Indian Citizenship and the Fourteenth Amendment

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Section one of the Fourteenth Amendment is one of the most important additions ever made to the Constitution for, among other things, it defined the requirements for national citizenship. A great deal of study and analysis has been devoted to this clause during the last century, but attention has focused primarily on its impact upon Negroes. Surprisingly, little concern has been shown over the questions this amendment raised in regard to native Americans and their status as citizens.

The English colonists of the New World accepted the legal doctrines of Monsieur De Vattel, the eighteenth century authority on international law, in regard to land possession and the Indians. Vattel wrote that no nation could appropriate more land than was needed for the purpose of livelihood. The American aborigines, therefore, with their economy that combined hunting with agriculture, which required greater amounts of land than a strictly agricultural economy, should be confined to "narrower limits." This provided a rationale for

1. Duane Douglas Smith, "The Evolution of the Legal Concept of Citizenship in the United States" (Ph.D. Diss., Ohio State University, 1936), pp. 194-200, briefly discusses the question of the Fourteenth Amendment and the Elk decision.

those Europeans so inclined to appropriate Indian lands without disturbing their Christian consciences. Sovereignty over the land went to the discovering civilized nation while the aborigines retained only possessory rights. Tribes could occupy and use their ancestral lands until the Caucasians required them for expansion. With independence, the United States followed the British policy in this regard: title to land could be obtained only from the sovereign and then only after the sovereign had extinguished the possessory rights of the natives.\(^3\)

In the process of American expansion the Indians were viewed as “standing in the path of progress.” The aboriginal culture and the civilized culture conflicted, so the weaker was given the choice of annihilation, relocation, or assimilation.\(^4\) The Constitution gave control over Indian affairs to Congress under the commerce power and to the president and Congress under the treaty and war powers. Significantly, in providing for apportioning direct taxes and congressional representation, the framers of the Constitution used total population as a criterion, qualified by the three-fifths clause for slaves until the Fourteenth Amendment, and “excluding Indians not taxed.” One nineteenth century legal authority believed that the framers envisioned assimilation and eventual citizenship by thus categorizing tax-paying Indians along with state citizens.\(^5\) In any case, from 1787 onward, this phrase was used to refer, constitutionally, to Indian tribes not under state jurisdiction.

The first significant case in the Supreme Court to deal with the question of Indian citizenship arose out of the efforts of Georgia to remove the tribes from her boundaries. A peculiar


4. One of the toasts used by frontier troops during the Revolutionary War was “Civilization or death to all American savages” (Roy H. Pearce, The Savages of America [Baltimore: John Hopkins Press, 1953], p. 55).

situation had developed in that many of the Cherokees there attempted to follow white advice and assimilate. The Cherokees made rapid progress in adopting civilization and by the 1820s they had substantial farms and orchards, slaves and cotton gins, and printed a newspaper in their language.\(^6\) They did not wish to relinquish their lands and in 1828 the Cherokees adopted a new constitution, declaring themselves to be a sovereign, independent nation. This was intolerable to states-rights-minded Georgians and they proceeded to assert state control over the Cherokee Territory and to survey the lands in preparation for sale to whites. The Cherokees, receiving a favorable legal opinion from ex-Chancellor James Kent of New York, decided to test their sovereignty in the federal courts.\(^7\)

Because the Eleventh Amendment banned suits against states by citizens of other states or of foreign states, it was decided to bring a bill of equity against Georgia by the Cherokee Nation in its capacity as an independent nation. The Cherokees were represented by former Attorney General William Wirt and John Sergeant of Philadelphia, then chief counsel for the Bank of the United States; Georgia refused to concede federal jurisdiction in the issue and ignored the proceedings.\(^8\) Counsel for the plaintiff argued that individual Cherokees were aliens who did not owe allegiance to the United States and, therefore, the Cherokee Nation was a foreign state.

Chief Justice John Marshall, delivering the opinion of the majority, agreed that “the acts of our government plainly recognize the Cherokee Nation as a State, and the courts are

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6. Praise for this Cherokee civilization can be found in many sources, but see especially Secretary of War John Calhoun to House of Representatives in 1820, *American State Papers: Indian Affairs*, 2: 200-201.

7. Charles Warren, *The Supreme Court in United States History*, rev. ed., 2 vols. (Boston: Little, Brown and Co, 1926), 1:731. Kent in his *Commentaries on American Law*, 11th ed. (Boston: Little, Brown and Co., 1867), pp. 270-71, had written, in regard to national sovereignty and Indian rights, “The principle is, that the Indians are to be considered merely as occupants, to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign country.”

bound to those acts.” But the more important question, he said, was “Do the Cherokees constitute a foreign state in the sense of the Constitution?” If not, the Court would lack jurisdiction in the case. Marshall noted that counsel had “shown conclusively that they are not a state of the Union.” He also took cognizance of counsel’s argument that they were aliens individually and as “an aggregate of aliens composing a State,” they had to be a foreign state. “Each individual being foreign, the whole must be foreign.” If they were a state, but not a constituent part of the Union, then what was their constitutional position?

