"EXCLUDING INDIANS NOT TAXED": *DRED SCOTT, STANDING BEAR, ELK* AND THE LEGAL STATUS OF NATIVE AMERICANS IN THE LATTER HALF OF THE NINETEENTH CENTURY

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Introduction

Throughout American history, the federal government has failed to follow a consistent approach in determining the legal and political status of individual Native Americans and Indian tribes. Such policies (i.e., treaty-making and reservations, allotment, reorganization, termination, and, currently, self-determination) range from the treatment of Indian tribes as sovereign nations to the assimilation of individual Native Americans as U.S. citizens in the dominant white society.[1] Assimilation generally meant that Native Americans should adopt Euro-American clothing, language, religion, and an agricultural lifestyle before qualifying for citizenship. Even at that, most Native Americans could only expect second-class citizenship status when it came to exercising their constitutional rights and protections. Simply put, the legal status of individual Native Americans has often been unclear.

During the latter part of the nineteenth century, social reformers, the courts, and politicians at the local, state, and federal level attempted to clarify this issue. To understand the difficulty in determining the legal standing of Native Americans, one must first examine the historical meaning and significance of the phrase "excluding Indians not taxed" as it appears in the U.S. Constitution. Attention should then be directed toward *Dred Scott v. Sandford* (1857), *Standing Bear v. Crook* (1879), and *Elk v. Wilkins* (1884), arguably the three most significant cases involving the legal status of Native Americans during the latter half of the nineteenth century.[2] Collectively, they tried to determine: (1) how Native Americans could obtain citizenship; (2) the legal rights of individual Native Americans notwithstanding their tribal affiliation; and, (3) the legal status of individual Native Americans who had paid taxes or had separated themselves from their tribes.[3] Despite having the means to readily grant citizenship to Native Americans, the U.S. government largely ignored the wishes of individual Native Americans and often used citizenship as a means of assimilating tribal Indians into the dominant white society.

After more than a century of treaties and legislative acts affecting the legal status of Native Americans, Congress adopted H.R. 6355, the Indian Citizenship Act of 1924, which granted citizenship to all "noncitizen Indians born within the territorial limits of the United States."[4] By then, almost two-thirds of the Native American population had gained citizenship through treaties or congressional legislation.[5] For example, the 1830 treaty with the Choctaws, which is noteworthy within the context of Indian removal, contained

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a provision which stated that "each Choctaw head of family being desirous to remain and become a citizen of the States, shall be permitted to do so."[6] Likewise, the 1887 General Allotment Act declared:

> every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, . . . who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and has adopted the habit of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.[7]

The prospect of citizenship, however, did not necessarily guarantee that Native Americans actually gained it or, if they did, that they enjoyed the same rights and privileges as other U.S. citizens.[8] Consequently, whether a citizen or not, the actual legal status of Native Americans remained controversial well into the twentieth century, long after passage of the Indian Citizenship Act of 1924.[9]

"EXCLUDING INDIANS NOT TAXED"

The phrase "excluding Indians not taxed" appears in the Constitution in regard to determining the apportionment of taxes and representation among the states, but little is known about the intent of inserting this clause into that governing document. Even James Madison's *Notes of Debates in the Federal Convention of 1787* makes only casual references to it.[10] Although little is known today about the debates surrounding the wording of the phrase -- assuming that there may have been at least some discussion on the topic -- the meaning of those four words became the focal point in trying to determine the legal status of Native Americans. At best, historians and legal experts today can offer only educated guesses to explain the rationale behind the origins of the phrase.

The phrase first appeared in the Articles of Confederation. Article VIII addressed the issue of how to provide for the defense of the United States and the citizenry's general welfare.[11] On April 18, 1783, the Confederation Congress sought to amend the original wording of Article VIII in order to specify what groups would contribute to a treasury to cover these expenses. According to the new wording, such expenses would be paid from a common treasury:

> which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State.[12]

This clause established the principle later included in the Constitution that slaves were only counted as three-fifths of a person for purposes of apportionment of taxes and representation in the federal government. By contrast, Native Americans who paid taxes counted as a whole person for apportionment purposes, but they were not necessarily U.S. citizens.[13]

Because Article VIII of the Articles of Confederation was amended in 1783, the first reference to the status of "Indians not taxed" appeared in Article IX of that same governing

document adopted two years earlier. Soon after achieving its independence from Great Britain, it became evident that the newly created U.S. government had to deal with a number of Native American nations within its boundaries as well as neighboring tribes in both the immediate west and Canada. The fact that many of these tribes lived in the Great Lakes region (i.e., the Northwest Territory) created an urgent need for the federal government to develop a Native American policy. The tribes that resided in the region, together with competing land claims among several states, influenced the enactment of legislation to organize future white settlement there. At Maryland's insistence, the states agreed to relinquish control of all western land claims to the Confederation Congress. Many states which held such claims originally opposed Maryland's proposal, but Virginia's Thomas Jefferson argued that any territory west of the original states should eventually be divided into new states. After Virginia and New York yielded their western land claims, other states followed suit.[14]

In its effort to establish a Native American policy, the Confederation Congress, according to Article IX of the Articles of Confederation, assumed responsibility for "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not interfered or violated."[15] On September 22, 1783, the Confederation Congress increased its authority over Indian affairs by adopting a proclamation which prohibited the purchase and settlement of any lands inhabited or claimed by Native Americans without congressional approval. By doing so, it sought to maintain "harmony and friendship with the Indians, not members of any of the states."[16] In other words, members of Congress feared that any uncontrolled settlement of lands already occupied by Indian tribes would result in open hostilities to the detriment of all parties involved.

Both Article VIII and Article IX of the Articles of Confederation made general references to Native Americans who either did not pay taxes or were not counted as members of any state. An attempt to clarify the meaning of "not members of any state" was made by inserting the phrase "excluding Indians not taxed" into the Constitution. Native Americans who did not pay taxes were specifically excluded as part of a state's population. Such wording differentiated between the status of Native Americans who were not legally or politically responsible to a specific state government and those who were apparently considered U.S. citizens, with the latter subject to taxation by a state.[17]

Despite the ambiguity of these phrases, they demonstrate that, at a very early stage in America's history, a distinction was made between Native Americans who were members of a state and those who were not. One must remember that, at the time, one's citizenship applied only to their legal status in connection to a state since there was no national citizenship. That distinction would remain unclear throughout much of American history. Indeed, Madison took note of this in *Federalist No. 42* when he addressed the issue of regulating commerce with Indian tribes. While the Articles of Confederation referred to individual Native Americans who were not members of a state, Madison confessed that he could not identify those who were. He wrote:

> What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils.[18]

That "perplexity" was not easily resolved.

