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The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed"

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The phrase *excluding Indians not taxed* appears in both Article I and the Fourteenth Amendment of the US Constitution. This essay examines the phrases *excluding Indians not taxed* and *subject to the jurisdiction* of sections 1 and 2 of the Fourteenth Amendment as they apply to Indians. This essay, through analysis of constitutional and legislative history, will demonstrate that *tribal* Indians were purposefully excluded from citizenship.

The drafters of the Fourteenth Amendment clearly defined *tribal* Indians as "Indians not taxed," as not "subject to the jurisdiction" of the United States. This essay delineates the jurisdictional links between taxation and citizenship and discusses how the courts have repeatedly misconstrued the pertinent phrases. Solid arguments will verify that acts which imposed citizenship on all Indians, contrary to the Fourteenth Amendment prohibition against tribal Indian citizenship, are unconstitutional. Finally, this essay substantiates that "Indians not taxed" was defined to mean that *tribal* Indians are not taxable as long as they remain subject to the jurisdiction of their tribe in any degree and hold tribal allegiance in any degree.

The only place these phrases are defined in a constitutional setting is in the 1866 debates related to the Fourteenth Amendment as recorded in the *Congressional Globe*.[1] Extensive quotations, in context, are necessary to assure authentic representation of the drafters' intent.

THE CIVIL RIGHTS ACT OF 1866—CONGRESSIONAL DEBATE

Congress first granted full citizenship to former slaves with the Civil Rights Act of 1866 ("the Act").[2] The Act also excluded *tribal* Indians from citizenship.

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During the debate, "excluding Indians not taxed" was defined to mean *tribal* Indians, "foreigners," those who are "not part of our people," and people excluded from US citizenship and enumeration, thus all of whom were not taxable according to the ideology of 1866.

The Act was passed by Congress and vetoed by President Andrew Johnson.[3] Congress overrode the veto. General understanding concluded that the 1787 Constitution excludes slaves, Indians, and other nonwhites from citizenship.[4] Most legislators believed that a constitutional amendment would be necessary to grant citizenship to the former slaves. Within a few weeks, the same Congress constitutionalized the Act through the Fourteenth Amendment.[5] Because the Act and the Fourteenth Amendment are inextricably bound together, the intent expressed in the Act mirrors the intent of the Fourteenth Amendment.

The Civil Rights Act of 1866 was first debated in the Senate on 30 January 1866.[6] Within moments of the bill's consideration, Senator Van Winkle addressed the bill's constitutionality.[7] Following Senator Van Winkle's remarks, the Senate immediately began a debate that lasted three days on the status of Indians under the Act:

> **Mr. Trumbull.** I move to insert the words: All persons born in the United States and not subject to a foreign Power, are hereby declared to be citizens of the United States without distinction of color and . . .
> **Mr. Guthrie.** I will ask the Senator if he intended by this amendment to naturalize all the Indians of the United States.
> **Mr. Howard.** That is the very question I was about to put.
> **Mr. Trumbull.** Our dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty and not by law. . . . I should have no objection to changing it so as to exclude the Indians. It is not intended to include them.[8]

These comments set the tone of the Senate debate over the following three days of deliberations on Indian citizenship, Indian taxation, and the constitutionality of the Act. The drafters were unclear as to how Indians should be treated by the United States and individual states, as is seen in this excerpt:

> **Mr. Lane.** I desire to call to the attention of the chairman . . . [that] most of the Indians of our State have taken an allotment of land and our supreme court has decided that by the act of accepting allotment, that they have separated themselves from their tribal relations; and I suppose the chairman does not intend to make the Indians of Kansas citizens of the United States.
> **Mr. Trumbull.** They are already citizens of the United States if they are separated from their tribes and incorporated in the community.
> **Mr. Lane.** But they are not. We do not intend to extend to them the right of citizenship, but our supreme court [Kansas] has decided that their lands are taxable and that they are separated from their tribe.[9]

Senator Cowan and others challenged the constitutionality of the Act. Senator Trumbull continued to assert the propriety of the Act, based on the powers granted to Congress to establish uniform rules of naturalization under the Naturalization Clause.[10]

On 31 January 1866, debate resumed on the Civil Rights Act of 1866. The controversy related to the naturalization laws and citizenship continued. Senator Davis of Kentucky spoke at length. This excerpt summarizes his opinion:

> The whole material out of which citizens were made previous to the adoption of the present Constitution was from the European nationalities, from the Caucasian race if I may use the term. I deny that a single citizen was ever made by one of the States out of the negro [*sic*] race. I deny that a single citizen was ever made by one of the States of the Mongolian race. I controvert that a single citizen was ever made by one of the States out of the Chinese race, out of the Hindus, or out of any race of people but the Caucasian race of Europe. . . . I come, then, to this position: that none of the inferior races of any kind were intended to be embraced or were embraced by this work [Declaration of Independence] of the government in manufacturing citizens. . . . [A]ll their intentions, and all their powers upon this subject were simply to make foreigners of the European families of nations citizens of the United States.[11]

Senator Lane offered an amendment meant to allow Kansas to tax Indian allottees: "That all persons born in the United States, and not subject to any foreign Power, and *Indians holding lands in severalty by allotment* are hereby declared to be citizens of the United States"[12] (emphasis indicates amendment).

Senator Trumbull objected to the amendment, professing that he had no objection to the amendment considered earlier, which "exclude[s] from naturalization all Indians who do owe allegiance to any tribal authority."[13] Senator Pomeroy wanted to revise the Lane amendment to include the words *tribal authority*, to which Senator Trumbull did not object. This debate illustrates the Senate's difficulty finding suitable wording to accomplish the common objective of excluding *tribal* Indians from US citizenship.[14] Senator Trumbull ultimately suggested the phrase *excluding Indians not taxed* from Article I, section 2, clause 3, which did become the wording in the Act and within weeks was incorporated into section 2 of the Fourteenth Amendment:

> Of course we cannot declare the wild Indians who do not recognize the Government of the United States at all, who are not subject to our laws, with whom we make treaties, who have their own regulations, whom we do not pretend to interfere with or punish for the commission of crimes one upon the other, to be the subject[s] of the United States, in the sense of being citizens, they must be excepted. The Constitution [in section 2 of Article 1] excluded them from the enumeration of the population of the United States when it says that

> Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words and says *that all persons born in the United States excluding Indians not taxed, and not subject to any foreign power shall be deemed citizens of the United States* (emphasis added).[15]

The ensuing discussion reveals the degree to which race defined citizenship.

> **Senator Pomeroy.** . . . All that we ask is that those who are taxed should be citizens.[16]
>
> **Mr. Trumbull.** My own opinion is that all persons born in the United States and under its authority, owing allegiance to the United States, are citizens without any act of Congress.[17] . . . The Indians have separate governments of their own. They do not recognize nor are they made subject to the laws of the United States. They make and administer their own laws; they are not counted in our population; they are not represented in our Government; and the Constitution of the United States in determining who shall be represented says: [quotes Article I, sec. 2, cl. 3] Does the Senator from Indiana want the wild roaming Indians not taxed, not subject to our authority to be made citizens of the United States—persons that are not to be counted in our Government? If he does not, let him not object to this amendment that brings in even the Indian when he shall have cast off his wild habits and submitted to the laws of organized society and become a citizen.
>
> **Mr. Hendricks.** I have no desire that the savage Indian shall be declared a citizen of the United States. I have no desire that any Indian shall be declared a citizen of the United States. I do not think he is now; and I do not think we ought to make him such. . . . The clause of the Constitution to which the Senator [Trumbull] referred has nothing to do with the question of citizenship and therefore he cannot use it to rely on.[18] It is a question of taxation and representation, what the basis shall be. My objection is to his proposition of making property a test of citizenship.
>
> **Mr. Davis.** My position is that this is a white man's Government. It was made so at the beginning. The charters that were granted by different sovereigns of England to the various colonies were granted to white men and included nobody but white men. They did not include Indians. They did not include negroes [*sic*] . . . . It is a white population, and not a negro [*sic*] population or an Indian or a mixed population. That is a truth of history. It is a truth of principle.[19]

Senator Johnson goes into a lengthy discourse on the *Dred Scott* case, quoting the Court:[20]

> **Mr. Johnson.** It is true that every person, and every class and description of persons who were at the time of the adoption of the

> Constitution recognized as citizens in the several states became citizens of the new political body, but none other; it was formed by them and for them and their posterity, but no one else.[21]
> **Mr. Davis.** Sir, the power [of Congress] to change the Constitution is a power to amend; it is not a power to revolutionize; it is not a power to subvert; it is not a power to change our form of Government.[22]

On 1 February 1866, a third day of debate relative to tribal Indian status commenced. The debate focused on the phrase *excluding Indians not taxed* offered by Senator Trumbull.[23] Within this debate, the *not taxed* component of *Indians not taxed* is clearly established:

