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The Disenfranchisement of the American Indian

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I. INTRODUCTION

The right to vote is, and has always been, “among the most contentious, highly charged questions in all of contemporary law.”¹ For one, the right to vote is not explicitly mentioned in the United States Constitution. It was understood that states controlled who could and could not vote, because the power of the state to regulate elections is an “attribute of state sovereignty and the element most essential to its existence”² as a sovereign, and such power was not surrendered by States when states adopted the United States Constitution. Thus, the federal adjustments to state franchise of elections took the form of “constitutional amendment rather than federal legislation.”³ Resulting were the Fourteenth Amendment⁴, Fifteenth⁵, Nineteenth⁶, Twenty-Fourth⁷, and Twenty-Sixth

⁴ U.S. Const., amend. XIV § 1, provides “[n]o State shall make or enforce any laws which shall abridge the privileges or immunities of citizens.”
⁵ U.S. Const., amend. XV § 1, provides “[t]he right 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.”
⁶ U.S. Const., amend. XIX § 1, provides “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of sex.”
⁷ U.S. Const., amend. XXIV § 1, provides “[t]he right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”
Amendments\textsuperscript{8} to the United States Constitution. Despite these constitutional amendments, as late as 1948, American Indians were still being denied the right to vote by states, regardless of having been conferred United States citizenship status in 1924.

The United States Constitution provides that “[a]ll persons born or naturalized of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”\textsuperscript{9} The Constitution further provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens.”\textsuperscript{10} Under these constitutional provisions, having been granted United States citizenship, the American Indian became a citizen of the state in which he resided, and therefore, entitled to the same privileges and immunities as other citizens, by which time, the United States Supreme Court had recognized the right to vote as a privilege or immunity of United States citizenship.\textsuperscript{11} By 1964, the United States Supreme Court held this right to be

\textsuperscript{8} U.S. Const., amend. XXVI § 1, provides “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

\textsuperscript{9} U.S. Const., Art. VI, § 2, cl. 1.

\textsuperscript{10} U.S. Const., amend. XIV § 1.

\textsuperscript{11} Ex parte Yarbrough, “The Ku-Klux Klan Cases,” 110 U.S. 651 (1884).
fundamental in that it “is preservative of other basic civil and political rights.”\textsuperscript{12} With this history, why, then, were American Indians being the denied the right to vote by states as late as 1948?

The history of the enfranchisement of the American Indian is complicated and complex. This paper will sort through this complicated and complex history. The paper will first analyze the unique status of Indians and how it excluded them from the meaning of “citizen,” as interpreted by the United State Supreme Court. It is against this backdrop that the way in which states denied American Indians the right to vote after the Indian Citizenship Act of 1924 will then be analyzed.

I. INDIANS’ NOT AMERICAN CITIZENS

The right to vote is “the most significant characteristic of American citizenship.”\textsuperscript{13} By 1820, it was assumed that American “[c]itizenship constituted membership in a federal community requiring allegiance to nation and state.”\textsuperscript{14} As such, “[i]t entitled the citizen fundamental privileges and immunities and in return bound him to assume duties and obligations toward the community as a whole.”\textsuperscript{15} With respect to Indians, this theory did not apply because “[h]istorically, tribes stood totally independent international sovereigns, each equal in status to the United States government, and that structural relationship of tribal nations to the

\textsuperscript{13} Houghton Mifflin, Encyclopedia of North American Indians.
\textsuperscript{15} Id.
United States has been largely based upon treaties.16 This unique independent status was recognized in the United States Constitution such that Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with Indian tribes.”17 In addition, “the exclusion of “Indians not taxed” from state population rolls for purposes of representation in the House of Representatives [in Article I, section, clause 3 18] impliedly recognized that tribal nations as independent of the States and the Union.”19 These constitutional provisions, read together, meant, “Indians were considered to be members of separate political communities and not part of the ordinary body politic of the states or of the United States.”20

This “concept of tribal sovereignty had serious inherent weaknesses, but it did allow courts and executive officers considerable flexibility in determining issues of citizenship concerning white-Indian relations.”21 In Worcester v. Georgia22 Justice Marshall opined that “[t]he Cherokee nation [] is a distinct

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17 U.S. Const., Art. I, sec. 8, cl. 3.
18 U.S. Const., Art. I, sec. 2, cl. 3 provides, “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other persons.”
22 31 U.S. 515 (1832). In Worcester v. Georgia, the Georgia state statute that made it a misdemeanor for “all white persons, residing within the limits of the Cherokee nation [] without a license or permit [] from [] the governor.” Id. at 542. A non-Indian, by consent of the Cherokee nation, resided in the Cherokee nation, was found in violation of the Georgia statute and “condemned to hard labour for four years in the
community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States."23 Justice Marshall based his reasoning on the fact that "Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate."24 In this sense, tribal sovereignty was construed in its exact sense to mean "distinct, independent political communities."

However, in United States v. Rogers, Justice Taney differed with Justice Marshall with respect to tribal sovereignty in reasoning that "[t]he native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the

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23 Id. at 521. The plaintiff in error asserted that "these laws of Georgia are [] unconstitutional, void, and of no effect [] because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee nation and the said United States of America." Id. at 539.
22 Id. at 561.
24 Id. at 559.
governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.”

