CITIZENSHIP AND EMPIRE IN *ELK V. WILKINS*

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ABSTRACT

In 1884, the Supreme Court held that the Fourteenth Amendment's guarantee of birthright citizenship did not apply to Native Americans. In Elk v. Wilkins*, the Court denied John Elk the right to vote on the grounds that he was born a tribal member, not subject to the jurisdiction of the United States, and thus ineligible for citizenship. This Article explores that decision, its context, and its consequences. It considers the radical promise of the Fourteenth Amendment's text alongside the intentions of its Framers and the expectations of minority litigants. It situates* Elk *in a transformative period for both federal Indian policy and American federalism.*

The Article offers several readings of the Elk *decision. It explores both the racist paternalism and the respect for tribal sovereignty evident in the Court's reasoning, as well as the rapid shifts in Indian policy coinciding with Reconstruction. It ultimately argues that* Elk v. Wilkins *is emblematic of a distinct inflection point in federal Indian law, in which the Court's formal adherence to longstanding principles of tribal sovereignty could simultaneously service federal assimilationist policy goals and a larger turn to American empire.*

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INTRODUCTION

The United States Constitution promises the right to vote to all adult citizens.[1] For many Native Americans, this promise has yet to be fulfilled.[2] According to a House Committee Report published in July 2024, Native communities continue to face significant structural barriers to voting in federal, state, and local elections.[3] Native voters are asked to travel farther with fewer resources to have their political voices heard on equal terms with other Americans. At the extreme, some voters on the Navajo Nation must travel ninety-five miles to reach their nearest polling place.[4] The effects of tremendous distances are exacerbated by unpaved roads and limited public transportation.[5] Voting by mail is frequently unavailable to reservation residents.[6] Those who do make it to polling places often face harassment and hostility by election officials.[7] Meanwhile, Native communities find

1. U.S. CONST. amends. XV, XIX; *see Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) (finding that the Fifteenth Amendment "substantially confer[s]" the affirmative right to vote on Black men); *see also* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 149 (1st ed. 2019).

2. COMM. ON HOUSE ADMIN., 118TH CONG., SECOND SESSION, REPORT ON VOTING FOR NATIVE PEOPLES: BARRIERS AND POLICY SOLUTIONS 2 (2024) [hereinafter REPORT ON VOTING]. *See generally* Torey Dolan, *Congress' Power to Affirm Indian Citizenship Through Legislation Protecting Native American Voting Rights*, 59 IDAHO L. REV. 47 (2023).

3. REPORT ON VOTING, *supra* note 2, at 2.

4. *Id.* at 40.

5. *Id.* at 43–44.

6. *Id.* at 48–49. *See generally* Torey Dolan, *Where's Mr. Postman? The Struggles of Voting by Mail in Indian Country*, 59 HARV. C.R.-C.L. L. REV. 123 (2024).

7. REPORT ON VOTING, *supra* note 2, at 96, 104–05.

their electoral power diluted through gerrymandering.[8] The House Committee Report concludes: "The full realization of citizenship promised 100 years ago remains unfulfilled."[9]

As the authors of the Report imply, political participation is a defining attribute of American citizenship today. These present-day barriers to Native voting evoke a long, fraught history of Native citizenship. Native political subordination is a consistent feature with various structural iterations in the American legal order. To explore the development of Native voting rights and the meaning of national citizenship, this Article focuses on the most revolutionary moment in American legal history: Reconstruction.

Reconstruction promised a radical reordering of American society. The Reconstruction Amendments abolished slavery, established national birthright citizenship, articulated a constitutional commitment to formal legal equality, guaranteed the privileges and immunities of citizenship to all, and forbade any racial requirements for the right to vote. In the wake of the bloodiest conflict in American history, the Reconstruction Congress envisioned a new political order featuring Black citizenship, voting, and officeholding. In pursuit of these ends, the Framers fashioned the Fourteenth Amendment to the United States Constitution with an expansive account of American citizenship.

Although the Framers may have been focused on Black citizenship, other groups seized upon the Fourteenth Amendment's textual promises in the years following ratification. As this Symposium celebrates, Virginia Minor read the Fourteenth Amendment to guarantee all privileges of citizenship, including the right to vote, 150 years ago in 1875.[10] In 1884, John Elk read the birthright citizenship clause of the Fourteenth Amendment in conjunction with the Fifteenth Amendment to secure voting rights for Native men.[11] And in 1898, Wong Kim Ark read the Fourteenth Amendment to ensure citizenship for the American-born children of foreign nationals.[12] All three of these plaintiffs tested the radical potential of the Amendment's text; only one succeeded.[13]

8. *Id.* at 65, 76.
9. *Id.* at 122.
10. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).
11. Elk v. Wilkins, 112 U.S. 94 (1884).
12. United States v. Wong Kim Ark, 169 U.S. 649 (1898).
13. Wong Kim Ark alone succeeded in his claims on citizenship. *Id.* at 705. Yet even his victory came with limits; his son Wong Yoke Fun was reportedly detained at Angel Island and deported when immigration authorities determined he failed to prove his relation to Wong Kim Ark. Kimmy Yam, *Great-Grandson of the Man Who Established Birthright Citizenship Slams Trump's New Executive Order*, NBC NEWS (Jan. 21, 2025, 2:34 PM), https://www.nbcnews.com/news/asian-america/wong-kim-ark-birthright-citizenship-trump-executive-order-rcna188481 [https://perma.cc/GN6Z-AM3D].

This Article focuses on John Elk's case and the Supreme Court's move to limit the extent of birthright citizenship. According to the Court, Native people born into tribal membership were categorically excluded from birthright citizenship. They could only be naturalized on terms set out by Congress. The Court has never had an occasion to revisit this peculiar decision. In 1924, Congress exercised its plenary power over Indian affairs to legislate the Indian Citizenship Act, granting American citizenship to all Native people born in the United States.[14] In this way, mere legislation effected structural constitutional change, recasting the relationship between the federal government and tribal citizens.

This Article explores *Elk v. Wilkins* and its complex legacy. It builds off a relatively small, but dynamic literature on the history of Native citizenship.[15] It presents three accounts of the *Elk* decision: as racist paternalism, as an affirmation of tribal sovereignty, and as a peculiar ruling emblematic of a distinct inflection point in federal Indian policy. The Article argues that *Elk* should be understood as a product of its exceptional context—at a moment when the United States was retreating from sovereign-to-sovereign treatymaking, reconsidering the political status of domestic minority populations, and poised to aggressively assert jurisdiction over tribal nations. The *Elk* case arose in the brief space between

14. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (amended by the Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940)) (codified at 8 U.S.C. § 1401(b) ("The following shall be nationals and citizens of the United States at birth: . . . (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.")). The original language of the Indian Citizenship Act granted citizenship to "all non-citizen Indians born within the territorial limits of the United States." Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924). The present language in the United States Code, amended by the Nationality Act of 1940, applies specifically to the children of tribal members. 8 U.S.C. § 1401(b). "Indian" and "tribal member" are not always coextensive categories in federal law. However, one can reasonably assume that 8 U.S.C. § 1401(b) was intended to cover whatever Indian carveout may exist in Section One of the Fourteenth Amendment.

The Indian Citizenship Act has not been universally embraced. *See* Robert B. Porter, *The Demise of the* Ongwehoweh *and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999); Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1241–42 (2016).

15. *See, e.g.*, Dolan, *supra* note 6; Berger, *supra* note 14; DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 1–20 (2007); DAVID MYER TEMIN, REMAPPING SOVEREIGNTY: DECOLONIZATION AND SELF-DETERMINATION IN NORTH AMERICAN INDIGENOUS POLITICAL THOUGHT 27–62 (2023); Cathleen D. Cahill, *"Our Democracy and the American Indian": Citizenship, Sovereignty, and the Native Vote in the 1920s*, 32 J. WOMEN'S HIST. 41 (2020); DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880 (Univ. Neb. Press ed., 2007); KIARA M. VIGIL, INDIGENOUS INTELLECTUALS: SOVEREIGNTY, CITIZENSHIP, AND THE AMERICAN IMAGINATION, 1880–1930 (2015). And most recently, in response to the Trump Administration's (mis)use of *Elk v. Wilkins*, Gregory Ablavsky and Bethany Berger have written on the Fourteenth Amendment and Indian citizenship. *See* Gregory Ablavsky & Bethany Berger, *"Subject to the Jurisdiction Thereof": The Indian Law Context,* N.Y.U. L. REV. ONLINE (forthcoming 2025).

two major restructuring events in American history: Reconstruction and the allotment revolution in federal Indian policy. Only in this moment could a Native man bring a viable constitutional claim to citizenship and be rebuked by a Supreme Court decision asserting that he was born outside American jurisdiction. In this way, *Elk* can help us identify a series of constitutional restructuring events in the nineteenth century, facilitated not only by formal constitutional change but also national legislation.

Within three years of the *Elk* decision, the Office of Indian Affairs, Congress, and the Court trampled the same principles of tribal sovereignty that justified this interpretation of birthright citizenship. In 1885, Congress passed the Major Crimes Act asserting federal criminal jurisdiction over crimes involving Indians in Indian country, plainly overriding the Court's claim that Indians existed beyond American jurisdiction.[16] In 1886, the Court upheld this imposition in *United States v. Kagama*, which articulated the doctrine of Congressional plenary power over Indian affairs. And in 1887, Congress wielded this plenary power to enact the General Allotment Act.[17] Carried out by the Department of the Interior's Office of Indian Affairs, the policy of allotment forcibly broke up collective land ownership, invited white settlers onto tribal lands, and facilitated the transfer of some ninety million acres of tribal land all in the name of assimilation.[18] Thus by 1887, all three branches of the federal government demonstrated a bare hostility to tribal sovereignty and any spaces of exclusive tribal jurisdiction.

Arguably, each branch had already abandoned the original constitutional arrangement premised on mutual sovereignty and treatymaking by 1884. In 1871, Congress forswore treatymaking altogether. The Grant Administration had already introduced its Indian Peace Policy in 1869, featuring the imposition of federal boarding schools designed to forcibly remove and acculturate Native children.[19] The Executive Branch continued to build on this foundation of interference into tribal communities,

16. Note how there already was the General Crimes Act of 1817 that asserted federal jurisdiction over crimes in Indian country where at least one party involved is a non-Indian. 18 U.S.C. § 1152. The General Crimes Act and its Trade and Intercourse Act predecessors might be considered the first assertions of American jurisdiction over Indian tribes. However, the General Crimes Act can also be understood as the domestic codification of treaty arrangements. Here we might find an important distinction between places where tribes have voluntarily availed themselves to federal jurisdiction versus unilateral impositions of federal jurisdiction. *See* Alexandra Fay, *Tribes and Trilateral Federalism: A Study of Criminal Jurisdiction*, 56 ARIZ. ST. L.J. 53, 86–87 (2024).

17. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (repealed 1934).

18. *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.08(3)(b) (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN'S HANDBOOK].

19. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 318–19 (1997); BRYAN NEWLAND, DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 53 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may 2022_508.pdf [https://perma.cc/47H6-Z8XW].

unilaterally imposing a criminal code on tribal communities with the advent of the Courts of Indian Offenses in 1883.[20] And by then the Supreme Court too had begun to affirm the invasion of tribal sovereignty, holding in the 1881 case of *United States v. McBratney* that states could exercise criminal jurisdiction in Indian country.[21] In *McBratney,* the Court began chipping away at a geographic model of tribal jurisdiction, albeit only for crimes involving exclusively non-Indians. The *Elk* Court's evaluation of the jurisdictional status of Indian country was thus significantly more accurate as it applied in the time of the Fourteenth Amendment's framing and ratification, rather than the time of the decision itself.

