

FILED

**United States Court of Appeals
Tenth Circuit**

PUBLISH

UNITED STATES COURT OF APPEALS

December 27, 2021

FOR THE TENTH CIRCUIT

**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. BROWNLIE, in his official
capacity as Assistant Secretary of State for
Consular Affairs,

Defendants - Appellants,

and

THE HONORABLE AUMUA AMATA;
AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants.

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

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

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

Amici Curiae.

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

Plaintiffs - Appellees,

v.

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

Defendants,

and

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

THE HONORABLE AUMUA AMATA;
AMERICAN SAMOA GOVERNMENT,

Intervenor Defendants - Appellants.

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

Amici Curiae.

ORDER

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

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

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

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

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

Entered for the Court,



CHRISTOPHER M. WOLPERT, Clerk

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

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

Nos. 20-4017, 20-4019

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

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

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

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

1. The issue is exceptionally important.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

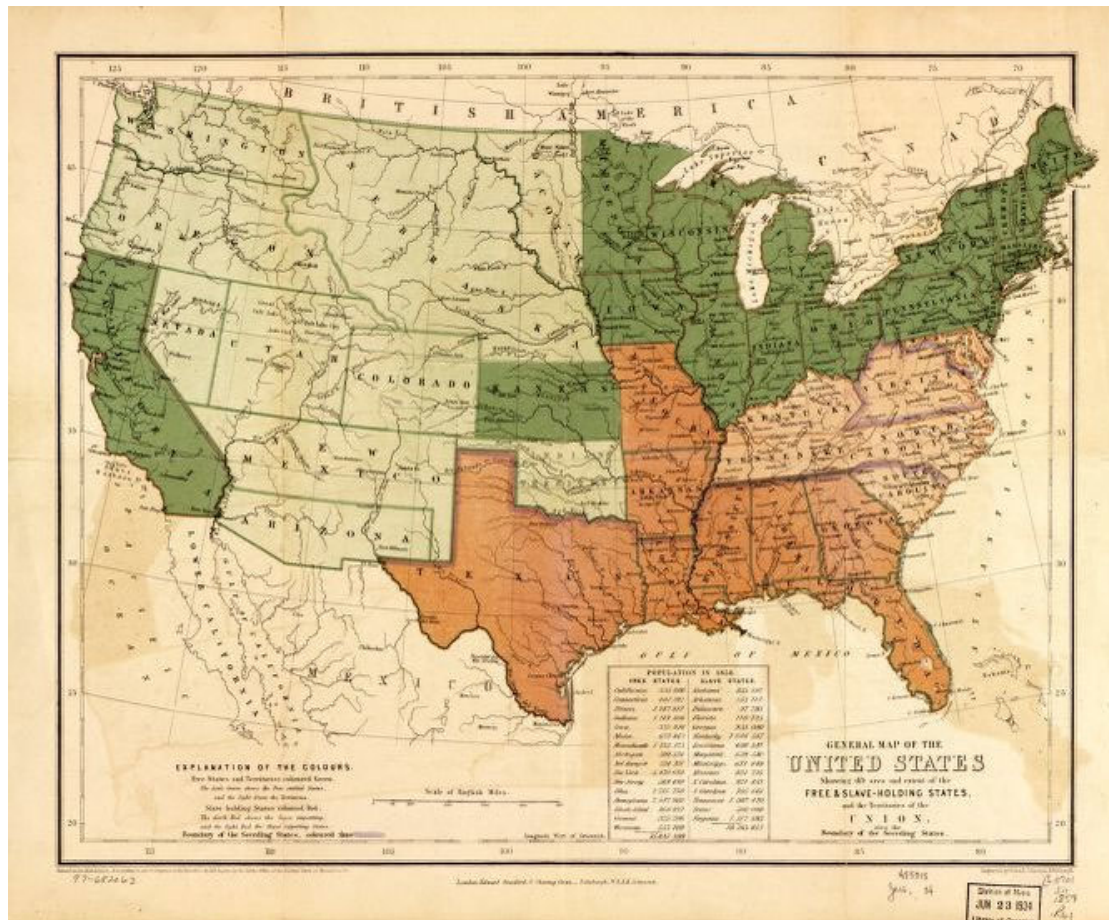
b. Contemporary dictionaries, maps, atlases, and censuses included the territories as part of the United States.

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

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

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

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



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

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

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

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

STATES AND TERRITORIES.

THE UNITED STATES.....

THE STATES.....

1	Alabama.....
2	Arkansas.....
3	California.....
4	Connecticut.....
5	Delaware.....
6	Florida.....
7	Georgia.....
8	Illinois.....
9	Indiana.....
10	Iowa.....
11	Kansas.....
12	Kentucky.....
13	Louisiana.....
14	Maine.....
15	Maryland.....
16	Massachusetts.....
17	Michigan.....
18	Minnesota.....
19	Mississippi.....
20	Missouri.....
21	Nebraska.....
22	Nevada.....
23	New Hampshire.....
24	New Jersey.....
25	New York.....
26	North Carolina.....
27	Ohio.....
28	Oregon.....
29	Pennsylvania.....
30	Rhode Island.....
31	South Carolina.....
32	Tennessee.....
33	Texas.....
34	Vermont.....
35	Virginia.....
36	West Virginia.....
37	Wisconsin.....

AREA, POPULATION, AND AVERAGE DENSITY OF SETTLEMENT OF EACH STATE AND TERRITORY.

