INDIANS NOT TAXED

BIRTHRIGHT CITIZENSHIP AND INDIANS

TICA-ASB CLE 2026

ILLUSTRATION COURTESY OF EMMETT SINGEL-FLETCHER

Fourteenth Amendment Text

Section 1

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Operative provisions are the first sentences in each section.

Elk v. Wilkins

The 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. They were never deemed citizens of the United States except under explicit provisions of treaty or statute to that effect either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life, for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, 7 Stat. 159, 211, 236, 335, 483, 488; *Wilson v. Wall,* 6 Wall. 83; Opinion of Attorney General Taney, 2 Opinions of Attorneys General 462; in 1855 with the Wyandotts, 10 Stat. 1159; *Karrahoo v. Adams,* 1 Dillon 344, 346; *Gray v. Coffman,* 3 Dillon 393; *Hicks v. Butrick,* 3 Dillon 413; in 1861 and in March, 1866 with the Pottawatomies, 12 Stat. 1192; 14 Stat. 763; in 1862 with the Ottawas, 12 Stat. 1237; and the Kickapoos, 13 Stat. 624; and Acts of Congress of March 3, 1839, c. 83, § 7, concerning the Brothertown Indians, and of March 3, 1843, c. 101 § 7, August 6, 1846, c. 88, and March 3, 1865, c. 127 § 4, concerning the Stockbridge Indians, 5 Stat. 351, 647; 9 Stat. 55; 13 Stat. 562. *See also* treaties with the Stockbridge Indians in 1848 and 1856, 9 Stat. 955; 11 Stat. 667; 7 Opinions of Attorneys General 746.

112 U.S. 94, 100 (1884)

ELK IS WRONG

"WHETHER AN INDIAN, BORN A MEMBER OF ONE OF THE INDIAN TRIBES WITHIN THE UNITED STATES, IS, MERELY BY REASON OF HIS BIRTH WITHIN THE UNITED STATES AND OF HIS AFTERWARDS VOLUNTARILY SEPARATING HIMSELF FROM HIS TRIBE AND TAKING UP HIS RESIDENCE AMONG WHITE CITIZENS, A CITIZEN OF THE UNITED STATES. . . ." 112 U.S. AT 99.

SMALL ACTS OF DEFIANCE ADD UP

WHETHER AN INDIAN:
1) SEVERED TRIBAL RELATIONS
2) GIVEN UP TREATY RIGHTS
3) RELINQUISHED TRIBAL MEMBERSHIP
4) LIVES AMONG WHITE PEOPLE
5) SPEAKS ENGLISH
6) GOES TO CHRISTIAN CHURCHES
7) IS DEPENDENT
8) OR IS ALIEN

IS IRRELEVANT TO SECTION 1 OF THE 14TH AMENDMENT.

HOW ELK WORKS:

QUESTION PRESENTED: WHETHER AN INDIAN IS "SUBJECT TO THE JURISDICTION" OF THE UNITED STATES UNDER SECTION 1.

OPERATIVE TEXT: THE **ELK** COURT LOOKED TO THE "**INDIANS NOT TAXED**" CLAUSE OF SECTION 2 OF THE FOURTEENTH AMENDMENT.

OPERATIVE PRECEDENT: THE **ELK** COURT THEN LOOKED **DRED SCOTT** FOR A GUIDANCE ON THE "INDIANS NOT TAXED" CLAUSE – INDIANS COULD [IN THEORY] BECOME CITIZENS IF THEY LEFT THEIR "NATION OR TRIBE, AND T[OOK] UP [THEIR] ABODE AMONG THE WHITE POPULATION[.]" 60 U.S 393, 404 (1856)

ELK'S CONCLUSION: BUT INDIANS ARE **ALIENS** SO THEY CANNOT BECOME CITIZENS WITHOUT CONGRESSIONAL AUTHORIZATION

HAYWOOD OUBRE, "YOU ARE CANNON FODDER"

How Birthright Citizenship Should* Work for Indians

1) Indians are under the jurisdiction of the United States
2) Therefore, Indians enjoy birthright citizenship

* This is **exactly** how birthright citizenship works for Indians **now** – statutory citizenship laws are nothing more than enforcement laws

But what about Indians not taxed?

1) Indians not taxed are Indians who are not citizens
2) Indians must consent to citizenship
3) Indians have the right to exit

THE GOVERNMENT HASN'T REALLY THOUGHT THIS THROUGH

"UH, I THINK SO?"
— JOHN SAUER, SOLICITOR GENERAL

"I'M NOT SURE — I'LL HAVE TO THINK THAT THROUGH."
— SAME DUDE WHO STAYED UP ALL NIGHT BEFORE ORAL ARGUMENT HOPING NO ONE WOULD ASK ABOUT INDIANS.

SO, ARE 21ST CENTURY AMERICAN INDIANS CITIZENS BY BIRTHRIGHT?

YES, SO WERE 18TH CENTURY AMERICAN INDIANS, BUT ASSUME FOR A MOMENT THAT, NO, INDIANS WERE NOT. WHAT DOES THAT MEAN FOR US NOW?

ASSUME FURTHER CONGRESS REPEALED ALL THE INDIAN CITIZENSHIP LAWS.*

IF THE REPEAL WAS RETROACTIVE, IT MIGHT MEAN THAT INDIANS WHO WERE BORN ON INDIAN RESERVATIONS TO NON-CITIZEN PARENTS ARE NOT CITIZENS BY BIRTHRIGHT.

IT WOULD **DEFINITELY** OPEN THE DOOR TO STATE LEGISLATURES DENYING THE RIGHT TO VOTE TO RESERVATION INDIANS, IF FOR NO OTHER REASON THAT TO SEE IF IT WOULD SURVIVE CONSTITUTIONAL CHALLENGE.

* THIS IS FUN, RIGHT? THE GOVERNMENT FUCKING WITH OUR LIVES? WHAT A LOUSY GODDAM GOVERNMENT.