Despite these limited references to Native Americans in the Articles of Confederation, it

appears that a basis existed for the Founding Fathers to use the phrase "excluding Indians not taxed" in Article I, Section Two of the Constitution. It is important to realize that Native Americans, at the time of the 1787 Constitutional Convention, generally were not considered citizens of the United States. Rather, they were viewed as members of distinct political communities (i.e., tribes) that existed within the boundaries of the United States.[19] Consequently, as long as a Native American belonged to a tribe, he could not be considered a U.S. citizen.[20]

While the debates during the Constitutional Convention of 1787 contain scant references to the phrase itself, convention delegates focused much of their attention on the issues of taxation and representation. While debating representation in the legislative branch of the proposed new government, John Rutledge of South Carolina moved that the states have an "equitable ratio of representatives." Pennsylvania's James Wilson believed that representation should be determined:

> in proportion to the whole number of white & other free Citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each State.

Such wording had already been approved by eleven states for the purpose of apportioning the amount of tax revenue each state would contribute to the federal treasury. Eventually, the delegates combined the issues of taxation and representation in the final wording of Article I, Section Two of the Constitution.[21]

Wilson's exemption of "...Indians not taxed" was more important than the recorded debate indicates. Since there were presumably a number of Native Americans who paid taxes and possessed no tribal affiliation, they were counted as part of a state's population, but, as noted earlier, they were not necessarily U.S. citizens. Subsequently, the phrase "excluding Indians not taxed" specified which Native Americans would to be included in determining a state's population for purposes of representation and taxation.[22] This exemption was likely connected to the issue of fairness among the individual states in deciding a state's apportionment of representatives in the proposed federal government. Since some states possessed large Native American populations while others did not, it was considered only fair that those states not include untaxed Native Americans as part of their population for the purpose of determining representation in the new government.[23]

The issue of not counting all Native Americans as part of a state's population, despite the fact that tribal members might reside within the boundaries of that state, was addressed in *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832), three U.S. Supreme Court cases concerning the legal and political status of Indian tribes. In *Cherokee Nation v. Georgia,* the Court held that tribal governments were not the same as state governments nor did they constitute completely separate nations. They were, Chief Justice John Marshall ruled, "domestic dependent nation[s]."[24] According to Marshall, Indian tribes were separate political entities only to a certain degree. The fact that these tribes existed within the geographic boundaries of the United States complicated efforts to determine their legal status. As white settlers advanced westward, the federal government generally relocated Indian tribes to specific lands in an effort to keep them separate from those settlers. Under such circumstances, these tribes maintained a great deal of sovereignty over their own government and culture. Nevertheless, the U.S. government continued to dictate to many of these tribes -- peacefully when pos-

sible, forcefully when necessary. Those tribes certainly were not as independent as another country. Rather, they were dependent on the temperament and needs of the federal government while retaining a limited degree of sovereignty. Consequently, Indian tribes were commonly referred to as nations whose authority rested under the guidance of the federal government. In other words, they maintained a peculiar relationship with the United States as domestic dependent nations.

Although *Cherokee Nation v. Georgia* was historically significant in defining the political status of Indian tribes, it did not address the legal status of non-tribal Native Americans. This meant that the legal status of many Native Americans, notably those no longer associated with a tribe, remained undefined until the Supreme Court addressed the issue in its *Dred Scott* decision.

Dred Scott v. Sandford (1857)[25]

In many respects, the *Dred Scott* case produced one of the most important legal decisions pertaining to non-tribal Native Americans. While the case is best remembered for its impact on the course of events leading to the American Civil War, few people are aware of its significance in addressing the legal status of Native Americans based on the phrase "excluding Indians not taxed."

As noted in the *Cherokee Nation* decision, the relationship between Indian tribes and the federal government resembled "that of a ward to his guardian." Since tribes were considered domestic dependent nations, individual Native Americans who maintained their tribal ties and resided on tribal land would technically be considered foreigners. Even if an individual Native American removed himself from his tribe's legal jurisdiction and paid taxes, he was treated no differently than any other non-citizen resident or visiting alien.[26] To be sure, some non-tribal Native Americans gained citizenship through treaties or legislative acts, but they could not become U.S. citizens through their own initiative.

The *Dred Scott* decision, in part, tried to clarify the legal status of individual Native Americans. In 1856, one year before that ruling, United States Attorney General Caleb Cushing, at the request of Secretary of the Interior Robert McClelland, offered his legal opinion on Native Americans and U.S. citizenship. McClelland's attention to the matter stemmed from a situation in Wisconsin where a man of mixed Chippewa descent claimed U.S. citizenship. If able to do so, he would then qualify for presumptive rights in acquiring land. In response to the question of this individual's legal status, Cushing acknowledged the fact that issues such as how Native Americans could voluntarily gain citizenship and the rights they would acquire by doing so had never "been fully determined, either by legislation or adjudication."[27]

At the time of Cushing's opinion, tribal Native Americans were considered both citizens of their own nation and wards of the federal government. But what about individual Native Americans who had separated themselves from their tribes? Based on Article I, Section Two of the Constitution, some state and federal government officials assumed that, if a Native American had severed his tribal affiliation and paid taxes, he qualified for citizenship as a responsible and productive member of American society. That individual could then rightfully be counted as a person for purposes of apportioning a state's taxes and determining its representation in the legislative branch of the federal government. The difficulty lay in the fact that, despite being assimilated into mainstream white society, a Native American was not necessarily a U.S. citizen. Some state and federal officials erred in assuming that a taxed Native American automatically qualified as a citizen. Actually,

such individuals were neither members of a tribe nor a ward of the federal government. Their legal status was, in fact, held in limbo; they were no longer tribal members or U.S. citizens. They could count as a person for the purpose of apportionment, yet simply paying taxes did not make them a citizen. In short, non-tribal Indians lacked a recognized legal and political identity. Since the U.S. government had neither formally addressed the matter of citizenship for Native Americans as a whole nor had the courts ruled on the legal status of individuals who had left their tribes, Attorney General Cushing's opinion was important for those seeking clarification on the matter.[28]

Cushing decided that a Native American, although born in the United States, was not a citizen since he was not completely under the jurisdiction of the federal government. Even taxed Native Americans did not fall under such jurisdiction unless they were specifically recognized as citizens. Unlike Marshall, who had ruled that Native Americans held an alien status because of their tribes' quasi-sovereign status, Cushing maintained that naturalization laws that applied to foreigners were not applicable to Native Americans because the latter were "domestic subjects" of the United States. On the one hand, Native Americans were comparable to foreigners because they did not fall completely under U.S. jurisdiction. On the other hand, they could not become naturalized citizens in the same manner afforded to immigrants. The only means by which a Native American could become a naturalized citizen was either through treaty provision or an act of Congress.[29]

