NO. 15-981

IN THE

Supreme Court of the United States

LENEUOTI FIAFIA TUAUA, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF EDWARD J. ERLER, ANDREW C. MCCARTHY III, AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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May 11, 2016

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QUESTION PRESENTED

Whether the people of American Samoa, who for decades have enjoyed self government as a U.S. territory and who, as a means of preserving their unique legal system and culture, have not pressed Congress for citizenship, should now have citizenship imposed on them by judicial fiat.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Professor Edward J. Erler, an expert on the history of American citizenship, in particular birthright citizenship; Andrew C. McCarthy III, a former federal prosecutor and current contributing editor at *National Review*; and the Claremont Institute's Center for Constitutional Jurisprudence. The Appendix contains further background on each.

Amici submit this brief to ensure that, in deciding whether to grant certiorari, this Court fully understands the ahistoric nature of the interpretation of the Citizenship Clause of the Fourteenth Amendment being urged by petitioners and their *amici* — one incompatible with the wide discretion traditionally exercised by the political branches, for well over a century, in defining the citizenship of those residing in U.S. territories. Exercising that discretion, Congress has deferred to the collective desire of the people of American Samoa not to have U.S. citizenship imposed on them *en masse*, while offering ample opportunities for individual American Samoans to obtain citizenship.

This brief addresses, in particular, the interpretation of the Citizenship Clause offered in the *amicus* brief filed by several non-voting Members of Congress who represent, or formerly represented, Puerto Rico, the U.S. Virgin Islands, and Guam. According to the

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[1] Rule 37 statement: No party's counsel authored any part of this brief, and no person other than *amici* and their counsel funded its preparation and submission. All parties were timely notified of the intent to file this brief, and all parties granted consent.

inflexible rule advocated in that brief, once Congress acquires a territory and exercises any control over it, U.S. citizenship is automatically imposed on every child born there, even if the child's parents object, and even if the territory's residents collectively prefer to remain non-citizens, because (that brief argues) "citizenship is the constitutional birthright of *everyone* born in the United States, not just those born in a State."[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

For over a century Congress has exercised its art. IV, § 3, cl. 2, power to regulate new territories in reliance on decisions of this Court recognizing Congress's discretion to distinguish between territories that will be incorporated into the United States, intended for eventual statehood, and unincorporated

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[2] Brief for *Amici Curiae* Members of Congress and Former Governmental Officials in Support of Petitioners at 5. *See also* Pet. at 15 (arguing that Citizenship Clause contains an "explicit guarantee of birthright citizenship to those born within the sovereign territorial limits of the United States"); Brief of Citizenship Scholars as *Amici Curiae* in Support of Petitioners at 12, 17 (arguing that "Citizenship Clause applies with full force to individuals born in the territories," so that U.S. government "cannot assert authority over its territories" without accepting those born there as citizens). As the D.C. Circuit observed in its decision below, adopting petitioners' argument would have "vast practical consequences" including, potentially, the retroactive grant of citizenship to "those born in the Philippines prior to its independence in 1946 . . . and potentially their children through operation of statute." Pet. App. 9 n.6.

territories not intended for statehood. *Boumediene v. Bush*, 553 U.S. 723, 755-58 (2008).

In a series of decisions now known as the Insular Cases, this Court held that residents of territories classified by Congress as unincorporated enjoy only "fundamental" personal rights guaranteed by the U.S. Constitution. *Id.* at 758-59. For example, in *Downes v. Bidwell*, 182 U.S. 244 (1901), after identifying rights that might be considered fundamental, and "indispensable to a free government," this Court listed several rights that presumably would *not* be considered fundamental: "the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence . . . ." *Id.* at 282-83 (citation omitted).

However, one need not rely on the Insular Cases, *see* Pet. App. 12a-17a, to agree with the result reached by the D.C. Circuit in this case, in declining to invoke the Citizenship Clause of the Fourteenth Amendment to impose U.S. citizenship on the people of American Samoa against their collective wishes. *Id.* at 18a-23a. That result follows by reading the Citizenship Clause as a structural provision enacted to solve a particular problem affecting the American polity circa 1868, involving the refusal of *state* governments to recognize African Americans as citizens. The Citizenship Clause need not be read as curbing the by then well-established authority of the political branches of the *federal* government to determine the citizenship status of the residents of territories acquired by the United States — an authority subsequently exercised for a century and a half without judicial interference.

