**IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**
**APPEAL NO. 2021-1**

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| J. TILO, P. GABBARD, and S. GABBARD,<br><br>**Plaintiff-Appellees**<br><br>**v.**<br><br>UNITED STATES OF AMERICA,<br><br>**Defendant-Appellant**<br><br>**and**<br><br>THE GOVERNMENT OF AMERICAN SAMOA,<br><br>**Intervenor Defendant - Appellant.** | **Appeal from the U.S. District Court for the Southern District of Anystate.** |

## OPINION OF THE COURT

Before: Smith, Johnson, and Williams, Circuit Judges

SMITH, J., 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 American Samoans who reside in Anystate, asked the district court there to upend this long-standing arrangement and declare that American Samoans have been citizens from the start. The district court so declared. Appellants, the United States federal government and the American Samoan government, ask us to reverse the district court's decision.

This case raises two questions: Are Plaintiffs already citizens of the United States under the plain language of the U.S. Constitution and its history? And, if not, should the federal courts or Congress decide the question of citizenship? We conclude that neither constitutional text nor Supreme Court precedent demands the district court's interpretation of the Citizenship Clause of the Fourteenth Amendment. And Congress plays the preeminent role in the determination of citizenship in unincorporated territorial lands; the courts play only a subordinate role in the process. Accordingly, we reverse.

## I. Background

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.

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. A federal statute designates American Samoans "nationals, but not citizens, of the United States." 8 U.S.C. § 1408. As a result, American Samoans cannot vote, run for any elective office – federal or state – outside American Samoa, or serve on any federal or state jury. They are, however, entitled to work and travel freely in the United States and receive certain advantages in the naturalization process. Plaintiffs contend this arrangement violates the Citizenship Clause of the Fourteenth Amendment, which 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.

Plaintiffs seek American citizenship based on their birth in American Samoa. In opposition, the United States government argues the Citizenship Clause does not encompass unincorporated territories. Also in opposition, intervenor-defendants ("Intervenors"), elected officials representing the government of American Samoa, argue that not only is the current arrangement constitutional, but also that imposing birthright citizenship would be against their people's will and would risk upending certain core traditional practices.

### A. The relevant history and characteristics of American Samoa.

American Samoa encompasses five islands and two coral atolls at the eastern end 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 neither specified how the territory would be governed, nor addressed whether American Samoans were, or would ever be, American citizens.[2] Since then, American Samoans

[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 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] *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).

have owed "permanent allegiance" to the United States but have never been American citizens. 8 U.S.C. § 1101(21), (22).

Like other colonial relationships, commentators contest the nature of the relationship between American Samoa and the United States. 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 internal affairs of the territory. *See, e.g.,* U.S. Dep't of State, *U.S. Relations with American Samoa* (2020). More recent scholarship argues 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, the relationship has profoundly influenced the culture of American Samoa. American Samoans have particularly high enlistment rates in the U.S. military, 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.

Despite these cultural imprints, American Samoans maintain a traditional and distinctive way of life: the fa'a Samoa. The intervenors argue this amalgam of customs and practices 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, "[c]ultural 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: landowners must 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 if the Plaintiffs 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 resulted 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.

### B. The history of the application of American citizenship to American territories.

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[3] 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.

The precise scope of citizenship was left unclear. Though the framers repeatedly used the term "citizen," the Constitution does not define the word. *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 Constitutionally guaranteed right. Charles Gordon et. al., Immigration Law and Procedure § 92.04[1][a] (2020).[4] This flexibility in the territories with regards to

[3] "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.

[4] *See, e.g., American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828) in which 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

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 last territorial acquisitions before Fourteenth Amendment ratification, show that citizenship was not assumed to automatically extend with sovereignty. *See* Treaty of Peace, Friendship, Limits and Settlement (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. The practical necessity to determine the citizenship status of the inhabitants of these territories arose quickly. *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.[5] 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. The *Insular Cases*, not *Wong Kim Ark*, Must Guide the Court's Analysis in This Case.

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 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.

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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 . . . .").

[5] 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).

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* rather than *Wong Kim Ark* supply the correct framework for application of constitutional provisions to the unincorporated territories.