Cushing's opinion had some impact on the Supreme Court's *Dred Scott* decision. While the brunt of the case involved the status of African Americans, the Court's ruling included significant holdings regarding the legal status of individual Native Americans. In announcing its decision on March 6, 1857, the Court issued three key rulings.[30] Though each was significant in its own respective way, the third concerns the legal status of Native Americans. In addressing the legal status of African Americans, Chief Justice Roger Taney, who wrote the majority opinion, tried to explain the historical status of African Americans by contrasting it with that of Native Americans, thus shedding light on how the two races were viewed during the late ante-bellum period.[31]

It is important to remember that the issue before the Court was whether Scott was a free man entitled to the rights of U.S. citizenship. Taney addressed the issue in two rather confusing ways. First, he alternated his wording; at times discussing federal citizenship, while, at other times, state citizenship. Since the case predated the passage of the Fourteenth Amendment, Taney's reference to a national versus state citizenship proved difficult for many people to understand. Second, Taney drew an analogy between African Americans and Native Americans; he compared the status of each group by emphasizing how the two races were more dissimilar than alike.[32]

Taney recognized that the federal government had granted citizenship to some Native Americans either through treaty stipulations or specific legislation enacted by Congress. He explained, however, that Native Americans, for the most part, were not included in what he referred to as the "political community" of the United States. Yet, because they were under the guardianship of the United States, the possibility that Native Americans could acquire citizenship did indeed exist.[33]

In comparing the legal status of African Americans with that of Native Americans, Taney explained that:

> The situation of [African Americans] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never

> amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion.[34]

Taney's opinion focused first on Indian tribes, then on individual Native Americans. In stating his views concerning the legal status of non-tribal Native Americans, Taney did not specifically mention the 1831 *Cherokee Nation v. Georgia* decision. Yet much of what he wrote has often been construed as a general reference to Marshall's ruling. Taney stated:

> These 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, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.[35]

Tribal status, however, was not necessarily the same as individual status. In shifting his focus from the political status of Indian tribes to the legal status of individual Native Americans, Taney wrote:

> [T]hey may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become Citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[36]

The key difference between Native Americans and foreign nationals who had immigrated to the United States was the ward-guardian relationship that existed between the federal government and Indian tribes. Taney did not address the Native American situation from a completely racial perspective. Instead, he focused on the unique relationship between Native Americans and the federal government. Because of this "state of pupilage," individual Native Americans could not become naturalized citizens through means afforded to other foreigners. Even if an individual Native American severed all ties with his tribe and paid taxes, he still was not considered a U.S. citizen by that criteria alone. The only way that such a person could become a citizen was through the "authority of Congress" either in the form of ratified treaties or the enactment of legislation.[37] This was precisely the argument that Attorney General Cushing made in his 1856 legal opinion. It would later emerge as an important consideration in the debate concerning the impact of the Fourteenth Amendment on the meaning of the phrase "excluding Indians not taxed."

Taney continued by addressing the issue of why Native Americans were not granted

citizenship in the Constitution. He reasoned that the Founding Fathers would never have admitted all Native Americans into a civilized society given their "untutored and savage state" at the time.[38] According to Taney, Native Americans could become citizens if they became civilized. This process of civilization and citizenship for African Americans was unforeseen in 1787.

The distinction made in Taney's comparison between African Americans and Native Americans explains why the former gained citizenship by way of a constitutional amendment, while the latter obtained citizenship through treaties or legislative acts. At the time, the *Dred Scott* decision proved to be immensely important in acknowledging the fact that Native Americans had a greater legal status than African Americans, at least in theory. Native Americans now knew that it was possible to enter white society and gain citizenship by the much easier process of legislation or treaty, while citizenship for African Americans would require a constitutional amendment.[39]

Taney's brief comments concerning the legal status of Native Americans established a much needed precedent. Unfortunately, the *Dred Scott* decision also created notable restrictions regarding the legal status of Native Americans. Regardless of whether they paid taxes or not, individual Native Americans could become citizens only at the discretion of the U.S. government. Since treaty and legislative provisions applied to tribal members, the *Dred Scott* decision failed to provide non-tribal Native Americans with any means of acquiring citizenship on their own. Consequently, part of the congressional debate regarding ratification of the Fourteenth Amendment would again focus on the meaning of the phrase "excluding Indians not taxed."

The Civil Rights Act of 1866 and the Fourteenth Amendment

Unfortunately, Madison's characterization of the Native Americans' perplexing situation in *Federalist No. 42* proved to be true. Throughout the ante-bellum period, no one was able to determine the legal status of Native Americans. Inclusion of the phrase "excluding Indians not taxed" in the Fourteenth Amendment failed to clarify the matter. Rather, it served as a catalyst for another debate over its meaning.[40]

Before the American Civil War, Congress tried to address the issue of Native American citizenship through a number of treaties and statutes which called upon individual Native Americans to break their tribal ties and to adopt "civilized ways" in exchange for U.S. citizenship. Following the war, such measures continued to be adopted, but the debate over citizenship for Native Americans focused not so much on whether it should be granted, but rather the expediency by which it could be bestowed. Such was the political climate when Congress debated the application of the Civil Rights Act of 1866 and the Fourteenth Amendment toward Native Americans.[41]

Before Congress revisited the issue of the legal status of Native Americans in adopting the Fourteenth Amendment, it passed the Civil Rights Act of 1866. The debate over the wording to be used in both laws became intertwined. Both mention people in connection to United States jurisdiction. In addition, the phrase "excluding Indians not taxed" is prominent in both laws. In fact, issues raised over the constitutionality of the Civil Rights Act of 1866 led Radical Republicans to propose the Fourteenth Amendment to strengthen that law.