As demonstrated in Part I of this brief, the concept of *jus soli* ("right of the soil"), or place-of-birth, citizenship is a vestige of feudalism which is incompatible with a core premise underlying the American Revolution, and which today is rejected by nearly every developed country.

Part II shows that both the Citizenship Clause and Article II's reference to natural born citizenship were designed to solve practical problems concerning the definition of the American polity, not to create any norm that would impact the discretion of the political branches regarding the citizenship status of those residing in U.S. territories such as American Samoa.

Part III shows that reading the Citizenship Clause as not limiting the discretion of the political branches to determine the citizenship status of territorial residents is validated by historical practice stretching back more than a century, during which the political branches have freely exercised discretion to confer, or not confer, citizenship on persons born in U.S. territories.

Finally, Part IV sets forth prudential considerations weighing against a grant of certiorari. Given the unusual context of this case, it is hardly an apt vehicle for reconsidering the Insular Cases. Further, petitioners' *amici* are incorrect in asserting that Congress has somehow singled out American Samoans for stigmatizing discrimination. And reversal of the decision below would disrupt a status quo which has proved acceptable to both American Samoans and Congress for over a century.

ARGUMENT

I. Place-of-Birth Citizenship is a Vestige of Feudalism Which Has Been Rejected by Nearly Every Developed Country

The overwhelmingly dominant legal rule in the modern world for ascribing citizenship to a newborn child is the rule of *jus sanguinis* ("right of blood"), or line of descent, under which the child takes on the citizenship of the parents, irrespective of where the child is born. Less than a fifth of the world's countries ascribe citizenship to infants with a focus on the place of birth, and only two countries with advanced economies (Canada and the United States) do so.[3]

The line-of-descent rule comports with American legal norms regarding the prerogative of parents to determine essential aspects of their child's identity and upbringing (in this instance, by bequeathing them their own citizenship, and only their citizenship), recognizing that "[t]he child is not the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and that it is the parents' responsibility to inculcate "moral standards, religious

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[3] Jon Feere, *Birthright Citizenship in the United States: A Global Comparison* (Center for Immigration Studies, Aug. 2010) at 14-16 (available at http://cis.org/birthright-citizenship). The international trend is away from place-of-birth citizenship, with the United Kingdom ending the practice in 1983; Australia in 1986; India in 1987; Ireland in 2004; and New Zealand in 2006. *Id.* at 14. *See also* Natalie Sears, Comment, *Repealing Birthright Citizenship: How the Dominican Republic's Recent Court Decision Reflects an International Trend*, 20 LAW & BUS. REV. AM. 423 (2014).

beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). European and international legal norms are in accord.[4]

The minority rule for ascribing citizenship to a newborn child looks not to the citizenship of the parents, but to the soil on which the child is born. This is the concept of *jus soli* ("right of the soil"), or place-of-birth, citizenship. It is a vestige of feudal times, tied to the monarchical structure of European society during the medieval era.[5] Under feudalism, the king owned and controlled all the land in the kingdom, and everyone born on his soil automatically became, at birth, his subject, owing him — and only

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[4] For example, Article 8 of the European Convention on Human Rights (available at http://www.echr.coe.int/Documents/Convention_ ENG.pdf) states that "[e]veryone has the right to respect for his private and family life," and that "[t]here shall be no interference by a public authority with the exercise of this right except" in extenuating circumstances. Similarly, the Universal Declaration of Human Rights, adopted by the United Nations in 1948 (available at http://www.un.org/en/universal-declaration-human-rights), affirms that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State," Art. 16.3, and states that "[n]o one shall be subjected to arbitrary interference with his . . . family . . . ." Art. 12.