In Rogers, “a white man, was indicted [] for murder [] of Nicholson, also a white man” in the Cherokee nation, in which, Rogers claimed he was an adopted Cherokee Indian and therefore not subject to the jurisdiction of the United States. The court disagreed with Rogers. Justice Taney explained that “[h]e (Rogers) may be such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian; and the exception is confined to those who by the usage and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally.” Thus, “[w]hatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress.”

Justice Taney seemed to go beyond “the proposition that tribal

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25 45 U.S. 567, 572 (1846).
26 Rogers, 45 U.S. at 571.
27 Id.
28 Id. at 573.
29 Rogers, 45 U.S. at 573.
governments possessed any residual characteristics of sovereignty”\textsuperscript{30} such that race seemed to be the basis for renouncing the recognition by Justice Marshall that tribes were “distinct, independent political communities.” It would be Justice Taney’s supposition that would serve as the stumbling block for Indians from achieving the right to vote.

Against this backdrop, this section will discuss how courts were able “to exclude the Native Americans from the status and privileges of American citizenship.”\textsuperscript{31}

A. CITIZENSHIP INTENDED ONLY FOR THE WHITE RACE

With respect to American citizenship, it was assumed by 1820 that “the [American] status was based on individual consent,”\textsuperscript{32} that American citizenship “entitled the citizen to fundamental privileges and immunities and in return bound him to assume duties and obligations toward the community as a whole,”\textsuperscript{33} and that it “constituted membership in a federal community requiring allegiance to nation and state.”\textsuperscript{34} This assumption held firm, however, American citizenship was deduced in \textit{Scott v. Sanford} to apply only to “the white race, and that they [the

\begin{itemize}
\item \textsuperscript{31} Kettner, \textit{The Development of American Citizenship}, 1608-1870 at 300.
\item \textsuperscript{32} \textit{Id.} at 287.
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
white race] alone constituted the sovereignty of the Government."\(^{35}\) This
perception would later complicate matters for the American Indian and their own
citizenship status.

In the case of *Sanford v. Scott*, Dred Scott, a former slave, commenced suit
in the Circuit Court of the United States "to assert the title of himself and his
family to freedom."\(^{36}\) Scott was a citizen of the state of Missouri.\(^{37}\) At issue was,
whether or not the "Circuit Court of the United States [had] jurisdiction to hear and
determine the case."\(^{38}\) In order to determine this, the United States Supreme Court
had to first address the issue: "[c]an a negro, whose ancestors were imported into
this country, and sold as slaves, become a member of the political community
formed and brought into existence by the Constitution of the United States, and as
such become entitled to all the rights and privileges, and immunities, guaranteed
by that instrument to the citizen?"\(^{39}\) After a thorough analysis of the "general
terms used in the Constitution of the United States,"\(^{40}\) the Court found that
citizenship was *intended* only for "the white race," and therefore, the court held
that Dred Scott was not a United States citizen because he was not of "the white
race," and therefore, not entitled to the privileges and immunities, "[o]ne of which

\(^{35}\) 60 U.S. 393, 419-420 (1856).
\(^{36}\) *Id.* at 400.
\(^{37}\) *Id.* at 400.
\(^{38}\) *Id.* at 400.
\(^{39}\) *Id.* at 403.
\(^{40}\) *Id.* at 409.
rights is the privilege of suing in a court of the United States in the cases specified in the Constitution,” because citizenship was intended only for “the white race.” Justice Taney’s thorough analysis of the “general terms of the Constitution” is important to examine because it had some impact on the way in which Indians were excluded from citizenship.

In determining “whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, was intended to include them, or to give to them or their posterity the benefit of any of its provision,” Justice Taney carefully analyzed the “language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; [ ] the legislation of the different States, before, about the time, and since, the Constitution was adopted; [ ] [and] the constant and uniform action of the Executive Department.” Based on his analysis, Justice Taney concluded that the materials “show[ed] that citizenship [ ] was perfectly understood to be confined to the white race; and that they [the white race] alone constituted the sovereignty in the Government,” because “[t]he word white is evidently used to exclude the African race.”

41 60 U.S. 393, 409 (1856).
42 60 U.S. 393, 409 (1856).
43 Id. at 426.
44 Id. at 420.
45 Id. at 420.
In addition to this finding, Justice Taney also had to address Dred Scott’s state citizenship status. In doing so, Justice Taney made clear the meaning of both United States citizenship and state citizenship, and what both entailed. The narrow interpretation by Justice Taney with respect to both American and state citizenship would provide implications for both “the African race” and Indians.

With respect to United States citizenship, the “Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by the court to be so.” 46 Justice Taney explained that “[t]he right of naturalization was [] surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish a uniform rule of naturalization is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.” 47 Justice Taney further provided that the United States Constitution “gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of

46 60 U.S. 393, 405 (1856).
47 Id. at 417.
citizenship outside of its own territory." Thus, Congress’ right of naturalization is exclusive, but confined only to persons “born in a foreign government, under a foreign Government.” This implied that Congress, even if it could, could not naturalize Dred Scott into American citizenship because Dred Scot was not a “[person] born in a foreign country, under a foreign government.”