> **Mr. Henderson.** The Senator will understand me as objecting to the amendment as it now stands. An individual of the Caucasian race whether he pays tax in a State or not is undoubtedly regarded as a citizen of the United States. Why make it obligatory upon the Indian, owing no allegiance to any tribal authority to pay a tax, before he can be regarded as a citizen of the United States. My point is that the Indian, if he is connected with no tribe, whether he is taxed or not, ought to be a citizen. . . .[24]
> **Mr. Doolittle.** From time immemorial, indeed in the Constitution itself, this very distinction between Indian taxed and Indian not taxed has been a fundamental distinction. In the enumeration of the people of the United States who are made the basis of representation and taxation, Indians not taxed were expressly excluded.
> **Mr. Henderson.** So were negros [*sic*] excluded.
> **Mr. Doolittle.** Two fifths were excluded and three fifths were counted.
> . . .
> **Mr. Henderson.** I am talking about citizenship. Slaves were not citizens at all; now they are.[25]
> **Mr. Doolittle.** Indians not taxed were excluded because they were not regarded as a portion of the population of the United States. They are subject to the tribes to which they belong, and those tribes are always spoken of in the Constitution as if they were independent nations, to some extent, existing in our midst but not constituting a part of our population, and with whom we make treaties. There is another reason why the Indian not taxed ought not be included in this grant of citizenship. If you make them citizens, of course, they will not only have the privilege of citizenship, but they will be subjected to the duties of citizenship. They will not only have the right to sue, but they will be liable to be sued.[26]
> **Mr. Ramsey.** The Senator from Missouri seems to base his position upon the mistaken theory that all Indians who are no longer connected with their tribes or under a tribal government are civilized Indians, living as farmers, or in some other way earning a livelihood in the white settlement. That is an entire mistake. . . . It certainly is not

the intention of the Senator or the intention of the Senate to admit Indians of this class to citizenship.[27]

Mr. Trumbull. The Senator from Missouri assumes that here is a sort of property qualification to citizenship. Such is not the meaning of the provision. . . . We cannot make citizens of a foreign minister who is temporarily here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and who owe allegiance to it. . . . What does the phrase "excluding Indians not taxed" mean? . . . It is a constitutional term used by the men who made the Constitution itself to designate what? To designate a class of persons who were not a part of our population. That is what it means. They are not regarded as part of our people. The term "Indians not taxed" means Indians not counted in our enumeration of the people of the United States.

Mr. Johnson. Considered virtually as foreigners.

Mr. Trumbull. Considered virtually as foreigners as a description of person connected with those tribes with whom we make treaties. That is what the phrase means.

Mr. Henderson. *Not taxed by whom? By Federal authority or by State authority* [emphasis added for future reference]?

Mr. Trumbull. *By anybody.* The term here is meant to embrace those persons who yet belong to the Indian tribes, foreign Governments. "Indians not taxed" is a term used to designate those Indians belonging to a foreign Government, and not counted as a part of our people [emphasis added].[28]

Mr. Lane. The proposition as it now stands before the Senate does not reach the objectives that I intended. . . . [I]t would be better to strike out that provision in reference to Indian not taxed. . . . The Indians holding their land in severalty by allotment are not taxed. . . .[29]

Mr. Williams. I am simply describing the condition of these Indians. I understand the honorable Senator to be in favor of making a distinction between one class of Indians and another class of Indians in the United States. . . . Thousands of these Indians in the State that I have the honor to represent are collected upon reservations; they are not subject to tribal authority; their tribes are broken up and destroyed; they consist of the fragments and remnants of tribes gathered together upon these reservations; but they are no more competent or qualified to vote than they were when they existed as original tribes.[30] . . . I insist Mr. President, that if the proposed amendment is to be adopted by the Senate it is in the best form in which it can be put at this time, and that the distinction which is made in it is the most convenient and certain one [that] can be adopted. *The object is not to make taxation a criterion or a test of citizenship* but, it is not absolutely certain, and may operate with hardship, perhaps in individual cases, it is the most certain way of defining the distinction between wild, savage and untamed Indians, and those who associate with white people [and] own property [emphasis added for future reference].[31]

Senator Trumbull's amendment was voted on and passed.[32] Thus the words *excluding Indians not taxed* became part of the Civil Rights Act. Within weeks this phrase became the wording in section 2 of the Fourteenth Amendment.

The House debate on the Civil Rights Act of 1866 relative to Indian citizenship was brief but similar to that in the Senate.[33] The constitutional powers of naturalization and definition of natural-born citizens comprised most of the House debate.[34] On 27 March 1866, President Andrew Johnson presented his veto message to the Senate.[35] The Senate voted to override the veto.[36] The House concurred with the Senate and overrode the veto.[37] The cloud hanging over the Act's constitutionality remained to be resolved by the Fourteenth Amendment, which happened within weeks.

THE FOURTEENTH AMENDMENT DEBATES

Both sections 1 and 2 of the Fourteenth Amendment contain wording pertinent to tribal Indians. These sections state:

> Section 1. All persons born and naturalized in the United States *and subject to the jurisdiction thereof,* are citizens of the United States and of the States 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 any person within its jurisdiction of equal protection of the law [emphasis added]. . . .
>
> Section 2. Representation 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* [emphasis added].

Senator Howard sponsored the Fourteenth Amendment, Joint Resolution no. 127, in the Senate on 30 May 1866.[38] According to the Supreme Court in *Afroyum v. Rusk*, Mr. Howard sponsored the Fourteenth Amendment in the Senate on 30 May 1866.[39] The Court said:

> **Mr. Howard.** The first amendment is to section one, declaring that "all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and the States wherein they reside." I do not propose to say anything on that subject except that the question of citizenship has been fully discussed in this body [in January–March, during the drafting of the Civil Rights Act of 1866] as not to need further elucidation, in my opinion. This amendment which I offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens,

> who belong to the families of embassadors [*sic*] or foreign ministers accredited to the Government of the United States, but will include every other class of persons. *It settles the great question of citizenship and removes all doubt as to what persons are and are not citizens of the United States.* This had long been a great desideratum in the jurisprudence and legislation of the country [emphasis added].[40]

Senator Doolittle immediately proposed an amendment to add the phrase *Indians not taxed* to both the first and second sections of the Fourteenth Amendment:

> **Mr. Doolittle.** I presume the honorable Senator from Michigan [Mr. Howard] does not intend by this amendment to include the Indians. I move therefore to amend the amendment—I presume he will have no objection to it—by inserting after the word "thereof" the words "excluding Indians not taxed."[41]
> **Mr. Howard.** I hope that amendment to the amendment will not be adopted. *Indians born within the limits of the United States* and who maintain their tribal relations are not in the sense of this amendment born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being *quasi*-foreign nations [emphasis added].[42]
> **Mr. Cowan.** . . . I am really desirous to have a legal definition of "citizenship of the United States." [He then asks why Chinese immigrants and Gypsies born in the United States were to be made citizens.] . . . [T]he mere fact that a man is born in the country has not heretofore entitled him to the right to exercise political power.[43]
> **Mr. Doolittle.** I moved this amendment because it seems very clear to me that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. . . . Are these persons to be regarded as citizens of the United States, and by a constitutional amendment declared to be such, because they are born within the United States and subject to our jurisdiction? Mr. President, the word "citizen" if applied to them would bring in all the Digger Indians of California. Perhaps they have mostly disappeared; the people, perhaps have put them out of the way. Our fathers certainly did not act in this way for in the Constitution as they adopted it they excluded the Indians who are not taxed; did not enumerate them, indeed as a part of the population upon which they based representation and taxation; much less did they make them citizens of the United States.[44]

Senator Fesseden asked Senator Trumbull's opinion because he believed that when the Civil Rights Act was debated, *tribal* Indians were excluded from citizenship.[45]

> **Mr. Trumbull.** 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" . . . not owing allegiance to anybody else. . . . Can you sue a Navajoe [*sic*] Indian in court?[46] 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 you introduce the words "not taxed," that is a very indefinite expression. What does "excluding Indians not taxed" mean? You will have just as much difficulty in regard to those Indians that you say are in Colorado, where there are more Indians than there are whites. Suppose they have property there, and are taxed; then they are citizens.[47]
> **Mr. Wade.** And ought to be.
> **Mr. Trumbull.** The Senator from Ohio says they ought to be [citizens]. If they are within the jurisdiction of Colorado, and subject to the laws of Colorado, they ought to be citizens; and that is all that is proposed. It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is "subject to the jurisdiction of the United States.". . . It seems to me sir, that to introduce the words suggested by the Senator of Wisconsin would not make the proposition any clearer than it is, and that it by no means embraces or by any fair construction—by any construction, I may say—could embrace the wild Indians of the plains or any with whom we have treaty relations, for the very fact that we have treaty relations with them shows that they are not subject to our jurisdiction. We cannot make treaties with ourselves; it would be absurd. I think the proposition is clear and safe as it is.[48]

Senator Trumbull asserts that the first and second sections must be considered together with respect to tribal Indians. Section 1 deals with citizenship. Section 2 deals with representation. *Tribal* Indians were not "subject to the jurisdiction" of the United States and were the "Indians not taxed." They were not to be enumerated for the purposes of representation or subject to US laws, including taxation.[49] The debate continues as "subject to the jurisdiction" is defined in terms of allegiance:

> **Mr. Trumbull.** They [*tribal* Indians] are not subject to our jurisdiction in the sense of owing allegiance *solely* to the United States [emphasis added]. . . .[50]
> **Mr. Van Winkle.** The Supreme Court decided that these untaxed Indians were subjects and distinguished between subjects and citizens.
> . . .
> **Mr. Trumbull.** I do not think they are subject to the jurisdiction of the United States in any legitimate sense; certainly not in the sense that the language is used here. . . . I think . . . that the phrase "excluding Indians not taxed," the very words which the Senator from Wisconsin wishes to insert here, would exclude everybody that did not pay a tax;