In December 1865, Senator Lyman Trumbull, a Radical Republican from Illinois, proposed the following preamble to the Civil Rights Act of 1866: "That all persons born in

the United States, and not subject to any foreign power, are hereby declared to be citizens." This immediately became the focus of a debate concerning the implications of this wording on the legal status of Native Americans.[42] Some senators questioned whether inserting such wording in the proposed act would naturalize all Native Americans who were not already citizens. Trumbull replied that it would not. Since the United States had established a precedent of treating tribal Indians as foreigners, he declared, they were subject to a foreign power. However, he did concede that individual Native Americans who had dissolved their tribal connections and paid taxes were in a different legal and political category than tribal Native Americans.[43]

The issue became more complicated when Republican Senator James Lane of Kansas pointed out that in his state most Native Americans had already separated themselves from their tribes and held land in severalty. However, they did not pay taxes. Lane questioned what their status would then be according the wording of Trumbull's preamble to the Civil Rights Act of 1866.[44] To resolve the matter, Senator John Henderson, a Democrat from Missouri, recommended that all Native Americans, whether taxed or not, should be naturalized as citizens.[45] He argued that:

> ...the Indian, if he is connected with no tribe, whether he is taxed or not, ought to be a citizen of the United States.... What injury can it do? ... The State need not admit him to the franchise. He may be a citizen of the United States, and yet not have all of the privileges and all the immunities of a citizen of the State in which he may be. The state may deny him any of them that it chooses to deny. But why not declare him a citizen of the United States? What harm can there be in that?[46]

Trumbull eventually amended his proposed preamble by inserting the constitutional wording "excluding Indians not taxed." As adopted, it read: "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."[47] Considering the significance of this law, many Radical Republicans believed that adding an amendment to the Constitution was the only means to enforce it. Consequently, Congress proposed the Fourteenth Amendment. Debate over the meaning of the phrase "excluding Indians not taxed" in the amendment mirrored that which occurred during the passage of the Civil Rights Act of 1866.[48]

Ratified in 1868, the legacy of the Fourteenth Amendment rests primarily on its first two sections. Section One marked the first time in American history that a constitutional amendment explained the concept of national citizenship and the criteria by which one would be classified as a U.S. citizen. Citizenship was granted to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, ..." This was particularly important to former slaves and their descendants seeking equality. Here, the amendment proved significant in expanding the application of the due process clause of the Fifth Amendment. Whereas the Fifth Amendment protected an individual against the federal government from being "deprived of life, liberty, or property, without due process of law," the Fourteenth Amendment applied similar restrictions to state governments.[49] Section Two, however, states 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." This reopened the debate over the meaning of the vexing phrase "excluding Indians not taxed."[50]

In 1870, Congress considered legislation that would discontinue treaties with Indian

tribes in favor of more direct governing through statutes. Concerned congressmen asked the Senate Judiciary Committee to report on how the Fourteenth Amendment affected the legal status of Native Americans, particularly its impact on previous treaties between the United States and specific tribes. If the Fourteenth Amendment did indeed make Native Americans citizens of the United States, would not all treaties with tribes be nullified? After all, the United States would certainly not make treaties with its own citizens. The committee determined that the citizenship clause of the Fourteenth Amendment did not apply to Native Americans who maintained their tribal membership since tribes were not completely under the sole jurisdiction of the U.S. government.[51]

The debate then shifted to the wording of Section One of the Fourteenth Amendment, wherein Native Americans were compared to foreign officials. Given the fact that foreign diplomats residing in the United States are not subject to American jurisdiction, neither would this be true for any of their children born there. Similarly, Indian tribes, although subject to federal jurisdiction to some degree, were placed in a unique category.[52] As Marshall had ruled in *Cherokee Nation v. Georgia*, tribes they domestic dependent nations. Though Indian tribes were clearly political communities, they depended on the federal government. Such dependence resembled that of "a ward to his guardian."[53] Since Native American tribes were not completely "subject to the jurisdiction" of the United States as stated in Section One of the Fourteenth Amendment, citizenship was not granted. Accordingly, all treaties with tribal governments remained legally binding agreements.[54]

Given its ambiguous history and the debate generated by both the Civil Rights Act of 1866 and the Fourteenth Amendment, the phrase "excluding Indians not taxed" remained a source of controversy. Instead of clarifying the legal status of Native Americans, new questions arose that would be examined and re-examined by the courts in *Standing Bear v. Crook* and *Elk v. Wilkins.*

Standing Bear v. Crook (1879)

Following the *Dred Scott* decision, the adoption of the Civil Rights Act of 1866, and ratification of the Fourteenth Amendment, a pair of court cases revisited the issue of the legal status of individual Native Americans. In *Standing Bear v. Crook*, a Federal District Court examined the claims of Native Americans who sought protection of their rights under the Constitution, despite the fact that they were not U.S. citizens or Native Americans who paid taxes.

By 1877, Standing Bear had been recognized as one of the highest-ranking Ponca leaders. While the U.S. government negotiated with the Ponca nation to facilitate their removal to Indian Territory that year, Standing Bear served on the delegation that inspected the land.[55] From the moment he first saw the area set aside for the Ponca, Standing Bear questioned the relocation of his tribe. The Ponca, nonetheless, moved to their assigned territory, and, in the process, suffered their own version of the 'Trail of Tears.' Many were enfeebled or died during the journey. Many more died from illnesses (e.g., malaria) after their arrival. Perhaps as many as one-third of the Ponca nation died within the first two years of their forced removal to Indian Territory.[56] During the trek, Standing Bear lost two of his daughters and his wife's mother and grandmother. The last straw came when his only son died. Upset with the removal from the start. Standing Bear decided to take his son's remains back to the traditional Ponca burial grounds. In January 1879, thirty Ponca men, women, and children, including Standing Bear, set out to return to Nebraska. When

the Indian agent responsible for the Ponca discovered that the group had left Indian Territory, he immediately contacted officials in Washington, D.C.[57]

Upon learning of Standing Bear's seemingly defiant act, Secretary of the Interior Carl Schurz ordered that the group of Ponca be arrested immediately for leaving Indian Territory without permission. As commanding officer of the Department of the Platte, that responsibility fell to Brigadier General George Crook. Soon after the Ponca arrived at the reservation of their long-time friends, the Omaha, Crook's troops placed the tired and hungry group under arrest.[58]

Thomas Henry Tibbles, an assistant editor for the *Omaha Daily Herald*, began interviewing the captives and soon became a leading advocate for the Ponca and for Native American rights as a whole.[59] He contacted a close personal friend and attorney, John L. Webster, who, in turn, contacted fellow attorney A.J. Poppleton. Together, Webster and Poppleton agreed to take Standing Bear's case pro bono and filed a writ of habeas corpus. By filing the writ, they sought a court order immediately releasing the Ponca, arguing that they were "prisoners unlawfully imprisoned, detained, and confined in custody."[60]

Formal proceedings began on May 1, 1879, and continued for two days. Prepared written statements provided to Judge Elmer S. Dundy before the trial came from supporters of both the Ponca and the U.S. government. During the trial, only the Ponca's attorneys, Webster and Poppleton, called witnesses to testify. G.M. Lumbertson, United States District Attorney for Nebraska, cross-examined each witness, but he did not call on anyone to testify on behalf of the federal government.[61] The final witness, Standing Bear, testified through an interpreter. As Webster prepared to examine his client, Lambertson questioned whether a Native American qualified as a competent witness. Judge Dundy ruled that since "[t]he law makes no distinction on account of race, color, or previous condition," the court recognized Native Americans to be "competent for every purpose in both civil and criminal courts."[62] Dundy's ruling foretold the final verdict.

