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The Fourteenth Amendment and Native American Citizenship

Earl M. Maltz

THE FOURTEENTH AMENDMENT AND NATIVE AMERICAN CITIZENSHIP

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Studies of the federal government's treatment of racial discrimination during the immediate post-Civil War era have dealt almost exclusively with problems related to the status of free blacks. This focus is in many respects entirely understandable. After all, the debate over black rights was a major factor dividing the Republican and Democratic parties, as well as one of the central themes of the entire Reconstruction process. Further, the adoption of both the Civil Rights Act of 1866 and section one of the Fourteenth Amendment itself was a direct response to the adoption of state laws that sharply curtailed the rights of newly-freed slaves. Thus, it should not be surprising that the subject has attracted the attention of most students of race relations, as well as those interested in the period more generally.

Blacks were not, however, the only racial minority in America during the late nineteenth century. The members of the Congress that drafted the Civil Rights Act of 1866 and the Fourteenth Amendment were also well aware of the presence of another group of nonwhites within the territorial boundaries of the United States—Native Americans.[1] Moreover, issues related to the status of Native Americans had a profound impact on the wording of the citizenship clauses of both enactments.

This essay will examine that impact in some detail. The essay will begin by focusing on the status of Native Americans in the antebellum era. It will then follow the drafting process that culminated in the definitions of citizenship contained in both the

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1. The members of the Reconstruction Congresses were also well aware of the presence of Chinese immigrants, and the special problems attendant to that presence. Concern over the proper treatment of the Chinese had a particularly strong influence on the drafting of the Fifteenth Amendment—a point explored in detail in Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 Harv. J.L. & Pub. Pol. 223 (1994).

Civil Rights Act and the Fourteenth Amendment. Finally, it will briefly discuss subsequent developments that resolved the ambiguities remaining after the adoption of the Fourteenth Amendment.

I. THE CONSTITUTIONAL STATUS OF NATIVE AMERICANS PRIOR TO THE CIVIL WAR[2]

The problem of defining the status of Native Americans created substantial theoretical difficulties for early American legal theorists. The difficulties derived from the fact that Native Americans resided on land over which the government of the United States claimed authority by right of conquest. Under then-accepted principles of international law, inhabitants of conquered nations were generally expected to be integrated into the polity of the conquerors as citizens.[3] Thus, it might seem to follow that the Native Americans who occupied that land should be considered citizens of the United States.

The problem was that neither the government nor the white citizenry of the United States was prepared to accept this conclusion. Native Americans were considered to be members of an alien, uncivilized race, whose values were antithetical to those of the dominant white civilization. Conversely, many Native Americans had no desire to become a part of white society, or to be subject to the rules of that society. In a passage that differed from other contemporary descriptions of "Indians" only in its relatively restrained language, Chief Justice John Marshall aptly described the attitude of white Americans toward this issue:

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[4]

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2. Much of the analysis in this section tracks that of James H. Kettner, *The Development of American Citizenship, 1608-1870* at 291-300 (U. of North Carolina Press, 1978).

3. Emer de Vattel, *The Law of Nations, or the Principles of Natural Law*, Book III, sec. 201 (George D. Gregory, trans., Oceana Publications, 1758, trans. 1902, reprinted 1964).

4. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823). The historical development of the justifications for the treatment of Native Americans in the antebellum era is described in detail in Robert A. Williams, Jr., *The American Indian in Western Legal*

Marshall would later provide a theoretical foundation for denying American citizenship to Native Americans in *Worcester v. Georgia*.[5] In *Worcester*, he suggested that the Cherokee Indians possessed a substantial degree of sovereign authority over their lands, declaring that the agreements between the federal government and the Native Americans "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."[6] In *Worcester* itself, this formulation was protective of Cherokee rights; however, it also implied that Native Americans who remained under the authority of tribal governments were citizens of those tribes, rather than of the United States as a whole, and thus were not even appropriately considered part of the people of the United States, let alone citizens.

