citizenship. For example, between the passage of the Thirteenth Amendment and the Fourteenth Amendment, Senator Trumbull urged inclusion of a similarly worded citizenship clause in the 1866 Civil Rights Act. He stated that with the new constitutional protection of freedom for African Americans came renewed status as "citizens" and "the great fundamental rights belonging to free citizens." Cong. Globe, 39th Cong., 1st Sess. 475 (1866); *see* N. Y. Times, Jan. 30, 1866, at 1 (carrying debate); Chi. Trib., Jan. 30, 1866, at 1 (same).

Other congressmen agreed that they could now confirm citizenship for African Americans and passed the Civil Rights Act of 1866 over

President Johnson's veto. Ch. 31, 14 Stat. 29–30; *see also* Michael Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 48 (Duke Univ. Press 1986) ("Republicans believed the Thirteenth Amendment effectively overruled *Dred Scott* so that black[] [Americans] were entitled to all rights of citizens."); Andrew Johnson, *The Veto*, N.Y. Times, March 28, 1866, at 1 ("If, *as is claimed by many*, all persons who are native born, already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill cannot be necessary to make them such." (emphasis added)).

The Citizenship Clause made explicit what the Thirteenth Amendment had already memorialized. So Senator Howard introduced his proposed language for the Citizenship Clause, regarding it as "simply declaratory of what [he] regard[ed] as the law of the land *already*." Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (emphasis added). And contemporary newspapers quoted Senator Doolittle's statement that the Civil Rights Act and the Citizenship Clause had undertaken "to do th[e] same thing." N.Y. Herald, May 31, 1866 p. 1; N.Y. Times, May 31. 1866 p. 1 (same); Chi. Trib., May 31, 1866, p. 1 (same). Indeed, in *United States v. Wong Kim Ark*, the Supreme Court recognized that the Citizenship Clause was "declaratory of existing rights, and affirmative of existing law." 169 U.S. 649, 676, 687–88 (1898). Because the Fourteenth Amendment did not

"impose any new restrictions upon citizenship," the Citizenship Clause must apply at least as broadly as the Thirteenth Amendment. *Id.* at 688.

The federal government also points to other constitutional provisions adopted long before and after the Citizenship Clause, such as the Territories Clause and the Eighteenth Amendment.

The Territories Clause provides for "the Territory and other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. This language treats a territory as a possession of the United States rather than a part of it. But the Constitution elsewhere refers to the territories as places distinct from U.S. "possessions." *See, e.g.*, U.S. Const. amend. XXI, § 2 (referring to "any State, Territory, *or* possession of the United States" (emphasis added)).

Nor is the Eighteenth Amendment decisive. This amendment (now repealed) banned the import and export of liquor, referring to "the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, § 1. From this language, we know that some territories are subject to U.S. jurisdiction even though they lie outside the United States. The Thirteenth Amendment had also shown the existence of territories subject to the U.S. jurisdiction even though they lay outside the United States. But no party suggests that the Thirteenth Amendment excludes all territories from "in the United States."

From the Territories Clause and the Eighteenth Amendment, we can safely conclude that the term "the United States" doesn't always include territories. But the Territories Clause preceded the Citizenship Clause by roughly eighty years, and the Citizenship Clause preceded the Eighteenth Amendment by roughly fifty years. And we know that the phrase "the United States" means different things in different constitutional contexts. *See Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671–72 (1945), *overruled on other grounds by Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984); *see also* p. 24, above. So when we interpret the Citizenship Clause's reference to "in the United States," we can learn little from

- the Territories Clause's 80-year-old reference to "the Territory . . . belonging to" the United States or
- the Eighteenth Amendment's repealed reference to "territory subject to" U.S. jurisdiction.

C. The constitutional structure does not affect the meaning of "in the United States" in the Citizenship Clause.

Despite the clear import of the Citizenship Clause, the defendants point to the constitutional structure, arguing that Congress's plenary power over the territories should override the Citizenship Clause. *See* U.S. Const. art. IV, § 3, cl. 2; *see also Downes v. Bidwell*, 182 U.S. 244, 306 (1901) (White, J., concurring) (questioning whether the right to acquire territory could "be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them" to

the Constitution's tax requirements). The defendants thus urge judicial restraint to prevent encroaching on congressional oversight of the territories.

But the defendants don't address the historical import of the Citizenship Clause. That clause wasn't part of the Constitution's original structure or the Founders' initial conception of the separation of powers. The clause emerged in the Fourteenth Amendment, which was designed to adjust the constitutional structure by putting "this question of citizenship . . . beyond the legislative power." *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard)). The Citizenship Clause was thus designed to remove birthright citizenship from Congress's domain, confirming the abrogation of *Dred Scott* and ensuring preservation of the citizenship that freed slaves had enjoyed under the common law.

The Fourteenth Amendment realigned the Constitution's structure. Given this realignment, a general structural argument about Congressional power to govern territories can't override the Citizenship Clause.

D. The majority erroneously relies on congressional actions 50 years after adoption of the Citizenship Clause to conclude that it does not apply to American Samoa.

Though I regard the Citizenship Clause as unambiguous, the majority doesn't. In characterizing the clause as ambiguous, the majority never considers what "in the United States" means in the Citizenship Clause,

choosing instead to find ambiguity based on other uses of "United States" in other constitutional provisions enacted at other times. In my view, this approach mixes apples and oranges, for the term "United States" is used in the Constitution sometimes as shorthand for

- the aggregation of states (U.S. Const. Preamble; amend. XI),
- the entity created by the states (art. I, § 8, cls. 16, 18; art. III, § 1; art. VI, cl. 2), and
- a place (amend. XIV, § 1; art. II, § 1, cl. 5; art. I, § 8, cl. 1).

See Part III(B)(7), above. The Citizenship Clause unambiguously uses the term "in the United States" to refer to a place. So we can parse the Citizenship Clause's meaning only by considering the use of the term "United States" when the clause was adopted and ratified.

But my esteemed colleagues do something different: They decline to consider the public understanding of "in the United States" or the intent of the drafters when extending birthright citizenship to everyone born "in the United States." Indeed, no one in the case—not the parties, the intervenors, or my colleagues—has pointed to a single contemporary judicial opinion, dictionary, map, census, or congressional statement that treated U.S. territories as outside the United States from 1866 to 1868.

Disregarding the public understanding of "in the United States" in 1866 to 1868, the majority instead relies on Congress's practice beginning roughly 50 years after adoption of the Citizenship Clause, when Congress

granted statutory citizenship to individuals born in the Territory of Puerto Rico.[10] But Congress's later views shed little light on the intent of the drafters and ratifiers from 1866 to 1868, for "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures . . . think that scope too broad." *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008); *see also United States v. Price*, 361 U.S. 304, 313 (1960) (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

Still, finding that ambiguity remains, Judge Lucero considers whether

- U.S. citizenship is a fundamental right or
- application of the Citizenship Clause would be impractical or anomalous in American Samoa.

But these inquiries would be appropriate only if the Citizenship Clause had not expressly defined its geographic scope, which the clause did through the phrase "in the United States." *See Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21 (1976).[11]

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[10] Years later, Congress also granted statutory citizenship to natives of four other territories (Guam, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands).

[11] There the Supreme Court interpreted one of the Insular Cases—*Dorr v. United States*, 195 U.S. 138, 143 (1904)—as holding "that the

Congress's later actions shed little light on the thinking 50 years earlier.

E. We can draw little insight from *Downes v. Bidwell* and its distinction between incorporated and unincorporated territories.

The federal government relies on *Downes v. Bidwell*, arguing that it suggests disregard for the common law's principle of birthright citizenship. 182 U.S. 244 (1901). In *Downes*, the Court considered the meaning of the Tax Uniformity Clause, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art I, § 8, cl. 1; *Downes*, 182 U.S. at 288 (White, J., concurring).

The context is all-important: Because citizenship wasn't involved, the Court had no reason to consider the common law's treatment of the country's geographic scope. For purposes of the Tax Uniformity Clause, the *Downes* Court held that the phrase "United States" does not include unincorporated territories. U.S. Const. art. I, § 8, cl. 1; *see Downes*, 182 U.S. at 263, 277–78, 287 (opinion of Brown, J.); *id.* at 341–42 (White, J., concurring); *id.* at 346 (Gray, J. concurring). The federal government extends this conclusion to the Citizenship Clause. I disagree for three reasons:

Constitution, *except insofar as required by its terms*, did not extend to the Philippines as an unincorporated territory." *Examining Bd. of Eng'rs*, 426 U.S. at 589 n.21 (emphasis added).

1. The Citizenship Clause's use of "United States" includes territories.

2. Justice White's discussion of citizenship entailed only dicta in a plurality opinion.

3. The Supreme Court has repeatedly warned against extending *Downes*.

First, the term "in the United States" in the Citizenship Clause refers to the states and territories. *See* Part III, above; *Examining Bd. of Eng'rs, Architects & Surveyors*, 426 U.S. at 589 n.21, 599 n.30. The term "United States" can refer to different geographic bounds depending on the context. *See* Part III(B)(7), above. *Downes* held that "United States," as used in the Tax Uniformity Clause, doesn't include unincorporated territories. *See* p. 33, above. But the Citizenship Clause followed the Tax Uniformity Clause by over a half century, with different drafters and a different purpose. Between 1866 and 1868, the word "territory" referred to an area in the United States.

The Tax Uniformity Clause was designed to prevent the federal government from using its power over commerce to the disadvantage of individual states. *United States v. Ptasynski*, 462 U.S. 74, 80–81 (1983). In contrast, the Citizenship Clause addresses "a reciprocal relationship between an individual and a nation, irrespective of where within that nation the individual may be found." José Julián Álvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status*

of Puerto Ricans, 27 Harv. J. on Legis. 309, 335 (1990). In determining the extent of this reciprocal relationship, the Citizenship Clause expressly defines its geographic reach, applying to all land "in the United States." By defining its own geographic reach, the Citizenship Clause differs from the Tax Uniformity Clause.

The majority points out that the Supreme Court has recognized a distinction between incorporated and unincorporated territories, citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), *Balzac v. Porto Rico*, 258 U.S. 298 (1922), and *Dorr v. United States*, 195 U.S. 138 (1904). Maj. Op. at 4–5 n.1 and 28. But those opinions addressed the right against unreasonable searches and the right to a jury trial—rights that do not identify their geographic scope. *See Verdugo-Urquidez*, 494 U.S. at 264 (Fourth Amendment protections against unreasonable searches and seizures), *Balzac*, 258 U.S. at 304 (Article III and the right to a jury trial under the Sixth and Seventh Amendments); *Dorr*, 195 U.S. at 144 (Sixth Amendment right to a jury trial). So those opinions don't establish a distinction between incorporated and unincorporated territories for a right, like the Citizenship Clause, that defines its own geographic scope.

Second, to the extent that the *Downes* opinions discussed citizenship, the opinions were splintered and provided only unhelpful dicta on the geographic scope of the "United States" for purposes of the Tax Uniformity Clause. There was no majority beyond *Downes*'s core holding.

Justice White's opinion was later recognized as "the settled law of the court." *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922). But Justice White's opinion garnered only two other votes. *Downes*, 182 U.S. at 287 (White, J., concurring). The holding is thus limited to the "position taken by [the concurring Justices] on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

And Justice White's discussion of citizenship constituted dicta outside the Court's narrow holding. In this dicta, Justice White used citizenship only as an illustration. *See Downes*, 182 U.S. at 306 (White, J., concurring) ("Let me illustrate . . . . Can it be denied that such right [to acquire territory] could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States . . . ?").

In another context, even dicta would carry great weight. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (explaining that this Court is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements" (quoting *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007))). But given the fractured opinions, Justice White's reasoning on citizenship carries only the authority of a concurrence. *See Nichols*, 511 U.S. at 745.

Finally, *Downes* is one of the nine "Insular Cases" whose impact has diminished over the last century. In the middle of the twentieth century, for example, a plurality of the Supreme Court stated that "neither the [Insular] cases nor their reasoning should be given any further expansion." *Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality op.); *see also Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, ___ U.S. ___, 140 S. Ct. 1649, 1665 (2020) ("Those [Insular Cases] did not reach this issue, and whatever their continued validity we will not extend them in these cases." (citing *Reid*, 354 U.S. at 14)); *cf. Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979) (Brennan, J., concurring in the judgment) ("Whatever the validity of the [Insular] cases . . . those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." (internal citations omitted)). Dicta from *Downes* has thus been further "enfeebled" by the Supreme Court's "later statements." *See Bonidy*, 790 F.3d at 1125.

