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From Vanishing American to Voter

The Enfranchisement of American Indians

The struggle for Indian suffrage has been a long one; it took nearly 200 years of effort to award U.S. citizenship to Indians and make them eligible to vote in national, state, and local elections. Thus the focus in this chapter is on overcoming the *denial* of Indian suffrage; most of the remainder of the book is about the *abridgment* of the Indian vote. The first section of this chapter describes the incremental bestowal of citizenship on American Indians. The second section focuses on state election laws and how they prohibited or impeded the Indian franchise. The conclusion interprets these developments in light of the passage of the Voting Rights Act (VRA).

Subjects Become Citizens

The authors of the Constitution did not envision Indian people as a part of the electorate. Congressional districts were apportioned among the states based on population, but "Indians not taxed" were excluded from the enumeration (Art. I. Sec. 2). This was in apparent recognition that most Indians were not under the jurisdiction of the fledgling U.S. government, and therefore taxes could not be levied against them. Indians are mentioned again in Article I, Section 8, where Congress is given the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The phrase clearly indicates that the Constitution's authors considered Indian tribes to be extrajurisdictional, lying somewhere between foreign nations and American citizens. For the next 200 years, the nation would struggle to define exactly where tribes fit in along that continuum.

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The first major effort to define legally the relationship between Indian tribes and the United States was a set of three Supreme Court cases known as the "Marshall trilogy" (see Wilkins and Lomawaima 2001, 52–63).[1] Chief Justice John Marshall admitted that the Cherokee tribe was a "distinct political society," but due to its association with the federal government he characterized it as a "domestic dependent nation" and stated that the tribe's relationship to the federal government "resembles that of a ward to a guardian" (*Cherokee Nation v. Georgia* 1831). The contradictions in these phrases are readily apparent; they combine the notion of dependency with that of nationhood. To make matters even more confusing, the opinions written by other justices ranged from a position that Indians had no sovereignty to one that Indians had complete sovereignty (Deloria and Lytle 1983, 30–1). The other two cases further confused the issue (Wilkins 1997).

The ambiguities of the Constitution and the contradictions within the Marshall trilogy of cases virtually guaranteed that the legal status of Indians, especially in regard to citizenship and the right to vote, would remain shrouded in confusion and conflict for many years. In an attempt to clarify the status of Indians, the U.S. attorney general, Caleb Cushing, issued an opinion in 1856, concluding:

> 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. . . . This distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law. (Official Opinions of the Attorneys General 1856, 749–50)

Thus, the Indians' relationship to the U.S. government was similar to that of people in an occupied land under the control of a foreign power – a strange relationship indeed for a country that purported to be a democracy.

The place of the Indian in the body politic again became a major issue when Congress began formulating the Fourteenth Amendment in 1866. The nation had just emerged from a brutal four-year civil war, and Congress was intent on freeing southern slaves and making them part of the political fabric of the nation. The three amendments ratified after the

[1] The three cases of the Marshall trilogy are *Johnson v. McIntosh* (1832), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832).

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Civil War were the first that were not written by the Founding Fathers.[2] Because of the North's victory in the war and the absence of southern members of Congress, the government was finally free to act decisively against slavery. The Thirteenth Amendment abolished slavery in 1865, just seven months after the conclusion of hostilities. But the Republicans who dominated Congress felt that more had to be done to protect the freed slaves and ensure them all the rights and privileges of citizenship. In 1866 Congress passed the first civil rights act, which declared: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States" (Civil Rights Act of 1866). However, there was concern that this law was unenforceable in the southern states unless it was made part of the Constitution. So, a constitutional amendment was introduced in Congress, but the phrase "Indians not taxed" was omitted from the first section of the proposed amendment. Thus, the first section of the amendment was exactly like the 1866 Civil Rights Act, but without the exemption for Indians not taxed.[3] During the Senate floor debate, Senator James Doolittle of Wisconsin proposed to add "Indians not taxed" to the first section of the amendment, arguing that