1868 Ratification of the Fourteenth Amendment
1869 President Grant's "Peace Policy" imposing federal boarding schools
1871 End of Treatymaking
1881 *United States v. McBratney*
1883 *Ex parte Crow Dog*, creation of the Courts of Indian Offenses
1884 *Elk v. Wilkins*
1885 Major Crimes Act
1886 *Kagama v. United States*
1887 General Allotment Act

In 1884, the political arrangement between the federal government, the tribes, and the states was far from stable. In this historical moment where federal actors were eager to intervene in matters of internal tribal self-government, the denial of birthright citizenship enabled federal abuses. As the 2024 House Committee Report summarized, *Elk* stood for "[s]ubjugation without [c]itizenship."[22] As scholars have rightly observed, access to citizenship became a popular rhetorical tool of assimilation during the Allotment Era.[23] The rights and privileges that attend citizenship—freedom to travel, freedom of religion, freedom of speech,[24] and more generally freedom from federal plenary power[25]—became leverage for "civilization" policies. Native people who adopted Anglo-American

20. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 115 (1983); Kekek Jason Stark, *Indian Policing: Agents of Assimilation*, 73 CASE W. RSRV. L. REV. 683, 710 (2023).

21. 104 U.S. 621, 624 (1882).

22. REPORT ON VOTING, *supra* note 2, at 22.

23. *See* Berger, *supra* note 14, at 1236 (describing the Allotment Era as "Coercion in the Name of Citizenship").

24. *See* TEMIN, *supra* note 15, at 36 (describing constitutional freedoms trampled under the reservation system as identified by Zitkala-Ša).

25. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 58 (2002).

customs and accepted private land ownership could be naturalized.[26] By withholding birthright citizenship, the Court handed Congress and the Office of Indian Affairs another tool for coercing acculturation.

To be sure, not all Native people pursued or wanted United States citizenship. Native attitudes toward citizenship were neither static nor monolithic at the turn of the century.[27] Tuscarora Chief Clinton Rickard famously opposed the unilateral imposition of American citizenship as a violation of tribal sovereignty.[28] Indeed, nations of the Haudenosaunee Confederacy still reject national citizenship to this day.[29] Yet many leading Native advocates in the early 1900s recognized American citizenship as a pragmatic tool for tribal self-determination.[30] Yankton Dakota activist and intellectual Zitkala-Ša (Gertrude Bonnin) identified citizenship as a means to escape the status of wardship,[31] and thus escape domination by the Office of Indian Affairs and the oppressive reservation system.[32] To Zitkala-Ša, American citizenship was a strategic necessity in the pursuit of collective self-determination.[33]

The Article proceeds as follows. Part I presents legal and historical background to John Elk's claim. It offers a close reading of the Fourteenth Amendment and then explores the expectations of its Framers. It ends with an overview of Elk's argument and the Court's decision. Part II considers the Court's reasoning in three distinct modes. First, it identifies the paternalist, racist assumptions that surround Registrar Wilkins's victory. Second, it suggests that *Elk v. Wilkins* might be regarded as a good, sovereignty-affirming decision that tribal advocates and allies ought to celebrate. And third, it uses *Elk v. Wilkins* to delineate a peculiar moment in the histories of American Indian policy and American federalism, in which the constitutional relationships between the federal government, Indian

26. *See infra* Section III.A.

27. *See* VIGIL, *supra* note 15, at 16.

28. *See* TEMIN, *supra* note 15, at 42.

29. *See* Joseph Heath, *The Citizenship Act of 1924*, ONONDAGA NATION (June 7, 2018), https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/ [https://perma.cc/L82Q4UND] (General Counsel of the Onondaga Nation describing the Indian Citizenship Act of 1924 as "an integral pillar of the colonization and forced assimilation policies of the United States in violation of treaties").

30. VIGIL, *supra* note 15, at 16. According to Vigil: "for writers and activists like [Charles] Eastman, [Carlos] Montezuma, [Gertrude] Bonnin, and [Luther] Standing Bear, access to political citizenship in the United States was of paramount importance, not because they aimed for integration into American society but rather because they saw political equality as a means for reshaping the settler-colonial nation that continued to intervene in the affairs of their people and in their lives." *Id.*

31. TEMIN, *supra* note 15, at 35

32. *Id.* at 36.

33. *Id.* at 42. As historian Stephen Kantrowitz recently documented, many Ho-Chunks similarly recognized national citizenship as a strategic opportunity for tribal survival in the late nineteenth century. *See* STEPHEN KANTROWITZ, CITIZENS OF A STOLEN LAND: A HO-CHUNK HISTORY OF THE NINETEENTH-CENTURY UNITED STATES 3 (2023).

tribes, and individual tribal members were rapidly shifting. This last account demonstrates the limits of originalist interpretation and the prominence of legislative constitutionalism in the field of federal Indian law. Finally, Part III explores the aftermath of the *Elk* decision: how citizenship became synonymous with civilization in federal Indian policy, and how restrictive readings of constitutional rights enabled America's overseas empire.

I. CONSTITUTIONALIZING BIRTHRIGHT CITIZENSHIP

Reconstruction transformed American society. Longstanding assumptions about race, gender, and the meaning of American citizenship were called into question in the wake of the Civil War. As Akhil Amar and others have contended, this pivotal moment in American history should be understood as nothing short of a constitutional revolution.[34]

Although Reconstruction ended in 1877 with the complete reassertion of white-supremacist Democratic Party control in the South, the Reconstruction amendments persisted as the enduring legacy of this revolutionary episode.[35] The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution abolished slavery, constitutionalized birthright citizenship and the principle of equality before the law, and enabled Black male suffrage, respectively.[36] The Fourteenth Amendment is the longest of this momentous trilogy, with many distinct components. It conceptually relocated citizenship from the states to the national government.[37] It addressed the immediate problems of war debt[38] and what to do with the former Confederate leaders.[39] It refashioned the formula for apportionment of Congressional representatives to encourage the enfranchisement of Black men, superseding the odious three-fifths compromise.[40] And functionally, it served as the principal test for

34. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 351 (1st ed. 2005); Kermit Roosevelt III, *Reconstruction as Revolution: The Fourteenth Amendment and the Destruction of Founding America*, 25 U. PA. J. CONST. L. 1073, 1073 (2023). Reconstruction is frequently referred to as the Second Founding. *See* JACK M. BALKIN, LIVING ORIGINALISM 27 (2011); Rogers M. Smith, *The Reconstruction Amendments, American Constitutional Development, and the Quest for Equal Citizenship*, 2 J. AM. CONST. HIST. 680, 680 (2024).

35. FONER, *supra* note 1, at xix–xx.

36. *Id.* at xix.

37. U.S. CONST. amend. XIV, § 1; s*ee* FONER, *supra* note 1, at 85 (noting the new "primacy of national citizenship").

38. U.S. CONST. amend. XIV, § 4.

39. U.S. CONST. amend. XIV, § 3.

40. U.S. CONST. art. I, § 2, cl. 3 (counting "three fifths of all other Persons" for the apportionment of representatives); U.S. CONST. amend. XIV, § 2 (amending the apportionment formula).

readmission for the Southern secessionist states.[41]

The following Part focuses on Section One of the Fourteenth Amendment, where the Reconstruction Congress sought to constitutionally define American citizenship for the very first time.[42] As preeminent Reconstruction historian Eric Foner asserts, the meaning of citizenship was in flux at this time, such that no singular original meaning existed.[43] Accepting that a definitive originalist reading is unattainable, this Part examines the meaning of American citizenship from a few angles. First, it examines the plain text of the Fourteenth Amendment, read in the context of the other Reconstruction amendments and preexisting terms of the Constitution. Next, it considers the Framers' intentions.[44] This Section relies on the Congressional Globe, a Senate Judiciary Committee Report, and Congress's prior attempt to legislate national citizenship in the Civil Rights Act of 1866. While the Framers were undoubtedly focused on the rights and status of former slaves, they did consider the Amendment's effects on other minority groups. Finally, this Part recounts the legal claim brought by John Elk that tested the new bounds of American citizenship.[45]

A. Constitutional Text

The Fourteenth Amendment is comprised of five sections. Present-day caselaw and scholarship is most often concerned with Section One,[46] and this Article is no exception.

The first sentence addresses the main object of this study: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[47] Thus the Reconstruction Framers transformed American citizenship. "All persons" could be American citizens regardless of race, color, gender, religion, ancestry, or prior status of enslavement. While

41. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867) (First Reconstruction Act).

42. AMAR, *supra* note 34, at 381. However, birthright citizenship was arguably already the law of the land "since the founding." Trump v. CASA, Inc., slip op. at *1 (U.S. June 27, 2025) (Sotomayor, J., dissenting).

43. FONER, *supra* note 1, at xxiv–xxv.

44. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

45. In pursuit of original meaning, plaintiffs like Elk, Virginia Minor, Myra Bradwell, and Wong Kim Ark represent counterpublic interpretations. *See* James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 679 (2016). Counterpublic original meaning is a useful tool for improving, though not wholly fixing, originalism's antidemocratic flaws.

46. Section Three was recently considered by the Supreme Court for the first time, a whopping 156 years after its ratification. *See* Trump v. Anderson, 601 U.S. 100 (2024).

47. U.S. CONST. amend. XIV, § 1.

Congress could still apply such qualifications in naturalization,[48] no legislation could deny the right of citizenship of anyone born "in the United States, and subject to the jurisdiction thereof."

What is the effect of that clause behind the comma, "subject to the jurisdiction thereof"? Is American jurisdiction not coextensive with the United States? Assuming the clause is not redundant, there are a few possible candidates for spaces within the United States not subject to the jurisdiction thereof. The easiest answer is foreign embassies, which the United States recognizes as essentially little pieces of foreign countries.[49] Likewise, invading foreign armies could be both geographically within the United States yet outside its jurisdiction.[50] Of course, this scenario is totally theoretical; it has not occurred since the ratification of the Fourteenth Amendment. These exceptions to birthright citizenship are small, limited to the occasional children of ambassadors and embassy workers, and the hypothetical children of invading enemy combatants born in the field.[51]

Another candidate is Indian country. Although the United States has formally recognized tribal sovereignty since its Founding,[52] American respect for tribal jurisdiction and self-government has been neither consistent nor robust. From the very first Congress, the United States has asserted criminal jurisdiction in Indian country, claiming the authority to prosecute Indians who committed crimes against non-Indians in federal court.[53] In 1823, the Supreme Court asserted that tribes only enjoyed the aboriginal rights of occupancy, subject to the United States' superior claim, rather than full property rights to their ancestral lands.[54] In 1831, the Court determined tribal political status to be not that of foreign nations, but of domestic dependent nations, formally subordinated to the United States federal government.[55] And in 1846, Chief Justice Taney reaffirmed this notion in *United States v. Rogers*, asserting that tribes hold their land "and occupy it with the assent of the United States, and under their authority."[56] Taney went on to claim:

48. *See* U.S. CONST. art. I, § 8, cl. 4.
49. AMAR, *supra* note 34, at 381.
50. *Id.*
51. *Id.*
52. COHEN'S HANDBOOK, *supra* note 18, at § 1.03 n.1 (citing McGirt v. Oklahoma, 591 U.S. 894, 903 (2020) ("[U]nder our constitution, States have no authority to reduce federal reservations lying within their borders.")); *see* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2220 (2023).
53. COHEN'S HANDBOOK, *supra* note 18, at § 1.03 n.3 (citing Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022)).
54. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
55. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
56. 45 U.S. (4 How.) 567, 572 (1846).

> [T]he Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.[57]

Given these precedents, the assertion that tribal reservations were outside United States jurisdiction was not wholly persuasive, even in 1868.[58] Perhaps the text implies a higher threshold, demanding the fullest extent of United States jurisdiction. Yes, Indians in the mid-nineteenth century were subjected to American jurisdiction in some contexts, but they were not subjected to the complete array of laws and regulations imposed on non-Indians. Although the Supreme Court long considered tribes as wards in a ward-guardian relationship with the United States and as domestic dependent nations whose sovereignty had necessarily been diminished by American supremacy, American law nonetheless recognized tribes as distinct political entities with retained powers of self-government.[59] United States jurisdiction existed, but in a decidedly limited fashion, on tribal land. This interpretation depends on reading "subject to the jurisdiction thereof" as "subject to the *full and exclusive* jurisdiction thereof"—an implied qualification the Amendment's Framers may well have intended.[60] On its

57. *Id.* In this case, the Court considered whether the United States had criminal jurisdiction over a white man who had been adopted by the Cherokee Nation through marriage. The Court found that for the purposes of the General Crimes Act, Rogers was not really an Indian, but Taney's opinion also suggested that even if he was, the United States would still have jurisdiction. *Id.* ("Consequently, the fact that Rogers had become a member of the tribe of Cherokees is no objection to the jurisdiction of the court . . . ."). Justice Taney changed his tune though in *Dred Scott*, where he remarked that tribes "were regarded and treated as foreign Governments." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

58. *See* SMITH, *supra* note 19, at 309 (observing that although the Amendment's Framers likely intended the jurisdiction clause to exclude tribes, "[t]he wording did not, however, really do the job. It only said not 'subject' to U.S. jurisdiction, and most federal officials had long regarded the tribes as instances of Vattel's 'dependent nations,' who *were* in decisive regards subject to U.S. sovereignty . . . Hence the tribespeople were still persons born in the U.S. and subject to its jurisdiction—birthright citizens as the clause was phrased . . .").