We should thus draw little guidance from *Downes*'s interpretation of the Tax Uniformity Clause.

IV. Even if the Citizenship Clause did not otherwise extend to American Samoa, this clause would apply because it recognized a fundamental right.

In *Downes*, Justice White's opinion distinguished between incorporated and unincorporated territories:

- an incorporated territory was "destined for statehood" and the Constitution applied in full;

- other territories were unincorporated, and constitutional provisions would govern only if they applied "by [their] own terms" or were considered "fundamental."

Downes v. Bidwell, 182 U.S. 244, 290–91, 299–300 (1901) (White, J., concurring); *see Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21, 599 n.30 (1976); *Boumediene v. Bush*, 553 U.S. 723, 758 (2008). In my view, the Citizenship Clause applies by its own terms. *See* Part III, above. But even if its application were ambiguous, the right to citizenship in some country would be fundamental.

A right is considered fundamental if it is "the basis of all free government." *Downes*, 182 U.S. at 290–91 (White, J., concurring). In the United States, citizenship lies at the core of our national identity: "Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry." *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). Though some other countries' constitutions don't elevate the status of citizens as we do in the United States, "[o]ther nations are governed by their own constitutions, if any, and we can draw no support from theirs." *Id.* at 257. The Supreme Court explained the unique importance of citizenship in the United States:

> [I]t is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and

> importance. By many it is regarded as the highest hope of civilized men.

Schneiderman v. United States, 320 U.S. 118, 122 (1943). Citizenship in our country is fundamental because political participation

- lies at the core of our government and
- turns on citizenship.

Our political identity comes from "voluntary consent" by individuals subject to U.S. laws. 1 Joseph Story, *Commentaries on the Constitution of the United States* § 325 (Charles C. Little & James Brown, 2d ed. 1851). In turn, this consent springs from the right to vote, which the Supreme Court has regarded "as a fundamental political right, . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (stating that "the right of suffrage is a fundamental matter in a free and democratic society" and "is preservative of other basic civil and political rights"); *see also Burdick v. Takushi*, 504 U.S. 428, 432 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))).

In the United States, voting hinges on citizenship. *See* Richard Sobel, *Citizenship as Foundation of Rights: Meaning for America* 154 (2016) ("Citizenship ultimately encompasses the rights and requisites to determine the nature of society and government."). The U.S. concept of citizenship

originated in ancient Greece, where citizenship reflected membership in the political body: citizens were "defined by no other thing so much as" voting ("partaking in decision") and "office." Aristotle, *Politics*, bk. 3, ch. 1, (Carnes Lord trans., Univ. Chi. Press, 2d ed. 2013) (c. 350 B.C.E.). Through this ancient concept of citizenship, it remains tied to voting. Our constitution thus refers to voting as a right of citizenship. U.S. Const. amend. XV, § 1; amend. XIX; amend XXIV, § 1; amend. XXVI, § 1.

Because citizenship unlocks the fundamental right of voting, a plurality of the Supreme Court has regarded citizenship itself as a "fundamental right" beyond the control of ordinary governmental powers. *Trop v. Dulles*, 356 U.S. 86, 92–93 (1958) (plurality op.); *see also Klapprott v. United States*, 335 U.S. 601, 616 (1949) (Rutledge, J., concurring) ("To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others."). And a majority of the Court later recognized that "the very nature of our free government" prevents government officials from taking away someone's constitutional citizenship. *Afroyim*, 387 U.S. at 286. So, in my view, the fundamental nature of citizenship prevents delegation of American Samoans' citizenship to Congress or any other political body.

V. Even if citizenship were not a fundamental right, its application in American Samoa would be neither impracticable nor anomalous.

Even when rights aren't fundamental, they presumptively apply in unincorporated territories. *Reid v. Covert*, 354 U.S. 1, 74–75 (1957) (Harlan, J., concurring); *see also* Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 Hastings Const. L. Q. 71, 119 (2013) ("The presumption is that a constitutional provision does apply [in unincorporated territories] unless it is impractical or anomalous to that particular territory."). So the burden falls on those who would decline to apply a given constitutional right based on impracticability or anomalousness. *See Reid*, 354 U.S. at 74–75 (Harlan, J., concurring).

The Court has interchangeably used the terms "impracticable" and "impractical" to refer to "[p]ractical considerations." *See Boumediene v. Bush*, 553 U.S. 723, 770, 793 (2008). "Impractical" "connotes difficulty of implementation or such a substantial degree of inconvenience that it makes the likelihood of success in realizing such a right very low." Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 Vand. L. Rev. 1373, 1417 (2014). So when the Supreme Court has considered the "impracticability" of applying a given right, the Court has focused on the difficulty of applying the right in a given territory. For example, the *Boumediene* Court analyzed the impracticability of applying

the Suspension Clause based in part on the "few practical barriers" to the exercise of habeas corpus. 553 U.S. at 770.

If it's not impracticable to implement a constitutional right in a territory, the court must do so unless it would be "anomalous." Implementing a right would be "anomalous" only if it deviates from ordinary conditions. *New Oxford American Dictionary* 64 (Oxford Univ. Press, 3d ed. 2010).

To determine whether extending citizenship to inhabitants of unincorporated territories is "impracticable and anomalous," a court must balance "the particular local setting, the practical necessities, and the possible alternatives" against the seriousness of the right. *Reid*, 354 U.S. at 75, 77–78 (Harlan, J., concurring).

A. Citizenship for everyone born in American Samoa is neither impracticable nor anomalous.

Even if citizenship were not a fundamental right, birthright citizenship for everyone born in American Samoa would be neither impracticable nor anomalous. Even without recognition of citizenship, American Samoans already enjoy the constitutional protections of due process and *Miranda* warnings. *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (right to due process); *Am. Sam. Gov't v. Pino*, 1 Am. Samoa 3d 186, 190–92 (1997) (*Miranda* warnings).

The American Samoan government argues that U.S citizenship would be impractical because it would lead to recognition of other constitutional rights, like equal protection, that would threaten local cultural traditions. This worry lacks any legal foundation. Equal protection already applies to everyone within the United States' territorial jurisdiction regardless of whether they are citizens. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the Fourteenth Amendment's equal protection clause applies universally to "all persons within the territorial jurisdiction" and "is not confined to the protection of citizens"); *see also Graham v. Richardson*, 403 U.S. 365, 371 (1971) (observing that the Fourteenth Amendment's equal protection clause encompasses both aliens and citizens). So courts have already applied the right to equal protection to American Samoans even while considering them non-citizens. *See Craddick v. Territorial Registrar*, 1 Am. Samoa 2d 10, 12 (App. Div. 1980) (stating that "the constitutional guarantees of due process and equal protection are fundamental rights which do apply in the Territory of American Samoa"); *see also Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976) (concluding that the right to equal protection applies to the Puerto Rican government).

And there's no reason to think that citizenship would open the floodgates to other constitutional rights. If another right is asserted, the court would need to separately decide the applicability of that right in

American Samoa. This inquiry would turn not on citizenship, but on (1) whether the right is fundamental and (2) if not, whether application of the Citizenship Clause in American Samoa would be impracticable or anomalous. *See* pp. 37–42, above.

The American Samoan government argues that birthright citizenship would upend political processes that ensure self-determination. I would reject this argument for three reasons:

1. The Citizenship Clause applies by its own terms.

2. Judicial recognition of birthright citizenship respects American Samoa's right to self-determination.

3. The practicality of applying a constitutional provision does not depend on elected legislators.

First, in my view, the Citizenship Clause currently applies by its own terms. *See* Part III, above. And the Citizenship Clause was meant to "put [the] question of citizenship . . . beyond the legislative power" for those to whom it applies. *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess. 2896 (1866) (statement of Sen. Howard)). As long as American Samoa remains a U.S. territory, citizenship is not for elected leaders to decide. That responsibility instead falls to the courts. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, J.) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?").

American Samoa can always choose independence. But while American Samoa remains joined with the United States, birthright citizenship respects the promises underlying the political union with the United States.

A substantial part of American Samoa memorialized in its cession that the United States had promised protection against "discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein." Instrument of Cession, Chiefs of Manu'a-U.S., July 14, 1904 (Ta'u, Olosega, Ofu, and Rose Islands), available at https://history.state.gov/historicaldocuments/frus1929v01/d855. To honor this promise, birthright citizenship ensures that people born in American Samoa and living elsewhere can retain autonomy by deciding whether to consent to the governing laws. *See* Part IV, above.

And the practicality of applying a constitutional amendment does not depend on the practices of elected legislators, whether they are in the U.S. Congress or the Fono, for constitutional rights do not flicker with the practices of political majorities. *See Boumediene v. Bush,* 553 U.S. 723, 765 (2008). Indeed, the Citizenship Clause was designed "to remove the right of citizenship by birth from transitory political pressures." Richard Sobel, *Citizenship as Foundation of Rights: Meaning for America* 6 (2016) (quoting Walter Dellinger, *Legislation Denying Citizenship at Birth to*

Certain Children Born in the United States, Statement before Subcomms. on Immigration and Claims and on the Constitution, 5 House Comm. on Judiciary (Dec. 13, 1995)).

Judge Lucero argues that it would be impractical to recognize birthright citizenship because of the "preference against citizenship expressed by the American Samoan people through their elected representatives." Maj. Op. at 34. In my view, the appellants have not made this argument and it lacks factual or legal support.

We have no poll or even argument about what American Samoans want. To the contrary, the American Samoan government denies "a monolithic view of citizenship among American Samoan people," claiming instead that "the American Samoan people have never achieved consensus regarding the imposition of birthright citizenship." Intervenors' Reply Br. at 9 n.1; Intervenors' Opening Br. at 26. So the American Samoan government has waived any argument that the American Samoan people oppose U.S. citizenship, and I would not consider the argument sua sponte. *See Frasier v. Evans*, 992 F.3d 1003, 1033 (10th Cir. 2021).

Second, the argument is factually unsupported, for the record says nothing about the preference of a majority in American Samoa. Despite the lack of such evidence, the American Samoan government cites a 2007 report by the American Samoa Future Political Status Study Commission. The American Samoa Future Political Status Study Commission, *Final*

Report (Jan. 2, 2007). This report states that among American Samoans who had publicly expressed their views to the Commission, "anti-citizenship attitude remain[s] strong[,] especially among the elders." *Id.* at 64. But the report also observed that "some" American Samoans residing in other parts of the United States had "recommended that American Samoa change to a political status which guarantees U.S. citizenship." *Id.* at 65. And one intervenor, the Honorable Aumua Amata, has proposed litigation to provide an expeditious route to U.S. citizenship for American Samoans. *See* H.R. 5026, 115th Cong. (2017); H.R. 1208, 116th Cong. (2019); H.R. 3482, 116th Cong. (2019).

Despite the dearth of evidence reflecting opposition to U.S. citizenship, Judge Lucero elevates the role of consent, insisting that we should confine U.S. citizenship to those who consent. Maj. Op. at 34–37. Certainly the three American Samoan plaintiffs consent to U.S. citizenship.

But Judge Lucero's focus on current consent is misguided. Our job is to interpret the Constitution regardless of the popularity of our interpretation in American Samoa, and the application of constitutional rights does not become impracticable or anomalous because of disagreement. *See Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be

applied by the courts.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). As long as America Samoa remains a U.S. territory and the U.S. Constitution contains the Citizenship Clause, consent plays no role in applying the Citizenship Clause under the "impracticable or anomalous" test.

Judge Lucero acknowledges that American Samoan preferences may change. Maj. Op. at 36 n.27. To Judge Lucero, Congress can accommodate by granting statutory citizenship to natives of American Samoa. *Id.* Put aside that

- Congress might not grant such a request and
- the Citizenship Clause either grants citizenship to natives of American Samoa or it doesn't.

By Judge Lucero's logic, every change in the popular will would require a change in our application of the Citizenship Clause. If we rely on the current political climate to resist application of the Citizenship Clause, would we overrule that precedent next year if the political climate changes, ping-ponging our interpretation with the change in political winds? I think not. Natives of American Samoa are either born in the United States or they're not. Because natives of American Samoa are born in the United States, they are citizens at birth irrespective of consent.

