

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**December 27, 2021**

**Christopher M. Wolpert**  
**Clerk of Court**

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

Plaintiffs - Appellees,

v.

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

Defendants - Appellants,

and

THE HONORABLE AUMUA AMATA;  
AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants.

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

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

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

Amici Curiae.

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

Plaintiffs - Appellees,

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DEPARTMENT OF STATE; ANTONY  
BLINKEN, in his official capacity as  
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THE HONORABLE AUMUA AMATA;  
AMERICAN SAMOA GOVERNMENT,

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ANDREW KENT; GARY S. LAWSON;  
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FROST; LINDA K. KERBER; D.  
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Amici Curiae.

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**ORDER**

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

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

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

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

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

Entered for the Court,



CHRISTOPHER M. WOLPERT, Clerk

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

*John Fitisemanu, et al. v. United States of America, et al.*

Nos. 20-4017, 20-4019

**BACHARACH**, J., dissenting from the denial of en banc consideration

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

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

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

**1. The issue is exceptionally important.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

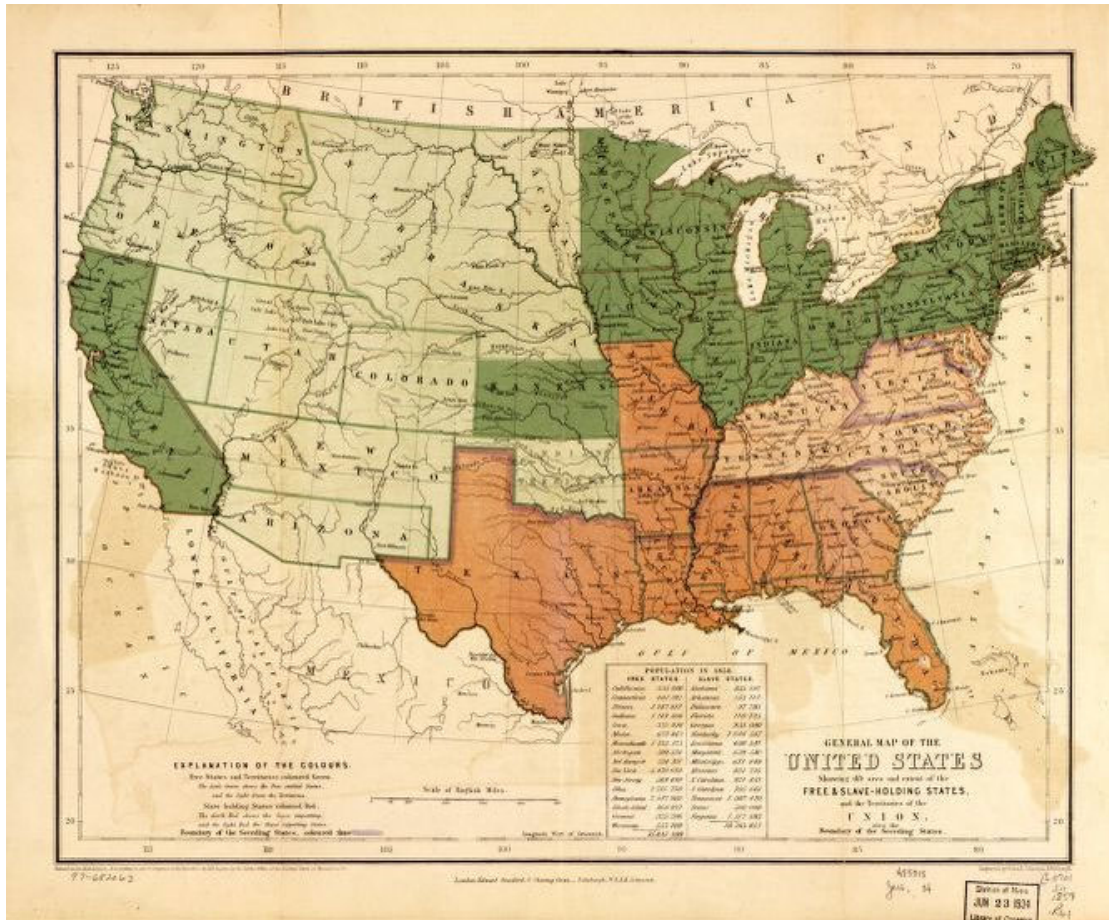
**b. Contemporary dictionaries, maps, atlases, and censuses included the territories as part of the United States.**

