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A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay

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I. INTRODUCTION

The Polish wife of a Pennsylvania coal miner . . . had gone back suddenly to Poland to visit her old father and mother who had taken sick and might soon die. The visit over, she returned quickly to America . . . . On the day before the ship made port, out on the high seas, a baby . . . had been born to the returning mother. The expected had happened, "mother and child both doing well in the Ellis Island hospital, everybody delighted, until—the [immigration] inspector admitted the mother but excluded the baby . . . ." [The Polish immigration quota was exhausted. Exhausted quotas also thwarted attempts to assign the baby either to the British quota since it was born on a British ship or the Belgian quota since the ship came from Belgium.] "oh, look here," I

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began wildly. "I've got it! How could I have forgotten my law so soon? You see, with children it's the way it is with Wills. We follow the intention.

Now it is clear enough that the mother was hurrying back so the baby would be born here and be a native-born American citizen, no immigrant business at all. And the baby had the same intention, only the ship was a day late and that upset everything. But—under the law—the baby, by intention, was born in America. It is an American baby—no baby Pole at all—no British, no Belgian—just good American. That's the way I rule—run up the flag!"[1]

This intent of the parent and the child which the immigration inspector found convincing has often entered the American Framework for citizenship. The relationship between required adherence to strict statutory requirements and an individual's intent as prerequisites to the acquisition of United States citizenship has been evolving since the beginning of our nation. Certain events in Nebraska have contributed to this process.

In June 1891, the University of Nebraska College of Law graduated its first class and also, after approval of the Board of Regents, officially became a part of the University of Nebraska. It is doubtful that the State's elected Governor was celebrating this association since he was at that time involved in a bitter fight for his right to occupy office. Just one month earlier, Governor James E. Boyd had been ousted from office. This was no ordinary retirement. The State of Nebraska was embroiled in a dispute over whether Governor Boyd was in fact a citizen of the United States and thus entitled to hold the office of Governor. The Nebraska Supreme Court had announced its decision that James E. Boyd, an Irish immigrant, was not a citizen of the United States at the time he received a plurality of the votes in the November 1890 election.[2] As a result, Governor Boyd appealed his case to the United States Supreme Court. The Supreme Court issued an opinion that has had a significant impact on the development of the law of citizenship.[3]

The Supreme Court decided the case of *Boyd v. Nebraska ex rel. Thayer* just eight years after it had decided another Nebraska case that also has continuing significance in citizenship law.[4] In 1884, the Supreme Court held in *Elk v. Wilkins* that the fourteenth amendment did not extend birth-right citizenship to every person born in the United States. John Elk, an American Indian,[5] had attempted to vote

1. Henry Currau, Ellis Island Commissioner 1922-26, commenting on FIRST QUOTA ACT, 1921, *quoted in* ELLIS ISLAND: ECHOES FROM A NATION'S PAST 79 (S. Jonas ed. 1989).
2. State *ex rel.* Thayer v. Boyd, 31 Neb. 682, 48 N.W. 739, 51 N.W. 602 (1891).
3. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135 (1892).
4. Elk v. Wilkins, 112 U.S. 94 (1884). The broader implications of this case are in the areas of civil rights and aboriginal rights which are beyond the scope of this Article.
5. The terms "Indian" and "Native American" are used in this article interchangea-

in a local election in Omaha, Nebraska. The election officials refused to let him vote, apparently believing that Indians were neither citizens of Nebraska nor of the United States, and therefore were not eligible to vote. In each case, the Supreme Court considered subjective intent in resolving difficult questions of citizenship.

The centennial year of the Law College also coincides with the centennial of the federal immigration system which was eventually broadened to include citizenship matters. By the Act of March 3, 1891, President Benjamin Harrison signed into law a statute providing for federal control over immigration.[6] This Article examines the development of one aspect of immigration and nationality policy, citizenship law, in the 100 years since the beginning of the University of Nebraska College of Law and the federal immigration system, and the impact of the *Boyd* and *Elk* decisions. These cases provide an opportunity for exploration of the development of the two primary classifications in our citizenship law, naturalized citizens and birth-right citizens, and the importance of an individual's conduct in conjunction with their subjective intent for the acquisition or loss of citizenship.

The Constitution in its original form referred to "citizens" in numerous provisions[7] but failed to define citizenship. It empowered Congress to establish a "uniform rule of naturalization" but failed to define naturalization. Critical citizenship questions were left unanswered. It took congressional action to provide a definition of citizenship first by statute and subsequently in the fourteenth amendment and eventually, to also provide a definition of naturalization. However, unresolved citizenship questions remained.

The results reached in the two Nebraska cases had a major impact on the resolution of some citizenship questions at the time that they were decided and continue to have significance in the resolution of difficult citizenship issues and the general citizenship policy pursued in the United States. The passage quoted at the beginning of this Article suggests that intent is an essential determinant in resolving ques-

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bly depending upon the usage in the source being discussed or cited. I have chosen to use this format to reflect the terminology of those considering the issues being discussed. This is done to give the reader not only a sense of the time in which the source occurred but also to illustrate the continuing problem that exists with regard to selecting terminology that can be used to adequately refer to various racial or ethnic groups. *See, e.g.*, AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 20-21 (V. Deloria, Jr., ed. 1985)(noting that "Native American" is a label not viewed as an improvement over "Indian;" many preferring tribal references).

6. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (1891).

7. Citizens are referred to in the Constitution in general terms in, among others, these various sections: U.S. CONST. art I, § 2, cl. 2 (qualifications for Representatives); U.S. CONST. art. I, § 3, cl. 3 (qualifications for Senators); U.S. CONST. art. II, § 1, cl. 5 (qualifications for President); U.S. CONST. art. IV, § 2, cl. 1 (privileges and immunities of citizens); and U.S. CONST. art. III, § 2, cl. 1 (judicial power regarding citizens of states).

tions of citizenship. The intent element received different emphasis in resolving the *Boyd* citizenship questions than was placed in *Elk*. This Article serves as neither an advocate nor as an opponent of the inclusion of subjective intent in the resolution of different citizenship issues but rather traces its role and resulting consequences in the development of citizenship law and procedures and the influence of the two Nebraska cases on such development.

This Article is organized into three parts. Part II sets forth a background for the understanding of citizenship law. Part III presents a detailed description of the factual context of *Boyd* and *Elk* and an analysis of the reasoning used by the Supreme Court to decide each case. Finally, Part IV examines the impact of the two cases on existing citizenship law by exploring some contemporary citizenship issues as they relate to: (1) the effect of individual as well as parental intent on citizenship, (2) the requirement of strict compliance with statutory prerequisites before citizenship is lost or acquired and, (3) distinctions made between citizens on the basis of how citizenship is acquired.

II. A BRIEF SUMMARY OF THE LAW OF CITIZENSHIP

The consideration of citizenship or nationality law is integrally related with immigration policy. The development of policies to deal with immigrants has included the necessity to develop a compatible policy for the determination of which individuals should be granted or denied citizenship. As the Supreme Court has stated, "[I]t is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."[8]

This issue may arise in several contexts. For example, an individual's attempt to gain entry into the United States might result in the discovery that such person is not an alien, but in fact has a claim to United States citizenship.[9] Conversely, an individual believing herself to be a United States citizen might learn upon application for a United States passport, that the United States considers her to be an alien rather than a citizen.

While many immigrants view citizenship as the ultimate achievement in the immigration process, most apparently do not come to the United States seeking immediate citizenship. The average alien waits about eight years before applying for citizenship although eligible long

8. United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898).

9. *See infra* text discussion on birth abroad accompanying notes 30-31 and 251-54.

before their actual application.[10] Yet, once immigrated to the United States, an individual faces the decision of whether she should or even could become a citizen. When an individual forms the intent to become a citizen, the first step has been accomplished.

The development of citizenship law in the United States has shaped both social and legal aspects of relationships in our political community. The social relationship is based upon the desired objective of common citizenship shared by an immigrant population composed of people of diverse racial and ethnic groups which leads to a social solidarity and therefore a cohesive nation. This cohesive nation would not be possible without a legal structure that establishes individual rights and obligations and the limits of government power. If the shared rights and obligations derived from citizenship outweigh the differences imposed by racial, ethnic and culture backgrounds the result is the formation of a political community.[11] The acquisition of citizenship is a prerequisite for membership in the political community.

Many consider citizenship law, which defines the resulting political community, to be the most complex topic in the area of immigration and nationality policy.[12] In the United States, the fashioning of a coherent citizenship law has been made more difficult due to issues arising from policies relating to the citizenry that is not a part of the immigrant population—former slaves, Native Americans, and inhabitants of territories acquired by the United States. A casual consideration of citizenship issues might lead one to believe that the questions of: (1) who is a citizen, (2) what are the rights of citizens, and (3) how one becomes a citizen of the United States were long ago resolved since we have now had over a century to consider such issues.[13] The historical formation of citizenship and naturalization laws has established a more precise definition of citizenship,[14] a clearer delineation

10. 1989 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE at xxxix (1990). This figure has varied only slightly over the past 30 years.

Even earlier in our immigrant history it was concluded that, "The alien does not come with any direct interest in citizenship. He comes to improve his status." J. GAVIT, AMERICANS BY CHOICE (1922), *republished* in 8 AMERICANIZATION STUDIES: THE ACCULTURATION OF IMMIGRANT GROUPS INTO AMERICAN SOCIETY 18 (W. Bernard ed. 1971)(discussing reasons for coming, freedom vs. economic.)

11. *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 165 (1874).

12. *See generally* R. BOSWELL, IMMIGRATION AND NATIONALITY LAW 591 (1991); T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 833 (1st ed.)(1985); C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 11-1 (rev. ed. 1988).

13. I am measuring here from the ratification of the fourteenth amendment which is the time most agree that the Constitution first provided answers to some of the citizenship acquisition questions. *See infra* text accompanying notes 22-23.

14. For general rules governing the acquisition of citizenship, see the Immigration

of rights and obligations of citizens, and a more demanding and standardized procedure for acquiring and proving a claim to citizenship. However, the following questions remain regarding the acquisition and retention of citizenship and the accompanying rights: (1) Should all persons born in the United States acquire citizenship at the time of their birth;[15] (2) Are there situations when distinctions should be made between native-born citizens and naturalized citizens;[16] (3) Should the acts of parents affect their children's right to acquire or retain citizenship; (4) Under what circumstances should certain groups become citizens, not as individuals, but based upon their membership in a group;[17] (5) Should we embrace the concept of dual nationality;[18] and (6) Is citizenship important—are there certain privileges or rights that can only be granted to citizens?[19] While it is possible to find answers to most of these questions in the applicable law, the search is a complex one. There is a lack of consensus as to whether our existing laws are appropriate and whether constitutional provisions and statutes have been interpreted properly.

There are two forms of citizenship—birthright and naturalized. In the first, a person becomes a citizen of a particular country at birth; generally it is automatic and dependent on the operative legal rules. In the second, a person becomes a citizen of a particular country by voluntary choice. The eligibility of a person to become a naturalized citizen of a particular country depends on the laws of that country.

Intent may be irrelevant to the acquisition of birthright citizenship. However, intent is an integral part of the acquisition of citizenship by naturalization. The Constitution allows Congress to adopt a system to

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and Nationality Act of 1952, §§ 304-348, 8 U.S.C. §§ 1401-1459 (1988). For rules governing loss of citizenship, see *id.* §§ 349-357, 8 U.S.C. §§ 1481-1489. For rules pertaining to persons who are nationals but not citizens at birth, see *id.* § 308, 8 U.S.C. § 1408.

15. *See, e.g.*, P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985)(questioning fourteenth amendment acquisition of citizenship at birth by children of illegal aliens and non-immigrants, *i.e.*, temporary visitors.)

16. *See infra* text accompanying notes 252-66.

17. The principle of collective naturalization is invoked by this question. *See infra* text accompanying note 34 & notes 267-71.

18. One alternative is to recognize the concept of dual nationality only for minors. Upon reaching the age of majority, the individual must affirmatively select to retain their American citizenship. *See infra* text accompanying notes 202-07.

19. This question is presented for consideration by Alexander Aleinikoff and David Martin in their law school immigration text, IMMIGRATION PROCESS AND POLICY, 928 (2d ed. 1991), in connection with the presence of large numbers of permanent residents who never become citizens and have been accorded the protections of the Constitution. *See also* Aleinikoff, *Citizens, Aliens, Membership and the Constitution* 7 Const. Comm. 9 (1990).

naturalize citizens under a uniform rule of naturalization.[20] In addition, the Constitution recognizes both state and national citizenship.[21] Yet, the Constitution did not contain a provision for birthright citizenship or even a definition of citizenship until the adoption of the fourteenth amendment on July 28, 1868.[22] The citizenship clause of the fourteenth amendment provides that: "All persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."[23]

The issue of birthright citizenship is made complex by our adoption of two doctrines, *Jus soli* and *Jus sanquinus*. *Jus soli*—citizenship by soil, is a doctrine that confers citizenship to a person based on the place of birth. An inquiry into individual intent is generally unnecessary. Citizenship is acquired even if the child's parents had no intent for the child to become a United States citizen. The ratification of the fourteenth amendment included this principle in the Constitution. *Jus sanquinus*—citizenship by blood or descent, confers citizenship based upon the citizenship of the person's parents at the time of birth. This doctrine is not explicitly recognized in the Constitution, but has been adopted in the United States through a series of congressional actions. Intent becomes relevant since Congress has imposed conditions upon the child's acquisition of citizenship. The principal application of this doctrine has been to children born outside of the United States to United States citizens. In most instances these doctrines are not in conflict. However, questions arise when a birth occurs and the parent(s) are not in the country of their own citizenship. Thus, there is a conflict if a British citizen gives birth to a baby while physically in the United States because Britain has adopted jus sanquinus citizenship. In that situation, the child has acquired dual citizenship—*jus soli* United States citizenship and *jus sanquinus* British citizenship.

The citizenship law of the United States consists of rules, conferred by the Constitution or by statute, attempting to resolve the conflicts associated with birthright citizenship, and the system of naturalization law that permits citizens of other countries to become United States

20. U.S. CONST. art. I, § 8, cl. 4. However, this grant of authority does not define naturalization.

21. For example, United States citizenship is a prerequisite for election as a Representative. "No person shall be a Representative who shall not have . . . been seven Years a Citizen of the United States . . . ." U.S. CONST. art. I, § 2, cl. 2. State citizenship, however, is the basis for privileges and immunities: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

22. It should be noted that it is possible to be born in the United States and become a citizen of the United States without being a citizen of a state. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872)(residents of the District of Columbia); Immigration and Nationality Act § 302, 8 U.S.C. § 1402 (1988)(Puerto Rico); *Id.* § 306(b), 8 U.S.C. § 1406(b)(Virgin Islands)(citizens of territories).

23. U.S. CONST. amend. XIV, § 1 (emphasis supplied).

citizens. Some persons are determined to be citizens based upon their birth in the United States. Others have become citizens through a naturalization process provided for in a statute or treaty, and a third group are citizens based upon statutes or treaties that have conferred citizenship status. These groups may be roughly categorized as constitutional (fourteenth amendment) citizens, in that they are entitled to citizenship as a matter of constitutional law,[24] naturalized citizens and statutory citizens,[25] respectively.

Most citizens acquire citizenship at birth. This group includes both statutory and constitutional citizens. Present law provides that all persons born in the United States become citizens of the United States at birth unless, as provided in the fourteenth amendment, they are not "subject to the jurisdiction thereof."[26] These are Constitutional citizens. The fourteenth amendment requires that a person be born or naturalized in the United States *and* be "subject to jurisdiction thereof." This clause has been held to exclude, Indians and children of either "enemies in hostile occupation" or foreign diplomats.[27] An issue remains as to whether the exclusion clause also includes children of undocumented workers or illegal aliens. It is asserted that since the United States has not given its consent to the presence of illegal aliens, their children cannot acquire United States citizenship.[28] Individual intent becomes irrelevant.

Congress has expanded the birthright citizenship category to include Indians,[29] children born abroad to a U.S. citizen,[30] certain children born in United States possessions,[31] and children of unknown parentage found in the United States under the age of five.[32] The citi-

24. I use this classification to describe citizenship acquired at birth when born in the United States, "subject to its jurisdiction." As discussed below, this term typically includes naturalized citizens since they are also referred to in the fourteenth amendment.
25. Naturalization is defined as the conferring of nationality after birth by any means. Immigration and Nationality Act § 101(a)(23), 8 U.S.C. § 1101(a)(23) (1988). "Statutory citizens" is a term used to describe citizens who do not acquire citizenship through birth in the United States or a naturalization process. *See, e.g.*, P. SCHUCK & R. SMITH, *supra* note 15, at 126.
26. Immigration and Nationality Act § 301(a), 8 U.S.C. § 1401(a)(1988). *See infra* notes 116-18 and accompanying text.
27. *See id.* § 301(b), 8 U.S.C. § 1401(b) and discussion accompanying notes 116-24.
28. *See* Schuck & Smith, *supra* note 15.
29. United States v. Wong Kim Ark, 169 U.S. 649, 682 (exclusion of children born to foreign enemies or diplomats based upon law of England and the English colonies as exceptions to the *jus soli* principle).
30. *Id.* § 301(c), (d), (e), (g), 8 U.S.C. § 1401(c), (d), (e), (g).
31. Immigration and Naturalization Act § 301(f), 8 U.S.C. § 1401(f).
32. Most residents of United States possessions are nationals but not citizens of the U.S. *Id.* § 308, 8 U.S.C. § 1408. Persons who are nationals but not citizens are considered to owe allegiance to the U.S. but do not have all the rights and obligations that accrue to citizens. Puerto Rico, § 302, 8 U.S.C. § 1402; Canal Zone or Repub-

zens who do not fit the constitutional requirements but, who are nonetheless accorded citizenship automatically at birth are "statutory citizens."