> that was the meaning of it, we must take it literally. . . . I am sure the Senator of Wisconsin would not be for that. . . .
> **Mr. Hendricks.** I did not ask him the question whether the Government . . . has the military power to go into the Indian territory and subjugate the Indian. . . . I asked whether under the Constitution . . . we may extend our laws over the Indians and compel obedience. . . .[51] *When the civil rights bill was under consideration I was of the opinion that the term "not taxed" means "not taxed" and when those words are in the law, I take them in their natural sense. When there is no ambiguity the law says there shall be no construction; and when you say a man is not taxed, I presume it means that he is not taxed. I do not know any words that express the meaning more clearly than the words themselves*, and therefore I cannot express the meaning in any more apt words then the words used by the Senator from Wisconsin, "Indians not taxed" [emphasis added for future reference].[52]
> **Mr. Clark.** Suppose the State of Kansas, for instance should tax her Indians for five years, they would be citizens.[53]
> **Mr. Howard.** Undoubtedly.
> **Mr. Clark.** But if she refuses to tax them for the next ten years, how would they be then? Would they be citizens or not?[54]
> **Mr. Howard.** I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation are to become my fellow citizen[s] and go to the polls and vote with me and hold lands and deal in every other way that a citizen of the United States has a right to do.[55]
> **Mr. Doolittle.** The President, the Senator from Michigan [Mr. Howard] declares his purpose to be not to include these Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them.[56]

As the debate concluded and the vote on Senator Doolittle's amentment was imminent, Senator Williams summarized the majority view in the debate:

> I would not agree to this proposed constitutional amendment if I supposed it made the Indians not taxed citizens of the United States. . . . I think it is perfectly clear, when you put the first and second sections together, that Indians not taxed are excluded from the term "citizenship"; I therefore think the amendment by the Senator from Wisconsin [Mr. Doolittle] is clearly unnecessary. I do not believe that "Indians not taxed" are included and *I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States*. If there was any doubt as to the meaning of those words [subject to the jurisdiction thereof] I think that doubt is entirely removed and explained by the wording in the subsequent section; and believe that, in any court or by any intelligent person, these two sections would be construed not to include Indians not taxed, I do not think the amendment is necessary [emphasis added].[57]

Senator Doolittle called for the vote. His amendment to the amendment was rejected.[58] The Senate voted by a 3-1 margin that "excluding Indians not taxed" was not needed in section 1 or section 2 because the phrase *subject to the jurisdiction thereof* was adequate to exclude Indians in a tribal relation from citizenship.[59]

THE SENATE JUDICIARY COMMITTEE REPORT OF 1870[60]

The Fourteenth Amendment was ratified in 1868, yet the status of Indian treaties and Indian citizenship was still unclear to some members of Congress in February 1869 when they drafted the Fifteenth Amendment.[61] In light of the confusion about the meaning of the Fourteenth Amendment vis-à-vis Indians, on 7 April 1870 the Senate instructed the Senate Judiciary Committee to "inquire into and report to the Senate the effect of the fourteenth amendment to the Constitution upon the Indian tribes of the country; and whether by the provisions thereof the Indians are citizens of the United States and whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not annulled." The Committee responded that the fourteenth amendment had no effect on the status of Indian tribes and did not annul any previous treaties.[62] However, the Committee concluded, "The question is whether the Indians "are subject to the jurisdiction" of the United States, within the meaning of this amendment, and the answer can only be arrived at by determining the status of the Indians at the time the amendment was adopted."[63]

The committee, on pages 2–9, analyzed the case law, legislative history, and treaties between Indians and European settlers and between Indians and the US government and then summarized their findings as follows:

> From a perusal of these statutes it is manifest that *Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States.* On the contrary, they have uniformly been treated as nations, and in that character held responsible for the crimes and outrages committed by their members, even outside of their territorial limits. And inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations capable of making treaties, *it is evident that any 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* [emphasis added].
>
> In the opinion of your committee, the Constitution and the treaties, acts of Congress, and judicial decisions above referred to, all speak the same language upon this subject, and all point to the conclusion that the *Indians in a tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term "jurisdiction" is employed in the fourteenth amendment* to the Constitution. The Government has asserted a political supremacy over the Indians, and the treaties and laws quoted from present these tribes as "domestic dependent nations" separated from the States of the Union within

whose limits they are located, and exempt from the operation of State laws; and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or state[s] [emphasis added].

It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the *Indian tribes were not made citizens, but were excluded by the restrictive phrase: "and subject to the jurisdiction" and that such has been the universal understanding of all our public men since that amendment became a part of the Constitution. And in the opinion of your committee, the second section of the amendment furnishes conclusive evidence of this fact, and settles the question* [emphasis added].

. . . [T]he amendment was intended to recognize the change in the status of the former slave which had been effected during the war, while it recognizes no change in the status of the Indians. They were excluded by the original constitution, and in the same terms are excluded by the amendment from the constituent body of people. Considering the political sentiment, which inspired the amendment, it cannot be supposed that it was designed to exclude a particular class of citizens from the basis of representation. *The Indians were excluded because they were not citizens* [emphasis in the last sentence is in the original report].[64]

For these reasons your committee do [*sic*] not hesitate to say that the Indian tribes within the limits of the United States and the individual members of such tribes, *while they adhere to and form a part of the tribe to which they belong, are not within the meaning of the fourteenth amendment, subject to the jurisdiction of the United States*; and, therefore, that such Indians have not become citizens of the United States by virtue of that amendment;[65] and if your committee are [*sic*] correct in this conclusion, it follows that the treaties heretofore made between the United States and the Indian tribes are not annulled by the amendment [emphasis added].[66]

THE FOURTEENTH AMENDMENT AND INDIAN CITIZENSHIP

Before analyzing the preceding legislative history, a statement of direction may be helpful. Whereas some readers may expect an emphasis on the scores of court decisions since 1866, this essay focuses on the Fourteenth Amendment, the drafters' intent, and only a few relevant cases. Even though historically Indian case law has changed with political will, constitutional law does not permit inconsistencies. The Constitution has not been amended to change the status of Indians since 1866. If these facts are demonstrable, then case law and extra-constitutional doctrine are irrelevant. Under constitutional law, the Constitution and the drafters' intent are the supreme law.

Undeniably, as demonstrated in the preceding three sections, the drafters of the Fourteenth Amendment repeatedly stated a clear intent to exclude *tribal* Indians from US citizenship[67] as long as they retained tribal identity.[68]

The question debated while drafting the Civil Rights Act of 1866 must be reconsidered: Under the general power granted Congress by the Naturalization Clause,[69] can citizenship be granted by an act of Congress to a class of people previously excluded from citizenship within the Constitution? Specifically, are the Indian Citizenship Act of 1924,[70] the Nationality Code of 1940,[71] and the General Allotment Act of 1887[72] constitutional?

Slaves and Indians were implicitly excluded from citizenship in the 1787 Constitution. Under the Fourteenth Amendment, former slaves were explicitly included and Indians were explicitly excluded from citizenship. Questioning the constitutional status of all Indian citizenship acts is reasonable, just as in 1866 it was reasonable to question granting citizenship to former slaves by an act of Congress. The Naturalization Clause is a general provision, but the exclusion of *tribal* Indians from citizenship by the Fourteenth Amendment is a subsequent and explicit exception to that general provision within the Constitution.

Elk v. Wilkins is the only Supreme Court case to address Indian citizenship.[73] The Court said *tribal* Indians might become citizens by abandoning their tribal relations and petitioning the Court for citizenship. But the analysis presents a caveat:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes are . . . no more born in the United States and "subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. The second section of the fourteenth amendment confirms this view. . . . Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.[74]

The Court in *Elk* correctly interpreted the Fourteenth Amendment and its drafters' intent.[75] The Constitution has not been amended with respect to tribal Indian citizenship.

Afroyim v. Rusk provides further insight into citizenship under the Fourteenth Amendment, although it is not perfectly analogous to the Indians' situation.[76] Secretary of State Dean Rusk attempted to revoke Mr. Afroyim's citizenship under a provision of the Naturalization Act of 1940 because he had visited Israel and voted in an Israeli election. The State Department cited its authority under the Naturalization Clause[77] and the Necessary and Proper Clause.[78] The Court disagreed. Justice Black wrote:

> [W]hen the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition [of citizenship] and grant of citizenship. They expressed fears that the

> citizenship so recently conferred on Negroes by the Civil Rights Act could be just as easily taken away from them by subsequent Congresses[,] and it was to provide an insuperable obstacle against every governmental effort to strip Negroes of this newly acquired citizenship that the first clause was added to the Fourteenth Amendment. Senator Howard, who sponsored the Amendment in the Senate thus explained the purpose of the clause: "It settles the great question of citizenship [between the states and the United States] and removes all doubt as to what persons are or are not citizens of the United States. . . . We desired to put this question of citizenship and the rights of citizens . . . under the civil rights bill beyond the legislative power."[79]
>
> Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power.[80]

The *Afroyim* court rejected arguments that either the Naturalization Clause or the Necessary and Proper Clause provided Congress with a means of revoking US citizenship because the Constitution makes no provision for revocation of citizenship. By similar constitutional reasoning, Indian citizenship, explicitly forbidden by the Fourteenth Amendment, is also beyond legislative authority of Congress to alter by the general power granted in the Naturalization Clause. Nothing in the Constitution grants Congress an expressed or implied authority under the Necessary and Proper Clause to make citizens of a race of people specifically excluded from citizenship by the Fourteenth Amendment. The *Afroyim* court, quoting Senator Howard, noted that the Fourteenth Amendment "removes all doubt as to what persons *are or are not* citizens of the United States."[81] The Fourteenth Amendment phrase *subject to the jurisdiction thereof*, as defined by the drafters, eradicates all doubt that *tribal* Indians were and are not to become citizens as long as they hold tribal allegiance.