59. Tribal self-government is a key element of what Justice Neil Gorsuch calls the Constitution's "Indian-law bargain." Haaland v. Brackeen, 599 U.S. 255, 307 (2023) (Gorsuch, J., concurring). Tribes' powers of self-government are pre-constitutional and not restrained by the Bill of Rights. Talton v. Mayes, 163 U.S. 376, 384 (1896). To this day, tribes retain criminal and civil jurisdiction over their own members, often to the exclusion of states. *See* McGirt v. Oklahoma, 591 U.S. 894, 897–98 (2020) (finding that the State of Oklahoma lacked jurisdiction over Jimcy McGirt because he was a tribal member who committed crimes in Indian country). While Congress has imposed some restrictions on tribal governments through the Indian Civil Rights Act, federal courts largely defer to tribes in the interpretation of those restrictions. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

60. *See infra* Section I.B*; see also* Trump v. CASA, Inc., slip op. at *4 (U.S. June 27, 2025) (Sotomayor, J., dissenting) ("To be 'subject to the jurisdiction' of the United States means simply to be bound to its authority and its laws.").

own, however, the text does not clearly endorse this interpretation.

The remainder of that first sentence might bolster the argument for excluding Indians. A person born in the United States and subject to its jurisdiction became a citizen not only of the United States, but also "of the State wherein they reside."[61] While Indian reservations could be described as geographically existing within the borders of states, they were long considered separate from the states.[62] At this time, the Indian Territory still existed wholly distinct from the future State of Oklahoma.[63] Today, reservations are generally treated as part of the states, though that question remained controversial as recently as 2023, as seen in the Court's divisive decision in *Oklahoma v. Castro-Huerta*.[64] The inclusion of Indians on reservations as citizens of both the United States and the individual states "wherein they reside" would have threatened the status of Indian country.

Section Two offers additional information. Section Two reworked the apportionment formula for representatives in Congress.[65] The new formula overwrote the original distinction between free and unfree persons (the odious three-fifths compromise) and instead apportioned representation based on the total population with a new caveat. State representation was reduced if the state barred any men over the age of twenty-one from voting.[66] In this way, Section Two incentivized states to enfranchise Black men. It also introduced a gender distinction into the language of the Constitution for the very first time.[67] What the Amendment did not change was the original reference to Indians. Article III Section Two and the Fourteenth Amendment Section Two both exclude for the purposes of apportionment "Indians not taxed."[68] The formal exclusion of Indians in Section Two may inform the interpretation of the birthright citizenship rule in Section One. To read a coherent structure for political participation and representation, perhaps Indians not taxed should be excluded from both citizenship and apportionment.

This reading is attractive insofar as it identifies a discernible class;

61. U.S. CONST. amend XIV, § 1. Akhil Amar identifies this addition as one of the most important elements of Section One, insofar as it "clarified that to be an American citizen meant having rights not just against the federal government but also against one's home state." AMAR, *supra* note 34, at 381.

62. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), *abrogated by* Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).

63. For a thorough history of the Indian Territory, see generally ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1940).

64. 597 U.S. 629 (2022); *see* Fay, *supra* note 16, at 106.

65. U.S. CONST. amend. XIV, § 2.

66. *Id.*

67. FONER, *supra* note 1, at 81 ("But with the second section . . . the amendment for the first time introduced a gender distinction into the Constitution.").

68. U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

however, it is undermined by the fact that the Framers were plainly aware of the category of Indians not taxed and chose not to use it in Section One. Indeed, the same Congress had previously used that exact language in their attempt to legislate birthright citizenship in the Civil Rights Act of 1866.[69] The Civil Rights Act declared citizenship for "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed."[70] But when Congress constitutionalized birthright citizenship, they changed the wording. This change implies a difference between the class excluded in Section One and the class excluded in Section Two.

Even with a fixed idea of what it means to be subject to the jurisdiction of the United States, another question remains. Do the two factors—(1) being born within the United States and (2) being subject to the jurisdiction thereof—have to come into existence at the same time? Does one have to be born off the reservation and subject to the full jurisdiction of the United States, or to a taxpaying household? Or could an Indian, born within the United States, choose to become subject to the full jurisdiction of the United States and pay taxes later in life, and at that moment become a citizen? This question split the Court in *Elk v. Wilkins*, with Justice Harlan and Justice Woods endorsing the latter interpretation in their dissent.

As this Article goes to press, President Donald Trump argues that there is another category of people born within the United States excluded from the Fourteenth Amendment's promise of birthright citizenship: the children of undocumented immigrants.[71] For years, a niche group of commentators have advanced this notion.[72] The argument asserts that undocumented immigrants enter the United States without availing themselves to American jurisdiction, such that their children could be born inside the United States but beyond the reach of its jurisdiction. This argument is fundamentally flawed. The United States asserts and assumes jurisdiction over all people within its borders as a general rule, and the only exceptions are based on diplomatic relations. Although the Department of Justice cites to *Elk v.*

69. Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27; *see* FONER, *supra* note 1, at 63.

70. Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27.

71. Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) ("Protecting the Meaning and Value of American Citizenship").

72. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985); John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over* Bush v. Gore*?*, 94 GEO. L.J. 1475, 1484–91 (2006); John Eastman & Ediberto Román, *Debate on Birthright Citizenship*, 6 FIU L. REV. 293 (2011); Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1 (2009). More recently, the New York Times has featured this argument in its opinion pages. Randy E. Barnett & Ilan Wurman, *Trump Might Have a Case on Birthright Citizenship*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-birthright-citizenship.html [https://perma.cc/F5DD-Y7GU].

Wilkins in its defense of the President's Executive Order,[73] the special political status of Indians is totally different from that of undocumented immigrants and their children. Indian reservations were historically free from some aspects of American jurisdiction thanks to treaties. Ambassadors and embassy workers are likewise free from American jurisdiction thanks to diplomatic arrangements with their foreign states. Even theoretical invading armies represent sovereign-to-sovereign relations, albeit with the absence of consent. Migrants who enter the United States outside the formal ports of entry have no special arrangement nor sovereign status and can be regulated, detained, and punished by American courts and their actors. One does not escape United States jurisdiction by breaking a law. As federal courts review the President's attempt to redefine birthright citizenship, they should find little support from John Elk's case or the literal text of Fourteenth Amendment.

After articulating this not-wholly-satisfying definition of birthright citizenship, Section One proclaims that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States."[74] This provision is more ambiguous than its predecessor. It invokes federal supremacy to guarantee individual rights of citizens against potential abuses by the states. But what are the "privileges or immunities of citizens"? One compelling interpretation suggests that this clause incorporates the Bill of Rights against the states.[75] That reading offers a nicely fixed list of rights.

Yet the text alone is inescapably capacious.[76] Perhaps we can say that privileges and immunities of citizenship certainly include the rights denied Dred Scott—to bring claims in United States courts. Perhaps they include the freedom to pursue a career, to participate in public life, and to contract freely.[77] Perhaps they could include political rights of voting, jury service, and officeholding. As Eric Foner observes, citizenship had become largely synonymous with voting by the Civil War, "if not in law . . . then in common

73. Opposition to Plaintiff States' Motion for a Temporary Restraining Order at 12–13, Washington v. Trump, 2025 WL 272198 (W.D. Wash. Jan. 23, 2025) (No. 2:25-cv-00127); Brief for Appellants at 1, Washington v. Trump, No. 25-807 (9th Cir. Mar. 7, 2025); Application for a Partial Stay of the Injunction Issued by the United States District Court for the Western District of Washington at 7, Trump v. Washington, No. 24A885 (U.S. Mar. 13, 2025).

74. U.S. CONST. amend. XIV, § 1.

75. AMAR, *supra* note 34, at 387.

76. This is arguably by design. *See* BALKIN, *supra* note 34, at 24–26.

77. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) (finding that state loyalty oaths preventing Confederates from practicing law were unconstitutional). *But see* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) (finding that state laws barring women from practicing law were constitutional).

usage and understanding."[78] To be sure, Foner also identifies the tension between this association and the nearly universal disenfranchisement of women.[79] One might be tempted to assume that since women were considered citizens without any political rights prior to Reconstruction, that the Fourteenth Amendment's definition of citizenship would of course maintain that assumption. But as noted at the start of this Section, Reconstruction was nothing short of legal revolution. The meaning of citizenship was being redefined. Why should the political rights associated with citizenship necessarily remain unchanged?

The last part of Section One introduced the Due Process and Equal Protection Clauses that have proven to be the most contested, litigated, and treasured elements of the Fourteenth Amendment. As noted above, Section Two set out a new apportionment model for Congressional representation, introducing the first mention of gender in the Constitution. Section Three dealt with the Confederate leadership, disqualifying any former officeholder of the United States who participated in the rebellion from returning to power.[80] Although this provision was immediately aimed at Confederates, its wording is not limited to those who participated in the Civil War, but rather all who break their oaths in committing insurrection against the United States.[81] Section Four handled debt from the war, disclaiming any debts incurred by the rebels or "any claim for the loss or emancipation of any slave."[82] And finally, Section Five authorized Congress with the "power to enforce, by appropriate legislation, the provisions of this article."[83]

Altogether, the Fourteenth Amendment announced many key constitutional principles, but left their exact meanings unfixed. The Amendment identified several distinct classes of people relating to differing rights and rules: citizens, Indians not taxed, men over the age of twenty-one,

78. FONER, *supra* note 1, at 5 (citing NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 1852)); *see Citizen*, WEBSTER'S DICTIONARY 1828, https://websterdictionary1828.com/Dictionary/citizen [https://perma.cc/66HB-HJPA] ("[A] person, native or naturalized, who has the privilege of exercising the elective franchise, or the qualifications which enable him to vote for rulers . . . ."). Foner also noted that an 1868 convention of Black people discussed suffrage as "the first, the crowning right of citizenship." FONER, *supra* note 1, at 98. During the debate over the Civil Rights Act's citizenship provision, Senator Van Winkle of West Virginia remarked that "if you make these people citizens of the United States, I should feel that they were entitled to the right to suffrage." CONG. GLOBE, 39th Cong., 1st Sess. 497 (1866) (note that Van Winkle expressed reservations about birthright citizenship and advocated having it determined by an amendment ratified by state conventions).

79. FONER, *supra* note 1, at 5.

80. U.S. CONST. amend. XIV, § 3.

81. Henry Ishitani, *The Fourteenth Amendment Is Not a Bill of Attainder*, HARV. L. REV. BLOG (Jan. 28, 2024), https://harvardlawreview.org/blog/2024/01/section-three-is-not-a-bill-of-attainder/ [https://perma.cc/K3M4-GL9Q]. *But see* Trump v. Anderson, 601 U.S. 100 (2024).