A person may become a naturalized citizen based upon their intent and a formal application,[33] or collectively. Collective naturalization eliminates the focus on both the individual and intent. Rather, it results from annexation of new territories, admission to statehood, territorial cession by treaty, or statutory enactment. All persons within a specified group and meeting certain qualifications become citizens upon the occurrence of one of these triggering events.[34]

Boyd and *Elk* illustrate the development of established citizenship principles as well as provide guidance in resolving some of the issues yet unresolved in citizenship law. The issues presented in *Boyd* provide an opportunity to explore the acquisition of citizenship by naturalization and the effect of parental intent and choice on a child's citizenship. The *Elk* decision focused primarily on the issues of birthright citizenship and provides opportunity for examination of the categories of birthright citizenship that have developed, in part because of *Elk*.

III. THE NEBRASKA CASES

A. *Boyd v. Thayer*

With the 1890 election, Governor James Boyd became the first Democratic Governor elected in Nebraska in thirty years.[35] Shortly after he received the democratic nomination in August 1890, the Omaha Daily Bee reported in Boyd's biographical sketch that he had come to Omaha in 1856 and engaged in the business of carpentry. Later he pursued merchandising and the raising of stock. His political career included positions as county clerk, councilman, Mayor of Omaha, representative and delegate to the state constitutional convention. The newspaper gave the following glowing praise of the immigrant gubernatorial candidate.

> He was also a founder of the Nebraska National Bank, and ten years ago built the splendid opera house. . . . Mr. Boyd has always been a staunch democrat and is one of the best known leaders of that party in the state. He is an uncompromising anti-prohibitionist.

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lic of Panama, § 303, 8 U.S.C. § 1403; Virgin Islands, § 306, 8 U.S.C. § 1406; Guam, § 307, 8 U.S.C. § 1407. Immigration and Nationality Act § 302, 8 U.S.C. § 1402 (1988)(Puerto Rico); *Id.* § 303, 8 U.S.C. § 1403 (Canal Zone or Republic of Panama); *Id.* § 306, 8 U.S.C. § 1406 (Virgin Islands); *Id.* § 307, 8 U.S.C. § 1407 (Guam); *Id.* § 301(f), 8 U.S.C. § 1401(f)(unknown parentage).

33. *See infra* note 195.

34. *See infra* text accompanying note 76.

35. Governor Boyd was actually the first Democratic Governor of the State. All previous Democrats had been Governors of the Territory of Nebraska.

> Mr. Boyd is an Irishman, having been born on . . . September 9, 1934. He came to America with his father in 1847, settled at Zanesville, O., and resided there until the western foyer brought him to Omaha.[36]

The celebration of Boyd's election and the return of the democratic party[37] was soon tainted. There was speculation that John H. Powers, the People's Independent candidate,[38] was about to file a contest to the election based on alleged irregularities in the counting of votes.[39] Boyd had won a plurality over Powers by 1144 votes.[40] The Republican candidate, L.D. Richards, received 68,878 votes, Powers 70,187, and Boyd 71,331.

On November 21, 1890, Boyd was officially notified that the election was to be contested.[41] As expected, the first protest was filed by candidate John Powers.[42] There were allegations that voters in Omaha had not been allowed to enter polling places and that other fraudulent conduct had occurred. While there were some allegations of fraudulent conduct in other parts of the State, most of the controversy centered in Omaha. The largest number of votes were cast in Douglas county (Omaha) with Boyd receiving over 18,000, Powers 1173 and Richards 6456.[43]

Powers' filed an affidavit alleging "foreigners" had filed their "first papers"[44] between August 1890 and October 1890 and that the fee for several of them was paid for by one individual or organization.[45] The

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36. Omaha Daily Bee, Aug. 15, 1890, at 4, col. 5. *See also* J. MORTON, 1 ILLUSTRATED HISTORY OF NEBRASKA 594-95 (1907).
37. The fireworks displays and other forms of celebration reached beyond the borders of Nebraska. Iowans joined in the rejoicing. Boies was elected in Iowa. One celebrating slogan announced Boyd's election as a celebration of "The Four Big B's," "Boies, Boyd, Bowman, Bryan," referring also to William Jennings Bryan Omaha Daily Bee, Nov. 11, 1890, at 5, col. 3.
38. The People's Independent Party was also referred to as the Farmers Alliance Party. The Populist Party grew out of the Farmers Alliance party which developed in part because of an agrarian crisis in the late 19th Century. *See, e.g.*, J. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMER'S ALLIANCE AND THE PEOPLE'S PARTY 95 (1931).
39. *See, e.g.*, Omaha Daily Bee, Nov. 17, 1890, at 8, col. 4.
40. *Id.* Nov. 19, 1890 at 4, col. 1.
41. *Id.* Nov. 21, 1890, at 1, col. 6.
42. *Id.* Dec. 5, 1890, at 7, col. 1.
43. *Id.*
44. This term could have been used to mean either voter registrations, naturalization certificates or declarations of intention to become citizens. While some newspaper accounts described the process as naturalization, declaration of intentions were required at that time so that "first papers" seems to indicate that the individuals had taken no previous steps toward becoming citizens. *See, e.g.*, *id.* Dec. 8, 1890, at 1, col 1; Omaha Word Herald, Feb. 2, 1892, at 1, col. 2. *See infra* text accompanying notes 231-34.
45. Omaha Daily Bee, Dec. 8, 1890, at 1, col. 1. (One hundred seventy-nine first papers were filed and 102 paid for by one organization in Hall County); *Id.* Dec. 10, 1890, at 4, col. 1 (Saline County, seven naturalized).

implication was that the foreigners were then registered to vote for the election. Some of those assisting in the registration of the new voters claimed that the sole purpose of registering them was so that they would vote against prohibition and not so that they would vote for or against any particular political party.[46]

The most serious allegation was not made until one month after the protest had begun. A Cleveland Ohio newspaper carried a story on December 12, 1890 that was picked up by the Nebraska newspapers. The article reported that Governor-elect Boyd's father had filed his declaration of intention[47] to become a citizen in 1849,[48] but did not receive his final citizenship papers until the month of the election, November 1890.[49] The naturalization law in effect at the time[50] provided derivative naturalization for minor children who were under the age of twenty-one and living in the United States at the time that their parents were naturalized.[51] If a parent failed to naturalize before the child reached the age of majority, the child could only acquire citizenship through their own naturalization proceeding.

The hidden meaning of Powers' affidavit became clearer. If the allegations were true, the elected Governor would not have been a citizen at the time of the election and Powers, receiving the next highest number of votes, it was claimed, should be the duly elected Governor.

On December 16, 1890, Governor Boyd presented the issue of his

46. *Id.* Dec. 18, 1890, at 4, col. 1.; *Id.* Dec. 19, 1890, at 3, col. 1. At the time, there was a common belief that numerous incidents of naturalization fraud occurred throughout the nation. *See infra* notes 223-24 and accompanying text.

47. *See infra* text accompanying notes 231-34.

48. The applicable naturalization laws in existence in 1849, when Governor Boyd's father filed his declaration of intention, provided that an alien was eligible for admission to citizenship under the following conditions:

    a. Must be a free white person having resided in the United States at least five years and in the State where admission is sought at least one year.
    b. Be of good moral character and have an attachment to the United States Constitution.
    c. Renouncement of any title of nobility he may have had.
    d. Take an oath of allegiance to the United States and of renunciation of his former allegiance.
    e. Have taken an oath at least two years prior to his application for admission before "a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction."

    Uniform Naturalization Act, ch. 28, 2 Stat. 153 (1802)(repealed 1906).

49. Omaha Daily Bee, Dec. 13, 1890, at 1, col. 2.

50. The provision regarding the naturalization of foreign-born minor children was the same as had been included in the first naturalization law enacted in 1790. *See infra* notes 170-72.

51. Uniform Naturalization Act, ch. 28, 2 Stat. 155 (1802)(repealed 1940) stated: "The children of persons who have been duly naturalized under any law of the United States . . . being under the age of 21 years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof."

citizenship before the federal district court in Nebraska. This action and the Cleveland Newspaper article were apparently the result of a post-election visit by Governor Boyd to his father in Zanesville, Ohio where he learned of the questionable citizenship status. The court issued a judgment that Boyd was in fact a citizen.

The other named party in the *Boyd* case was Governor John M. Thayer. He was a Republican from Grand Island, Nebraska, first elected in 1886 and reelected in 1888.[52] Although Thayer challenged Boyd's right to take over the office of Governor,[53] Boyd took office on January 9, 1891. By this time, Governor Thayer had instructed his lawyer, John L. Webster,[54] to begin quo warranto proceedings[55] against Governor Boyd on the grounds that he was ineligible to be elected since he was not a citizen at the time of the election and therefore should be ousted from the office.[56]

When Boyd appeared at the gubernatorial office, the state militia including six policemen and a deputy sheriff refused to allow him to enter. Thayer's refusal to relinquish the customary Governor's

52. A. SHELDON, HISTORY AND STORIES OF NEBRASKA 272 (1913). A contemporary account of the election contest and the Supreme Court decision was reported in the Omaha World Herald, Feb. 2, 1892, at 1 (Sunrise ed.).

53. John M. Thayer had served as the first brigadier general of the Nebraska militia, which was organized primarily to protect the settlers from the Indians, and also as Nebraska's U.S. Senator. A. SHELDON, NEBRASKA, THE LAND AND THE PEOPLE 264, 424 (1931). Thayer was born in Massachusetts and spent his early life there. His family had immigrated to the United States from England three generations before with the coming of Thomas Thayer, Governor Thayer's great grandfather. Thayer moved to Nebraska in 1854. He served in the Nebraska territorial council from Douglas County and in his first week introduced an act to abolish slavery. Curtis, *John Milton Thayer*, 28 NEB. HIST. 225 (1947).

54. Webster had served as the President of the Convention that drafted the territory's constitutional provision regarding qualifications for office. He was described as the "prohibition attorney." This was not the first case involving constitutional rights that Webster had presented to the Supreme Court. He had served as attorney for John Elk, as well as attorney for Standing Bear in another famous trial arising in Nebraska involving the rights of the Ponca Indians. *See* Lake, *Standing Bear! Who?*, 60 NEB. L. REV. 451 (1981) for a detailed discussion of the decision and events surrounding United States *ex rel.* Standing Bear v. Crook, 25 F. Cas 695 (C.C.D. Neb. 1879)(No. 14,891).

55. NEB. REV. STAT. § 25-21, 146 (1989 & Supp. 1990), in effect since 1858, reads:

> When any citizen . . . shall claim any office . . . unlawfully held and exercised by another, the person so claiming such office shall have the right to file . . . an information in the nature of a quo warranto, upon his own relation, and . . . to prosecute said information to final judgment; *Provided*, he shall have first applied to the prosecuting attorney . . . , and the prosecuting attorney shall have refused or neglected to file the . . . [information].

56. The Nebraska Constitution provided in relevant part that "No person shall be eligible to the office of Governor . . . [W]ho shall not have attained to the age of thirty years, and been for two years next preceding his election a citizen of the United States and of this State. . . ." NEB. CONST. art. V, § 2.

quarters, resulted in Boyd having to occupy offices previously held by the board of transportation. The local papers reported that the Nebraska Supreme Court had returned Thayer's quo warranto papers to Webster and expert attorneys assumed that this meant the supreme court was refusing to hear the quo warranto action.[57] This assumption was apparently based upon the challenge to Thayer's standing to file the proceedings.[58]

This speculation was short-lived when on January 13, 1891, Chief Justice Cobb announced that the court did have jurisdiction and would allow the quo warranto proceedings. The court suggested that Thayer relinquish the gubernatorial office during the pendency of the proceedings, even though it questioned it's authority to order Thayer to do so.[59] Thayer vacated the gubernatorial offices at the state house when Governor Boyd's representatives, including the new head of the state militia, General Vifquain, and State Treasurer Hill presented him with a legislative resolution that required that the offices and quarters he occupied be turned over to Governor Boyd.[60] Although Thayer stated at the time he vacated the quarters that he was content to wait for the decision of the Nebraska Supreme Court, within a few days he notified Governor Boyd that an injunction was being sought to prevent Boyd from functioning as Governor. Thayer's affidavit, accompanying the notice, alleged that Boyd had wrongfully taken the offices and rooms from Thayer by force.[61] A small article appearing in the Omaha Daily Bee reported that "General Thayer is not a raving maniac, as has been asserted," and that Thayer was reported as simply

57. Omaha Daily Bee, Jan. 9, 1891, at 1, col. 1.

58. *See infra* note 65 and accompanying text.

59. Omaha Daily Bee, Jan. 13, 1891, at 1, col. 1.

60. *Id.* Jan. 15, 1891, at 1, col. 3.

61. A copy of the notice served on Boyd was reprinted in the Omaha Daily Bee, Jan. 19, 1891, at 1, col. 5.

> Notice to James E. Boyd—You are hereby notified that the relator, John M. Thayer, will move the court on January 29, 1891, at the capitol, in the court room of said court, at 9 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an injunction to restrain and enjoin you from exercising or undertaking to exercise the office or duties of Governor of the state of Nebraska, and from invading, using or occupying the rooms or any of them of the Governor of Nebraska, heretofore, and until the 15th day of January, 1891, occupied and used by the relator as Governor of Nebraska, and which you on said 15th day of January unlawfully and with force invaded and took from the relator; and further to restrain you from using or removing from said rooms any of the furniture or records thereof, and from in any manner hindering or disturbing the relator in the quiet occupancy, use and enjoyment of said rooms, office, records and furniture pending this suit, and until the final hearing and judgment herein, or further order of the court; and you are further notified that the affidavits hereto attached and accompanying this notice will be read and used at said hearing, and at that time and place you may be heard to show cause, if any you have, why such injunction should not be granted.

resting in bed because he had "overtaxed his strength and was physically prostrated."[62] The Nebraska Supreme Court apparently did not consider the injunction request on January 29, 1891 as scheduled.[63]

The court overruled Boyd's motion to dismiss Thayer's complaint. In his answer to the complaint, Boyd alleged that he was a citizen—he had lived his life as a citizen and that he had taken an oath of allegiance, the same oath required of a person being naturalized, when he had enlisted in the militia.[64] Boyd essentially argued that based upon his intent to become a citizen and his conduct which was consistent with his intent, the Court should find that he was a citizen at the time of the election. Boyd also recounted the actions taken by his father in furtherance of his intent to make the United States his permanent residence and to become a citizen as well as the senior Boyd's belief for forty years that he was a citizen. Further, Boyd recounted, his father had told him, when he was twenty-one years old, that he was a United States citizen. Boyd also claimed, in the alternative, that he had acquired citizenship when Nebraska was admitted into the Union as a State. The court found this last argument unpersuasive, after concluding that Congress had not specifically provided for collective naturalization in Nebraska's admission documents and further, Boyd's assertion would mean that even foreigners who either did not meet statutory qualifications for naturalization or had no intention of becoming citizens would have acquired citizenship.

In response to Thayer's demurrer, requesting a judgment on the pleadings, the three-judge Nebraska Supreme Court rejected Boyd's claim that it lacked jurisdiction to hear the case[65] and on the afternoon of May 5, 1891, announced its decision that Thayer should retain the Governor's office. In rejecting his claim, the court found that Boyd was not a citizen at the time of election, and since an ineligible

62. *Id.*

63. *Id.* Jan. 29, 1891, at 1, col. 1.

64. While the action was pending, the head of the State militia, Adjutant General Vifquain, discovered that Boyd had volunteered and been drafted into the army in 1864 at Fort Kearney, Nebraska, as one of the settlers needed in an "Indian campaign." *Id.* Jan. 20, 1891, at 4, col. 1. He believed that the discovery of the information would help Boyd in his battle to retain office. Governor Boyd had apparently either forgotten that he had served in the army for a brief period or failed to recognize the significance of his service.

65. The attorney general refused to challenge Boyd's right to hold the office based upon his lack of citizenship. It was argued on behalf of Boyd that since Thayer's term had expired, he did not have the required standing to institute a quo warranto proceeding. *Id.* Mar. 4, 1891, at 1, col. 3.