STATE AND TERRITORY.	1870. pop.	1880. pop.	1890. pop.	1900. pop.	1910. pop.
THE UNITED STATES.....	38,556,349	50,189,221	62,949,721	76,212,221	91,972,221
THE STATES.....	38,556,349	50,189,221	62,949,721	76,212,221	91,972,221
1 Alabama.....	1,285,568	1,585,381	1,919,581	2,285,568	2,685,568
2 Arkansas.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
3 California.....	1,285,568	1,585,381	1,919,581	2,285,568	2,685,568
4 Connecticut.....	285,568	335,381	419,581	485,568	555,568
5 Delaware.....	85,568	105,381	129,581	155,568	185,568
6 Florida.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
7 Georgia.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
8 Illinois.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
9 Indiana.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
10 Iowa.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
11 Kansas.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
12 Kentucky.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
13 Louisiana.....	1,285,568	1,585,381	1,919,581	2,285,568	2,685,568
14 Maine.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
15 Maryland.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
16 Massachusetts.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
17 Michigan.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
18 Minnesota.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
19 Mississippi.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
20 Missouri.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
21 Nebraska.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
22 Nevada.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
23 New Hampshire.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
24 New Jersey.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
25 New York.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
26 North Carolina.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
27 Ohio.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
28 Oregon.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
29 Pennsylvania.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
30 Rhode Island.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
31 South Carolina.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
32 Tennessee.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
33 Texas.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
34 Vermont.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
35 Virginia.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
36 West Virginia.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
37 Wisconsin.....	1,115,368	1,385,381	1,719,581	2,085,568	2,485,568
THE TERRITORIES.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
38 Alaska (unorganized territory).....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
39 Arizona.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
40 Arkansas.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
41 Colorado.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
42 Dakota.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
43 District of Columbia.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
44 Florida.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
45 Idaho.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
46 Illinois.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
47 Indian Country (unorg. territory).....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
48 Ind. Coun., Unorg. ter. west of	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
49 Indiana.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
50 Iowa.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
51 Kansas.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
52 Louisiana.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
53 Michigan.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
54 Minnesota.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
55 Mississippi.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
56 Missouri.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
57 Montana.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
58 Nebraska.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
59 New Mexico.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
60 Ohio, North of the River.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
61 Ohio, South of the River.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
62 Oregon.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
63 Orleans.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
64 Utah.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
65 Washington.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
66 Wisconsin.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
67 Wyoming.....	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568
68 On pub. ships in serv. of the U. S.	1,115,368	1,115,381	1,119,581	1,115,568	1,115,568

(a) The land area of the United States, including water areas, which formed the land area, within the great circle, and which, given a constant area, is the same as the area of the United States, is the

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 and population of “The States”

Area and population of “The Territories”