82. U.S. CONST. amend. XIV, § 4.

83. U.S. CONST. amend. XIV, § 5.

and insurrectionists. Reading the Fourteenth Amendment in conjunction with the Thirteenth and Fifteenth Amendments, it is clear that the Reconstruction Amendments were aimed most directly at slavery and its legacies. But that does not mean that the future of Freedmen was the only issue on the Framers' minds nor in the immediate understandings by the public.[84]

B. Framers' Intents

The Reconstruction Framers were conscious of Native people in the drafting of the Fourteenth Amendment.[85] According to Earl Maltz, the Framers' awareness of the distinct status of Native Americans had "a profound impact on the wording of the citizenship clause[] . . . ."[86]

The Senate spent significant time debating the textual limits of birthright citizenship. Senator James Doolittle of Wisconsin proposed to replace "subject to the jurisdiction thereof" with an express exclusion of "Indians not taxed" in Section One.[87] According to Doolittle, "[a]ll the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military. We appoint civil agents who have control over them in behalf of the Government. We have our military commanders . . . who have complete control."[88] He expressed concern that the Amendment as written would give many or all Indians citizenship, which, in his words, would "degrade that citizenship."[89] The racist notions of civilization and fitness for American citizenship that undergirded Senator Doolittle's critique appear all over the legislative record. In 1866, Congress considered both the Civil Rights Act and the Fourteenth Amendment, and both instruments drew out racial objections to granting rights not only

84. Regrettably, this symposium piece does not have the space to lay out all the ways in which women and members of minority communities sought to use Reconstruction's constitutional text. The cases brought by Myra Bradwell and Virginia Minor considered a broad reading of the privileges and immunities clause. Meanwhile Wong Kim Ark's case and the Chinese community that propelled it to the Supreme Court demanded an inclusive account of birthright citizenship and the freedom of movement that comes with it.

85. Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 555 (2000).

86. *Id.*

87. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866).

88. *Id.* at 2892. In response to the suggestion that Indians are not subjects of the United States, Doolittle replied, "'Subjects of the United States!' Why, sir, they are completely our subjects, completely in our power. We hold them as our wards." *Id.* at 2896.

89. *Id.* at 2893.

Indians, but also to Asians and Romani.[90]

Section One's primary senatorial proponents, Lyman Trumbull of Illinois and Jacob Howard of Michigan, maintained a consistent account of the expected effect of their text. According to Trumbull and Howard, the jurisdiction provision excluded Indians living in tribal communities.[91] In Trumbull's words:

> The provision is, that "all persons born in the United States, and subject to the jurisdiction thereof, are citizens." That means "subject to the complete jurisdiction thereof." . . . What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else. That is what it means. Can you sue a Navajoe Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were, we would not make treaties with them.[92]

Assuming the text does imply "complete jurisdiction," then Trumbull's argument is strong. Treatymaking demonstrated the absence of total jurisdiction over tribes. Yet one has to ask, if the Framers meant to say "subject to the complete jurisdiction thereof," why did they not write Section One that way?

Trumbull and Howard presented a robust account of tribal sovereignty. On the Senate floor, Trumbull identified the crucial ways in which American jurisdiction was incomplete:

> Would the Senator from Wisconsin think for a moment of bringing a bill into Congress to subject these wild Indians with whom we have no treaty to the laws and regulations of civilized life? Would he think of punishing them for instituting among themselves their own tribal regulations? Does the Government of the United States pretend to take jurisdiction of murders and robberies and other crimes committed by one Indian upon another? Are they subject to our

90. Senator Cowan of Pennsylvania prominently rejected the idea that "Chinese and Gypsies" could or should be American citizens. Senator Trumbull, one of the principal authors of both citizenship provisions, responded that the children of those immigrants should be treated exactly the same as the children of German immigrants. *Id.* at 498–99.

91. *Id*. at 2893 (statement of Sen. Trumbull).

92. *Id.*

> jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them.[93]

Speaking in 1866, Trumbull accurately described the limits of congressional oversight in Indian affairs. Ironically, every one of these examples of regulation presumed beyond the reach of Congress's authority would become part of federal Indian policy within two decades.[94] In five years, Congress would forswear treatymaking and instead begin unilaterally imposing so-called civilizing laws and regulations on tribes.[95] In seventeen years, the Bureau of Indian Affairs would impose legal institutions and codes on tribal communities, with federal agents as the ultimate authorities.[96] In nineteen years, Congress would assert federal jurisdiction over murders and robberies committed by one Indian upon another.[97] Eventually, Congress would legislatively disestablish longstanding tribal governments and reservations guaranteed in treaties.[98] But in 1866, Trumbull was right. Tribes enjoyed self-government, and Congress was reluctant to intervene absent authorization by treaty.

Senator Howard reiterated Trumbull's description of the relationship between the United States and Indian tribes. He claimed that "from the beginning [the United States] treat[ed] with the Indian tribes as sovereign Powers."[99] According to Howard, the United States:

> [A]lways recognized in an Indian tribe the same sovereignty over the soil which it occupied as we recognize in a foreign nation of a power in itself over its national domains. They sell the lands to us by treaty,

93. *Id.* In her recent dissenting opinion in *Trump v. CASA, Inc.*, Justice Sotomayor references these same arguments in her account of the history of birthright citizenship. *See* Trump v. CASA, Inc., slip op. at *7 n.1 (U.S. June 27, 2025) (Sotomayor, J., dissenting).

94. *See infra* Section II.C.

95. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71).

96. *See* Letter from H.M. Teller, Sec'y of the Interior, to Hiram Price, Comm'r of Indian Affs., on Rules Governing the Court of Indian Offenses (Mar. 30, 1883), https://commons.und.edu/indigenous-gov-docs/131/ [https://perma.cc/6F4K-96W2]; WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 3 (1966).

97. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153).

98. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887); Curtis Act of 1898, ch. 517, 30 Stat. 495.

99. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866). For more on the founding generation's understanding of tribal sovereignty, see generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014). Justice Gorsuch engages with this robust, originalist account of tribal sovereignty in his constitutional interpretation. *See* M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. 1, 14–15 (2024).

> and they sell the lands as the sovereign Power owning, holding, and occupying the lands.[100]

This description was wholly at odds with Senator Reverdy Johnson's telling of the Doctrine of Discovery, in which he asserted that the United States was entitled to complete jurisdiction over Indians regardless of the treaty history.[101]

Howard argued that not only was their original formulation sufficient to prevent Indian citizenship, but that Doolittle's version would add greater confusion.[102] He worried that courts might read the taxation qualification literally, looking to see whether an Indian was paying state taxes.[103] And this would have two undesirable consequences. First, it would make a class barrier to citizenship for Indians—wealthy, propertied Indians would be citizens when poor Indians without taxable property would not. Second, it would give states a primary role in naturalization through tax policy—a power they should not possess.[104]

Almost every participant in the debate over Doolittle's proposed amendment agreed on the favored outcome: that Indians living in tribal communities should not gain American citizenship. There was apparently one notable exception to this opinion. Senator Saulsbury of Delaware announced that he would be voting against Doolittle's amendment "because if these negroes are to made citizens of the United States, I can see no reason in justice or in right why the Indians should not be made citizens."[105]

The expectations of the provision's proponents may be more valuable than those of its detractors.[106] Doolittle and Johnson, the most vocal critics

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100. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866).

101. *Id.* at 2893. According to Johnson:

> They are within the territorial limits of the United States. . . . [W]hen the United States took possession—England for us in the beginning, and our limits have been extended since—of the territory which was originally peopled exclusively by the Indians, we found it necessary to recognize some kind of a national existence on the part of the aboriginal settlers of the United States; but we were under no obligation to do so, and we are under no constitutional obligation to do so now, for although we have been in the habit of making treaties with these several tribes, we have also, from time to time, legislated in relation to the Indian tribes.

Id.

102. *Id.* at 2895 (statement of Sen. Howard).

103. *Id.*

104. *Id.*

105. *Id.* at 2897. Saulsbury went on, "[i]f our citizens are to be increased in this wholesale manner, I cannot turn my back upon that persecuted race, among whom are many intelligent, educated men, and embrace as fellow-citizens the negro race." *Id.* Interestingly, he did not in fact vote against Doolittle's amendment and instead was marked absent in the tally of yeas and nays. *Id.*

106. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."); Victoria F. Nourse, *A Decision*

of Section One, ultimately voted against the passage of the Fourteenth Amendment.[107] Saulsbury too.[108] We can still read Saulsbury's speech as genuine—if Black people were to become citizens, he would think Indians deserved the same. But he did not want Black people to become citizens in the first place. As Eric Foner observes, prior to ratification, Democratic opponents to Reconstruction claimed the citizen provision was extraordinarily broad in an effort to sink the Fourteenth Amendment.[109] They did not succeed.

After ratification, the Senate Judiciary Committee issued a report on the question of the application of Section One to Indians.[110] The 1870 report echoed Trumbull and Howard, finding that the Fourteenth Amendment had "no effect whatever upon the status of the Indian tribes within the limits of the United States," nor did it annul any existing treaties.[111] The report found that tribes were not subject to the jurisdiction of the United States, and even suggested that "an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void."[112] Moreover, the absence of tribal participation in the amendment process would make any consequent alteration in the relations set out in treaties reprehensible and in violation of the trust relationship.[113]

Unfortunately for tribal sovereignty, this account of federal Indian law would prove to be short-lived.

C. John Elk's Challenge

In 1884, the Supreme Court considered whether John Elk, a Native man, was an American citizen and thus entitled to the right to vote as a resident of Nebraska.[114]

John Elk was indisputably born in the United States. He was a

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Theory of Statutory Interpretation: Legislative History by the Rules, 122 YALE L.J. 70, 118 (2012) ("Fourth Principle: Never Cite Legislative History Without Knowing Who Won and Who Lost the Textual Debate").

107. *Senate Roll Call Vote on the 14th Amendment*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/image/RollCall_681866_14thAmendment.htm [https://perma.cc/E9RG-AVHN].

108. *Id.*

109. FONER, *supra* note 1, at 86.

110. S. REP. NO. 41-268 (1870).

111. *Id.* at 1.

112. *Id.* at 9.

113. *See id.* at 11; *see also* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991) ("[I]t would be absurd to suggest that the tribes surrendered [preexisting sovereignty] in a convention to which they were not even parties.").

114. Elk v. Wilkins, 112 U.S. 94, 95 (1884).

Winnebago tribal member,[115] born within the boundaries of Iowa,[116] and descended from a tribal nation with ancestral lands across the American Midwest.[117] The Winnebago/Ho-Chunk people relocated repeatedly across the nineteenth century, often coerced or pressured by the United States.[118] According to Bethany Berger, Elk was likely a survivor of those many removals.[119] He ultimately chose a life off the reservation, settling down in Omaha, Nebraska.[120] The record does not definitively tell us what motivated Elk to bring this case.[121] Nor can we extrapolate from Elk any universal Native attitude toward citizenship. As discussed at the outset of this Article, different Native nations and individual tribal members had very different stances on American citizenship.[122] What we do know is that John Elk claimed a constitutional right to vote, and through that claim demanded the vindication of his citizenship.[123]

Elk had to prove that he met the second condition of citizenship under the Fourteenth Amendment: subjection to American jurisdiction. Elk asserted that he was subject to the jurisdiction of the United States insofar as he had severed his tribal ties, voluntarily settled in Omaha, Nebraska, and "completely surrendered himself to the jurisdiction of the United States."[124]

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115. Berger, *supra* note 14, at 1215. The Ho-Chunk tribe is now divided into the Ho-Chunk Nation of Wisconsin and the Winnebago Tribe of Nebraska. *Id.* Winnebago is a name used by Algonquian people to describe the Ho-Chunk, and it was adopted by the United States and the Nebraska tribe. *See id.* Today, the Winnebago Tribe of Nebraska refers to its citizens as Ho-chunks or Hocąk. WINNEBAGO TRIBE NEB., https://winnebagotribe.com/ [https://perma.cc/EAT4-RJ8Y]; HO-CHUNK RENAISSANCE, https://hochunklanguage.com/ [https://perma.cc/TB3K-RMF9] (describing the HoChunk Renaissance Project, the language preservation program of the Winnebago Tribe).

116. Berger, *supra* note 14, at 1216.

117. *About Ho-Chunk Nation*, HO-CHUNK NATION, https://ho-chunknation.com/about/ [https://perma.cc/2BNG-BHDC]; *Tribal History*, WINNEBAGO TRIBE NEB., https://winnebagotribe.com /tribal-history/ [https://perma.cc/E5GV-J82D].