But see Sorensen v. Swanson, 181 Neb. 205, 147 N.W.2d 620 (1967)(Primary purpose of Nebraska quo warranto statute is the same as existed at common law—determination of an occupant to hold an office)(demurrer sustained; an action by the occupant of an executive state office to contest the election of his successor is not an action in quo warranto within the meaning of article V, section 2, of the Constitution of Nebraska but rather an election contest).

candidate had received a plurality of the votes, the election was void. Immediately after issuing the two-judge majority opinion, which was written on behalf of the court by Judge Norval, reported by the Omaha Daily Bee to be the brother of "Governor Thayer's lawyer," the court had a writ of ouster served upon Governor Boyd. Governor Boyd relinquished the Governor's office to Governor Thayer only about one hour after the decision was issued.[66]

In reaction, the Omaha Daily Bee suggested that Thayer and his lawyers had some advantage in the lawsuit because of their connections. The author of the decision, Judge T. Norval was the brother of Richard Norval, Thayer's appointee as Attorney General. In addition, Boyd's lawyers were not present when the court announced the decision. The decision was expected on the morning of May 5, 1891 and when the decision had not been issued by noon, Boyd's lawyers apparently left the courthouse. It was suggested that Boyd's lawyers were misled into believing that the court would adjourn until the next day. Therefore, none of Boyd's lawyers arrived at the Governor's office until Boyd already had relinquished the office.[67] Other reports claimed the writ of ouster was prepared before the decision was issued and was immediately enforced by a "posse of about fifty others" including John L. Webster and Dick Norval accompanied by a deputy sheriff.[68]

Judge Maxwell, the lone dissenter, complained that Boyd's lawyers had not been given proper time to file objections and that the writ of ouster had been " 'surreptitiously obtained.' "[69] Boyd apparently requested time to call his lawyer before he vacated the office but John Webster insisted that the deputy sheriff demand immediate possession of the office.

Boyd's attorney, John D. Howe, announced immediately after the decision was entered that an appeal would be filed with the United States Supreme Court.[70] Governor Boyd stated that he agreed with Judge Maxwell's dissenting opinion, and that with respect to his citizenship:

> I believe . . . that *I am a citizen of the United States*, and of course it goes without saying that *I always intended to be such*. A man who has lived in this country since he was a child and been a resident and citizen of this state for thirty-five years, and who helped to frame the constitutional provision . . . of the enabling act under which the state was admitted into the union, and who has done perhaps as much as any other man in building up and developing the resources of the state, is certainly entitled to citizenship . . . . [I]f the law will so permit I will carry this case to the supreme court of the United States for the purpose of having a declaration of what constitutes citizenship of the

66. Omaha Daily Bee, May 6, 1891, at 1, col 7.
67. *Id.*
68. *Id.*
69. *Id.* May 7, 1891, at 1, col. 5.
70. *Id.*

United States by the highest tribunal in the land.[71]

The law so permitting, he filed a request for review with the Supreme Court. His review request used essentially the same arguments as presented to the Nebraska Supreme Court. Boyd based his claim to citizenship on three alternate theories: First, he claimed that he was a citizen in fact—having acquired citizenship while he was still a minor through the naturalization of his father. Second, he argued that the circumstances of his life warranted a conclusion that he was a citizen. He believed that he was a citizen. It was his intent to be a citizen. He had voted for many years, held public offices and taken oaths of his allegiance to the United States. Finally, he argued that the principal of collective naturalization operated to make him a citizen when Nebraska was admitted into the Union in 1867. This last argument, taken to the full extent meant that everyone living in Nebraska at the time of its admission as a State became a citizen whether they intended to or not.

With only one dissenter, the United States Supreme Court agreed that the evidence supported a conclusion that Boyd was a citizen.[72] However, the Justices did not agree on the reasons for reaching that conclusion.

With respect to the issue of whether he was a naturalized individual based on his father's naturalization, the issue was simple. If Governor Boyd's father became a citizen before October 1854, the date when Governor Boyd reached the age of his majority, then the Governor was a citizen.

Justices Gray, Harlan and Brown joined Chief Justice Fuller in holding that the proof offered by Boyd was sufficient for a jury to infer that Governor Boyd's father had become a citizen before October, 1854. Thus, based upon Thayer's demurrer, Governor Boyd was entitled to a judgment concluding that he was a citizen at the time of the election. In reaching this result, the Justices relied, in part, on the well-pleaded allegations that Boyd's father had consistently exercised the right of voting and believed himself to be a citizen. The conclusion that Boyd had alleged facts sufficient to sustain a demurrer is probably better explained by the circumstances of the time rather than by legal analysis. At that time, there was little distinction between the rights granted to immigrants and those granted to citizens. Under Nebraska law, immigrants were eligible to vote if they had filed a declaration of intention to become a citizen. An intent evidenced by the filing of a form was sufficient to confer a right usually reserved for

71. *Id.* May 6, 1891, at 1, col. 7, continued at 7, col. 3 (quoting Governor Boyd)(emphasis supplied).

72. The decision was apparently issued by an eight judge court which included Chief Justice Melville W. Fuller, and Justices David Brewer, Henry B. Brown, John M. Harlan, Horace Gray, Lucius Lamor, Stephen J. Field, and Samuel Blatchford.

citizens. Additionally, the lax nature in which the naturalization process was conducted made it unrealistic to insist upon strict compliance with naturalization procedures and almost impossible to prove that naturalization had or had not occurred.[73]

By deciding that a jury could conclude at least in part, from the actions of Boyd that he was a citizen,[74] the Court essentially approved the consideration of Boyd's intent as support for his claim to citizenship. His actions evidenced intent to be a citizen even though all formalities had not been completed. The conduct evidence could not have been the sole basis for a conclusion that Boyd was a citizen. For example, it was common at that time for those declaring intent but not yet becoming citizens to vote.[75]

Boyd's second contention, that even if he had not been naturalized, aliens residing in territories or States at the time of their admission in the Union became citizens through the process of collective naturalization was accepted, with some clarification, by Chief Justice Fuller, and Justices Brewer, Blatchford and Lamar. In his opinion, Chief Justice Fuller noted that there were numerous instances of collective naturalization by Congress under its naturalization powers. *Elk* was cited for the proposition that even Indians who were not members of a political sovereignty had gained citizenship through collective naturalization. In accepting Boyd's collective naturalization argument, Chief Justice Fuller wrote:

> Congress having the power to deal with the people of the Territories in view of the future States to be formed from them, there can be no doubt that in the admission of a State a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.[76]

The Court then examined the documents involved in the creation of the State. The Nebraska Legislature petitioned Congress in 1864 for Nebraska statehood. As a result, Congress passed Nebraska's Enabling Act,[77] pursuant to which Nebraska adopted a Constitution that was narrowly approved.[78] Nebraska was admitted into the Union on

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73. *See* J. GAVIT, *supra* note 10, at 25-33; *infra* section IV.B.1.

74. It is not known if the court would have reached the same conclusion if there had not also been some evidence that Boyd's father had acted as though he believed that he had become naturalized.

75. This privilege generally extended to white males and was restricted on the basis of race (Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)), sex (Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874)), and property ownership, but not necessarily citizenship (Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093-97 (1977)).

76. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 170 (1892).

77. Act of Apr. 19, 1864, ch. 59, 13 Stat. 47.

78. The vote was 3938 for and 3838 against. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 174 (1892). *See* J. BARRETT, NEBRASKA AND THE NATION 54 (4th ed. 1906)(citing HISTORY OF NEBRASKA 151 (1882)).

March 1, 1867 after amending its Constitution, as required by Congress, to eliminate its restriction of suffrage to "free white males."

At the time of Nebraska's admission into the Union, some states determined eligibility to vote based upon length of residence in the state. Others, such as Nebraska, based the determination upon citizenship, which included those who had the filed a declaration of intention to become a citizen. This practice was reflected in the 1854 Organic Law under which the Territory of Nebraska was organized. This law included in section 5 the requirements for eligibility to hold office or to vote dictated that a person be (1) a citizen of the United States or (2) have filed a declaration of intention to become a citizen and also have taken an oath to support the Constitution of the United States.[79] These requirements were emphasized in section 10 which provided that:

> [Every free white male citizen,] and those who shall have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States, [shall be entitled to vote.][80]

The Court agreed with the Nebraska Supreme Court that Congress did not intend to confer citizenship on all newly-arrived aliens who took up residence in Nebraska before it was admitted into the Union. Nonetheless, it concluded that these documents reflected an intention on the part of Congress to recognize as United States citizens, anyone who was already a citizen living in the territory as well as anyone who had filed a declaration of intention. But, Governor Boyd had never filed a declaration of intention nor had he been naturalized in the time required prior to the election. Justice Fuller, writing for the court, had to create a theory of citizenship acquisition. He reasoned that since Governor Boyd was a minor at the time, his father's declaration of intention conferred upon him an "inchoate status" which had to be accepted or repudiated upon reaching his majority. Since there was no evidence that Governor Boyd had made any application of acceptance prior to the election, the Court concluded that a formal act was not required. Instead, Governor Boyd's actions, which included serving in elected offices, taking oaths of allegiance, and serving in the militia, demonstrated that he had accepted his father's repudiation of his former nationality and therefore had performed the "actual equivalent" of a formal application.[81] That is, his subjective intent and belief was to become a citizen and his actions evidenced this intent.

The Supreme Court issued its decision on February 1, 1892 and Thayer surrendered the Governor's office on February 8, 1892. Boyd filed the Supreme Court opinion with the Nebraska Clerk of Court on March 15, 1892 and on the next day a hearing was held. Thayer's ac-

79. Act of May 30, 1854, ch. 59, § 5, 10 Stat. 277, 279.
80. *Id.* § 10, 10 Stat. 277, 281.
81. Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 178-79 (1892).

tion was dismissed with no appearance being made on his behalf. Apparently notice of the hearing had been served on Webster who was no longer Thayer's attorney. Consequently a motion was filed on Thayer's behalf to set aside the dismissal.[82] Thayer contended that the Supreme Court had merely determined that his demurrer should have been overruled and that Boyd should be allowed to proceed to trial and the Court had not resolved the citizenship question. The Nebraska Supreme Court determined that the motion was untimely and noted that the notice had been served in good faith since the change in attorneys was unknown to either the court or Boyd.[83] Further, the court held that it was not required to resolve the question presented by Thayer since he no longer had authority to pursue the quo warranto proceedings. The court distinguished this conclusion from it's earlier approval of Thayer's action by finding that when Thayer relinquished the office to Boyd, he became a private person who could not maintain the proceedings. On April 7, 1892, the court issued its opinion and the battle for the State House ended. There were no further challenges to Governor Boyd's citizenship.

B. *Elk v. Wilkins*

In deciding whether John Elk, an Indian living in Omaha, was a citizen, the Supreme Court announced in *Elk v. Wilkins*[84] that the fourteenth amendment phrase "subject to the jurisdiction thereof," was to be interpreted to exclude Indians from becoming citizens of the United States under the doctrine of *jus soli*. John Elk's tribal affiliation was not alleged in his petition. The petition simply alleged that he "is an Indian."[85] The Omaha, Otoe, Ponca, Pawnee and Sioux tribes lived in Nebraska at that time. However, Elk's tribal affiliation may not have been to a tribe based in Nebraska. The 1880 census records reveal that John Elk was born in Iowa and that his mother and father were both from Wisconsin. The census further reported that he was thirty-five years of age, employed as a laborer, and that he lived with his wife, Louise, in a "wigwam" along the Missouri land banks in Omaha in "dwelling no. 282."[86] John Elk had severed his tribal relations for at least one year before he attempted to register as a voter. When he presented himself before Charles Wilkins, an election official of the Fifth Ward, Wilkins refused to register him. John Elk subsequently presented himself to vote again and was again refused.

John Elk brought suit in the United States Circuit Court for the District of Nebraska seeking $6000 in damages. He was represented

82. State *ex rel.* Thayer v. Boyd, 34 Neb. 435, 436, 51 N.W. 964, 964 (1892).
83. *Id.* at 436, 51 N.W. at 964.
84. 112 U.S. 94 (1884).
85. *Id.* at 95.
86. Douglas County, Nebraska 1880 Census, Dist. 20, Ward 5, p.34.

by John L. Webster, the lawyer representing Thayer in his opposition to Governor Boyd's claim to citizenship,[87] and A.J. Poppleton. Wilkins was represented by United States District Attorney G.M. Lambertson,[88] one of the first faculty members of the Nebraska Law College.[89] A demurrer was filed on behalf of Wilkins, admitting the following:

> [That Elk] is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a *bona fide* resident of the State of Nebraska and city of Omaha.[90]

The issue seemed simple—had an Indian who had "assimilated" and who had the intention of becoming a citizen acquired citizenship and therefore eligibility to vote.[91] The dicta in the *Dred Scott* majority opinion indicated that an affirmative response was required. It stated, "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."[92] This statement along with a prior Nebraska case deciding an Indian Rights issue would seem to warrant a conclusion that Elk was both a citizen of the United States and Nebraska. One of the circuit court judges hearing the *Elk* case, Judge Elmer S. Dundy, had held in *Standing Bear v. Crook* that Indians had a right of expatriation—that is, a right to sever their tribal relationships and leave an established reservation.[93]

It was clear that an alien who had expatriated himself from his original nationality could become a citizen. It would then seem that

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87. *See supra* note 54 and accompanying text.
88. After the *Elk* decision, Lambertson published an article stating his view regarding the case. He agreed with other commentators that not all Indians were ready for citizenship. He asserted however, that *Elk* did not reach the question of whether an Indian who was taxed became a citizen under the fourteenth amendment, suggesting that proof of Elk's taxation might have supported his claim to citizenship. Lambertson, *Indian Citizenship*, 20 AM. L. REV. 183, 185 (1886). This view of the *Elk* majority was rejected in Justice Harlan's dissent. Elk v. Wilkins, 112 U.S. 94, 110-11 (1884)(Harlan & Woods, J.J., dissenting). *See infra* notes 107-12, 149-50 and accompanying text.
89. Allen, *History of the Organization of the University of Nebraska Law School*, 22 NEB. L. REV. 200 (1943). Mr. Lambertson along with the other faculty members received no pay. He taught Interstate Commerce.
90. Elk v. Wilkins, 112 U.S. 94, 98 (1884).
91. Much of the opposition to citizenship for Indians was the belief that they had not assimilated into "civilized life." *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 153 (1986 ed).
92. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).
93. *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879)(No. 14,89) Poppleton and Webster had appeared before Judge Dundy with Lambertson opposing them in *Standing Bear*. In the first case Poppleton and Webster prevailed. *See supra* notes 54, 154-55 and accompanying text.

an Indian could similarly become a citizen upon expatriating himself from his tribe and forming the necessary intent. However, in the *Elk* circuit court opinion, Judges McCrary along with Judge Dundy sustained Wilkins' general demurrer, dismissing Elk's petition on the basis that he was not a citizen.

Prior to *Elk*, the Supreme Court decided two major cases regarding the status of Indians which were used in support of the Supreme Court's decision in *Elk*. In 1831, in the case of *Cherokee Nation v. Georgia*,[94] the Court was presented with the question of whether or not the Cherokee Nation was a "foreign state" within the meaning of article III, section 2 of the Constitution which provides for federal judicial power over controversies between a state and foreign states.[95] While this case did not involve a suffrage or citizenship issue directly, it did lay the groundwork for the *Elk* decision. In resolving the *Cherokee Nation* jurisdictional question, Chief Justice Marshall characterized the Cherokee Tribe as "a state . . . a distinct political society . . . capable of managing its own affairs and governing itself,"[96] and its members as "in a state of pupilage . . . [t]heir relation to the United States resembles that of a ward to his guardian."[97]

In the second case, *Worcester v. Georgia*,[98] the question of Indian sovereignty again arose. In *Worcester*, white missionaries had settled on Cherokee land with the permission of the tribe but in violation of state law. They were convicted by a Georgia state court for residing on Indian lands without a state license. The missionaries argued that the federal government had recognized the sovereignty of the Cherokee Nation through treaties and that state law therefore could not be applied on Indian land. Again writing for the Court, Chief Justice Marshall reasoned that Georgia's actions interfered with relations between the United States and the Cherokee Nation and thus violated superior federal law.[99] The Court noted that Indians were not aliens but were in a rather unique relationship with the United States government. In *Cherokee*, Chief Justice Marshall had stated that Indian nations are not foreign nations but "domestic dependent nations."[100] Since prior cases had held that Indians were also not aliens even though they were to be considered "distinct and independent political communities,"[101] the status of the individual Indian based on these

94. 30 U.S. (5 Pet.) 1 (1831).
95. *See* U.S. CONST. art. III, § 2.
96. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
97. *Id.* at 17.
98. 31 U.S. (6 Pet.) 515 (1832).
99. *Id.* at 560-61.
100. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). For a summary of the history of the guardian relation, see F. COHEN, *supra* note 91, at 169-73.
101. *See, e.g.*, United States v. Osborne, 6 Sawyer 406 (D. Or. 1880).

cases was arguably that of a citizen granted certain special rights (and denied certain rights) based upon their tribal relationship.