The 1866 drafters objected to the imposition of citizenship without the Indians' consent.[82] The several acts of Indian citizenship were not "grants" but an imposition of citizenship. Felix Cohen, in *Handbook of Federal Indian Law*, documents Indians' resistance to having citizenship imposed on them.[83] Under the doctrine of judicial review, any act that is contrary to a constitutional provision or the explicit intent of such a provision is unconstitutional: "The fundamental principle of constitutional construction is that effect must be given to the intent of the framers' of the organic law and the people who adopted it. This is the polarstar of constitutional construction."[84]

The Indian Citizenship Act of 2 June 1924 (as well as other acts unique to individual tribes) imposes citizenship on *tribal* Indians, which violates section 1 of the Fourteenth Amendment. It has been suggested that Congress would certainly have considered the constitutionality of the Act when it was

proposed in 1924. There is no evidence of such consideration in the Congressional Record.[85]

As stated at the start of this section, this essay relies on constitutional law. When the words and the drafters' intent in the Constitution are clear, as in this case, there can be no construction, no extra-constitutional interpretation. The doctrine of *stare decisis* is rarely applicable in constitutional law because, as in this case, it is an affront to the Constitution and the doctrine of judicial review. If the *Elk* court precedent is correct in its interpretation of the Fourteenth Amendment, there is no precedent to be changed. The *Elk* decision stands alone as precedent on the clause "subject to the jurisdiction thereof" as applied to *tribal* Indians. If a change is to be made, it must be done through the constitutional amendment process.

PRECEDENT IN ERROR—"EXCLUDING INDIANS NOT TAXED"

All precedent on "excluding Indians not taxed" in tax cases relies only on *US v. Kagama*,[86] *Jourdain v. Commissioner* (which was heard in tax court),[87] and the *Jourdain* appeals court.[88] All subsequent tax cases rely only on Article I of the US Constitution. All courts involved in Indian tax cases have ignored the Fourteenth Amendment, the only place the phrase is defined in a constitutional setting.[89]

US v. Kagama was a murder jurisdiction case in which the phrase *excluding Indians not taxed* played no part in the decision. The Court provided this dictum relative to Article I, sec. 2, cl. 3:

> In declaring the basis on which representation in the lower branch of the congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which of course includes nearly all of that race, but which meant that *if there were such within the State as were taxed to support the government, they should be counted for representation*, and in computation for direct taxes by the United States. This expression, "excluding Indians not taxed" is found in the fourteenth amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither shed[s] much light on the power of congress over Indians in their existence as tribes distinct from the ordinary citizens of a state or territory [emphasis added for future reference].[90]

This dictum correctly defines "Indians taxed" before the Fourteenth Amendment. It does not define "Indians *not* taxed." "Indians taxed" are Indians who had lost their tribal relations and merged with the white population. "Indians *not* taxed" were defined in *Elk* and by the drafters of the Fourteenth Amendment as "tribal Indians," "foreigners" not "subject to the jurisdiction" of the states or of the United States.[91] The drafters clearly stated that *tribal* Indians, not being "subject to the jurisdiction" of the United States, were thus not to be taxed by either "state or federal authority."[92]

Defining the phrase as *Kagama* does—"if there were such within the State as were taxed to support the Government they should be counted for representation"—implies that those Indians not taxed should not be enumerated for representation. The *Jourdain* tax court takes that position:

> We believe that the Clause in article 1 is an apportionment provision designed to establish the method of computing the number of representatives for each State and determining apportionment of direct taxes among the States.[93] The phrase "Indians not taxed" *when viewed in context is clearly descriptive, describing the fact that some Indians are not taxed by the State in which they reside and should, therefore be excluded from the enumeration of the population* [emphasis added for future reference].[94]

In just one sentence, without any evident study of the Fourteenth Amendment debates, the Eighth Circuit Appeals Court upheld the *Jourdain* tax court's opinion on the phrase: "It [the Tax Court] also held that the constitutional reference to Indians not taxed merely reflects the fact that some Indians are not taxed by the state in which they reside; the reference does not restrain the federal government from taxing Indians."[95] Not only did the *Kagama* and *Jourdain* courts incorrectly define "excluding Indians not taxed" by ignoring the Fourteenth Amendment. they also committed two substantial errors in direct conflict with the clearly stated intent of the amendment.

The first flaw is the courts' contention that *the states* determine the criteria for enumeration for representation.[96] After passage of the Fourteenth Amendment, citizenship and enumeration for representation became federal criteria. The drafters' stated intent was to remove the inconsistency of the various state criteria.[97] One purpose of the amendment was to *require* all states to grant full citizenship and representation to all persons—except Indians. The wording of section 1 makes clear that citizenship and the rights of citizenship are federal criteria, not states' criteria:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, *are citizens of the United States* and the states within which they reside. . . . No State shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States [emphasis added].

Then, section 2 clearly establishes a federal criterion for who shall and who shall not be enumerated, which terminated a variety of state criteria: "Representation shall be apportioned among the several States according to their representative numbers, counting the whole number of persons in each state, excluding Indians not taxed." The *Kagama* and *Jourdain* opinions are in error relative to the states' role in determining enumeration for representation because they ignored the Fourteenth Amendment. The errors continue.

The second flaw in both opinions is their belief that payment of state taxes is required before an Indian can be enumerated for representation.[98] After ratification of the Fourteenth Amendment, that is not the case. The

1866 drafters did momentarily consider taxation as a requirement for enumeration and citizenship. They agreed unanimously that such a requirement was not only problematic but also "certainly an objectionable provision."[99]

The courts have generally held, as in *Jourdain*, that the phrase *excluding Indians not taxed* is simply an apportionment provision. That is misleading. The phrase was first defined in the Civil Rights Act of 1866, where it is an exclusion from citizenship and nothing more. The Act has nothing whatsoever to do with apportionment. The Act says: "*Be it enacted*, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[100] Except for the *Elk* Court, courts have repeatedly misconstrued and oversimplified the definition of "excluding Indians not taxed." Without any dissenting opinions, the 1866 drafters established that Indians not taxed were "tribal Indians," "foreigners," "not part of our people," "not citizens," and thus not taxable by either "State or Federal authority."[101] Yet with the remarkable brevity of about five sentences and a hundred words, these three courts established an erroneous precedent on a constitutional phrase that took the 1866 Senate several days to define.

Because the *Kagama* and *Jourdain* courts did not rely on the Fourteenth Amendment, they incorrectly defined "excluding Indians not taxed." They erroneously stated that the states determined who should be enumerated. They erroneously stated that payment of state tax was a prerequisite to enumeration. Finally, they decided, contrary to the drafters' intent, that Indians not taxed means Indians are taxable.

No court has questioned these errors or examined the 1866 drafters' debate when deciding Indian tax cases. Since *Kagama* and *Jourdain*, subsequent courts have accepted an incorrect definition and flawed analysis in all Indian tax cases involving the concept of "excluding Indians not taxed."[102]

Tribal Indians were excluded from citizenship and the laws of the United States by the phrase *subject to the jurisdiction thereof.* That alone, as the Senate Judiciary Committee pointed out in 1870, excludes *tribal* Indians from the "municipal jurisdiction of the United States." That would include US revenue laws. *Indians not taxed* does indeed mean that *tribal* Indians are not taxable or considered citizens as long as they retain tribal relations. The Constitution has not been amended to provide otherwise.

THE SIXTEENTH AMENDMENT AND "INDIANS NOT TAXED"

The Sixteenth Amendment states: "The Congress shall have the power to lay and collect taxes on the incomes from whatever source derived, without apportionment among the several States and without regard to any census or enumeration."[103] This amendment was drafted in response to the *Pollock v. Farmers Loan and Trust Co.*[104] decision that declared an income tax law unconstitutional because it conflicted with Article I, section 2, clause 3 and Article I, section 9, clause 4. At issue was the 1894 Income Tax Act. The Pollock court decided that an income tax was a tax on property, within the meaning of the Constitution. The law was unconstitutional because the tax was not "in Proportion to the Census or Enumeration" as required by section 9, clause 4.

The Sixteenth Amendment does not address the Fourteenth Amendment. The Fourteenth Amendment does not require that taxation and representation are to be "in Proportion to the Census." The 1909 drafters of the Sixteenth Amendment indicated no intention to change anything in the Fourteenth Amendment or *tribal* Indians' tax status. The word *Indians*, the phrase *excluding Indians not taxed*, or reference to sections 1 and 2 of the Fourteenth Amendment are not found in the debates, the committee reports, or the appendix.[105] The constitutional rule of specificity applies:

> A constitutional provision adopted by the people already having a well-defined institution and system of law should not be construed as intended to abolish the former system, except insofar as the old order is in manifest repugnance to the new constitution, but such a provision must be read in light of the former law and existing system. Thus, if a constitutional amendment contains no expressed or modification of existing provisions[,] the old and new provision[s] should stand and operate together if in so doing the intent of the lawmaking power as duly expressed in the later provision is not controverted.[106]

There is no evidence of an expressed or implied intent to include *tribal* Indians in the US income tax system. The "Necessary and Proper" clause does not apply because the Constitution is specific with respect to Indians' tax exemption and citizenship exclusion. Clause 18 of Article 1, section 8, is the "Necessary and Proper" clause. That clause may be employed only as required to implement the powers specifically granted Congress under the Constitution. Where the Constitution prohibits an action, such as acts to make *tribal* Indians citizens, clause 18 cannot be employed. No evidence indicates that Indians were considered during the drafting of the Sixteenth Amendment.