118. *See* Berger, *supra* note 14, at 1216–17; *Tribal History*, *supra* note 117. Ho-Chunk people moved from Wisconsin to Iowa to Minnesota to South Dakota to Nebraska. *See* Berger, *supra* note 14, at 1216–17. For the treaties that facilitated these many removals, see Treaty with the Winnebagoes, U.S.-Winnebago, art. I–II, Sept. 15, 1832, 7 Stat. 370; Treaty with the Winnebagoes, U.S.-Winnebago, art. 1–2, Nov. 1, 1837, 7 Stat. 544; Treaty with the Winnebago Indians, U.S.-Winnebago, art. II–III, Oct. 13, 1846, 9 Stat. 878; Treaty with the Winnebagoes, U.S.-Winnebago, art. 1–2, Feb. 27, 1855, 10 Stat. 1172; Treaty Between the United States and the Winnebago Tribe of Indians, U.S.-Winnebago, art. I, Apr. 15, 1859, 12 Stat. 1101; Treaty Between the United States of America and the Winnebago Tribe of Indians, U.S.-Winnebago, art. I, Mar. 8, 1865, 14 Stat. 671. For a thorough study of Ho-Chunk-U.S. relations in the nineteenth century and Ho-Chunk perspectives on American citizenship, see generally KANTROWITZ, *supra* note 33.

119. Berger, *supra* note 14, at 1218.

120. *Id.*

121. In Berger's account, Elk probably sought citizenship "to escape the federal campaign of domination and civilization, a campaign whose costs he already knew far too well." *Id.*

122. VIGIL, *supra* note 15, at 16.

123. Brief of Plaintiff at 1, Elk v. Wilkins, 112 U.S. 94 (1884).

124. *Elk*, 112 U.S. at 99.

While the record does not show whether he was paying taxes,[125] Elk would have been subject to state civil and criminal jurisdiction in his own home. Elk, like Nebraska and the Court, implicitly accepted Trumbull's interpretation of the jurisdiction requirement, that the limited jurisdiction claimed by the United States over Indian reservations was insufficient. Never mind that the United States used its authority over Indian country to effectively force Elk's people to relocate five times, starting in the 1830s.[126]

The Court was not persuaded by Elk's argument. Perhaps the majority would have accepted a claim to citizenship had Elk been able to prove that he was subject to the complete jurisdiction of the United States at the moment of his birth. Facing the facts presented, the majority was skeptical of whether an Indian, born in the United States, could gain citizenship by voluntarily availing himself of American jurisdiction after his birth.[127] To address this question, Justice Gray looked to the Founding generation to understand the bounds of Reconstruction.[128] There, the Court found that the 1790 Constitution regarded Indians as dependents, like wards in a state of pupilage, untaxed and uncounted in the American political body.[129] Moreover, the Court found that the Founders believed "[t]he alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States."[130] At the Founding, Indians could only become citizens through "explicit provisions of treaty or statute."[131] So at the Founding, so too in the late nineteenth century: Elk could only become a citizen through naturalization.[132] The constitutional revolution of Reconstruction would not be allowed to upset this original understanding.

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125. The dissent suggests that even had he been paying taxes, the majority would still have found him to not be a citizen. *Id.* at 110 (Harlan, J., dissenting). Described as living in a wigwam by the river, Elk likely had little if any taxable property. Berger, *supra* note 14, at 1191 (noting that at the time of the suit, "he was an illiterate laborer living in a wigwam on the banks of the Mississippi"). The dissent asserts that, for the Court's analysis, he should be considered subject to state taxation, based on his assertion that he was a bona fide resident of Nebraska. *Elk*, 112 U.S. at 111 (Harlan, J., dissenting).

126. *See* Berger, *supra* note 14, at 1216–17.

127. *Elk*, 112 U.S. at 99.

128. *Id.* This move is analogous to Chief Justice Waite's reasoning in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1875). In *Minor,* the Court unanimously found that women had not gained a constitutional right to vote via the Fourteenth Amendment's Privileges and Immunities Clause. *Id.* In its reasoning, the Court adopted an inherently conservative approach to citizenship, looking only for "the privileges and immunities of citizenship as they existed at the time it was adopted." *Id.* Strikingly, the Court looked not to the 1860s, but to the 1780s, when the Constitution was written and ratified. *Id.* at 172.

129. *Elk*, 112 U.S. at 99.

130. *Id.* at 100.

131. *Id.*

132. *Id.* at 101 (asserting there are "two sources of citizenship, and two sources only: birth and naturalization").

Naturalization could not be initiated through the actions of an individual Indian.[133] It was only up to the United States to determine when a tribe was ready for citizenship.[134] As Justice Gray noted at the outset of the majority opinion, although Elk alleged that he "'completely surrendered himself to the jurisdiction of the United States,' he [did] not allege that the United States accepted his surrender."[135] Thus, absent any specific statute or treaty to naturalize him, Elk remained a noncitizen.[136] Having left his tribal membership to live in the state and now denied American citizenship, Elk was essentially deemed an American subject without access to any of the rights of citizenship.[137] He could only access those rights through a naturalization process set out by Congress.[138]

Justices Harlan and Woods disagreed. They found that Elk should be considered a tax-paying Indian, not because he literally paid taxes, but because he availed himself to the jurisdiction of the state.[139] Thus, they found that as an Indian living in the State of Nebraska and subject to its taxes, Elk was a citizen under the Civil Rights Act of 1866.[140] Reviewing both the language and the legislative history of the Act, Harlan concluded:

> It would seem manifest . . . that one purpose of that legislation was to confer national citizenship upon a part of the Indian race in this country—such of them at least, as resided in one of the States or Territories, and were subject to taxation and other public burdens.[141]

Extrapolating from the Civil Rights Act in this way, Harlan articulated a distinction that was not discussed in the ratification debates. Some Indians already lived in the states, integrated with white Americans. Surely the exception to birthright citizenship was not aimed at these people. Indeed, many eastern states granted Indians citizenship by state legislation before

133. *Id.* at 106–07.
134. *Id.*
135. *Id.* at 99.
136. *Id.* at 109.
137. *See id.* at 122–23 (Harlan, J., dissenting).
138. A contemporary news article reprinted in the Cherokee Advocate in 1887 observed that naturalization laws of the time were only applicable to people of European and African descent. *Indian Citizenship*, CHEROKEE ADVOC. (Tahlequah, Cherokee Nation), Aug. 31, 1887, at 1. There were no provisions for Native people or Asians in the general naturalization laws. *Id.* As discussed in the introduction, Native people could be naturalized through treaties and targeted statutory provisions, namely allotment and marriage. *See supra* Introduction.
139. *Elk*, 112 U.S. at 111 (Harlan, J., joined by Woods, J., dissenting).
140. *Id.* at 112. Harlan notes that everyone agreed that national citizenship would go to "Indians who abandoned their tribal relations, and became residents of one of the States or Territories," and that this understanding was one of President Johnson's express reasons for vetoing the bill. *Id.* at 114.
141. *Id.* at 114.

the Civil War, and others had gained citizenship through treaties.[142]

Given their contemporaneous debate and passage, Harlan and Woods found that the Civil Rights Act and the Fourteenth Amendment should be understood as essentially identical in respect to citizenship for Indians.[143] The majority may have been correct in finding that prior to Reconstruction, citizenship was only conferred on Indians through targeted statutes and treaties.[144] But Congress had the power to change that process, and, according to the dissent, it chose to do so in the Civil Rights Act and the Fourteenth Amendment.[145]

The dissenters rejected the majority's assumption that the jurisdictional element had to exist at the moment of birth. They found "nothing in the history of the adoption of the Fourteenth Amendment [that] . . . justifies the conclusion that only those Indians are included in its grant of national citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States."[146] According to Harlan, the majority read the Fourteenth Amendment as though it said: "All persons *born subject* to the jurisdiction of, or naturalized in, the United States. . . ."[147] In contrast, the actual wording "implies in respect of persons born in this country, that they may claim the rights of national citizenship from and after the moment they become subject to the complete jurisdiction of the United States."[148] Harlan even considers, briefly, whether under *Cherokee Nation v. Georgia* and *United States v. Rogers*, Elk should be considered born within the jurisdiction of the United States regardless.[149]

The dissenters reached their conclusion by utilizing a different approach than the majority. The majority constrained the effects of Reconstruction by basing their understandings of citizenship in antebellum norms. They

142. Georgia, Tennessee, and Mississippi all offered state citizenship to certain Indians who stayed behind during Removal in the 1830s. ROSEN, *supra* note 15, at 157. Northeastern states, most notably Massachusetts, expressly granted citizenship to Indians and Black people in the years following the *Dred Scott* decision. *Id.* The earliest grant of citizenship by treaty was in 1817, in a treaty between the United States and the Cherokee Nation. Treaty with the Cherokees, Cherokee-U.S., art. 8, July 8, 1817, 7 Stat. 156 (offering citizenship to those "who may wish to become citizens of the United States"); *see also* A Treaty of Perpetual Friendship, Cession and Limits, Choctaw-U.S., art. XIV, Sept. 27, 1830, 7 Stat. 333 (offering citizenship to interested members of the Choctaw Nation).

143. *Elk*, 112 U.S. at 115 (Harlan, J., joined by Woods, J., dissenting) ("An examination of the debates, pending the consideration of the amendment, will show that there was no purpose, on the part of those who framed it or of those who sustained it by their votes, to abandon the policy inaugurated by the act of 1866, of admitting to national citizenship such Indians as were separated from their tribes and were residents of one of the States or of one of the Territories outside of any reservation. . . .").

144. *Id.* at 116.

145. *Id.*

146. *Id.* at 116–17.

147. *Id.* at 121 (emphasis in original).

148. *Id.*

149. *Id.* at 121–22.

privileged the expectations of the Founding generation, necessarily limiting Reconstruction within eighteenth-century ideas. In contrast, the dissenters looked first to the Reconstruction Framers—their goals, their debates recorded in the Congressional Globe, and the text they ultimately presented for ratification.[150] Accepting Reconstruction as a major point of discontinuity in American legal history, the dissenters would have had the Court embrace some of the more radical changes permitted by the text of the Fourteenth Amendment.

II. THREE ACCOUNTS OF *ELK V. WILKINS*

This Part takes a closer look at the *Elk v. Wilkins* decision. It presents three perspectives on the case. The first account highlights the racial reasoning expressed by the Court and by Charles Wilkins, the Nebraska registrar of voters whom Elk sued. The racial assumptions on display in this case were not deployed in lieu of legitimate legal reasoning in either the decision or the briefing. However, the expressed notions of Native inferiority can help us understand the justices' attitudes toward John Elk. The second account highlights a robust respect for tribal sovereignty evident in both the Framers' debates and the Court's decision. This Section engages with Bethany Berger's bold endorsement of *Elk v. Wilkins* in her 2016 article, *Birthright Citizenship on Trial*.[151] The third account returns to the question of constitutional interpretation, this time in recognition of massive constitutional change. This perspective focuses on *Elk*'s role in the development of federal Indian policy. The *Elk* decision can be understood as both admirable in its legal reasoning and absolutely devastating in its immediate result. This Section explores the interplay between the Fourteenth Amendment and national legislation.

A. Reasoning from Racial Assumptions

Federal Indian law decisions have been inflected with racial assumptions since Chief Justice John Marshall first articulated the Doctrine of Discovery's meaning for American law.[152] The recognition of aboriginal rights came with disparaging language, describing Native people as "fierce savages, whose occupation was war."[153] The distinct political relationship between tribes and the federal government, referred to often in the decisions

150. *Id.* at 113–14.
151. Berger, *supra* note 14.
152. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
153. *Id.* at 590. These stereotypes predate the Court's interventions into Indian policy. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (referring to "merciless Indian Savages").

recounted in Part I, assumed an American superiority. This is the ward-guardian relationship, expressed first in *Cherokee Nation v. Georgia*[154] and reiterated constantly throughout the history of federal Indian policy.[155] This paradigm casts Indians as wards—a status of children or incapacitated adults—in "a state of pupilage" overseen by the United States.[156] Invocations of the trust relationship allude to this paternalist stance the United States adopted early in its history. Federal Indian policy that embraced tribal separatism should be understood as both a recognition of tribal sovereignty and also an American expectation that Indians were not suitably civilized to integrate with American citizens.[157]

The Nebraska Registrar's brief appeals to notions of tribal inferiority. It ends its argument[158] with sharply racist remarks:

> As *wards* of the government [Indians] are the objects of especial care and protection, as against the superior intelligence, cunning, and treachery of the white man. . . . A greater injustice could not be done to the Indian, than to withdraw the strong hand of government, which has so long sustained him and impose upon him the duties and responsibilities of citizenship.[159]

In other words, Indians, given their presumed racial inferiority, were not ready for the autonomy and responsibility granted to citizens. The brief goes on to imply that withdrawing federal paternalist control over Indians would result in an "almost intolerable burden of vagabondage, pauperism and crime."[160] It ends with a recitation of classic Indian tropes: "Indians are a nation of aristocratic idlers," insofar as "[t]hey know not what it is to labor, to plow and to sow."[161] Indians allegedly have "little knowledge of law save

154. 30 U.S. (5 Pet.) 1, 17 (1831) (asserting that "[Tribes'] relation to the United States resembles that of a ward to his guardian" rather than that of an equal foreign state).