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

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

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

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



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

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

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

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

	1870. in sq. Miles	1860. in sq. Miles	1850. in sq. Miles	1840. in sq. Miles	1830. in sq. Miles
THE UNITED STATES.....	3,613,497	3,613,497	3,613,497	3,613,497	3,613,497
THE STATES.....	3,613,497	3,613,497	3,613,497	3,613,497	3,613,497
1 Alabama.....	52,420	52,420	52,420	52,420	52,420
2 Arkansas.....	52,420	52,420	52,420	52,420	52,420
3 California.....	152,377	152,377	152,377	152,377	152,377
4 Connecticut.....	4,564	4,564	4,564	4,564	4,564
5 Delaware.....	2,486	2,486	2,486	2,486	2,486
6 Florida.....	55,520	55,520	55,520	55,520	55,520
7 Georgia.....	30,572	30,572	30,572	30,572	30,572
8 Illinois.....	143,277	143,277	143,277	143,277	143,277
9 Indiana.....	36,423	36,423	36,423	36,423	36,423
10 Iowa.....	56,272	56,272	56,272	56,272	56,272
11 Kansas.....	82,378	82,378	82,378	82,378	82,378
12 Kentucky.....	40,469	40,469	40,469	40,469	40,469
13 Louisiana.....	52,420	52,420	52,420	52,420	52,420
14 Maine.....	33,337	33,337	33,337	33,337	33,337
15 Maryland.....	12,067	12,067	12,067	12,067	12,067
16 Massachusetts.....	8,000	8,000	8,000	8,000	8,000
17 Michigan.....	30,572	30,572	30,572	30,572	30,572
18 Minnesota.....	22,377	22,377	22,377	22,377	22,377
19 Mississippi.....	47,272	47,272	47,272	47,272	47,272
20 Missouri.....	68,272	68,272	68,272	68,272	68,272
21 Nebraska.....	77,272	77,272	77,272	77,272	77,272
22 Nevada.....	112,377	112,377	112,377	112,377	112,377
23 New Hampshire.....	9,572	9,572	9,572	9,572	9,572
24 New Jersey.....	8,000	8,000	8,000	8,000	8,000
25 New York.....	50,272	50,272	50,272	50,272	50,272
26 North Carolina.....	52,420	52,420	52,420	52,420	52,420
27 Ohio.....	40,469	40,469	40,469	40,469	40,469
28 Oregon.....	95,272	95,272	95,272	95,272	95,272
29 Pennsylvania.....	40,469	40,469	40,469	40,469	40,469
30 Rhode Island.....	1,500	1,500	1,500	1,500	1,500
31 South Carolina.....	32,272	32,272	32,272	32,272	32,272
32 Tennessee.....	40,469	40,469	40,469	40,469	40,469
33 Texas.....	69,272	69,272	69,272	69,272	69,272
34 Vermont.....	9,572	9,572	9,572	9,572	9,572
35 Virginia.....	38,272	38,272	38,272	38,272	38,272
36 West Virginia.....	62,272	62,272	62,272	62,272	62,272
37 Wisconsin.....	23,272	23,272	23,272	23,272	23,272
THE TERRITORIES.....	0	0	0	0	0
38 Alaska (unorganized territory).....	0	0	0	0	0
39 Arizona.....	0	0	0	0	0
40 Arkansas.....	0	0	0	0	0
41 Colorado.....	0	0	0	0	0
42 Dakota.....	0	0	0	0	0
43 District of Columbia.....	0	0	0	0	0
44 Florida.....	0	0	0	0	0
45 Idaho.....	0	0	0	0	0
46 Illinois.....	0	0	0	0	0
47 Indian Country (unorg. territory).....	0	0	0	0	0
48 Ind. Coun., Unorg. ter. west of Ind.....	0	0	0	0	0
49 Indiana.....	0	0	0	0	0
50 Iowa.....	0	0	0	0	0
51 Kansas.....	0	0	0	0	0
52 Louisiana.....	0	0	0	0	0
53 Michigan.....	0	0	0	0	0
54 Minnesota.....	0	0	0	0	0
55 Mississippi.....	0	0	0	0	0
56 Missouri.....	0	0	0	0	0
57 Montana.....	0	0	0	0	0
58 Nebraska.....	0	0	0	0	0
59 New Mexico.....	0	0	0	0	0
60 Ohio, North of the River.....	0	0	0	0	0
61 Ohio, South of the River.....	0	0	0	0	0
62 Oregon.....	0	0	0	0	0
63 Orleans.....	0	0	0	0	0
64 Utah.....	0	0	0	0	0
65 Washington.....	0	0	0	0	0
66 Wisconsin.....	0	0	0	0	0
67 Wyoming.....	0	0	0	0	0
68 On pub. ships in serv. of the U. S.....	0	0	0	0	0

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

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

AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EACH STATE AND TERRITORY															
STATES AND TERRITORIES.	1870. (a) (b)			1860. (c) (d)			1850. (e)			1840.		1830			
	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.			
<b>THE UNITED STATES.</b>	<b>3,601,884</b>	<b>38,558,371</b>	<b>10.7</b>	<b>1,223,029</b>	<b>31,040,840</b>	<b>18.01</b>	<b>1,544,224</b>	<b>23,047,891</b>	<b>14.99</b>	<b>912,614</b>	<b>16,891,107</b>	<b>18.50</b>	<b>800,197</b>	<b>12.7</b>	
<b>THE STATES.</b>	<b>1,984,467</b>	<b>38,115,041</b>	<b>19.21</b>												
1 Alabama.....	59,772	996,092	16.66	50,772	964,201	19.01	50,772	771,623	15.21	50,772	590,756	11.66	50,772	2	
2 Arkansas.....	52,198	484,471	9.30	52,198	435,450	8.34	52,198	209,897	4.02	52,198	97,574	1.87			