### A. The *Insular Cases*

Issued between 1900 and 1922, the *Insular Cases*[6] 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?[7] In his concurrence in what became *Insular's* seminal case, *Downes v. Bidwell*, 182 U.S. 244 (1901), Justice Edward White wrote, "[T]he determination of what particular provision of the Constitution is applicable [in an unincorporated territory] . . . involves an inquiry into the situation of the territory and its relations to the United States." *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 *Insular Cases* came to stand for the proposition 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"). The imperial impulse 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

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[6] 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 comprising the Insular Cases, see *Ballentine v. United States*, 2001 WL 1242571, at *5 n.11 (D.V.I. Oct. 15, 2001).

[7] 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.").

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.

But the Supreme Court has continued to invoke the *Insular* framework when grappling 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). The Court has since employed "impracticable and anomalous" 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. *Wong Kim Ark*

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 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 English common law and as expounded in the leading case on the issue, *Calvin's Case*, 77 Eng. Rep. 377 (1608),[8] 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.

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

[8] *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.

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.[9]

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 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

[9] Furthermore, English law came to make some of the same distinctions between the citizenship status of its imperial subjects that Appellees 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 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.

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. *Insular Cases* rather than *Wong Kim Ark* supply the correct framework for application of constitutional provisions to the unincorporated territories.

Between these competing frameworks, the *Insular Cases* provide the more relevant, workable, and, as applied here, just standard for three reasons.

#### 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[10] to the Sixth Amendment,[11] 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.[12] 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, but it was also 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*.

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

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[10] *Downes*, 182 U.S. 244.

[11] *Balzac*, 258 U.S. 298.

[12] *See Boumediene*, 553 U.S. at 764.

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 the district court assigned to it.

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).[13] That maxim is one this court will heed.

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

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

[13] *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 ....").

century-old precedent. It follows that they are not only the most relevant precedents, but also the ones that lead to the most respectful and just outcome.

## III. The Citizenship Clause does not apply, by its own terms, to natives of American Samoa.

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. We agree.

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.[14]

By comparison, the competing argument juxtaposes the Fourteenth Amendment's Citizenship Clause in Section One with its apportionment provisions in Section Two.[15] The former uses the broad term "in the United States," whereas the latter apportions representatives "among the several States." Because the Citizenship 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."

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[14] 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).

[15] Section Two begins: "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." Const. amend. XIV, § 2, cl. 1 (emphasis added).

Neither of these arguments is entirely persuasive, with each depending on uncertain inferences. Nor is the legislative history Plaintiffs cite 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 the dissent offers rests entirely on eliding the distinction between incorporated and unincorporated territories. In the dissent's view, because territories on their way to becoming states were often[16] 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, but it also undercuts the relevance of the evidence the dissent offers. 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

[16] The dissent characterizes available historical evidence as "uniformly" supporting its conclusion. Dissent at 21. 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 18 n. 4.

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.

If we resolved the 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.[17] Moreover, Congress' discretionary authority in this area has been upheld by every circuit court to have addressed the issue.[18] We resolve this case by application of the *Insular Cases*' "impracticable and anomalous" framework instead of 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.

## IV

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

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[17] 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 ....").

[18] *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).

**IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT**
**APPEAL NO. 2021-1**

| | |
|---|---|
| R. TILO, J. GABBARD, and S. GABBARD,<br><br>**Plaintiff-Appellees**<br><br>**v.**<br><br>UNITED STATES OF AMERICA,<br><br>**Defendant-Appellant**<br><br>**and**<br><br>THE AMERICAN SAMOA GOVERNMENT**,**<br><br>**Intervenor Defendant - Appellant.** | **Appeal from the U.S. District Court for the Southern District of Anystate** |

# DISSENT

Williams, J., Circuit Judge, dissenting.

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. This clause provides citizenship to the three individual Plaintiffs. 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." The *Insular* cases, including *Downes v. Bidwell*, 182 U.S. 244, 306 (1901), add nothing to this discussion and should not be applied here.

I would affirm the district court's decision.

## I. 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 what the Citizenship Clause means, we first consider how the public understood 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 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) pre-1868 judicial opinions, (2) 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.[1] In return, the United States promised to respect American Samoans' property rights.[2] 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

[1] *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).