While rationalizing the status of Native Americans, Marshall's analysis created other theoretical difficulties. The idea that tribal governments had many aspects of true sovereigns would seem to imply that the authority of the federal governments over recognized tribes of Native Americans might be subject to inconvenient limitations. Thus, Chief Justice Roger Brooke Taney seemed to retreat from Marshall's theory in *United States v. Rogers*.[7] *Rogers* was a challenge to the jurisdiction of the federal courts over a murder of one white man by another on the Cherokee reservation. The relevant statute provided that the federal courts should not have jurisdiction over crimes committed by one Native American against another. The defendant claimed that he could not be prosecuted because both he and the victim had married Cherokee women and been integrated into the Cherokee tribe, and thus should be considered Native Americans for jurisdictional purposes.

Speaking for the Court in rejecting this contention, Taney went well beyond a simple interpretation of the statute. Emphasizing that Congress could, if it had so chosen, have exercised jurisdiction over crimes committed by one Native American against another, Taney seemed to reject the proposition that

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Thought (Oxford U. Press, 1990).

5. 31 U.S. (6 Pet.) 515 (1832).

6. Id. at 557.

7. 45 U.S. (4 How.) 567 (1846).

tribal government possessed any residual characteristics of sovereignty, declaring that

> [t]he native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and occupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[8]

Under this analysis, although Native Americans were not citizens, they were nonetheless to be considered subjects of the government of the United States. On its face, this view was in considerable tension with Marshall's assertion of tribal sovereignty in *Worcester*; remarkably, however, Taney did not even acknowledge this apparent tension, let alone seek to resolve it.

Even the dissonance between *Worcester* and *Rogers* did not fully capture the complexity of the relationship between Native Americans and the government of the United States in the antebellum era. Both cases focus on the relationship between the federal government and tribal governments, and thus implicitly on the status of the Native Americans who were affiliated with those tribes. Some Native Americans lived outside tribal communities, attempting to assimilate into white society. The legal status of this group was governed by different principles.

The Articles of Confederation had clearly recognized this difference; under the Articles, Congress was granted authority to regulate commerce only with those Native Americans who were "not members of any state." The drafters of the Constitution abandoned this limitation on Congressional power as unnecessarily ambiguous; however, the different status of tribal and nontribal Native Americans was reflected clearly in the formulation of the basis of representation for the House of Representatives.

The Constitution provides that representation in the House is to be apportioned among the states by population. Free alien residents were counted fully in the basis of representation; even three-fifths of the number of slaves was counted. By contrast, "Indians not taxed"—that is, Native Americans who remained within the tribal structure—were not to be considered at all in

8. Id. at 572.

determining the number of representatives to which a state was entitled.[9] By contrast, those who joined white society were counted fully in the basis of representation.

In general, however, even these Native Americans were not considered the full political equals of white people. Indeed, Native Americans who left their tribal communities were not even eligible for naturalization under the general naturalization statute, which allowed only white people to become naturalized citizens.[10] Nonetheless, by specific treaty or statute, members of some Native American tribes did become naturalized citizens of the United States.

The practice of naturalizing specific tribes of Native Americans created potential difficulties for Taney in *Dred Scott v. Sandford*.[11] In *Dred Scott*, Taney concluded that Congress lacked authority to naturalize free blacks born in the United States, relying on the view that the naturalization power extended only to those who had not been subject to the jurisdiction of the government of the United States at birth.[12] Although dissenting on the merits, Justice Benjamin Robbins Curtis took the same view of the scope of the naturalization power.[13] If one combined this position with Taney's analysis in *Rogers*, the constitutionality of the practice of tribal naturalization would have been called into serious question.

Taney resolved this difficulty by retreating to Marshall's analysis in *Worcester*. Without even discussing the seemingly contrary language in *Rogers*, he argued that when whites first came to America, "[Native Americans] were yet a free and independent people, associated together in nations or tribes, and governed by their own laws" and that "[t]hese Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day."[14] Thus, for naturalization purposes, Taney was able to distinguish the position of Native Americans from that of native-born free blacks.

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9. U.S. Const., Art. 1, § 2, cl. 3.
10. See, for example, Act of Jan. 29, 1795, 1 Stat. 414, 415 (1795).
11. 60 U.S. (19 How.) 393 (1857).
12. Id. at 417-18.
13. Id. at 578 (Curtis, J., dissenting).
14. Id. at 403-04.