In 1909 *tribal* Indians had little or no taxable income. Additionally, the 1909 Congress considered "the Indian problem" to be well on its way to a final solution with the allotment system. The General Allotment Act of 1887[107] and numerous individual tribal allotment acts were being implemented. The stated purpose of the allotment acts was to "assimilate" the *tribal* Indians into the white population within no more than twenty-five years. In 1901 President Theodore Roosevelt heralded the General Allotment Act: "In my judgment, the time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass."[108]

The 1909 drafters of the Sixteenth Amendment had reason to expect that there would soon be no tribal lands, no tribal society, and no "Indians not taxed." For that reason, Indians and "Indians not taxed" were not considered in the debates related to the Sixteenth Amendment. Clearly, the Sixteenth Amendment lacks the specificity required under constitutional law to apply to the Indians. Courts have ignored the 1866 history of Indians' tax exemption. The 1866 constitutional definition of "Indian not taxed" has been conspicuously absent from all court opinions for more than a century.

PLENARY AUTHORITY OF CONGRESS OVER INDIANS

A brief comment on the doctrine of plenary authority of Congress over Indians is in order because some people argue that it is a constitutionally sanctioned, unlimited authority over all Indian affairs.[109] Numerous books, law reviews, and essays have attacked this doctrine.[110] Here the doctrine is examined in light of the 1787 framers' intent and the Fourteenth Amendment.

The doctrine is based in part on the Treaty Clause[111] but is founded primarily on a liberal interpretation of the Commerce Clause:[112] ["The Congress shall have Power . . . cl. 3 . . .] To regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes." There is no question that the government can make treaties, subject to approval by two-thirds of the Senate. But the doctrine relies most heavily on the definition that "Commerce" means more than simply trade.

The *Lone Wolf v. Hitchcock* court[113] (1903) did not rely on the Commerce Clause to justify the reliance on Congress's plenary authority but decided that Congress's plenary authority was a "political power"[114] rather than a "judicial power" and that it thereby removed the Court from subjecting the case to judicial review. Several decisions echoed that opinion by relying on the nonjusticibility doctrine.[115] In 1977 the Supreme Court began to reconsider its responsibility to review the constitutionality of cases involving Congress's plenary authority over Indians.[116]

No court has considered the Fourteenth Amendment framers' determination that *tribal* Indians are not "subject to the jurisdiction thereof." The doctrine of plenary authority is irreconcilable with that constitutional mandate. The two doctrines are polar opposites. If one accepts the doctrine of plenary authority, one must also acknowledge that the Fourteenth Amendment is a subsequent, specific, and conflicting view. If Indians are not "subject to the jurisdiction" of the United States, then Congress cannot have plenary authority over them. The Fourteenth Amendment must prevail.

There is no support for the doctrine of plenary authority in the 1787 framers' notes on the Commerce Clause. The original intent of the Commerce Clause was to grant the federal government exclusive authority over all commercial agreements. Joseph Story records that members of the Continental Congress expressed conflicting views of states' authority with respect to negotiations with the Indian tribes, both within and without the bounds of the state or the United States.[117] The disputed authority simply would not work under the new federal system. It was essential to put all commerce agreements exclusively under federal authority. Indeed, all eighteen clauses of section 8 are necessary provisions in a federal government system, removing those powers from state authority.[118]

Commerce with Indians implies more than just trade, however. It also entails intercourse (interchange, communication, regulation). The extent and intent of intercourse are evident in the early trade acts enacted by those who framed the 1787 Constitution.

The Indian Trade and Intercourse Acts of 1790,[119] 1793, 1796,[120] and 1802[121] demonstrate the intent with respect to commerce with Indians. These acts were enacted and administered under the first five US presidents who

were framers of the 1787 Constitution and were enacted by Congresses composed of several Constitution framers. The acts prohibited states from negotiating trade agreements with Indians and prohibited states and individuals from purchasing Indian lands without the authorization of the US government. The acts regulated who could trade with Indians, what could be traded, and where. The acts imposed penalties on whites for unauthorized trade practices and unauthorized entry onto Indian lands. No regulatory authority over Indians was evident in those acts. Historically, the problem was to control unauthorized interaction with Indians. The object was to maintain peace with the Indian tribes. Unauthorized entry onto Indian lands, both within and without the boundaries of the United States, posed a real threat of conflict. The young, struggling government found it difficult to control its own citizens, much less attempt to regulate Indians affairs with scores of tribes. The US government dealt with the Indians not through laws but by implementing treaties with each tribe. The 1787 framers of the Constitution showed no intention to exercise plenary authority over Indian affairs.

Further, none of the 1866 drafters of the Fourteenth Amendment indicated that the United States had, wanted, or intended to have plenary authority over tribal Indian affairs. Senator Howard, who sponsored the amendment, said: "Indians born within the limits of the United States and who maintain their tribal relations are not in the sense of this amendment born subject to the jurisdiction of the United States."[122] That was also the conclusion of the Senate Judiciary Committee in 1870, as discussed previously.[123]

Felix Cohen documents that such power does not extend to violations of the Constitution, such as the Bill of Rights. Chief Justice Fuller is cited as the authority in *Stephens v. Cherokee Nation*.[124] Thus Congress's plenary authority cannot extend to "Indians not taxed" and Indians not "subject to the jurisdiction" of the United States, as the 1866 drafters of the Fourteenth Amendment defined those phrases. The doctrine of plenary authority cannot coexist with the Fourteenth Amendment definition that tribal Indians are not "subject to the jurisdiction" of the United States. The doctrine represents raw political power without a solid constitutional basis. It is unconstitutional because it violates the Fourteenth Amendment.

CONCLUSION

This essay highlights a long-standing constitutional problem regarding Indians. The first step in problem solving is to recognize that a problem exists. This essay has attempted to establish such recognition. Congress is not apt to surrender its control over Indian affairs. The courts must recognize that their predecessors created the constitutional problem, and they must accept their duty to uphold the Constitution as it applies to Indians.

Under the US three-branch system, courts use judicial review to decide the constitutionality of acts. Justices regularly search for the framers' intent in the debates on the Constitution, and they give that intent effect. Arguably, few constitutional phrases are debated more extensively by Congress and are more clearly defined than "excluding Indians not taxed" and "subject to the

jurisdiction thereof." Reliance on the 1866 drafters' intent, however, has been conspicuously absent during the past century in court opinions regarding Indian citizenship and taxation.

Current justices are aware of this Fourteenth Amendment Indian history, but they have not considered the incontrovertible evidence in their deliberations or decisions. To do so might lead to decisions that would not be politically expedient. *Elk v. Wilkins* is the only Supreme Court precedent on Indian citizenship.[125] In deciding this case, the Court adhered to the fundamental rules of constitutional construction by relying on the drafters' intent in the Fourteenth Amendment debates. The Constitution has not changed. The fundamental rules of constitutional law have not changed. The various acts involving Indian citizenship conflict with the *Elk* precedent and the clearly stated intent of the Fourteenth Amendment. Perhaps the strongest indication of the significance of this 1866 legislative history of the Fourteenth Amendment is the fact that the courts have avoided considering that history since *Elk*.

Problem solving begins with the courts recognizing that *Elk* is precedent and that since *Elk* the courts have applied the Fourteenth Amendment incorrectly in decisions involving Indians. Once the courts recognize this precedent, Congress will take steps to amend the Constitution.

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NOTES

1. Senate debate on the Civil Rights Act of 1866 as recorded in the *Congressional Globe*, 39th Cong., 1st Sess., 30 January 1866, 497–507, 31 January 1866, 522–30, 1 February 1866, 569–75. Senate debate on the drafting of the Fourteenth Amendment is recorded in the *Congressional Globe,* 1st Sess., 30 May 1866, 2890–97.

2. Civil Rights Act of 1866, 14 Stat. 27, § 1: "*Be it enacted.* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." Senate debate began on 30 January 1866.

3. *Congressional Globe*, 39th Cong, 1st Sess., 27 March 1866, 1679–81. Veto message.

4. Neither the 1787 Constitution nor the debate in the Constitutional Convention defined who should be citizens of the United States. US Const., art. I,

sec. 2, cl. 3 only defines who shall be "enumerated for purposes of representation." The constitutional definition of what persons are or are not citizens did not exist until 1866 when the Act and the Fourteenth Amendment were drafted.

5. In *Oregon v. Mitchell,* 400 US 112, 162, Justice Harlan wrote: "Section 1 [of the Fourteenth Amendment] must have been seen as little more than a constitutionalization of the 1866 Civil Rights Act."

6. *Congressional Globe,* 39th Cong., 1st Sess., 30 January 1866, 497, Protection of Civil Rights (S. no. 61), generally known as the Civil Rights Act of 1866.

7. Ibid. Immediately after debate opened on the Civil Rights Act of 1866, Senator Van Winkle questioned the Act's constitutionality. Several other senators shared that concern. That concern became a part of the debate and led to the passage of the Fourteenth Amendment, thereby removing all doubt as to the constitutional status of citizenship for former slaves. Mr. Van Winkle. "Mr. President, when I interrupted the chairman of the Committee on the Judiciary yesterday to make an inquiry, I asked first whether persons of the negro [*sic*] race are, or indeed can be, citizens of the United States without a constitutional amendment. . . . I think it needs a constitutional amendment to make these people citizens of the United States."

8. Ibid., 498. Senator Trumbull from Illinois was chairman of the Senate Judiciary Committee. He brought the bill to the Senate floor, and he was the authority to whom others often turned for his opinions. The phrase *Indians not taxed* is not included in Trumbull's first draft of the Act but evolved within the debate.