[2] *See Id.*

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.). And Justice Story, riding Circuit, also explained: "[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)).[3]

The American Samoan government argues 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 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.**

[3] A leading attorney of the era, William Rawle, also observed, "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) (identifying Rawle as a U.S. Attorney and a leading attorney of the period).

We may also consider contemporary dictionaries, maps, and censuses. *See NLRB v. Noel Canning*, 573 U.S. at 527 (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).

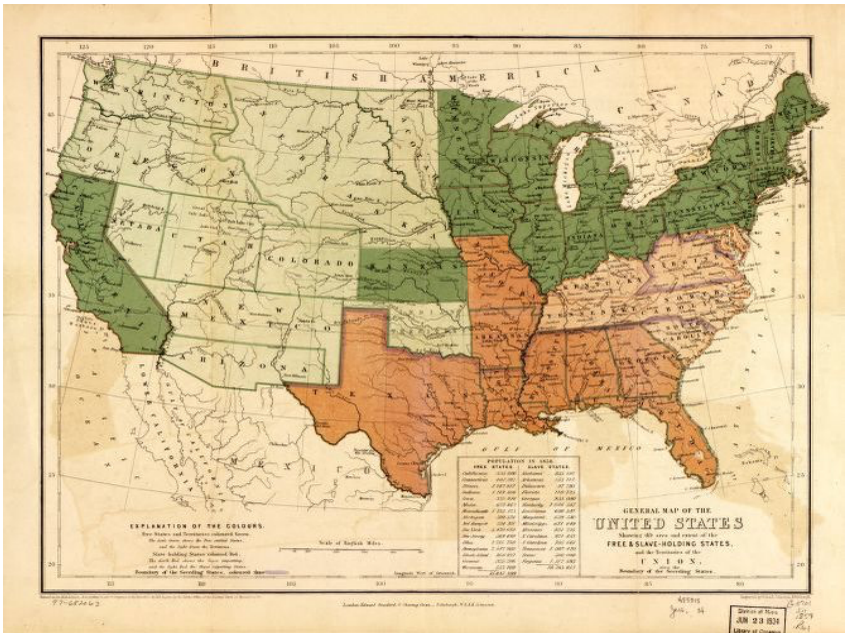
Like judicial opinions, dictionaries of the era regarded territories as land "in the United States." For example, the 1867 edition of *Webster's Dictionary* defined "Territory" as "2. A distant tract of land belonging to a prince or state. 3. In the United States, a portion of the country not yet admitted 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);[4] *see* note 6, below (discussing Alaska's unincorporated 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):