In one of the few understatements of his legal career, Marshall conceded that “the conditions of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.” Then he came quite close to accepting, and some scholars insist he did accept, counsel’s argument of alien status when he declared that “in the general, nations not owing a common allegiance are foreign to each other.” Yet, Marshall said, “the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.”

These peculiarities include their territory being within the United States and their being under the jurisdiction and protection of the national government. Thus, Marshall determined, they could “more correctly, perhaps, be denominated domestic dependent nations.” Indians occupied territory over which the United States asserted title; the title would take complete effect when the Indians’ right of possession ceased. “Meanwhile,” he said, “they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.” Although Marshall qualified this with the term “resembles,” henceforth, tribal Indians would be regarded in the popular mind as “wards of the nation.”


10. Canfield, “The Legal Position of the Indian,” p. 23, correctly asserts that the term “ward” has no precise legal meaning whatever, but refers to a moral relationship.
Marshall insisted that the United States and foreign nations considered Indians and Indian country as being under United States sovereignty. Any foreign attempt to acquire their lands or to form a political connection with them would be considered "an act of hostility" and tantamount to an invasion. This interpretation, the chief justice said, goes "far to support" the conception that the framers of the Constitution did not have Indian tribes in mind when they provided for federal courts to have jurisdiction over controversies between states and foreign states. In 1787, he pointed out, "the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk or to the government."

The plaintiff's counsel had argued that in framing the commerce clause the intention was to give plenary power to the national government and that no distinction was intended between foreign nations and Indian tribes in regard to regulating commerce. But if this were the true construction, Marshall responded, the framers would have worded the clause as "to regulate commerce with foreign nations, including the Indian tribes, and among the several states," rather than "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Using the latter terminology, he insisted, meant Indians were "clearly contradistinguished" from foreign nations and states in the Union. Marshall concluded that Indian tribes were not foreign states within a constitutional sense and to ask the Court to restrain a state in this matter "savors too much of the exercise of political power to be within the province of the judicial department." The motion was denied.

Justice Smith Thompson, joined by Joseph Story, wrote a strong and lengthy dissent. He quoted Vattel and his principle that a weak state may place itself under the protection of a strong one and still retain its sovereignty and independence. Even the majority, he noted, agreed that the Cherokees constituted a sovereign state. The differing opinions arose over

11. For the strong feelings the Cherokee cases aroused in Story, see Warren, The Supreme Court in United States History, 1:750, 755-57.
whether or not they were foreign. He asserted that on this question one could not “draw much light from the law of nations.” Instead, the practice of the national government and how it had treated Indians must be consulted.

The Cherokees were a sovereign nation before the discovery of the New World, he pointed out. How then, and when, did they lose this character? They were never conquered and made subjects; all wars with them had been followed by treaties that guaranteed them self-government and right of occupancy of the soil, subject to ultimate title in the United States. They were deemed competent “to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety.”

Thompson also argued that the term “foreign” did not relate to geographical or territorial position; it denoted a political relationship. When Georgia was referred to as a state, the reference was to its political character, not its boundaries. There was no “absurdity or inconsistency” in the fact that the state of Georgia surrounded the Cherokee Territory. It might be convenient for Georgia to remove the Cherokees, but this desire did not affect the political relationship between Georgia and the sovereign Cherokees. To shed light on the anomalous situation, he suggested substituting the term “Spaniard” for “Cherokee” in the controversy. Spaniards—foreigners—would remain foreign just like the Cherokees.

In judicial terms, foreign meant under a different jurisdiction or government, Thompson declared, and each state in the United States was foreign to others in regard to state laws. The Cherokees, in turn, were governed by their own laws and customs and had “no connection with any other government or jurisdiction, except by way of treaties,” which they had agreed to with the United States in “like form and ceremony as with foreign nations.”

Thompson’s most telling point was an analogy of Georgia, with congressional consent, purchasing the Cherokee lands from the Indians and then not paying for them. Could not the Cherokees sue for the money, he asked, “could there be a doubt that an action could be sustained upon such a contract?” The judicial sustaining of this action would have to come from the
constitutional provision for jurisdiction over controversies between states and foreign states. “For,” he reasoned, “the Cherokee Nation is certainly not one of the United States.” The Cherokees had rights secured by treaties and laws of the United States, and the doctrine in Osborn v. Bank of the United States (forcing a state official to return money seized from the bank in payment of an unconstitutional state tax) sustained the Cherokee application for an injunction against Georgia.