3 California.....	188,981	560,247	2.97	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	309,988	65.26	4,750	2	
5 Delaware.....	2,120	126,815	59.97	2,120	112,216	52.93	2,120	91,531	43.18						
6 Florida.....	59,268	187,748	3.17	59,268	140,424	2.36	59,268	87,445	1.48						
7 Georgia.....	58,000	1,184,099	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	2,639,894	47.84	55,410	1,711,991	30.90	55,410	814,770	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	683,866	20.29	33,809	3	
10 Iowa.....	55,045	1,194,020	21.69	55,045	974,913	17.69	55,045	192,214	3.49						
11 Kansas.....	84,318	384,399	4.58												
12 Kentucky.....	37,680	1,321,011	35.33	37,680	1,155,684	30.94	37,680	984,405	26.07	37,680	777,828	20.70	37,680	68	
13 Louisiana.....	41,346	786,915	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	396	
15 Maryland.....	11,124	780,894	70.20	11,124	689,649	61.76	11,124	583,034	52.41	11,124	470,019	42.25	11,124	441	
16 Massachusetts.....	7,800	1,457,351	186.84	7,800	1,231,666	157.83	7,800	994,514	127.50	7,800	737,699	94.58	7,800	61c	
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	439,196	5.26	83,531	173,003	2.10									
19 Mississippi.....	47,156	877,222	17.56	47,156	791,305	16.78	47,156	606,526	12.86	47,156	373,651	7.99	47,156	135	
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	65,350	140	
21 Nevada.....	77,995	12,093	1.62												
22 New Hampshire.....	9,280	418,300	44.97	9,280	376,073	40.53	9,280	317,976	34.26	9,280	284,574	30.67	9,280	269	
23 New Jersey.....	8,320	966,096	116.11	8,320	671,035	80.77	8,320	480,555	58.84	8,320	373,306	44.87	8,320	32c	
24 New York.....	47,000	4,382,759	93.25	47,000	3,886,735	82.71	47,000	3,097,394	65.90	47,000	2,428,921	51.68	47,000	1,918	
25 North Carolina.....	50,704	1,071,361	21.13	50,704	996,612	19.85	50,704	869,639	17.14	50,704	753,419	14.86	50,704	737	
26 Ohio.....	39,664	2,665,260	66.69	39,664	2,339,511	58.54	39,664	1,980,329	49.55	39,664	1,519,467	38.27	39,664	937	
28 Oregon.....	95,274	90,923	0.95	95,274	52,465	0.55									
29 Pennsylvania.....	46,000	5,511,651	119.82	46,000	2,998,215	65.18	46,000	2,317,286	50.26	46,000	1,724,603	37.48	46,000	1,348	
30 Rhode Island.....	1,306	217,353	166.43	1,306	174,620	133.71	1,306	147,545	112.97	1,306	108,830	83.33	1,306	97	
31 South Carolina.....	34,000	705,606	20.75	34,000	703,708	20.70	34,000	668,507	19.66	34,000	594,398	17.48	34,000	58	
32 Tennessee.....	45,600	1,288,210	27.66	45,600	1,109,801	24.34	45,600	1,007,717	21.99	45,600	829,210	18.18	45,600	68	
33 Texas.....	274,356	818,279	2.98	274,356	604,215	2.20	274,356	214,901	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	0	61,348	1,599,318	26.02	61,348	1,421,661	23.17	61,312	1,139,797	20.22	61,312	1,211
36 West Virginia.....	24,000	443,314	19.22												
37 Wisconsin.....	53,924	1,024,670	19.56	53,924	775,881	14.39	53,924	305,391	5.66						
<b>THE TERRITORIES.</b>	<b>1,610,417</b>	<b>442,730</b>	<b>0.27</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	
38 Alaska (unorganized territory).....	577,396	0	0												
39 Arizona.....	113,916	0	0												
40 Arkansas.....		0	0												
41 Colorado.....	104,500	39,864	0.38												
42 Dakota.....	615,022	14,131	0.02												
43 District of Columbia.....	64	131,200	2057.81	64	75,080	1173.13	64	51,687	807.61	100	43,712	437.12	100	39	
44 Florida.....		0	0												
45 Idaho.....	86,494	14,999	0.17												
46 Illinois.....		0	0												
47 Indian Country (unorg. territory).....	58,191	0	0	58,191	0	0	524,256	0	0	812,601	0	0			
48 Ind. Coun. TERR. OF W. I. II.....	10,800	0	0	10,800	0	0	22,576	0	0						
49 Indiana.....		0	0												
50 Iowa.....		0	0												
51 Kansas.....		0	0	126,283	141,483	0.90									
52 Louisiana.....		0	0												
53 Michigan.....		0	0	81,060	4,837	0.06	165,491	6,077	0.04						
54 Minnesota.....		0	0												
55 Mississippi.....		0	0												
56 Missouri.....		0	0												
57 Montana.....	614,376	20,595	0.04												
58 Nebraska.....		0	0	351,558	28,841	0.08									
59 New Mexico.....	131,201	91,874	0.76	261,342	93,516	0.36	215,807	61,547	0.29						
60 Ohio, North of the River.....		0	0												
61 Ohio, South of the River.....		0	0												
62 Oregon.....		0	0												
63 Orleans.....		0	0												
64 Utah.....	84,476	86,786	1.03	220,196	47,130	0.21	220,196	11,380	0.05						
65 Washington.....	69,994	3,355	0.34	193,071	11,594	0.06									
66 Wisconsin.....		0	0												
67 Wyoming.....	97,853	9,118	0.09												
68 On pub. ships in serv. of the U.S.....											6,100			5	