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



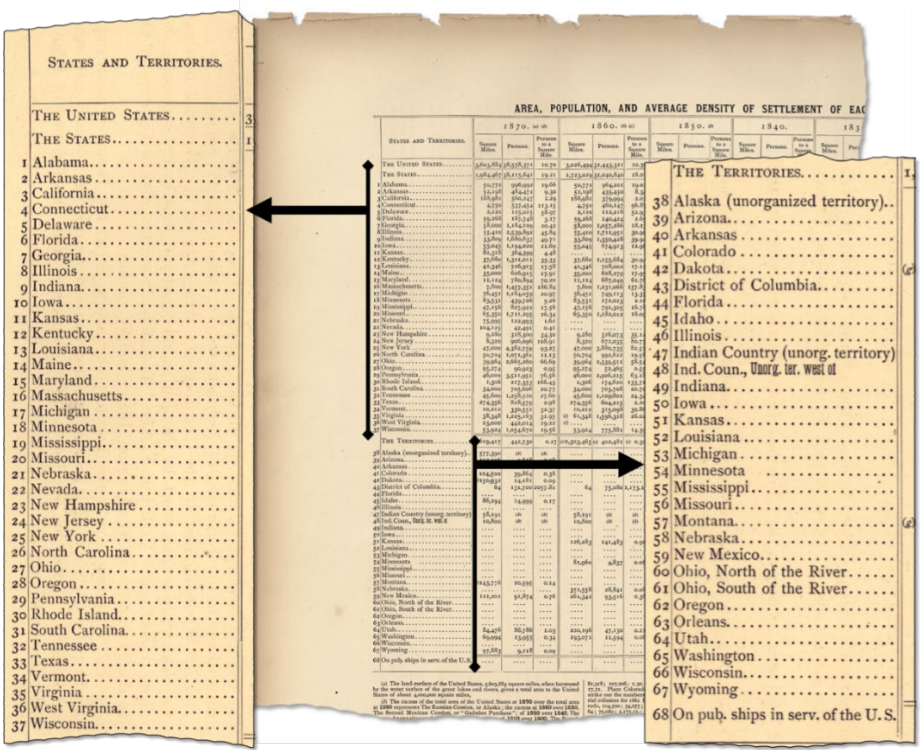

Henry D. Rogers, W. & A.K. Johnston Ltd. & Edward Stanford Ltd., *General map of the United States, showing the area and extent of the free & slave-holding states & the territories of the Union: also the boundary of the seceding states* (1857), available at https://www.loc.gov/item/97682063/ (last visited 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/item/98685164/ (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).

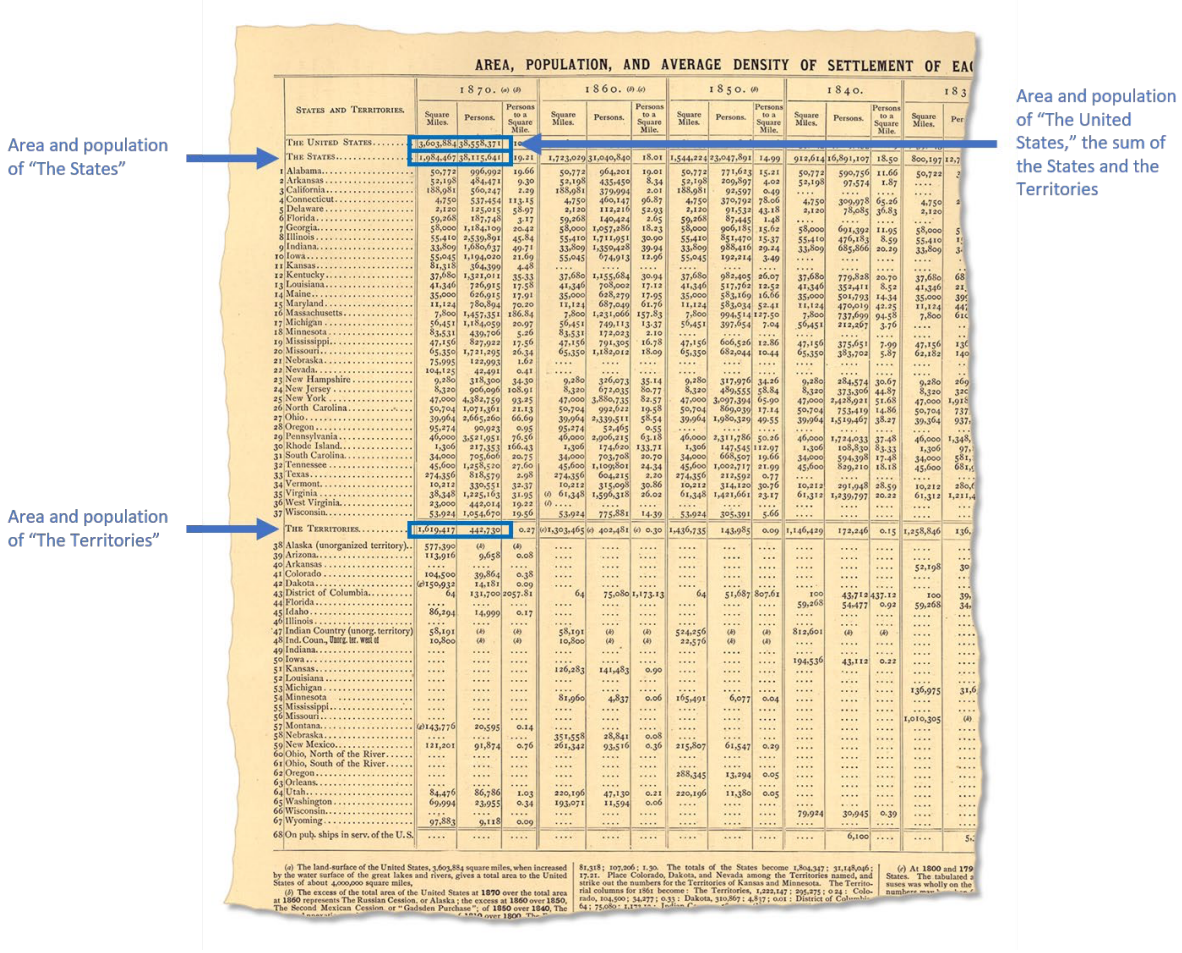
In 1870, the government conducted another census, again