155. TEMIN, *supra* note 15, at 30 (describing how the wardship paradigm was built up through Supreme Court decisions including Elk v. Wilkins, 112 U.S. 94 (1884), *Ex parte* Crow Dog, 109 U.S. 556 (1883), United States v. Kagama, 118 U.S. 375 (1886), and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)); *see* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006).

156. *Cherokee Nation*, 30 U.S. at 17.

157. *See Johnson*, 21 U.S. (8 Wheat.) at 589–90 (describing Indians as "fierce savages" unable to integrate with American society); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 420 (1857) (enslaved party) (describing how Indians were not made citizens because of their "untutored and savage state"); *Ex parte Crow Dog*, 109 U.S. at 571 (justifying tribal separatism in part by claims of Indians' "savage nature"); *Elk*, 112 U.S. at 100 (discussing the history of Indian naturalization requiring "satisfactory proof of fitness for civilized life").

158. Note that most of the brief focuses more on established law and regards tribes like foreign nations. *See infra* Section II.B.

159. Brief and Argument of Defendant in Error at 16, Elk v. Wilkins, 112 U.S. 94 (1884).

160. *Id.* at 17.

161. *Id.*

the *lex talionis,*" the law of revenge.[162] Tribal governments "are the simplest and rudest," and tribal leaders gain their status "by violence . . . without right or justice."[163] According to the brief, Indian citizenship should be a goal—one to be attained only when Indians had achieved a higher degree of civilization "through a course of industry, instruction and constraint, maintained by the government."[164] Until then, it would be absurd to "invest them with all rights and privileges of American citizenship."[165]

The majority decision does not display the same extent of crude racial stereotypes, but nonetheless adopts the same assumption that citizenship should only be made available to Indians who were deemed sufficiently civilized. In other words, Native people could be made citizens once they abandoned their tribal heritage to adopt "the habits and manners of civilized people."[166] In the paternalist framework of the ward-guardian relationship, Indians could not decide for themselves whether they would benefit from citizenship; only the federal government could make that decision. According to Gray:

> [T]he question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.[167]

In this way, the Court assumes tribes to be uncivilized and thus ineligible for citizenship, and individual Indians unable to escape the oppressive ward-guardian relationship without federal approval. These assumptions undergirded contemporary "civilizing" efforts including federal boarding schools[168] and Indian courts and police forces tasked with criminalizing

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162. *Id.* at 18. The brief also refers to Indians as people "who have made the tomahawk the arbiter of their wrongs." *Id.* The violent Indian trope will not relent. Ironically, this is the year after the Court heard *Crow Dog*, where the tribe resolved a murder through restitution, thus averting retaliation, much to the chagrin of the federal authorities. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

163. Brief and Argument of Defendant in Error at 17, Elk v. Wilkins, 112 U.S. 94 (1884).

164. *Id.* at 18.

165. *Id.*

166. *Elk*, 112 U.S. at 109 (quoting United States v. Osborn, 2 F. 58 (D. Or. 1880))

167. *Id.* at 106–07. For commentary on *Elk v. Wilkins* and the enduring use of racist civilization ideas in the present fight for birthright citizenship, see Matthew L.M. Fletcher, *Materials in the Challenge to the Birthright Citizenship Executive Order [and Commentary]*, TURTLE TALK BLOG (Jan. 24, 2025), https://turtletalk.blog/2025/01/24/materials-in-the-challenge-to-the-birthright-citizenship-executive-order-and-commentary/ [https://perma.cc/86AH-XK93] ("The obvious conclusion here is that DOJ is equating foreign-born children in the United States to a class of persons that never existed, subhuman Indigenous people so uncivilized as to be incapable of citizenship.").

168. NEWLAND, *supra* note 19, at 51.

Native religion and culture.[169]

In this period, just as in the days of John Marshall, the Court could produce Indian law decisions that were simultaneously affirming tribal sovereignty and deeply, deeply racist. Only the year before *Elk v. Wilkins*, the Court delivered its decision in *Ex parte Crow Dog,* deemed by some scholars a "high point for the recognition of tribal self-government."[170] In a unanimous decision, the Court found that the federal government lacked jurisdiction to prosecute the murder of one Indian by another on a reservation.[171] In addition to statutes and treaties, the Court looked to the "nature and circumstances of the case," and found it inappropriate for a federal court to assert its laws "over the members of a community separated by race, by tradition, by the instincts of a free though savage life . . . to subject them to the responsibilities of civil conduct."[172] To do so would be to try Indians

> not by their peers, nor by the customs of their people . . . but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[173]

Thus, just one year prior to *Elk*, the Court endorsed an account of limited federal jurisdiction in Indian country premised on tribal inferiority, lawlessness, and savagery. Part of the same justification for tribal self-government had come to serve now as a barrier to citizenship.

B. Affirming Tribal Sovereignty

Despite the racial assumptions evident in the opinion and the briefing discussed above, *Elk v. Wilkins* can nonetheless be regarded as a victory for

169. The Courts of Indian Offenses were established in 1883, pursuant to a letter from the Secretary of the Interior H.M. Teller to Commissioner of Indian Affairs Hiram Price. Letter from H.M. Teller to Hiram Price, *supra* note 96. The courts were created to eradicate "savage and barbarous practices" such as plural marriage, traditional dances, and the work of medicine men. *Id.*; *see also* Stark, *supra* note 20, at 710 (characterizing the courts as colonial tools designed to destroy and replace tribal law). *But see* Alexandra Fay, *Courts of Indian Offenses, Courts of Indian Resistance*, MICH. L. REV. (forthcoming 2026) (documenting how despite these assimilationist directives from Washington, Native judges often co-opted the Courts of Indian Offenses to maintain tribal law and self-government) (on file with the author).

170. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 802 (2006).

171. *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883).

172. *Id.* at 571.

173. *Id.*

tribal sovereignty. Bethany Berger stakes out this account most thoroughly in her 2016 article, *Birthright Citizenship on Trial*. According to Berger, the exclusion of Indians from citizenship "reflected the autonomy of tribal nations" and should be understood as "faithful to the egalitarian principles of Reconstruction."[174] To support the latter claim, Berger looks to the Congressional debates on both the Fourteenth Amendment and the Civil Rights Act.[175] She maintains that the most dedicated, egalitarian Congressmen understood the exclusion of Indians as required by tribal sovereignty.[176] In the words of Senator Trumbull, it would "be a breach of good faith on our part to extend the laws of the United States over the Indian tribes with whom we have these treaty stipulations."[177]

As discussed in Part I, this is a pretty accurate characterization of the provision's authors. Trumbull and Howard believed tribal members to be excluded because they lived outside American jurisdiction.[178] In this way, they regarded tribal nations more like foreign countries. And in the 1860s, this description was not wrong. Despite Marshall's writing on domestic dependent nations and the limitations of Indian title, in the mid-nineteenth century the United States waged wars and made treaties with tribes.[179] The secession movement was a rebellion, because the southern states were considered part of the Union. They did not get a treaty at the conflict's end, unlike the tribes of the Indian Territory that joined them as allies against the Union.[180]

The majority opinion regards Indians as both dependent wards and foreign aliens. Just like in *Crow Dog,* this recognition of tribal autonomy is laced with disparaging language, but nonetheless allows for tribal self-government, at least in theory. In practice, it is less clear how much tribal self-government the United States actually allowed by 1884. Reconstruction marked a turn in the federal government's approach to tribal relations.[181] In

174. Berger, *supra* note 14, at 1197.

175. *Id.* at 1198–99.

176. *Id.* at 1199. She also notes, however, that outside of Congress, it was many of the Northeastern abolitionists who sought Indian citizenship and assimilation. *Id.* at 1201.

177. *Id.* at 1198 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2894 (1866) (statement of Sen. Trumbull)).

178. *See supra* Section I.B.

179. *See, e.g.*, Treaty Between the United States of America and Different Tribes of Sioux Indians, Sioux-U.S. art. I, Apr. 29, 1868, 15 Stat. 635 (ending Red Cloud's War with the United States and asserting that "all war between the parties to this agreement shall for ever cease").

180. Treaty Between the United States of America and the Seminole Nation of Indians, Seminole-U.S., Mar. 21, 1866, 14 Stat. 755; Treaty Between the United States of America and the Choctaw and Chickasaw Indians, Apr. 28, 1866, 14 Stat. 769; Treaty Between the United States of America and the Creek Nation of Indians, Creek-U.S., June 14, 1866, 14 Stat. 785; Treaty Between the United States of America and the Cherokee Nation of Indians, Cherokee-U.S., July 19, 1866, 14 Stat. 799.

181. SMITH, *supra* note 19, at 318; COHEN'S HANDBOOK, *supra* note 18, at § 2.07.

1869, one year after the ratification of the Fourteenth Amendment, President Grant announced his Peace Policy for Indian affairs in his inaugural address, promising to "civilize" Indians and procure their citizenship.[182] The Grant Administration recruited churches to the civilizing mission, in "the most extensive state and church interlocking at the federal level in the nation's history."[183] These religious groups were involved in the federal boarding schools, initiated the same year.[184] The Grant Administration doubled the budget for Indian Affairs, enabling a more aggressive and invasive approach to tribes resisting assimilation.[185] As previously cited, Congress foreswore treatymaking in 1871. That meant in practice, after *Elk*, Indians could only be naturalized by statute, through unilateral federal action.

To be sure, formal recognition of tribal sovereignty matters. Marshall's decision in *Worcester v. Georgia* was a pillar of federal Indian law, even though President Andrew Jackson's removal policy robbed the Cherokee Nation of actual justice.[186] The Court's adherence, at least on a formal level, to that foundational principle of tribal sovereignty would prove critical to President Nixon's initiation of the era of tribal self-determination a century later.[187] Today, we can celebrate the pro-sovereignty formalism of *Elk*, and embrace the majority's finding that individuals cannot single-handedly throw off the effects of sovereignty, even if John Elk himself did not benefit

182. *See* President Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), https://www.nps.gov/articles/000/president-ulysses-s-grant-s-first-inaugural-address-march-4-1869.htm [https://perma.cc/C725-THB6], ("I will favor any course toward [the Indians] which tends to their civilization and ultimate citizenship."); SMITH, *supra* note 19, at 318. Earlier in the 1860s, the United States built detention camps on reserved tribal land without tribal consent. *See* Blackhawk, *supra* note 52, at 2234.

183. SMITH, *supra* note 19, at 318.

184. *Id.* at 320. Boarding schools became federal policy under Grant's presidency, but the first federal boarding school was opened on the Yakama Reservation in 1860, even before the framing of the Fourteenth Amendment. This institution was authorized by treaty, and it imposed the same brutal, abusive assimilationist programming for Native children featured in the later schools. *See* Donald W. Meyers, *It Happened Here: Indian Boarding School Established at Fort Simcoe*, YAKIMA HERALD-REPUBLIC (Feb. 17, 2019), https://www.yakimaherald.com/news/local/it-happened-here-indian-boarding-school-established-at-fort-simcoe/article_c062dddc-3269-11e9-b45c-132b57505e66.html [https://perma.cc/33YU-S3V4].

185. SMITH, *supra* note 19, at 319.

186. *See* Dylan R. Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of* Worcester v. Georgia, 52 SW. L. REV. 255, 256–57 (2023).

