

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 5: The Jacksonian Era – Equality/Native Americans

Caleb Cushing, **Opinion on the Relation of Indians to Citizenship** (1856)¹

A federal statute passed in 1841 authorized American citizens or persons who had declared their intention to become an American citizen to claim federal lands. In 1854, a member of the Chippewa tribe of Wisconsin made a land claim. The claimant insisted that he was a citizen in part because one of his parents was a citizen and in part because he had voting rights in Wisconsin. Such claims become common by the middle nineteenth century as many Native Americans married American citizens and participated in the lives of American communities.

Attorney General Caleb Cushing rejected the claim that Native Americans could become American citizens, except under very restrictive conditions. He insisted that “Indians are the subjects of the United States,” not citizens. Unlike former slaves, however, Native Americans had paths to citizenship. Tribes could be naturalized by treaty. Persons who had both white and Native American ancestors, Cushing declared, might become citizens. Nevertheless, Cushing insisted that tribal members could not normally exercise the rights of an American citizen. On what basis did Cushing determine when a Native American may become a citizen? Compare Native American citizenship to the citizenship status of free blacks in Jacksonian America. What are the major similarities and differences? What explains those similarities and differences?

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In its highest political sense, [“citizens”] signifies in our public law, the persons who constitute the political society. . . .

But the appellation is not confined to persons enjoying the right of suffrage. A woman, a minor, a person temporarily incapacitated by pauperism or crime, is a *citizen* in the sense of the present inquiry, that is to say, as distinguished from an alien or other person not constituting an elemental part of the *sovereign* people, the body politic, of the United States. . . .

On the other hand, a person may be an elector without being a citizen. We shall have occasion to speak particularly hereafter of great classes of persons, who enjoy, by statute or constitution, the right of suffrage in a given State, without being declared citizens of the State, by such statute or constitution, and certainly without being citizens of the United States.

Considering the term ‘citizen’ in whatever sense, the first sub-question is, whether the mere fact of a person being born in the United States, constitutes a citizen thereof.

Clearly not: persons may be born abroad, (of citizens in the public service, for instance,) and be natural born citizens of the United States; they may be born here, (of aliens in the service of their government, for instance,) and not be natural born citizens of the United States.

...

The fact, therefore, that Indians are born in the country does not make them citizens of the United States.

The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.

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¹ 7 U.S. Op. Atty. Gen. 746 (1856).

Not being citizens of the United States by mere birth, can they become so by naturalization? Undoubtedly.

But they cannot become citizens by naturalization under existing general acts of Congress. . . .

Those acts apply only to *foreigners*, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance, without being *citizens* of the United States. Moreover, those acts only apply to 'white' men.

. . .

Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress.

Of this we have examples. Thus the act of March 3d, 1843, provides that, upon certain things happening or being performed, the 'Stockbridge tribe of Indians, and each and every of them, shall then be deemed to be, and from that time declared to be, citizens of the United States.' . . . By this act the Stockbridge Indians were naturalized *en masse*, and thus became *naturalized* citizens of the United States.

In fine, no person of the *race* of Indians is a citizen of the United States by right of local birth. It is an incapacity of his race.

But may not that natural incapacity cease? May not the members of a family of Indians, by continual crossing of blood, cease to be Indians? Undoubtedly.

. . .

But, when questions of *mixed blood* arise, it appears at once that there is no intrinsic precision in the expression 'white man.' There exist, in various parts of the United States, men of indubitable citizenship, nay, of the highest mental, political, and social eminence, who have aboriginal blood in their veins.

. . .

Instead, therefore, of attempting, by reference to the legislation of some of the States, or by consideration of the analogies of foreign law and the reason of the thing, to lay down a general rule, or to say what the general rule ought to be, as to the stage at which, by admixture of blood, the political incapacity of Indians will cease; it seems to me to be more desirable to confine my conclusion to the very case presented, without going a step beyond it, — that is, to express the opinion that a person of mixed blood, retaining tribal relations, cannot also enjoy at the same time the rights of a citizen of the United States.

Many persons of this class, it is not to be doubted, are of most respectable character, and mentally and morally capable to be citizens of the United States. But citizenship does not depend on that alone. Such persons are capable to become citizens: the question will remain in each case, whether they have become so in fact. . . . If, by some act of recognised legality, he has manifested his desire to be considered a citizen, then it will have to be considered whether such act is effective: whether, for instance, it was performed in good faith, as in the case of alleged change of domicile; whether it is not contradicted by the party's having in the mean time retained his tribal relations; whether, in a word, if of admitted capacity to become a citizen of the United States, he has in fact become such, by throwing off the *status* of Indian.