9. Ibid. Eighteen years later, in *Elk v. Wilkins,* 112 US 94, 100, 101 (1884), the Court ruled that it was not enough that an Indian who had been born under tribal authority simply abandon tribal ties to become a citizen.

10. Ibid., 499–500. See US Const., art. I, sec. 8, cl. 4: Congress shall have the power "To establish an uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcy throughout the United States."

11. Ibid., 523. Senator Davis's opinion continues on pages 524–25.

12. Ibid., 525. This wording would permit Kansas to tax Indian allottees' holdings. Senator Lane wanted Indian allottees to be declared citizens and thus be taxable. That wish, however, conflicts with his statement in the text related to note 9: "We do not intend to extend them the right of citizenship."

13. Within weeks, while drafting the Fourteenth Amendment, "allegiance" would become a criterion by which *tribal* Indians were excluded from citizenship. *Tribal* Indians, like foreign ambassadorial personnel, hold foreign allegiance and were thus determined not to be "subject to the jurisdiction" of the United States.

14. Ibid., 525–26. Senator Pomeroy stated: "Not being citizens under the law, we cannot tax them." Senator Guthrie: "Here is a provision that Indians [nontribal] shall become citizens of the United States without their consent or the consent of those exercising authority over them. I cannot consent to imposing citizenship and its liabilities and responsibilities upon people without their assent." Senator Pomeroy objected to conferring citizenship upon the Indians because "the Indian has not consented to it."

15. Ibid., 527. In this Act "Indians not taxed" means Indians are not citizens. It does not refer to enumeration, representation, or taxation in the wording of the

Act. A definition of the "not taxed" component is provided in the third day of debate on the Act.

16. Ibid. At this point the amendment on the floor was withdrawn to permit Senator Trumbull to present the amendment that contained the words "excluding Indian not taxed." Senator Hendricks objected: "I do not like to see the right of citizenship dependent on the question of whether a man is taxed or not. I do not know that that has ever been done in any Government. Citizenship is a very high right. It is the right to be considered a member of the political community, and for us to say that Indians or anybody else shall be citizens or not citizens dependent upon the question [of] whether they pay taxes is certainly a very objectionable proposition."

17. Ibid., 527–28. But see *Elk v. Wilkins*, 112 US 94, 101, 102 (1884).

18. True: The original Constitution contained no definition of citizenship for anyone. Art. I, sec. 2, cl. 3 is an apportionment provision for determining representation in Congress.

19. Ibid., 528.

20. Ibid., 529–30. See also *Dred Scott v. Sanford*, 19 How. 393 (1857).

21. Ibid., 529. This was presented as an argument that, in the opinion of the Supreme Court, citizenship for the previous slaves could only be accomplished by an amendment to the Constitution. Several senators believed a citizenship act to cover any persons excluded by the 1787 Constitution was unconstitutional.

22. Ibid., 530. Congress had the power to amend the Constitution to grant citizenship to the former slaves, and within weeks it did so by passing the Fourteenth Amendment. It was doubtful that citizenship, granted by the 1866 Civil Rights Act, contrary to the 1787 drafters' intent, could have withstood a constitutional test according to the *Dred Scott* opinion, as quoted in note 26. The Fourteenth Amendment passed within weeks to resolve that problem.

23. Ibid., 569.

24. Ibid., 571.

25. Ibid. Senator Henderson makes this important distinction here between those enumerated for representation and those counted for citizenship. Slaves, i.e., "other Persons," were enumerated as three-fifths of a person for representation, but it was well understood that slaves, Indians, and other racial minorities were not citizens. Neither the 1787 Constitution nor the framers' note contains a definition of citizenship. The 1787 framers did not define "other Persons," "free Persons," or "Indians not taxed" as used in Article I, but in 1787 and 1866 everyone knew who was referenced by those terms.

26. Ibid. The right of Indians to bring action in court was decided thirty-five years earlier in *Cherokee Nation v. Georgia*, 5 Peter's 1 (1831). The Court determined that Indian tribes could not bring an action in the US courts. Further, the US courts were determined to be without jurisdiction and "the framers of our constitution had not the Indian tribes in view when they opened the courts of the union to controversies between the states or the citizens thereof and foreign states. . . . At the time the Constitution was framed the idea of appealing to the American Courts for justice for assertion of rights or redress of wrong, had never entered the mind of the Indian or of his tribe." The 1866 drafters saw Congress's jurisdiction over *tribal* Indians no differently. In the debate on the Fourteenth Amendment, they

reaffirm that *tribal* Indians were not "subject to the jurisdiction" of the United States. The Constitution has not been amended to change that status.

27. Ibid., 572.

28. Ibid.When drafting the Fourteenth Amendment the senators again likened *tribal* Indians to foreign diplomatic staff whose children were born in the United States. They were not citizens or subject to the laws of the United States because they were not born with allegiance to the United States.

29. Ibid. Senator Lane wanted Kansas to be able to tax Indian allottees but not make them citizens.

30. Ibid., 573.

31. Ibid. During the 1866 Senate debates the linkage between taxation and representation in Congress was discussed several times. That linkage was optionally available to the states under the 1787 Constitution, but it proved embarrassing, inequitable, difficult to determine, and generally undesirable. Thus as Senator Williams concluded his debate on the Fourteenth Amendment, he stated that under that amendment "the object is not to make taxation a criterion or test of citizenship." No senator disagreed during the debate. This is one of several errors in the *Kagama* and *Jourdain* tax opinions. That error and others are covered in this article in the section "Precedent in Error—'Excluding Indians Not Taxed.'"

32. Ibid., 575. The vote was 31 yeas, 10 nays, and 9 absent.

33. *Congressional Globe,* 39th Cong., 1st Sess., 1 March 1866, 1115–20.

34. Ibid., 1293–96. In the House debate citizenship is defined as a birthright, but only if the child is born to persons with undivided US allegiance.

35. Ibid., 1679–81.

36. Ibid., 1755–87, and on 4 April and 5 April 1866, 1801–09. The veto was overridden by a vote of 33 yeas, 15 nays, and 1 absent.

37. Ibid., starting at 1832, 7 April 1866.

38. *Congressional Globe,* 39th Cong., 1st Sess., 1866, 2890–97.

39. *Afroyim v. Rusk,* 387 US 253, 262, 263 (1967). See also *US v. Wong Kim Ark,* 169 US 649, 675.

40. *Congressional Globe,* 39th Cong., 1st Sess., 1866, 2890. This quote would be relied on in *Afroyim v. Rusk* as definitive of what persons are or are not citizens. The federal government now uniformly determines who are citizens of both the United States *and* all individual states.

41. Ibid. Senator Doolittle wanted the phrase *excluding Indians not taxed* included in both sections to assure that Indians would be excluded from both citizenship (section 1) and representation (section 2).

42. Ibid. Senator Howard provides this early definition of "subject to the jurisdiction thereof" with respect to *tribal* Indians. In the following debate, several senators reaffirm that definition to assure Indian exclusion.

43. Ibid. Senator Cowan was from California where there was a large Chinese immigrant population employed as cheap labor. He did not want Chinese children to be granted natural-born citizenship status. See *US v. Kim Wong Ark,* 169 US 649 (1898), in which the Court determined that children of Chinese nationals, born in the United States, are citizens by birth according to the intent of the Fourteenth Amendment. Several senators spoke against citizenship for any non-European whites (they mentioned Indians, Negroes, Chinese, and Gypsies). None

spoke in favor of their citizenship. Citizenship for former slaves was a foregone conclusion in the Reconstruction period. Indians were the targets for specific exclusion. Other minorities received only passing negative comment.

44. Ibid., 2892.

45. Ibid., 2893.

46. In *Cherokee Nation v. Georgia,* 5 Peter's 1 (1831) the Supreme Court had ruled thirty-five years earlier that "an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and cannot maintain an action in the courts of the United States." The 1831 Supreme Court opinion was clearly also the intent of the 1866 drafters. Indian tribes were not to be permitted any legal remedies in US courts. In like respect, Indian-on-Indian crimes in Indian country were excluded from US jurisdiction, according to the 1866 drafters of the Fourteenth Amendment.

47. See the discussion in notes 19 and 76. Indians were excluded from US jurisdiction for commission of crimes one upon the other that occurred on tribal lands. *Cherokee Nation v. Georgia,* 5 Peter's 1 (1831).

48. Ibid. Notice that allegiance to and jurisdiction within the United States must be total and complete. Later in the debate the senators used the terms *sole allegiance, undivided, exclusive,* and *absolute.*

49. Ibid., 2893–94. It is interesting that a tax exemption for Indians does in fact exist in the 1787 Constitution. US Const., art. I, sec. 2, cl. 3 must be considered along with art. I, sec. 9, cl. 4. Indians excluded from representation in clause 3 are not taxable according to clause 4. Clause 4 provides that taxation and representation must be proportional. Therefore Indians not represented are not taxable. No court or legal scholar has been found who recognizes this tie between the article I clauses. In the ideology of 1787 and 1866 it was unthinkable to tax persons who were not citizens or represented. The Fifteenth Amendment changed that for most persons, but the 1909 drafters did not mention Indians' tax exemption. Thus the amendment lacks the specificity required under constitutional law to tax *tribal* Indians. The matter is covered in the section "Plenary Authority of Congress over Indians."