Thompson’s argument was never accepted and the Marshall doctrine that an Indian tribe was not a foreign state remained unaltered. The legal and constitutional consequences of holding otherwise would undoubtedly have been disastrous in creating unknown confusion. But certainly Marshall’s sophistry of describing them as “dependent domestic nations,” while it extracted the chief justice from the dilemma the case presented the Court, did little to help the future cause of Indians in asserting tribal sovereignty. This ruling made the individual tribal Indian, in effect, an alien. As long as an Indian in this classification remained in his tribe in Indian country, he was governed by tribal law under the protection of the national government. Once outside the jurisdiction of his tribe, his status would be “no different from that of any resident or visiting alien” in the United States.

The citizenship status of Indians remained clouded during the years preceding the Civil War. Chief Justice Roger Taney in Dred Scott v. Sandford, utilized their vague legal position to clarify his decision that free Negroes were not, and never had been, considered citizens in the complete sense of that term by drawing an analogy with Afro-Americans and Indians. The

12. Felix Cohen, “Indian Wardship,” The Legal Conscience, p. 328, states that the fallacy of viewing Indians as “wards” led to “one of the oldest living legends” in the United States—that Indians are not citizens.


14. 19 Howard 393 (1857).
condition of the former was quite unlike that of the Indian race. Indians were uncivilized and had never formed a part of colonial communities by amalgamating socially or governmentally; instead they were “a free and independent people” who governed themselves in tribes and nations. While the white race held ultimate dominion over tribal lands, neither the English nor the colonial governments claimed possessory rights until the tribes were willing to cede them. The tribal governments “were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white” and their freedom had always been acknowledged. Taney said that individual Indians had “always been treated as foreigners not living under our government.” He conceded that the spread of civilization had resulted in bringing tribes under “subjection to the white race” and during the period of their “state of pupilage” the United States had to legislate over them “for their sake as well as our own.” But, “like the subjects of any other foreign government,” Indians could be naturalized by Congress “and become citizens of a State and the United States.” If any individual Indian left his tribe and settled among the whites, “he would be entitled to all the rights and privileges which would belong to an immigrant from any other foreign people.” But Negroes could not even be naturalized because this was restricted to whites and Indians unless specific exceptions were made. The Constitution simply did not contemplate citizenship for Negroes.

The year previously, the attorney general determined that Indians could not avail themselves of the provisions of the general statutes of naturalization; they could become citizens only by special congressional act or by treaty. Attorney General Caleb Cushing, a capable lawyer, responded to a query from the secretary of interior—could a half-breed Chippewa in Wisconsin, maintaining his tribal relationship, legally preempt land, a right limited to United States citizens or those who had filed a declaration of intent to become naturalized?

Cushing admitted that the question of citizenship, and how its rights could be acquired and lost, had never “been fully determined, either by legislation or adjudication.” He distinguished between natural born citizens and those who acquired citizenship by naturalization. Citizenship, he said,
signified “the persons who constitute the political society.” Yet the term was not confined to those who enjoyed suffrage, because women and minors are citizens and merely being born in the United States did not make one a citizen—he had also to be under United States jurisdiction. Indians born in the United States were not automatically citizens. Instead, Indians were “domestic subjects” of the national government.

Indians could become naturalized citizens, but not under the general laws of naturalization. These statutes limited the process to foreigners and white people. Indians were not foreigners because “they are in our allegiance” and could be naturalized only by treaty or a special act of Congress. Cushing noted this had been done in certain cases. The Stockbridge were naturalized en masse by law and individual Choctaws by the Treaty of Dancing Rabbit Creek. He believed the Treaty of Guadalupe Hidalgo “probably” made “many” Indians in the Southwest citizens although their status would be “inferior in capacity” to that enjoyed by the Choctaws. But “in fine,” he declared, “no person of the race of Indian is a citizen of the United States by right of local birth. It is an incapacity of his race.”

In finally answering the specific question posed, Cushing determined that any Indian of mixed blood who retained his tribal relationship could not become a United States citizen. As long as he maintained that relationship, he was “a mere denizen or domestic” living in the United States. The Wisconsin constitution substantiated his argument, Cushing insisted, because it permitted “civilized persons of Indian descent not members of any tribe” to be state electors. “But electorship and citizenship are different things; they are not, of necessity, consociated facts,” he said, because “a person may be elector and not citizen, as he may be citizen and not elector.” This did not automatically make them United States citizens or citizens of the state of Wisconsin. He agreed that in terms of public policy, “it may be injudicious to seek to maintain the present legal distinction between the two races.” But the present condition could be altered only by treaty or by act of Congress.15

Prompted by Indian Commissioner George Manypenny, Congress made some provisions for individual Indian citizenship prior to the Civil War. In a series of treaties and statutes, Congress provided that whenever individuals of certain tribes dissolved their tribal relationship and adopted "civilized ways," they could receive a land allotment and national citizenship. This markedly unsuccessful approach was interrupted by secession and war.  