In the aftermath of *Rogers* and *Dred Scott*, the theoretical justification for the status of Native Americans was unclear. Nonetheless, in practical terms, the parameters of that status were widely accepted in the antebellum era. First, Native Americans typically did not acquire American citizenship simply by virtue of being born within the territorial limits of the United States. Moreover, under the terms of the naturalization statutes, they were generally ineligible for naturalization. Nonetheless, some groups of Native Americans and their descendants acquired citizenship by virtue of treaties and specific statutory authorization. It was against this background that the framers of the Fourteenth Amendment considered the issue of Native American citizenship.

II. THE ISSUE OF NATIVE AMERICAN CITIZENSHIP IN THE DRAFTING OF THE FOURTEENTH AMENDMENT

A. THE EVOLUTION OF THE REPUBLICAN POSITION ON CITIZENSHIP

The problem of Native American citizenship arose as a by-product of Republican determination to confer national citizenship on African-Americans born in the United States. The atti tude of the Republican party toward this issue underwent a profound transformation during the Civil War and the early Reconstruction period. During the antebellum era, party members were deeply divided on the issue. By contrast, at the time that the Fourteenth Amendment was drafted, mainstream Republicans almost unanimously embraced the principle that native-born African-Americans should be viewed as citizens of the United States.

One critical turning point was Attorney General Edward Bates' analysis of the status of free blacks in an opinion issued on November 29, 1862.[15] In considering whether African-Americans were citizens within the meaning of a federal statute, Bates rejected the state-centered view of citizenship espoused prior to the Civil War by leading Republicans such as Abraham Lincoln; instead, he declared that national citizenship was solely a matter of federal law, and that all citizens of the nation were also citizens of the respective states in which they were domi-

15. *Citizenship*, 10 Op. Att'y Gen. 382 (1862).

ciled.[16] Further, Bates concluded that all native-born free blacks were citizens of the United States, characterizing the contrary conclusion of the majority in *Dred Scott v. Sandford* as "'*dehors the record* [i.e., dictum],' and of no authority as a judicial decision."[17]

Taken alone, these conclusions might have formed the basis for a claim that states were under an obligation to grant free blacks a variety of basic rights. However, another prominent feature of the opinion was its rejection of the theory that a claim to such rights was the *sine qua non* of citizenship. Bates noted that infants and females were considered citizens despite the fact that they possessed few if any of the rights normally associated with that status;[18] he further observed that even those who were sold into involuntary servitude as a punishment for crime retained their citizenship.[19] Thus he declared, "I can hardly comprehend the thought of the absolute incompatibility of degradation and citizenship."[20] Drawing on authorities such as Kent and Blackstone, Bates espoused a quite different definition of citizenship:

> In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other.[21]

He explicitly concluded that this right to "protection" was not inconsistent with the denial of important rights.[22] Thus, in isolation at least, the practical significance of the Bates opinion was quite limited.

In other respects, however, the opinion was profoundly significant. Although Bates' conclusions were not immediately accepted by all Republicans—as late as 1864, its premises were questioned by Republican Senators such as John Henderson of Missouri and Peter Van Winkle of West Virginia[23]—the Attorney General spoke as the official voice of the Lincoln admini-

16. See id. at 388.
17. Id. at 412.
18. See id. at 408.
19. See id. at 398-99.
20. Id. at 398.
21. Id. at 388.
22. See id. at 398-99, 407-08.
23. Cong. Globe, 38th Cong., 1st Sess. 1459-65 (1864) (Henderson); id. at 1780-81 (Van Winkle).

stration, and thus for the national Republican party itself. Moreover, despite the narrowness of the opinion, in symbolic terms it recognized free blacks as equal members of American society. Thus, in a limited sense at least, it clearly committed the Republican party to the principle of racial equality.

Given racial attitudes in 1862, such a commitment carried with it substantial political risks. Republicans were well aware of these risks;[24] indeed, the issuance of the opinion (three weeks *after* the elections of 1862) was no doubt timed to minimize damage to Republican candidates. Nonetheless, given the political climate, one might well ask what motivated the Lincoln administration to publicly embrace the principle of black citizenship.