Thus, under this structure, despite that Congress’ exclusive authority over naturalization, Justice Taney was careful to emphasize that states still retained the power to determine state citizenship, however, that status was confined to that state only. Justice Taney wrote, “[e]ach State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of the courts, nor to the privileges and immunities of a citizen in the other States.” But was not Dred Scott a citizen of the state of Missouri?

Justice Taney explained that “if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the State could limit or restrict

48 60 U.S. 393, 418 (1856).
49 Id. at 405.
them, or place the priority in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them."

"But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not therefore called on to uphold and defend it."

What does Dred Scott say about about Indians? At the time of Dred Scott, it was assumed that tribes were considered to still be outside the jurisdiction of the United States. Thus, it would seem, then, that Indians could be naturalized by Congress, such that Indians were "born in a foreign government, under a foreign government." Justice Taney recognized this quandary, and addressed this issue, in dictum, at the beginning of the Dred Scott opinion. Justice Taney explained:

"The situation of this population [referring to the negro race] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in the government. But although they were uncivilized, they were yet a free and independent people,

50 60 U.S. 393, 422-423 (1856).
51 Id. at 415.
associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.\textsuperscript{52}

The last sentence is worthy of analysis.

The last sentence seems to indicate two things. First, with respect to \textquotedblleft[but they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States,\right\textsuperscript{52}\textquotedblright, Justice Taney wrote: \textquoteleft\textquoteleft Congress might, as we before said, have

\textsuperscript{52} 60 U.S. 393, 403-404 (1856).
authorized the naturalization of Indians, because they were aliens and foreigners. But, in their untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them. Just as Justice Taney found that the word white was used to exclude “the African race,” Justice Taney also construed it to mean that the word white also meant to exclude Indians. However, this seemed to leave open the question: despite that “no one would have thought of admitting them as citizens in a civilized community,” could congress naturalize Indians? As it stood, naturalization statues only applied to “the white race.”

The second part of Justice Taney’s statement, “and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people,” is interesting because latter statement

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53 60 U.S. 393, 420 (1856).
was not fully explained in *Dred Scott*. This second part seems to imply that, for purposes of naturalization, an Indian would be considered a "white" if the Indian adopted the ways of the "white," for then, the naturalization statues would apply, since at that time naturalization status only applied to whites. If this is true, then, when the Fourteenth Amendment was passed, and an Indian assimilated into the white population, would not an Indian become a United States citizen, and therefore, entitled to the privileges and immunities of other citizens? This was precisely the issue in *Elk v. Wilkins*.

Lastly, Taney's statement is interesting because there were Indians who were made United States citizens "under explicit provisions of treaty of statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life."54 Such tribes included the Cherokees, Choctaws, Wyandotts, Pottawatomies, Ottawas, Kickapoos, Brothertown Indians, and the Stockbridge Indians.55 It did not appear that Dred Scott had any affect on these Indians and their status.

Nonetheless, *Dred Scott* set the foundation for a complicated history for both the black and Indian races, in which, it had to take a constitutional amendment to

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54 *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).
55 *Id.*
undue narrow rulings of the Dred Scott decision. For one, naturalization only applied to those persons “born in a foreign government, under a foreign government.” Second, although an individual could become a citizen of a state, this did not mean that that individual was a United States citizen, in which case, only a United States citizen would be entitled to the privileges and immunities under the United States Constitution. Third, United States citizenship was only intended for “the white race.” Unfortunately, even with the passage of the Fourteenth and Fifteenth Amendments to the Constitution, American Indians would continue to be excluded from the meaning of the amendments.

B. ELK V. WILKINS (1884)

The aftermath of the Dred Scott decision was the ratification of the Fourteenth and Fifteenth Amendments to the United States Constitution. The Fourteenth Amendment was ratified in 1870. Section 1 of the Fourteenth Amendment provides:

“All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Section 2 of the Fourteenth Amendment, in part, provides:
“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”

Two years after the Fourteenth Amendment, the Fifteenth Amendment to the Constitution was ratified in 1870. Section 1 of the Fifteenth Amendment provides:

“The right 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 servitude.”

Ironically, both amendments would be challenged by an Indian who was denied from voting in a city election.

In Elk v. Wilkins, John Elk was “an Indian, and was born in the United States, and ha[d] severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, [] and [was] a bona fide resident of the State of Nebraska and city of Omaha.”56 It is interesting to note that “the petition [] [did] not show of what Indian tribe the plaintiff was a member.”57 “When [Elk] applied in 1880 to be a registered voter, he possessed [] the qualifications of age and residence in State, county, and ward, required for electors by the Constitution and laws of that State.”58 The Nebraska state Constitution provided that “Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, and in the country, precinct or ward for the term provided by

56 112 U.S. 94, 98 (1884).
57 Id. at 98.
58 Id. at 110.
law, shall be an elector. First. Citizens of the United States. Second. Persons born of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.”