Following the Civil War, some of the reformers who had labored for abolition and who continued to work for the improvement of the lot of the freedman, also took up the cudgels of reform for Indians. Their belated efforts proved important. They sought a program that would rapidly educate and acculturate the Indians so they could quickly be assimilated. They believed that the key to success was a combination of education, Christianization, individual ownership of land, and eventual citizenship. This concept provided the basis for President Grant's Peace Policy.

The Civil War had aggravated hostile frontier conditions and in March 1865 Indian Affairs Committee member Senator James Doolittle, a Republican from Wisconsin, introduced a resolution in Congress calling for a joint congressional committee to investigate the problem. The committee was established, chaired by Doolittle, and reported to Congress in January 1867. One of its major recommendations was a program to civilize tribal Indians. Out of this proposal emerged the Peace Policy for handling Indian affairs. Indians were to be protected through maintenance of the tribal system with the special rights and disabilities incurred through treaties being retained while they were educated and gradually assimilated into white culture. Meanwhile, some persons were advocating immediate Indian citizenship. The Civil Rights Act

16. For a summarization of these proposals and their results, see U. S., Congress, House, Committee on Indian Affairs, The Organization of the Territory of Oklahoma, 45th Cong., 3d sess., 1879, H. Rept. 188, pp. 1-38.


of 1866 and the proposed Fourteenth Amendment of the same year prompted congressional debate over this question.

The Radical Republicans were determined to protect the civil and political rights of the freedman after Appomattox. To this end, Senator Lyman Trumbull, a Republican from Illinois, introduced a measure in Congress in December 1865 that became the Civil Rights Act of 1866. The first section of this law was influential in determining the first section of the Fourteenth Amendment and was important in the evolution of citizenship for Indians.\(^\text{19}\) During the debates on this bill, Trumbull moved to insert a new introduction that would read, "That all persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens." This was immediately questioned by some senators because they believed it would naturalize, among other groups, Indians and Chinese living in the United States.

Trumbull insisted this clause would not apply to tribal Indians because the United States had always dealt with them "as foreigners, as separate nations," except for those who had dissolved their tribal membership and were taxed. If any Indians were taxed and were "domesticated," they should be citizens, he said, and for all others—tribal members—the clause would not apply. However, James H. Lane, a Republican from Kansas, called his attention to what he believed was an exception. Most Indians in Kansas had taken land allotments in severalty and the state supreme court had rules that they were thus separated from their tribe. Their lands were not taxed and the whites of Kansas had no intention of extending "to them the right of citizenship."\(^\text{20}\)

Lane wanted to move to insert the phrase "and Indians holding lands in severalty by allotment" after the term "foreign power." Trumbull thought it would be unsafe to adopt this phraseology because Indians might hold lands in severalty in Indian country that was outside the organized jurisdiction of

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the United States. Trumbull’s bill was further “embarrassed,” when Alexander Ramsey, a Republican from Minnesota, complained that the “worst kind” of Indians were those rovers who had cut themselves off from tribal authority; Trumbull, Ramsey complained, wanted to make United States citizens out of this type of nomad! To preclude further argument, Trumbull moved an amendment so that his introductory section conformed to constitutional terminology by using the phrase “excluding Indians not taxed.”

John Henderson, a Democrat from Missouri, wanted all Indians, taxed or untaxed, who were not under tribal authority to be naturalized. The states could still deny them suffrage and this would permit the individuals to use United States courts to enforce their rights. According to the accepted constitutional interpretation of Trumbull’s introduction, this would be achieved. Lane, absent the previous day when Trumbull proposed the alteration, opposed Trumbull’s addition because the Kansas Indians holding lands in severalty were not taxed. Trumbull remained adamant against any change, however, and his amendment was accepted. The statute as enacted declared, “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.”