The most plausible explanation is that the opinion was simply a part of the ongoing effort to discredit *Dred Scott*. This effort was critical to the theoretical justification for Lincoln's military response to secession. If the majority opinion on the issue of slavery in the territories was in fact an authoritative, binding interpretation of the Constitution, then secession was a response to the refusal by the federal government to recognize the legitimate interests of the slave states—at worst, a rebellion against unjust governmental action. This was hardly the background against which Republicans sought to prosecute the war effort.

Of course, in theory Republicans might have focused their attacks entirely on the territorial question, simply ignoring Taney's treatment of the citizenship issue; indeed, this was the approach taken by many antislavery commentators immediately after *Dred Scott* was decided.[25] In the public mind, however, the two aspects of the decision were linked. Thus, in the words of the *New York Times*, "it was incumbent upon the [Lincoln] Administration to purge the Government of all recognition of [the doctrines of *Dred Scott*], on the first fair opportunity."[26]

Moreover, Lincoln's prewar response, resting on a state-centered view of national citizenship, also created theoretical difficulties for Union theorists. This view of citizenship was not entirely compatible with the position that states had no right to leave the Union, and that support for the Confederate cause was

24. See, for example, *Attorney-General Bates on the Dred Scott Decision*, N.Y. Times 4 (Dec. 17, 1862).

25. Id.

26. See Don E. Fehrenbacher, *The* Dred Scott *Case: Its Significance in American Law and Politics* 417-48 (Oxford U. Press, 1978).

treason. Thus, the most palatable solution to the problem was to adopt Justice McLean's position in *Dred Scott*, and argue that all native-born free blacks were citizens of the Union.

In any event, the Bates opinion marked an important stage in the evolution of the Republican attitude toward citizenship. The next major turning point came in the drafting of the Civil Rights Act of 1866.

B. THE CIVIL RIGHTS ACT OF 1866

As initially proposed by Senator Lyman Trumbull of Illinois on January 5, 1866, section one of the Civil Rights Bill did not deal with citizenship at all. Instead, the Bill provided that

> . . . [t]here shall be no discrimination in civil rights or immunities among the *inhabitants* of any state of Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right to make and enforce contracts, to sue, to be parties and to give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property and shall be subject to like punishment, pains and penalties, and to none other . . . .

Congressional power to pass the proposal in this form could only be found in the enforcement clause of the Thirteenth Amendment. Reliance on this constitutional provision posed substantial problems. First, one had to conclude that the Thirteenth Amendment went beyond mere dissolution of the master/slave relationship and granted Congress the authority to protect a certain class of rights which were essential to the status of freedman. Substantial evidence supports the conclusion that this position was consistent with the understanding of the drafters of the Thirteenth Amendment;[27] nonetheless, from the language of the amendment, the grant of such power is far from clear.

Moreover, even if one conceded that the Thirteenth Amendment vested power in Congress to protect certain rights,

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27. See Earl M. Maltz, *Civil Rights, The Constitution, and Congress, 1863-1869* at 13-28 (U. Press of Kansas, 1990) (discussing the drafting and contemporary understanding of the Thirteenth Amendment). Some aspects of the debate over native American citizenship are discussed in Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale U. Press, 1985).

some of the prohibitions in the Civil Rights Bill might have been considered to be beyond that power. Some Republicans believed that the section two authority extended only to those rights which were essential to the status of a freedman. Put another way, if one could be a freedman without a particular right, then Congress could not rely on Thirteenth Amendment authority to protect that right. Although aliens, for example, were clearly not slaves, they had historically been limited in their right to own real property and to inherit intestate. Thus, one could be deprived of those rights and yet not have the status of a slave.[28] Nonetheless, both rights were protected by Trumbull's proposal.