[5] "[B]irthright citizenship originated as a distinctively feudal status intimately linked to medieval notions of sovereignty, legal personality, and allegience." PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 2 (1985). *See generally id.* at 9-18; JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 13-28 (1978); John W. Salmond, *Citizenship and Allegiance*, 18 LAW. Q. REV. 49, 53-54 (1902).

him — an unbreakable, lifelong duty of allegiance.[6] The basis of the *jus soli* rule, as summarized by Blackstone, was that "every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once."[7]

Those who sought to justify this system relied on the divine status accorded kings during the medieval era. It was based on "the eternal law of the Creator," Sir Edward Coke insisted in *Calvin's Case*, the seminal decision defining natural born subjectship.[8] The theory was that, "immediately upon their birth, [infants] are under the king's protection," while "incapable of protecting themselves," forming a "[n]atural allegiance" and "a debt of gratitude; which

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[6] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354-55, 359, 361 (Oxford, The Clarendon Press 1765). *See also* Kettner, *supra* note 5, at 19 ("Because the primal obligations of allegiance and protection remained perpetual and inviolate, no subject could ever lose his natural allegiance. He might abjure the kingdom and leave the country, but he could not break the tie that bound him to his king, the father of his country.").

[7] Blackstone, *supra* note 6, at 361. Exceptions to this rule were made for children of the king (and his ambassadors) born abroad, *id.*, and children born to members of the military while occupying another country. *Calvin v. Smith*, 77 ENG. REP. 377, 399 (K.B. 1608). *See also* Kettner, *supra* note 5, at 13-14.

[8] *Calvin v. Smith*, 77 ENG. REP. 377, 392 (K.B. 1608). "Coke's entire analysis rested on the ascriptive view that one's political identity is automatically assigned by the circumstances of one's birth." Schuck & Smith, *supra* note 5, at 13.

cannot be forfeited . . . ."[9] "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[10] This theory had a profound impact: "Lord Coke found that the heavens made subjects at birth of all persons born within the king's realm," and "[i]n time subjectship per *jus soli* became the fabric of the British Empire, as by law and superstition it assured subjection of all those born within the empire as it might stretch across the globe."[11]

The English Parliament codified the *jus soli* rule in 1368.[12] In 1381 Parliament solidified the king's control over his natural born subjects by requiring most subjects to obtain the king's permission even to

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[9] Blackstone, *supra* note 6, at 357. "Today it would seem peculiar to speak of an infant as indebted for a protection he never sought and of which he was quite unaware," but "[t]o men like Coke, the universe consisted of divinely created hierarchical relationships between superiors and inferiors . . . ." Schuck & Smith, *supra*, note 5, at 15-16. In this world view, "government and society" were seen "as reflections of natural principles of order and hierarchy," with "[t]he bond between the subject and his sovereign mirror[ing] the divinely ordered obligations of right and duty subsisting between the inferior and superior." Kettner, *supra*, note 5, at 19.

[10] Blackstone, *supra* note 6, at 354.

[11] William Ty Mayton, *Birthright Citizenship and the Civic Minimum*, 22 GEO. IMM. L.J. 221, 222 (2008).

[12] 42 Edw. 3, c. 10 (1368). *See also* Kettner, *supra* note 5, at 13 & n.1.

leave the kingdom.[13] The *jus soli* rule remained in effect in Britain, with some modifications,[14] at the time of the American Revolution. It was repealed in 1981, bringing an end to British citizenship focused on the place of birth.[15]

The concept of natural born subjectship is incompatible with a core premise underlying the American Revolution. Indeed, "[i]t would be difficult to imagine a more antirepublican basis for citizenship . . . ."[16] Whereas the British government insisted that Americans were subjects of the king, with a permanent duty of allegiance requiring obedience to government

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[13] Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 CATH. U. L. REV. 317, 324 & n.45 (2015) (citing 5 Ric. 2, stat. 1, c. 2 (1381)). The statute remained in effect for more than two centuries. *Id.*

[14] For example, in 1350 Parliament granted subjectship to children born abroad whose father and mother were both natural born English subjects, and in 1731 it liberalized this rule so that only the father need be a natural born subject. McManamon, *supra* note 13, at 323, 327.