187. *See* Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1971). In the years following Nixon's address, federal Indian policy took a meaningful turn toward tribal self-determination. *See* Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423) (allowing tribes to contract with the federal government to operate federal programs serving tribes); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified at 25 U.S.C. §§ 5361–77) (amending the Indian Self-Determination and Education Assistance Act of 1975 to establish a permanent program of Tribal Self-Governance within the Department of the Interior); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–63) (disrupting a long history of Native family separation by recognizing and enhancing tribal authority in the area of child welfare).

from the decision.[188]

Berger's triumphant depiction of *Elk v. Wilkins* is complemented by her scathing characterization of citizenship.[189] She asserts that American citizenship was not a shield from federal abuse, as individuals like Elk and Wong may have believed,[190] but rather a tool of assimilation.[191] Citizenship and cultural assimilation were certainly entwined ideas in the minds of federal bureaucrats throughout this period. Citizenship premised on the elimination of tribal relations was incredibly destructive. But I would suggest that Berger's condemnation of Indian citizenship in Elk's case is perhaps too informed by hindsight.[192] Had the Court not categorically excluded Native people from constitutional birthright citizenship and instead disentangled citizenship from assimilation policy, perhaps citizenship could have truly been a source of liberty, as Zitkala-Ša and presumably John Elk believed. American citizenship is also defined by the political outsiders who seek it, not just the in-group with the most power to police it.

Counterfactual thought experiments notwithstanding, Berger's intervention raises a critical question: what are the actual benefits of citizenship for minorities in the United States? What constitutional

188. *But see* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (considering whether a tribe voluntarily disbanded and ceased to exist).

189. Berger's account of citizenship as a false promise of liberation echoes political theorist Iris Marion Young's influential 1989 article. Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 250 (1989).

190. Berger, *supra* note 14, at 1191 ("For both Indians and Chinese, formal citizenship was initially believed to limit federal authority, but this limitation soon evaporated.").

191. *See id.* at 1208–10. Berger focuses on how in this time, federal actors tied citizenship to notions of civilization and programs designed to break up tribal relations. The promise of the full rights of citizenship were thus premised on assimilation to white American norms, the abandoning of tribal community, and integration into state jurisdiction, taxation, and private property. As Berger documents, citizenship premised on the destruction of tribes proved to be very harmful to many Native individuals. *Id.*

192. We need not concede that citizenship is more about cultural conversion and less about enjoying common rights, privileges, and power within our political system. Berger suggests that people like John Elk and Wong Kim Ark were not actually interested in citizenship *qua* citizenship, just freedoms from the federal government. I wonder, how useful is this distinction? Isn't freedom a key aspect of American citizenship to many Americans? Yes, Chinese Americans understood citizenship as a means to power and protection. In this way, the legal team supporting Wong Kim Ark strategically embraced citizenship much like Zitkala-Ša and like-minded Native activists. Citizenship in the American tradition has carried many meanings. *See* Linda Bosniak, *Varieties of Citizenship*, 75 FORDHAM L. REV. 2449, 2449 (2007) (remarking how the concept of citizenship evokes "the enjoyment of rights . . . political and civic engagements, . . . experiences of collective identity and solidarity, and . . . formal national . . . status"). Minority communities have often sought individual rights within American constitutional law in pursuit of collective self-determination and liberation. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). Do they not have a role in defining citizenship too?

protections attach specifically to citizenship, as opposed to those rights and due process guaranteed to "all persons"? Citizenship is a prerequisite for voting, jury service, and office holding. It guarantees the right to petition the government.[193] It promises protection against deportation.[194] It promises protection on the high seas and against foreign powers.[195] It guarantees the right to travel.[196] The very notion of citizenship wields rhetorical force, evoking equality and belonging.[197] The Reconstruction Framers certainly considered it a highly meaningful status,[198] even if the Court stripped away most of the privileges the Framers intended it to convey.[199]

C. Turning Point in Federal Indian Policy

The Court was loyal to the principle of tribal sovereignty in *Elk v. Wilkins*. But the very next year, when Congress defied the jurisdictional boundaries the Court had set in *Crow Dog* and affirmed in *Elk*, the Court acquiesced.[200] Instead of defending tribal self-government, the Court embraced the doctrine of Congressional plenary power in Indian Affairs.[201] The limits previously respected by the federal government gave way, and only the paternalist, civilizing mission of the ward-guardian relationship remained.

Elk should therefore be understood as part of a distinctive inflection point in the history of federal Indian law. Caught between Reconstruction and the Allotment Era, between *Crow Dog* and *Kagama*, the *Elk* decision occupied an exceptionally dynamic moment for the Court and the country. A generous reading of *Elk* regards the Court as holding fast to the

193. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

194. *But see* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011).

195. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79.

196. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969); United States v. Guest, 383 U.S. 745, 758 (1966); Twining v. New Jersey, 211 U.S. 78, 97 (1908).

197. *See* Julian Wonjung Park, Note, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology*, 96 CALIF. L. REV. 999, 1007 (2008); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 564–65 (2006). Scholars of citizenship and immigration recognize inherent tensions between citizenship as a promise of universal equality and citizenship as a delineation between political insiders and outsiders. *See id.* at 574; Bosniak, *supra* note 192, at 2451.

198. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard) (referring to the question of citizenship as the great desideratum of Congress).

199. *See* Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1, 1 (1996).

200. United States v. Kagama, 118 U.S. 375 (1886).

201. *See* Ishitani & Fay, *supra* note 99; Blackhawk, *supra* note 52, at 2233 (identifying *Rogers* as the actual origin of the plenary power doctrine).

constitutional principle of tribal sovereignty, despite the federal government's many contemporaneous moves to undermine that principle. In this reading, the Court rightfully understood that John Elk was already a citizen of a sovereign nation and that finding him to be an American citizen would have been an affront to that nation. As suggested above, this could be true on a formal, doctrinal level, even if the material conditions of the Ho-Chunk and Winnebago Nations looked more like those of a conquered and persecuted people than those of a respected sovereign.[202]

A more cynical reading looks to the racism inherent in the Court's decision, to suggest that the Court was not interested in recognizing constitutional rights for Indians that may have impeded the federal government's assimilation program. In this account, paternalist policy concerns led the Court to ignore the various ways in which Indians were already subjected to the jurisdiction of the United States, to find the outcome that would not upset the ward-guardian relationship.

Either way, the Court's course relied on an older account of American jurisdiction in Indian country to practically prevent Native people like John Elk from developing a new strategy for protection against the federal government. The old account supplied its own strategy for protection—the recognition of sovereignty and the powers of self-government beyond the reach of the federal government. But Elk had hardly left the courtroom when the justices abandoned this older account of limited jurisdiction, removed the original means of protection, and then failed to revisit the question of citizenship.

The 1880s heralded a second major episode of structural constitutional change. Reconstruction is rightfully regarded as a revolutionary moment in American legal history, fundamentally reorganizing the political relationships between the states, the federal government, and individual Americans. Reconstruction was brought about by a terrible Civil War and formalized through three constitutional amendments. Yet formal Article V change is not the only way to restructure the American political system.[203] In the late nineteenth century, Congress rejected longstanding traditions of tribal separatism and tribal sovereignty, and reordered the relationships between tribes, states, the federal government, and individual Indians through legislation. The 1887 Dawes Act and associated targeted allotment

202. *See supra* Section II.B.

203. *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (describing constitutional moments that do not always follow the Constitution's Article V amendment process).

acts transformed Indian country, physically and politically.[204] Through these policies of reservation destruction, state jurisdiction crept further into Indian country.[205] As Indian allottees gained American citizenship, they stepped into new political relationships with both the federal government and the states. Robbed of their land bases and communal land ownership, tribes were transformed.[206]

Legislative constitutionalism, an approach to constitutional interpretation that centers Congress as the primary actor in constitutional lawmaking, describes this kind of informal constitutional change. Under this theory, the judiciary serves a "vital but secondary role."[207] It is an alternative to the dominant juricentric model of constitutionalism.[208] Maggie Blackhawk suggests that Indian law is an exceptional area of American law, in which constitutional interpretation and development is primarily done by Congress.[209] Thanks to Congress's plenary power over Indian affairs, structural change relating to Indians can bypass the amendment process.

The Indian Citizenship Act of 1924 is a clear example of legislated constitutional change.[210] The Act brought a class of people into the American polity. It also altered the conception of American citizenship by allowing for dual allegiance—tribal members no longer had to abandon tribal membership to be American citizens.[211]

By mapping the rapid series of events that generated the *Elk* moment, a second, subtler example of legislative constitutional change becomes apparent. In denying John Elk citizenship under the Fourteenth Amendment, the Court defined a class of people: Indians born outside the full jurisdiction of the United States. In subsequent legislation, Congress

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204. *See* Kevin K. Washburn, *Landback as Federal Policy*, 71 UCLA L. REV. (forthcoming 2025) (manuscript at 9–10) (on file with the author); LEWIS MERIAM ET AL., INST. FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION 7 (1928).

205. Many allotment acts expressly diminished reservations, legally availing former Indian country land to state jurisdiction. Other reservations were never formally diminished, but states acted as though they were, asserting jurisdiction despite an absence of clear legislative direction. *See* McGirt v. Oklahoma, 591 U.S. 894 (2020). Allotments were subjected to state taxation, which hastened the transfer of tribal lands into non-Indian hands. Washburn, *supra* note 204 (manuscript at 9).

206. *See* MERIAM ET AL., *supra* note 204, at 6–7 (identifying allotment as the root cause of rampant poverty in Indian country); Stark, *supra* note 20, at 731–32 (observing that allotment undermined tribal customary law).

207. Blackhawk, *supra* note 52, at 2216; *see also* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (assigning "equal interpretive authority to Congress and the Court").

208. Blackhawk, *supra* note 52, at 2209–10.

209. *Id.* at 2212–19.

210. *Id.* at 2213, 2237.

211. *Id.* 2213–14.

claimed full jurisdiction over all reservations, thus emptying that class. If the Court had revisited the question of citizenship for Indians born on reservations after 1890, it should have produced the opposite outcome.

Of course, neither Congress nor the Court acknowledged that the jurisdictional development neutralized the rule of *Elk*. Indeed, Congress's assumptions that Indians awaited citizenship fueled a new era of American imperialism.

III. ON CITIZENS AND SUBJECTS

This final Part briefly examines the aftermath of *Elk v. Wilkins*. It first looks to the role of citizenship in federal Indian policy in the decades following the decision. It then considers *Elk* in the context of the American Empire's expansion overseas.

A. Citizenship as Assimilation

In the years following *Elk v. Wilkins*, Indian citizenship remained in the attention of both Congress and the Office of Indian Affairs. The architects of allotment policy and the Commissioner of Indian Affairs both understood citizenship as inextricably tied to development in terms of civilization, such that the full rights promised by the Fourteenth Amendment could only be earned through proof of assimilation.

In 1885, Commissioner of Indian Affairs John D.C. Atkins (1885–88) included a lengthy discussion on Indian citizenship in his annual report to the Secretary of the Interior.[212] He opened the discussion by immediately tying citizenship to civilization:

> When the farm and the school have become familiar institutions among the Indians, and reasonable time has intervened for the transition from barbarism or a semi-civilized state to one of civilization, then will the Indian be prepared to take upon himself the higher and more responsible duties and privileges which appertain to American citizenship.[213]

According to Commissioner Atkins, would-be citizens must rise to a level of American civilization, measured by industry and assimilation. He presumed Native people to occupy a state of barbarism, or at best a "semi-

212. J.D.C. ATKINS, DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at vi–viii (D.C., Gov't Printing Off. 1885).

213. *Id.* at vi.

civilized state."[214] In this framing, citizenship was an award and incentive for compliance with federal policy. Atkins asserted that once "their upward progress has been attained they will be a part and parcel of the great brotherhood of American citizens, and the last chapter in the solution of the Indian problem will be written."[215] When Native people became citizens, the colonial project would be complete.[216]

Meanwhile in Congress, Senator Henry Dawes responded to the Court's ruling in *Elk*. A Republican Senator from Massachusetts, Dawes is best known for the 1887 General Allotment that drastically transformed Indian country.[217] Dawes's new bill declared:

> [E]very Indian born within the territorial limits of the United States to whom allotments shall have been made . . . under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner . . . affecting the right of any such Indian to tribal or other property.[218]

According to Atkins, this legislation was designed to reverse *Elk v. Wilkins* for John Elk and others sharing his factual circumstances.[219] Individual actors like Elk should be allowed to voluntarily separate themselves from their tribes, take up residence in the states, and gain

214. *See id.*

215. *Id.* Not every Commissioner of Indian Affairs shared this view that more proofs of civilization must come before citizenship. Atkins's predecessor Hiram Price recommended that all new states to the Union ought to confer citizenship to Native people residing within their borders and assert full jurisdiction over them. This plan would have enforced "civilization" and citizenship contemporaneously. H. PRICE, DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR, at xi (D.C., Gov't Printing Off. 1883).