> there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. . . . The word "citizen," if applied to them, would bring in all the Digger Indians of California. Perhaps they have mostly disappeared; the people of California, perhaps, have put them out of the way; but there are the Indians of Oregon and the Indians of the Territories. Take Colorado; there are more Indian citizens of Colorado than there are white citizens this moment if you admit it as a State. And yet by a constitutional amendment you propose to declare the Utes, the Tabhuaches, and all those wild Indians to be citizens of the United States, the Great Republic of the world, whose citizenship should be a title as proud as that of king, and whose danger is that you may degrade that citizenship. (*Congressional Globe* 1866, 2892)

Senator Doolittle was making two arguments against Indian suffrage – arguments that would be heard time and again throughout the years. His first point was that Indians were an inferior race and therefore were simply not good enough to hold the title of citizen. His second point was that, if granted citizenship, and implicitly the right to vote, they could vote in

[2] The Twelfth Amendment was ratified in 1804 under the guidance of President Thomas Jefferson.

[3] The phrase does appear in the second section of the amendment, which deals with the apportionment of House seats; that section simply repeats the language from Art. I, Sec. 2.

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sufficient numbers to change the power structure and overwhelm their white neighbors.

Other senators responded to these arguments by making two points. First, they argued that Indians were not under the jurisdiction of the United States, and therefore were excluded from the provisions of the proposed amendment even without the phrase "Indians not taxed." Senator Lyman Trumball of Illinois, the chairman of the Committee on the Judiciary, argued this point:

> What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anyone else. That is what it means. Can you sue a Navajoe [sic] Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? By no means. We make treaties with them, and therefore they are not subject to our jurisdiction. If they were we would not make treaties with them. [This proposed amendment] by no means embraces, or by a fair construction – by any construction, I may say – could embrace the wild Indians of the Plains or any with whom we have treaty relations. (*Congressional Globe* 1866, 2893)

In other words, although Indians were "subjects" of the United States, they were not "subject" to its jurisdiction. This implies that tribes were still considered extrajurisdictional entities.

Senator Trumball offered a second reason why the phrase "Indians not taxed" should not be added to the proposed amendment; it would, he argued, be completely contrary to the progressive notion that the franchise is not limited to those who are well moneyed:

> I am not willing to make citizenship in this country depend on taxation. I am not willing . . . that the rich Indian residing in the State of New York shall be a citizen and the poor Indian residing in the State of New York shall not be a citizen. If you put in those words in regard to citizenship, what do you do? You make a distinction in that respect, if you put it on the ground of taxation. (*Congressional Globe* 1866, 2894)

The argument over the connection between Indians voting and Indians paying taxes continues to this day.

Ultimately the Senate approved the first section of the proposed amendment without the phrase "Indians not taxed," but not before receiving assurances from the amendment's sponsors that it would not apply to Indians. Senator Jacob Howard of Michigan undoubtedly expressed the common will of the Senate when he averred: "I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me . . ." (*Congressional Globe* 1866,

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2895). This viewpoint – that the amendment did not affect the status of Indians – was reiterated two years later in a report by the Senate Judiciary Committee (see Deloria and Wilkins 1999, 142–4).

The debate over the Fourteenth Amendment took place within a larger debate regarding the long-term objectives of the nation's Indian policy. This context included passage of the Fifteenth Amendment, which was a profound development but at the time had little relevance to Indians because of their citizenship status. Thus, it had virtually no impact on the right of Indians to vote.

In the nineteenth century, the larger policy context veered between two visions of the Indian's future. One approach was basically genocide, replete with statements that all Indians should be exterminated forthwith, or, in Senator Doolittle's quaint phrase quoted earlier, "put . . . out of the way." Colonel George Armstrong Custer clearly demonstrated this objective when he slaughtered a Cheyenne village on the Washita River in 1868 – the year the Fourteenth Amendment was ratified. A Nebraska newspaper at that time editorialized: "Exterminate the whole fraternity of redskins" (Connell 1985, 127).

Other events in 1868 reflected a second approach to Indian policy, which was to create a system of reservations set aside for Indians until they could become "civilized" and amalgamated into the great mass of white people. Treaties with the Navajos, and the Lakota Sioux and Arapahoe, both in 1868, created extensive reservations; the latter treaty also contained a provision whereby the Indians could gain citizenship by "receiving a patent for land under the foregoing provisions . . . and be entitled to all the privileges and immunities of such citizens, and shall, at the same time retain all [their] rights to benefits accruing to Indians under this treaty" (Treaty of Fort Laramie 1868, Article 6).