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

STATES AND TERRITORIES.	1870. (a) (b)			1880. (c) (d)			1890. (e)			1900. (f)			1910. (g)		
	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.
THE UNITED STATES.....	3,601,884	38,558,371	10.7	3,703,465	50,400,840	13.6	3,901,847	62,947,891	16.1	4,081,872	76,212,167	18.7	4,236,558	92,029,107	21.7
THE STATES.....	3,601,884	38,558,371	10.7	3,703,465	50,400,840	13.6	3,901,847	62,947,891	16.1	4,081,872	76,212,167	18.7	4,236,558	92,029,107	21.7
1. Alabama.....	50,772	996,992	19.66	50,772	964,201	19.01	50,772	771,623	15.21	50,772	590,756	11.66	50,772	590,756	11.66
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	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	188,981	92,597	0.49	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	309,978	65.26
5. Delaware.....	2,450	156,415	63.87	2,450	112,216	45.80	2,450	95,531	39.01	2,450	78,085	31.83	2,450	78,085	31.83
6. Florida.....	59,268	187,748	3.17	59,268	140,424	2.37	59,268	87,445	1.48	59,268	87,445	1.48	59,268	87,445	1.48
7. Georgia.....	58,000	1,184,109	20.42	58,000	1,057,186	18.23	58,000	906,185	15.62	58,000	691,392	11.92	58,000	691,392	11.92
8. Illinois.....	55,410	2,539,891	45.84	55,410	1,711,991	30.90	55,410	811,470	14.65	55,410	476,183	8.59	55,410	476,183	8.59
9. Indiana.....	33,809	1,680,537	49.71	33,809	1,359,428	39.94	33,809	988,416	29.24	33,809	685,866	20.29	33,809	685,866	20.29
10. Iowa.....	55,045	1,194,020	21.69	55,045	1,074,913	19.36	55,045	924,214	16.79	55,045	800,197	14.54	55,045	800,197	14.54
11. Kansas.....	81,318	384,399	4.73	81,318	310,400	3.82	81,318	230,478	2.83	81,318	168,846	2.08	81,318	168,846	2.08
12. Kentucky.....	37,680	1,321,011	35.07	37,680	1,155,684	30.94	37,680	984,405	26.13	37,680	779,880	20.70	37,680	779,880	20.70
13. Louisiana.....	41,346	726,915	17.58	41,346	708,002	17.12	41,346	517,262	12.52	41,346	352,411	8.52	41,346	352,411	8.52
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	501,793	14.34
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	470,019	42.25
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	737,699	94.58
17. Michigan.....	56,451	1,184,059	20.97	56,451	749,113	13.27	56,451	397,654	7.04	56,451	212,267	3.76	56,451	212,267	3.76
18. Minnesota.....	84,531	439,761	5.20	84,531	172,603	2.04	84,531	107,541	1.27	84,531	107,541	1.27	84,531	107,541	1.27
19. Mississippi.....	47,156	877,222	18.62	47,156	791,305	16.78	47,156	606,526	12.86	47,156	377,651	7.99	47,156	377,651	7.99
20. Missouri.....	65,350	1,721,295	26.34	65,350	1,182,012	18.09	65,350	682,044	10.44	65,350	387,702	5.93	65,350	387,702	5.93
21. Montana.....	75,995	122,993	1.62	75,995	122,993	1.62	75,995	122,993	1.62	75,995	122,993	1.62	75,995	122,993	1.62
22. Nevada.....	104,155	48,491	0.46	104,155	48,491	0.46	104,155	48,491	0.46	104,155	48,491	0.46	104,155	48,491	0.46
23. New Hampshire.....	9,280	318,300	34.30	9,280	316,073	34.14	9,280	317,976	34.26	9,280	284,574	30.67	9,280	284,574	30.67
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	373,306	44.87
25. New York.....	47,000	4,362,597	92.83	47,000	3,880,735	82.57	47,000	3,097,394	65.90	47,000	2,428,921	51.68	47,000	2,428,921	51.68
26. North Carolina.....	50,704	1,071,361	21.13	50,704	996,612	19.65	50,704	860,639	17.14	50,704	753,419	14.86	50,704	753,419	14.86
27. Ohio.....	39,964	2,665,260	66.69	39,964	2,330,511	58.54	39,964	1,980,329	49.55	39,964	1,519,407	38.27	39,964	1,519,407	38.27
28. Oregon.....	95,274	90,923	0.95	95,274	52,405	0.55	95,274	52,405	0.55	95,274	52,405	0.55	95,274	52,405	0.55
29. Pennsylvania.....	46,000	5,511,651	120.03	46,000	2,995,215	65.18	46,000	1,311,786	28.50	46,000	1,274,323	27.70	46,000	1,274,323	27.70
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	108,830	83.33
31. South Carolina.....	34,000	705,600	20.75	34,000	703,708	20.70	34,000	668,507	19.66	34,000	594,398	17.48	34,000	594,398	17.48
32. Tennessee.....	45,600	1,258,210	27.60	45,600	1,109,801	24.34	45,600	1,007,717	21.99	45,600	829,210	18.18	45,600	829,210	18.18
33. Texas.....	274,356	818,579	2.98	274,356	604,215	2.20	274,356	214,501	0.77	274,356	214,501	0.77	274,356	214,501	0.77
34. Vermont.....	10,212	230,551	22.57	10,212	215,098	20.98	10,212	214,120	20.93	10,212	201,948	19.77	10,212	201,948	19.77
35. Virginia.....	38,348	1,225,163	31.95	38,348	1,099,318	28.66	38,348	1,421,661	37.11	38,348	1,230,797	32.08	38,348	1,230,797	32.08
36. West Virginia.....	24,000	443,164	18.47	24,000	443,164	18.47	24,000	443,164	18.47	24,000	443,164	18.47	24,000	443,164	18.47
37. Wisconsin.....	53,924	1,044,670	19.36	53,924	775,881	14.39	53,924	305,391	5.66	53,924	305,391	5.66	53,924	305,391	5.66
THE TERRITORIES.....	1,010,417	442,730	0.44	1,010,417	442,730	0.44	1,010,417	442,730	0.44	1,010,417	442,730	0.44	1,010,417	442,730	0.44
38. Alaska (unorganized territory).....	577,390	0	0	577,390	0	0	577,390	0	0	577,390	0	0	577,390	0	0
39. Arizona.....	113,916	0	0	113,916	0	0	113,916	0	0	113,916	0	0	113,916	0	0
40. Arkansas.....	52,198	0	0	52,198	0	0	52,198	0	0	52,198	0	0	52,198	0	0
41. Colorado.....	104,500	39,864	0.38	104,500	39,864	0.38	104,500	39,864	0.38	104,500	39,864	0.38	104,500	39,864	0.38
42. Dakota.....	615,032	14,131	0.02	615,032	14,131	0.02	615,032	14,131	0.02	615,032	14,131	0.02	615,032	14,131	0.02
43. District of Columbia.....	64	131,200	2057.81	64	75,080	1173.13	64	51,687	807.61	64	43,712	683.12	64	43,712	683.12
44. Florida.....	59,268	0	0	59,268	0	0	59,268	0	0	59,268	0	0	59,268	0	0
45. Idaho.....	86,494	14,999	0.17	86,494	14,999	0.17	86,494	14,999	0.17	86,494	14,999	0.17	86,494	14,999	0.17
46. Illinois.....	55,410	0	0	55,410	0	0	55,410	0	0	55,410	0	0	55,410	0	0
47. Indian Country (unorg. territory).....	58,191	0	0	58,191	0	0	58,191	0	0	58,191	0	0	58,191	0	0
48. Ind. Coun. Terr. III. W. II.....	10,800	0	0	10,800	0	0	10,800	0	0	10,800	0	0	10,800	0	0
49. Indiana.....	33,809	0	0	33,809	0	0	33,809	0	0	33,809	0	0	33,809	0	0
50. Iowa.....	55,045	0	0	55,045	0	0	55,045	0	0	55,045	0	0	55,045	0	0
51. Kansas.....	81,318	0	0	81,318	0	0	81,318	0	0	81,318	0	0	81,318	0	0
52. Louisiana.....	41,346	0	0	41,346	0	0	41,346	0	0	41,346	0	0	41,346	0	0
53. Michigan.....	56,451	0	0	56,451	0	0	56,451	0	0	56,451	0	0	56,451	0	0
54. Minnesota.....	84,531	0	0	84,531	0	0	84,531	0	0	84,531	0	0	84,531	0	0
55. Mississippi.....	47,156	0	0	47,156	0	0	47,156	0	0	47,156	0	0	47,156	0	0
56. Missouri.....	65,350	0	0	65,350	0	0	65,350	0	0	65,350	0	0	65,350	0	0
57. Montana.....	75,995	0	0	75,995	0	0	75,995	0	0	75,995	0	0	75,995	0	0
58. Nebraska.....	55,045	0	0	55,045	0	0	55,045	0	0	55,045	0	0	55,045	0	0
59. New Mexico.....	121,261	91,874	0.75	121,261	91,874	0.75	121,261	91,874	0.75	121,261	91,874	0.75	121,261	91,874	0.75
60. Ohio, North of the River.....	39,964	0	0	39,964	0	0	39,964	0	0	39,964	0	0	39,964	0	0
61. Ohio, South of the River.....	39,964	0	0	39,964	0	0	39,964	0	0	39,964	0	0	39,964	0	0
62. Oregon.....	95,274	0	0	95,274	0	0	95,274	0	0	95,					

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

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



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

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

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

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

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

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

Though the term “unincorporated territory” hadn’t yet surfaced in 1868, the United States had fresh experience with territories that were not considered destined for statehood. Indeed, only a year before ratification of the Citizenship Clause, the United States had acquired the Territory of Alaska from Russia. The acquisition came in a treaty that said nothing about eventual statehood for Alaska. *See* Cession of Alaska, Russ.-U.S., T.S. No. 301, Mar. 30, 1867.³

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

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

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

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



H. H. Lloyd & Co., *The Washington map of the United States* (1868),

<https://www.loc.gov/resource/g3700.ct002969/> (last visited Dec. 1, 2021)

(on file at the Library of Congress).