Area and population of “The United States,” the sum of the States and the Territories

Area and population of “The States”

Area and population of “The Territories”

Id.

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

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

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



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

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

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

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

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

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

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

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

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



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

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



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

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

**AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EACH STATE OR TERRITORY AT EACH CENSUS.**

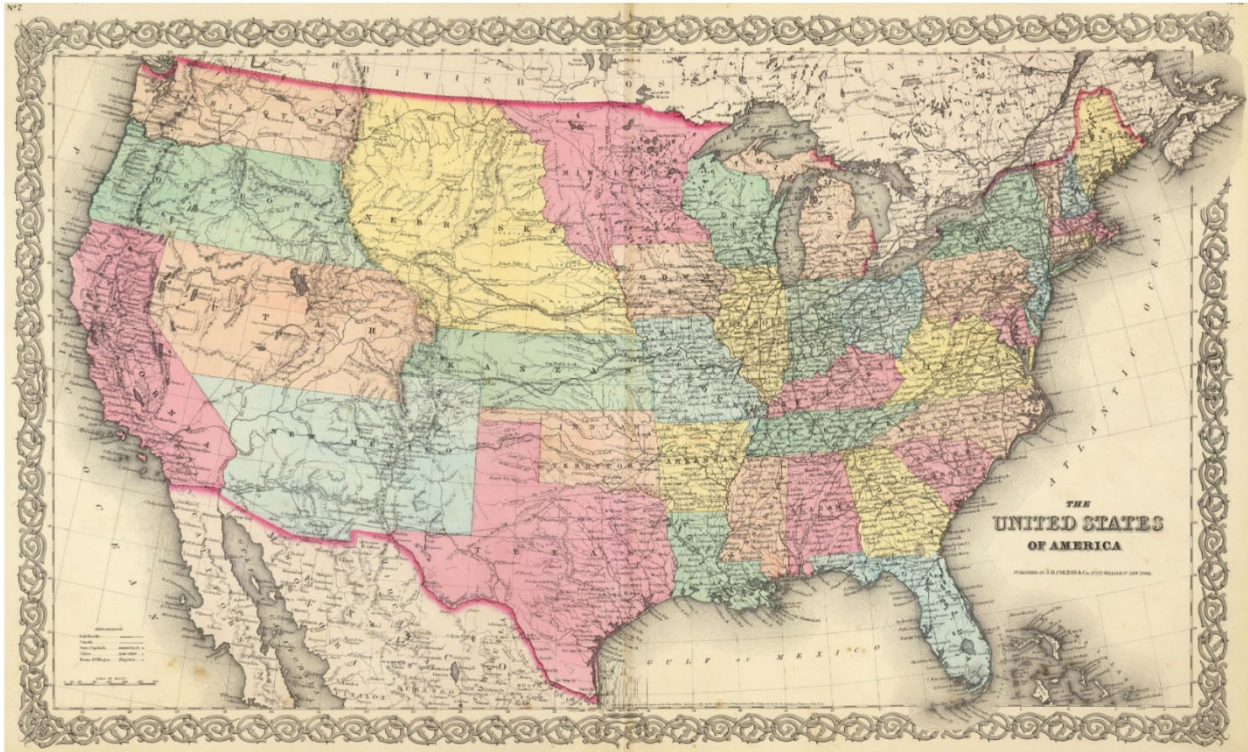
STATES AND TERRITORIES.	1870. 40			1880. 46			1890. 52			1900. 58			1910. 64			1920. 70		
	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.	Square Miles.	Persons.	Persons to a Square Mile.
<b>THE UNITED STATES</b> .....	3,531,471	39,811,764	11.27	3,700,000	46,216,360	12.49	3,902,000	55,497,360	14.22	4,100,000	63,000,000	15.37	4,300,000	75,000,000	17.44	4,500,000	85,000,000	18.89
<b>THE STATES</b> .....	3,531,471	39,811,764	11.27	3,700,000	46,216,360	12.49	3,902,000	55,497,360	14.22	4,100,000	63,000,000	15.37	4,300,000	75,000,000	17.44	4,500,000	85,000,000	18.89
1 Alabama.....	52,439	1,025,328	19.55	57,560	1,519,554	26.39	62,681	2,000,000	31.91	67,802	2,500,000	36.89	72,923	3,000,000	41.14	78,044	3,500,000	44.85
2 Arkansas.....	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39
3 California.....	158,801	486,982	3.07	158,801	1,025,328	6.46	158,801	1,876,743	11.82	158,801	2,728,158	17.24	158,801	3,580,573	22.55	158,801	4,432,988	27.91
4 Connecticut.....	4,750	1,025,328	21.58	4,750	1,025,328	21.58	4,750	1,025,328	21.58	4,750	1,025,328	21.58	4,750	1,025,328	21.58	4,750	1,025,328	21.58
5 Delaware.....	2,455	1,025,328	41.75	2,455	1,025,328	41.75	2,455	1,025,328	41.75	2,455	1,025,328	41.75	2,455	1,025,328	41.75	2,455	1,025,328	41.75
6 Florida.....	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68
7 Georgia.....	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18
8 Illinois.....	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68
9 Indiana.....	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07
10 Iowa.....	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68
11 Kansas.....	82,121	1,025,328	12.49	82,121	1,025,328	12.49	82,121	1,025,328	12.49	82,121	1,025,328	12.49	82,121	1,025,328	12.49	82,121	1,025,328	12.49
12 Kentucky.....	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21
13 Louisiana.....	47,439	1,025,328	21.62	47,439	1,025,328	21.62	47,439	1,025,328	21.62	47,439	1,025,328	21.62	47,439	1,025,328	21.62	47,439	1,025,328	21.62
14 Maine.....	35,000	1,025,328	29.30	35,000	1,025,328	29.30	35,000	1,025,328	29.30	35,000	1,025,328	29.30	35,000	1,025,328	29.30	35,000	1,025,328	29.30
15 Maryland.....	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18
16 Massachusetts.....	7,800	1,025,328	131.45	7,800	1,025,328	131.45	7,800	1,025,328	131.45	7,800	1,025,328	131.45	7,800	1,025,328	131.45	7,800	1,025,328	131.45
17 Michigan.....	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18
18 Minnesota.....	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07	33,000	1,025,328	31.07
19 Mississippi.....	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21	37,680	1,025,328	27.21
20 Missouri.....	65,350	1,025,328	15.70	65,350	1,025,328	15.70	65,350	1,025,328	15.70	65,350	1,025,328	15.70	65,350	1,025,328	15.70	65,350	1,025,328	15.70
21 Montana.....	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18
22 Nevada.....	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18	11,124	1,025,328	92.18
23 New Hampshire.....	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31
24 New Jersey.....	8,200	1,025,328	125.04	8,200	1,025,328	125.04	8,200	1,025,328	125.04	8,200	1,025,328	125.04	8,200	1,025,328	125.04	8,200	1,025,328	125.04
25 New York.....	47,000	1,025,328	21.82	47,000	1,025,328	21.82	47,000	1,025,328	21.82	47,000	1,025,328	21.82	47,000	1,025,328	21.82	47,000	1,025,328	21.82
26 North Carolina.....	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39
27 Ohio.....	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18	30,000	1,025,328	34.18
28 Oregon.....	95,704	1,025,328	10.71	95,704	1,025,328	10.71	95,704	1,025,328	10.71	95,704	1,025,328	10.71	95,704	1,025,328	10.71	95,704	1,025,328	10.71
29 Pennsylvania.....	46,000	1,025,328	22.29	46,000	1,025,328	22.29	46,000	1,025,328	22.29	46,000	1,025,328	22.29	46,000	1,025,328	22.29	46,000	1,025,328	22.29
30 Rhode Island.....	1,500	1,025,328	683.55	1,500	1,025,328	683.55	1,500	1,025,328	683.55	1,500	1,025,328	683.55	1,500	1,025,328	683.55	1,500	1,025,328	683.55
31 South Carolina.....	32,000	1,025,328	32.06	32,000	1,025,328	32.06	32,000	1,025,328	32.06	32,000	1,025,328	32.06	32,000	1,025,328	32.06	32,000	1,025,328	32.06
32 Tennessee.....	45,000	1,025,328	22.79	45,000	1,025,328	22.79	45,000	1,025,328	22.79	45,000	1,025,328	22.79	45,000	1,025,328	22.79	45,000	1,025,328	22.79
33 Texas.....	77,439	1,025,328	13.24	77,439	1,025,328	13.24	77,439	1,025,328	13.24	77,439	1,025,328	13.24	77,439	1,025,328	13.24	77,439	1,025,328	13.24
34 Vermont.....	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31	9,380	1,025,328	109.31
35 Virginia.....	38,124	1,025,328	26.90	38,124	1,025,328	26.90	38,124	1,025,328	26.90	38,124	1,025,328	26.90	38,124	1,025,328	26.90	38,124	1,025,328	26.90
36 West Virginia.....	20,000	1,025,328	51.27	20,000	1,025,328	51.27	20,000	1,025,328	51.27	20,000	1,025,328	51.27	20,000	1,025,328	51.27	20,000	1,025,328	51.27
37 Wisconsin.....	35,284	1,025,328	29.09	35,284	1,025,328	29.09	35,284	1,025,328	29.09	35,284	1,025,328	29.09	35,284	1,025,328	29.09	35,284	1,025,328	29.09
<b>THE TERRITORIES</b> .....	7,411	444,730	59.87	11,124	1,025,328	92.18	15,000	1,025,328	68.35	20,000	1,025,328	51.27	25,000	1,025,328	40.97	30,000	1,025,328	34.18
38 Alaska (unorganized territory).....	577,339	0	0.00	577,339	0	0.00	577,339	0	0.00	577,339	0	0.00	577,339	0	0.00	577,339	0	0.00
39 Arizona.....	111,124	9,638	0.08	111,124	9,638	0.08	111,124	9,638	0.08	111,124	9,638	0.08	111,124	9,638	0.08	111,124	9,638	0.08
40 Arkansas.....	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39	36,121	1,025,328	28.39
41 Colorado.....	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09
42 Dakota.....	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09	104,560	10,000	0.09
43 District of Columbia.....	64	1,025,328	16,024	64	1,025,328	16,024	64	1,025,328	16,024	64	1,025,328	16,024	64	1,025,328	16,024	64	1,025,328	16,024
44 Florida.....	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68	55,410	1,025,328	18.68
45 Idaho.....	86,194	10,000	0.12	86,194	10,000	0.12	86,194	10,000	0.12	86,194	10,000	0.12	86,194	10,000	0.12	86,194	10,000	0.12
46 Illinois.....	55,410	1,025,328	18.68	55,														