Judge Lucero's approach is not only short-sighted but misguided based on the fervor that spurred the creation and adoption of the

Citizenship Clause. Shortly before the Citizenship Clause was proposed, Congress had passed the 1866 Civil Rights Act, which extended citizenship to everyone born in the United States.

But fierce opposition worried the Republican Congress, for the law could be repealed. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 Va. L. Rev. 493, 578–79 (2013). Many Congressmen wanted to strip future congresses of the power to take away birthright citizenship. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1328–29 (1952).

Among these congressmen was Senator Jacob Howard. On the floor of the Senate, he proposed the amendment that would ultimately become the Citizenship Clause. The amendment, he explained, was necessary to remove the issue of citizenship from the domain of legislators: "It settles the great question of citizenship and removes all doubt as to what persons are or not citizens of the United States . . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power . . . ." Cong. Globe, 39th Cong., 1st Sess. 2890, 2896 (1866).

The Supreme Court relied in part on this intention in *Afroyim v. Rusk*, 387 U.S. 253 (1967). There the issue was whether Congress's oversight of foreign affairs could affect someone's constitutional right to citizenship. *Id.* at 254–56. The issue arose because (1) Congress had

forbidden U.S. citizens from voting in a foreign election and (2) a U.S. citizen had voted in an Israeli election. *Id.* at 254. The Court recognized Congress's province over foreign affairs. *Id.* at 256. But this right did not override the clear import of the Citizenship Clause. To interpret this clause, the Court considered its origins, recognizing that Senator Howard had proposed the constitutional language in order to remove citizenship from the legislative realm. *Id.* at 262–63.

The American Samoan government downplays *Afroyim* and the history of the Citizenship Clause, pointing out that here we are addressing recognition of citizenship in the first instance rather than a political choice to strip individuals of their citizenship. This is a distinction without a difference. The Supreme Court reasoned that Congress had adopted the Citizenship Clause to divest legislatures of power over someone's citizenship. *Id.*

In elevating citizenship beyond legislative influence, the drafters and ratifiers of the Fourteenth Amendment recognized that some rights should not be subject to political preferences: "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." *Id.* at 268.

From 1866 to 1868, many would have preferred to remove the constitutional recognition of citizenship for the recently freed slaves. But

that preference didn't rule the day because citizenship wasn't subject to a popularity contest. Irrespective of who we think best suited to decide who are citizens, the Citizenship Clause and the Supreme Court have vested that decision in us, not the political leadership in American Samoa.

Regardless of whether we want that responsibility, the Citizenship Clause entitles the American Samoan people to citizenship. The opposition of the American Samoan government does not, and cannot, affect the applicability of the Citizenship Clause to the natives of American Samoa. Irrespective of that opposition, application of the Citizenship Clause to all of American Samoa would be neither impracticable nor anomalous.

B. Citizenship for the plaintiffs, who were born in American Samoa and now reside in Utah, is neither impracticable nor anomalous.

To determine the impracticability or anomaly of applying a constitutional right, we must consider the application in the particular case rather than in a vacuum. In *Reid v. Covert*, for example, Justice Harlan did not "agree with the sweeping proposition that a full Article III trial, with indictment and trial by jury, is required in every case for the trial of a civilian dependent of a serviceman overseas." 354 U.S. 1, 75 (1957) (Harlan, J., concurring). He instead concluded only that the petitioners should obtain a jury trial "on [the] narrow ground" that they were standing trial for a capital offense "on pain of life itself." *Id.* at 77–78. So we must decide only whether application of the Citizenship Clause would be

impracticable or anomalous for the three individual plaintiffs. All were born in American Samoa, but reside now in Utah.

Would it be impracticable to treat them as citizens only because they moved to Utah (or any other State or incorporated territory)? In *Reid*, Justice Harlan limited the right to a jury trial to capital defendants because they had the most to gain. 354 U.S. at 74–78 (Harlan, J., concurring). Similarly, an injunction for the three individual plaintiffs would allow them to vote, serve on juries, and run for state office. *See* Part I & n.1, above; n.12, below.

Citizenship wouldn't impair the individual plaintiffs' ability to follow the cultural traditions of American Samoa, for these plaintiffs do not live on communal land or vote for members of the Fono. *See* Am. Samoa Const. art. II § 7 (providing that only residents of American Samoa may vote for its legislature); 48 U.S.C. § 1732(a) (providing that American Samoa's delegate to Congress "shall be elected by the people qualified to vote for [its] popularly elected officials"). So U.S. citizenship is uniquely practicable for the individual plaintiffs here, just as a jury trial was uniquely practicable for the plaintiffs in *Reid*.

And if the plaintiffs ultimately return to American Samoa, it would be no more impracticable to recognize their continued U.S. citizenship than

it would be to recognize U.S. citizenship for natives of a state who have moved to American Samoa.[12]

VI. Applying the Citizenship Clause would create a circuit split, but the other circuits' contrary opinions are wrongly decided.

Circuit courts have had six occasions to consider application of the Citizenship Clause to an unincorporated territory. *Tuaua v. United States*, 788 F.3d 300, 302–06 (D.C. Cir. 2015); *Thomas v. Lynch*, 796 F.3d 535, 542 (5th Cir. 2015); *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). One of these cases (*Tuaua*) involved American Samoa; four involved the Philippines; and one (*Thomas*) involved a U.S. military base in Germany. On each occasion, the circuit court held that the Citizenship Clause does not apply to the territory. In light of these holdings, we should exercise caution before creating a circuit split. *United States v. Thomas*, 939 F.3d 1121, 1130–31 (10th Cir. 2019). Despite this caution, we must

[12] Though I would affirm because American Samoans are U.S. citizens, I would instruct the district court to narrow its injunction. The injunction currently extends to anyone born in American Samoa. I would direct the district court to modify the injunction so that it applies only to the three individual plaintiffs. *See* n.1, above.

interpret the Constitution correctly when convinced that other circuit courts haven't. In my view, that is the case here.

For American Samoa, the D.C. Circuit Court of Appeals held that the Citizenship Clause does not apply, reasoning that it would be anomalous to recognize citizenship for American Samoans in the face of disapproval from their elected leadership. *Tuaua*, 788 F.3d at 309–12. But this rationale confuses the case law.[13] Courts consider the anomaly of applying a given constitutional right in an unincorporated territory, not the anomaly of recognizing constitutional rights for residents when the elected leadership opposes recognition of these rights. *See* Part V(A), above.

VII. Conclusion

A U.S. territory, like American Samoa, is "in the United States." So the Citizenship Clause unambiguously covers individuals born in American

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[13] The Citizenship Clause applies by its own terms to U.S. territories, including American Samoa, so the Citizenship Clause's application is not for legislatures to decide. *See* Part III, above.

The other circuits make the same mistake, interpreting the Citizenship Clause not on its own terms but instead through the lens of *Downes*'s interpretation of the Tax Uniformity Clause. *See Thomas*, 796 F.3d at 539–42; *Nolos*, 611 F.3d at 282–84; *Lacap*, 138 F.3d at 519; *Valmonte*, 136 F.3d at 918–19, *Rabang*, 35 F.3d at 1452–53. Four of these cases (*Nolos*, *Lacap*, *Valmonte*, and *Rabang*) are even less useful because they concern the Philippines, which had only a temporary relationship with the United States. *See Boumediene v. Bush*, 553 U.S. 723, 757–58, 768–69 (2008) (distinguishing the *Insular Cases* because they concerned regions where the United States had "not intend[ed] to govern indefinitely").

Samoa. From colonial days, Americans understood that citizenship extended to everyone within the sovereign's dominion. So those in territories like American Samoa enjoy birthright citizenship, just like anyone else born in our country. The plaintiffs are thus U.S. citizens, and I would affirm.

Exhibit C

FILED
United States Court of Appeals
Tenth Circuit

December 27, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN FITISEMANU; PALE TULI; ROSAVITA TULI; SOUTHERN UTAH PACIFIC ISLANDER COALITION,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; ANTONY BLINKEN, in his official capacity as Secretary of the U.S. Department of State; IAN G. BROWNLEE, in his official capacity as Assistant Secretary of State for Consular Affairs,

Defendants - Appellants,

and

THE HONORABLE AUMUA AMATA; AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants.

VIRGIN ISLANDS BAR ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION; ACLU OF UTAH; LINDA S. BOSNIAK; KRISTIN COLLINS; STELLA BURCH ELIAS; SAM ERMAN; TORRIE HESTER; POLLY J. PRICE; MICHAEL RAMSEY; NATHAN PERL-ROSENTHAL; LUCY E. SALYER; KATHERINE R. UNTERMAN;

No. 20-4017
(D.C. No. 1:18-CV-00036-CW)
(D. Utah)

CHARLES R. VENATOR-SANTIAGO; SAMOAN FEDERATION OF AMERICA, INC.; RAFAEL COX ALOMAR; J. ANDREW KENT; GARY S. LAWSON; SANFORD V. LEVINSON; CHRISTINA DUFFY PONSA-KRAUS; STEPHEN I. VLADECK; CONGRESSWOMAN STACEY PLASKETT; CONGRESSMAN MICHAEL F.Q. SAN NICOLAS; CARL GUTIERREZ; FELIX P. CAMACHO; JUAN BABAUTA; DR. PEDRO ROSSELLO; ANIBAL ACEVEDO VILA; LUIS FORTUNO; JOHN DE JONGH; KENNETH MAPP; DONNA M. CHRISTIAN-CHRISTENSEN; AMANDA FROST; LINDA K. KERBER; D. CAROLINA NUNEZ; ROGERS M. SMITH,

Amici Curiae.

JOHN FITISEMANU; PALE TULI; ROSAVITA TULI; SOUTHERN UTAH PACIFIC ISLANDER COALITION,

Plaintiffs - Appellees,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF STATE; ANTONY BLINKEN, in his official capacity as Secretary of the U.S. Department of State; IAN G. BROWNLEE, in his official capacity as Assistant Secretary of State for Consular Affairs,

Defendants,

and

No. 20-4019
(D.C. No. 1:18-CV-00036-CW)
(D. Utah)

THE HONORABLE AUMUA AMATA; AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants - Appellants.

VIRGIN ISLANDS BAR ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION; ACLU OF UTAH; LINDA S. BOSNIAK; KRISTIN COLLINS; STELLA BURCH ELIAS; SAM ERMAN; TORRIE HESTER; POLLY J. PRICE; MICHAEL RAMSEY; NATHAN PERL-ROSENTHAL; LUCY E. SALYER; KATHERINE R. UNTERMAN; CHARLES R. VENATOR-SANTIAGO; SAMOAN FEDERATION OF AMERICA, INC.; RAFAEL COX ALOMAR; J. ANDREW KENT; GARY S. LAWSON; SANFORD V. LEVINSON; CHRISTINA DUFFY PONSA-KRAUS; STEPHEN I. VLADECK; CONGRESSWOMAN STACEY PLASKETT; CONGRESSMAN MICHAEL F.Q. SAN NICOLAS; CARL GUTIERREZ; FELIX P. CAMACHO; JUAN BABAUTA; DR. PEDRO ROSSELLO; ANIBAL ACEVEDO VILA; LUIS FORTUNO; JOHN DE JONGH; KENNETH MAPP; DONNA M. CHRISTIAN-CHRISTENSEN; AMANDA FROST; LINDA K. KERBER; D. CAROLINA NUNEZ; ROGERS M. SMITH,

Amici Curiae.

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ**, **HOLMES**, **BACHARACH**, **PHILLIPS**, **MORITZ**, and **CARSON**, Circuit Judges.*

These matters are before the court on *Plaintiffs-Appellees' Petition for Rehearing En Banc* ("Petition"). We also have responses from Defendants-Appellants and Intervenor Defendants-Appellants.

The Petition and responses were transmitted to all non-recused judges of the court who are in regular active service. A poll was called and did not carry. *See* Fed. R. App. P. 35(a) (en banc consideration requires the approval of a majority of the circuit judges who are in regular active service and who are not disqualified). Accordingly, the Petition is DENIED.

Judge Bacharach and Judge Moritz would grant rehearing en banc. Judge Bacharach has prepared the attached written dissent from the denial of rehearing en banc, which is joined by Judge Moritz.