Despite meeting the state voter qualifications, the plaintiff was denied from voting by the city registrar because he was Indian, and by that, he was not a United States citizen, and therefore, not entitled to vote. Elk challenged this assertion claiming that the city registrar was in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, when the city registrar denied Elk from voting.

Similarly framed as in Dred Scott, the issue before the court in Elk was “whether an Indian, born a member of one of the Indian tribes within the United States, is merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residency among white citizens, a citizen of the United States, within the meaning of the first section of the Fourteenth Amendment of the Constitution.” The court found Elk to “not [be] a citizen of the United States under the Fourteenth Amendment of the Constitution.”

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59 Pl.’s Memorandum of Law.
61 Id. at 98.
62 The issue framed in Dred Scott was: “Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges, and immunities, guarantied by that instrument to the citizen?”
Constitution, [and therefore] ha[d] been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.”

In his analysis, Justice Grey began by stating that “[g]eneral acts of Congress did not apply to Indians, unless, so expressed as to clearly manifest an intention to include them.”

Justice Grey reasoned that the Fourteenth Amendment “contemplates two sources of citizenship, and two sources only: birth and naturalization.” With respect to birth, Justice Grey found that Indians “are no more ‘born in the United States and subject to the jurisdiction thereof,’ than the children of subjects of any foreign governments born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.” With respect to naturalization, it was already understood that Indians could be made citizens this way, as Congress had already done so with particular tribes.

Despite finding that birth and naturalization applied to Indians, how did Justice Grey find that Indians were not citizens? Justice Grey referred to section 2

64 Elk v. Wilkins, 112 U.S. 94, 109 (1884).
65 This court’s holding resembles the holding in Dred Scott, in that, in Dred Scott the court held, that ‘the African race’ ‘are not, and that they are not included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to the citizens of the United States.” Scott v. Sandford, 60 U.S. 393, 404. The similarities between Dred Scott and Elk are very parallel, which raises the question, did Justice Grey decide Elk in the same way as Dred Scott was decided?
66 Elk v. Wilkins, 112 U.S. 94, 100 (1884).
67 Id. at 101.
68 Id. at 102.
of the Fourteenth Amendment which reads “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” Justice Grey explained that “Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is ‘wholly inconsistent with their being considered citizens.’ Justice Grey further explained that “[it is also worthy of remark, that the language used, about the same time, by the very Congress which framed the Fourteenth Amendment, in the first section of the Civil Rights Act of April 9, 1866, declaring who shall be citizens of the United States, is ‘all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.’ Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being ‘naturalized in the United States,’ or under some treaty or statute.” Thus, mere birth into the United States was not enough for Elk to become a citizen, rather in order for Elk to become a United States

69 Elk v. Wilkins, 112 U.S. 94, 102 (1884).
70 Id. at 103.
citizen, then Congress would have to explicitly do so, either by naturalization, treaty or statute, because the Fourteenth Amendment meant to exclude Indians. Therefore, Elk “not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.”71

As a result, Elk was disenfranchised, and it would not be until 1924 that Congress enacted the Indian Citizenship Act, which would confer United States citizenship to all Indians not yet United States citizens, and not until 1948 that every Indian would have the right to vote.

II. INDIAN CITIZENSHIP ACT OF 1924

Unlike the aftermath of the Dred Scott decision, in which the Fourteenth and Fifteenth Amendments were ratified to extend citizenship to “the African race,” the aftermath of Elk was not as exciting. Instead of a constitutional amendment, Congress would continue to confer United States citizenship to Indians on a varied statutory basis. For example, the Dawes Act of 1887 would grant citizenship only to Native Americans who would give up their tribal affiliations. In 1901, Congress granted citizenship to Native Americans living in Indian Territory. Then in 1919, Congress passed “law which granted citizenship to ‘every American who served in the military or naval establishments.” Finally, in 1924 Congress enacted the Indian

Citizenship Act of 1924, which conferred U.S. citizenship upon Indians who were not yet citizens.

Most scholars attribute the passage of the Act in recognition of Indian men for their service during World War I. However, the enactment of the 1924 Indian Citizenship Act was not without controversy, especially among states. During its enactment, “[i]n the House, [] the only question on the Indian Citizenship Act arose when [Representative] Finiss J. Garrett of Tennessee asked if the legislation would affect state voting regulations. Snyder assured Garrett that it was ‘not the intention of the law to have any effect upon the suffrage qualifications in any State.’ It simply made the Indian ‘an American citizen, subject to all restrictions to which any other American citizen is subject, in any State.’”72 Thus, “[t]he discussion in the House on May 3 made it unmistakably clear that state suffrage qualifications were not to be affected by the new law.”73

Although the Fourteenth and Fifteenth Amendments to the Constitution were passed to ensure that states would not deprive citizens of the “privileges or immunities” of the Constitution, or deny citizens from voting, nothing was done to ensure that Indians would be protected from states from infringing on their rights as citizens. Thus, in states with a significant Indian population, Indians were

73 Id. at 265.
denied the right to vote, and it was not until 1948 that every Indian got the right to vote.

III. AFTERMATH OF INDIAN CITIZENSHIP ACT: ENFORCEMENT OF AMERICAN INDIAN RIGHT TO VOTE

The aftermath of the Indian Citizenship Act of 1924 was that Indians, without the protection to enforce states from denying Indians the right to vote, had to challenge each state that denied them the right to vote. This was an uphill battle, since, it was at this point in history that states had become keen to their authority with respect to elections. Despite state control over elections, once granted citizenship Indians should have been entitled to same privileges and immunities as other citizens, of which, by this time, the right to vote was deemed a privilege and immunity. Thus, how were states able to get around denying the Indian the right to vote?