Trumbull was positive his Civil Rights Act was constitutional under the Thirteenth Amendment, but, to make certain, the Radicals proposed the Fourteenth Amendment. The House-sponsored Joint Resolution for this amendment contained, in the first section, clauses on privileges and immunities, equal protection, and due process of law. But Senate Republicans, meeting in caucus, decided to add an amendment to the section that would define citizenship. The Senate sponsor of the measure, Jacob Howard, a Republican from Michigan, during Senate debate moved to insert the phrase

24. James, Framing of the Fourteenth Amendment, pp. 142-43.
“all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside” as an introduction to these guarantees. He said that this statement was “merely declaratory of what I regard as the law of the land already.” Senator Doolittle, who had not attended the party caucuses, wanted to add the phrase “excluding Indians not taxed.” Howard immediately expressed the hope that this addition would not be accepted because Indians maintaining tribal allegiance were not born subject to United States jurisdiction in that sense. These types of Indians, he asserted, “are regarded, and always have been in our legislation and jurisprudence, as being quasi foreign nations.” Doolittle insisted that there was “a large mass of the Indian population . . . upon reservations within the several states [who] are most clearly subject to our jurisdiction, both civil and military,” though, and they should not be declared United States citizens. Trumbull was certain there was “nothing whatever” in Doolittle’s suggestion because the United States dealt with these Indians by treaty for the very reason that they were not subject to United States jurisdiction.

In addition to treating with Indians, Reverdy Johnson, a Democrat from Maryland, noted that the Congress also “from time to time, legislated in relation to the Indian tribes.” He was certain the courts would interpret this clause as granting citizenship to Indians that fit Doolittle’s description so “what possible harm can there be in guarding against it” by accepting the amendment? He noted that the second section of the proposed amendment, apportioning representation, included the phrase “excluding Indians not taxed,” as did the Civil Rights Act—a bill written by Trumbull. This suggestion was not received in good humor. Trumbull curtly responded that the second section of the Joint Resolution dealt solely with states and had nothing to do with Great Plains Indians except that tribal Indians were not to be counted for representation. He further noted that, in the Civil Rights Act debates on this issue, Johnson himself had pointed out that the phrase did not


26. Ibid., pp. 2892-93.
refer to taxation *per se* but to a classification of people—"civilized Indians." More importantly, Trumbull did not want to make citizenship dependent upon taxation, which would be the result if the phrase "excluding Indians not taxed" were added.  

Comments from Democrat Thomas Hendricks from Indiana cut to the heart of the matter when he asked Trumbull if it was not purely "a matter of pleasure" of Congress whether they dealt with Indians through legislation or by treaty; either way they could compel their obedience. "If the Indian is bound to obey the law he is subject to the jurisdiction of the country," Hendricks insisted. He described Indians, instead, as subjects of the nation. Howard agreed, noting that if Trumbull's phrase were adopted then a state could impose a tax upon the Indians, whether in their tribal condition or otherwise, in order to make them citizens of the United States. He warned that, "it would, in short, be a naturalization, whenever the states saw fit to impose a tax upon the Indians, of the whole Indian race within the limits of the States." Doolittle's amendment died by vote of ten to thirty. Later the phrase on naturalization was inserted so that the final version of the first section read:

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

Soon after the Fourteenth Amendment was ratified, Congress determined to end the practice of treating with Indian tribes, to place them on reservations, and to exert jurisdiction over them through statutes. When debating this, however, the question was raised concerning the effects of the Fourteenth Amendment on Indian treaties. So the Senate Committee on the Judiciary was instructed to investigate and to report on whether or not this amendment had made citizens of the Indians, "and

27. Ibid., pp. 2893-94.
28. Ibid., pp. 2894-95, 2897.
whether thereby the various treaties heretofore existing between the United States and the various Indian tribes are, or are not annulled." Obviously, if the amendment had collectively made them citizens, this could have an impact as a country does not sign a treaty with its citizens. Also, if they were United States citizens, Congress could not legislate over them in the same manner as it had previously.

The Committee on the Judiciary reported an emphatic “no” to the Senate. The fundamental question was whether Indians were “subject to the jurisdiction” of the United States at the time the Fourteenth Amendment was adopted. The committee noted that, from the beginning of colonization onward, the European conquerors had always treated with Indian tribes as foreign nations in terms of acquiring possessory rights to Indian lands. But, otherwise, the tribes had always been permitted to govern themselves provided they did not “endanger the safety of governments established by civilized man.” These same principles guided United States Indian policy under the Articles of Confederation and the Constitution. The committee report cited numerous treaties and Supreme Court decisions to substantiate this, especially Cherokee Nation v. Georgia and Worcester v. Georgia.29

The committee further argued that in all the statutes dealing with Indian policy, Congress had never regarded Indian tribes as subject to “the municipal jurisdiction of the United States.” The tribes had always been treated with as foreign nations and were held responsible for governing themselves, punishing crimes, and so forth. Indians “in tribal condition,” therefore, “have never been subject to the jurisdiction of the United States, in the sense in which the term jurisdiction is employed in the fourteenth amendment to the Constitution.”30 The tribes had always been “domestic, dependent nations” and the

29. The Worchester case concerned land titles and treaties, rather than citizenship.

30. General Francis A. Walker, “Indian Citizenship," International Review, 1 (May 1874): 316, notes that this statement is in error. He cites U.S. v. Rogers, 4 Howard 567 (1846), and The Cherokee Tobacco, 11 Wallace 616 (1871), in which the Supreme Court declared national sovereignty over Indian tribes to be complete and plenary. The latter decision was handed down the same month as the committee report.
United States had always dealt with them “in their collective capacity as a state.” United States jurisdiction had been asserted over individual Indians, but only when “such members were separated from the tribe to which they belonged.” The report concluded that “when the members of a tribe are scattered, they are merged in the mass of our people, and become equally subject to the jurisdiction of the United States.”