However, the *Elk* Court rejected application of an intent theory and concluded that Indians could not discard their tribal relationship and become citizens without the consent of the United States government through either treaty or statute.[102] Self-determination was based on tribal rather than individual intent. Of course, a decision that John Elk was not a citizen meant that he had no suffrage right protected under the fifteenth amendment. In reaching its conclusion that Indians were not "subject to the jurisdiction" of the United States within the meaning of the fourteenth amendment, the Court relied in part on the fact that Indians are referred to in two clauses of the Constitution. Article I, section 2 excludes "Indians not taxed" from the calculations for distribution of representatives and direct taxes. Article I, section 8 grants Congress the power to regulate commerce with "Indian tribes," and is the basis for the conclusion that states were prohibited from taxing Indian lands within their borders. The Supreme Court reasoned that Indian tribes were separate nations consisting of distinct political communities and therefore Indians, like children of foreign enemies or diplomats born within the territorial limits, were not subject to the jurisdiction of the United States and thus did not acquire citizenship at birth. Further, citizenship could be bestowed upon Indians only through acts of Congress or treaties made specifically applicable to Indians since general acts of Congress did not apply to Indians. Justice Gray, writing for the majority, stated:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, 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 the 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.[103]

The Court relied upon the fact that subsequent to the ratification of the Fourteenth Amendment there were Indian citizens who had acquired their citizenship pursuant to treaties or statutes that provided for certain tribes to acquire citizenship.[104] The rationale was

102. "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." Elk v. Wilkins, 112 U.S. 94, 100 (1884)(citing U.S. CONST. art. I, §§ 2, 8; U.S. CONST. art. II, § 2; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

103. Elk. v. Wilkins, 112 U.S. 94, 102 (1884).

104. For example, the Court noted that Winnebago Indians in Minnesota could become citizens in connection with the issuance a fee simple patent for land and payment of their proportion of tribal money, pursuant to the Act of July 15, 1870, ch. 296, § 10. *Id.* at 104-05.

that since Congress had conferred citizenship by statute or treaty, it could be assumed that citizenship was not already available to Indians under the Constitution.

The Court concluded that the fourteenth amendment required that all necessary conditions for birthright citizenship be met at the time of birth. That is, at the time of birth a person had to be "subject to the jurisdiction."[105] Of course, the Court asserted, Indians were not subject to the jurisdiction of the United States because they were not taxed. Thus, Indians could only become citizens through naturalization—individual or collective. The Court also noted that there was no evidence that John Elk was taxed.

Cherokee Nation, *Worcester* and the constitutional clauses cited by the Court could have been used to support a tenable argument that Indians did acquire citizenship pursuant to the fourteenth amendment. Since the practice of recognizing tribes as independent nations and entering into treaties with the Indians had ended in 1871, it is arguable that Congress concluded Indians were constitutional citizens, the same as all others born in the United States.[106] For some this would have required acquisition of citizenship through a two-step process. First, birth had to occur in the United States. Second, an Indian had to become subject to the jurisdiction of the United States either upon expatriation from his tribe or some other event as defined by Congress. An inquiry into intent and conduct would have been necessary. While this would have presented a variation from the standard way of acquiring citizenship under the citizenship clause, the Court had previously announced that Indians held a unique relationship with the United States. The method for acquiring constitutional citizenship could have been determined to be one more feature of this unique relationship.

In response to the Court's observation that there was no evidence that John Elk was taxed, Justice Harlan, in his dissent, argued that it was possible to construe constitutional restrictions applicable to "Indians not taxed" to mean Indians not subject to taxation. Therefore, an Indian that was a resident of a state, such as John Elk, was subject to taxation "by the laws of the State of which they were residents."[107] In other words, by becoming assimilated into state residency, John Elk had become subject to the jurisdiction of the United States. Even if

105. A naturalized citizen had to be "subject to the jurisdiction thereof" at the time of naturalization.

106. A dispute between the House of Representatives and Senate resulted in an abrupt halt to treaty-making. The Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 provided "[t]hat hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."

107. Elk v. Wilkins, 112 U.S. 94, 112 (1884)(Harlan & Woods, J.J., dissenting).

his tribe had not sought citizenship, he had individually intended to acquire citizenship and his conduct supported such intent.

Congress had passed the Civil Rights Act of 1866, which provided 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."[108] The Court only referred to this statute in a cursory manner as the predecessor to the fourteenth amendment, rejecting any argument that Indians had acquired citizenship pursuant to the 1866 Act. The Court saw no reason for having subsequently entered treaties with Indian tribes which included a grant of collective naturalization if Indians had acquired citizenship in 1866. The possibility of superfluous legislation was rejected as was Justice Harlan's construction of the statute to confer citizenship upon Indians who were subject to taxation. In the majority's view, the fourteenth amendment retained this exclusion, and made no provision for a two-step process—jurisdiction and birth had to occur simultaneously.

Justice Harlan reasoned that the 1866 Act conferred citizenship upon Indians who were no longer in tribal relations. Thus, any Indian subject to taxation was subject to jurisdiction and therefore a citizen. There was ample support in legislative history to support Harlan's interpretation. As observed in his dissent, Senator Trumbull of Illinois clarified the reason for including the language "excluding Indians not taxed": "[T]his amendment . . . 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.*"[109] Even clearer, he noted, was President Andrew Johnson's interpretation of the law as he voiced his disagreement and vetoed the Act: "This provision comprehends the Chinese of the Pacific States, *Indians subject to taxation*, the people called Gypsies, as well as the entire race designated as blacks . . . . Every individual of those races, born in the United States, is by the bill made a citizen of the United States."[110]

If the Court had adopted Harlan's dissent, it could have easily reconciled its conclusion with it's prior decisions as well as *Standing Bear*. John Elk's act of leaving his tribe could be viewed as a voluntary expatriation which required assimilation rather than naturalization since his tribal relationship did not make him alien but rather placed him in this two-step citizenship category.

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108. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified at 8 U.S.C. § 1 (1988)), *repealed by* Nationality Act of 1940, ch. 876, § 504, 54 Stat. 1137, 1172.

109. Elk v. Wilkins, 112 U.S. 94, 114 (1884)(quoting CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866)(remarks of Sen. Trumbull)). This congressional discussion also involved the question of whether citizenship for the Indians required property ownership rather than simply being assimilated.

110. *Id.* at 114 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1679 (1866)(President Johnson's veto message)). Congress overrode a presidential veto for the first time to pass the 1866 Act.

The Court did not inquire as to the citizenship status of Elk's parents. The assumption was apparently made that the inquiry was irrelevant since John Elk's tribe and therefore his parents were named neither in a treaty nor a statute. By analogy to *Boyd*, the Court could have found that if John Elk's parents had left the tribe before John's birth, he had an "inchoate status" and therefore acquired citizenship through his parent's assimilation.

The *Elk* decision echoed the views of some[111] but was denounced by others because it placed Indians in a separate status. Justice Harlan voiced his dissatisfaction with the majority's treatment of John Elk:

> If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.[112]

Since the majority found no clear intent by Congress to apply either the fourteenth amendment or the 1866 Civil Rights Act to Indian citizenship questions. John Elk was not a citizen and therefore could not vote.

It was not until 1924 that Congress passed an Act conferring United States citizenship on all Indians born within the territorial limits of the United States.[113]

The *Elk* decision is evidence that the fourteenth amendment is interpreted as "a constitutional testimony of the separate status of Indian[s]."[114] More important for this discussion, the decision remains relevant to the continuing question of who has a claim to birth-right citizenship and the role that intent should play in resolving that question. Given the broad interpretation in *Elk*, the fourteenth amendment phrase "subject to the jurisdiction thereof," retains operative power to exclude certain persons born in the United States.[115]

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111. *See supra* note 88. *See also* Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21 (1881)(expressing the view that Indians were not ready for citizenship).

112. Elk v. Wilkins, 112 U.S. 94, 122-23 (1884)(Harlan & Woods, J.J., dissenting).

113. Act of June 2, 1924, ch. 233, 43 Stat. 253. *See infra* notes 166-67 and accompanying text.

114. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 239 (1984).

115. Schuck and Smith use such an argument to support their position that children of illegal aliens born in the United States should not be considered birth-right citizens pursuant to the fourteenth amendment. *See* P. SCHUCK & R. SMITH, *supra* note 15, at 116-22.

IV. AN EXAMINATION OF INTENT IN THE DEVELOPMENT OF CITIZENSHIP LAW AS INFLUENCED BY *ELK* AND *BOYD*

With *Elk* and *Boyd*, the Nebraska social scene contributed to the early understanding of the law of citizenship. As these cases reach their centennial, the issues both explicit and implicit in the two cases define and illuminate current issues of citizenship that continue to arise and perplex the courts and policy makers. The tension between *jus soli* and *jus sanguinis* theories of citizenship played a role in fashioning the dispute in both cases and this tension remains unresolved in some areas. For example, although the setting and environment has changed, Governor Boyd's assertion of citizenship through his father's intention of becoming a citizen, even with the development of the elaborate statutory and regulatory system that now exists, is relevant to the resolution of difficult determinations of citizenship based upon parental actions. And the constitutional phrase "subject to the jurisdiction thereof," so critical to the exclusion of John Elk from the voting booth, is central to the current issue facing children born in the United States to nonimmigrant and illegal alien parents as well as the unique relationship established between Native Americans and the Constitution.

In the remainder of this Article, I focus on a number of issues of contemporary interest relating to the determination of a person's citizenship to show how the *Elk* and *Boyd* decisions have influenced the resolution of some issues and still permeate the issues that remain to be resolved. In addition, I offer my own approach to how a just society should properly approach some of these issues.

A. Intent as a Determinant of Citizenship

Intent remains as a contemporary concern testing the limits of citizenship law as to what relevance an individual's intent or parental intent should have in determining citizenship. This question arises in the acquisition of citizenship by either birthright or naturalization as well as the loss of citizenship. The citizenship of John Elk's and Governor Boyd's parents was relevant to the Supreme Court's resolution of both cases.

1. Acquisition at Birth

John Elk, although born in the United States, could not acquire citizenship at birth because his parents were not members of a tribe that had been granted citizenship by Congress. Thus, parental as well as individual intent were irrelevant in *Elk*. The Court found it unnecessary to consider anything other than the existence or non-existence of a statute or treaty conferring citizenship on John's Elk's tribe. Self-

determination was possible for a tribe not not an individual. His citizenship was a matter of group rather than individual rights. This rejection of individual intent in *Elk* has had an extensive effect on all aspects of Native American law.

In *Elk*, the Court was required to determine under what circumstances a child born in the United States acquired United States citizenship. In the Court's first interpretation of the fourteenth amendment, it stated that "[t]he phrase, 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."[116] While the legislative history of the fourteenth amendment made it clear that blacks were to be considered constitutional citizens, its application to certain other groups was less clear. Justice Miller's dictum in the *Slaughter-House Cases* that "[t]he phrase was intended to exclude children of . . . citizens or subjects of foreign states born within the United States,"[117] led to early questions as to whether two controversial groups, (1) Indians, and (2) children born in the United States of alien parents, some of whom were ineligible for naturalization,[118] could acquire U.S. citizenship. It was assumed that these two groups had no intent to form an allegiance to the United States. As described above,[119] when faced with this controversy with respect to Indians, the Supreme Court concluded that Indians born in the United States did not acquire citizenship pursuant to the fourteenth amendment.[120] Strict application of the phrase required that no consideration be given to whether or not John Elk's parents intended to become citizens. Therefore, they were not "Fourteenth-Amendment-first-sentence citizen[s]."[121] At this point then, it seemed that the statements from the *Slaughter-House Cases* required a conclusion that a child born in the United States did not acquire citizenship unless the parents were United States citizens, or at least eligible to become citizens. *Elk* adopted the restrictive view that a distinction could be made between births occurring in the United States to determine who would acquire citizenship.

The restrictive interpretation of the fourteenth amendment's exclusion clause was not applied to aliens. In *United States v. Wong*

116. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73 (1872)(dictum).

117. *Id.*

118. *See generally* L. GETTYS, THE LAW OF CITIZENSHIP IN THE UNITED STATES 17-23 (1934).

119. *See supra* text accompanying notes 102-05.

120. *See infra* text accompanying notes 253-54.

121. This phrase was used by Justice Blackmun in Rogers v. Bellei, 401 U.S. 815, 827 (1971), to describe individuals who acquire citizenship at birth because of their birth in the United States. *See* section IV.C. for a discussion of implications of this conclusion on the acquisition of citizenship by other statutory citizens.

Kim Ark,[122] the Supreme Court held that a Chinese person born in the United States was a citizen even if his parents were alien residents who because of their race could not become naturalized citizens.[123] Thus, it was determined early after adoption of the fourteenth amendment, that citizenship of parents was not necessary for a child to acquire citizenship at birth in the U.S. Here, the subjective intent element was provided by the parental permanent residence status. In contrast to this decision, *Elk*, placed the Native American in a position where a child's citizenship depended entirely upon the parent's objective right to obtain citizenship commensurate with the provisions of a treaty or statute. In its 1924 report to Congress, the Committee on Indian Affairs summarized the different ways by which Indians might become citizens. They included citizenship by birth only if the child is born to citizen Indian parents or born in a legitimate marriage to an Indian woman and a white citizen father.[124] The subjective intent of an Indian child's parents was irrelevant.

It is now generally accepted that in addition to individuals born to parents who have been granted permission to remain in the United States permanently,[125] born in the United States[126] "subject to the jurisdiction thereof" includes individuals born to parents: (1) who are passing through the United States, (2) allowed to remain in the United States temporarily while an extraordinary condition exists in their country of nationality, (3) granted a temporary status to remain here as visitors, obtain medical treatment, attend school, attend a conference or work, (4) granted refugee status, but not yet status of a permanent resident, and (5) even to children born to parents on vessels belonging to the United States government in foreign waters.[127] Chil-

122. 169 U.S. 649 (1898).

123. It was not until 1943 that Chinese became eligible for naturalization. The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600 (making Chinese eligible for naturalization and also allowing a small number of Chinese to immigrate annually).

124. H.R. REP. No. 222, 68th Cong., 1st Sess. (1924).

125. Persons in this category are generally referred to as resident aliens or lawful permanent residents. This status is conferred on aliens who are permitted to reside in the U.S. on a permanent basis. *See* Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20)(1988).

126. The "United States" is defined in the Immigration and Nationality Act to include," when used in a geographical sense, . . . the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands." *Id.* § 101(a)(38), 8 U.S.C. § 1101(a)(38)(1988).

127. "In the United States" is another phrase contained in the fourteenth amendment that has caused some problems of interpretation. Statutes have been enacted to resolve early questions regarding whether individuals born in previously disputed boundaries such as territories or territorial waters are citizens. *See* L. GETTYS, *supra* note 118, at 16-17. It is generally accepted that birth on a vessel owned by a U.S. citizen or corporation outside of U.S. territorial waters does not confer citizenship and birth on a foreign vessel in U.S. territorial waters or on an airplane

dren may also acquire citizenship at birth if they are born outside of the United States to a parent who is a United States citizen.[128]

The debate as to the acquisition of citizenship by children born to aliens has been revived with respect to illegal aliens. Some commentators took the position early in our history, prior to the adoption of the fourteenth amendment, as well as subsequently, that a child born in the United States should acquire United States citizenship only if the parent(s) of the child was either a citizen or permanent resident of the United States.[129] If the desired objective was to grant citizenshp only to individuals that had the necessary parental or individual intent in those cases, it was clear that the parents had an intent to participate in the political community of the United States.

The presence of a large number of illegal immigrants has prompted some to again raise these issues. Should a child born to a parent who has no legal status in the United States acquire citizenship? Peter Schuck and Roger Smith suggest that since the government has not given consent to the parents to enter or remain in the United States, their children, although born in the United States would not acquire U.S. citizenship. It is argued that the exclusion of Indians from four-

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over U.S. territory does confer citizenship. 8 Foreign Affairs Manual, U.S. Dep't of State, § 212.4.

The U.S.S. Saipan, a navy vessel was assisting in the evacuation of individuals from Liberia in the 1990 uprising. It was reported in a Naval publication, Wilde, *It's a Girl!*, 884 ALL HANDS 46, 46 (1990), that a child born to a Lebanese citizen on board ship acquired United States citizenship as well as the Lebanese citizenship of the parents. This is a reasonable construction of "in the United States" if a vessel operated by the United States government is considered to be within the "geographical limits" of the United States. Similar reasoning should apply, however, to birth of a non-citizen's child in a U.S. embassy. An argument against this construction can be based on the enactment of Immigration and Nationality Act § 330, 8 U.S.C. § 1441 (1988), which provides that service on a U.S. operated vessel by a lawful permanent resident is considered "constructive residence" for determining naturalization eligibility. It would seem that this statute would be unnecessary if a U.S. operated vessel is "in the United States."

128. This form of citizenship acquisition is included within the category of statutory citizenship discussed *infra* in text accompanying notes 251-55.

129. Here is how one writer described a consequence of the *Slaughter-House Cases* as it related to a child born in the United States whose father was a citizen or subject of a foreign government:

> Now it is obvious that such child would be subject to a foreign power, to wit, the country of his father, which of course would exclude him from being subject to the jurisdiction of the United States.
>
> In conclusion . . . 'the phrase . . . was intended to exclude . . . children of . . . citizens or subjects of foreign States born within the United States.'