A. STATE AUTHORITY WITH RESPECT TO ELECTIONS

There is no doubt that states have considerable control over the regulation and administration of federal elections, and exclusive control over local elections. The United States Constitution provides for states authority with respect to elections in two instances. First, the Tenth Amendment relates to the states' powers over local elections. And, second, the Election Clause bespeaks to the states' authority with respect to federal elections. Both of these constitutional

sections, however, are limited by the Guarantee Clause and several Amendments to the Constitution, and case law suggests that states’ authority over federal elections also can be limited. In any event, understanding the scope of state authority over both federal and state elections highlight delayed reaction of states in granting the American Indian right to vote.

"Congress does not have general constitutional authority to legislate regarding the administration of [state and local] elections," because it is presumed under the Tenth Amendment of the United States Constitution that states have exclusive control over the administration of state and local elections. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, such exclusive authority is subject to both the Guarantee Clause, providing for a Republican Form of Government, as well as the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-

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76 Tenth Amendment to the United States Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
77 U.S. Const., amend. XIV § 1, provides no state shall "[n]o state shall deny to any person within its jurisdiction the equal protection of the laws."
78 U.S. Const., amend. XV § 1, provides "[t]he right 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."
79 U.S. Const., amend. XIX § 1, provides "[t]he right 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 sex."
80 U.S. Const., amend. XXIV § 1, provides "[t]he right of citizens of the United States to vote in any primary or other election for President or Vice-President, for electors for President or Vice-President, or
Sixth Amendments to the Constitution. Subject to these “explicit and well-defined substantive limits on state power” by Congress, states retain much control over elections and its process and structure.

The source of state power over federal elections is found in the Election Clause of the United States Constitution. Article I, Section 4, Clause 1, confers on states broad authority to proscribe the “Times, Places and Manner” of congressional elections, but “Congress may at any time by Law make or alter such [state] Regulations, except as to the Places of chusing Senators.” “Manner” has been interpreted by the United States Supreme Court as “authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of elections returns.” However, “Congress may at any time by Law make or alter such [state] Regulations.”

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81 U.S. Const., amend. XXVI § 1, provides “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”


83 The Twenty-Fourth Amendment to the United States Constitution serves as an additional imposition on states such that states shall not deny or abridge the right to vote of citizens of the United States for “failure to pay any poll tax or other tax.”

“The Constitution establishes a system of dual sovereignty.”85 States have argued that the power of the state to regulate elections, both federal and state is an “attribute of state sovereignty and the element most essential to its existence” as a sovereign,86 and causes them to resist the federal government from interfering with state administration of elections. The federal government, respects this attribute of state sovereignty, and has recognized this by making adjustments to state franchise of elections by “constitutional amendment rather than federal legislation.”87 The United States Supreme Court, itself, has recognized this concern, in that the issue of federalism is delicately balanced.88

States have been reluctant “to relinquish their long-standing control over the regulation of elections,”89 asserting that states have had this right before the adoption of the Constitution. Congress responded by making “adjustments in the state franchise [by] constitutional amendment rather than federal legislation.”90 This is illustrated in the wording of the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the Constitution. Nonetheless, Congress’ recognition of states’ administration of both federal and state elections got in the way of Congress safeguarding the American Indian right to vote.

86 Zywicki, 20 T. Marshall L. Rev. at 94.
87 Id. at 97.
88 See generally, Ex Parte Siebold, 100 U.S. 371 (1879).
89 Zywicki, 20 T. Marshall L. Rev. at 103-104.
90 Id. at 104.
Just how did states get away with denying American Indians the right to vote?

B. ARIZONA

1) PORTER V. HALL (1928)

Just two years after the enactment of the Indian Citizenship Act, the Indian right to vote would be challenged. In Porter v. Hall, the Arizona county registrar refused to "enter [plaintiffs's] names on the proper and general and precinct registers of Pinal county" so that they could vote.91 The plaintiffs were members of the Gila River Indian Reservation, who were born on the Gila Reservation, and who resided there.92 The defendant precluded the plaintiffs' from registering asserting that because the reservation, although geographically in the state of Arizona, is "exclusively subject to and under the jurisdiction of the laws and courts of the United States and the tribal customs of said Pima Tribe,"93 it "is not subject to the laws of the state of Arizona, and is, therefore, not a part of the state of Arizona, either politically or governmentally. Therefore, the state argued that plaintiffs were not residents of the state of Arizona within the meaning of the Constitution of the state of Arizona."94 In addition, the defendant also argued, that as a result of this exclusiveness of the federal government, the defendant claimed