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

[illegible]

Francis A. Walker, *Statistical Atlas of the United States Based on the*

Results of the Ninth Census 1870 (1874) (on file at the Library of

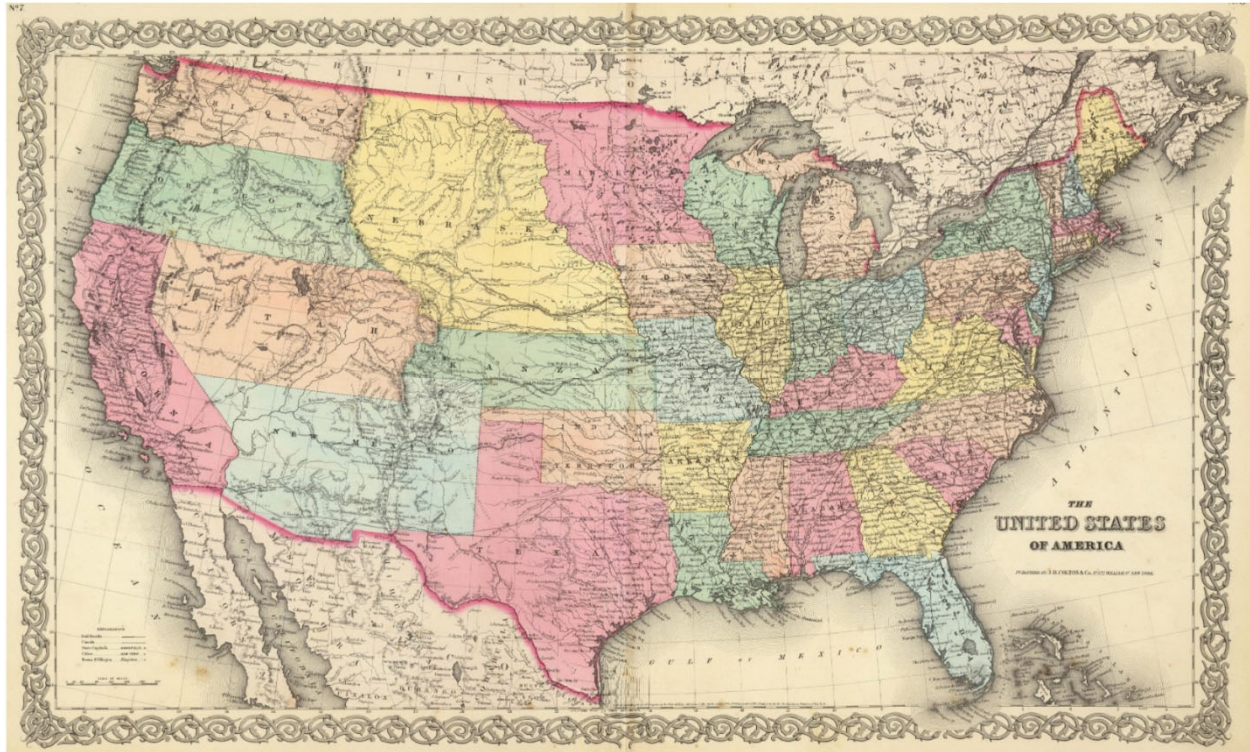
Congress). The atlas thus derived the area and population of “the United