To address this problem, even before the Bill was debated in the full Senate, Trumbull moved an amendment to provide that "all persons of African descent born in the United States are hereby declared to be citizens of the United States." Soon thereafter, the language was altered to provide that "all persons born in the United States and not subject to any foreign power" were deemed to be citizens. Trumbull argued that the Naturalization Clause as well as the Thirteenth Amendment gave Congress authority to adopt this provision. He further contended that the power to create citizens necessarily implied a power to guarantee that those who were naturalized could exercise the rights generally associated with citizenship. These rights he defined by reference to judicial decisions interpreting the Comity Clause.[29] Other prominent Republicans argued that the Comity Clause itself conferred authority on Congress to protect the "privileges and immunities" of all citizens. Thus the relationship between the citizens of the United States and the federal government became the anchor to which the Civil Rights Bill was attached.

Democrats attacked the citizenship provision, contending that blacks should not be made citizens and that, in any event, *Dred Scott* could only be overruled by a constitutional amendment. Republicans generally rejected these arguments. At the same time, however, they showed considerable concern about the proper limitations on "the inestimable privilege" of American citizenship and the rights appurtenant to that status.[30] In any event, concerns about the impact of the proposed language on the position of Native Americans cut across party lines.

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28. See Cong. Globe, 39th Cong., 1st Sess. App. 158 (1866).
29. Cong. Globe 39th Cong., 1st Sess. 475, 499-500, 600 (1866).
30. Id. at 527 (remarks of Sen. Ramsey).

Both Democratic Senator James Guthrie of Kentucky and radical Republican Senator Jacob Howard of Michigan expressed the fear that Trumbull's proposal would naturalize all Native Americans.[31] Trumbull responded that this was not his intention. Noting that the Indian tribes were viewed as separate nations, Trumbull argued that his proposal would only grant citizenship to those Indians "who are domesticated and pay taxes and live in civilized society," and thus had become "incorporated into the United States." Nonetheless, he indicated a willingness to include a provision dealing specifically with Native American citizenship.[32]

At this point, Republican Senator Henry Lane of Kansas raised the issue of the status of Native Americans who had taken individual allotments of land as provided by treaty. While Trumbull insisted that these Native Americans were already citizens, Lane disagreed.[33] To resolve any ambiguities, Lane proposed an amendment that would have specifically conferred citizenship on "Indians holding lands in severalty by allotment."[34] Trumbull objected to this proposal on the ground that some of these allotments remained wholly within the jurisdiction of the tribal government,[35] and the amendment was rejected.[36]

Seeking to deal with the same problem, Republican Senator Samuel C. Pomeroy of Kansas then proposed to amend the bill to exclude "persons . . . subject to . . . tribal authority" from its declaration of citizenship. This language was ambiguous; it was unclear whether a person who was born subject to tribal authority and later left his tribe to assimilate into white society would become citizen. Taking the view that such a person would not become a citizen because he was born subject to tribal authority, Democratic Senator Reverdy Johnson of Maryland argued that the Pomeroy language would not solve the problem of Native Americans who took allotments.[37]

Taking the opposing view on the import of the language, Guthrie raised a different objection. Focusing on the potential burdens associated with citizenship, he observed that, while immigrants seeking naturalization were required to affirmatively

31. See id. at 498.
32. Id.
33. Id. at 498-99.
34. Id. at 522.
35. Id. at 525.
36. Id. at 526.
37. Id.

evince a desire to become American citizens, as written the Civil Rights Act conferred citizenship *by operation of law* on some classes of Native Americans who had not been born citizens. Guthrie declared that "I cannot consent to impose citizenship and its liabilities and responsibilities upon a people without their assent [or the assent of their government]."[38]

Republican Senators John Conness of California and Alexander Ramsey of Minnesota then raised a different objection to Pomeroy's formulation. They noted that not all Native Americans were associated with a recognizable tribe; some lived on so-called "public" reservations, while others traveled in small nomadic groups. Conness and Ramsey pointed out that these non-aligned Native Americans owed no allegiance to any other government, and would thus become citizens under the Pomeroy language.[39]

The existence of this class of Native Americans presented Republicans with a conceptual dilemma. As persons who were born within the territorial limits of the United States owing no allegiance to any other government, they were theoretically entitled to citizenship under the dominant Republican ideology of the early Reconstruction era. As Republican Senator John B. Henderson observed, to decide otherwise would be to conclude that "[the government is] made for the white man and the black man, but that the red man shall have no interest in it."[40] Nonetheless, most Republicans balked at conferring citizenship on a group that they viewed as "perhaps the lowest class known [as] Indians."[41] Republican Senator George H. Williams of Oregon expressed concern over the extent of the rights that might be granted to these Native Americans if they were made citizens by the proposed Act. He noted that states typically banned sales of firearms and alcoholic beverages to Indians, and observed that, under the terms of the Bill, states would apparently be powerless to enforce such bans against Indians who were granted citizenship.[42]