This question on the status of the individual Indian became crucial. Most congressmen accepted the statement of the committee as valid. When Congress extended provisions of the Homestead Act to Indians in 1875, a provision that would grant citizenship to those who availed themselves of this opportunity was eliminated because it was believed that the Fourteenth Amendment made it unnecessary. Also, when Congress debated a severalty bill in 1881, Senator George Hoar of Massachusetts pressed for an amendment that would make citizens of those Indians holding lands in severalty. But other senators objected that this was unnecessary; when the individuals separated from the tribe and took lands, the Fourteenth Amendment made them citizens. By this time “most Americans believed either that all Indians were citizens or that they could become so by leaving their tribes.”

The legal view that the national government had limited criminal jurisdiction over Indian tribes was sanctioned by the Supreme Court in 1883 in *Ex parte Crow Dog.* This Sioux chief had murdered Spotted Tail, a fellow chief, and was sentenced to death by the District Court of Dakota. He appealed to the Supreme Court on the grounds that the United States had no jurisdiction over crimes committed by Indians upon Indians in Indian country. The Supreme Court unanimously agreed that Congress had failed to provide for punishment of Indian crimes in Indian country, leaving this up

31. S. Rept. 268.


34. 109 U. S. 556 (1883).
to the tribes. As long as he maintained his tribal relationship, he was subject only to tribal authority for this type of crime. A horrified Congress amended the Indian Appropriation Act of 1885 to extend United States jurisdiction over seven types of major crimes committed in Indian country.35

There were others, however, who held the opposite constitutional interpretation. The term “born in the United States,” some argued, meant more than just on its soil; it also included within its jurisdiction. When an Indian abandoned his tribal relationship, this did not automatically make him a citizen. United States citizenship confers, among other benefits, a political privilege that can be assumed only with some form of consent. One legal source noted that the person “must either be born into the government or made by force of some law subject to its jurisdiction.”36 The Supreme Court adopted this view in 1884 in Elk v. Wilkins.

Reformers became increasingly concerned over the plight of the Indians, particularly after the attempts to remove the Nez Perce in 1877, the effort of Dull Knife and his Cheyennes to return to Dakota in 1878, and the Ponca controversy of the same year. Several organizations were formed to assist the Indian cause. One of these was the Ponca Committee, organized to assist the Poncas in their efforts to resist removal to Indian Territory. This Ponca Committee subsequently initiated the Elk v. Wilkins case to test Indian status under the Fourteenth Amendment.37

John Elk, a resident of Omaha, Nebraska, was an Indian who had severed all tribal connections (his brief did not name his former tribe). He sought to register to vote in a city election in Omaha in 1880. Charles Wilkins, the registrar, refused to let him vote on the grounds that, although Elk met the state and city residence requirements, he was an Indian who paid no taxes and thus was not a citizen. In his suit Elk claimed to have no tribal connection and to have “fully and completely


surrendered himself to the jurisdiction of the United States." Thus, under the Fourteenth Amendment, he claimed citizenship and argued that, in violation of the Fifteenth Amendment, he was being denied the right to vote on the grounds of race. Both plaintiff and defendant agreed that the fundamental question was whether or not section one of the Fourteenth Amendment had made Elk a citizen of the United States when he voluntarily left his tribe and took up residence among white citizens.\(^{38}\)

Justice Horace Gray wrote the opinion for the Supreme Court. He noted that from the beginning of the government of the United States, Indian tribes were dealt with, not as foreign states, but as "alien Nations, distinct political communities." Individual Indians owed allegiance to their tribe, were not part of the United States, and were considered wards of the United States. They and their property, while in a tribal connection, were exempt from taxation by states. Gray declared that "the alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States." They had never been deemed citizens except when a specific treaty or statute had naturalized them. He cited a number of instances in which this had been done. Section one of the Fourteenth Amendment, he noted, considered only two sources of citizenship—birth or naturalization. Being "subject to the jurisdiction thereof" means "completely subject to their political jurisdiction and owing them direct and immediate allegiance." He said that although tribal Indians are born in the United States in a geographical sense, they are not subject to its jurisdiction any more than are children born in this country of ambassadors of foreign nations.