- 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 EA(

| States and Territories. | 1870. (a) (b) Square Miles. | 1870. (b) Persons. | 1870. (b) Persons to a Square Mile. | 1860. (b) (c) Square Miles. | 1860. (b) Persons. | 1860. (b) Persons to a Square Mile. | 1850. (b) Square Miles. | 1850. (b) Persons. | 1850. (b) 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.[illegible] | | | | | | | | | | | |
| The States | 3,584,467 | 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 | 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 | 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 | 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 | (c) 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 | (c) .... | .... | .... | .... | .... | .... | .... | .... | .... | .... | |
| 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 | (c) 1,303,465 | (c) 402,481 | (c) 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 [illegible] over 1800. The [illegible] 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, 320,807; 4,837; 0.01: District of Columbi[illegible] 64; 75,080; 1,173.[illegible]

(c) At 1800 and 179[illegible] States. The tabulated [illegible] sues was wholly on the [illegible] numbers [illegible]

Contemporary judicial opinions, dictionaries, maps, and censuses, show 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). These 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 (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 13. 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.[5]

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:

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[5] The Supreme Court later suggested in *Rassmussen v. United States*, 197 U.S. 516 (1905), that Alaska had become incorporated in 1891. The 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))

*See Rassmussen*, 197 U.S. at 523–25. So *Rassmussen* suggests 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).

> [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, 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 I (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: 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 United States' dominion. *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 21 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.[6]

The Supreme Court returned to the meaning of the Citizenship Clause in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). 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 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 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

[6] 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.

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. at 592 (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 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 the phrase "in the United States" must encompass all the territories, including American Samoa. The federal government posits 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 1-1⁄2 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 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 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 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 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 the Citizenship Clause was "declaratory of existing rights, and affirmative of existing law." 169 U.S. at 676, 687-88. 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 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 the Thirteenth Amendment excludes all territories from "in the United States."

From the Territories Clause and the Eighteenth Amendment, we can safely conclude 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 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 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 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).

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.[7] 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. at 634–35; *see also United States v. Price*, 361 U.S. 304, 313 (1960) (stating, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

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

### E. We can draw little insight from *Downes v. Bidwell* or any of the other *Insular Cases* and their distinction between incorporated and unincorporated territories.

The federal government relies on *Downes v. Bidwell*, 182 U.S. 244, arguing it suggests disregard for the common law's principle of birthright citizenship. In *Downes*, the Court considered the meaning of the Tax Uniformity Clause, which provides, "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 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:

[7] 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).

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. *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. *Downes* held that "United States," as used in the Tax Uniformity Clause, doesn't include unincorporated territories. 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). 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 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*, 258 U.S. at 305. 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, "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.

## III. Conclusion

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

**IN THE SUPREME COURT OF THE UNITED STATES**
**APPEAL NO. 2022-2**

| | |
|---|---|
| R. TILO, J. GABBARD, and S. GABBARD,<br><br>**Petitioners**<br><br>**v.**<br><br>UNITED STATES OF AMERICA, ET AL.,<br><br>**Respondents** | **On Petition for Certiorari from the United States Court of Appeals for the Fourteenth Circuit** |

## ORDER GRANTING CERTIORARI

The petition of the United States of America for an order of certiorari to the U.S. Court of Appeals for the Fourteenth Circuit is GRANTED. Oral argument shall occur on October 26, 2022, in Crawfordsville, Indiana, and be limited to the following issue:

> Whether persons born in United States Territories are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause. Specifically:
>
> - Are Petitioners citizens of the United States under the plain language of the United States Constitution and its history?
>
> - If not, should the federal courts or Congress decide whether they are citizens?
>
> Petitioners shall open and close the argument.

FOR THE COURT

*Bill Brown*

Bill Brown, Clerk of Court