This argument bears an almost eerie similarity to Taney's warnings against the dangers of black citizenship in *Dred Scott*.[43] Williams's emphasis on the sale of firearms is particularly strik-

38. Id.
39. Id. at 526-27.
40. Id. at 574.
41. Id. at 526 (remarks of Sen. Conness); see also id. at 574 (remarks of Sen. Lane).
42. Id. at 573.
43. See *Dred Scott*, 60 U.S. at 416-17.

ing. One of the common Republican complaints against the Black Codes, whose passage had precipitated the Civil Rights Bill, was that they often prevented free blacks from obtaining firearms.[44] Nonetheless, Williams was apparently in favor of denying to Native Americans what was then viewed as an essential tool of self-protection.

In the face of the Republican objections to the Pomeroy language, Trumbull finally retreated to the phraseology used in the original Constitution, excluding "Indians not taxed" from the definition of citizenship in the Civil Rights Bill.[45] Democratic Senator Thomas A. Hendricks of Indiana complained that the right to citizenship should not depend on whether a person pays taxes;[46] Trumbull responded that he was in essence using the phrase as a term of art, connoting "a class of persons who [are] not counted as a part of our people."[47] Whatever their reservations, mainstream Republicans were willing to acquiesce in this formulation, and it became law when the Civil Rights Act as a whole eventually was passed over the veto of President Andrew Johnson.

C. THE FOURTEENTH AMENDMENT

The passage of the Civil Rights Act did not end the controversy over Native American citizenship. Seeking to definitively overrule *Dred Scott*, Republicans proposed to include language in the Fourteenth Amendment which declared that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." Senator James R. Doolittle of Wisconsin—a nominal Republican who was by this point firmly allied with the Democrats—proposed to add language which, like the Civil Rights Act, excluded "Indians not taxed" from the definition of citizenship.[48] This language had been adopted by Republicans in section two of the proposed amendment, which redefined the basis of representation in the House of Representatives. Nonetheless, clearly having rethought the issue carefully, mainstream Republicans unanimously rejected the

44. See, for example, Cong. Globe, 39th Cong., 1st Sess. at 651 (remarks of Rep. Grinnell); see also id. at 474 (remarks of Sen. Trumbull).
45. See id. at 527.
46. See id.
47. Id. at 572.
48. Id. at 2892-93.

idea of incorporating a specific exclusion for Native Americans in the section one definition of citizenship.

Both Lyman Trumbull and Jacob Howard—the floor manager of the Fourteenth Amendment in the Senate—argued that the clause as written required Indians to be subject to the "complete" jurisdiction of the United States in order to claim citizenship, and thus excluded Indians who retained allegiance to their tribal governments.[49] In addition, Trumbull noted that Hendricks's argument on the Civil Rights Act language had convinced him that judges might interpret the "Indians not taxed" language literally, thus discriminating between poor Indians and rich Indians in determining citizenship status.[50] Finally, Howard and Republican Senator Daniel Clark noted that the "Indians not taxed" language in essence gave states the authority to decide whether to naturalize or not naturalize Indians through their taxing policy—an idea that was fundamentally inconsistent with the Republican view that national citizenship should be paramount.[51] Thus, the Doolittle amendment was rejected on a party line vote,[52] and the definition of citizenship was ultimately adopted without change.