All pending motions for leave to file amici curiae briefs are granted. The briefs attached to those motions will be shown as filed as of the date of this order.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

* The Honorable Scott M. Matheson, the Honorable Carolyn B. McHugh, the Honorable Allison H. Eid, and the Honorable Veronica S. Rossman did not participate in the consideration of Plaintiffs-Appellees' petition for rehearing en banc.

John Fitisemanu, et al. v. United States of America, et al.
Nos. 20-4017, 20-4019
BACHARACH, J., dissenting from the denial of en banc consideration

This case involves a discrete question: Does the Fourteenth Amendment's Citizenship Clause extend to individuals born in American Samoa? The individual plaintiffs—John Fitisemanu, Pale Tuli, and Rosavita Tuli—say *yes*: having been born in American Samoa, they allege birth "in the United States." U.S. Const. amend. XIV, § 1, cl. 1. The defendants—the United States, the American Samoa government, and the Honorable Aumua Amata—say *no*: they contend that unincorporated territories, including American Samoa, are not "in the United States."

A divided panel reversed summary judgment for the plaintiffs without determining the meaning of the constitutional text. Instead, the panel majority characterizes the constitutional text as ambiguous and rests on other grounds. One panel member (Judge Lucero) relies on the Insular Cases. Another panel member (Chief Judge Tymkovich) relies on a congressional practice that didn't begin until roughly a half-century after ratification of the Citizenship Clause.

Both approaches skirt our obligation to determine the meaning of the constitutional language. Because of the exceptional importance of this obligation and the issue of citizenship, we should have granted the plaintiffs' request for en banc consideration.

1. The issue is exceptionally important.

We rarely convene en banc, but do so for questions of exceptional importance. 10th Cir. R. 35.1(A). In my view, the issue of citizenship for individuals born in American Samoa is exceptionally important.

The right of citizenship is precious to every U.S. citizen, something that the Fourteenth Amendment has removed from Congress's control. *See Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (stating that the framers of the Fourteenth Amendment "wanted to put citizenship beyond the power of any governmental unit to destroy"). That precious right is being denied to those born in American Samoa.

Although American Samoa ceded itself to the United States over a century ago, individuals born there have never obtained recognition as U.S. citizens. So if American Samoans are not naturalized, they cannot enjoy any of the plethora of rights that we enjoy as citizens. For over 120 years, we've denied these rights to American Samoans.

This issue also affects individuals born in the United States' other territories, including natives of Puerto Rico born in the last 120+ years, natives of Guam born in the last 70+ years, natives of the Northern Mariana Islands born in the last 40+ years, and natives of the Virgin Islands born in the last 100+ years. Unlike American Samoans, individuals born in these territories enjoy statutory citizenship; but they are treated as citizens only at the whim of Congress.

Few judicial tasks are more important than deciding who are U.S. citizens and who aren't. Our method of answering this question is just as important. To answer that question, we must unravel the meaning of the Citizenship Clause. Unlike many constitutional provisions, the Citizenship Clause expressly defines its geographic scope, stating that the right (citizenship) extends to everyone born "in the United States." So the parties and the panel agree that our threshold task is to define the scope of the geographic term "in the United States."

2. U.S. territories, such as American Samoa, lie "in the United States."

To interpret this term, we have various interpretive tools at our disposal. The Citizenship Clause was ratified in 1868, so different jurists might consider contemporary

- judicial opinions,
- censuses,
- maps,
- dictionary definitions,
- legislative statements, and
- statutes.

All of these sources treated territories like American Samoa as lying "in the United States."

a. Contemporary judicial opinions included the territories as part of the United States.

To discern what ordinary Americans meant in 1866 to 1868 by the phrase "in the United States," we can consider contemporary judicial opinions. In the nineteenth century, "[c]ourts . . . commonly referred to U.S. territories as 'in' the United States." Michael D. Ramsey, *Originalism and Birthright Citizenship*, 109 Geo. L.J. 405, 426 (2020).

For example, in the early part of the century, the Supreme Court observed that

- "the United States" "is the name given to our great republic, which is composed of States and territories" and
- "the territory west of the Missouri [was] not less within the United States . . . than Maryland or Pennsylvania."

Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820) (Marshall, C.J.).

Justice Story, riding Circuit, also explained that "[a] citizen of one of our territories is a citizen of the United States." *Picquet v. Swan*, 19 F. Cas. 609, 616 (C.C.D. Mass. 1828).

About 25 years later, the Court considered whether U.S. tariffs had been properly applied to products coming from outside the United States into the Territory of California. *Cross v. Harrison*, 57 U.S. (16 How.) 164, 181, 197 (1853). The Court answered *yes*, considering the Territory of California as "part of the United States." *Id.* at 197–98.

And in 1867, the Supreme Court observed that U.S. citizens included inhabitants of "the most remote States or territories." *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35, 48–49 (1867) (quoting *Smith v. Turner* (*The Passenger Cases*), 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).[1]

The American Samoan government points out that in *Fleming v. Page*, the Supreme Court held that Tampico (a port in Tamaulipas, Mexico) was not "in the United States" even though the U.S. military had occupied the port during the Mexican-American War. 50 U.S. 603, 614–16 (1850). But the Court clarified that even though other nations had to regard Tampico as U.S. territory, the port was not "territory included in our established boundaries" without a formal cession or annexation. *Id.* So the opinion doesn't address whether territories of the United States are "in the United States."

[1] A leading attorney of the era, William Rawle, also observed that "every person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural born citizen in the sense of the Constitution, and entitled to all the rights and privileges appertaining to that capacity." William Rawle, *A View of the Constitution of the United States of America* 86 (Philip H. Nicklin, 2d ed. 1829); *see* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 826–27 (1989) (stating that Mr. Rawle was a U.S. Attorney and a leading attorney of the period).

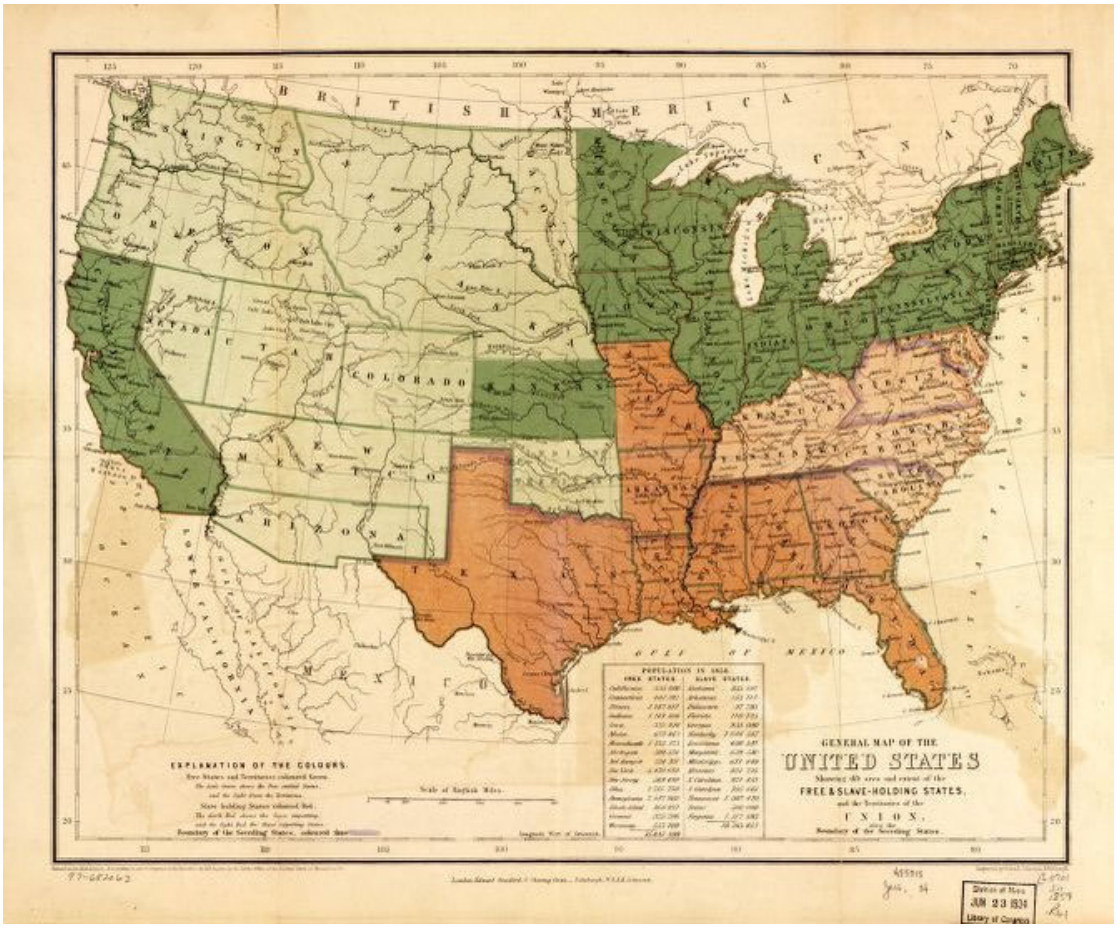
b. Contemporary dictionaries, maps, atlases, and censuses included the territories as part of the United States.

We may also consider contemporary dictionaries, maps, atlases, and censuses. *See NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (looking to contemporary dictionaries to interpret the Recess Appointments Clause); *New Jersey v. New York*, 523 U.S. 767, 797–803, 810 (1998) (looking to historical censuses and maps to determine which parts of Ellis Island lay in New York and New Jersey).

Like judicial opinions, dictionaries of the era regarded territories as land "in the United States." For example, the 1867 edition of *Webster's Dictionary* defined "Territory" as "2. A distant tract of land belonging to a prince or state. 3. In the United States, a portion of the country not yet admitted as a State into the Union, but organized with a separate legislature, a governor." William G. Webster & William A. Wheeler, *A Dictionary of the English Language* 434 (academic ed. 1867).

The next year, Judge John Bouvier's legal dictionary defined "Territory" even more broadly as "[a] portion of the country subject to and belonging to the United States which is not within the boundary of any of the States." II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 587 (George W. Childs 12th ed. rev. 1868). So contemporary dictionaries defined territories as "in the United States."

This understanding is also apparent in contemporary maps of the United States. For example, the 1857 map of the United States included the territories of Washington, Oregon, Nebraska, Nevada, Utah, New Mexico, Arizona, Dakota, and Indian Territory (later Oklahoma):

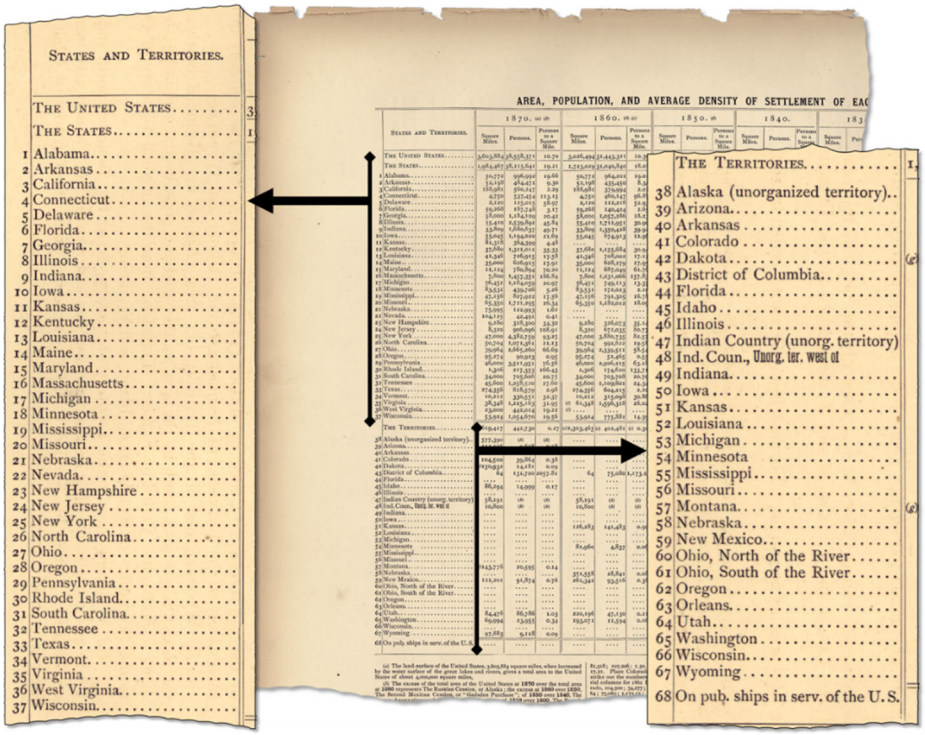


Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General Map of the United States, Showing the Area and Extent of the Free & Slave-Holding States & the Territories of the Union: also the Boundary of the Seceding States* (1857), https://www.loc.gov/resource/

g3701e.cw1020000/ (last visited on Dec. 1, 2021) (on file at the Library of Congress).