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

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

STATES AND TERRITORIES	1870. 40th	1880. 50th	1890. 60th	1900. 70th	1910. 80th	1920. 90th	1930. 100th	1940. 110th	1950. 120th	1960. 130th	1970. 140th	1980. 150th	1990. 160th	2000. 170th	2010. 180th
	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.
THE UNITED STATES	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01
THE STATES	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01	3,553,311	10,700,000	3.01
1 Alabama.....	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1
2 Arkansas.....	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5
3 California.....	155,949	1,000,000	6.4	155,949	1,000,000	6.4	155,949	1,000,000	6.4	155,949	1,000,000	6.4	155,949	1,000,000	6.4
4 Connecticut.....	5,543	1,000,000	180.6	5,543	1,000,000	180.6	5,543	1,000,000	180.6	5,543	1,000,000	180.6	5,543	1,000,000	180.6
5 Delaware.....	2,486	1,000,000	402.3	2,486	1,000,000	402.3	2,486	1,000,000	402.3	2,486	1,000,000	402.3	2,486	1,000,000	402.3
6 Florida.....	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0
7 Georgia.....	59,261	1,000,000	16.9	59,261	1,000,000	16.9	59,261	1,000,000	16.9	59,261	1,000,000	16.9	59,261	1,000,000	16.9
8 Illinois.....	57,243	1,000,000	17.5	57,243	1,000,000	17.5	57,243	1,000,000	17.5	57,243	1,000,000	17.5	57,243	1,000,000	17.5
9 Indiana.....	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5
10 Iowa.....	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8
11 Kansas.....	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1
12 Kentucky.....	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7
13 Louisiana.....	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1
14 Maine.....	33,081	1,000,000	30.2	33,081	1,000,000	30.2	33,081	1,000,000	30.2	33,081	1,000,000	30.2	33,081	1,000,000	30.2
15 Maryland.....	11,314	1,000,000	88.4	11,314	1,000,000	88.4	11,314	1,000,000	88.4	11,314	1,000,000	88.4	11,314	1,000,000	88.4
16 Massachusetts.....	7,800	1,000,000	128.2	7,800	1,000,000	128.2	7,800	1,000,000	128.2	7,800	1,000,000	128.2	7,800	1,000,000	128.2
17 Michigan.....	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3
18 Minnesota.....	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1
19 Missouri.....	68,403	1,000,000	14.6	68,403	1,000,000	14.6	68,403	1,000,000	14.6	68,403	1,000,000	14.6	68,403	1,000,000	14.6
20 Montana.....	147,040	1,000,000	6.8	147,040	1,000,000	6.8	147,040	1,000,000	6.8	147,040	1,000,000	6.8	147,040	1,000,000	6.8
21 Nebraska.....	77,339	1,000,000	12.9	77,339	1,000,000	12.9	77,339	1,000,000	12.9	77,339	1,000,000	12.9	77,339	1,000,000	12.9
22 Nevada.....	110,121	1,000,000	9.1	110,121	1,000,000	9.1	110,121	1,000,000	9.1	110,121	1,000,000	9.1	110,121	1,000,000	9.1
23 New Hampshire.....	9,330	1,000,000	107.2	9,330	1,000,000	107.2	9,330	1,000,000	107.2	9,330	1,000,000	107.2	9,330	1,000,000	107.2
24 New Jersey.....	8,814	1,000,000	113.6	8,814	1,000,000	113.6	8,814	1,000,000	113.6	8,814	1,000,000	113.6	8,814	1,000,000	113.6
25 New York.....	47,000	1,000,000	21.3	47,000	1,000,000	21.3	47,000	1,000,000	21.3	47,000	1,000,000	21.3	47,000	1,000,000	21.3
26 North Carolina.....	50,704	1,000,000	19.7	50,704	1,000,000	19.7	50,704	1,000,000	19.7	50,704	1,000,000	19.7	50,704	1,000,000	19.7
27 Ohio.....	39,861	1,000,000	25.1	39,861	1,000,000	25.1	39,861	1,000,000	25.1	39,861	1,000,000	25.1	39,861	1,000,000	25.1
28 Oregon.....	95,996	1,000,000	10.5	95,996	1,000,000	10.5	95,996	1,000,000	10.5	95,996	1,000,000	10.5	95,996	1,000,000	10.5
29 Pennsylvania.....	46,000	1,000,000	21.7	46,000	1,000,000	21.7	46,000	1,000,000	21.7	46,000	1,000,000	21.7	46,000	1,000,000	21.7
30 Rhode Island.....	1,545	1,000,000	648.5	1,545	1,000,000	648.5	1,545	1,000,000	648.5	1,545	1,000,000	648.5	1,545	1,000,000	648.5
31 South Carolina.....	32,040	1,000,000	31.2	32,040	1,000,000	31.2	32,040	1,000,000	31.2	32,040	1,000,000	31.2	32,040	1,000,000	31.2
32 Tennessee.....	42,329	1,000,000	23.6	42,329	1,000,000	23.6	42,329	1,000,000	23.6	42,329	1,000,000	23.6	42,329	1,000,000	23.6
33 Texas.....	69,567	1,000,000	14.4	69,567	1,000,000	14.4	69,567	1,000,000	14.4	69,567	1,000,000	14.4	69,567	1,000,000	14.4
34 Vermont.....	9,616	1,000,000	104.0	9,616	1,000,000	104.0	9,616	1,000,000	104.0	9,616	1,000,000	104.0	9,616	1,000,000	104.0
35 Virginia.....	38,017	1,000,000	26.3	38,017	1,000,000	26.3	38,017	1,000,000	26.3	38,017	1,000,000	26.3	38,017	1,000,000	26.3
36 West Virginia.....	62,028	1,000,000	16.1	62,028	1,000,000	16.1	62,028	1,000,000	16.1	62,028	1,000,000	16.1	62,028	1,000,000	16.1
37 Wisconsin.....	23,840	1,000,000	42.0	23,840	1,000,000	42.0	23,840	1,000,000	42.0	23,840	1,000,000	42.0	23,840	1,000,000	42.0
THE TERRITORIES	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0
38 Alaska (unorganized territory).....	586,412	1,000,000	1.7	586,412	1,000,000	1.7	586,412	1,000,000	1.7	586,412	1,000,000	1.7	586,412	1,000,000	1.7
39 Arizona.....	113,990	1,000,000	8.8	113,990	1,000,000	8.8	113,990	1,000,000	8.8	113,990	1,000,000	8.8	113,990	1,000,000	8.8
40 Arkansas.....	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5	36,330	1,000,000	27.5
41 Colorado.....	104,237	1,000,000	9.6	104,237	1,000,000	9.6	104,237	1,000,000	9.6	104,237	1,000,000	9.6	104,237	1,000,000	9.6
42 Dakota.....	171,011	1,000,000	5.8	171,011	1,000,000	5.8	171,011	1,000,000	5.8	171,011	1,000,000	5.8	171,011	1,000,000	5.8
43 District of Columbia.....	68	1,000,000	14,706	68	1,000,000	14,706	68	1,000,000	14,706	68	1,000,000	14,706	68	1,000,000	14,706
44 Florida.....	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0	55,567	1,000,000	18.0
45 Idaho.....	84,364	1,000,000	11.9	84,364	1,000,000	11.9	84,364	1,000,000	11.9	84,364	1,000,000	11.9	84,364	1,000,000	11.9
46 Indian Country (unorg. territory).....	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0
47 Ind. Coun. Dist. W. of R.R.	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0	1,000,000	1,000,000	1.0
48 Indiana.....	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5	36,423	1,000,000	27.5
49 Iowa.....	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8	56,278	1,000,000	17.8
50 Kansas.....	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1
51 Kentucky.....	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7	40,423	1,000,000	24.7
52 Louisiana.....	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1	52,424	1,000,000	19.1
53 Michigan.....	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3	46,821	1,000,000	21.3
54 Minnesota.....	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1	82,278	1,000,000	12.1
55 Mississippi.....	47,000	1,000,000	21.3	47,000	1,000,000	21.3	47,000	1,000,000	21.3	47,000	1,000,000	21.3			