91 34 Ariz. 308 313 (1928).
92 Id. at 312.
93 Id.
94 Id.
that the plaintiffs "are not sui juris," and therefore, a "guardian within the meaning of the Constitution of the state of Arizona."\textsuperscript{95} The plaintiffs denied that "they were subject to any Indian tribal customs, or that the reservation was not subject to the laws of Arizona, and alleging that they United States exercises no jurisdiction or control over them or their property, except over certain property held in trust for them."\textsuperscript{96}

The suffrage requirements in Arizona at that time were that the voter be a United States Citizen, over the age of 21, and be a resident of the state of Arizona for at least one year.\textsuperscript{97} The two other election provisions dealt with criminals and "persons under guardianship."\textsuperscript{98}

The two issues the Arizona Supreme Court decided were: "[1)] Is the Gila River Indian reservation within the political and governmental boundaries of the state of Arizona, so that a residence thereon is residence in the state of Arizona, with in the meaning of section 2, article 7 of [the Arizona] Constitution? [2)] Are persons of Indian race, under the conditions set forth in the stipulation of facts as being those in which plaintiffs find themselves, 'under guardianship', within the meaning of the same section?"\textsuperscript{99}

\textsuperscript{95} Id.
\textsuperscript{96} Id. at 312.
\textsuperscript{97} Id. at 323.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 315.
As to the first issue, the court determined that the plaintiffs were residents of Arizona. The court reasoned that "[w]e have no hesitancy in holding, therefore, that all Indian reservations in Arizona are within the political and governmental, as well as geographical, boundaries of the state, and that the exception set forth in our Enabling Act applies to the Indian lands considered as property, and not as a territorial area withdrawn from the sovereignty of the state of Arizona. Plaintiffs, therefore, under the stipulation of facts, are residents of the state of Arizona, within the meaning of section 2, article 7."100

After finding that the plaintiffs were residents of the state of Arizona for purposes of voter eligibility, the Arizona Supreme Court next determined whether the plaintiffs were "under guardianship", within the meaning of the same section," as it was admitted that the plaintiffs were citizens, over the age of 21 and a resident of Arizona.

The court stated that "[b]roadly speaking, person under guardianship may be defined as those who, because of some peculiarity of status, defect of age, understanding of managing their own affairs, and who therefore have some other person lawfully invested with the power and charged with the duty of taking care of their persons or managing their property, or both [] to put in a word, he is not sui juris. It is apparent to us that it was the purpose of our [Arizona] Constitution,

100 Id. at 321.
by these three phrases, to disenfranchise all persons not sui juris, *no matter what the cause, and its justice is plain.*”

The court then referred to the federal policy to assimilate the American Indians, and construed this to mean that American Indians were not sui juris, because the federal policy was understood to mean that Indians could not manage their own affairs. The court determined then that because plaintiffs has always resided on the Gila River Indian Reservation, subject to the law, rules, and regulations of the federal government, subject to the jurisdiction of the Court of Indian Offenses, and not subject to the laws of the state of Arizona, the court concluded that “[w]e need go no further to determine that plaintiffs have not been emancipated from their guardianship, and to some extent, at least, are not subject to the laws of the state of Arizona, in the same manner as are ordinary citizens.”

The court commented that this guardianship would cease to exist only when Congress said so, despite the fact that the plaintiffs in this case had denied that they were subject to any Indian tribal customs. The court did, however, mention that “[w]e heartily approve of the present announced policy of the federal government that, so soon as its Indian wards are fitted therefore, they should be released from their guardianship and placed in the ranks of citizens of the United States and of the state of their residence, as sui juris, subject to all the responsibilities and

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101 Id. at 323-324.
102 Id. at 330.
entitled to all the privileges of such status.\textsuperscript{103} The court would prefer to hear from the federal government that the expression must be clearly expressed: “Whenever that government shall determine in regard to any Indian or class of Indians that they are so released, and that their status in regard to the responsibilities of citizenship is the same as that of any other citizen, the law of this state considers them no longer ‘persons under guardianship, [] and they will be entitled to vote on the same terms as all other citizens.”\textsuperscript{104}

It is interesting to note that the court failed to recognize or even mention in its reasoning the Indian Citizenship Act. The dissent however did recognize that the Indian Citizenship Act was “general and all-inclusive,” such that “[b]eing citizens of the United States and admittedly possessing all the qualifications provided for by our Constitution and laws, as to residence, education, etc., they are entitled to be registered as voters, and to vote, unless they fall with the exceptions of the [Arizona] Constitution.”\textsuperscript{105} The dissent would have found that the Arizona constitutional provision “persons under guardianship” did not apply. The dissenting judge interpreted the law differently with respect to Indian guardianship to mean that “[i]t is not a guardianship, but as Marshall said, it ‘resembles’ a guardianship.”\textsuperscript{106} The justice then commented that “[i]t may be that these

\textsuperscript{103} Id. at 331.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 332.
\textsuperscript{106} Id. at 333.
plaintiffs, and others in their situation, should not, as a matter of public policy, be granted the franchise, since they are not entirely emancipated from federal control, nor amenable while on the reservation to the state laws; but as the laws are now written it seems to me they are entitled to register and to vote."\footnote{107} This is a drastic contrast from the majority opinion.