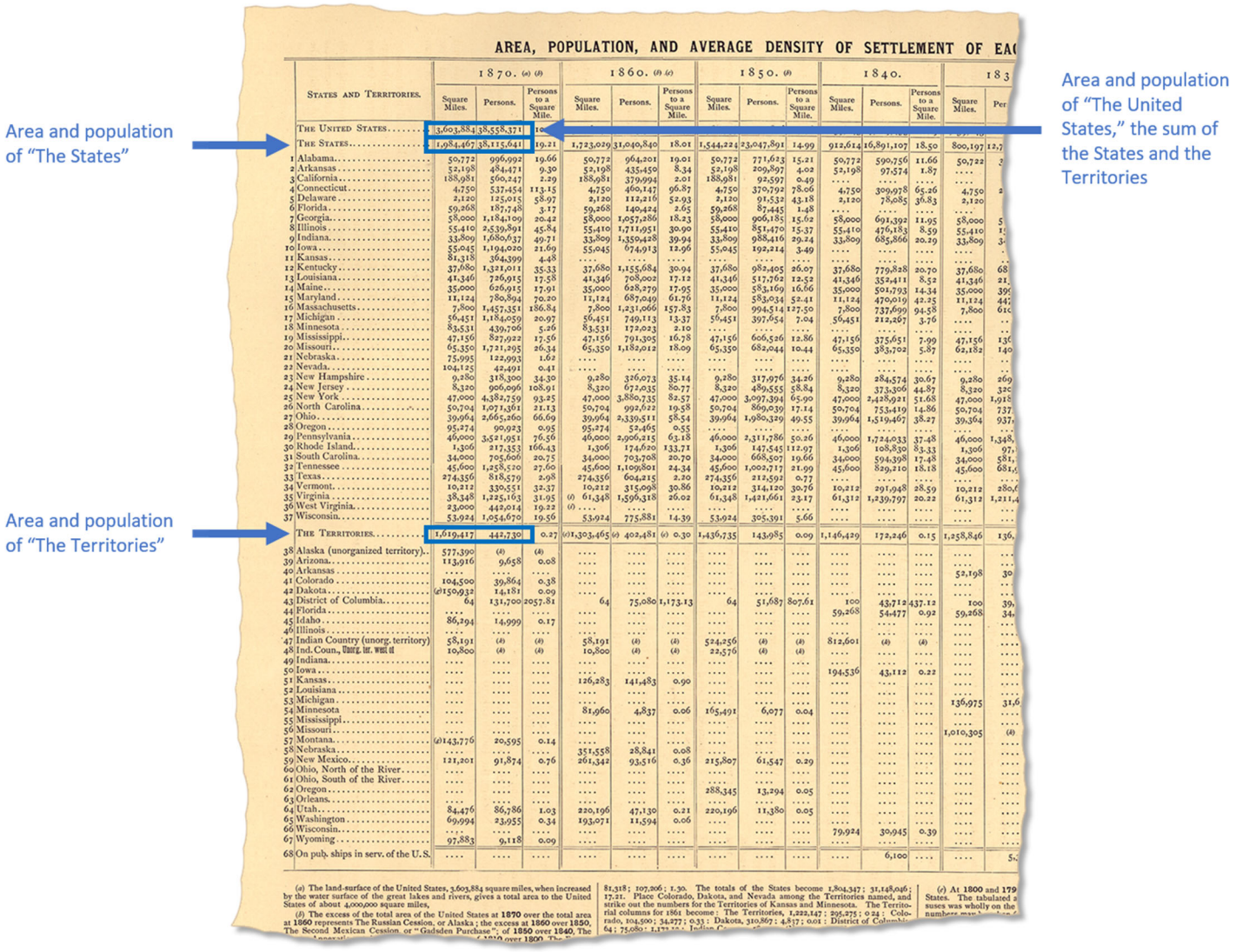
Like contemporary maps, the censuses of the era showed territories as part of the United States. For example, the 1854 census stated that "[t]he United States consist at the present time (1st July 1854,) of thirty-one independent States and nine Territories . . . ." J.D.B. De Bow, Superintendent of the U.S. Census, *Statistical View of the United States* 35 (A.O.P. Nicholson 1854).

In 1870, the U.S. Statistical Atlas again listed both states and territories as the region constituting the United States:



Francis A. Walker, *Statistical Atlas of the United States Based on the Results of the Ninth Census 1870* (1874) (on file at the Library of

Congress). The atlas thus derived the area and population of "the United States" by including the territories as well as the states.



AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EAC

States and Territories.	1870. (a) (d)			1860. (b) (c)			1850. (b)			1840.			183	
	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Per
The United States	3,603,884	38,558,371	10.											
The States	1,984,467	38,115,641	19.21	1,723,029	31,040,840	18.01	1,544,224	23,047,891	14.99	912,614	16,891,107	18.50	800,197	12.7
1 Alabama	50,722	996,992	19.66	50,722	964,201	19.01	50,722	771,623	15.21	50,722	590,756	11.66	50,722	
2 Arkansas	52,198	484,471	9.30	52,198	435,450	8.34	52,198	209,897	4.02	52,198	97,574	1.87	....	
3 California	188,981	560,247	2.29	188,981	379,994	2.01	188,981	92,597	0.49	....	....	....	....	
4 Connecticut	4,750	537,454	113.15	4,750	460,147	96.87	4,750	370,792	78.06	4,750	309,978	65.26	4,750	
5 Delaware	2,120	125,015	58.97	2,120	112,216	52.93	2,120	91,532	43.18	2,120	78,085	36.83	2,120	
6 Florida	59,268	187,748	3.17	59,268	140,424	2.65	59,268	87,445	1.48	....	....	....	....	
7 Georgia	58,000	1,184,109	20.42	58,000	1,057,286	18.23	58,000	906,185	15.62	58,000	691,392	11.95	58,000	5
8 Illinois	55,410	2,539,891	45.84	55,410	1,711,951	30.90	55,410	851,470	15.37	55,410	476,183	8.59	55,410	1
9 Indiana	33,809	1,680,637	49.71	33,809	1,350,428	39.94	33,809	988,416	29.24	33,809	685,866	20.29	33,809	3
10 Iowa	55,045	1,194,020	21.69	55,045	674,913	12.96	55,045	192,214	3.49	....	....	....	....	
11 Kansas	81,318	364,399	4.48	....	....	....	....	....	....	....	....	....	....	
12 Kentucky	37,680	1,321,011	35.33	37,680	1,155,684	30.94	37,680	982,405	26.07	37,680	779,828	20.70	37,680	68
13 Louisiana	41,346	726,915	17.58	41,346	708,002	17.12	41,346	517,762	12.52	41,346	352,411	8.52	41,346	21
14 Maine	35,000	626,915	17.91	35,000	628,279	17.95	35,000	583,169	16.66	35,000	501,793	14.34	35,000	39
15 Maryland	11,124	780,894	70.20	12,124	687,049	61.76	11,124	583,034	52.41	11,124	470,019	42.25	11,124	44
16 Massachusetts	7,800	1,457,351	186.84	7,800	1,231,066	157.83	7,800	994,514	127.50	7,800	737,699	94.58	7,800	61
17 Michigan	56,451	1,184,059	20.97	56,451	749,113	13.37	56,451	397,654	7.04	56,451	212,267	3.76	....	
18 Minnesota	83,531	439,706	5.26	83,531	172,023	2.10	....	....	....	....	....	....	....	
19 Mississippi	47,156	827,922	17.56	47,156	791,305	16.78	47,156	606,526	12.86	47,156	375,651	7.99	47,156	13
20 Missouri	65,350	1,721,295	26.34	65,350	1,182,012	18.09	65,350	682,044	10.44	65,350	383,702	5.87	62,182	14
21 Nebraska	75,995	122,993	1.62	....	....	....	....	....	....	....	....	....	....	
22 Nevada	104,125	42,491	0.41	....	....	....	....	....	....	....	....	....	....	
23 New Hampshire	9,280	318,300	34.30	9,280	326,073	35.14	9,280	317,976	34.26	9,280	284,574	30.67	9,280	26
24 New Jersey	8,320	906,096	108.91	8,320	672,035	80.77	8,320	489,555	58.84	8,320	373,306	44.87	8,320	32
25 New York	47,000	4,382,759	93.25	47,000	3,880,735	82.57	47,000	3,097,394	65.90	47,000	2,428,921	51.68	47,000	1,91
26 North Carolina	50,704	1,071,361	21.13	50,704	992,622	19.58	50,704	869,039	17.14	50,704	753,419	14.86	50,704	73
27 Ohio	39,964	2,665,260	66.69	39,964	2,339,511	58.54	39,964	1,980,329	49.55	39,964	1,519,467	38.27	39,364	93
28 Oregon	95,274	90,923	0.95	95,274	52,465	0.55	....	....	....	....	....	....	....	
29 Pennsylvania	46,000	3,521,951	76.56	46,000	2,906,215	63.18	46,000	2,311,786	50.26	46,000	1,724,033	37.48	46,000	1,34
30 Rhode Island	1,306	217,353	166.43	1,306	174,620	133.71	1,306	147,545	112.97	1,306	108,830	83.33	1,306	97
31 South Carolina	34,000	705,606	20.75	34,000	703,708	20.70	34,000	668,507	19.66	34,000	594,398	17.48	34,000	58
32 Tennessee	45,600	1,258,520	27.60	45,600	1,109,801	24.34	45,600	1,002,717	21.99	45,600	829,210	18.18	45,600	68
33 Texas	274,356	818,579	2.98	274,356	604,215	2.20	274,356	212,592	0.77	....	....	....	....	
34 Vermont	10,212	330,551	32.37	10,212	315,098	30.86	10,212	314,120	30.76	10,212	291,948	28.59	10,212	28
35 Virginia	38,348	1,225,163	31.95	(f) 61,348	1,596,318	26.02	61,348	1,421,661	23.17	61,312	1,239,797	20.22	61,312	1,21
36 West Virginia	23,000	442,014	19.22	(f)	....	....	....	....	....	....	....	....	....	
37 Wisconsin	53,924	1,054,670	19.56	53,924	775,881	14.39	53,924	305,391	5.66	....	....	....	....	
The Territories	1,619,417	442,730	0.27	(e) 1,303,465	(e) 402,481	(e) 0.30	1,436,735	143,985	0.09	1,146,429	172,246	0.15	1,258,846	136
38 Alaska (unorganized territory)	577,390	(d)	(d)	....	....	....	....	....	....	....	....	....	....	
39 Arizona	113,916	9,658	0.08	....	....	....	....	....	....	....	....	....	....	
40 Arkansas	....	....	....	....	....	....	....	....	....	....	....	....	52,198	30
41 Colorado	104,500	39,864	0.38	....	....	....	....	....	....	....	....	....	....	
42 Dakota	(e) 150,932	14,181	0.09	....	....	....	....	....	....	....	....	....	....	
43 District of Columbia	64	131,700	2057.81	64	75,080	1,173.13	64	51,687	807.61	100	43,712	437.12	100	39
44 Florida	....	....	....	....	....	....	....	....	....	59,268	54,477	0.92	59,268	34
45 Idaho	86,294	14,999	0.17	....	....	....	....	....	....	....	....	....	....	
46 Illinois	....	....	....	....	....	....	....	....	....	....	....	....	....	
47 Indian Country (unorg. territory)	58,191	(d)	(d)	58,191	(d)	(d)	524,256	(d)	(d)	812,601	(d)	(d)	....	
48 Ind. Coun., Unorg. ter. west of	10,800	(d)	(d)	10,800	(d)	(d)	22,576	(d)	(d)	....	....	....	....	
49 Indiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
50 Iowa	....	....	....	....	....	....	....	....	....	194,536	43,112	0.22	....	
51 Kansas	....	....	....	126,283	141,483	0.90	....	....	....	....	....	....	....	
52 Louisiana	....	....	....	....	....	....	....	....	....	....	....	....	....	
53 Michigan	....	....	....	....	....	....	....	....	....	....	....	....	136,975	31
54 Minnesota	....	....	....	81,960	4,837	0.06	165,491	6,077	0.04	....	....	....	....	
55 Mississippi	....	....	....	....	....	....	....	....	....	....	....	....	....	
56 Missouri	....	....	....	....	....	....	....	....	....	....	....	....	1,010,305	(d)
57 Montana	(e) 143,776	20,595	0.14	....	....	....	....	....	....	....	....	....	....	
58 Nebraska	....	....	....	351,558	28,841	0.08	....	....	....	....	....	....	....	
59 New Mexico	121,201	91,874	0.76	261,342	93,516	0.36	215,807	61,547	0.29	....	....	....	....	
60 Ohio, North of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
61 Ohio, South of the River	....	....	....	....	....	....	....	....	....	....	....	....	....	
62 Oregon	....	....	....	....	....	....	288,345	13,294	0.05	....	....	....	....	
63 Orleans	....	....	....	....	....	....	....	....	....	....	....	....	....	
64 Utah	84,476	86,786	1.03	220,196	47,130	0.21	220,196	11,380	0.05	....	....	....	....	
65 Washington	69,994	23,955	0.34	193,071	11,594	0.06	....	....	....	....	....	....	....	
66 Wisconsin	....	....	....	....	....	....	....	....	....	79,924	30,945	0.39	....	
67 Wyoming	97,883	9,118	0.09	....	....	....	....	....	....	....	....	....	....	
68 On pub. ships in serv. of the U.S.	....	....	....	....	....	....	....	....	....	....	6,100	....	....	5