Examining the witnesses required only a short amount of time compared to the closing arguments presented by the three lawyers. In their closing statements, Webster and Poppleton spoke for six hours and four hours, respectively, each emphasizing that the Ponca were entitled to basic civil rights regardless of their lack of citizenship. Lambertson summarized his position in no less than five hours.[63] He argued that Standing Bear did not qualify for the constitutional protection of a writ of habeas corpus because, as a Native American, he was not considered a person or citizen in a legal sense. Lambertson then attempted to draw a parallel between Dred Scott and Standing Bear. He reiterated Chief Justice Taney's opinion that slaves did not possess the rights of citizenship such as the right to sue. Poppleton challenged Lambertson's notion that Standing Bear could not file a writ of habeas corpus. After explaining the origin of the writ, Poppleton stated that it was a protection guaranteed to all human beings. Whether the Ponca were U.S. citizens was not the point. The issue, according to Poppleton, was that they were people entitled to the same basic liberties as any other person.[64]

In his ruling, Judge Dundy rejected Lambertson's assertion that Native Americans were not people, and, therefore, did not possess the right to sue for a writ of habeas corpus.

> [I]t must be borne in mind, that the habeas corpus act describes applicants for the writ as 'persons,' or 'parties,' who may be entitled thereto. It nowhere describes them as 'citizens,' nor is citizenship in any way or place made a qualification for suing out the writ.[65]

Dundy then quoted the definition of "person" from a dictionary, emphasizing such terms as "'a living human being'" and "'an individual of the human race.'" With a hint of facetiousness in his voice, he declared that these definitions "were comprehensive enough, it would seem, to include even an Indian."[66] Unlike Taney's ruling in the *Dred Scott* case that a slave could not sue, Dundy emphatically stated that Native Americans had constitutional rights. If they were expected to obey the laws of the United States, then they were equally entitled to its protection.[67]

Standing Bear v. Crook recognized that Native Americans, although not U.S. citizens, still had individual rights protected by the Constitution. Yet, despite the Federal District Court's ruling, many government officials continued to disregard the rights of non-citizen Native Americans. Instead, local, state, and federal officials interpreted the phrase "excluding Indians not taxed" at their convenience as opposed to using it to help individual Native Americans gain citizenship. Consequently, the legal status of individual Native Americans who were no longer associated with a tribe remained unclear. Nevertheless, *Standing Bear v. Crook* remains one of the most important judicial decisions regarding the legal status of Native Americans. It provided the impetus for late nineteenth-century social reformers to push for legislation granting Native Americans citizenship and legal protection.

Elk vs. Wilkins (1884)

Even after the judicial rulings in *Dred Scott v. Sandford* and *Standing Bear v. Crook,* the issue of the legal status of Native Americans seemed to generate new questions and begged for practical solutions. The main problem was a lack of consensus in determining the best solution. Former Commissioner of Indian Affairs, Francis A. Walker, believed that "whenever Congress shall take up in earnest this question [of Native American legal rights], its choice will clearly be between two antagonistic schemes – seclusion and citizenship." According to Walker, Native Americans should either be isolated on reservations with minimal white contact, or "the government must prepare to receive the Indians into the body of the people." He noted that seclusion had often been attempted through removal practices and reservations. Despite such efforts to keep the two peoples separate, whites already substantially influenced many Native Americans, but they still did not receive any benefits of citizenship.[68]

Standing Bear's case brought new attention to the plight of Native Americans prompting social reformers to advocate greater recognition of Native American legal rights.[69] According to legal scholar David E. Wilkins, the late nineteenth and early twentieth centuries witnessed an "ideological consciousness" within the legal community regarding the legal status of Native Americans. This generated hope that *Elk v. Wilkins* would reflect the changing views of the public at large toward the legal status of Native Americans.[70]

In April 1880, John Elk, a Native American, tried to become a registered voter in Omaha, Nebraska, only to be denied by the registrar, Charles Wilkins. Elk had consciously severed his tribal affiliation and taken up residence in Omaha. As a person who met the voter registration requirements, not only for the city of Omaha, but also for the state of Nebraska, Elk wanted to vote in a city election. Wilkins, however, refused to let him vote because he was a Native American who presumably did not pay taxes.[71] Once again, the phrase "excluding Indians not taxed" stood at the heart of the controversy in trying to define the legal status of Native Americans.

The basis of Elk's argument was that, by his decision to terminate his tribal connections and place himself under the full jurisdiction of the United States, he qualified for citizenship under the Fourteenth Amendment. He had strengthened his claim of citizenship by buying a house in Omaha and enrolling in the Nebraska militia. Furthermore, state law allowed male foreign nationals who planned on becoming U.S. citizens to become registered voters. The question at hand then was whether Elk's actions automatically made him a U.S. citizen in accordance with Section One of the Fourteenth Amendment. If so, then his Fifteenth Amendment right to suffrage had been violated.[72]

In his complaint against Wilkins, Elk described how the registrar prevented him from registering to vote, ignoring his claim that "he was a citizen of the United States, and was entitled to exercise the elective franchise." He further charged that Wilkins "designedly, corruptly, willfully, and maliciously" refused to register Elk because he was Native American. Elk's argument thus rested on his claim that his constitutional rights under the Fourteenth Amendment had been violated.[73]

In its ruling in *Elk v. Wilkins,* the Supreme Court referred often to the *Dred Scott* and *Standing Bear* decisions. In delivering the Court's decision, Associate Justice Horace Gray, writing for the majority, reviewed the facts and question before the Court. Both parties agreed that:

> [t]he plantiff is an Indian, and was born in the United States, and ha[d] severed his tribal relation to Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and ... continue[d] to [be]subject to the jurisdiction of the United States, and is a bona fide resident of the state of Nebraska and the city of Omaha.