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

**AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EACH STATE OR TERRITORY AT EACH CENSUS.**

STATES AND TERRITORIES	1870.		1880.		1890.		1900.		1910.		1920.		1930.		1940.		1950.		1960.		1970.			
	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.		
<b>THE UNITED STATES.....</b>	<b>3,538,711</b>	<b>38,553,711</b>	<b>3,538,711</b>	<b>50,155,041</b>	<b>3,538,711</b>	<b>63,553,711</b>	<b>3,538,711</b>	<b>92,053,711</b>	<b>3,538,711</b>	<b>120,553,711</b>	<b>3,538,711</b>	<b>149,053,711</b>	<b>3,538,711</b>	<b>177,553,711</b>	<b>3,538,711</b>	<b>206,053,711</b>	<b>3,538,711</b>	<b>234,553,711</b>	<b>3,538,711</b>	<b>263,053,711</b>	<b>3,538,711</b>	<b>291,553,711</b>	<b>3,538,711</b>	<b>320,053,711</b>
<b>THE STATES.....</b>	<b>3,538,711</b>	<b>38,553,711</b>	<b>3,538,711</b>	<b>50,155,041</b>	<b>3,538,711</b>	<b>63,553,711</b>	<b>3,538,711</b>	<b>92,053,711</b>	<b>3,538,711</b>	<b>120,553,711</b>	<b>3,538,711</b>	<b>149,053,711</b>	<b>3,538,711</b>	<b>177,553,711</b>	<b>3,538,711</b>	<b>206,053,711</b>	<b>3,538,711</b>	<b>234,553,711</b>	<b>3,538,711</b>	<b>263,053,711</b>	<b>3,538,711</b>	<b>291,553,711</b>	<b>3,538,711</b>	<b>320,053,711</b>
1 Alabama.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
2 Arkansas.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
3 California.....	158,333	1,285,263	158,333	1,587,654	158,333	1,937,224	158,333	2,339,045	158,333	2,792,216	158,333	3,296,916	158,333	3,852,427	158,333	4,458,978	158,333	5,116,589	158,333	5,825,260	158,333	6,584,971	158,333	7,394,682
4 Connecticut.....	5,294	1,285,263	5,294	1,587,654	5,294	1,937,224	5,294	2,339,045	5,294	2,792,216	5,294	3,296,916	5,294	3,852,427	5,294	4,458,978	5,294	5,116,589	5,294	5,825,260	5,294	6,584,971	5,294	7,394,682
5 Delaware.....	2,455	1,285,263	2,455	1,587,654	2,455	1,937,224	2,455	2,339,045	2,455	2,792,216	2,455	3,296,916	2,455	3,852,427	2,455	4,458,978	2,455	5,116,589	2,455	5,825,260	2,455	6,584,971	2,455	7,394,682
6 Florida.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
7 Georgia.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
8 Illinois.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
9 Indiana.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
10 Iowa.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
11 Kansas.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
12 Kentucky.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
13 Louisiana.....	52,424	1,285,263	52,424	1,587,654	52,424	1,937,224	52,424	2,339,045	52,424	2,792,216	52,424	3,296,916	52,424	3,852,427	52,424	4,458,978	52,424	5,116,589	52,424	5,825,260	52,424	6,584,971	52,424	7,394,682
14 Maine.....	33,349	1,285,263	33,349	1,587,654	33,349	1,937,224	33,349	2,339,045	33,349	2,792,216	33,349	3,296,916	33,349	3,852,427	33,349	4,458,978	33,349	5,116,589	33,349	5,825,260	33,349	6,584,971	33,349	7,394,682
15 Maryland.....	11,314	1,285,263	11,314	1,587,654	11,314	1,937,224	11,314	2,339,045	11,314	2,792,216	11,314	3,296,916	11,314	3,852,427	11,314	4,458,978	11,314	5,116,589	11,314	5,825,260	11,314	6,584,971	11,314	7,394,682
16 Massachusetts.....	7,804	1,285,263	7,804	1,587,654	7,804	1,937,224	7,804	2,339,045	7,804	2,792,216	7,804	3,296,916	7,804	3,852,427	7,804	4,458,978	7,804	5,116,589	7,804	5,825,260	7,804	6,584,971	7,804	7,394,682
17 Michigan.....	30,814	1,285,263	30,814	1,587,654	30,814	1,937,224	30,814	2,339,045	30,814	2,792,216	30,814	3,296,916	30,814	3,852,427	30,814	4,458,978	30,814	5,116,589	30,814	5,825,260	30,814	6,584,971	30,814	7,394,682
18 Minnesota.....	35,331	1,285,263	35,331	1,587,654	35,331	1,937,224	35,331	2,339,045	35,331	2,792,216	35,331	3,296,916	35,331	3,852,427	35,331	4,458,978	35,331	5,116,589	35,331	5,825,260	35,331	6,584,971	35,331	7,394,682
19 Missouri.....	47,556	1,285,263	47,556	1,587,654	47,556	1,937,224	47,556	2,339,045	47,556	2,792,216	47,556	3,296,916	47,556	3,852,427	47,556	4,458,978	47,556	5,116,589	47,556	5,825,260	47,556	6,584,971	47,556	7,394,682
20 Montana.....	65,350	1,285,263	65,350	1,587,654	65,350	1,937,224	65,350	2,339,045	65,350	2,792,216	65,350	3,296,916	65,350	3,852,427	65,350	4,458,978	65,350	5,116,589	65,350	5,825,260	65,350	6,584,971	65,350	7,394,682
21 Nebraska.....	75,993	1,285,263	75,993	1,587,654	75,993	1,937,224	75,993	2,339,045	75,993	2,792,216	75,993	3,296,916	75,993	3,852,427	75,993	4,458,978	75,993	5,116,589	75,993	5,825,260	75,993	6,584,971	75,993	7,394,682
22 Nevada.....	106,155	1,285,263	106,155	1,587,654	106,155	1,937,224	106,155	2,339,045	106,155	2,792,216	106,155	3,296,916	106,155	3,852,427	106,155	4,458,978	106,155	5,116,589	106,155	5,825,260	106,155	6,584,971	106,155	7,394,682
23 New Hampshire.....	9,340	1,285,263	9,340	1,587,654	9,340	1,937,224	9,340	2,339,045	9,340	2,792,216	9,340	3,296,916	9,340	3,852,427	9,340	4,458,978	9,340	5,116,589	9,340	5,825,260	9,340	6,584,971	9,340	7,394,682
24 New Jersey.....	8,810	1,285,263	8,810	1,587,654	8,810	1,937,224	8,810	2,339,045	8,810	2,792,216	8,810	3,296,916	8,810	3,852,427	8,810	4,458,978	8,810	5,116,589	8,810	5,825,260	8,810	6,584,971	8,810	7,394,682
25 New York.....	47,000	1,285,263	47,000	1,587,654	47,000	1,937,224	47,000	2,339,045	47,000	2,792,216	47,000	3,296,916	47,000	3,852,427	47,000	4,458,978	47,000	5,116,589	47,000	5,825,260	47,000	6,584,971	47,000	7,394,682
26 North Carolina.....	50,704	1,285,263	50,704	1,587,654	50,704	1,937,224	50,704	2,339,045	50,704	2,792,216	50,704	3,296,916	50,704	3,852,427	50,704	4,458,978	50,704	5,116,589	50,704	5,825,260	50,704	6,584,971	50,704	7,394,682
27 Ohio.....	39,964	1,285,263	39,964	1,587,654	39,964	1,937,224	39,964	2,339,045	39,964	2,792,216	39,964	3,296,916	39,964	3,852,427	39,964	4,458,978	39,964	5,116,589	39,964	5,825,260	39,964	6,584,971	39,964	7,394,682
28 Oregon.....	55,774	1,285,263	55,774	1,587,654	55,774	1,937,224	55,774	2,339,045	55,774	2,792,216	55,774	3,296,916	55,774	3,852,427	55,774	4,458,978	55,774	5,116,589	55,774	5,825,260	55,774	6,584,971	55,774	7,394,682
29 Pennsylvania.....	46,900	1,285,263	46,900	1,587,654	46,900	1,937,224	46,900	2,339,045	46,900	2,792,216	46,900	3,296,916	46,900	3,852,427	46,900	4,458,978	46,900	5,116,589	46,900	5,825,260	46,900	6,584,971	46,900	7,394,682
30 Rhode Island.....	1,545	1,285,263	1,545	1,587,654	1,545	1,937,224	1,545	2,339,045	1,545	2,792,216	1,545	3,296,916	1,545	3,852,427	1,545	4,458,978	1,545	5,116,589	1,545	5,825,260	1,545	6,584,971	1,545	7,394,682
31 South Carolina.....	34,000	1,285,263	34,000	1,587,654	34,000	1,937,224	34,000	2,339,045	34,000	2,792,216	34,000	3,296,916	34,000	3,852,427	34,000	4,458,978	34,000	5,116,589	34,000	5,825,260	34,000	6,584,971	34,000	7,394,682
32 Tennessee.....	45,600	1,285,263	45,600	1,587,654	45,600	1,937,224	45,600	2,339,045	45,600	2,792,216	45,600	3,296,916	45,600	3,852,427	45,600	4,458,978	45,600	5,116,589	45,600	5,825,260	45,600	6		