50. Ibid., 2894.

51. Ibid.

52. Ibid., 2895.

53. Ibid.

54. Ibid. Senator Clark poses a hypothetical question to Senator Howard to point out that it is problematic to link citizenship to payment of taxes. None of the senators disagreed. All senators repeatedly rejected the idea of making taxation a criterion for whether a person is a citizen or enumerated. This points out another error in the *Kagama* and *Jourdain* decisions that is covered in the section "The Sixteenth Amendment and 'Indians Not Taxed.'" Both courts declared that taxation was a prerequisite to enumeration for purposes of representation.

55. Ibid., 2895.

56. Ibid., 2895–96.

57. Ibid., 2897.

58 Ibid. The vote on the Doolittle amendment was 10 yeas, 30 nays, and 9 absent.

59. The House debates on the Fourteenth Amendment did not focus on Indians.

60. The Senate Judiciary Report, S. Ret. No. 268, 41st Cong., 3d Sess., 14 December 1870. Most senators on this committee took part in drafting the Thirteenth, Fourteenth, and Fifteenth amendments. They had firsthand knowledge of the drafters' intent on all Reconstruction-era legislation in the years immediately following the Civil War. This gives the report credibility, as eminent authority, to be cited in *Elk v. Wilkins,* 112 US 94 (1884); *US v. Kim Wong Ark,* 169, US 649 (1898); and other cases.

61. US Const., amend. XV, sec. 1: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." Sec. 2. "The Congress shall have power to enforce this article by appropriate legislation." The amendment, proposed in 1869, was ratified in 1870. See *Elk v. Wilkins,* 112 US 94 (1884), 109, an Indian voters' rights case in which citizenship was pivotal. The Court ruled that Mr. Elk had no rights under the Fifteenth Amendment because he was not a citizen according to the Fourteenth Amendment.

62. The Senate Judiciary Report, S. Ret. No. 268, 41st Cong., 3d Sess., 14 December 1870, 1.

63. Ibid. The committee noted apologetically at the bottom of page 1: "The white man's treatment of the Indian is one of the great sins of civilization, for which no single generation of the nation is wholly answerable, but which is now too late to redress. Repentance is all that is left for us, restitution is impossible. But the harsh treatment of the race by former generations should not be considered a precedent to justify the infliction of further wrongs."

64. Ibid., 9–10.

65. Ibid. The committee's interpretation of the intent of the drafters of the Fourteenth Amendment relative to Indian citizenship is found in this sentence. It confirms that *tribal* Indians are precluded from becoming citizens of the United States "while they adhere to and form a part of a tribe."

66. Ibid., 10–11.

67. See, for example, discussions in notes 8–9, 15, 17–18, 20, 28–32, 42, 44, 55–57, 62–63, 65.

68. See, for example, discussions in notes 57 and 65.

69. US Const., art. I, sec. 8, cl. 4: "Congress shall have power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcy throughout the United States."

70. The Indian Citizenship Act of 2 June 1924, 43 Stat. 253: "An Act to authorize the Secretary of the Interior to issue certificates of citizenship to Indians. Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, that all non-citizen Indians born within the territorial limits of the United States be, and are hereby, declared to be citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner or otherwise affect the rights of any Indian to tribal or other property." The debate on the act was nil. The question of constitutionally was not raised in debate. See note 100.

71. The Naturalization Act of 14 Oct. 1940, 54 Stat. 1137: "The following

shall be nationals and citizens of the United States at birth: … (b) All persons born in the United States to members of an Indian, Eskimo, Aleutian, or other aboriginal tribe."

72. The General Allotment Act of 8 February 1887, 234 Stat. 388 (25 U.S.C. § 331) and numerous individual tribal allotment acts.

73. *Elk v. Wilkins,* 112 US 94, 103–04 (1884). *Elk* is a voters' rights case in which the pivotal issue was citizenship. Mr. Elk had been born in a tribal relationship, lost his tribal identity, and merged into the Omaha, Nebraska, white population. The Court determined that as a foreigner he would have to meet the uniform rules established for naturalization to gain citizenship and voters' rights. Such foreigners must first become naturalized citizens. The Court relied heavily on the debates of the 1866 Civil Rights Act, the Fourteenth Amendment, and the Senate Judiciary Report of 1870 in arriving at that decision.

74. Ibid., 102.

75. See also *US v. Wong Kim Ark*, 169 US 649, 680, 681 (1898) for the same opinion on the Fourteenth Amendment. The Court distinguished between the Chinese defendant and the explicitly excluded Indians.

76. *Afroyim v. Rusk,* 387 US 253 (1967).

77. US Const., art. I, sec. 8, cl. 4.

78. Ibid., cl. 18. In *McCulloch v. Maryland,* 17 US (4 Wheat) 316, 421 (1819), Chief Justice John Marshall makes it clear that Congress can do whatever is "necessary and proper" unless it violates "the letter and spirit of the Constitution." Congress may exercise only those "necessary and proper" powers granted by the Constitution. Looking ahead to the Indian citizenship situation, the Fourteenth Amendment explicitly excluded *tribal* Indians from citizenship. Thus any argument that making Indians citizens would be "necessary and proper" is negated.

79. *Cong. Globe,* 39th Cong., 1st Sess., 2890, 2896 (1866). See *Afroyim v. Rusk,* 387 US 262–63 (1967). The Fourteenth Amendment not only put citizenship for former slaves beyond the reach of further legislation, it also constitutionalized the exclusion of *tribal Indians* from citizenship.

80. Ibid., 257.

81. See discussion in note 79, the *Afroyim* court quoting Senator Howard.

82. See, e.g., *Congressional Globe,* 39th Cong., 1st Sess., 526, 1866, discussion by Senators Pomeroy and Guthrie.

83. Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, DC: US Department of the Interior, Office of the Solicitor, 1942), 155, and text related to Cohen's footnotes 43–46: Indians "frequently did not welcome citizenship" and often chose "to leave their homes in order to retain their tribal membership." Further, the "Indian (except in rare individual cases) does not desire [US] citizenship," and "the Five Civilized Tribes opposed the grant of citizenship." Further, for example, when the United States imposed citizenship on all Indians by the 1924 Indian Citizenship Act, the Iroquois Nation refused it because its members were already citizens of the six nations of the Iroquois Confederacy. The Iroquois (Mohawk tribe) made that argument in *Lazore v. Commissioner,* 50,669 and 48,354 M-TC 992-404, *affd.* 11 F. 3d, 1180 (1993). The courts ignored the argument without comment. In *Ex Parte Green,* 12 F.2d 862 (1941) the Onondaga tribe of the Iroquois Confederation made the same argument, but the

court said the 1940 Citizenship Act and the 1924 Indians Citizenship Act superseded the 1784 treaty provision. There is no indication that the Fourteenth Amendment exclusion of *tribal* Indians from citizenship was considered in these cases. After World War I, in recognition of the Indians' proportionally great contribution, Congress passed the act of 6 November 1919 to grant honorably discharged Indian veterans citizenship simply if they asked for it, "without in any manner impairing … property rights, individual or tribal, of any such Indian." The response was nil and in most tribes none. These Indians were already citizens of their own tribes.

84. 16 *American Jurisprudence* 2d., Constitutional Law, sec. 92.

85. See Congressional Record on H.R. 6355 (1924), 1665, 2977, 4446, 4477, 6753, 8621, 9303, 9498, 9527, 9576, and 11341. The entries are almost all procedural. The only debate took place in the House on 23 May 1924 when Representative Garrett of Tennessee asked about the bill's effect on state laws. Representative Snyder assured him that the question had been thoroughly examined and that there was no effect on the suffrage qualifications in any state.

86. *US v. Kagama,* 118 US 375 (1886). The issue in this case was whether sec. 9 of the 3 March 1885 Major Crimes Act applied to the murder of one Indian by another that occurred on the Hoopa Valley Indian Reservation. The Court concluded: "The power of the General Government . . . is necessary to their [Indians] protection." Thus US criminal law was applied to Indian reservations contrary to the intent of the drafters of the Fourteenth Amendment.

87. *Jourdain v. Commissioner,* 71 TC 980 (1979), *affd.,* 617 F.2d 507 (1980); *cert. denied,* 449 US 839 (1980). The plaintiffs argued that certain income was tax-exempt under the provisions of the General Allotment Act of 1887 as income directly derived from the land. Further, the plaintiffs were free from molestation by the United States, including taxation, under the Treaty of Greenville of 3 August 1795. Finally, the phrase *excluding Indians not taxed* provided an exemption from US income tax. The Court denied the tax exemption on all arguments and directed only two sentences to the constitutional phrase.

88. Ibid.

89. See note 1.

90. "[The Fourteenth Amendment] deals with the same subject under conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of congress over the Indians … distinct from the ordinary citizens of a state or territory." These two sentences are all that is found in *Kagama* about the Fourteenth Amendment. Both sentences are inaccurate and misleading. They direct the reader away from considering the Fourteenth Amendment by making it seem irrelevant to Indian matters, which is a gross inaccuracy. As we know, the Fourteenth Amendment was debated for five days and recorded in over thirty pages of fine print in the *Congressional Globe* for the explicit purpose of excluding tribal Indians from citizenship, taxation, and enumeration and from being subject to the jurisdiction of the US legal system and all US laws. The justices in *Kagama* knew what they were doing because they had also decided *Elk* just two years earlier in which they quoted extensively from the 1886 Senate debates and the 1870 Senate Judiciary Report as they denied Mr. Elk citizenship and the right to vote.

91. See discussion involving Senator Trumbull in notes 15, 17–19, 46, 48, 50, 57, and *The Senate Judiciary Committee Report,* notes 64–68. See generally *Elk v. Wilkins* 112, US 94 (1884).