The citizenship clause in the Fort Laramie treaty was just one of several laws and treaties that permitted select Indians to become citizens under certain conditions. The significant point regarding the Sioux treaty was that it allowed Indians to become citizens and still maintain their status and rights as Indians. Many policymakers at that time felt that Indian citizenship should be granted only if individual Indians gave up their tribal affiliation and culture and adopted the "habits of civilization." In other words, citizenship, and the right to vote, would be contingent upon abandoning one culture and adopting another. However, this was not yet official policy. The law was not at all clear as to whether an individual Indian could leave his reservation, adopt the habits of the white race, pay taxes, and thus earn the right to vote. In 1884 the Supreme Court

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provided an answer. John Elk, an Indian who lived in Omaha, Nebraska, attempted to register to vote in local elections. He was refused a ballot, even though he had severed his tribal relations and was living among white people. In *Elk v. Wilkins*, the Supreme Court ruled against Mr. Elk, reasoning that the Fourteenth Amendment did not apply to Indians and that they were "no more 'born in the United States and subject to the jurisdiction thereof' . . . than the children . . . born within the United States, of ambassadors or other public ministers of foreign nations" (*Elk v. Wilkins* 1894, 102). Thus, it was clear that, to obtain citizenship, Indian people would need a statute or other official action to bestow that status upon them.

That statute was passed in 1887 after a long debate about how to break up the reservations and convert Indians into the Jeffersonian image of the yeoman farmer. The Dawes Act, or General Allotment Act, divided up reservation lands into individual landholdings for tribal members and then sold off the remainder to white settlers. The act provided an avenue to citizenship, but only for those Indians who availed themselves of the act's provisions and accepted allotments or completely abandoned their tribe and adopted Anglo culture:

> And 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, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States. . . . (Dawes Act 1887, 390)

In 1901 President Theodore Roosevelt called the allotment policy a "mighty pulverizing engine to break up the tribal mass. . . . Under its provisions, some sixty thousand Indians have already become citizens of the United States" (Roosevelt 1901, 6672). Allotment cost Indians dearly, reducing their landholdings by more than half in less than a decade. But it did provide a conditional avenue to citizenship. As Prucha described the process, it "was not a matter of legal citizenship but of cultural amalgamation of the Indian into the mass of white citizens, a much more comprehensive matter" (1984, 686).

By the dawn of the twentieth century, after a "century of confusion" (O'Brien 1989, 71), the 250,000 American Indians who had survived the onslaught of European settlement were still in a legal state that has been described as a "legal vacuum" (Wolfley 1991, 175), a "kind of legal limbo" (Phelps 1991, 65), an "anomalous legal status" (Prucha 1984, 682), and

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a "large no-mans' land" (Cohen 1942, 122). Perhaps the bluntest assessment was offered by Joseph Muskrat: "The major consequence of the wars between the Indians and the Whites was that the Indians became a politically castrated and administered people" (1973, 46–7).

Indians continued to be added to the citizenship rolls on a piecemeal basis. In 1907, as part of the abolishment of the Indian Territory (what is today the state of Oklahoma), Indians living in that territory were made citizens (Oklahoma Enabling Act 1906, 267–8). Another major citizenship grant occurred in 1919 when Congress offered citizenship to every Indian who had served in the military during the First World War and received an honorable discharge (Act of November 6, 1919). Two years later, Congress granted citizenship to every member of the Osage tribe (Act of March 3, 1921). The underlying assumption of each of these acts was that these particular Indians had demonstrated that they had become part of the larger Anglo culture and were no longer wholly Indian. By the early 1920s, about two-thirds of the Indian people in the United States had been granted citizenship, and Congress began considering a bill to make citizens of the remainder (Tyler 1973, 110). The principal question was whether such an offer of citizenship would require that individuals relinquish their tribal membership and reservation and adopt Anglo culture, as in the Dawes Act. In 1922 the Office of Indian Affairs submitted a report to Congress regarding Indian citizenship. It identified eight different legal procedures or sets of conditions that had enabled select Indians to become citizens. This document reflected not only the racism of the time, but also the sexism. It stated that "legitimate children born of an Indian woman and a white citizen father are born to citizenship" (Office of Indian Affairs 1922).