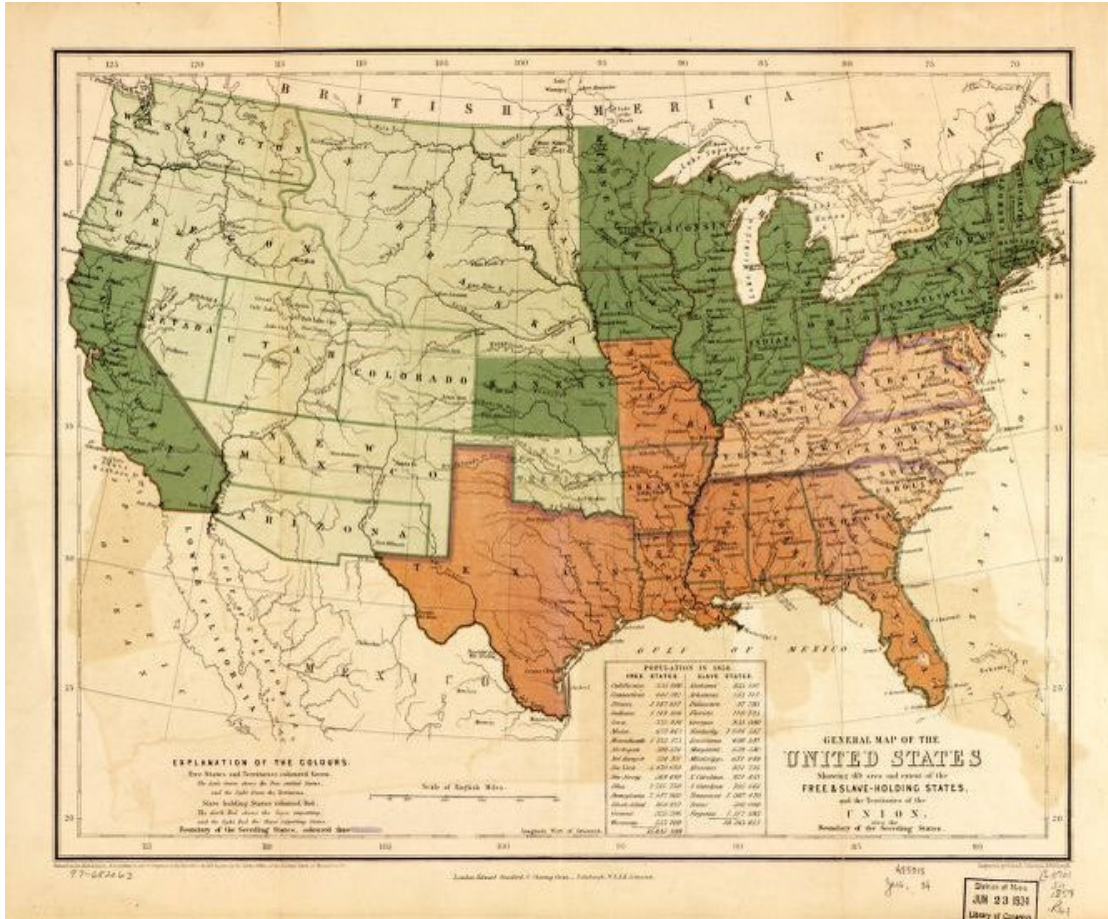
United States in 1856 (roughly a decade before ratification of the Citizenship Clause):



J.H. Colton & Co., The United States of America (1856),

[https://mapofus.org/\\_maps/atlas/1856-US.html](https://mapofus.org/_maps/atlas/1856-US.html) (last visited Dec. 1, 2021).