Unfortunately, \textit{Porter v. Hall} would remain good law for twenty years. It would not be until 1948 that the Arizona Supreme Court would overrule it.

2) \textbf{HARRISON V. LAVEEN (1948)}

As states began to grant American Indians the right to vote after the passage of the Indian Citizenship Act of 1924, it increased the public pressure in other states to grant Native Americans the right to vote. There were also other pressures that forced states to grant American Indians the right to vote. First, the "[f]ederal government was threatening to withdraw funds from states which denied social security to Indians."\footnote{108} A second pressure was that it "was becoming increasingly difficult for the United States to condemn Communist regimes for mistreatment of their citizens while American citizens were being denied equality on the basis of race and color."\footnote{109} By 1948, only two states in the union denied American Indians the right to vote. The two states were Arizona and New Mexico.

\footnote{107 Id. at 333.}
\footnote{108 Gordon Bronitsky, Indians and Civil Rights: The Story of Miguel Trujillo ¶ 10 (published in New Mexico Magazine 1989).}
\footnote{109 Id.}
In *Harrison v. Laveen*, the Arizona Supreme Court overruled *Porter v. Hall*. In *Harrison*, two members of the “Mohave-Apache Indian Tribe, residing on the Fort McDowell Indian Reservation, [] sought to register preparatory to exercising their claimed right of franchise.” The county recorder refused to permit them, and the Indian plaintiffs sued. The plaintiffs claimed that they “possessed all the qualifications for suffrage set forth in the constitution and laws of the state of Arizona, and asserted that if they were denied the right to register and vote they would be deprived of the franchises, immunities, rights, and privileges of citizens which are guaranteed to them under the constitution and laws of both the United States and the State of Arizona.” The plaintiffs claimed that they each owned property, paid state taxes, that they were subject to both the civil and criminal laws of the state, and permitted to leave the Fort McDowell Indian Reservation at any time.

The issue in this case was “basically the same question [] as was presented in the *Porter* case, and that is, are plaintiffs person ‘under guardianship’ within the meaning of section 2, article 7 of the Arizona Constitution. [] If this primary question be answered in the affirmative, as it was in the Porter case, then we must determine whether such denial of the franchise to plaintiffs violates the Fourteenth

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67 Ariz. 337, 340 (1948).

Id. at 340.

Id.
and Fifteenth Amendments to the Constitution of the United States." The court never reached this last question, since it determined that Indians were not "persons under guardianship".

It is interesting to consider the court's approach in overruling Porter. First, it noted in its opinion that 11.5% of the State's population at that time were Indians, which was the largest minority group in that state. Second, the President's Committee on Civil Rights just issued a report, which called for the enfranchisement of Indians in Arizona and New Mexico. In that report it "brand[ed] the decision in the Porter case as being discriminatory." Lastly, the court mentioned and referred to the Indian citizenship Act of 1924. The court also acknowledged that "during the twenty years that have elapsed since the decision in the Porter case some significant changes have taken place in the legal position of the Indian which have a bearing upon the applicability of that decision to contemporary conditions."

With all of this negative attention, the court accepted that its decision in Porter was wrong. The court viewed the Porter decision as "a tortuous construction by the judicial branch of a simply phrase 'under guardianship',

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113 Id. at 341.
114 Id.
115 Id.
116 Id.
117 Id. at 343.
accomplishing a purpose that was never designed by its framers.”¹¹⁸ The court then explained non sui juris and what it meant in terms of guardianship. The court emphasized specific instances where Indians were able to sue in court. Thus, the court held “[t]he term ‘guardianship’ has a very definite meaning, both at common law and under the Arizona statutes, [of which] one of the foregoing characteristics apply to the plaintiffs or to other Indian citizens similarly situated.”¹¹⁹

Furthermore, the court stated “It is axiomatic that if a person is under guardianship he must have a guardian. If an Indian, living on a reservation, is under guardianship the United States presumably must be his guardian. Yet in the instant case the United States is appearing specially in this litigation as amicus curiae to disclaim any intention to treat the plaintiffs as ‘persons under guardianship’. Certainly the state courts cannot make the United States a guardian against its will. Furthermore, to ascribe to all Indians residing on reservations the quality of being ‘incapable of handing their own affairs in an ordinary manner’ would be a grave injustice, for amongst them are educated persons as fully capable of handling their affairs as their white neighbors. This leads us to the conclusion that the framers of the constitution had in mind situations where disabilities are

¹¹⁸ Id. at 345.
¹¹⁹ Id. at 347-348.
established on an individual rather than a tribal basis."\textsuperscript{120} Having made this conclusion, the court never reached the federal constitutional question, as to whether denial of the franchise to plaintiffs violated the Fourteenth and Fifteenth Amendment to the Constitution of the United States.

