Supplementary Material

Chapter 7: The Republican Era—Equality/Native Americans

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

On April 6, 1880, John Elk attempted to vote in a local election held in Omaha, Nebraska. Nebraska law entitled "every male person of the age of twenty-one years or upwards . . . who shall have resided in the state six months" and was a "citizen[] of the United States" to vote. Charles Wilkins, the registrar of voters, insisted Elk did not meet these conditions. In particular, Wilkins declared that, as a Native American, Elk was not a citizen of the United States. Elk sued Wilkins for damages. He claimed that he was a citizen of the United States under the Fourteenth Amendment. The local federal circuit court ruled that Elk did not have a cause of action. Elk appealed to the Supreme Court of the United States.

The Supreme Court by a 7–2 vote ruled that Elk was not a citizen of the United States. Justice Horace Gray's majority opinion asserted that Elk was not subject to the jurisdiction of the United States when born and had never been naturalized. Justice Harlan's dissent agreed that Elk was not subject to the jurisdiction of the United States when born, but insisted that Elk was naturalized by the Civil Rights Act of 1866. Why did all the justices agree that Elk, who was born in the United States, was not subject to the jurisdiction of the United States when born? Under what conditions did Justice Gray believe Native Americans could become American citizens? Under what conditions did Justice Harlan believe Native Americans could become American citizens? Whose interpretation of the Fourteenth Amendment is correct?

JUSTICE GRAY

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The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which "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"; and on the fifteenth article of amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." . . .

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and

their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. . . .

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 were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life. . . .

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The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the constitution, by which "no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president"; and "the congress shall have power to establish an uniform rule of naturalization." By the thirteenth amendment of the constitution slavery was prohibited. The main object of the opening sentence of the fourteenth amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which foreign territory is acquired. Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that "representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. . . .

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Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States. . . .

. . . [T]he question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself. There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the fourteenth amendment, and of the condition of the Indians at the time of its proposal and ratification.

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JUSTICE HARLAN, dissenting,

JUSTICE WOODS and myself feel constrained to express our dissent from the interpretation which our brethren give to that clause of the fourteenth amendment which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." . . .

. . . The plaintiff has 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 a part of her militia. He may, being no longer a member of an Indian tribe, sue and be sued in her courts. And he is counted in every apportionment of representation in the legislature; for the requirement of her constitution is that "the legislature shall apportion the senators and representatives according to the number of inhabitants, excluding Indians not taxed, and soldiers and officers of the United States army."

At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, §3, which requires, in the apportionment of representatives and direct taxes among the several states "according to their respective numbers," the exclusion of "Indians not taxed." This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country. The same provision is retained in the fourteenth amendment; for, now, as at the adoption of the constitution, Indians in the several states, who are taxed by their laws, are counted in establishing the basis of representation in congress. By the act of April 9, 1866, entitled "An act to protect all persons in the United States in their civil rights, and furnish means for their vindication," it is provided that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." This, so far as we are aware, is the first general enactment making persons of the Indian race citizens of the United States. . . . Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race, (excluding only "Indians not taxed,") who were born within the territorial limits of the United States, and were not subject to any foreign power. Surely every one must admit that an Indian residing in one of the states, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, although he may have been, when born, a member of a tribe. . . .

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The entire debate [over the Civil Rights Act of 1866] shows, with singular clearness, indeed, with absolute certainty, that no senator who participated in it, whether in favor of or in opposition to the measure, doubted that the bill as passed admitted, and was intended to admit, to national citizenship Indians who abandoned their tribal relations and became residents of one of the states or territories, within the full jurisdiction of the United States. It was so interpreted by President Johnson, who, in his veto message, said: "By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific states, *Indians subject to taxation*, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States."

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If it be also said that, since the adoption of the fourteenth amendment, congress has enacted statutes providing for the citizenship of Indians, our answer is that those statutes had reference to tribes, the members of which could not, while they continued in tribal relations, acquire the citizenship granted by the fourteenth amendment. Those statutes did not deal with individual Indians who had severed their tribal connections and were residents within the states of the Union, under the complete jurisdiction of

the United States. There is nothing in the history of the adoption of the fourteenth amendment which, in our opinion, justifies the conclusion that only those Indians are included in its grant of citizenship who were, at the time of their birth, subject to the complete jurisdiction of the United States. . . .

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A careful examination of all that was said by senators and representatives, pending the consideration by congress of the fourteenth amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that, in the form in which it was approved by congress, it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the states or territories of the Union. . . .

It seems to us that the fourteenth amendment, in so far as it was intended to confer national citizenship upon persons of the Indian race, is robbed of its vital force by a construction which excludes from such citizenship those who, although born in tribal relations, are within the complete jurisdiction of the United States. There were, in some of our states and territories at the time the amendment was submitted by congress, many Indians who had finally left their tribes and come within the complete jurisdiction of the United States. They were as fully prepared for citizenship as were or are vast numbers of the white and colored races in the same localities. Is it conceivable that the statesmen who framed, the congress which submitted, and the people who adopted that amendment intended to confer citizenship, national and state, upon the entire population in this country of African descent, (the larger part of which was shortly before held in slavery,) and, by the same constitutional provision, to exclude from such citizenship Indians who had never been in slavery, and who, by becoming *bona fide* residents of states and territories within the complete jurisdiction of the United States, had evinced a purpose to abandon their former mode of life, and become a part of the people of the United States? If this question be answered in the negative, as we think it must be, then we are justified in withholding our assent to the doctrine which excludes the plaintiff from the body of citizens of the United States upon the ground that his parents were, when he was born, members of an Indian tribe; for, if he can be excluded upon any such ground, it must necessarily follow that the fourteenth amendment did not grant citizenship even to Indians who, although born in tribal relations, were, at its adoption, severed from their tribes, subject to the complete jurisdiction as well of the United States as of the state or territory in which they resided.