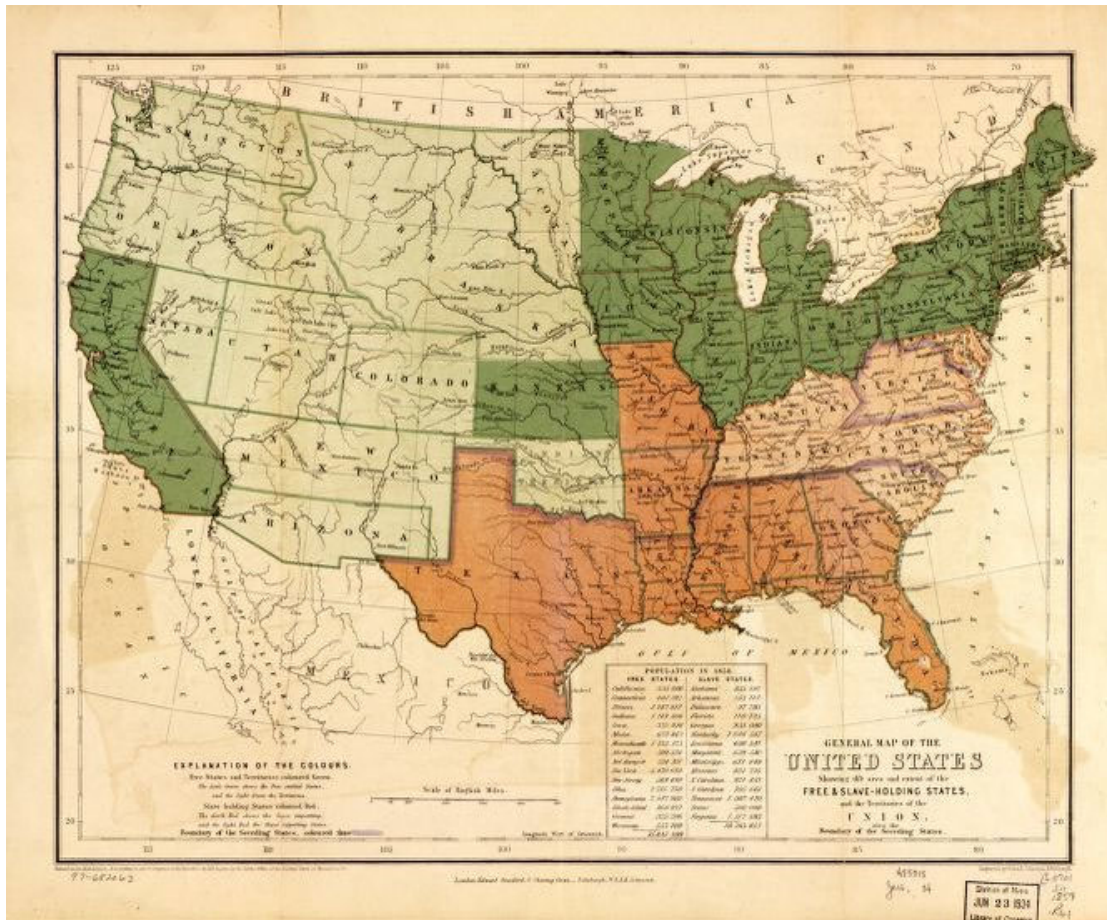
United States in 1856 (roughly a decade before ratification of the Citizenship Clause):



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

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

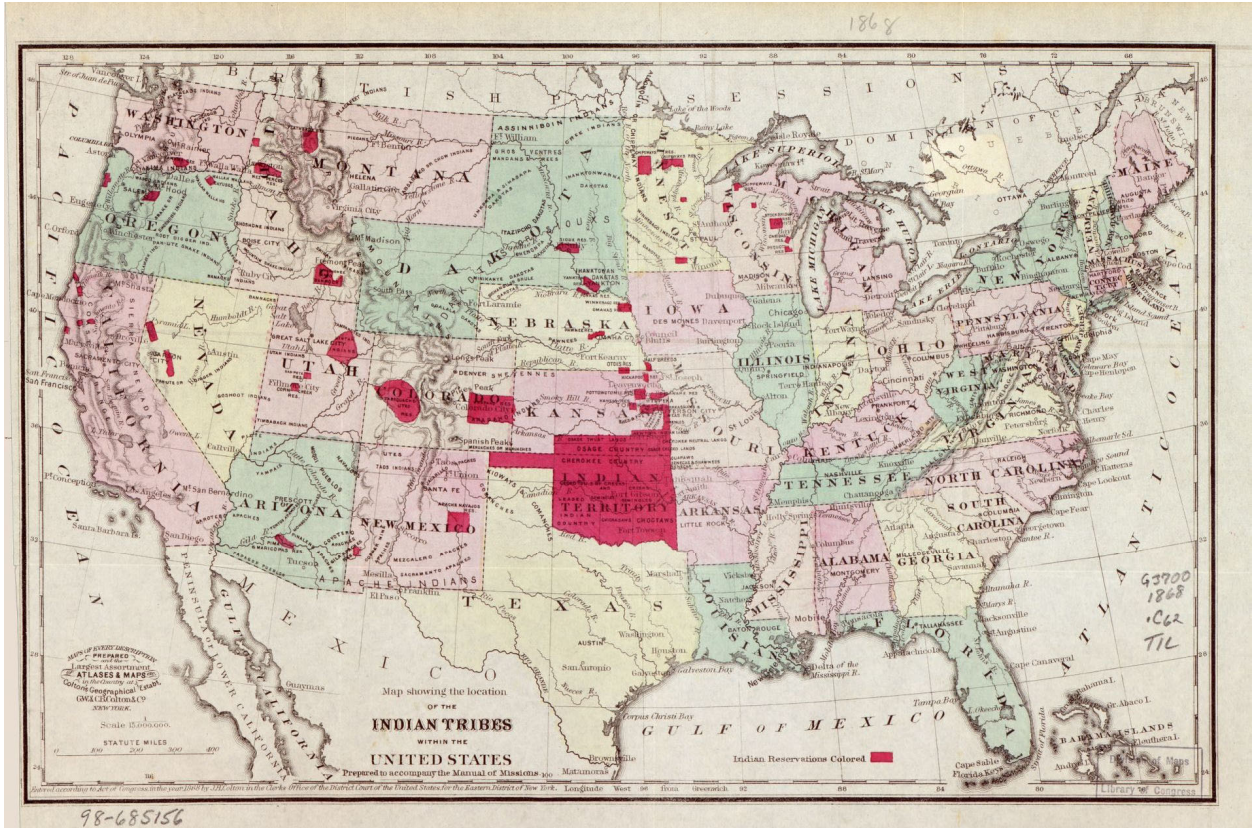
The Indian Territory reappeared the next year in another map of the United States:



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

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

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



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

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

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

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

STATES AND TERRITORIES	1870. 60 00		1880. 00 00		1890. 00 00		1900. 00 00		1910. 00 00		1920. 00 00		1930. 00 00		1940. 00 00		1950. 00 00		1960. 00 00		1970. 00 00		
	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	Square Miles	Persons	
THE UNITED STATES	3,538,834	38,553,317	3,538,834	50,189,291	3,538,834	63,000,903	3,538,834	75,994,585	3,538,834	91,972,267	3,538,834	105,050,017	3,538,834	121,651,532	3,538,834	138,328,013	3,538,834	156,212,165	3,538,834	175,329,828	3,538,834	195,650,036	3,538,834
THE STATES	2,969,924	31,112,641	2,969,924	43,811,721	2,969,924	56,418,711	2,969,924	68,925,701	2,969,924	81,432,691	2,969,924	93,939,681	2,969,924	106,446,671	2,969,924	118,953,661	2,969,924	131,460,651	2,969,924	143,967,641	2,969,924	156,474,631	2,969,924
1. Alabama	52,420	1,215,454	52,420	1,567,954	52,420	1,920,454	52,420	2,272,954	52,420	2,625,454	52,420	2,977,954	52,420	3,330,454	52,420	3,682,954	52,420	4,035,454	52,420	4,387,954	52,420	4,740,454	52,420
2. Arizona	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	29,800	207,819	
3. Arkansas	56,540	1,188,081	56,540	1,340,081	56,540	1,492,081	56,540	1,644,081	56,540	1,796,081	56,540	1,948,081	56,540	2,100,081	56,540	2,252,081	56,540	2,404,081	56,540	2,556,081	56,540	2,708,081	56,540
4. California	158,335	1,583,335	158,335	2,583,335	158,335	3,583,335	158,335	4,583,335	158,335	5,583,335	158,335	6,583,335	158,335	7,583,335	158,335	8,583,335	158,335	9,583,335	158,335	10,583,335	158,335	11,583,335	158,335
5. Connecticut	5,543	1,253,543	5,543	1,405,543	5,543	1,557,543	5,543	1,709,543	5,543	1,861,543	5,543	2,013,543	5,543	2,165,543	5,543	2,317,543	5,543	2,469,543	5,543	2,621,543	5,543	2,773,543	5,543
6. Delaware	2,455	125,455	2,455	140,455	2,455	155,455	2,455	170,455	2,455	185,455	2,455	200,455	2,455	215,455	2,455	230,455	2,455	245,455	2,455	260,455	2,455	275,455	2,455
7. Florida	55,560	1,155,560	55,560	1,307,560	55,560	1,459,560	55,560	1,611,560	55,560	1,763,560	55,560	1,915,560	55,560	2,067,560	55,560	2,219,560	55,560	2,371,560	55,560	2,523,560	55,560	2,675,560	55,560
8. Georgia	59,720	1,159,720	59,720	1,311,720	59,720	1,463,720	59,720	1,615,720	59,720	1,767,720	59,720	1,919,720	59,720	2,071,720	59,720	2,223,720	59,720	2,375,720	59,720	2,527,720	59,720	2,679,720	59,720
9. Illinois	58,014	2,539,014	58,014	3,039,014	58,014	3,539,014	58,014	4,039,014	58,014	4,539,014	58,014	5,039,014	58,014	5,539,014	58,014	6,039,014	58,014	6,539,014	58,014	7,039,014	58,014	7,539,014	58,014
10. Indiana	36,420	1,859,420	36,420	2,109,420	36,420	2,359,420	36,420	2,609,420	36,420	2,859,420	36,420	3,109,420	36,420	3,359,420	36,420	3,609,420	36,420	3,859,420	36,420	4,109,420	36,420	4,359,420	36,420
11. Iowa	56,280	1,909,280	56,280	2,159,280	56,280	2,409,280	56,280	2,659,280	56,280	2,909,280	56,280	3,159,280	56,280	3,409,280	56,280	3,659,280	56,280	3,909,280	56,280	4,159,280	56,280	4,409,280	56,280
12. Kansas	81,510	1,109,510	81,510	1,261,510	81,510	1,413,510	81,510	1,565,510	81,510	1,717,510	81,510	1,869,510	81,510	2,021,510	81,510	2,173,510	81,510	2,325,510	81,510	2,477,510	81,510	2,629,510	81,510
13. Kentucky	40,360	1,809,360	40,360	2,059,360	40,360	2,309,360	40,360	2,559,360	40,360	2,809,360	40,360	3,059,360	40,360	3,309,360	40,360	3,559,360	40,360	3,809,360	40,360	4,059,360	40,360	4,309,360	40,360
14. Louisiana	52,420	1,159,420	52,420	1,311,420	52,420	1,463,420	52,420	1,615,420	52,420	1,767,420	52,420	1,919,420	52,420	2,071,420	52,420	2,223,420	52,420	2,375,420	52,420	2,527,420	52,420	2,679,420	52,420
15. Maine	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080	609,080	33,080