[15] The British Nationality Act of 1981, c. 61, § 1(1) (available at http://www.legislation.gov.uk/ukpga/1981/61/enacted), provided that a person born in the United Kingdom "shall be a British citizen if at the time of birth his mother or father is . . . a British citizen," or if his parents are "settled in the United Kingdom."

[16] Edward J. Erler, *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 163, 164 (Ronald J. Pestritto & Thomas G. West eds., 2003).

mandates,[17] Americans countered that British authority over the colonies must ultimately rest on the consent of the governed,[18] which Americans could — and eventually did — withdraw based on the British government's failure to honor "the social compact, including its guarantees of respect for natural rights." Schuck & Smith, *supra* note 5, at 31.

"The American Revolution was fought to secure inalienable rights and to establish government by consent of the governed; it sought to create a liberal republic of self-governing citizens in place of monarchical rule over subjects." *Id.* at 40. By contrast, "birthright citizenship's historical and philosophical origins make it strikingly anomalous as a key constitutive element of a liberal political system." *Id.* at 90. *See also* Erler, *supra* note 16, at 164 (American Revolution "established social compact as the foundation of republican citizenship"); *id.* at 178 ("Birthright citizenship has no more status in the social compact theory of citizenship than 'natural subjectship.'"). "There can be little doubt that the American Founders rejected 'birth-right ligeance' in favor of the social compact origins of citizenship and political obligation" — to suggest otherwise "ignores the most crucial dimensions of the American Founding." *Id.* at 179-80.

Why, then, do two provisions of our Constitution nonetheless define citizenship status based in part on

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[17] *E.g.* Kettner, *supra* note 5, at 141-48.

[18] *See generally id.* at 148-209. *See also* Schuck & Smith, *supra* note 5, at 22-31.

the place of one's birth? As *amici* will next show, these provisions were included to solve concrete structural problems, not to create any norm that would impact the discretion of the political branches regarding the citizenship status of those residing in U.S. territories.

II. Place-of-Birth Citizenship Was Included in the U.S. Constitution as a Pragmatic Means of Solving Concrete Structural Problems

Neither the Constitution of 1789 nor the Bill of Rights, added in 1791, recognized any individual rights regarding citizenship. "The original Constitution, prior to Reconstruction, contained no definition of citizenship, and precious few references to the concept altogether."[19] Among the many individual rights listed in art. I, §§ 9 & 10, and in the first eight amendments, citizenship was not even mentioned. Just as much of the Bill of Rights is properly viewed as structural in purpose and design,[20] the provisions in the original Constitution mentioning citizenship are properly viewed as structural.

That includes even the clause which borrowed from the *jus soli* rule, the Natural Born Citizen Clause of art. II, § 1, cl. 5. Nothing in its text or history

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[19] Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 369 (1973). *See also* Schuck & Smith, *supra* note 5, at 1 ("The original Constitution failed to define the status of citizen").

[20] *E.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xii-xiii, 20-23, 26-27, 31, 34, 47-49, 64-65, 76, 79, 93-96, 111-13, 119-33 (1998).

suggests the Clause's purpose was to create an individual right to U.S. citizenship at birth.[21] Rather, it was simply one of several provisions included to help insulate the federal government from foreign domination — the others being the Titles of Nobility Clause (art. I, § 9, cl. 8), barring federal officials from accepting anything of value from a foreign sovereign, and the requirement of art. I, § 2, cl. 2, and art. I, § 3, cl. 3, that only persons who had been citizens for specified periods of years would be eligible to serve in Congress. The Natural Born Citizen Clause was a structural provision crafted to guard against a danger the framers knew European monarchies had faced, that a foreign prince might be installed to wield executive powers.[22] It appeared in one of the final

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[21] Of course, as a logical matter, the clause had the *effect* of barring Congress from enacting a statute denying citizenship to individuals who qualified for citizenship at birth under the common-law *jus soli* rule in effect in 1789 — for if Congress could do *that*, it could theoretically render all Americans born in the United States ineligible to serve as president, leaving the office vacant. *See* William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457, 468-76 (2010). *See also* Schuck & Smith, *supra* note 5, at 1-2, 50.