Four years later, the Senate Judiciary Committee produced a detailed report that specifically addressed the issue of the relationship of the Fourteenth Amendment to Native American citizenship.[53] The report ignored *Rogers* in its review of the legal background of the issue; instead, noting the uniform practice of dealing with Native American tribes as separate nations and characterizing Chief Justice Marshall's analysis in *Worcester* as "the unquestioned law of the court today,"[54] the report asserted that members of Native American tribes were not subject to the jurisdiction of the United States within the meaning of section one:[55]

> [I]t is manifest that Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States. On the contrary, they have uniformly been treated as nations .... And inasmuch as the Constitution treats Indian tribes as belonging to the rank of nations capable of making

49. Id. at 2893 (remarks of Sen. Trumbull); id. at 2895 (remarks of Sen. Howard).
50. Id. at 2894.
51. Id. at 2895.
52. Id. at 2897.
53. S. Rep. No. 268, 41st Cong., 3d Sess. (1870).
54. Id. at 7.
55. Id. at 11.

> treaties, it is evident that an act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional and void.[56]

Thus, the report concluded that "the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States," [57] and that members of these tribes were not made citizens by section one.

The premise on which the Judiciary Committee report was based would not long survive. In 1886, the Supreme Court would hold in *United States v. Kagama* that Congress had plenary authority to regulate the internal affairs of Native American tribes.[58] Nonetheless, the report undoubtedly reflected the understanding of those who drafted the Fourteenth Amendment regarding its impact on tribal Native Americans.

However, the drafters might have been more troubled by the implications of the report for the status of Native Americans who were not affiliated with an organized tribe. As noted above, many of the drafters were adamantly opposed to conferring citizenship on this class. By contrast, the report strongly suggested that "Indians straggling from their tribes" were under the complete jurisdiction of the United States.[59] Given the wording of the amendment itself, it would thus be difficult to deny that these stragglers had become citizens of the United States.

In any event, this issue was never litigated. The Supreme Court was, however, called upon to resolve other ambiguities that had been created by the definition of citizenship.

III. EPILOGUE: FROM *ELK V. WILKINS* TO THE INDIAN NATURALIZATION ACT

Despite the careful drafting effort of Trumbull and his colleagues, some important ambiguities remained in the section one definition of citizenship. One such ambiguity involved the status of Native Americans who chose not to live on reservations. Clearly, a Native American who was born on the reservation and remained there was not made a citizen of the United States by the Fourteenth Amendment. However, the language did not

56. Id. at 9.
57. Id. at 1.
58. 118 U.S. 375, 383-385 (1886)
59. S. Rep. No. 268 at 10 (cited in note 53).

clearly establish the status of a Native American who was born on a reservation, and then voluntarily severed his ties with his tribe and sought to live in white society.

Elk v. Wilkins[60] provided a definitive resolution of this issue. *Elk* arose from the situation of a Native American who had voluntarily separated himself from his tribe and then attempted to vote in the state of Nebraska. If Elk had become a citizen of the United States, the Fifteenth Amendment would have prohibited the state from denying him the right to vote on the basis of his race; by contrast, if he was not a citizen, the Fifteenth Amendment provided him with no resolution. Thus, the key question in the case was whether section one of the Fourteenth Amendment automatically made Elk a citizen when he moved off of the reservation and severed his tribal connection.

Speaking for the majority, Justice Horace Gray concluded that Elk was not a citizen, and could therefore constitutionally be denied the right to vote in state elections. Gray began with the premise that one could only become a citizen by virtue of either birth or naturalization.[61] At the time of his birth, Elk was subject to the jurisdiction of an Indian tribe, which Gray described as "an alien, though dependent, power"[62] and could therefore not claim birthright citizenship in the United States. Since Elk had never been naturalized, in Gray's view he failed both tests for citizenship—a conclusion Gray supported by reference to a variety of historical evidence which suggested that Indians born subject to tribal jurisdiction could only obtain citizenship through naturalization.[63]

In his dissent,[64] Justice John Marshall Harlan argued that the legislative history of both the Civil Rights Act of 1866 and the Fourteenth Amendment itself suggested that Elk should be considered a citizen of the United States.[65] He also made a textual argument, noting that section one by its terms did not require that persons be "born subject" to the jurisdiction of the United States, and that by leaving his tribe, Elk had become subject to the "complete jurisdiction" of the United States.[66] Moreover, Harlan asserted that, because Indian land should be

60. 112 U.S. 94 (1884).
61. See id. at 101.
62. Id. at 102.
63. See id. at 103-09.
64. Id. at 110-23 (Harlan, J., dissenting).
65. See id. at 112-19.
66. See id. at 121.

deemed part of the United States, Elk had been born within the country.[67] These two factors led Harlan to the conclusion that Elk had satisfied the requirements of the Fourteenth Amendment, and should therefore be considered an American citizen.