(a) The land-surface of the United States, 3,603,884 square miles, when increased by the water surface of the great lakes and rivers, gives a total area to the United States of about 4,000,000 square miles,

(d) The excess of the total area of the United States at 1870 over the total area at 1860 represents The Russian Cession, or Alaska; the excess at 1860 over 1850, The Second Mexican Cession, or "Gadsden Purchase"; of 1850 over 1840, The

81,318; 107,206; 1.30. The totals of the States become 1,804,347; 31,148,046; 17.21. Place Colorado, Dakota, and Nevada among the Territories named, and strike out the numbers for the Territories of Kansas and Minnesota. The Territorial columns for 1861 become: The Territories, 1,222,147; 295,275; 0.24: Colorado, 104,500; 34,277; 0.33: Dakota, 310,867; 4,837; 0.01: District of Columbia

64; 75,080; 1,173.13; Indian

(f) At 1800 and 179 States. The tabulated a suses was wholly on the numbers may

Id.

Together, contemporary judicial opinions, dictionaries, maps, atlases, and censuses provide convincing proof that nineteenth-century Americans considered the U.S. territories to lie "in the United States." Given the uniformity of that proof, I see nothing uncertain or ambiguous about the

intent to apply the Citizenship Clause to the territories. So when the United States acquired American Samoa as a territory, everyone born in the territory became a U.S. citizen. We thus need not stray beyond the text of the Citizenship Clause to determine the plaintiffs' citizenship.

Despite the uniformity of the historical evidence, the panel majority points solely to a single map published in 1830:

Fitisemanu v. United States, 1 F.4th 862, 876 n.18 (10th Cir. 2021) (majority opinion) (citing Mary Van Schaack, *A Map of the United States and Part of Louisiana* (c. 1830), www.loc.gov/resource/g3700.ct000876 (last visited Dec. 1, 2021) (on file with the Library of Congress)). Based

on the title of this map (*A Map of the United States and Part of Louisiana*), the majority implies that the mapmaker, Ms. Van Schaack, wouldn't intentionally be redundant by specifying in the title that the map included Louisiana if the territory would otherwise have been considered part of the United States.

This reasoning incorrectly assumes that Louisiana was a territory when the map was drawn. Louisiana was a state, not a territory. As a state, Louisiana was obviously part of the United States. Irrespective of Ms. Schaack's reasons for the title, however, she did include three U.S. territories in her map of the United States: the Territories of Mississippi (1798), Indiana (1800), and Illinois (1809).[2] So her map supplies further historical proof that nineteenth-century Americans considered the territories part of the United States.

The panel majority explains away the judicial opinions, dictionaries, maps, atlases, and censuses, stating that they were referring to *incorporated* territories rather than *unincorporated* territories like American Samoa. *Fitisemanu v. United States*, 1 F.4th 862, 876 (10th Cir. 2021) (majority opinion). This explanation is mistaken. In fact, the term "unincorporated territory" hadn't even existed in 1868; the term didn't

[2] By the time of this map, Mississippi, Indiana, and Illinois had also become states. Despite statehood in each of these regions, the map depicts them as territories.

surface until 33 years later (when Justice White concurred in *Downes v. Bidwell*, 182 U.S. 244, 311–14 (1901)). So the term cannot help us interpret the Citizenship Clause. But contemporary treatment of similar territories confirms that nineteenth-century Americans considered all territories to be part of the United States—even if they weren't destined for statehood.

Though the term "unincorporated territory" hadn't yet surfaced in 1868, the United States had fresh experience with territories that were not considered destined for statehood. Indeed, only a year before ratification of the Citizenship Clause, the United States had acquired the Territory of Alaska from Russia. The acquisition came in a treaty that said nothing about eventual statehood for Alaska. *See* Cession of Alaska, Russ.-U.S., T.S. No. 301, Mar. 30, 1867.[3]

Though no one in 1868 would have considered the new Territory of Alaska as *incorporated* or otherwise destined for statehood, Alaska was

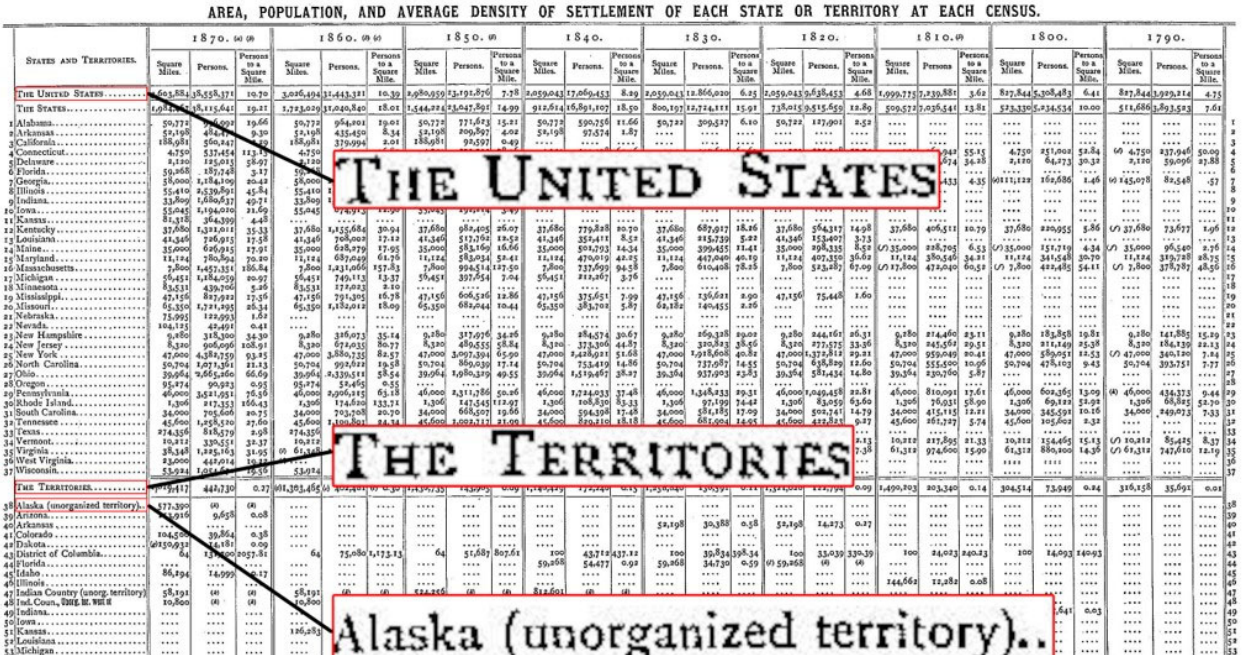
[3] Though nothing was said about statehood for Alaska, the treaty did ensure Alaskans "the enjoyment of all of the rights, advantages, and immunities of citizens of the United States." Cession of Alaska, Russ.-U.S., T.S. No. 301, art. III, Mar. 30, 1867. Similar language governed the United States' acquisition of a large part of American Samoa: "[T]here [would] be no discrimination in the suffrages and political privileges between the present residents of said Islands and citizens of the United States dwelling therein." Instrument of Cession, Chiefs of Manu'a-U.S., July 14, 1904 (Ta'u, Olosega, Ofu, and Rose Islands), https://history.state.gov/historicaldocuments/frus1929v01/d855 (last visited Dec. 1, 2021).

uniformly considered part of the United States. For example, John Bouvier's legal dictionary (published 15 years after ratification of the Citizenship Clause) defined Alaska as part of the United States. II John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union* 765 (J.P. Lippincott and Co., 15th ed. rev. 1883).

Like Bouvier's legal dictionary, maps of the era treated Alaska as part of the United States. Indeed, in the year that the Citizenship Clause was ratified, the map of the United States included the newly acquired Territory of Alaska:

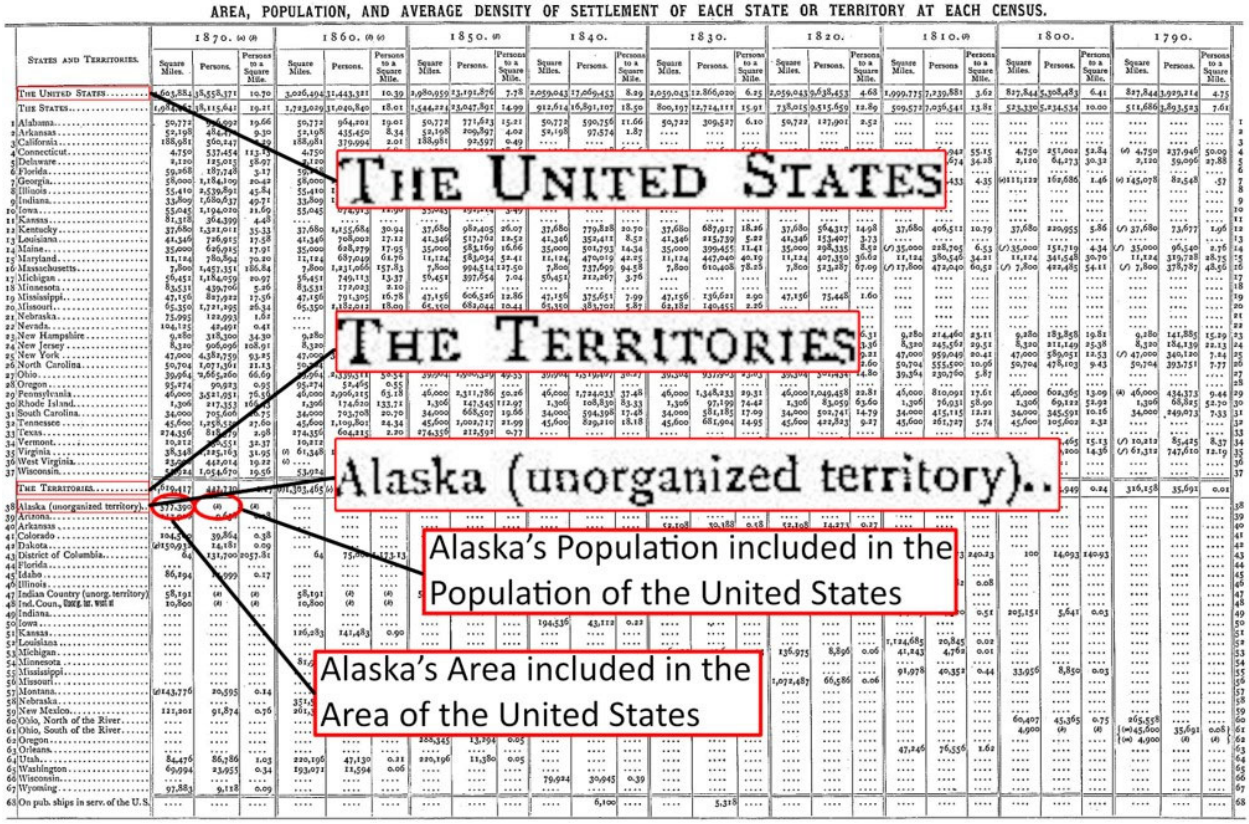
H. H. Lloyd & Co., *The Washington map of the United States* (1868), https://www.loc.gov/resource/g3700.ct002969/ (last visited Dec. 1, 2021) (on file at the Library of Congress).