[22] *E.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1473, at 332-33 (1833) (the "indispensable" Natural Born Citizen Clause "cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe."). *See generally* Jack Maskell, Congressional Research Service, *Qualifications for President*

drafts of the Constitution, without debate and without objection, after a leading figure in the Constitutional Convention received a letter from John Jay suggesting that requiring the president to be a natural born citizen would "provide a . . . strong check to the admission of Foreigners into the administration of our Government . . . ."[23]

The remaining provisions in the original Constitution mentioning citizenship are similarly structural in nature. They were included for the purpose of structuring a system of federalism which would preserve national unity, not to create any norm which might impact the discretion of the political branches regarding the citizenship status of those residing in U.S. territories.[24]

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and the "Natural Born" Citizenship Eligibility Requirement (Nov. 14, 2011), at 6-8 (available at bit.ly/1ofkiWb).

[23] *See* McManamon, *supra* note 13, at 328-29 (quoting letter from John Jay to George Washington, July 25, 1787).

[24] For example, the Comity Clause, art. IV, § 2, cl. 1, required that a state must treat citizens of other states no worse than it treats its own citizens with regard to certain important matters. *E.g.*, *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218-23 (1984); *McBurney v. Young*, 133 S.Ct. 1709, 1714-19 (2013). Similarly, art. III, § 2, provided that federal court jurisdiction in some cases would depend at least in part on the citizenship of the parties, "to furnish an impartial tribunal when state court bias was feared." RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 13 (7th ed. 2015). *See also id.* at 17-18. The only other provision mentioning citizenship was the Naturalization Clause, art. I, § 8, cl. 4, which

The Citizenship Clause, ratified as part of the Fourteenth Amendment in 1868, is likewise most appropriately viewed as structural in nature. It was the pragmatic device chosen by Congress to solve the problem created by this Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393, 404-08, 416-17 (1857), which declared that persons of African descent, even those who had never been held in slavery, could not be regarded as citizens, even if they had been born in the United States.[25]

After ratification of the Thirteenth Amendment, which completed the task of freeing all African Americans from bondage, Congress enacted the Civil Rights Act of 1866, which granted citizenship to nearly all of them (except for those born outside the United States). Section 1 provided: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby

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displaced the patchwork, state-by-state system of naturalization that had existed under the Articles of Confederation, in favor of uniform rules enacted by Congress. No individual right was recognized here, either. It is well established, under the plenary-power doctrine, with its roots in Congress's authority over foreign affairs, that it is within the complete discretion of Congress to grant, or not grant, citizenship by statute for any reason. *See generally* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015).

[25] Mayton, *supra* note 11, at 240-43; Erler, *supra* note 16, at 165-67. Schuck & Smith, *supra* note 5, at 66-73, 79-85. Another objective of Congress in framing the Citizenship Clause was to settle the citizenship status of Native Americans. *Id.* at 63-66, 77; *see also* Kettner, *supra* note 5, at 288-300.

declared to be citizens of the United States . . . ." 14 Stat. 27 (1866).

Given that the Act conflicted with *Dred Scott*, a constitutional decision which had not been overruled, the 39th Congress included the principle set out in the Act in the Citizenship Clause of the Fourteenth Amendment, which it sent to the States for ratification later in 1866.[26] Although the Citizenship Clause was worded differently than the Act — declaring that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" — during congressional deliberations its framers indicated that its intended function was to replicate the coverage of the Act, on a constitutional level.[27]

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[26] The debates "clearly demonstrate . . . that Congress's purpose in proposing the Fourteenth Amendment immediately after enactment of the 1866 act was to 'constitutionalize' the protections established by the act, including the principle of birthright citizenship." Schuck & Smith, *supra* note 5, at 74-75. *See also* Kettner, *supra* note 5, at 342-43.

[27] *See* Schuck & Smith, *supra* note 5, at 74-77, 79-83. For example, in introducing the language of the Citizenship Clause on the Senate floor, Senator Jacob Howard indicated that the phrase, "subject to the jurisdiction thereof" meant "a full and complete jurisdiction" — that is, "the same jurisdiction in extent and quality as applies to every citizen of the United States now" (i.e., under the Act). CONG. GLOBE, 39th Cong., 1st Sess. 2890, 2895 (1866). *See also* John C. Eastman, *Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11*, 12 TEX. REV. L. & POL. 167, 1172-78 (2007); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 6-8 (2009).