It is this issue that would be determined by the New Mexico Federal District Court in the case of Trujillo v. Garley.

C. NEW MEXICO

1) TRUJILLO V. GARLEY (1948)

After Harrison v. Laveen, New Mexico became the only state that continued to disenfranchise American Indians.

Attempts to challenge the election provision of the New Mexico Constitution were few. However, many of those attempts were later withdrawn, due in part to the fact that tribal governments forced the individual members to withdraw their suits. The biggest concern of the tribal governments were that if their tribal members were to vote in state elections, the tribes might be subject to the jurisdiction of the states, or that the states would then be able to tax Indians.

In New Mexico, "in a state where the majority party held power by an 8,000 vote margin, not everyone favored enfranchisement of some 20,000 Indian

\textsuperscript{120} Id. at 348.
votes.”121 In the struggle to gain the right to vote, rumors spread that if Indians obtained the right to vote, then it would allow for the state to tax them. This rumor instilled fear into many tribes and had an effect on a pending lawsuit challenging the “Indians not taxed provision.” Two Zuni Pueblos members and a Navajo tribal member filed a suit in federal district court challenging the “Indians not taxed” provision, however, it was at the request of the Zuni tribal Council that the Zuni plaintiffs withdrawn their appeal.122 The Council explained “that the elders of the pueblo, feared a favorable opinion giving the Indians the right to vote would result automatically in their reservation lands being taxed.”123 Thus, the lawsuit was withdrawn. However, it would not be long before Miguel H. Trujillo, an Isleta Pueblo tribal member, would file his own suit challenging the “Indians not taxed” provision.

On July 15, 1948, Miguel H. Trujillo attempted to register to vote in Valencia County but was denied on the grounds that he was an “Indian not taxed” despite him meeting the other state qualifications for voting. An ex-Marine, educator, and at the time of this denial a candidate for Master’s degree at the University of New Mexico, Trujillo wanted to “bring equality to the Indian

122 Fearing Reservation Lands Taxes, Zunis Withdraw Efforts to Achieve Franchise, Gallup Independent (July 17, 1948).
123 Id.
people.”124 For some time, Trujillo “had tried unsuccessfully to get the [All Indian Pueblo Council] to unite on the issue of the Indian vote, and decided to go ahead on his own.”125 As a result, Trujillo initiated his own lawsuit challenging Article VII, Section 1 of the New Mexico Constitution.

In his lawsuit, Trujillo argued that the “Indians not taxed” provision violated the Fifteenth Amendment to the United States Constitution because “persons of other races are accepted for [voter] registration regardless of any question of taxation.”126 The major assertion for this violation was that the prohibition on Indian voting “was eliminated when the last non-citizen Indian was made a citizen in 1974.”127 Thus, when Indians were made citizens in 1924, they could not longer be denied the right to vote an account of race under the Fifteenth Amendment because the Fifteenth Amendment applied to “citizens.”128 In addition, the Fourteenth Amendment would be violated as well.

Granting the 20,000 Indians in New Mexico the right to vote would impact elections results, and that was the biggest concern to the state. However, Attorney for the Plaintiff reassured the court that states still maintained the authority to control elections: “[N]o one denies that taxation, literacy, or age may be elements

125 Id. at ¶ 4.
126 Pl.’s Memorandum of Law 1 (n.d.).
127 Id. at 4.
128 The Fifteenth Amendment in part states: “[t]he right of citizens of the United States to vote shall not be denied [ ] by any State on account of race.”
in constitutionally valid electoral requirements. But these elements, proper in themselves, cannot be linked with any requirements which in terms or in substance bring race, color, or previous condition of servitude into the determination of a man’s right to vote.”

On August 11, 1948, the three judge panel for the United States District Court for the District of New Mexico concluded that “the denial of registration to the plaintiff and other persons similarly situated with plaintiff is a denial of rights protected by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.”

This conclusion however received a mixed reaction. For Miguel Trujillo this was triumphant ruling. However, tribes in New Mexico were still unsure whether this ruling would have an affect of Indians lands being taxed. After the ruling, Attorney for the Plaintiff immediately assured tribes that there was nothing to fear because the “[a]ctual event revealed the emptiness of the these fears.”

Thus, this is how New Mexico became the last state in the Union to grant Native American the right to vote.

IV. CONCLUSION

The enfranchisement of the American Indian has been a long, drawn out struggle which could have been prevented had there been a constitutional

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129 Id. at 6.
130 Letter from Felix S. Cohen to Officers of the All Pueblo and the Pueblo Governors (Oct. 19, 1950).
amendment specifically dealing with Indian voting rights. Despite the fact that most states came to see that the federal constitution, with the addition of the Civil War amendments, compelled the giving of the franchise to all American Indians, the foot dragging by Arizona and New Mexico stand out as a form of residual racism which was used largely to avoid the political consequences of mass Indian registration where the Indian populations were sufficient to make a real difference in electoral outcomes. Although there may be other important unresolved constitutional issues surrounding the status of tribes and tribal members, the sad tale of the voting rights of American Indians is one which has been properly, if belatedly, resolved.