Gray then noted that, although Elk did not specify to which tribe he belonged, he obviously had to be born into an Indian tribe in order for him to sever his ties. Gray then explained that Elk's willful surrender "to the jurisdiction of the United States" did not in itself qualify him for citizenship. In fact, there was never any indication that the U.S. government acknowledged Elk's self-proclaimed new allegiance. The majority of the Court believed that Elk was never formally naturalized, not a taxpayer, nor recognized as a citizen by either the state of Nebraska or the federal government. Furthermore, there was no specific statute or treaty that qualified Elk to claim U.S. citizenship.[74]

Gray then addressed the unique relationship between Indian tribes and the U.S. government. While Native American tribes were not fully considered foreign states, neither were tribal members considered part of the country's population. Instead, these tribes and their members held a "dependent condition." Individual members of a tribe could not end this relationship simply of their own choosing. Tribal members "were never deemed citizens of the United States except under explicit provisions of a treaty or statute to that effect."[75]

In presenting their case before the Supreme Court, Poppleton and Webster, again involved in a high-profile case concerning the legal status of Native Americans, quoted from Chief Justice Taney's ruling in the *Dred Scott* case. In referring to Native Americans, Taney had stated, "...if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people." Gray, however, pointed out that this did not mean that any alien, including Native Americans, could make a claim of U.S. citizenship without undergoing the formal process of naturalization. Elk had to for-

mally renounce his tribal allegiance *and* be officially recognized by the U.S. government as a citizen.[76]

Gray elaborated on this point by referring to the Fourteenth Amendment. Specifically, he referred to the phrase, "excluding Indians not taxed" in Section Two of that amendment. Noting that Native Americans who did not pay taxes were excluded as part of a state's population for apportionment purposes, Gray explained that this stemmed from the fact that Native Americans were not citizens. In addition, Gray noted that the Civil Rights Act of 1866 excluded "Indians not taxed" from the definition of U.S. citizenship. Of course, even if Elk did actually pay taxes, he still would not have been a citizen on that merit alone. Again, the Court decided that "an individual must first have the acknowledgement of the federal government before claiming citizenship."[77]

In his dissenting opinion, Associate Justice John Harlan focused on whether Elk was a taxpayer. The majority of the Court presumed that Elk was not a taxpayer, and, therefore, was excluded from U.S. citizenship. Harlan argued that Elk was a taxpayer, and that he and other taxpaying Native Americans should be considered U.S. citizens. He then focused on Section One of the Fourteenth Amendment. Given the fact that Elk was born within the legal boundaries of the United States, Harlan's fellow justices ascertained that Elk could only become a citizen through appropriate legislation or treaty stipulations. And given the fact that Elk was born into an Indian tribe, he was only under the *quasi-jurisdiction* of the United States. With these two provisions rejected, it seemed peculiar to Harlan that the issue of taxation held such weight in the majority's decision. Consequently, he stated that "[i]t would, therefore, seem unnecessary to inquire whether he was taxed at the time of his application to be a registered voter." But since the majority had addressed the issue, he, too, would do so.[78]

If a tribal Native American did eventually become a resident of a state, Harlan argued, the precedent would be that his legal status would not be changed even if he did pay taxes. While it is true that Elk failed to mention in his petition that he paid taxes, he did own property. Since Nebraska law stipulated that all real and personal property was subject to taxation, Elk most certainly was a taxpayer of that state. Along this same line of reasoning, Nebraska's constitution apportioned its number of state legislators "according to the number of inhabitants, excluding Indians not taxed." It seemed clear that Elk, who did own taxable property, was considered a part of the general populace of Nebraska. Consequently, Elk should rightfully be considered a legitimate resident of Nebraska.[79]

In retrospect, one of the most significant precedents established in the *Elk* decision was the application of a quasi-dependent ward status to individual Native Americans. Prior to this case, Indian tribes were regarded as wards of the federal government. As such, Congress exercised a great deal of authority over the numerous tribes located within the United States. According to the *Elk* decision, individual Native Americans were also regarded as wards of the federal government. Within the context of this relationship, only the federal government, not individuals such as Elk, could determine if and when non-tribal Native Americans became U.S. citizens.[80]

Elk v. Wilkins further defined the legal status of individual Native Americans, albeit unfavorably. The central issues were no longer whether Native Americans were tribal members or if they paid taxes. Instead, the Supreme Court's ruling reinforced the notion that the federal government continued to interpret the phrase "excluding Indians not taxed" at its discretion. No doubt, the ruling disappointed late nineteenth-century social reformers who had hoped for a decision favorable to individual Native Americans like Elk,

but it did not curb their efforts to integrate Native Americans into mainstream white society. They continued to call for federal legislation that would clarify the legal status of individual Native Americans (e.g., the Allotment Act of 1887).

Conclusion

The phrase "excluding Indians not taxed" appeared in the Articles of Confederation, the Constitution, the Civil Rights Act of 1866, and the Fourteenth Amendment. Each time it was used, its meaning and significance became embroiled in controversy. The *Dred Scott, Standing Bear*, and *Elk* cases each wrestled with the effect of the phrase on the legal status of individual Native Americans.

In *Dred Scott v. Sandford*, Chief Justice Taney ruled that Native Americans did not share the same status as African Americans nor were they identical to immigrants. It was possible for Native Americans to become citizens, but they could not do so by the same means of naturalization available to foreigners. Nor did the constitutional phrase "excluding Indians not taxed" necessarily mean that any Native American who paid taxes automatically became a U.S. citizen. Native Americans, Taney opined, could only become citizens through specific legislation or treaties.

The *Standing Bear* case determined that individual Native Americans, even if they were not U.S. citizens, possessed the same constitutional protections as any other person residing in the United States. That decision, applauded by contemporary social reformers, represented a major victory in recognizing the legal rights of Native Americans. Whereas the Supreme Court ruled that, as a slave, Dred Scott did not possess the right to sue for his freedom, the Federal District Court of Nebraska held that Standing Bear and his small band of Ponca followers had the legal right to file a writ of habeas corpus. Nevertheless, the legal status of individual Native Americans who were no longer associated with a tribe remained uncertain. Questions as to whether non-tribal Native Americans could, of their own accord, become U.S. citizens, and what recourse they might have if states refused to recognize certain civil rights remained unsettled. Still, the case helped clarify that individual Native Americans had some basic legal rights such as habeas corpus.

The *Elk* case focused on whether an individual Native American could willfully sever his tribal connections and become a U.S. citizen. The Court ruled that Elk could not become a citizen simply of his own free will; the federal government must formally acknowledge an individual Native American as a citizen, which it finally did in applying the 1924 Indian Citizenship Act to all Native Americans not covered in earlier treaties or congressional legislation.

The legal status of individual Native Americans has been debated numerous times throughout American history. Attempts to define their status focused primarily on the meaning of the phrase "excluding Indians not taxed." As noted in *Dred Scott v. Sandford, Standing Bear v. Crook*, and *Elk v. Wilkins*, the federal government had the power to grant citizenship to all Native Americans. Yet treaties and legislative acts that did so dealt with tribal Native Americans more so than non-tribal individual Native Americans. In retrospect, the federal government found it more advantageous to use citizenship as a means of controlling tribal Native Americans. Individual Native Americans who severed their tribal connections, acculturated themselves into mainstream white society, and willfully paid taxes often lacked a distinct legal status. In essence, for almost 150 years the U.S. government used the phrase "excluding Indians not taxed" to restrict the legal status of Native Americans.