Nothing in the congressional debates concerning the Citizenship Clause suggests that the Members of Congress who framed it intended to create a norm that would in any way limit the discretion of the political branches of the *federal* government concerning the citizenship status of those residing in U.S. territories. Rather, the debates confirm what seems clear from the text of the Fourteenth Amendment: the governmental actors intended to be constrained by the Citizenship Clause were *the States* (some of which were refusing to recognize African Americans as citizens) and *this Court* (which had handed down *Dred Scott*).[30]

To bind both the States and this Court to a definition of citizenship which included African Americans, one solution Congress considered was to simply legislate that "all persons of African descent born in the United States are hereby declared to be citizens of the United States . . . ."[31] Ultimately, to

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[30] As Professor Rosenkranz has observed, "a constitutional claim is necessarily a claim that some *actor* has acted inconsistently with the Constitution," requiring the identification of the relevant "governmental actor, a constitutional *subject*." Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1214 (2010). That *state* governments, and not Congress, are among the subjects of the Citizenship Clause would appear to be corroborated by the enforcement power granted Congress under § 5 of the Fourteenth Amendment — presumably the Amendment's framers did not intend to create a constitutional constraint which Congress would enforce against itself.

[31] CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (amendment offered by Sen. Trumbull). *See also* Schuck &

achieve its aim Congress used more general language, both in the Act and in the Citizenship Clause, thereby overruling *Dred Scott* "by a definition of citizenship in which race played no part." Bickel, *supra* note 19, at 374. But the debates "establish that the framers of the Citizenship Clause had no intention of establishing a universal rule of birthright citizenship." Schuck & Smith, *supra* note 5, at 96.

III. The Citizenship Clause is Readily Construed as Validating the Discretion Congress Has Long Exercised Concerning Whether, When, and How to Offer Citizenship to, or Impose Citizenship on, Residents of U.S. Territories

That the purpose of the Citizenship Clause was to make citizens of the recently freed slaves and other free blacks, and not to create any norm that would impact the discretion of the political branches regarding the citizenship status of those residing in U.S. territories, is corroborated by the free hand that the political branches subsequently exercised in defining the citizenship status of people residing in U.S. territories. "It is certainly now too late to doubt the power of Congress to govern the Territories," this Court observed 137 years ago, in *National Bank v. County of Yankton*, 101 U.S. 129, 132 (1879), in acknowledging the power vested in Congress to "do for the Territories what the people, under the Constitution of the United States, may do for the States." *Id.* at 133. Throughout our history the political branches have exercised wide discretion, without interference

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Smith, *supra* note 5, at 76-77.

by this Court or by lower courts, concerning whether, when, and how to offer citizenship to, or impose citizenship upon, those residing in U.S. territories.

In some situations, those domiciled in a newly acquired territory have automatically become U.S. citizens pursuant to a treaty governing acquisition of the territory. For example, Article III of the Louisiana Purchase Treaty of 1803 provided that the inhabitants of the ceded territory "shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all these rights, advantages and immunities of citizens of the United States . . . ."[32] Federal courts accordingly held that its inhabitants had automatically obtained U.S. citizenship upon statehood, and perhaps even earlier.[33] Similar language guaranteeing that acquired territories would be incorporated into the Union, and that their residents would become U.S. citizens, was included in the treaties by which much of the western United States was acquired from Mexico.[34]

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[32] *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 78-79 (2004).

[33] Kettner, *supra* note 5, at 251-53.

[34] Lawson & Seidman, *supra* note 32, at 103-04. In contrast to the mandatory citizenship rule applicable to the Louisiana Purchase, the 1848 Treaty of Guadaloupe-Hidalgo guaranteed Mexican citizens residing in the ceded territory the right to avoid acquiring U.S. citizenship, provided they publicly elected that option within one year. Kettner, *supra* note 5, at 253 n.15.