Collins, *Are Persons Born Within the United States Ipso Facto Citizens Thereof*, 18 AM. L. REV. 831, 837 (1884). *See also* L. GETTYS, *supra* note 118, at 17-19 (discussion of the effect of the *Slaughter-House Cases* on the subsequent Supreme Court ruling in *United States v. Wong Kim Ark*); P. SCHUCK & R. SMITH, *supra* note 15.

teenth amendment citizenship in *Elk* supports such a view.[130] That is, just as Indians were construed not to be "subject to the jurisdiction" of the U.S., illegal aliens should also be considered in the same status and such status would attach to their children. The same conclusion could be reached by focusing on parental intent. Since the parents are in the U.S. illegally, they could have no realistic intent to acquire citizenship for their child since they have not complied with the necessary prerequisites for entering the country.

A strict interpretation of the fourteenth amendment soon after its ratification, led to the conclusion that "Congress has seen fit to confine the privilege of becoming an American citizen to the Caucasian and African races."[131] The congressional debates on the fourteenth amendment make it clear that there was no universal agreement on the meaning of the amendment's language. Some considered the language as encompassing only whites and blacks; others read it to also include Chinese since there could be no restriction by race, but not to include Indians because of their special situation; and others considered the language to include Indians if they had separated from their tribes.[132] Adoption of this latter view by the *Elk* Court would have allowed an intent consideration. The refusal to consider intent as an element in *Elk* has resulted in exclusion of Indians from the category of constitutional citizens. This restrictive interpretation of the fourteenth amendment in *Elk* has also contributed to the creation of distinctions between citizens, creating a situation that does not support the objective of a cohesive nation. Federal Indian law has developed around the pronouncement in *Elk* that Indians do not acquire citizenship pursuant to the fourteenth amendment and that general laws do not apply to Indians.[133] While later cases have held that such laws do apply to Indians,[134] the issue continues to be debated.[135] The Court's

130. *See* P. SCHUCK & R. SMITH, *supra* note 15, at 97.

131. Collins, *supra* note 128, at 835.

132. For a summary of the various positions taken in opposition to the fourteenth amendment and its presumed purposes and intentions, see generally W. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

133. *See, e.g,* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)(citing *Elk* in support of its position that the Federal Power Act did not authorize the Commission to take lands from Indians since general laws did not apply to Indians unless specifically included); Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965)(Mrs. Colliflower, an Indian, challenged the validity of a sentence pronounced by an Indian court. The Court held that constitutional restrictions applied to the Tribal Court notwithstanding the announcement in *Elk* that Indians living on a reservation were not citizens).

134. *See, e.g.*, Navajo Tribe v. National Labor Relations Board, 288 F.2d 162, 164 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 928 (1961). *See also* Comment, *Archeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act*, 15 ENVTL. L. 413, 441 (1985)(suggests the National Historic Preservation Act applies in its entirety to Indian lands).

broad statement in *Elk* that general federal laws did not apply to Indians unless Congress expressly included them,[136] has been extended to all types of federal and state law.[137]

The subjective intent of parents continues as an important determinant of citizenship. For example, the question of intent is relevant to the determination of citizenship of children born out of wedlock and outside of the United States to fathers who are U.S. citizens. The debate here involves the subjective intent of the father as it relates to creating a relationship to the child. In 1986, Congress included a provision in the Immigration and Nationality Act to broaden the category of individuals that would acquire citizenship at birth by including children born outside of the U.S., out of wedlock, to American citizen fathers.[138]

Primarily because of the Court's refusal to consider intent, *Elk* remains as the only decision placing a restriction on birth-right citizenship based upon the citizenship or nationality of the parent. All generally accepted inclusions within the phrase "subject to the jurisdiction thereof," are based on principles of international law except the exclusion of Native Americans from constitutional citizenship.[139] The Native American continues in a special relationship with the country, not an alien, but not a fourteenth amendment citizen.

Prior to *Elk*, the cases holding that Indians were not citizens did not present a factual situation as compelling as that of John Elk. In *United States v. Shanks*,[140] the Chief of the Chippewas held land and "adopted ways of civilized life" yet he was not considered a citizen for the purpose of resolving his estate in state court. An Indian who had left his reservation and lived with a white family for ten years as a

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135. *See, e.g.*, Note, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1414 n.99 (1985)(discussing Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. 133, 140-41 (1977)). It suggests that Ragsdale's argument is erroneous.

> *Elk v. Wilkins* is no longer in force because later cases have held that 'generally applicable' laws apply to tribes even if they do not mention Indians. For example, worker's compensation laws define employer and employee without any reference to Indians, but have been held to apply to tribes. But this sort of statute is far different from statutes defining courts' status and power, where one would expect Congress to specifically mention all courts to which the statutes apply.

Id. at 1414 n.99 (citation omitted).

136. *See supra* notes 102-03 and accompanying text.

137. However, the fourteenth amendment is construed to provide equal protection to Indians and to establish them as citizens of the states of their residence. *See* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1016-17 (1981).

138. Immigration and Nationality Act § 309, 8 U.S.C. § 1409, *amended by* Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657 (1986).

139. *See supra* text accompanying notes 116-22.

140. 15 Minn. 369, 15 Gil. 302 (1870).

domestic was determined not to be a citizen or voter in *United States v. Osborne*.[141] The exclusion of John Elk from citizenship has been described as "[o]ne of the most extreme cases." John Elk had not only separated himself from his tribe, but had also become a resident of Nebraska and "completely surrendered himself to the jurisdiction of the United States."[142] Under the *Elk* Court's reasoning, even the children of Indians who had been granted citizenship by a treaty were not citizens by virtue of their birth in the United States pursuant to the fourteenth amendment, but also had to base their claim for citizenship on the relevant treaty.

Senator George H. Williams of Oregon, among others, believed that the fourteenth amendment should be construed to exclude only "Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States."[143] This construction would have resulted in a determination that John Elk was a citizen. John Elk had the intent to abandon his tribal relations and his conduct was consistent with his intent. Since Congress attempted to confer citizenship in the Civil Rights Act of 1866, it is even possible that some Indians were considered to have had citizenship bestowed upon them under the provisions of that Act only to later be told that it was essentially revoked by ratification of the fourteenth amendment.[144] Take a hypothetical case, where a member of a tribe that had not entered into a treaty which conferred citizenship decided to leave the tribe sometime prior to 1866 and establish residence in a populated community. If he had taken further actions showing that he had "assimilated," such as obtaining work and having a family, he might have presented himself to vote and been granted that right and continued to vote on the basis that he was a citizen of the United States. Then, when *Elk* is decided he is told that he is no longer to be considered a citizen and therefore not eligible to vote.

Arguably, the Supreme Court felt compelled to ignore individual intent and limit the extension of citizenship to Indians as a response to assimilationists as well as a fear expressed by some that large numbers of Indians could become citizens and control political power.[145] These fears had been addressed to some extent by treaties that placed restrictions on Indians. In 1871, Congress passed a bill stating in part that no additional treaties were to be made with the Indians.[146] Therefore, treaty limitations on Indian participation in the political

141. 6 Sawyer 406 (D.Or. 1880).
142. H.R. DOC. NO. 326, 59th Cong., 2d Sess. 57 (1906)(quoting Elk v. Wilkins, 112 U.S. 94, 98 (1884)).
143. CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).
144. *See supra* text accompanying notes 102-05.
145. *See* AMERICAN INDIAN POLICY, *supra* note 5, at 106-16.
146. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (1988)).

process was not available by the time *Elk* was decided. Exclusion from the political process could only occur by a determination that Indians were not citizens and therefore did not have suffrage rights.

The *Elk* case could have been avoided entirely. If Nebraska had decided to grant state citizenship or at least the right to vote to Indians that had in fact become Nebraska residents, as they had done with aliens who had filed a declaration of intention, John Elk would have been allowed to vote. At the time, Wisconsin included a provision in its State constitution that an Indian who had abandoned his tribe and adopted civilized methods and habits was a citizen of Wisconsin.[147] The Court in *Elk* expressly refused to consider this possibility when it stated:

> Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff.[148]

The Nebraska Constitution limited the right of suffrage to United States citizens and aliens having filed the declaration of intention, and contained no reference to Indians.

In his article written after the *Elk* decision, U.S. District Attorney Lambertson, the attorney opposing John Elk, suggested that since the right to vote and most constitutional rights and privileges guaranteed to citizens were also extended to non-citizens, it was not necessary to grant citizenship to Indians in order for a state to grant the right of suffrage. He noted that although citizenship is generally a prerequisite to voting, the right to vote and citizenship were not always coterminous.[149] This view was persuasive since many states had extended the right to vote to non-citizens and women, who were citizens but did not have suffrage rights. In addition, Lambertson stated that, "[p]robably the solution of the Indian problem will only be attained by the destruction of the Indians as tribes, and their absorption into our civilization and citizenship. [C]itizenship should be regarded as an end, not a means."[150]

John Elk possibly acquired the right to vote as well as citizenship four years later. The *Elk* decision led Congress to take action to add a citizenship provision in a land allotment bill to "clearly manifest an intention to include [Indians adopting civilized life]" in the political community.[151] The General Allotment Act (Dawes Act) of 1887, provided that land would be allotted to certain Indians. In addition, each

147. *See* Helgers v. Quinney, 51 Wis. 62, 8 N.W. 17 (1881).
148. Elk v. Wilkins, 112 U.S. 94, 109 (1884).
149. Lambertson, *supra* note 88, at 186.
150. *Id.*
151. In *Elk* the Court rejected inclusion of Indians in the fourteenth amendment citizenship clause because "[g]eneral acts of Congress did not apply to Indians, unless

individual receiving the allotment was "hereby declared to be a citizen of the United States."[152] By accepting the allotment they became "Indians taxed," satisfying the Supreme Court's requirement that Indians must be taxed to be subject to the jurisdiction of the United States. The individual intent, exhibited by the acceptance of land, now controlled acquisition of citizenship.

Senator Dawes of Massachusetts introduced the legislation. He had become actively involved in attempts to obtain rights for Indians after the Ponca Indians in Nebraska had been removed from their tribal lands in violation of a treaty.[153] The Nebraska case, *United States ex rel. Standing Bear v. Crook*,[154] arose out of that incident.[155] The inclusion of a citizenship provision in the Dawes Act[156] is attributed in part to the actions of two persons from Nebraska. One, of course, was John Elk who had been told by the Supreme Court that he was not a citizen. Senator Dawes viewed the decision as vile, similar to the *Dred Scott* disenfranchisement of the black man. The second person was Bright Eyes (Inshtatheamba), the daughter of Omaha Chief, Iron Eye.[157] In 1881, she married Thomas Tibbles, an Omaha newspaper-

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so expressed as to clearly manifest an intention to include them." 112 U.S. 94, 100.

152. The Dawes Act provided:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made . . . and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 8 U.S.C. § 1401(b)(1988)).

The primary purpose of this law was to assimilate Indians into "civilized life." This was to be accomplished by allotting lands in severalty which were then held by tribes, to individual members of tribes. Each member of a tribe was allotted a fixed number of acres.

153. *See* Lake, *supra* note 54, for a thorough discussion of the Ponca incident.

154. 25 F. Cas. 695 (C.C.D. Neb. 1879)(No. 14,891).

155. Standing Bear and some other Ponca Indians left the reservation which they had been removed to after the treaty violation. Upon their return to the area, they began living with some members of the Omaha tribe. When Brigadier General Crook arrested and returned them to Fort Omaha, Nebraska, a writ of habeas corpus was issued on their behalf. Judge Dundy granted the writ. At the conclusion of the trial he held that an Indian could withdraw from his tribe and sever his tribal relationship, recognizing that Indians had a right of expatriation from their tribe.

156. The Commissioner of Indian Affairs was opposed to the citizenship clause. He supported the grant of citizenship but only under some formalized individual naturalization process. *See* COMM'N OF INDIAN AFF., 1885 ANN. REP. at vi-viii.

157. Bright Eyes was also known as Susette La Flesche, the name she usually used and preferred. Her father was Joseph La Flesche. The La Flesche family is de-

man[158] who had been involved in the reporting of the Ponca tribe incident. She, like others distressed by *Elk*, wrote to Senator Dawes: "I see that the Supreme Court has decided that the Indian is not a citizen. What can be done about it? Would a bill have to be brought in Congress making the Indians citizens?"[159]

Congress gradually began to further extend citizenship to individual Indians. In 1888, Indian women who married citizens of the United States could also gain citizenship.[160] While the Dawes Act provided for the conferring of citizenship on Indians after the fulfillment of certain conditions, it was not until thirty years later that Indians were determined to be citizens from birth.[161] The emphasis placed upon adopting a "civilized life" continued until 1924 and is illustrated by decisions that concluded the children of an Indian mother and a citizen would not be considered citizens if the father adopted the Indian laws by virtue of the family residing with Indians. This was true even if the mother had at one time lived in a "civilized community."[162] Curiously, the father was determined to retain his United States citizenship but not able to confer it upon his children. Again, with respect to questions of Native American citizenship the intent of the parent was not a relevant factor.

Commentators have described the treatment of Indian citizenship during the late 1800s and early 1900s as the era of allotments and assimilation,[163] which was based upon the idea that citizenship was not compatible with a continued allegiance to a tribe. Indians were even prohibited from rejoining their tribes if they had acquired citizenship.[164] Some whites as well as Indians, resisted this assimilationist

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scribed in Lake, *supra* note 54, at 480 n.84, as being "very important in the history of the Omaha Tribe." One of her relatives, Frank La Flesche, along with Alice Fletcher of Boston wrote a history of the Omaha tribe and studied with Rev. William Hamilton, a Presbyterian missionary, at the Omaha Mission. A. SHELDON, *supra* note 53, at 206.

158. *See* Lake, *supra* note 54, at 480 n.84.

159. W. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887, at 23 (1975) (quoting a letter from Bright Eyes to Henry L. Dawes, Nov. 12, 1884, Dawes Papers, General Correspondence, Box 25). *See* L. PRIEST, UNCLE SAM'S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY, 1865-1887, at 244 (1942).

160. Act of Aug. 9, 1888, ch. 818, § 2, 25 Stat 392 (codified at 25 U.S.C. § 182 (1988)).

161. General citizenship was granted by the Indian Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)(1988)).

162. *See, e.g.*, United States v. Rogers, 45 U.S. (4 How.) 567 (1846); H.R. DOC. NO. 326, *supra* note 142, at 59.

163. *See* F. COHEN, *supra* note 91, at 142-43.

164. *E.g.*, Treaty with the Senecas, Mixed Senecas and Shawnees, Quapaws, Confederated Peorias, Kaskaskias, Weas, and Piankeshaws, Ottawas, and certain Wyandottes, Feb. 23, 1867, arts. 13, 17, 28, 34, 15 Stat. 513, 516-22. The Treaty with the Quapaws and Wyandottes forbad tribal membership to Wyandottes who had consented to become citizens under a prior treaty unless they were found "unfit to

view since acquisition of citizenship was viewed as an undesirable termination of tribal rights.[165] John Elk, however, seemed to have met the required goal of assimilation, yet, he was not treated as an individual in the resolution of his claim to citizenship. In its recommendation to Congress, to pass the Citizenship Act of 1924, the Committee on Indian Affairs concluded that since some Indians had been granted citizenship "it was only just and fair that all Indians be declared citizens."[166] However, even after passage of the 1924 Act, some states attempted to exclude Indians from voting by using the "Indians not taxed" clause as an exclusion from voting eligibility.[167]

By construing the fourteenth amendment as excluding Native Americans from birth-right citizenship the Supreme Court rejected individual Indian intent to become a citizen. The Court determined that any action to make Indians citizens would have to be taken by Congress. Congressional reaction to *Elk* was to first attempt to include some aspect of individual intent into citizenship acquisition by requiring that Indians demonstrate their individual assimilation. Subsequent action granting statutory citizenship to all Native Americans may be equally unsatisfactory since individual intent again became irrelevant and some Native Americans would elect to maintain tribal relations in lieu of citizenship.[168] The distinctive treatment of Indian citizenship established by the *Elk* Court suggests that distinctions can be made between rights granted to citizens. This possibility is discussed below in section IV.C.

2. *Derivative Naturalization*

The Supreme Court determined that Governor Boyd was a citizen in part because the facts indicated that he had derived citizenship through his father's intent to become a citizen. Derivative citizenship of a child upon a parent's naturalization is based upon the principle that a child is a citizen of the country of the parents.[169]

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continue in the exercise of the responsibilities of citizenship." *Id.* at art. 13, 15 Stat. 513, 516.

165. *See* F. COHEN, *supra* note 91, at 153-54.

166. H.R. Doc. No. 222, 68th Cong., 1st Sess. (1924), *reprinted* in S.R. No. 441, 68th Cong., 1st Sess., 2-3 (1924).

167. *See* AMERICAN INDIAN POLICY *supra* note 5, at 111.

168. *Id.* at 29-30.