92. See discussion involving Senators Trumbull and Henderson in note 28; that involving Senator Doolittle in notes 24–26; and that of Senators Hendricks, Clark, and Howard in notes 51–55. No senator disagreed with the opinion that *tribal* Indians were not taxable except Senator Lane, who wanted Kansas to be able to tax Indian allottees. See note 29.

93. The tax court refers to "the Clause in article one" and ignores the Fourteenth Amendment completely, just as the *Kagama* Court had done. The Tax court only cites *Kagama* and *Elk* as a footnote, without analysis or comment.

94. *Jourdain v. Commissioner,* 71 TC 980 (1979), *affd.* 617 F.2d 507 (1980), *cert. denied,* 449 US 839 (1980). Consider what the tax courts said in 1980: Indians who are not taxed by the *state* should not be enumerated. By federal law, then and now, millions of reservation Indians are not taxable by the states. Thus according to the *Jourdain* court they should not be enumerated. Clearly, the *Jourdain* opinion was and is out of touch with reality. The appeals court did not correct it. The US Supreme Court denied cert.

95. Ibid. That is all the appeals court said relative to the phrase *Indians not taxed.*

96. The Supreme Court in *Kagama* said, relative to the states' authority in determining who should be enumerated for purposes of representation, "[I]f there were such within the state as were taxed . . . they should be counted." The tax court in *Jourdain* said, relative to the states' authority in determining representation, "Some Indians are not taxed by the State . . . and should therefore be excluded from the enumeration." Based only on Article I these opinions might be correct, but the states' role in determining enumeration was clearly and intentionally changed by passage of the Fourteenth Amendment.

97. See Senator Howard's speech in note 42: "It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. *This has long been a great desideratum in the jurisprudence* and legislation of the country" [emphasis added].

98. See the quotations from the *Kagama* and *Jourdain* decisions in note 96. Under the 1787 Constitution each state determined who would be considered a citizen of that state, and only those who paid taxes were enumerated. All that changed with the passage of the Fourteenth Amendment, and the *Kagama* and *Jourdain* courts ignored the Fourteenth Amendment changes.

99. See discussions in notes 18, 24–26, 28, 31, 44, 52–54.

100. The Civil Rights Act of 1866, 14 Stat. 27 (1866).

101. See discussions in notes 31–32 by Senators Trumbull and Henderson. See also discussion in notes 24–28 by Senator Doolittle and in notes 50–52 by Senator Hendricks.

102. See, e.g., *Comenout v. C.I.R.,* 82,040 TC Memo 1982–4 (1984); *Cross v. Commissioner,* 83 TC 542, Docket Nos. 11878–79; *Dillon v. United States,* 792 F.2d 849 (9th Cir. 1986); *US v. Willie,* 941 F.2d 1384 (1991); *Lazore v. Commissioner,* 50,669 and 48,354 MTC 1992-404, *affd.,* 11 F.3d 1180 (1993); *US v. Brown,* 50568 TC and 824 F. Supp. 124 (1993), to mention only a few of the more prominent cases.

103. US Const., amend. XVI, was drafted in 1909 and ratified on 3 February 1913.

104. *Pollock v. Farmers Loan and Trust Co.,* 157 US 429 (1895).

105. See Congressional Record, 61st Cong., 2nd Sess. (1909). See the Senate debate on 4105–21, House debate on 4390–4441, committee reports on 3900 and 4364, and the appendix on 70–71, 75–79, 117–28, and 130–32. After several years of public discussion, the final debate was limited in time. The proposed amendment passed the Senate: yeas 77, nays 0, and 15 not voting, as recorded on page 4121. It passed the House by 318 yeas, 143 nays, and 55 not voting, as recorded on page 4440. The only mention of the Fourteenth Amendment was that the Sixteenth Amendment might revisit the problem of ratification experienced with the Fourteenth Amendment.

106. 16 *American Jurisprudence* 2d, Constitutional Law, sec. 102.

107. General Allotment Act, 24 Stat. 388 (1887), also known as the Dawes Act.

108. Quoted in S. Lyman Tyler, *Indian Affairs: A Work Paper on Termination* (Provo, UT: Institute of American Indian Studies, Brigham Young University, 1964), 5.

109. The plenary authority of Congress over Indians was first suggested in *Cherokee Nation v. Georgia,* 30 US 5 Peter's 1 (1831). Justice Marshall described the relation of the United States to the Indians as a "plenary kind." In *US v. Kagama,* 118 US 375 (1886) the Court decided that Congress had plenary authority and that it was necessary in the Indians' best interest to apply the Major Crimes Act of 1885 (18 U.S.C., sec. 1153,3242) to Indian Territory. In *Lone Wolf v. Hitchcock,* 187 US 553 (1903) the Court permitted Congress to abrogate the Treaty of Medicine Lodge (21 October 1867, 15 stat 589) with the Kiowa, Comanche, and Apache to take Indian land. Further, the Court said Congress had plenary power over the Indians' tribal relations, which was granted by the Constitution and thus beyond judicial review. Thereafter, Congress seized upon the Court-sanctioned plenary authority to regulate Indian affairs by the authority the *Lone Wolf* court called a "political one, not subject to be controlled by the judicial department of government."

110. For example, Petra T. Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitutional System* (Oxford, UK: Berg Publishing, 1991), 121–29.

111. US Const., art. II, sec. 2, cl. 2. In *McClenahan v. Arizona State Tax Commission,* 411 US 164 (1973) the Court alluded to the Treaty Clause but gave deference to the Commerce Clause as the source of plenary authority.

112. US Const., art. I, sec. 8, cl. 3.

113. *Lone Wolf v. Hitchcock,* 187 US 553 (1903). Congress had violated the treaty and taken surplus land after allotment. The Court determined that Congress had the right to abrogate treaties. Treaty making and abrogation are "political power[s]" granted to Congress by the Constitution in which the Judicial Department had no authority. In fact, the government did not abrogate the treaty; it violated the treaty.

114. Ibid., 565: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning [That is simply not true. It was

certainly not the intent of the 1866 drafters], and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." The Court did not refer to the Commerce Clause or the Fourteenth Amendment.

115. Shattuck and Norgren, *Partial Justice,* 138, note 98. The nonjusticibility doctrine simply means that the matter in question is not appropriate for judicial determination.

116. Ibid. See *Delaware Tribal Business Committee v. Weeks,* 430 US 732,84 (1977); *Sioux Nation,* 448 US 371, 413 (1980); and *Tee-Hit–Ton Indians v. United States*, 348 US 272 (1955).

117. Joseph Story, *Commentaries on the Constitution of the United States,* ¶¶ 1092–95 (1833). Born in 1779, died in 1845, associate justice of the US Supreme Court (1811–45) during John Marshall's tenure as chief justice, Joseph Story is arguably the preeminent authority on the drafting of the 1787 Constitution. Paragraph 1095 provides a history of trade and intercourse under the British crown, after the revolution, and under the 1787 Constitution: "Indians from the first settlement of the country, were always treated, as distinct, though in some sort, as dependent nations. Their Territorial rights and sovereignty were respected. They were deemed incapable of carrying on trade or intercourse with any foreign nations, or ceding their territories to them. But their right of self-government was admitted and they were allowed a national existence, under protection of the parent country, which exempted them from the ordinary operation of the legislative power of the colonies during the revolution[,] and afterwards they were secure in the like enjoyment of their rights and properties as separate communities. The government of the United States since the Constitution have [*sic*] always recognized the same attributes of dependent sovereignty, as belonging to them, and claimed the same right of exclusive regulation of trade and intercourse with them, and the same authority to protect and guarantee their territorial possession, immunity and jurisdiction." That history, by eminent authority relative to the Commerce Clause, has no indication of an attempt or intent to exercise plenary authority over the Indian tribes. Rather it depicts a respectful relationship of coexistence and sovereign self-government.

118. US Const., art. I, sec. 8, cl. 1, collect taxes, duties and excises to pay for the common defense; cl. 2, borrow money; cl. 3, regulate commerce; cl. 4, establish rules of naturalization and bankruptcy; cl. 5, coin money; cl. 6, punish counterfeiters; cl. 7, establish post offices; cl. 8, establish copyright and patent laws; cl. 9, establish courts; cl. 10, punish piracy; cl. 11, declare war; cl. 12, raise and support an army; cl. 13, raise and support a navy; cl. 14, establish rules of military justice; cl. 15, call up the militia; cl. 16, organize, arm and discipline the militia; cl. 17, erect military forts, harbors and arsenals; cl. 18, do all things "necessary and proper" to effect the above clauses. All of these clauses are necessary federal functions that under the Continental Congress might have been shared to some extent with the states. Section 8 clearly established the federal responsibilities in these matters.

119. Indian Trade and Intercourse Act, 22 July 1790, ch. 33, 1 Stat.137, 25 U.S.C. § 177, amended (1982).

120. The Indian Trade and Intercourse Act of 14 December 1795 was signed by President Washington on 19 May 1796. It is a six-page act detailing what could

be traded, where, and by whom and describing punishment for non-Indians who engaged in unlawful trade. The act in no way attempts to restrict Indians. The declared purpose was "to preserve peace on the frontier."

121. Two acts passed in 1802, 1st Sess. of Seventh Congress: The Trade and Intercourse Acts with Indian Tribes, and to Preserve Peace on the Frontiers, and an act to "Establish Trading Houses with the Indians Tribes."

122. See discussion in note 42.

123. See discussion in notes 60–66.

124. Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, DC: US Department of the Interior, Office of the Solicitor, 1942), 91. In note 15 Cohen cites *Stevens v. Cherokee Nation,* 174 US 445, 478 (1899).

125. See note 73.