In other situations, the political branches have, during the acquisition of new territories, guaranteed that territorial inhabitants would enjoy the rights of U.S. citizens, but have stopped short of guaranteeing that the territories would eventually be incorporated into the Union as States. Examples include the acquisition of Oregon and Alaska.[35]

New territories have also been acquired without the political branches making *any* guarantees that territorial inhabitants would *ever* become U.S. citizens, as happened when Spain ceded Cuba, the Philippines, Guam and Puerto Rico following the Spanish-American War. The relevant provision of the 1898 Treaty of Paris simply stated that "[t]he civil rights and political status of the native inhabitants of the territories . . . shall be determined by the [U.S.] Congress."[36] Over a period of decades, Congress ultimately decided to grant independence to both Cuba and the Philippines, and to grant statutory citizenship to all those born in Guam or Puerto Rico after cession,[37] without interference by any court.

More than 125 years passed after ratification of the Fourteenth Amendment before a federal appellate court addressed the novel argument that the political

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[35] Lawson & Seidman, *supra* note 32, at 94-95, 105-08.

[36] Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

[37] *See* Brief for *Amici Curiae* Members of Congress and Former Governmental Officials in Support of Petitioners at 18-19 (citing statutes).

branches had no business *ever* drawing such distinctions between various territories regarding citizenship, because the Citizenship Clause supposedly grants automatic citizenship at birth to any child born in any territory under the control of the United States government. In 1994 the Ninth Circuit rejected that argument,[38] as has every other circuit subsequently presented with it, including the D.C. Circuit in this case.[39]

A century and a half after the framing of the Citizenship Clause, that novel argument has now reached this Court. Petitioners and their *amici* urge this Court to strip the political branches of the discretion they have traditionally exercised to decide the citizenship status of persons born in U.S. territories. But to justify this Court taking that step, it is not enough for petitioners and their *amici* to argue that the Citizenship Clause might plausibly be read as conferring on them place-of-birth citizenship.

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[38] *Rabang v. INS*, 35 F.3d 1449, 1452-53 (9th Cir. 1994), *cert. denied*, 515 U.S. 1130 (1995) (observing that "[n]o court has addressed whether persons born in a United States territory are born 'in the United States' within the meaning of the Fourteenth Amendment," and rejecting argument). *See also id.* at 1455-56 (Pregerson, J., dissenting) (noting that plaintiffs are arguing "a *new* theory . . . that by virtue of their birth, or their parents' birth, in the Philippines during the territorial period, they qualify as United States citizens under the Citizenship Clause of the Fourteenth Amendment").

[39] Pet. App. 4a-19a; *Nolos v. Holder*, 611 F.3d 279, 282-84 (5th Cir. 2010); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam); *Valmonte v. INS*, 136 F.3d 914, 918-20 (2d Cir. 1998).

Instead, the burden is on them to show that the Citizenship Clause *cannot* plausibly be read as validating the discretion long exercised in this area by the political branches. They have not met that burden. Where, as here, a given practice has "wide acceptance in the legal culture," existing precedent supporting that practice should not be overruled. *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000).

IV. Prudential Considerations Weigh Against a Grant of Certiorari in This Case

Even if this Court, at some point, in some context, might choose to revisit the status of the Insular Cases, as petitioners and several *amicus* briefs urge, prudential considerations weigh against granting certiorari in this case.

First, as set out above, the correctness of the result below does not depend on the status of the Insular Cases.

Second, this case is hardly an apt vehicle for reconsidering the Insular Cases. The typical person disadvantaged by the Insular Cases is a U.S. citizen living in Puerto Rico who is denied an individual right that he would enjoy if he were living in a State — for example, the right to a jury trial on a criminal misdemeanor charge putting him or her at risk of more than six months incarceration, or the right to equal treatment under particular statutes, for example,

social-welfare legislation.[40] If this Court wishes to revisit the Insular Cases it should grant review in such a case. This case is not an apt vehicle because it does not involve the regularly arising question of whether an *existing* U.S. citizen is being unconstitutionally deprived of rights because he or she lives in a territory. Rather, this case involves the quite different question of whether the residents of a particular territory are U.S. citizens *in the first place*.