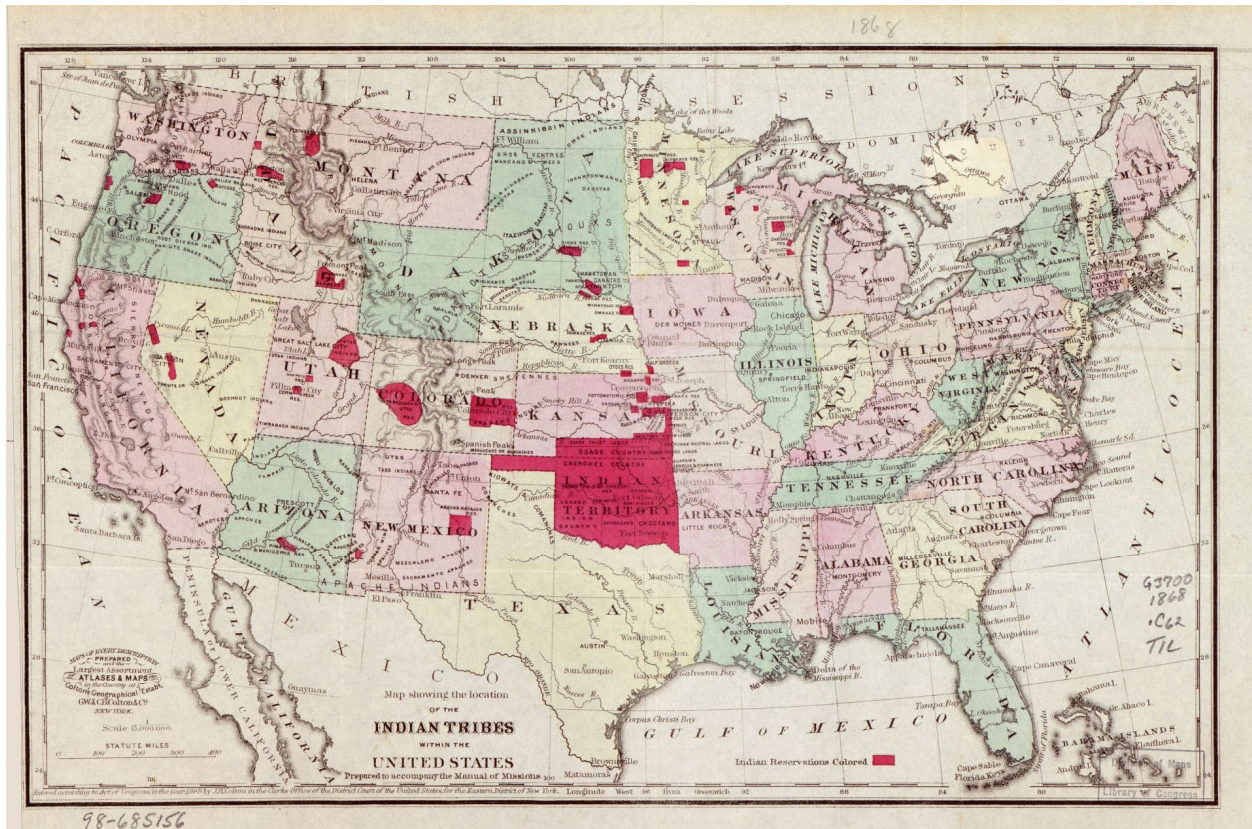
The Indian Territory reappeared the next year in another map of the United States:



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

<https://www.loc.gov/resource/g3701e.cw1020000/> (last visited Dec. 1, 2021) (on file at the Library of Congress).

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



G.W. & C.B. Colton & Co., United States (1868),

<https://www.loc.gov/item/98685156/> (last visited Dec. 1, 2021).