16. Maryland	11,740	1,209,740	11,740	1,361,740	11,740	1,513,740	11,740	1,665,740	11,740	1,817,740	11,740	1,969,740	11,740	2,121,740	11,740	2,273,740	11,740	2,425,740	11,740	2,577,740	11,740	2,729,740	11,740
17. Massachusetts	7,800	1,459,800	7,800	1,611,800	7,800	1,763,800	7,800	1,915,800	7,800	2,067,800	7,800	2,219,800	7,800	2,371,800	7,800	2,523,800	7,800	2,675,800	7,800	2,827,800	7,800	2,979,800	7,800
18. Michigan	30,800	1,809,800	30,800	2,059,800	30,800	2,309,800	30,800	2,559,800	30,800	2,809,800	30,800	3,059,800	30,800	3,309,800	30,800	3,559,800	30,800	3,809,800	30,800	4,059,800	30,800	4,309,800	30,800
19. Minnesota	35,510	1,309,510	35,510	1,559,510	35,510	1,809,510	35,510	2,059,510	35,510	2,309,510	35,510	2,559,510	35,510	2,809,510	35,510	3,059,510	35,510	3,309,510	35,510	3,559,510	35,510	3,809,510	35,510
20. Mississippi	47,150	1,109,150	47,150	1,261,150	47,150	1,413,150	47,150	1,565,150	47,150	1,717,150	47,150	1,869,150	47,150	2,021,150	47,150	2,173,150	47,150	2,325,150	47,150	2,477,150	47,150	2,629,150	47,150
21. Missouri	68,800	1,909,800	68,800	2,159,800	68,800	2,409,800	68,800	2,659,800	68,800	2,909,800	68,800	3,159,800	68,800	3,409,800	68,800	3,659,800	68,800	3,909,800	68,800	4,159,800	68,800	4,409,800	68,800
22. Montana	75,800	1,109,800	75,800	1,261,800	75,800	1,413,800	75,800	1,565,800	75,800	1,717,800	75,800	1,869,800	75,800	2,021,800	75,800	2,173,800	75,800	2,325,800	75,800	2,477,800	75,800	2,629,800	75,800
23. Nebraska	77,000	1,109,000	77,000	1,261,000	77,000	1,413,000	77,000	1,565,000	77,000	1,717,000	77,000	1,869,000	77,000	2,021,000	77,000	2,173,000	77,000	2,325,000	77,000	2,477,000	77,000	2,629,000	77,000
24. Nevada	11,000	1,109,000	11,000	1,261,000	11,000	1,413,000	11,000	1,565,000	11,000	1,717,000	11,000	1,869,000	11,000	2,021,000	11,000	2,173,000	11,000	2,325,000	11,000	2,477,000	11,000	2,629,000	11,000
25. New Hampshire	9,340	1,109,340	9,340	1,261,340	9,340	1,413,340	9,340	1,565,340	9,340	1,717,340	9,340	1,869,340	9,340	2,021,340	9,340	2,173,340	9,340	2,325,340	9,340	2,477,340	9,340	2,629,340	9,340
26. New Jersey	8,200	1,109,200	8,200	1,261,200	8,200	1,413,200	8,200	1,565,200	8,200	1,717,200	8,200	1,869,200	8,200	2,021,200	8,200	2,173,200	8,200	2,325,200	8,200	2,477,200	8,200	2,629,200	8,200
27. New York	47,000	4,809,000	47,000	5,059,000	47,000	5,309,000	47,000	5,559,000	47,000	5,809,000	47,000	6,059,000	47,000	6,309,000	47,000	6,559,000	47,000	6,809,000	47,000	7,059,000	47,000	7,309,000	47,000
28. North Carolina	50,700	1,609,700	50,700	1,859,700	50,700	2,109,700	50,700	2,359,700	50,700	2,609,700	50,700	2,859,700	50,700	3,109,700	50,700	3,359,700	50,700	3,609,700	50,700	3,859,700	50,700	4,109,700	50,700
29. Ohio	30,800	2,809,800	30,800	3,059,800	30,800	3,309,800	30,800	3,559,800	30,800	3,809,800	30,800	4,059,800	30,800	4,309,800	30,800	4,559,800	30,800	4,809,800	30,800	5,059,800	30,800	5,309,800	30,800
30. Oregon	95,774	909,774	95,774	1,161,774	95,774	1,363,774	95,774	1,565,774	95,774	1,767,774	95,774	1,969,774	95,774	2,171,774	95,774	2,373,774	95,774	2,575,774	95,774	2,777,774	95,774	2,979,774	95,774
31. Pennsylvania	46,000	3,609,000	46,000	3,859,000	46,000	4,109,000	46,000	4,359,000	46,000	4,609,000	46,000	4,859,000	46,000	5,109,000	46,000	5,359,000	46,000	5,609,000	46,000	5,859,000	46,000	6,109,000	46,000
32. Rhode Island	1,500	1,109,500	1,500	1,261,500	1,500	1,413,500	1,500	1,565,500	1,500	1,717,500	1,500	1,869,500	1,500	2,021,500	1,500	2,173,500	1,500	2,325,500	1,500	2,477,500	1,500	2,629,500	1,500
33. South Carolina	34,000	1,109,000	34,000	1,261,000	34,000	1,413,000	34,000	1,565,000	34,000	1,717,000	34,000	1,869,000	34,000	2,021,000	34,000	2,173,000	34,000	2,325,000	34,000	2,477,000	34,000	2,629,000	34,000
34. Tennessee	40,000	1,809,000	40,000	2,059,000	40,000	2,309,000	40,000	2,559,000	40,000	2,809,000	40,000	3,059,000	40,000	3,309,000	40,000	3,559,000	40,000	3,809,000	40,000	4,059,000	40,000	4,309,000	40,000
35. Texas	69,700	1,109,700	69,700	1,261,700	69,700	1,413,700	69,700																

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.