The decision in *Elk* clearly limited the significance of the Fourteenth Amendment to Native Americans seeking to become citizens of the United States. By contrast, *United States v. Wong Kim Ark*[68] pointed in the opposite direction. Wong Kim Ark was a man who had been born in the United States to Chinese parents. After visiting China, he was denied the right to reenter the United States under the terms of the Chinese Exclusion Act. He argued that the terms of the Act did not apply to him because, having been born in the United States, he was a citizen of this country.[69]

A majority of the Supreme Court agreed, holding that the relevant provisions of the Exclusion Act were inapplicable to Wong Kim Ark. Speaking for the majority, Justice Horace Gray concluded that the language of the Fourteenth Amendment embodied the common law principle that birth within the territorial boundaries of a nation conferred citizenship in that nation.[70] Dissenting, Chief Justice Melville Fuller took a different view, focusing on the requirement that the person born in the United States must also be "subject to the jurisdiction thereof."[71] Relying on the Roman principle that a child's citizenship followed that of its parents, this argument rested on the contention that a child of Chinese parents born in the United States should be viewed as subject to the jurisdiction of the Chinese government, rather than that of the United States.[72] Language in the *Slaughter-House Cases*—dismissed by Gray as *dictum*—also seemed to support this view.[73]

Although formally dealing only with the right of Chinese-Americans to citizenship, *Wong Kim Ark* also had important implications for the status of Native Americans. Under *Elk*, a Native American could not claim citizenship for himself merely by separating from his tribe and assimilating into white society. However, *Wong Kim Ark* gave the children of the Native

67. See id. at 122.
68. 169 U.S. 649 (1898).
69. See id. at 652-53.
70. See id. at 674-94.
71. See id. at 718-30.
72. See id. at 708-09.
73. 83 U.S. (16 Wall.) 36, 73 (1872).

American a constitutional right to citizenship, so long as they were born outside the reservation.

In any event, even before the decision in *Wong Kim Ark*, statutory developments were beginning to reduce the practical importance of the Fourteenth Amendment for Native Americans seeking citizenship. In 1887, the General Allotments Act conferred American citizenship on all Native Americans who accepted individual allotments of land under the provisions of statutes and treaties. Finally, in 1924, Congress eliminated any remaining complexities by naturalizing all Native Americans born within the territorial limits of the United States. Thus, the issue of Native American citizenship was laid to rest once and for all.

CONCLUSION

One can draw any number of lessons from the Congressional discussions of Native American citizenship in 1866. One of the most important, however, is its implications for our understanding of the framers' attitude toward citizenship generally. In recent years, the idea that citizenship was important to the framers has been challenged from a number of different quarters. Elizabeth Hull, for example, contends that the concept of citizenship "was [not] granted more than a minimal and vague role in [the fourteenth] amendment[]."[74] Thus, she concludes, even a requirement that policymaking state officials be citizens "vests citizenship with a significance that is at variance with the language and history of the Constitution."[75] While perhaps less vehement than Hull, other commentators have also suggested that the distinction between citizens and noncitizens was of little importance in the framers' worldview.[76]

Even a passing review of the discussions of the status of Native Americans belies any such assertion. The intense struggle to draft appropriate language reflects far more than a simple, lawyerlike impulse to be precise; it also reveals an acute sense of the importance of citizenship, both for symbolic reasons and in terms of the rights and obligations appurtenant to that status. Admittedly, the discussions cast little additional light on the precise nature of those rights and obligations; however, they

74. Elizabeth Hull, *Without Justice For All: The Constitutional Rights of Aliens* 45 (Greenwood Press, 1985).

75. Id. at 46.

76. See Alexander M. Bickel, *The Morality of Consent* 36 (Yale U. Press, 1975).

strongly suggest that any effort to reconstruct the worldview of the drafters of the Fourteenth Amendment must take significant account of the distinction between citizens and persons generally.