Gray substantiated the latter point by noting section two of the Fourteenth Amendment included the phrase "excluding Indians not taxed." They were excluded for apportionment purposes because they were not citizens. Also, he noted that the section of the Civil Rights Act of 1866 that defines citizenship excluded "Indians not taxed." Because tribal Indians cannot become citizens by birth, they can become citizens only by naturalization. They have to have some kind of assent from the

\(^{38}\) Elk v. Wilkins, 112 U.S. 94 (1884).
United States government, he concluded, before acquiring citizenship.

Justice John Marshall Harlan, joined by William Woods, wrote a very lengthy and perceptive dissent from the majority opinion. He insisted that if Elk paid taxes, the majority still would not have held him to be a citizen; an Indian born into a tribe could become one only by naturalization. But Elk’s petition showed sufficiently that he was the type of person the state of Nebraska taxed. Furthermore, he had “become so far incorporated with the mass of the people of Nebraska that, being as the petition avers, a citizen and resident thereof, he constitutes part of her militia.” No longer being a member of a tribe, he could sue and be sued and was counted for state legislature apportionment purposes.

Harlan declared that the constitutional clause for national apportionment, “excluding Indians not taxed,” applied solely to members of a tribe and the same was true for that clause in section two of the Fourteenth Amendment. Indians taxed by states were counted for apportionment purposes. He particularly emphasized that the Civil Rights Act of 1866, “beyond question,” conferred national citizenship on all persons, “of whatever race” excluding Indians not taxed, or tribal Indians, as long as they were born in this country and not subject to any foreign power. As he suggested, exclusion of Indians not taxed in this law “evinced a purpose to include those subject to taxation in the State of their residence.” Harlan substantiated this by pointing out that when this measure was reported, it did not contain this exclusion. Trumbull subsequently inserted the phrase to satisfy those who wanted to make citizens of Indians who had left their tribe and to satisfy those who wanted to exclude tribal Indians from citizenship. The congressional debates showed “with absolute certainty” that the Senate intended to admit those Indians to citizenship.

Harlan reasoned that the debates on the Fourteenth Amendment by that same Congress demonstrated that its sponsors intended to continue this policy. He noted that during debate on this proposal, Doolittle tried to add the phrase “excluding Indians not taxed” to the first section. Trumbull and others objected because the exception was unnecessary; the phrase “subject to jurisdiction thereof” would itself exclude
tribal Indians. But the sponsors of the amendment, with Trumbull as their spokesman, "distinctly announced . . . that they intended to include [these nontribal Indians] in the grant of national citizenship." Harlan then quoted Trumbull's remark denouncing the concept of making citizenship contingent upon paying taxes.

Harlan further buttressed his argument by citing the conclusion in the report made by the Senate Committee on the Judiciary in 1871. The report said that "when the members of any Indian tribe are scattered they are merged in the mass of our people and become equally subject to the jurisdiction of the United States." If Elk did not acquire citizenship when he abandoned his tribe, Harlan reasoned, then the Fourteenth Amendment did not achieve what was intended by its framers and "there is still in this country a despised and neglected class of persons, with no nationality whatever."

Harlan was correct in his analysis of congressional intent. The congressional debates on the Civil Rights Act of 1866 and the Fourteenth Amendment prove conclusively that the sponsors and all who participated in the debates intended to grant citizenship to Indians in the status of John Elk. But the majority in Elk v. Wilkins reasoned that, because Indians had "never been considered citizens," they could acquire citizenship only by naturalization. In reasoning thusly, they were forgetting the main purpose of the Fourteenth Amendment. In the Dred Scott case, Taney argued that neither Indians nor Negroes had "ever been considered citizens." The framers of the Fourteenth Amendment intended to reverse the Dred Scott decision and there is evidence in the congressional debates to indicate their intent applied to Indians who severed tribal connections as well as to Americans of African descent.

Harlan made a telling point in his dissent concerning the Civil Rights Act of 1866. Even if the majority of the Court correctly interpreted the status of Indian citizenship (and they did for the period prior to the adoption of the Fourteenth

39. Harlan was also correct in analyzing the intent of the framers of the Fourteenth Amendment when he dissented from the "separate but equal" doctrine case of 1896. See Barton J. Bernstein, "Plessy v. Ferguson: Conservative Sociological Jurisprudence," The Journal of Negro History, 48 (July 1963): 196-205, for a good account of the judicial reasoning in this case.
Amendment), Congress naturalized Elk by using the phraseology employed in the Civil Rights Act. This terminology gave blanket naturalization to all Indians unconnected with a tribe because, constitutionally, the phrase “Indians not taxed” always was used to refer only to tribal Indians.