Atlases of the era did the same. Six years after ratification of the Citizenship Clause, the U.S. Statistical Atlas included the Territory of Alaska though statehood was still not expected:



Francis A. Walker, *Statistical Atlas of the United States Based on the Results of the Ninth Census 1870* (1874) (on file at the Library of Congress). The atlas thus derived the area and population of "the United

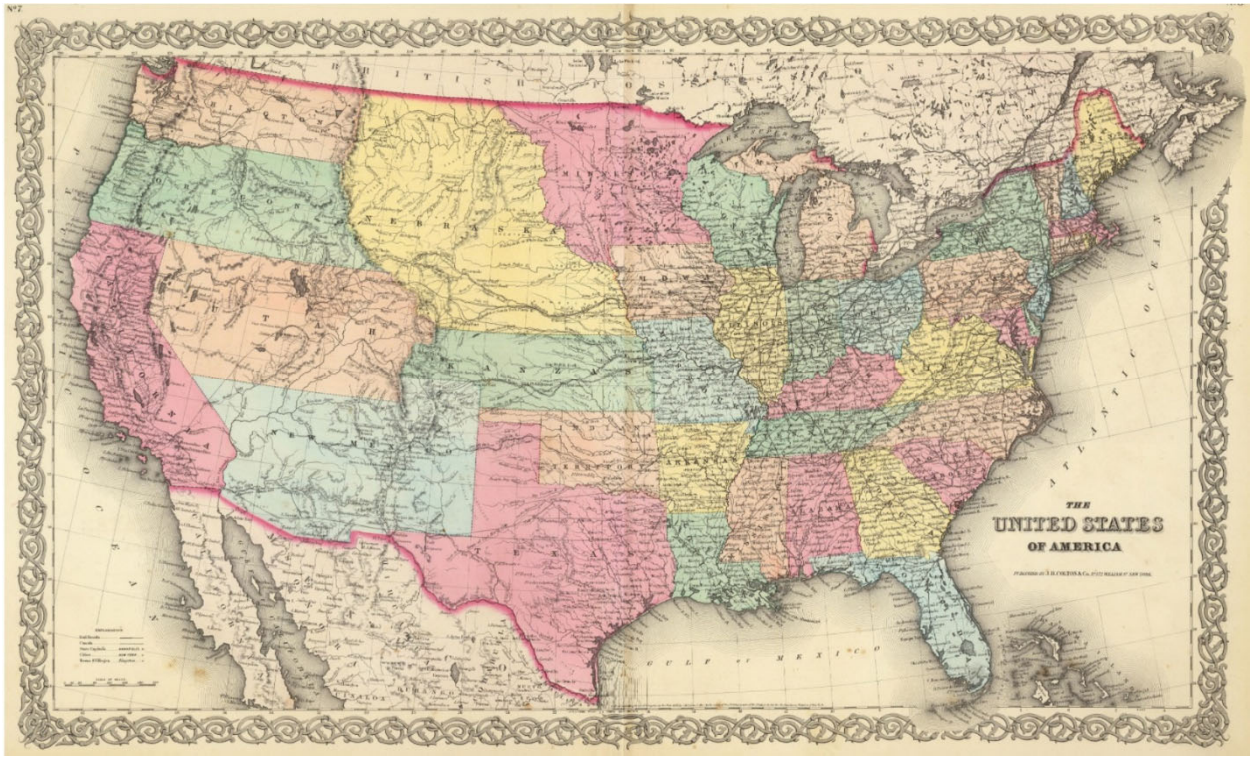
States" by including data from the newly acquired Territory of Alaska without mentioning the prospect of statehood.



Id. The census of 1870 explained that it too included the population of Alaska in order "to present the statistics of the true population of the country formerly complete." Francis A. Walker, *Report of the Superintendent of the Ninth Census*, *in* 1 *The Statistics of the Population of the United States* xvi (1870).

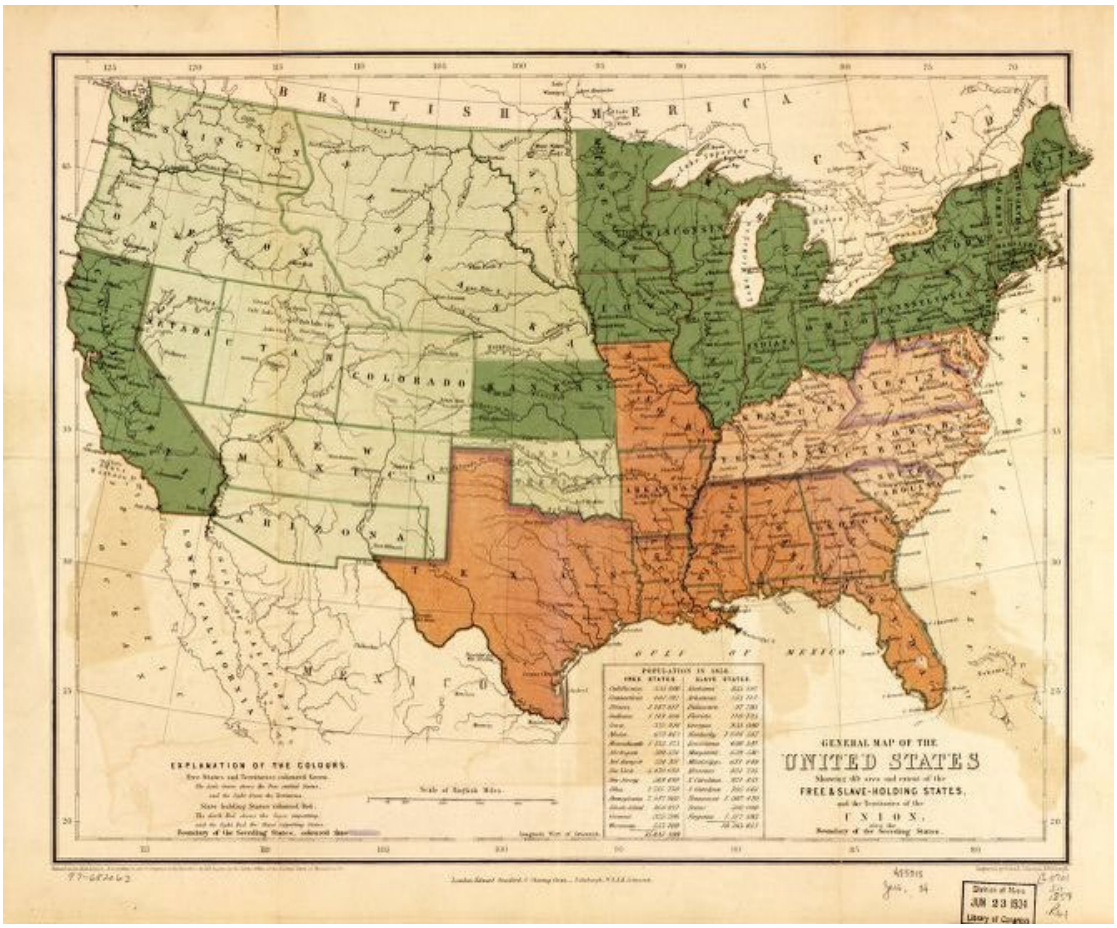
But Alaska isn't the only example of a territory uniformly considered part of the United States in 1868 even though no one there expected statehood. Consider the Indian Territory, which appears in this map of the

United States in 1856 (roughly a decade before ratification of the Citizenship Clause):



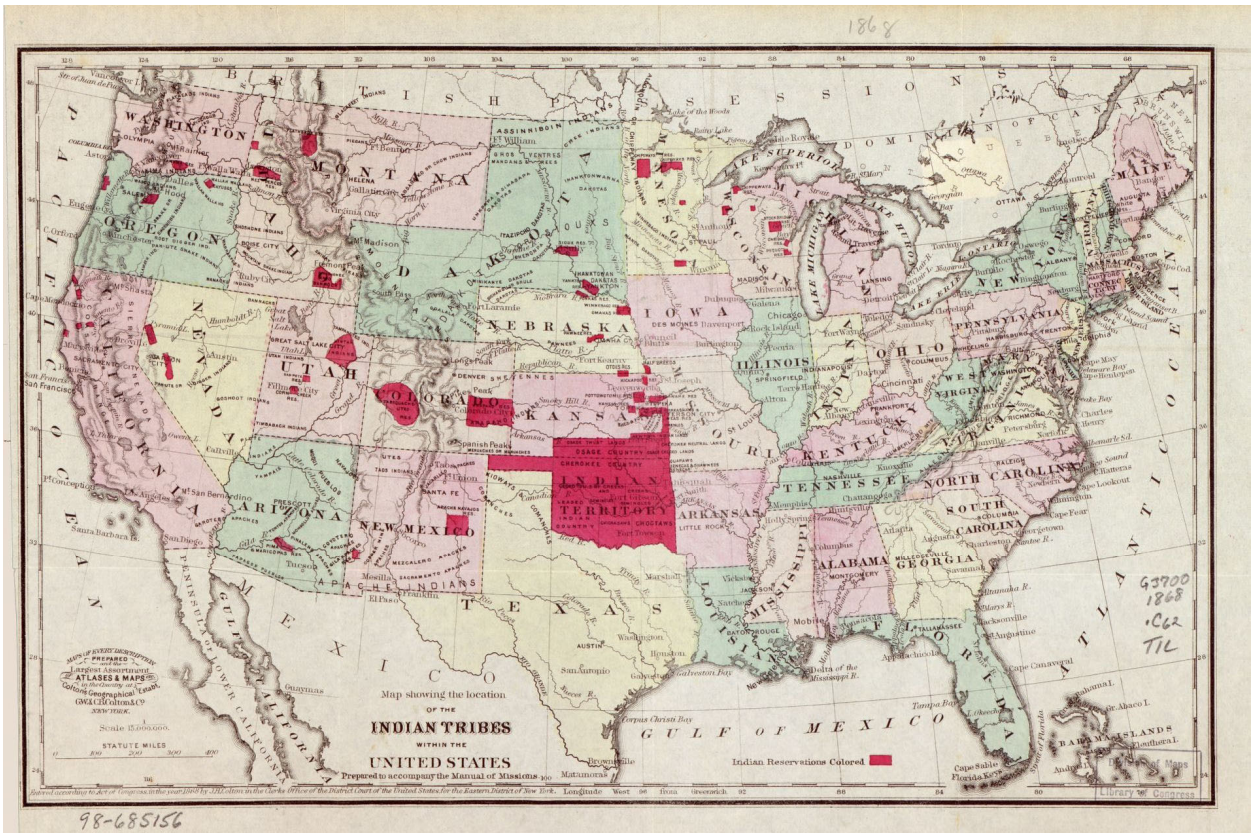
J.H. Colton & Co., The United States of America (1856), https://mapofus.org/_maps/atlas/1856-US.html (last visited Dec. 1, 2021).