Finally, petitioners are mistaken in suggesting that Congress has somehow selectively targeted American Samoans as supposedly unfit to be the beneficiaries of statutory birthright citizenship. *E.g.*, Pet. at 2-3, 10 (Congress has "singled out" American Samoans for "inferior, subordinate status," thereby "stigmatizing" them). After all, Congress has by statute provided for birthright citizenship in every territory whose residents have expressed a collective desire to have it. No such statute applies to American Samoa because its people, through their elected representatives, *have successfully urged Congress not to impose birthright citizenship on them*, for fear that it might adversely impact their unique legal system

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[40] Several *amicus* briefs in this case address these and other adverse impacts of the Insular Cases on Puerto Ricans. Brief of the Puerto Rican Bar Association, Inc., as *Amicus Curiae* in Support of Petitioners at 15-19; Brief for *Amici Curiae* Members of Congress and Former Governmental Officials in Support of Petitioners at 2, 5-7, 13; Brief of Former Federal and Local Judges as *Amici Curiae* in Support of Petitioners at 19-22.

and culture.[41] Especially considering that birthright citizenship is a vestige of feudalism at odds with a core principle of the American Revolution concerning the consent of the governed, see pp. 6-10, *supra*, there is no compelling reason to disrupt the status quo embraced by the duly elected representatives of American Samoa.

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[41] *See* Pet. App. 18a-23a; Brief for Intervenors or, in the Alternative, *Amici Curiae* the American Samoa Government and Congressman Eni F.H. Faleomavaega (D.C. Cir. No. 13-5272), Aug. 25, 2014, at 23-35. The wish of the people of American Samoa, expressed through their leaders, not to have U.S. citizenship imposed on them dates back at least to 1948, when nearly 100 chiefs asked Congress to table proposed citizenship legislation. ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 426 (1989). Nowhere do petitioners or their *amici* explain how Congress's longstanding deference to American Samoans' desire for self determination "stigmatizes" them as somehow "inferior." To the contrary: through its deference, Congress demonstrates its respect for the people of American Samoa and it accords them control over their own destiny. Congress is so deferential on such matters that it has ceded to the American Samoan government complete control over whether U.S. citizens may even *enter* American Samoa. *Id.* at 447-48.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 11, 2016

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APPENDIX

Edward J. Erler is Professor of Political Science (Emeritus) at California State University, San Bernardino, and a Senior Fellow of the Claremont Institute for the Study of Statesmanship and Political Philosophy. His many works on constitutional law and on the history of the American political system include THE FOUNDERS ON CITIZENSHIP AND IMMIGRATION: PRINCIPLES AND CHALLENGES IN AMERICA (2007) (coauthor); *From Subjects to Citizens: The Social Compact Origins of American Citizenship*, in THE AMERICAN FOUNDING AND THE SOCIAL COMPACT 163 (Ronald J. Pestritto & Thomas G. West eds., 2003); *Citizenship*, in THE HERITAGE GUIDE TO THE CONSTITUTION 493 (2d ed. 2014); and THE AMERICAN POLITY: ESSAYS ON THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT (1991). Professor Erler has testified in Congress on the subject of birthright citizenship, in hearings held by the House Judiciary Committee's Subcommittee on Immigration and Claims in 1995 (available at http:// bit.ly/1ZD8dar) and 1997 (available at http://bit.ly/1TDLdU8). He received his B.A. from San Jose State University and his M.A. and Ph.D in government from the Claremont Graduate School.

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profile cases, including the prosecution of Omar Abdel Rahman ("The Blind Sheik") and eleven other jihadists complicit in the 1993 World Trade Center bombing. He is the author of two *New York Times* bestselling books, *Willful Blindness: A Memoir of the Jihad* (2008) and *Jihad: How Islam and the Left Sabotage America* (2010).

The Claremont Institute's **Center for Constitutional Jurisprudence** was established in 1999. It is dedicated to upholding the principles of the American Founding, regarding both the Constitution's structural protections of our liberty and its guarantees of individual rights. In addition to holding seminars, conducting legal clinics, and sponsoring educational opportunities for constitutional scholars, the Center has frequently appeared in cases before this Court, both on behalf of parties and on behalf of itself and other *amici*.