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

**AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EACH STATE OR TERRITORY AT EACH CENSUS.**

STATES AND TERRITORIES.	1870.		1880.		1890.		1900.		1910.		1920.		1930.		1940.		1950.		1960.		1970.	
	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.	Sq. Miles.	Persons.
<b>THE UNITED STATES.....</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>
<b>THE STATES.....</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>	<b>3,531,471</b>	<b>50,189,291</b>
1 Alabama.....	52,420	1,011,594	52,420	1,244,557	52,420	1,505,287	52,420	1,792,227	52,420	2,086,868	52,420	2,399,331	52,420	2,730,932	52,420	3,080,937	52,420	3,449,395	52,420	3,836,273	52,420	4,241,794
2 Arkansas.....	52,420	1,011,594	52,420	1,244,557	52,420	1,505,287	52,420	1,792,227	52,420	2,086,868	52,420	2,399,331	52,420	2,730,932	52,420	3,080,937	52,420	3,449,395	52,420	3,836,273	52,420	4,241,794
3 California.....	158,381	506,794	158,381	1,011,594	158,381	1,505,287	158,381	1,999,454	158,381	2,493,621	158,381	2,987,788	158,381	3,481,955	158,381	3,976,122	158,381	4,470,289	158,381	4,964,456	158,381	5,458,623
4 Connecticut.....	4,750	273,484	4,750	312,727	4,750	351,970	4,750	391,213	4,750	430,456	4,750	469,699	4,750	508,942	4,750	548,185	4,750	587,428	4,750	626,671	4,750	665,914
5 Delaware.....	2,450	125,013	2,450	140,861	2,450	156,709	2,450	172,557	2,450	188,405	2,450	204,253	2,450	220,101	2,450	235,949	2,450	251,797	2,450	267,645	2,450	283,493
6 Florida.....	55,000	187,428	55,000	375,131	55,000	562,834	55,000	770,537	55,000	978,240	55,000	1,185,943	55,000	1,393,646	55,000	1,601,349	55,000	1,809,052	55,000	2,016,755	55,000	2,224,458
7 Georgia.....	59,000	1,184,109	59,000	1,401,312	59,000	1,618,515	59,000	1,835,718	59,000	2,052,921	59,000	2,270,124	59,000	2,487,327	59,000	2,704,530	59,000	2,921,733	59,000	3,138,936	59,000	3,356,139
8 Illinois.....	55,410	2,539,891	55,410	3,124,801	55,410	3,709,711	55,410	4,294,621	55,410	4,879,531	55,410	5,464,441	55,410	6,049,351	55,410	6,634,261	55,410	7,219,171	55,410	7,804,081	55,410	8,388,991
9 Indiana.....	33,800	1,086,571	33,800	1,324,801	33,800	1,563,031	33,800	1,801,261	33,800	2,039,491	33,800	2,277,721	33,800	2,515,951	33,800	2,754,181	33,800	2,992,411	33,800	3,230,641	33,800	3,468,871
10 Iowa.....	55,041	1,194,020	55,041	1,401,312	55,041	1,608,603	55,041	1,816,184	55,041	2,023,765	55,041	2,231,346	55,041	2,438,927	55,041	2,646,508	55,041	2,854,089	55,041	3,061,670	55,041	3,269,251
11 Kansas.....	81,215	304,399	81,215	412,501	81,215	520,603	81,215	628,705	81,215	736,807	81,215	844,909	81,215	953,011	81,215	1,061,113	81,215	1,169,215	81,215	1,277,317	81,215	1,385,419
12 Kentucky.....	37,680	1,221,012	37,680	1,412,501	37,680	1,604,000	37,680	1,795,499	37,680	1,986,998	37,680	2,178,497	37,680	2,369,996	37,680	2,561,495	37,680	2,752,994	37,680	2,944,493	37,680	3,135,992
13 Louisiana.....	48,345	726,913	48,345	812,501	48,345	898,090	48,345	983,679	48,345	1,069,268	48,345	1,154,857	48,345	1,240,446	48,345	1,326,035	48,345	1,411,624	48,345	1,497,213	48,345	1,582,802
14 Maine.....	35,000	609,915	35,000	685,414	35,000	760,913	35,000	836,412	35,000	911,911	35,000	987,410	35,000	1,062,909	35,000	1,138,408	35,000	1,213,907	35,000	1,289,406	35,000	1,364,905
15 Maryland.....	11,244	780,592	11,244	866,091	11,244	951,590	11,244	1,037,089	11,244	1,122,588	11,244	1,208,087	11,244	1,293,586	11,244	1,379,085	11,244	1,464,584	11,244	1,550,083	11,244	1,635,582
16 Massachusetts.....	7,800	1,457,351	7,800	1,604,850	7,800	1,752,349	7,800	1,899,848	7,800	2,047,347	7,800	2,194,846	7,800	2,342,345	7,800	2,489,844	7,800	2,637,343	7,800	2,784,842	7,800	2,932,341
17 Michigan.....	50,485	1,184,109	50,485	1,401,312	50,485	1,618,515	50,485	1,835,718	50,485	2,052,921	50,485	2,270,124	50,485	2,487,327	50,485	2,704,530	50,485	2,921,733	50,485	3,138,936	50,485	3,356,139
18 Minnesota.....	83,531	439,790	83,531	526,289	83,531	612,788	83,531	700,287	83,531	787,786	83,531	875,285	83,531	962,784	83,531	1,050,283	83,531	1,137,782	83,531	1,225,281	83,531	1,312,780
19 Mississippi.....	47,195	1,221,012	47,195	1,412,501	47,195	1,604,000	47,195	1,795,499	47,195	1,986,998	47,195	2,178,497	47,195	2,369,996	47,195	2,561,495	47,195	2,752,994	47,195	2,944,493	47,195	3,135,992
20 Missouri.....	65,350	1,221,012	65,350	1,412,501	65,350	1,604,000	65,350	1,795,499	65,350	1,986,998	65,350	2,178,497	65,350	2,369,996	65,350	2,561,495	65,350	2,752,994	65,350	2,944,493	65,350	3,135,992
21 Montana.....	75,992	122,993	75,992	188,494	75,992	273,995	75,992	359,496	75,992	444,997	75,992	530,498	75,992	615,999	75,992	701,500	75,992	787,001	75,992	872,502	75,992	958,003
22 Nevada.....	104,193	42,494	104,193	80,995	104,193	161,996	104,193	218,997	104,193	275,998	104,193	332,999	104,193	389,000	104,193	446,001	104,193	503,002	104,193	560,003	104,193	617,004
23 New Hampshire.....	9,240	318,300	9,240	357,801	9,240	397,302	9,240	436,803	9,240	476,304	9,240	515,805	9,240	554,806	9,240	593,807	9,240	632,808	9,240	671,809	9,240	710,810
24 New Jersey.....	8,240	906,901	8,240	1,011,594	8,240	1,117,287	8,240	1,222,980	8,240	1,328,673	8,240	1,434,366	8,240	1,540,059	8,240	1,645,752	8,240	1,751,445	8,240	1,857,138	8,240	1,962,831
25 New York.....	47,000	4,582,591	47,000	5,177,092	47,000	5,771,593	47,000	6,366,094	47,000	6,960,595	47,000	7,555,096	47,000	8,149,597	47,000	8,744,098	47,000	9,338,599	47,000	9,933,100	47,000	10,527,601
26 North Carolina.....	50,704	1,071,394	50,704	1,244,895	50,704	1,418,396	50,704	1,591,897	50,704	1,765,398	50,704	1,938,899	50,704	2,112,400	50,704	2,285,901	50,704	2,459,402	50,704	2,632,903	50,704	2,806,404
27 Ohio.....	42,300	2,062,591	42,300	2,317,092	42,300	2,571,593	42,300	2,826,094	42,300	3,080,595	42,300	3,335,096	42,300	3,589,597	42,300	3,844,098	42,300	4,098,599	42,300	4,353,100	42,300	4,607,601
28 Oregon.....	95,474	99,923	95,474	199,846	95,474	299,769	95,474	399,692	95,474	499,615	95,474	599,538	95,474	699,461	95,474	799,384	95,474	899,307	95,474	999,230	95,474	1,099,153
29 Pennsylvania.....	45,000	3,812,591	45,000	4,217,092	45,000	4,621,593	45,000	5,026,094	45,000	5,430,595	45,000	5,835,096	45,000	6,239,597	45,000	6,644,098	45,000	7,048,599	45,000	7,453,100	45,000	7,857,601
30 Rhode Island.....	1,300	471,313	1,300	526,814	1,300	582,315	1,300	637,816	1,300	693,317	1,300	748,818	1,300	804,319	1,300	859,820	1,300	915,321	1,300	970,822	1,300	1,026,323
31 South Carolina.....	34,000	705,600	34,000	791,101	34,000	876,602	34,000	962,103	34,000	1,047,604	34,000	1,133,105	34,000	1,218,606	34,000	1,304,107	34,000	1,389,608	34,000	1,475,109	34,000	1,560,610
32 Tennessee.....	45,000	1,221,012	45,000	1,412,501	45,000	1,604,000	45,000	1,795,499	45,000	1,986,998	45,000	2,178,497	45,000	2,369,996	45,000	2,561,495	45,000	2,752,994	45,000	2,944,493	45,000	3,135,992
33 Texas.....	274,350	1,184,109	274,350	1,401,312	274,350	1,618,515	274,350	1,835,718	274,350	2,052,921	274,350	2,270,124	274,350	2,487,327	274,350	2,704,530	274,350	2,921,733	274,350	3,138,936	274,350	3,356,139
34 Vermont.....	9,240	318,300	9,240	357,801	9,240	397,302	9,240	436,803	9,240	476,304	9,240	515,805	9,240	554,806	9,240	593,807	9,240	632,808	9,240	671,809	9,240	710,810
35 Virginia.....	38,345	1,221,012	38,345	1,412,501	38,345	1,604,000	38,345	1,795,499	38,345	1,986,998	38,345	2,178,497	38,345	2,369,996	38,345	2,561,495	38,345	2,752,994	38,345	2,944,493	38,345	3,135,992
36 West Virginia.....	20,000	514,192	20,000	579,693	20,000	645,194	20,000	710,695	20,000	776,196	20,000	841,697	20,000	907,198	20,000	972,699	20,000	1,038,200	20,000	1,103,701	20,0	

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

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

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

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

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



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

\* \* \*

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

**3. We must decide what it means to be born “in the United States.”**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

None of these courts

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

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

#### **4. Conclusion**

We bear an obligation to interpret the geographic scope of the Citizenship Clause based on the text and its historical context. When we do, there is only one answer: The Territory of American Samoa lies within the United States.

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