The Indian Territory reappeared the next year in another map of the United States:



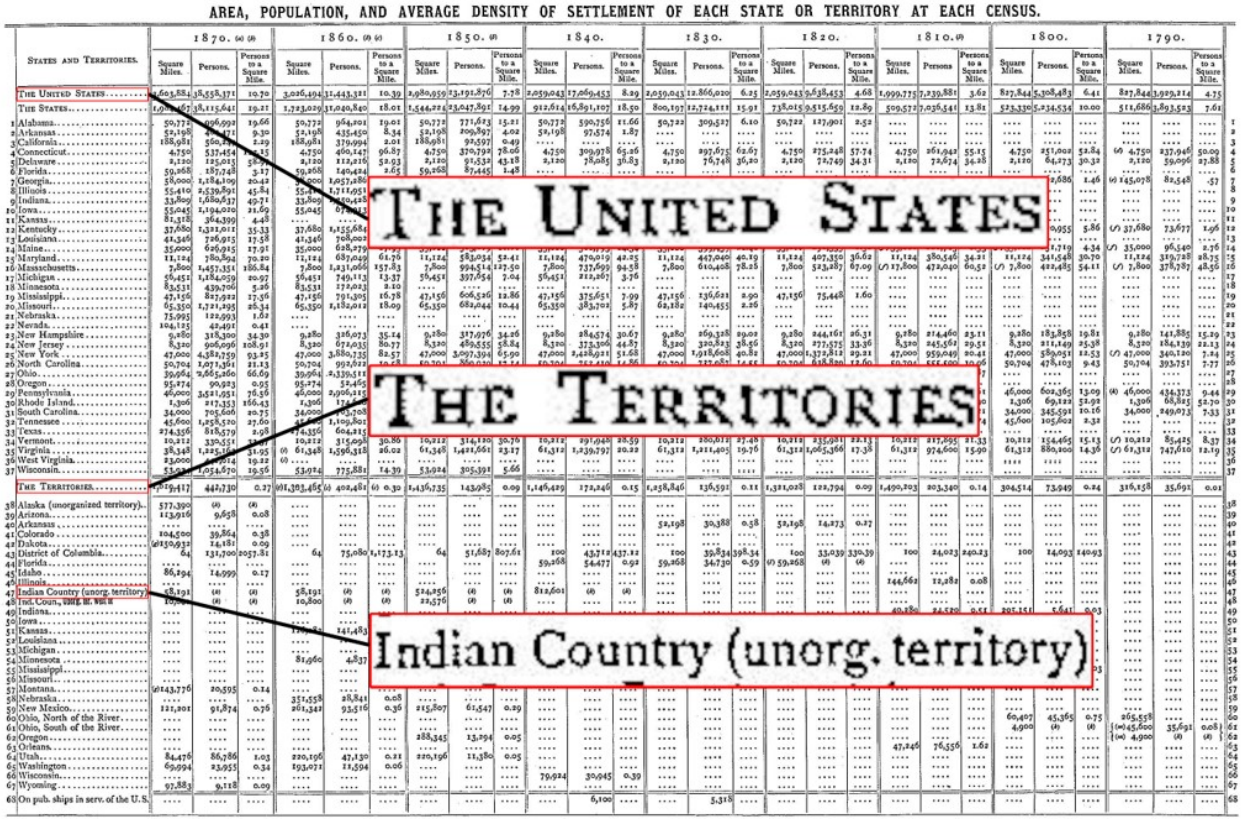
Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General Map of the United States, Showing the Area and Extent of the Free & Slave-Holding States & the Territories of the Union: also the Boundary of the Seceding States* (1857), https://www.loc.gov/resource/g3701e.cw1020000/ (last visited Dec. 1, 2021) (on file at the Library of Congress).

The Indian Territory continued to appear in maps of the United States. For example, in the year that the Citizenship Clause was ratified, this map showed the Indian Territory as within the confines of the United States:



G.W. & C.B. Colton & Co., United States (1868), https://www.loc.gov/item/98685156/ (last visited Dec. 1, 2021).

Similarly, the 1874 U.S. Statistical Atlas included the Indian Territory when listing the territories and states making up "the United States":



Maps and atlases depicted the Indian Territory within the United States[4] even though no one would have expected statehood for the Indians residing in this territory. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . . .").

[4] Many other contemporary maps of the United States included the Indian Territory. *See, e.g.*, S. Augustus Mitchell et al., *Mitchell's School Atlas* (1839), https://www.loc.gov/resource/g3200m.gct00054/?sp=6 (last visited Dec. 1, 2021); Henry A. Burr, *Disturnell's New Map of the United States and Canada: Showing All the Canals, Rail Roads, Telegraph Lines & Principal Stage Routes* (1850), https://www.loc.gov/item/2012593337/ (last visited Dec. 1, 2021).

The panel majority says nothing about how Americans of 1868 had viewed the territories. Regardless of whether statehood was expected, Americans regarded the U.S. territories as within the United States.

c. Contemporary legislative statements and statutes included the territories as part of the United States.

Aside from judicial opinions, maps, atlases, censuses, and dictionary definitions, we have the contemporary statements by legislators discussing the meaning of the Citizenship Clause. The legislators' floor statements uniformly regarded Indian tribes as "in the United States" even though they did not reside in states or regions destined for statehood. *See Fitisemanu v. United* States, 1 F.4th 862, 890–91 (10th Cir. 2021) (Bacharach, J., dissenting).

In his concurrence, Chief Judge Tymkovich dismisses these statements as "off-the-cuff statements" by individual legislators. *Id.* at 882 (Tymkovich, C.J., concurring). But the Supreme Court itself relied on these floor statements, calling them "valuable . . . contemporaneous opinions of jurists and statesmen upon the legal meaning" of the Citizenship Clause. *United States v. Wong Kim Ark*, 169 U.S. 649, 669 (1898).

Nineteenth century statutes confirm that Congress understood territories to be part of the United States. With creation of the Oklahoma Territory from the Indian Territory (which was never destined for statehood), Congress referred to the Indian Territory as a "portion of the

United States": "[A]ll that *portion of the United States* now known as the Indian Territory, except so much of the same as is actually occupied by the five civilized tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee outlet, together with that portion of the United States known as the Public Land Strip, is hereby erected into a temporary government by the name of the Territory of Oklahoma." Oklahoma Organic Act, Pub. L. No. 51-182, 26 Stat. 81, 81 (1890) (emphasis added).

* * *

In my view, the text of the Citizenship Clause, along with *all* of the historical evidence, shows that the Citizenship Clause extended to everyone born in the U.S. territories—including individuals born in territories like Alaska and the Indian Territory, where statehood was not expected.

3. We must decide what it means to be born "in the United States."

The panel majority disregards the vast historical evidence on what it meant in 1868 to be born "in the United States." Having characterized the Citizenship Clause as ambiguous, Judge Lucero relies on the Insular Cases, which considered the impracticability and anomalousness of applying constitutional provisions to unincorporated territories. *Fitisemanu v. United States*, 1 F.4th 862, 877 (10th Cir. 2021) (majority opinion). But

this test doesn't apply when the constitutional provision defines its own geographic scope.

The impracticability and anomalousness of the issue does not bear on the meaning of the constitutional provision itself. Suppose that the Citizenship Clause had stated that citizenship extends to everyone "born in a U.S. state or U.S. territory." Would we still define the scope of the Citizenship Clause based on impracticability and anomalousness? I doubt that any of us would because the clause itself would define its geographic scope. *See Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 589 n.21 (1976) (interpreting one of the Insular Cases to provide that the Constitution does not extend to the Philippines "except insofar as required by [the Constitution's] terms"). The same is true here, for the Insular Cases provide no guidance when the Constitution creates a distinct right and defines its own geographic scope.

The Citizenship Clause performs this double duty, creating a distinct right (citizenship) and defining its own geographic scope ("in the United States"). *See Fitisemanu v. United* States, 1 F.4th 862, 875 (10th Cir. 2021) (majority opinion) (stating that "[t]he Citizenship Clause's applicability hinges [in part] on a geographic scope clause—'in the United States'"). This guarantee is self-executing: birthright citizenship "is established by the mere fact of birth under the circumstances defined in the constitution." *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

For over 120 years, we've interpreted this guarantee to elevate birthright citizenship beyond the reach of the political process. *Id.* at 704 (stating that laws and treaties "cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the constitution: 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States'"). The Citizenship Clause "settle[d] the great question of citizenship and remove[d] all doubt as to what persons are or are not citizens of the United States." *Afroyim v. Rusk*, 387 U.S. 253, 263 (1967) (quoting Cong. Globe, 39th Cong., 1st Sess., 2890 (1866) (statement of Sen. Jacob M. Howard)). So Congress lacks authority "to restrict the effect of birth [in the United States], declared by the constitution to constitute a sufficient and complete right to citizenship." *Wong Kim Ark*, 169 U.S. at 703.

Despite this intent to remove citizenship from congressional control, Chief Judge Tymkovich relies on the "settled understanding and practice over the past century . . . that Congress has the authority to decide the citizenship status of unincorporated territorial inhabitants." *Fitisemanu*, 1 F.4th at 883 (Tymkovich, C.J., concurring). In my view, there is no such settled understanding. The Supreme Court has yet to decide whether the Citizenship Clause applies to the territories. In the face of this silence, Congress has stepped in and granted citizenship to some residents of the territories. But this acquiescence says little, if anything, about Congress's

views on the scope of the Clause. Only one branch—the executive, through the State Department—has spoken definitively on this issue. *See Fitisemanu v. United States*, 426 F. Supp. 3d 1155, 1159 (D. Utah 2019) (noting the undisputed fact that "[i]t is the State Department's policy that [the Citizenship Clause] does not apply to persons born in American Samoa") (citation omitted). But even if there were a settled practice and understanding over the past century, a practice that began a half century after the ratification of the Fourteenth Amendment would shed little light on the meaning of the Citizenship Clause in 1868.

Rather than rely primarily on congressional practice, Judge Lucero would stretch the Insular Cases by applying them in a new setting. The Insular Cases didn't address whether the Citizenship Clause—or any other portion of the Fourteenth Amendment—applied in unincorporated territories. And the Supreme Court has never applied the "impracticable and anomalousness test" to determine the applicability of a constitutional right that defines its own geographic scope. *See Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion) (stating that "neither the [Insular Cases] nor their reasoning should be given any further expansion"). By its terms, the Citizenship Clause applies to everyone born in the United States, and "we have no authority . . . to read exceptions into [the Constitution] which are not there." *Id.*

As the federal government notes, some other circuits have rejected application of the Citizenship Clause to unincorporated territories. But these opinions haven't grappled with the textual or historical evidence on the meaning of the Citizenship Clause.

An example is *Tuaua v. United States*—the only other circuit case to consider whether the Citizenship Clause applies to American Samoa. 788 F.3d 300 (D.C. Cir. 2015). There the D.C. Circuit held that the scope of the Citizenship Clause was ambiguous, reasoning that the phrase "in the United States" does not unambiguously

- *exclude* the territories (unlike the Apportionment Clause's reference to "the several States") or
- *include* them (unlike the Thirteenth Amendment's prohibition on slavery, which applies "within the United States, or any place subject to their jurisdiction").

Id. at 302–04. But the court stopped there without considering any historical evidence of the nineteenth-century meaning of "in the United States." *See id*.

The other four circuit cases addressed application of the Citizenship Clause to the Philippines, and each opinion relied on *Downes v. Bidwell*'s consideration of the Tax Uniformity Clause without considering the historical meaning of "in the United States." *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994); *Valmonte v. I.N.S.*, 136 F.3d 914 (2d Cir. 1998);

Lacap v. I.N.S., 138 F.3d 518 (3d Cir. 1998) (per curiam); *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010) (per curiam).

In the first of these cases, the Ninth Circuit held that unincorporated territories are not "in the United States" for purposes of the Citizenship Clause, relying on *Downes*'s interpretation of the Tax Uniformity Clause. *Rabang v. I.N.S.*, 35 F.3d 1449, 1452–53 (9th Cir. 1994). But important differences exist between the Tax Uniformity Clause and the Citizenship Clause: they were ratified eighty years apart; and the Tax Uniformity Clause protects states, while the Citizenship Clause protects individuals. The court disregarded these differences without considering the nineteenth-century meaning of "in the United States." *See id.* at 1455 (Pregerson, J., dissenting).

Nor did the other three circuit court opinions, which simply followed the reasoning in *Rabang*. *Valmonte v. I.N.S.*, 136 F.3d 914 (2d Cir. 1998); *Lacap v. I.N.S.*, 138 F.3d 518 (3d Cir. 1998) (per curiam); *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010) (per curiam).

None of these courts

- focused on the textual meaning of the phrase "in the United States" or
- addressed the extensive historical evidence that territories were considered "in the United States" when the Citizenship Clause was ratified.

So none of the other circuit court opinions can shed any meaningful light on the textual or historical meaning of the Citizenship Clause.

4. Conclusion

We 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.

Despite the unambiguous, uniform historical meaning of the term "in the United States," our country has denied constitutional citizenship for over a century to virtually everyone born in U.S. territories like American Samoa. The right of constitutional citizenship for these fellow Americans is deserving of en banc consideration. I thus respectfully dissent from the denial of en banc consideration.