169. Although statutes often referred to "parent(s)," the position usually taken was based upon the common-law doctrine of primacy of male citizenship. Thus, it was the father's nationality that determined citizenship. *See* J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 13-20 (1978). The generally accepted view early in American history was that the male had authority over both his wife and children. *Id.* at 321-22. The controlling statute and its application in *Boyd* reflects this view. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155. The *Boyd* Court reasoned that if a father filed a declaration of intention, the wife and children acquired the same "inchoate status." There was no discussion of the citizen-

The first naturalization law was passed by Congress in 1790,[170] and it reflected the existing state naturalization laws.[171] The Act provided that a "free white" alien was eligible for naturalization by a common-law court of record after a period of two years residence in the United States, and at least one years residence in the state where he sought naturalization. He also had to possess good moral character and take an oath to support the Constitution. His naturalization resulted in the naturalization of his minor children.[172] This naturalization law was revised in 1795 to require that an alien file a declaration of intention to become a citizen at least three years before seeking to be admitted as a citizen.[173] In addition, the residence requirement was changed from two to five years.[174]

A subsequent revision provided that a foreign-born child dwelling in the United States at the time of the naturalization of their parent automatically became a citizen.[175] The naturalization law was amended in 1804 to establish the citizenship of the widow and children of a foreign subject who declared his intention to become a citizen, but died before he received his certificate of citizenship.[176] The next major change in naturalization came with the enactment of the Naturalization Act of 1906,[177] which was further amended in 1907 to provide that a foreign-born child who was not in the United States when the parent was naturalized, became a citizen from the time that, if while still a minor, it came to reside permanently in the United States.[178]

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ship status or actions of Governor Boyd's mother. If an alien died or became insane before completing the naturalization process, the widow or wife and children could become naturalized by complying with the other provisions of the naturalization laws without having to complete independent declarations of intention.

170. Uniform Naturalization Act, ch. 3, 1 Stat. 103 (1790)(repealed 1795).

171. *See* H.R. DOC. NO. 46, 59th Cong., 1st Sess. 9 (1905).

172. Uniform Naturalization Act, ch. 3, 1 Stat. 103, 104 (1790)(repealed 1795).

173. Act of Jan. 29, 1795, ch. 20, § 2, 1 Stat. 414, 415 (repealed 1802).

174. *Id.* at ch. 20, § 1, 1 Stat. 414.

175. Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 153, 155.

176. Act of Mar. 26, 1804, ch. 47, § 2, 2 Stat. 292, 293. Prior to 1804, the wife and children of a man who had filed a declaration of intention could not become naturalized by completing the declarant's naturalization in the event he died or became insane before he was able to become naturalized.

177. Act of June 29, 1906, ch. 3592, 34 Stat. 596.

178. Act of Mar. 2, 1907, ch. 2534, § 5, 34 Stat. 1228, 1229, provided:

> That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

The 1906 Act and the 1907 amendments resulted from two reports issued regarding existing citizenship law and naturalization procedures. Report to the Presi-

Citizenship continued to be conferred upon foreign-born persons, male or female, through the naturalization of the father during the minority of such persons.[179]

The naturalization of a mother did not confer citizenship on minor children, unless the father had died. A child's status continued to be governed by the nationality of their father.[180] The 1905 Commission on Naturalization expressed the belief that the provision was based on the 1779 Virginia naturalization law which conferred citizenship upon the child of a naturalized mother only if the father was not living at the time.[181] Our citizenship laws clearly expressed that paternal intent with respect to nationality controlled that of a child.[182]

Although some courts had held that pursuant to the 1907 Naturalization Act minor children living in the United States with their mother, at the time she was naturalized by a competent court, were also naturalized,[183] this was an exception rather than the general rule. This exception was applied, for example, where an individual was born in England in 1913, to a mother who was originally an American citizen and British father. He came to the United States with his parents in 1919, where he had since continuously resided. His mother became naturalized in 1925, and his father, who apparently did not file a declaration of intention and was never naturalized, died in 1927. The

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dent Commission on Naturalization H.R. DOC. NO. 46, 59th Cong. 1st Sess. (1905) and H.R. DOC. NO. 326, 59th Cong., 2d Sess. (1906).

179. *See, e.g.,* Dorsey v. Brigham, 177 Ill. 250, 52 N.E. 303, (1898). *See also* Schuster v. State, 80 Wis. 107, 49 N.W. 30 (1891). This patriarchal approach also applied to the citizenship of a woman. Early citizenship law provided that any American woman who married a foreigner "shall take the nationality of her husband" [for so long as the marriage lasted]. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29. Since the Act of Sept. 22, 1922, ch. 411, §§ 3, 7, 42 Stat. 1021, 1022, women who married foreigners did not relinquish their citizenship and women who had lost their citizenship by operation of the law could regain their U.S. citizenship through naturalization and be restored to the same status, i.e., native-born or naturalized citizen, that existed at the time citizenship was lost. The current form of this law is contained in the Immigration and Nationality Act § 324, 8 U.S.C. § 1435 (1988).

180. *In re* Citizenship Status of Minor Children Where Mother Alone Becomes Citizen Through Naturalization, 25 F.2d 210 (D.N.J. 1928).

181. * * * And all infants wheresoever born, whose father, if living, or otherwise, who mother was a citizen at the time of their birth, or who migrate hither, their father, if living,or otherwise their mother, becoming a citizen, or who migrate hither without father or mother, shall be deemed citizens of this Commonwealth until they relinquish that character in manner hereinafter expressed.

H.R. DOC. NO. 46, *supra* note 178, at 41.

182. *See, e.g.,* Rogers v. Bellei, 401 U.S. 815, 823-24 (1971)(discussing "emphasis of paternal residence" in early citizenship laws to determine nationality of children born abroad to U.S. citizen parents). *Contra* Montana v. Kennedy, 366 U.S. 308, 313 (1961)(1907 Act reference to "parent" included mother).

183. *See, e.g.,* Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N.E. 232 (1888); Citizenship of R. Bryan Owen, 36 Op. Att'y Gen. 197 (1929).

U.S. Attorney General opined that, if the child did not acquire citizenship status at the time of his mother's naturalization, he became a citizen by reason of his father's death and the other existing conditions.[184]

In order to express the intent of Congress more clearly, the 1907 Naturalization Act, was amended in 1934.[185] The amendment replaced "parent" with the words "father or mother," in the section of the act providing that a minor whose parent became naturalized should be deemed a citizen.[186] The 1934 Act recognized the equality of the intent of men and women in most cases[187] of derivative citizenship by providing, among other things, that (1) citizenship could be derived by minor children of alien parents by virtue of the mother's as well as the father's naturalization and (2) citizenship could be derived *jus sanguinis* through the mother as well as the father.

Under early laws, derivative naturalization was not available to Indians. Justice Gray suggests in *Elk* that Indians could simply be naturalized: "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,' by or under some treaty or statute."[188] However, collective naturalization was the only option available at the time. Indians could not be naturalized as individuals. The Act of July 14, 1870, provided that the naturalization laws were extended to "aliens of African nativity and to persons of African descent."[189] The provision was construed literally to allow naturalization of only caucasians and Africans. Indians continued to be excluded from eligibility for naturalization.[190] As expressed by the 1906 Commission on Naturalization, "[a] recent decision . . . confirmed . . . [what is obvious] that an Indian is not 'a free white person or an alien of African nativity or African descent.' "[191] Therefore, even after the 1924 Act granting birth-right citizenship to Indians, they could not be naturalized based upon individual intent and therefore Indian children could not receive derivative naturalization. Indians born elsewhere such as Canada or Mexico were prohibited from becoming

184. *See supra* note 177 and accompanying text.
185. Act of May 24, 1934, ch. 344, § 2, 48 Stat. 797.
186. *See* United States v. Perkins, 17 F. Supp. 177 (D.D.C. 1936).
187. While it was unclear in the 1934 Act subsequent amendments provided that illegitimate children of naturalizing mothers receive derivative naturalization, but not illegitimate children of naturalizing fathers.
188. Elk v. Wilkins, 112 U.S. 94, 103 (1884). It is possible to construe the court's language as an invitation to Congress to use its naturalization power to enact a statute conferring citizenship, which it subsequently did with the 1924 Citizenship Act.
189. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256.
190. *See generally* J. KETTNER, *supra* note 169, at 288-89 (stating view that Indians were the most isolated group in part because of citizenship laws).
191. *See* H.R. DOC. NO. 326, *supra* note 142, at 99 (citing *In re* Burton, 1 Alaska 111 (1900)).

citizens until the law was changed in 1940.[192] It was not until 1940 that Indians were eligible for the parental acquisition of citizenship through naturalization and thus subject to the derivative citizenship status that had been granted Governor Boyd. However, admitted to citizenship as "free white persons" was not applied consistently and on at least one occasion was held to include a Mexican who was largely Indian in blood.[193] Thus, while an intent consideration was available to Governor Boyd in resolving his citizenship the inapplicability of derivative or any individual naturalization to John Elk made any such inquiry irrelevant.

While there have been some criticisms of derivative citizenship the principle has continued in our naturalization law,[194] although some requirements have changed.[195]

3. Loss of Citizenship

An exploration of developing citizenship law also includes an inquiry as to whether there is certain conduct that should not be tolerated by citizens to the extent that anyone engaging in such conduct will lose their citizenship as well as the citizenship of their minor children. As described by T. Alexander Aleinikoff, there are essentially two ways that citizenship can be lost, (1) through voluntary relinquishment by the citizen—expatriation, or (2) revocation by the nation, referred to as denationalization or denaturalization.[196]

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192. Nationality Act of 1940, ch. 876, 54 Stat. 1137 (repealed 1952).

193. *See, In re* Rodriguez, 81 F. 337 (1897).

194. One member of the 1905 Commission, Richard Campbell from the Department of Commerce and Labor, proposed that the naturalization laws be changed to eliminate the automatic naturalization of foreign-born minor children when their parents are naturalized. Another Commission member, Gaillard Hunt from the State Department, rejected such a proposal as not being consistent with historical understandings of the law of citizenship in the United States as well as the then existing law of England. He did not find that the few isolated instances of citizenship being granted to "young men who are not fitted for citizenship" and who would not have been able to be naturalized on their own, justified such a change to effect an entire class of individuals. He further asserted that safeguards placed upon the naturalization process would sufficiently exclude those not "fit" to be citizens. H.R. DOC. NO. 46, *supra* note 171, at 42-43.

195. The requirements for naturalization are contained in Immigration and Naturalization Act §§ 310-339, 8 U.S.C. 1421-1450. A child under the age of 18 who is born outside of the United States acquires citizenship upon the naturalization of their parent(s) pursuant to Immigration and Naturalization Act § 321, 8 U.S.C. § 1432 (1988).

196. Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471 (1986). This article contains a complete discussion of the various ways that a person can lose their citizenship and the historical bases for Congressional actions including certain conduct in statutes governing loss of citizenship.

Expatriation rather than denationalization has caused the most controversy. The first case decided by the Supreme Court regarding an individual's right to expatriate himself was Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795). The Court

Subjective intent has gained increasing importance in determining whether an individual's actions have resulted in a loss of citizenship while decreasing in importance in determining the acquisition of citizenship. This makes it relatively easy to acquire U.S. citizenship and extremely difficult to lose citizenship. A certificate of citizenship is cancelled ab initio upon denationalization. In contrast, when expatriation occurs, the certificate of citizenship issued upon naturalization is valid from the time issued until the date of expatriation. The unresolved issue in this consideration is how to determine an individual's intent regarding continuing citizenship when their conduct is inconsistent with continued participation in the political community.

The question in the situation that was converse to the situation in *Boyd* also arose early in the development of citizenship law. That is, whether a minor child that acquired citizenship through the naturalization of a parent lost that citizenship by the expatriation or denationalization of the parent from which the child derived citizenship. In fact, this situation has not been limited to the naturalized citizen. The same problem was presented if an American born child's parent was naturalized in a foreign nation while the child was still a minor. Under *Boyd* and the law then existing it would seem that the questions in both situations would have to be answered in the affirmative—if a parent relinquished their citizenship while the child was a minor then the child also lost her citizenship.

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refused to recognize such a right. This rejection was based upon the view that once citizenship was properly acquired an individual lacked control over the retention of that citizenship.

Congress enacted the Act of July 27, 1868, ch. 249, 15 Stat. 223, primarily to protect naturalized U.S. citizens who returned to their countries of origin and to address situations involving U.S. citizens who purported to expatriate themselves in order to join in a conflict between two foreign nations without violating U.S. laws requiring citizens to remain neutral. The Act provided:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore, . . . any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.

Id. at § 1, 15 Stat. 223, 223-24. This statute reflected the principle applied in American citizenship acquisition that an alien could become naturalized because he could expatriate himself from his former nationality.

On the other hand, denationalization presumes that the naturalization was obtained through fraud or mistake and therefore is null.

Some commentators argued against such a conclusion because the child in the latter case was a constitutional citizen and therefore Congress could not enact a statute that changed the effect of birth in the United States.[197] However, Congress could provide for voluntary expatriation and determine that certain acts constituted a voluntary relinquishment of citizenship. For example, a woman who married a foreign national voluntarily expatriated herself by adopting the nationality of her husband even if she expressly stated that she did not want to give up her U.S. citizenship.[198] Her intent was determined by her actions. Alternatively, her husband's intent as to citizenship controlled after marriage and was therefore imputed to the wife. It was believed that the woman had made the voluntary choice of marriage and thus the voluntary expatriation. Similarly, the parent had made the voluntary choice and that choice, like the choice to become naturalized was imputed to the child.[199]

It was argued however, that it did not logically follow that a child had voluntarily expatriated herself simply because the parent had made a choice of a new nationality.[200] The decision that a parent's choice also controlled expatriation or denaturalization would seem consistent with the reasoning in *Boyd*. The parent's intent or choice controls with respect to loss of citizenship, not just the acquisition of citizenship. While it is arguable that *Wong Kim Ark*, would support a conclusion that a parent's citizenship status is not controlling, the difference is that there the parent was not called upon to express an intent, there was no act, other than giving birth in the United States, that had to be performed to confer citizenship status. While the Court in *Boyd* indicated that a child could make a choice upon reaching his majority, even if the father had taken an oath renouncing allegiance to his country of nationality this only applied where naturalization had not been completed. Therefore, if a parent chose to become naturalized in a foreign country while the child is a minor, the child acquired the new nationality of the parent. To prevent loss of citizenship by a parent's actions, the conclusion must be that the parent can acquire a benefit for the child—citizenship, but not cause the child to suffer a loss—expatriation. To accept this argument, however, one has to conclude that loss of citizenship should be more fervently protected and scrutinized than acquisition of citizenship. The child then retains her United States citizenship and also acquires citizenship in her parent's new nation. The development of the law on loss of citizenship supports this conclusion. The problems arising in this area are largely

197. *See, e.g.*, Orfield, *International Law—Citizenship—Expatriation—Effect of Expatriation of Father upon Citizenship of Child*, 13 NEB. L. BULL. 466, 467-68 (1935).

198. Act of Mar. 2, 1907, ch. 2534, § 3, 34 Stat. 1228, 1228-29. *See supra* note 179.

199. *See, e.g.*, United States v. Reid 73 F.2d 153 (9th Cir. 1934).

200. *See* Orfield, *supra* note 197, at 468.

due to resistance to dual nationality.[201]

Dual nationality is the consequence of the conflicting laws of different nations, and has been discouraged by the United States.[202] There are four principle groups of United States citizens who possess dual nationality. First, there are persons born in the United States of alien parents, and the country of the parents' nationality also claims them as citizens.[203] The second group includes persons born abroad whose parents are citizens of the United States, but on whom citizenship is also conferred by the land of their birth.[204] A third group includes persons who become citizens of the United States either by their own or their parents' naturalization, but whose country of origin does not recognize expatriation. Finally, there are persons who are citizens of the United States, but whose parents expatriate themselves from the United States by becoming naturalized in a foreign state while the child was a minor.[205] It is also possible to acquire another type of dual nationality that might be more accurately described as "triple" nationality. This occurs when a child is born in the United States to parents who are nationals of two separate countries that both confer citizenship through descent.

The official policy of the United States has been to discourage the incidence of dual nationality.[206] Notwithstanding this policy, it has generally been accepted that some United States citizens may possess another nationality as the result of separate conflicting laws of other countries since each sovereign state has the right inherent in its sovereignty to determine who shall be its citizens and what laws will govern them.

Prior to the major changes made in the immigration laws by the

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201. For a discussion of resistance to dual nationality by the United States and other nations, see Hammar, *State, Nation, and Dual Citizenship* in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA, (W. Brubaker ed. 1989) at 81. In the same text, William Brubaker provides a general discussion of problems of dual citizenship and suggests that in the United States, we have both (1) a high incidence of dual nationals because of the ease with which a person acquires U.S. citizenship under the fourteenth amendment as well as (2) a difficulty in determining the extent of dual nationals since the oath of allegiance requires naturalized citizens to renounce allegiance to other nations, yet the other nation may not accept such renunciation. In addition, citizens that acquire U.S. citizenship at birth under the jus soli principle may have also acquired citizenship in the nation of their parents under the jus sanguinis principle. W. BRUBAKER, CITIZENSHIP AND NATURALIZATION: POLICIES AND POLITICS 99, 115.

202. *See* Kawakita v. United States, 343 U.S. 717, 734 (1952).

203. *See, e.g., id.* (Japan); Fletes-Mora v. Rogers, 160 F. Supp 215 (S.D. Cal. 1958) (MEXICO).

204. *Cf.* Rogers v. Bellei, 401 U.S. 815 (1971).

205. *See, e.g.*, Perkins v. Elg, 307 U.S. 325 (1939).