216. *See* Lauren van Schilfgaarde, *(Un)Vanishing the Tribe*, 66 ARIZ. L. REV. 409, 411–12 (2024) (discussing the longstanding vanishing Indian myth in various modes, including assimilation).

217. *See supra* Section II.C. He is also known for his support for the creation of Yellowstone National Park, the first United States National Park. *See* Megan Kate Nelson, *The Big Business Politics Behind the Formation of Yellowstone National Park*, TIME (Mar. 1, 2022, 9:23 AM), https://time.com/6145391/the-big-business-politics-behind-the-formation-of-yellowstone-national-park/ [https://perma.cc/9Q3D-CN86].

218. Indian General Allotment Act, ch. 119, § 6, 24 Stat. 388, 390 (1887).

219. 1885 COMM'R OF INDIAN AFFS. ANN. REP., at vii–viii.

citizenship—so long as they sufficiently adopted the habits of civilization.[220] In this way, Dawes, like Atkins, also understood Indian citizenship to be innately tied to Indian civilization. Yet Atkins worried that Dawes's bill was too broad and too fast, and that citizenship should be conferred more gradually.[221] Despite the Commissioner's concerns, the Dawes Act passed with the broad citizenship language intact.[222] According to the Commissioner of Indian Affairs, the Dawes Act immediately conferred citizenship on 10,122 Indians upon enactment.[223] By 1891, over 16,000 Indians had gained citizenship by allotment.[224] By the passage of the Indian Citizenship Act in 1924, approximately two-thirds of Indians were already citizens.[225] Legislative constitutionalism strikes again (and again).

As Lauren van Schilfgaarde asserts, federal Indian policy worked to vanish Native nations by "emptying the Tribes of their members" in the late nineteenth century.[226] The federal government leveraged citizenship, allotment, and blood quantum requirements in an effort to wholly assimilate Native people into the American polity and thereby erase tribal sovereignty.[227] In the words of Commissioner Thomas Jefferson Morgan (1889–93), it was a "great political truth" that "[t]here is no place within our borders for independent, alien governments, and the Indians must of necessity surrender their autonomy and become merged in our nationality."[228] To this end, Native people necessarily had to "abandon their

220. At the turn of the twentieth century, the measures of civilizations included private land ownership, Western clothing, formal education, adherence to Anglo-American gender norms, and agricultural work (or other acceptable forms of "industry"). *See* CATHLEEN D. CAHILL, FEDERAL FATHERS AND MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869–1933, at 45 (2011) (describing federal oversight of farming, industry, and gendered housekeeping); Indian General Allotment Act § 6 (premising citizenship on private land ownership); 1900 COMM'R OF INDIAN AFFS. ANN. REP. 638, 656 (tracking the number of Native people who wore "citizens' dress" meaning Western-style clothing); R. H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 NAT'L CONF. OF CHARITIES & CORR. 45, 46 (1892) (promoting Indian boarding schools as a means of civilization, to "[k]ill the Indian . . . and save the man").

221. ATKINS, *supra* note 212, at viii.

222. Indian General Allotment Act § 6.

223. T.J. MORGAN, DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., SIXTIETH ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF THE INTERIOR 21 (D.C., Gov't Printing Off. 1891).

224. *Id.* This count excluded allottees in the newly formed Territory of Oklahoma. *Id.* Meanwhile, Indians in the Indian Territory were categorically deemed eligible for citizenship through the Oklahoma Organic Act of 1890. Act of May 2, 1890, 26 Stat. 81 § 43 ("[A]ny member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States . . . ."). Commissioner Morgan interpreted this provision as "provid[ing] a means of naturalization . . . in addition to that provided by the general allotment act." MORGAN, *supra* note 223 at 22.

225. COHEN'S HANDBOOK, *supra* note 18, at § 17.01.

226. van Schilfgaarde, *supra* note 216, at 429.

227. *Id.* at 430–31.

228. MORGAN, *supra* note 223, at 6.

tribal organizations . . . and accept in lieu thereof American citizenship and a full participation in all the riches of our civilization."[229]

In this way, naturalization remained transactional rather than a matter of birthright. For many, the cost of wholly abandoning tribal identity was certainly too high. Only with the passage of the Indian Citizenship Act of 1924 did Indian citizenship finally depart from imposed metrics of civilization.[230] By limiting the application of constitutional birthright citizenship, the *Elk* Court allowed federal actors like Atkins, Morgan, and Dawes to define citizenship as something to be earned, a status contingent on feats of assimilation.

B. Elk *and American Empire*

Elk v. Wilkins was emblematic of an expanding American Empire. The American nineteenth century is characterized by territorial expansion, from the Louisiana Purchase in 1803, to the Mexican Cession of 1848, to the purchase of Alaska in 1867.[231] At its tail end in 1898, the United States acquired Hawai'i, following the American-led overthrow of the Hawaiian Kingdom, and Guam, Puerto Rico, and the Philippines at the conclusion of the Spanish-American War.[232] These latest acquisitions marked a "radical turn" in American imperialism, bringing heavily populated overseas territories under the American flag,[233] and inspiring extensive political debate over the legal status of their inhabitants.[234]

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229. *Id.*

230. 8 U.S.C. § 1401(b); COHEN'S HANDBOOK, *supra* note 18, at § 17.01(3) ("Historically, extensions of citizenship were closely tied to efforts to forcibly assimilate Indians and destroy their tribes.").

231. *See* Cleveland, *supra* note 25, at 164–65 (listing these expansions along others such as the 1853 Gadsden Purchase and the 1856 Guano Islands Act).

232. *See id.* The peace treaty was signed in December of 1898 and ratified by Congress in February 1899. Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

233. Cleveland, *supra* note 25, at 207.

234. *Id.* at 208–09. As Cleveland documents, the Secretary of War asserted in 1899 that the peoples of the territories

> have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution, . . . not because these provisions were enacted for them, but because they are essential limitations inherent to the existence of the American government.

Id. at 210. Yet racist, nativist attitudes argued for exceptional treatment for these predominantly non-white peoples. *Id.* at 215–16 (describing Supreme Court justices concerned with whether the people of the territories were sufficiently civilized to be incorporated into the American polity).

Like John Elk, the people of the overseas territories challenged the limits of the Constitution. In a series of decisions known as the *Insular Cases*,[235] the Supreme Court found once again that constitutional rights do not extend to colonized people in the American Empire.[236] In *Downes v. Bidwell*[237] and *Goetze v. United States*,[238] the United States argued that Puerto Rico was not part of the United States for the purposes of federal law or constitutional protections. In its briefing for *Goetze*, the United States supported this claim with the argument that Puerto Ricans could not be made citizens;[239] rather, they were only subjects.[240]

The Court sided with the United States. It held that Puerto Rico was "a territory appurtenant and belonging to the United States, but not a part of the United States" for the purposes of constitutional interpretation.[241] Puerto Rico existed outside the Constitution, governed by the near limitless plenary power of Congress.[242]

Although the issue in *Downes* did not directly concern the question of citizenship, the Justices, like the advocates representing the United States, nevertheless worried about the prospect of territorial subjects becoming citizens. In his opinion for the Court, Justice Brown observed that such a development would be "extremely serious," and that "it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States."[243] In his concurring opinion, Justice White similarly fretted about the "bestowal of citizenship on those absolutely unfit to receive it."[244]

Once again, citizenship was tied to perceived notions of civilization and Americanness. Once again, citizenship for the colonized peoples of the United States was postponed into the twentieth century. Just like John Elk,

235. De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. N.Y. & Porto Rico S.S. Co., 182 U.S. 392 (1901).

236. In her monumental law review article, *Powers Inherent in Sovereignty*, Sarah Cleveland maps out how the constitutional status of the people of the territories is theoretically linked to the status of Indians and immigrants. Arguments from Indian law informed the Court in the *Insular Cases*. *See* Cleveland, *supra* note 25, at 218–219.

237. 182 U.S. 244 (1901).

238. 182 U.S. 221 (1901).

239. Cleveland, *supra* note 25, at 217–18.

240. "To be called an American subject . . . is no disgrace." *Id.* at 218 (quoting Brief for the United States at 72, Goetze v. United States, 182 U.S. 221 (1901) (No. 340)).

241. *Downes*, 182 U.S. at 287.

242. *Id.* at 279–80.

243. *Id.*; *see also* Cleveland, *supra* note 25, at 266. For a more recent account of *Insular Cases* and their present-day meaning, see generally Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against the Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022).

244. *Downes*, 182 U.S. at 306 (White, J., concurring).

the people of Puerto Rico and Guam ultimately received citizenship by federal legislation, not the Fourteenth Amendment.[245]

CONCLUSION

Elk v. Wilkins is a peculiar case in the Indian law canon. It stands for a robust, originalist account of tribal sovereignty. It is simultaneously burdened with racist and paternalist baggage. This symposium Article uses *Elk* to explore a pivotal moment in federal Indian policy, in which longstanding rules were rapidly discarded in service of a newly emboldened American imperialism.

While this Article set out to interrogate a unique episode of American history, its author cannot help but notice the troubling new relevance of *Elk*. As this Article was written, the Department of Justice cited *Elk* to defend an executive order withholding birthright citizenship from the children of immigrants of varying legal status.[246] Navajo Nation responded to reports that United States Immigration and Customs Enforcement agents were detaining tribal members.[247] The President of the United States called for overseas territorial expansion[248] and issued an executive order to rename the tallest mountain in North America to honor the president who won the Spanish-American War, replacing the Indigenous Athabaskan name.[249] The nineteenth century appears to be making a comeback, and birthright citizenship is once again before the federal courts.

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245. Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917); Organic Act of Guam, ch. 512, 64 Stat. 384 (1950) (codified at 48 U.S.C. § 1421). *But see* Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1249 (2019) (noting how American citizens in the Territories lack full political rights to this day).

246. Opposition to Plaintiff States' Motion for a Temporary Restraining Order at 12–13, Washington v. Trump, 2025 WL 272198 (W.D. Wash. Jan. 23, 2025) (No. 2:25-cv-00127); Brief for Appellants at 1, Washington v. Trump, No. 25-807 (9th Cir. Mar. 7, 2025); Application for a Partial Stay of the Injunction Issued by the United States District Court for the Western District of Washington at 7, Trump v. Washington, No. 24A885 (U.S. Mar. 13, 2025).

247. Gabe Trujillo, *Navajo Nation Council Calls for Action as Its Members Reportedly Are Detained in ICE Deportation Raids*, 12 NEWS (Jan. 24, 2025, 12:03 PM), https://www.12news.com/article/news/local/arizona/navajo-council-raises-concerns-about-deportation-raids/75-8bb20b5e-a416-4915-8186-e0a5dd87a709 [https://perma.cc/B584-BANZ].

248. Ian Aikman, *Trump Says He Believes US Will 'Get Greenland*,*'* BBC (Jan. 25, 2025), https://www.bbc.com/news/articles/crkezj07rzro [https://perma.cc/VU2C-PFGW].

249. Exec. Order No. 14,172, 90 Fed. Reg. 8629 (Jan. 20, 2025) ("Restoring Names that Honor American Greatness"). While President McKinley had no ties whatsoever to Alaska and never once visited the state, he nonetheless embodied "American greatness" according to the executive order, not least because of his "expansion of territorial gains for the Nation." *Id.*