Soon after the Elk decision, the counsel for defendant Wilkins wrote an article for the American Law Review. He presented a very strong case against granting citizenship to Indians, arguing that they first needed education. He believed, in any case, that they should “be excluded from the ballot as long as possible.” He also noted, correctly, that upon gaining citizenship the Indian would lose his special privileges and protection. This was true for tribal Indians, but not for Elk. Indians who separated from their tribes and were living among whites at this time certainly needed citizenship status for protection even if they were denied such privileges as suffrage.

Two years after the Elk decision, the Supreme Court handed down a very inclusive interpretation of the scope of United States jurisdiction over Indians. Litigants testing the extension of national jurisdiction over the seven major crimes in Indian country quickly brought a case to the Court. In 1886 the Supreme Court sustained the law in a very broad construction of the power of Congress over Indian tribes. Justice Samuel Miller, speaking for a unanimous Court, discussed the difficulty of locating the constitutional source of this power. He admitted that the phrase “excluding Indians not taxed” referred only to representation; certainly making murder in Indian country a crime would not come under the power to regulate commerce “with the Indian tribes,” which was the only other clause in the Constitution that mentions Indians.

But this jurisdiction was constitutional, Miller insisted, because Indian tribes are wards of the nation. He said that “they are communities dependent on the United States.” This dependency on the national government produced the obligation to protect both the Indians and also “those among whom they dwell.” This power, Miller asserted, must be located in the national government “because it has never existed anywhere else, because the theater of its exercise is within the

40. Lambertson, “Indian Citizenship.”
geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes."  

Miller’s decision denied the contentions that Indians were not “completely” under the jurisdiction of the United States. It also sustained the arguments that Senator Doolittle presented in his attempt to qualify the citizenship clause of the Fourteenth Amendment with the phrase “excluding Indians not taxed.”

Most people were as pleased with the Kagama outcome as they were deeply shocked by the Elk opinion. Republican Senator Henry Dawes of Massachusetts called the latter “the strangest, if not the wickedest decision since the fugitive slave cases.” Reformers began working for immediate citizenship for Indians. In fact, in their zeal for this cause, some were willing to deny Indians all special protection and thrust them, ready or not, into complete responsibilities of citizenship. Congress proceeded to grant citizenship to Indians under the power of naturalization on a gradual basis.

The first step in this process came in 1887 with the passage of the Dawes Act. This new policy applied the principle of severalty, tried previously with individuals and certain tribes, to all reservation Indians except the Five Civilized Tribes. Tribal lands were to be broken up and assimilation and assumption of responsibility would be realized gradually. Indians would acquire immediate United States citizenship and, after twenty-five years, would acquire title in fee simple to their allotments of land. Section six of this law made citizens of all Indians who


43. Priest, Uncle Sam’s Stepchildren, p. 207.


had severed tribal connections, like John Elk, and adopted "habits of civilized life."

The Burke Act of 1906 amended the Dawes Act to protect Indians who had not yet received allotted lands by withholding citizenship until the end of the trust period. In addition, the secretary of interior was given greater discretion in determining competency, and thus land ownership, of individual Indians. Previously, in 1888, Congress granted citizenship to Indian women who married white citizens. In 1919 it granted citizenship to all Indian veterans of World War I who had received an honorable discharge. Finally, after developing the new restricted immigration policy in 1924, Congress made all Indians citizens of the United States who had not acquired citizenship previously.

For three centuries after the first voyage of Columbus to the New World, the people he misnamed were considered, legally, aliens in their own land. Nearly another century passed before all of the first Americans acquired citizenship. Even after 1924, Indians were not first-class citizens. They did not win the right to vote in New Mexico and Arizona, for example, until 1948 and the question of the sale of liquor to tribal Indians continues to pose a problem. But, as Felix Cohen pointed out, even though they did not possess all the rights and privileges of citizens in 1924, the principal battle was won—achievement of citizenship status. Like Afro-Americans following ratification of the Fourteenth Amendment, Indian Americans could then fight for complete civil rights through the political and legal processes. From the Wheeler-Howard Act of 1934 onward, Indians have sought to preserve their culture and at the same time achieve first-class status as United States citizens.

46. Ibid., 34: 182.

47. Ibid., 25:392; 41:350. U. S., Congress, House, Committee on Indian Affairs, Certificates of Citizenship to Indians, 68th Cong., 1st sess., 1924, H. Rept. 222, pp. 1-3, contains a brief summary of the ways by which Indians became citizens prior to 1924.

48. U. S., Statutes at Large, 43: 253. This included approximately one-third of the Indians in the United States.

49. Felix Cohen, "Indians are Citizens" and "Indian Wardship: The Twilight of a Myth," The Legal Conscience, pp. 253-63, 328-34.
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