206. *See* Savorgnan v. United States, 338 U.S. 491, 500 (1950); Warsoff, *Citizenship in the State of Israel*, 33 N.Y.U. L. REV. 857 (1958)(detailing efforts of the U.S. government to prevent dual American-Israeli citizenship).

1952 Amendment,[207] many cases held that since an order of denaturalization made the original naturalization void, it related back to the date of naturalization, and any children or other relatives benefitting from the void naturalization also lost their citizenship or other acquired immigration benefit.[208] Although there was no express statutory provision prior to 1952 that revocations were to have retroactive effect, courts had developed the judicial doctrine of relation-back. As early as 1906, the Naturalization Act authorized the revocation of fraudulently obtained naturalization certificates. Courts reasoned that exercise of this authority resulted in a void grant of citizenship as well as any other rights attached to such grant. In applying this reasoning to derivative citizenship, courts held that a denaturalized alien's family derived no citizenship rights.[209] In such a situation, an alien never became a citizen and consequently the citizenship never existed, and prior to 1940, a derivative citizen would also lose their citizenship status. In one early decision, the Supreme Court cited with approval a lower court's application of that theory: "It is [the applicant's] province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant." [210]

The development of the relation-back theory was limited by Congress when it enacted the Nationality Act of 1940.[211] A provision was included to protect children's derivative citizenship rights from revocation, except where the primary alien's revocation was based upon actual fraud.[212] The parental intent ceased to control the child's intent with respect to loss of citizenship pursuant to denaturalization.

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207. Act of June 27, 1952, ch. 477, § 403(a)(42), 66 Stat. 163, 280.

208. *See* Johannessen v. United States, 225 U.S. 227 (1912); Battaglino v. Marshall, 172 F.2d 979, 981 (2d Cir. 1949); Rosenberg v. United States, 60 F.2d 475 (3d Cir. 1932).

209. *See, e.g.*, Battaglino v. Marshall, 172 F.2d 979 (2d Cir. 1949); Rosenberg v. United States, 60 F.2d 475 (3d Cir. 1932).

210. Johannessen v. United States, 225 U.S. 227, 240-41 (1912)(quoting United States v. Spohrer, 175 F. 440, 442 (1910)). *See also* Luria v. United States, 231 U.S. 9, 24, (1913).

211. Nationality Act of 1940, ch. 876, 54 Stat. 1137 (repealed 1952).

212. *Id.* at ch. 876, § 338(d), 54 Stat. 1137, 1159 (codified as amended at 8 U.S.C. § 1451(e)(1988)). The relevant section of the Nationality Act of 1940 provides:

> (d) The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 shall not, where such action takes place after the effective date of this Act, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or available to a wife or minor child of the naturalized person had such naturalization not been revoked, but the citizenship and any such right or privilege of such wife or minor child shall be deemed valid to the extent that it shall not be affected by such revocation: *Provided*, That this subsection shall not apply in any case where the revocation and setting aside of this order was the result of actual fraud.

Id.

In 1950, the Senate Judiciary Committee summarized the existing law as follows:

> The effect of a decree of denaturalization, as distinguished from expatriation or forfeiture of citizenship, is to declare that the 'naturalized' person never was in fact naturalized, because either by fraud or illegality the statutory prerequisites were not met. The naturalization laws make certain reservations, saving the naturalization of children who derive citizenship from a parent from the alienage which they would otherwise incur because of the fraudulent or illegal naturalization.[213]

Parental actions were also considered as determinative of a minor's citizenship or loss there of in questions of expatriation. Courts once held that a citizen by birth could be expatriated during their minority by act of their parents.[214] The Supreme Court held in *Perkins v. Elg*[215] that these decisions were in error.[216] The Court reasoned that a minor's right to elect to retain her United States citizenship prevented loss of citizenship based upon a parent's naturalization in a foreign country even though this resulted in problems of dual nationality. Similar to the resolution in *Boyd*, the Court found there was no requirement to make a formal application to demonstrate an intent to retain U.S. citizenship where a parent had taken some action that effected a minor's citizenship status. Instead, the intent of the citizen-child could be determined by an examination of the individual's actions. There was no voluntary intent established by the parental expatriation. The child had therefore not intended to relinquish her citizenship after reaching the age of majority unless she engaged in some inconsistent conduct.

The law as it has developed with respect to loss of derivative citizenship is consistent with *Boyd* if the primary focus is individual rather than parental intent. A child upon reaching majority could take some action that showed they had no intent to rely on a parent's action that conferred citizenship. Similarly, a child's actions can be evidence that they did not intend to rely on the parent's actions that resulted in loss of citizenship.[217]

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213. S. REP. NO. 1515, 81st Cong., 2d Sess. 755 (1950).

214. *See, e.g.*, United States v. Reid, 73 F.2d 153 (9th Cir. 1934)(reversing *In re* Reid, 6 F. Supp. 800 (D.C. Or. 1934)); Citizenship of Tobiassen, 36 Op. Att'y Gen. 535 (1932).

215. 307 U.S. 325 (1939).

216. *Id.* at 349.

217. For a thorough discussion on the issue of loss of citizenship and the role of intent as compared to conduct, see James, *The Board of Appellate Review of the Department of State: The Right to Appellate Review of Administrative Determinations of Loss of Nationality*, 23 SAN DIEGO L. REV. 261 (1986) and Aleinikoff, *supra* note 196.

B. Statutory Procedures Affecting Intent

The Immigration Act of 1990[218] contains notable changes in the naturalization procedure. The authority to naturalize persons no longer is conferred upon the United States District Courts. The Attorney General is now vested with this authority,[219] making it an administrative rather than judicial process. The two-step procedure of first filing an application for a petition for naturalization with the Immigration and Naturalization Service, and upon approval, filing a petition for naturalization with the district court has been eliminated. Now a prospective citizen is only required to file a petition for naturalization with the Immigration and Naturalization Service. The certificate of naturalization will be issued by the Service instead of the district courts and the Immigration and Naturalization Service is charged with the responsibility of maintaining, "in chronological order, indexed, and consecutively numbered, as part of its permanent records, all declarations of intention and applications for naturalization filed with the office."[220] The 1905 Commission on Naturalization made similar recommendations based in part upon concerns voiced in the 1891 Nebraska election contest.

1. Proof Problems

Proving naturalization or declaration of intention to become a citizen presented numerous problems prior to the establishment of existing naturalization procedures. Proof of the naturalization of the parents generally required presentation of the record of the naturalization proceedings. Parol evidence was routinely allowed to prove the minority and residence of minors.[221] Lack of uniformity in the existing procedures for filing declarations, becoming naturalized, and court decisions regarding the proof required to establish a claim to citizenship contributed to the Court's need to resort to intent in *Boyd*. The *Boyd* decision arguably contributed to the confusion.

President Theodore Roosevelt issued an executive order in 1905 directing the formation of the 1905 Commission or Naturalization to

218. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

219. Immigration Act of 1990, 8 U.S.C.A. § 1421(a)(West Supp. 1991)(effective Oct. 1, 1991). "(a) Authority In Attorney General. The sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General." *Id.* Subsequent to the writing of this Article, the Immigration and Naturalization Act was amended by the Judicial Naturalization ceremonies amendments of 1991 to restore authority to the district courts to perform naturalization ceremonies. Dec. 12, 1991, Pub. L. 102-232, Title I., § 102(a), Title III, § 305(a), 105 Stat. 1734, 1749 (effective January 1992).

220. Immigration Act of 1990, Pub. L. No. 101-649, § 407(d)(17), 104 Stat. 4978, 5045 (amending § 339(b), 8 U.S.C. § 1450 (1988)).

221. *See, e.g.*, Belcher v. Farren, 89 Cal. 73, 26 P. 791 (1891). *See also* Prentice v. Miller, 82 Cal. 570, 23 P. 189 (1890).

prepare and propose a new naturalization law. The Commission consisted of three administrative officers, one each from the Departments of Justice, State, Commerce and Labor. The report issued by the Commission sounded like a summary of the Boyd election contest. It concluded that the naturalization process was tainted with fraud and that the desire to vote was the most common reason for fraud. Western states were accused of manipulating rights of aliens such as granting the right of suffrage, to attract immigrants.[222] The fraud resulted from aliens being sought out by "political agents" who paid the newly naturalized citizens for their vote. In attempt to eliminate some of the fraud, the commission proposed that the naturalization fee be increased, certificates of naturalization be registered, and that naturalization be prohibited for thirty days preceding a presidential or congressional election.[223]

While the report recommended a more standard and formal procedure for naturalization,[224] it stopped short of recommending that naturalization only occur in federal court or be conducted by a federal agency, even though it noted that only Canada joined the United States in making naturalization a judicial function.[225] The state courts were viewed as providing a more careful procedure than some federal courts and there was no other entity established that could handle the task. The report also suggested that a rule be established that would result in "uniform fairness" among aliens seeking citizenship. It was concluded that fairness would not result if naturalization was confined to federal courts because the individuals residing where federal courts existed would have an advantage over aliens that had to travel to the location of a federal court. The Commission did recommend however that the number of courts allowed to conduct naturalization should be limited. It was necessary to limit the number of courts because they were competing with each other to handle the largest number of naturalizations so that they could collect the accompanying fees. They would be limited depending upon whether a federal court was in that district. If so, the federal court would have exclusive jurisdiction, if not, one state court was designated as having exclusive jurisdiction.

The strongest criticism of procedures existing during the *Boyd* conflict voiced by the Commission was regarding the lack of federal su-

222. For a discussion of the accusations of over-aggressiveness of the Western states, see D. WARD, W.S. BERNARD & R. UEDA, IMMIGRATION 117 (1982).

223. In the accompanying report of the Special Examiner of the Department of Justice, it was suggested that the increased fee which applied both to declarations of intentions and certificates of naturalization would make it too expensive for political agents to assist in fraudulent naturalization. *See* H.R. DOC. NO. 46, *supra* note 178, at 79-92.

224. *Id.* at 17-20.

225. *Id.* at 18.

pervision of the naturalization process.[226] To assure that accurate records were made regarding naturalization, the Commission recommended that along with abolishing the declaration of intention requirement, a formal petition be filed at least three months before the naturalization was heard in court with a duplicate of the petition being sent to the bureau of naturalization. Under the recommended procedure, the Commission concluded that "[f]rauds committed against the courts or by the courts should under these circumstances become rare."[227] The report also criticized the granting of the "inchoate status" that had been used by the *Boyd* Court. Several of the recommendations were incorporated into the 1906 Naturalization Act which remained the basic statute until 1940.

The Nationality Act of 1940[228] made it a felony for a person "[k]nowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."[229] Under this statute and its subsequent codifications, the courts used the approach suggested in *Boyd*. They allowed the issue of a person's citizenship to be submitted to a jury, if there were facts upon which a jury could reasonably draw an inference that an individual was a citizen, and provided there was some showing that no other proof was available.[230]

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226. *Id.* at 20-29.

227. *Id.* at 28. The commission summarized its principle recommendations as follows:

> First. That no one be admitted to citizenship who does not solemnly declare his intention of permanently residing in the United States.
>
> Second. That no one be admitted to citizenship who does not know the English language.
>
> Third. That the declaration of intention be abolished and there be substituted in its place a petition to be filed with the court before which the application for naturalization will be heard, at least ninety days before the hearing.
>
> Fourth. That only Federal courts in cities of over 100,000 inhabitants shall have power to naturalize aliens who are residents of such cities.
>
> Fifth. That the wording of the certificate of naturalization be prescribed by law, that it be printed upon safety paper and furnished to the courts by the bureau of naturalization.
>
> Sixth. That there be prescribed by law a uniform fee, and that a portion thereof be turned into the Federal Treasury. Seventh. That there be established in the Department of Commerce and Labor a bureau of naturalization to supervise the execution of the naturalization laws and receive returns of naturalizations, pending and accomplished.

Id. at 28-29.

228. The Nationality Act of 1940, ch. 876, 54 Stat. 1137 (repealed 1952).

229. *Id.* at ch. 876, § 346(a)(18), 54 Stat. 1137, 1165 (codified as amended at 18 U.S.C. § 911 (1988)(making it a crime if one "falsely and willfully represents himself to be a citizen of the United States")).

230. *See, e.g.*, Rassano v. Immigration and Naturalization Service, 377 F.2d 971 (7th Cir. 1967). Petitioner was unable to produce evidence to supply the necessary foundation for the admissibility of hearsay. There was no showing that other means of proof were unavailable, such as an allegation that the certificate of nat-

Although it is sometimes necessary to resort to evidence upon which a jury might find that citizenship has been acquired, the current system for maintaining records of naturalization and issuing certificates of citizenship eliminates most of the proof problems that occured in *Boyd* and thus requested the Court to consider intent. These procedures were established in part because of the 1905 commission's review of *Boyd*.

2. *The Rise and Fall of the Declaration of Intention*

Boyd was decided at a time when the declaration of intention was perhaps at the peak of its importance. It's primacy eventually began to decline. Contrary to the recommendation of the 1905 Commission, the declaration of intention was maintained in the 1906 Act and required of all applicants for citizenship as a prerequisite to citizenship[231] until it was made optional by the 1952 Immigration and Nationality Act.[232] The declaration was introduced into American naturalization law in 1795 by the second Act of Congress on the subject of naturalization.[233] For the more than 150 years between these enactments, Congress considered it appropriate to require aliens to declare their intention to become United States citizens several years before they petitioned for naturalization. Exceptions were made from time to time to avoid hardship or to expedite the naturalization of a favored group, but until the 1952 enactment, the declaration constituted the "first papers" toward citizenship in the usual naturalization procedure.[234]

In a case that arose in Nebraska subsequent to *Boyd*, *Trabing v. United States*,[235] the court had to consider the validity of an individual's claim that he was a citizen of Nebraska as well as the nation based upon an application of the principles announced in *Boyd*. Arthur Trabing claimed that like Governor Boyd, he had come to the

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uralization had been lost or destroyed. It was held that petitioner's evidence was insufficient to raise a genuine issue on his claim to citizenship.

See also Colt v. United States, 158 F.2d 641 (5th Cir. 1946). Rumanian-born defendant had been living in the United States for at least nineteen years prior to committing the alleged criminal act of registering to vote in Florida and thereby claiming to be a United States citizen. He maintained that, having lived in the United States since the age of four, he was a naturalized citizen. The government was required to offer sufficient evidence from which a jury could draw the inference that the person in question was neither natural-born nor naturalized.

231. Act of June 29, 1906, ch. 3592, §§ 4, 27, 34 Stat. 596, 596, 603.

232. Immigration and Nationality Act, Pub. L. No. 82-414, § 334, 66 Stat. 163, 254 (1952)(codified at 8 U.S.C. § 1445(f)(1988)).

233. Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

234. *See* Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., on S. 716, H.R. 2379, and H.R. 2816, pp. 79-80, 723-25; S. REP. NO. 1515, *supra* note 213, at 732-34.

235. 32 Ct. Cl. 440 (1897).

United States at an early age with his father, that his father had taken an oath of allegiance to the United States (at the time that he went to work in the Quartermaster Department), and that he himself had moved to Nebraska in 1866. Also, he alleged that he was a resident of the State in 1867, at the time of Nebraska's admission into the Union. The court distinguished the situation in *Trabing* from *Boyd* by finding that Trabing's father had never sought naturalization nor filed a declaration of intention. Additionally, the only evidence that his father had voted was hearsay. The court viewed Trabing's act of applying for and receiving naturalization in 1892 as inconsistent with his claim to already be a citizen.

As the Court explained, a minor, by the declaration of his parents, acquired an inchoate status but on attaining majority he had an election and could repudiate the status. Trabing's application for naturalization, which occurred many years after he attained his majority, negatived the presumption of an earlier election to become a citizen. The reasoning is somewhat inconsistent with *Boyd* in that the Court indicated that the hearsay evidence submitted by Boyd regarding his father's naturalization was appropriate for a jury to consider. Further, Governor Boyd's action of obtaining a judicial decision with respect to his citizenship was motivated by the same factor motivating Trabing to become naturalized—his citizenship was questioned.

The declaration of intent seemed to be designed to eliminate a need to consider subjective intent. The desire to become a citizen as well as the required period of residency could be established by the filing of the dedication. Intent would only be evidenced by the signed declaration. However, official records of both declarations and naturalizations were not reliable. Consequently, intent coupled with some conduct evidencing the intent such as the act of voting developed as the crucial element needed to establish a presumption of citizenship in the absence of naturalization documents.[236] As long as the declaration of intention was required, inconsistent approaches were taken with respect to declarants. In 1906, Nebraska along with eight other states granted the right to vote to declarants. A declarant could be required to serve in a war, but was not accorded the protection of the U.S. Government if abroad.[237] A child of a declarant was unsure about the status acquired and a determination as to their citizenship was uncertain as evidenced by the different results in *Boyd* and *Trabing*.[238] It is

236. *See, e.g.*, Kadlec v. Pavik, 9 N.D. 278, 83 N.W. 5 (1900)(party was shown to have been an alien, proof that he voted overcame the presumption of alienage, and raised a presumption of naturalization).

237. *See* H.R. DOC. NO. 326, *supra* note 142, at 20. The report uses "inchoate status" to describe the status conferred on a declarant (quoting *Boyd* at 143 U.S. 135, 178 (1892)). Nebraska, Arkansas, Indiana, Kansas, Michigan, Missouri, Texas, Oregon, and Wisconsin were noted as having granted the right to vote to declarants.