ENDNOTES

[1]For details on the history of federal government policies regarding Native Americans, see Francis Paul Prucha, ed., *Documents of the United States Indian Policy,* 3rd ed. (Lincoln, NE: University of Nebraska Press, 2000); Frederick E. Hoxie and Peter Iverson, eds., *Indians in American History: An Introduction*, 2nd ed. (Wheeling, IL: Harlan Davidson, Inc., 1998); Vine Deloria, Jr., ed., *American Indian Policy in the Twentieth Century* (Norman, OK: University of Oklahoma Press, 1985); Francis Paul Prucha, ed., *United States Indian Policy: A Critical Bibliography* (Bloomington, IN: Indiana University Press, 1977).

[2]While the *Dred Scott* and *Elk* cases were argued before the United States Supreme Court on appeal, a Federal District Court decided the *Standing Bear* case.

[3]James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (New York: W.W. Norton & Company, Inc., 1987), 103. Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Virginia all agreed to include "excluding Indians not taxed" to determine each state's population for the purpose of tax apportionment among the states. Delaware and New Jersey were the only states to vote for similar wording to determine representation among the states.

[4]"Indian Citizenship Act, June 2, 1924," in *Documents of United States Indian Policy,* ed. Prucha, 3rd ed., 218.

[5]Wilcomb E. Washburn, *Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian* (New York: Charles Scribner's Sons, 1971), 209.

[6]"Treaty with the Choctaws, September 27, 1830," in *Documents of the United States Indian Policy,* ed. Prucha, 3rd ed., 55.

[7]"General Allotment Act (Dawes Act), February 8, 1887," in *Documents of the United States Indian Policy,* ed. Prucha, 3rd ed., 172.

[8]For details on the treatment of the approximately 5,000 Choctaws who elected to stay in Mississippi, see John H. Peterson, Jr., "Three Efforts at Development among the Choctaws of Mississippi," in *Southeastern Indians since the Removal Era*, ed. Walter L. Williams (Athens, GA: University of Georgia Press, 1979), 144, 146. For the negative consequences of the Allotment Act, see Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton, NJ: Princeton University Press, 1991).

[9]Even after the passage of the Indian Citizenship Act of 1924, many states denied Native Americans the right to vote, freedom of religion, and basic civil rights. Furthermore, following the Indian Civil Rights Act of 1968, many Native Americans still faced numerous obstacles when they tried to exercise their rights of citizenship.

[10]Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison,* 103, 116, 190.

[11]Vine Deloria, Jr., and David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* (Austin, TX: University of Texas Press, 1999), 25. The late Vine DeLoria, Jr., was a member of the Standing Rock Sioux Tribe. Wilkins is a Lumbee Indian.

[12]"Article VIII, Articles of Confederation," in *Journals of the Continental Congress, 1774-1789*, ed. Gaillard Hunt (Washington, D.C.: Government Printing Office, 1922), XXIV:260.

[13]Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison,* 103; U.S. Constitution, art I., sec. 2.

[14]Richard B. Morris, *The Forging of the Nation, 1781-1789* (New York: Harper & Row, 1987), 227.

[15]Articles of Confederation, art. IX, para. 4.

[16]"Proclamation of the Continental Congress, 22 September 1783," in *Journals of the Continental Congress*, ed. Hunt, XXV:602.

[17]Deloria, Jr., and Wilkins, *Tribes, Treaties, and Constitutional Tribulations*, 25.

[18]"*Federalist Number 42*," in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Bantam Books, 1982), 215.

[19]Washburn, *Red Man's Land/White Man's Law*, 173.

[20]Today, however, tribal Indians are recognized as having dual citizenship with their tribe and the United States.

[21]Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 103.

[22]Washburn, *Red Man's Land/White Man's Law*, 164-65; Curtis Berkey, "United States-Indian Relations: The Constitutional Basis," in *Exiled in the Land of the Free: Democracy, Indian Nations, and the United States Constitution,* ed. Oren Lyons (Santa Fe, NM: Clear Light Publishers, 1992), 221-22.

[23]Francis A. Walker, *The Indian Question* (Boston: James R. Osgood and Company, 1874), 129. In the late nineteenth century, renowned Harvard legal scholar James Bradley Thayer developed yet another explanation for the wording. He argued that the convention delegates believed that the native population would eventually be assimilated into white society and attain citizenship within a state. The reference made to Native Americans who did not pay taxes left open the possibility that someday they would do so and be assimilated into the state's population. See R. Alton Lee, "Indian Citizenship and the Fourteenth Amendment," *South Dakota History* 4, no. 2 (Spring 1974):199.

[24]*The Cherokee Nation v. The State of Georgia. 30 U.S. 1, 8 L. Ed. 25 (1831)*; Jill E. Martin, "Neither Fish, Flesh, Fowl, nor Good Red Herring: The Citizenship Status of American Indians, 1830-1924," *Journal of the West* 29, no. 3 (July 1990):75. In *Johnson v. McIntosh,* the Court held that tribes could only transfer title to land to the federal government and not to states or private citizens. In *Worcester v. Georgia,* it ruled that state laws did not apply to tribal lands.

[25]Dred Scott was born and raised in Virginia as a slave. In 1832, Scott was sold to Dr. John Emerson, a military surgeon. Over the next ten years, Emerson served at military posts in Missouri, Illinois, and present-day Minnesota. With every move, Emerson took Scott with him as his personal servant. While serving at Fort Snelling in Wisconsin Territory (now Minnesota), Emerson granted Scott permission to marry. Eventually, Emerson, Scott, and Scott's wife, Harriet, relocated in Missouri. After Emerson's death in 1843, John A. Sandford, Emerson's brother-in-law, acquired Scott. Dred and Harriet Scott then pursued litigation seeking their freedom. The basis for their claim was the fact that the State of Illinois and the Wisconsin Territory (now Minnesota), where Scott resided during Emerson's military career, were both free. Illinois had always been a non-slave state based on the exclusion of slavery in that region under the 1787 Northwest Ordinance. Likewise, slavery was banned in the Louisiana Purchase territory based on the terms of the 1820 Missouri Compromise. See Don Edward Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 239-41, 244.

[26]Lee, "Indian Citizenship and the Fourteenth Amendment," 204.

[27]Caleb Cushing, "Relation of Indians to Citizenship," 7 Op. Atty. Gen., 746-49 (1856).