238. *See supra* text accompanying notes 72-75 & 235-36.

quite possible that neither father had been naturalized. As early as 1885, President Cleveland had urged Congress to enact legislation clearly defining the rights and obligations attaching to the "inchoate status" acquired by a declarant.[239]

During the late 1800s and early 1900s more certificates of intention than certificates of naturalization were filed. It was assumed by the 1905 Commission on Naturalization that this was the apparent result of some declarants believing they were made citizens by the declaration. The Commission recommended the repeal of the declaration of intention. It was noted in the report that the only other country requiring a declaration of intention was Mexico. The report noted that Alexander Porter Morse in his treatise on citizenship had recommended that the intention to adopt an allegiance to the United States be evidenced by permanent residence rather than a declaration of intent. He suggested that "[t]he taking out of two papers is cumbersome and unnecessary." [240] The use of the declaration of intention and the lack of uniform procedures was criticized for the same reasons that had led to a favorable decision for Governor Boyd.

As a result of the report, the declaration of intention was maintained but lost some of its effect. No longer did a wife (widow) or child acquire citizenship automatically upon the death[241] or insanity[242] of a declarant. They were required to complete the naturalization process.[243] This was consistent with the holding in *Boyd* that the child had accrued some "inchoate status" which eliminated some of the prerequisites to naturalization if completed by the father, but required either individual or collective naturalization to acquire citizenship.

The 1950 Report of the Committee on the Judiciary which led to the 1952 Immigration and Nationality Act repeated the recommendation of the early 1900s—eliminate the declaration of intention.[244] The document that had been used to establish the citizenship of Governor Boyd was criticized as "serv[ing] no useful purpose."[245] Congress accepted the recommendation in part. Under the 1952 Act, declarations

239. H.R. DOC. NO. 326, *supra* note 142, at 22 (quoting President Cleveland's 1885 annual message).

240. H.R. DOC. NO. 46, *supra* note 178, at 17.

241. Act of June 29, 1906, ch. 3592, § 4(Sixth), 34 Stat. 596, 598.

242. Act of Feb. 24, 1911, ch. 151, 36 Stat. 929.

243. *See, e.g., In re* Schmidt, 161 F. 231 (S.D.N.Y. 1908)(An alien son, whose father declared his intention of becoming a citizen but died before being naturalized and during son's minority, could acquire naturalization upon complying with the other provisions for naturalization without making a declaration of intention).

244. S. REP. NO. 1515, *supra* note 213, at 744.

245. The Nationality Act of 1940 set formal requirements for the filing of a declaration of intention. Nationality Act of 1940, ch. 876, § 328, 54 Stat. 1137, 1151. The 1950 Committee on the Judiciary criticized this provision and recommended that the declaration of intention be eliminated since it served no useful purpose. S.REP. NO. 1515, *supra* note 213, at 738.

of intention were eliminated as a prerequisite to naturalization.[246] Under current law, a declaration of intention may be filed with the Immigration and Naturalization Service.[247] The apparent objective of retaining this provision as optional was to preserve the rights of aliens under state laws, where, for example, there was a requirement that a legal resident alien shall have filed his declaration of intention before he could obtain work.[248] However, there are other benefits which have accrued to non-citizens from the filing of a declaration of intention for filing a complaint. For example, section 102 of the Immigration Reform and Control Act of 1986[249] required that an individual file a declaration of intention in order to be protected by the anti-discrimination provisions of the Act that prohibited citizenship status discrimination. Section 533 of the Immigration Act of 1990 eliminated this requirement.[250]

C. Distinguishing Between Citizens: Second-class Citizenship?

Another contemporary issue presented is whether it is constitutionally permissible to distinguish between citizens. Attempts to justify distinctions have suggested that a birth-right citizen is entitled to certain rights not guaranteed to those who acquire their citizenship through naturalization. The rejection of any consideration of John Elk's individual intent along with the subsequent passage of the 1924 Citizenship Act left us with the practice of conferring citizenship on some individuals by statutory enactment even if they acquired citizenship at the time of their birth rather than through some process of naturalization.

The majority opinion in *Elk* stated that the fourteenth amendment "contemplates two sources of citizenship, and two sources only: birth

246. Act of June 27, 1952, Title III ch. 2, § 334, 66 Stat. 254.

247. Immigration and Nationality Act, § 334, 8 U.S.C. § 1445(f)(1988):

> Any alien over eighteen years of age who is residing in the United States pursuant to a lawful admission for permanent residence may . . . make and file in duplicate . . . a signed declaration of intention to become a citizen of the United States . . . Nothing in this subsection shall be construed as requiring any such alien to make and file a declaration of intention as a condition precedent to filing a petition for naturalization.

This was amended to read:

> An alien over 18 years of age who is residing in the United States pursuant to a lawful admission for permanent residence may file with the Attorney General a declaration of intention to become a citizen of the United States. Such a declaration shall be filed in duplicate and in a form prescribed by the Attorney General and shall be accompanied by an application prescribed and approved by the Attorney General.

8 U.S.C.A. § 1445(g)(West Supp. 1991).

248. *See* Joint Hearings on S. 716, H.R. 2379 and H.R. 2816, *supra* note 234, at 80; S. REP. NO. 1515, *supra* note 213, at 738.

249. 8 U.S.C. § 1324(b)(1988)(amended 1990).

250. Immigration Act of 1990, Publ. L. No. 101-649, § 533, 104 Stat. 4978, 5054-55.

and naturalization."[251] The fourteenth amendment restricts the ability of Congress to confer citizenship other than through naturalization. Therefore, seemingly, the choice left to Congress after *Elk* was to naturalize Indians. The 1924 Act provided for the acquisition of citizenship at birth, presumably naturalization by birth. Congress had historically provided for another form of naturalization by birth. Children born abroad to United States citizens have acquired citizenship at birth since the 1790 naturalization law. This *jus sanguinis* citizenship, however, has been excluded from the fourteenth amendment by the Supreme Court. In *Rogers v. Bellei*,[252] the Court held that such citizens were not "Fourteenth-Amendment-first-sentence citizen[s]"[253] and since the citizenship clause of the fourteenth amendment did not apply to an individual born abroad to a U.S. parent, it was permissible for Congress to include a condition subsequent to the statutory grant of citizenship.[254] If Congress can make such individuals citizens then they must be naturalized citizens. However, Congress does not view this as "naturalizing" individuals. Congress has defined naturalization as the conferring of nationality *after birth* by any means.[255] Since Indians and children born aboard acquire citizenship at birth they apparently are not considered naturalized by Congress. As the Supreme Court tells us, neither are they constitutional citizens. Therefore, we

251. Elk v. Wilkins, 112 U.S. 94, 101 (1884). It almost seems as though Congress and the Supreme Court were working at times at cross purposes in their attempts to define citizenship. At first, since there was no definition of citizenship, it was simply assumed that birth in the United States conferred citizenship. Congress felt it necessary to clarify how citizenship could be acquired at birth by children of United States citizens born aboard, so using its powers to naturalize enacted statutory provisions effecting jus sanguinis citizenship. When the fourteenth amendment was ratified, the Supreme Court believed that it had found its definition of citizenship. For example, in *Pope v. Williams*, 193 U.S. 621, 625 (1904), the Court stated, "The first sentence of the Fourteenth Amendment is in effect a national naturalization law; and the acquisition of United States and state citizenship is solely regulated by it." However, the fourteenth amendment only addressed citizenship by birth or naturalization *in the United States*. See discussion in Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1, 13-15 (1968), regarding the problems encountered in trying to interpret the fourteenth amendment as defining citizenship. To further complicate matters, Congress added its definition of naturalization to limit naturalization to acquisition of citizenship *after* birth. When the Court announced in *Elk* that citizenship could be acquired only by birth or naturalization, and suggested that the only possibility open to Indians was naturalization, it seemed to include acquisition *at* birth other than pursuant to the fourteenth amendment as naturalization.

252. 401 U.S. 815 (1971).

253. *Id.* at 827.

254. The provision required that such child born to an American parent should lose that citizenship unless he resided in the United States for the time period specified by Congress. *Id.* at 816. The statutory provision requiring a period of residence for the child was subsequently repealed by Congress in 1978.

255. 8 U.S.C. § 1101(a)(23)(1988).

are required to refer to them in the third category of "statutory citizens."

Are statutory citizens second-class citizens? There are consequences attached to the method of acquiring citizenship, resulting in disparate treatment. Any category of statutory citizenship is subject to amendment or even repeal. In contrast, Congress does not have the power to determine conditions for fourteenth amendment citizenship. The Supreme Court has stated "that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive,"[256] and lower courts have struck down legislation violating this principle. For example, in *Fernandez v. Georgia*,[257] the court held that a Georgia statute requiring that state troopers be native-born rather than naturalized citizens violated the equal protection clause of the fourteenth amendment because distinctions could not be made between types of citizens. However, in *Rogers v. Bellei*, the Supreme Court stated that statutory citizenship is an expression of "congressional generosity,"[258] suggesting that there is room for some distinction. The distinction that has been the subject of much debate, but never decided by the Supreme Court, is whether the Constitutional provision that only a "natural born" citizen is eligible to be President[259] applies to statutory citizens.[260] The Supreme Court has stated that "naturalized" citizens are ineligible for the Presidency.[261] Therefore, if statutory citizens are considered to be naturalized citizens, rather than birth-right citizens, they would not be eligible for the presidency.

Congress has expressly rejected arguments in favor of a *jus soli* only policy for acquisition of citizenship at birth. Early naturalization statutes as well as British law conferring citizenship through *jus sanguinis* principles had referred to these citizens as "natural born." The confusion has resulted in large part from the definition of "naturalization" in the 1940 Act. The authors of the definition were a Cabinet Committee appointed in 1933 by President Franklin D. Roosevelt composed of the Secretary of State, Attorney General, and the Secretary of Labor. They recommended a limiting definition but stated that it was "expressly limited to the use of the term for purposes of [the Act]."[262] The committee found that a definition limiting naturalization to acquisition of citizenship after birth included derivative naturalization of minors as well as collective naturalization. Citing

256. Schneider v. Rusk, 377 U.S. 163, 165 (1964).
257. 716 F. Supp. 1475 (M.D. Ga. 1989).
258. Rogers v. Bellei, 401 U.S. 815, 835 (1971).
259. U.S. CONST. art. II, § 1, cl.5.
260. *See supra* text accompanying notes 29-32.
261. *See, e.g.*, Schneider v.Rusk, 377 U.S. 163, 165-77 (1944).
262. Hearings on H.R. 6127 Before the Comm. on Immigration and Naturalization, 76th Cong., 1st Sess. 413 (1938).

Boyd,[263] the committee found it was in conformance to the generally accepted use of the term to not apply to "the conferring of the nationality of a state, *jus sanguinis*, at birth, upon a child born abroad."[264] As the committee saw it, citizenship could be conferred by *jus soli*, *jus sanguinis*, or by naturalization. The acquisition of citizenship at birth—whether *jus soli* or *jus sanguinis* was one category and naturalization was another. The recommended statute which was adopted by Congress included this new definition, an enumeration of the various means of acquiring citizenship at birth, and a separate procedure for naturalization. We are thus left with two separate uses of the term naturalization—one by Congress and one by the Constitution.

Commentators have made convincing arguments that citizens born abroad should be considered native-born or natural born thereby allowing them to be eligible to become President.[265] Support for this position is found in the historical treatment of *jus sanguinis* citizens as natural born. No such support is found with respect to Indians. An interesting question that is raised but that is beyond the scope of this Article is whether *Elk* excludes Native Americans from the Presidency.

Citizenship can be acquired *jus soli* by every race and nationality except Native Americans pursuant to the fourteenth amendment. The fourteenth amendment should be reinterpreted to apply to Native Americans.

Schuck and Smith have proposed a reinterpretation of the citizenship clause with the objective to "achieve a law of citizenship at birth that is theoretically consistent, practical for addressing current policy problems, and consonant with the nation's fundamental claim that its government rests on the consent of the governed."[266] Their proposed reinterpretation would not require overriding any prior decisions but would require a reading of "subject to the jurisdiction thereof" to refer only to citizens and permanent residents, resulting in an exclusion from the grant of birth-right citizenship to children of illegal aliens and nonimmigrants. Their stated objective is consistent with the inclusion of Indians as fourteenth amendment citizens. Further, the proposal does suggest a resolution to the exclusion of Indians from this clause. It was perhaps a plausible argument at the time that *Elk* was decided that all Indians were not born subject to the jurisdiction of the United States. The tribal relationships with the United States were unresolved. There is no sustainable argument that Indians are

263. *Id.* at 415

264. *Id.* at 414.

265. *See, e.g.*, Note, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 864; Gordon, *supra* note 251.

266. P. SCHUCK & R. SMITH, *supra* note 15, at 116.

now not completely subject to the jurisdiction of the United States. The reinterpretation could occur without expressly overruling *Elk*. The fourteenth amendment could be construed to apply to Indians based upon subsequent legislation and judicial interpretations that have brought Indians completely within the jurisdiction of the United States.

V. SUMMARY AND CONCLUSIONS

Both *Boyd* and *Elk* represent problems encountered early in our attempt to resolve claims to citizenship. The troublesome procedural issues presented in *Boyd* were easily addressed through legislation, eliminating in most situations a need to consider subjective intent. Intent is provided by the act of seeking naturalization. Nevertheless, we continue to try to determine the appropriate form of legislation for the naturalization process. The two main principles relied upon, collective naturalization and derivative citizenship, remain as available sources for providing claims to citizenship and have been further refined. Collective naturalization granted citizenship to Puerto Ricans even though the territory was not granted statehood.[267] Similarly, residents of Hawaii,[268] various states upon their admission to the Union,[269] and Alaska[270] became citizens through collective naturalization. Although there was some dispute as to whether the Court held

267. Puerto Ricans became citizens through statutory enactment. Act of Mar. 2, 1917, ch. 145, § 5, 39 Stat. 951, 953 (current version at 8 U.S.C. § 1402 (1988)). The problems that may be associated with collective naturalization in the Puerto Rican experience is beyond the scope of this Article. However, Jose A. Cabranes has prepared a detailed study of the how the granting of citizenship to Puerto Ricans while maintaining Puerto Rico in colonial status has effected the Puerto Rican people. In his study, he also examines why at the same time Puerto Rico was not granted statehood, its people became citizens and the people of another territory, the Philippines, were not granted citizenship. J. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS (1979).

Additionally, in 1872 Congress enacted a statute which provided for the collective naturalization of "all persons born in . . . the Territory of Oregon." Act of May 18, 1872, ch. 172, § 3, 17 Stat. 122, 134.

268. The Republic of Hawaii sought and received annexation to the United States in 1898. In 1900, Congress enacted a statute providing that U. S. citizenship was granted to all inhabitants of Hawaii who were citizens of the Republic of Hawaii at the time of its annexation. Act of April 30, ch. 339, 31 Stat. 141, codified at Immigration and Nationality Act § 305, 8 U.S.C. § 1405.

269. Admission to statehood can either be to a sovereign state or a territory. Texas, for example, was considered a sovereign state at the time of its annexation in 1845. Texans became citizens by the terms of the congressional resolution approving the annexation. In *Boyd*, Nebraska's admission was characterized as the admission of a territory to statehood. *See supra* text accompanying notes 77-81.

270. The treaty between Russia and the United States for the purchase of Alaska in 1867 involved territorial cession by treaty and included the grant of United States citizenship to all inhabitants who did not elect to retain Russian allegiance (ex-

Boyd that the Governor was a citizen based upon the principle of collective naturalization, courts having occasion to decide a related question have cited *Boyd* for this proposition.[271]

Elk has left us with a more troublesome legacy. Native Americans acquire citizenship based upon statutes which are always subject to amendment or repeal. While Congress has included Native Americans among the individuals that acquire citizenship upon birth in the United States, they are the only group of statutory citizens born in the United States. This could prevent their right of full participation in the political community unless *Elk* is construed to be limited in its application to the relationship of the federal government to Indians as it existed in the late nineteenth century.

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cept uncivilized native tribes). Treaty with Russia, Mar. 30, 1867, United States-Russia, 15 Stat. 539.

271. Bahuaud v. Bize, 105 F. 485, (C.C.D.Neb. 1901)(citizen of France who had declared his intention to become a citizen in 1965 after residing in Nebraska since 1860 and voting in numerous elections became a citizen upon Nebraska's admission into the Union pursuant to the holding in *Boyd*); Bolln v. Nebraska, 176 U.S. 83, 88 (1900) ("[T]he legislation of Congress connected with the admission of Nebraska into the Union, so far as it bore upon the question of citizenship, was fully considered by this court in the case of Boyd v. Thayer, 143 U.S. 135, and the conclusion reached that upon its admission into the Union the citizens of what had been the Territory became the citizens of the United States and of the State"); City of Minneapolis v. Reum, 56 F. 576, 580 (8th Cir. 1893)(describing the holding of *Boyd*, "Gov. Boyd was there held to be one of a class of foreign-born residents that was naturalized by the acts of congress admitting the state of Nebraska into the Union").