[28]Robert P. Porter, "The Demise of the Ongwehoweh and the Rise of Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples," *Harvard Black Letter Law Journal* 15 (Spring 1999):130-31.

[29]Cushing, "Relation of Indians to Citizenship," 7 Op. Atty. Gen. 746-49 (1856).

[30]Fehrenbacher, *The Dred Scott Case*, 323. The first ruling stems from the U.S. Supreme Court's power of judicial review. Here the Court held that the Missouri Compromise of 1820, in which Congress prohibited slavery in the Louisiana Purchase north of 36° 30', was unconstitutional. This ruling favored pro-slavery factions and intensified sectional tensions that eventually produced the American Civil War. The second key point of the *Dred Scott* decision is that the Court rejected Scott's petition for his freedom on the basis that he was a slave. Since the Court's ruling stipulated that Scott remained a slave and was not a citizen, he could not sue for his freedom.

[31]Frederick E. Hoxie, "What was Taney Thinking? American Indian Citizenship in the Era of *Dred Scott*," *Chicago-Kent Law Review* 82, no. 1 (2007):329. Taney's effort to clarify the legal status of Native Americans took the form of an *obiter dicta,* that is, a legal opinion not necessarily pertinent to the case at hand, for which he received a fair amount of criticism. See Edward Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (Princeton, NJ: Princeton University Press, 1914; repr., Union, NJ: Lawbook Exchange, Ltd., 2000), 133.

[32]Fehrenbacher, *The Dred Scott Case*, 341-42.

[33]Ibid.

[34]*Dred Scott, Plaintiff In Error, v. John F.A. Sandford. 60 U.S. 393, 15 L. Ed. 691* (1857).

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39]Martin, "Neither Fish, Flesh, Fowl, nor Good Red Herring," 76.

[40] For studies on the debate over the meaning of the phrase, see, for example, Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999); James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* (Westport, CT: Praeger Publishers, 1997); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, NC: Duke University Press, 1986).

[41]Lee, "Indian Citizenship and the Rise of Native Americans," 207.

[42]Congress, Senate, Committee of the Judiciary, "Effect of the Fourteenth Amendment Upon Indian Tribes," 41st Cong. 3rd sess., 1870, S. Rept. 268, 1-11.

[43]*Congressional Globe,* 39th Cong., 1st sess., 30 January 1866, pt. 1:498-99.

[44] Ibid.

[45] Lee, "Indian Citizenship and the Rise of Native Americans," 208-09.

[46] *Congressional Globe*, 39th Cong., 1st sess., 30 January 1866, pt. 1:571.

[47] Lee, "Indian Citizenship and the Rise of Native Americans," 209.

[48] Ibid.

[49]United States Constitution, amend. XIV, sec. 1.

[50]Lee, "Indian Citizenship and the Rise of Native Americans," 198.

[51]Ibid., 211; Vine Deloria, Jr., "The Application of the Constitution to the American Indian," in *Exiled in the Land of the Free*, ed. Lyons, 310.

[52]J.W. Peltason, *Understanding the Constitution,* 12th ed. (San Diego, CA: Harcourt Brace and Jovanovich, 1991), 317.

[53]*The Cherokee Nation v. The State of Georgia, 30 U.S. 1, 8 L. Ed. 25 (1831).*

[54]Deloria, Jr., "The Application of the Constitution to the American Indian," in *Exiled in the Land of the Free,* ed. Lyons, 310.

[55]Stanley Clark, "Ponca Publicity," *Mississippi Valley Historical Review* 29, no. 4 (March 1943):495.

[56]Charles M. Robinson III, "*Standing Bear vs. Crook:* A Major Step Toward Indian Rights," *Papers of the Thirty-Second Annual Dakota Conference* (Sioux Falls, SD: Center for Western Studies, 2000), 446. The "Trail of Tears" refers to the Cherokee Nation and other tribes moved to Indian Territory under the Indian Removal Act of 1830. Thousands of individuals died during the relocation process. See John Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (New York: Doubleday, 1988).

[57]Clark,"Ponca Publicity," 496.

[58]Valerie Sherer Mathes, "Helen Hunt Jackson and the Campaign for Ponca Restitution, 1880-1881," *South Dakota History* 17, no. 1 (Spring 1987):28. Crook sympathized with the Ponca, yet he could not disobey his orders and simply release the prisoners on his own. In fact, while the federal government held firm in its position, General Crook, despite being named as a defendant in this case, collaborated with Standing Bear's attorneys to help the Ponca gain a favorable legal decision.

[59]Robinson, *"Standing Bear vs. Crook,"* 447.

[60]Ibid., 450.

[61]Thomas Henry Tibbles, *The Ponca Chiefs: An Account of the Trial of Standing Bear* (Boston: Lockwood, Brooks and Co., 1880; repr., Lincoln, NE: University of Nebraska Press, 1972), 36-37, 66, 90, 140 (The original title of the book was *The Ponca Chiefs:An Indian's Attempt to Appeal from the Tomahawk to the Courts*).

[62]Ibid., 79.

[63]Robinson, "*Standing Bear vs. Crook,"* 451.

[64]Tibbles, *The Ponca Chiefs,* 92.

[65]*Standing Bear v. Crook, 25 F. Cas. 695 (1879).*

[66]Ibid.

[67]Robinson, "*Standing Bear vs. Crook,"* 452.

[68]Walker, *The Indian Question,* 118-19.

[69]Mathes, "Helen Hunt Jackson and the Campaign for Ponca Restitution, 1880-1881," 30-31.

[70]David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Meaning of Justice* (Austin, TX: University of Texas Press, 1997), 6-7.

[71]Lee, "Indian Citizenship and the Fourteenth Amendment," 215.

[72]Ibid., 216; Deloria, Jr., and Wilkins, *Tribes, Treaties, and Constitutional Tribulations,* 145.

[73]*Elk v. Wilkins, 112 U.S. 94, 5 S. Ct. 4128 L. Ed. 643 (1884).*

[74]Ibid.

[75]Ibid.

[76]"*Elk v. Wilkins,*" in *The American Indian and the United States: A Documentary History,* ed. Wilcomb E. Washburn (New York: Random House, 1973), IV:2667.

[77]*Elk v. Wilkins, 112 U.S. 94, 5 S. Ct. 4128 L .Ed. 643 (1884);* Lee, "Indian Citizenship and the Fourteenth Amendment," 216.

[78]*Elk v. Wilkins, 112. U.S. 94, 5 S. Ct. 4128 L. Ed. 643 (1884).*

[79]Ibid.

[80]United States Department of the Interior, *Federal Indian Law* (Washington, D.C.: Government Printing Office, 1958), 562.