When a bill to grant universal Indian citizenship was introduced in Congress, Secretary of the Interior Hubert Work wrote to the chairman of the House Committee on Indian Affairs, endorsing the bill and noting that it "will bridge the present gap and provide a means whereby an Indian may be given United States Citizenship without reference to the question of land tenure or the place of his residence" (U.S. House of Representatives, Report No. 222, 1924). In other words, Indians would not have to give up being Indian in exchange for citizenship; an Indian could be an enrolled member of a tribe, live on a federally recognized reservation, practice his or her own culture, and still be a U.S. citizen. Not every Indian welcomed the unilateral extension of citizenship, but at least they were not required to abandon their culture and homeland. The Indian Citizenship Act became law on June 24, 1924.

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Citizenship for all Indian people did not automatically create the right to vote for Indians. In the congressional debate over the bill, the following exchange took place on the floor of the House of Representatives:

> Mr. Garrett of Tennessee: I would like very much to have the gentleman's construction of the meaning of this matter as applied to State laws that will be affected by this act; that is, the question of suffrage.
>
> Mr. Snyder: I would be glad to tell the gentleman that, in the investigation of this matter, that question was thoroughly looked into and the laws were examined, and it is not the intention of this law to have any effect upon the suffrage qualifications in any State. In other words, in the State of New Mexico, my understanding is that in order to vote a person must be a taxpayer, and it is in no way intended to affect any Indian in the country who would be unable to vote unless qualified under the State suffrage act. That is my understanding. . . .
>
> Mr. Garrett: . . . the principal thing I wanted to ask about was with regard to suffrage rights. It is the construction, then, of the chairman of the committee, and speaking for the committee, that this in no way affects the suffrage rights under State laws.
>
> Mr. Snyder: That is the understanding of the chairman of the committee, and he is carrying to the House that understanding, after careful consideration on that particular question, by a unanimous vote of the committee. (*Congressional Record* 1924, 9303–4)

Not everyone interpreted the Indian Citizenship Act in that manner. The Indian Bureau made the assumption that citizenship equaled enfranchisement. In 1928, the U.S. Department of the Interior issued an optimistic statement regarding Indian voting:

> Two-thirds of the Indians of the United States had acquired citizenship in one way or another prior to 1924. That year Congress passed a law which gave citizenship to all native-born Indians. The franchise was so newly granted that no great use was made of it in the election of 1924. The election of this year is the first general election at which American Indians will have a fair chance to exercise the franchise.

The Department of the Interior clearly did not anticipate the opposition to Indian voting that would be expressed in a number of western states.

The confusion and conflict concerning Indian policy at that time were due in large part to the fact that the nation had not yet decided to allow Indians to remain a separate and politically distinct part of the populace. To many people, Indians were the "vanishing Americans" who would soon be engulfed by the dominant culture. The "Indian problem," as it was termed, was simply a matter of deciding on the most effective means of ridding the nation of the remnants of these formerly independent societies. But at the same time, an alternative view was gaining ground; according to that approach, Indians were here to stay, and the

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best way to accommodate that reality was to recognize tribal governments, honor treaty rights, and give Indians access to the political process so that they could protect those rights. Rather than vanishing, the Indians would become voters. The 1934 Indian Reorganization Act was the pivot on which Indian policy changed from the first perspective to the second.

The passage of the Indian Citizenship Act marked the end of an era characterized by efforts to gradually obtain citizenship for American Indians. It did not, however, automatically bestow the franchise on Indians. To achieve that, Indians would have to overcome a panoply of state laws, constitutional clauses, and court decisions that blocked the way to Indian suffrage.

From Citizenship to Suffrage

The 1924 Indian Citizenship Act granted citizenship to Indians at the federal level, with the implication that they would also be considered citizens at the state and local levels. The 1934 Indian Reorganization Act recognized the legitimacy of tribal governments and permitted limited self-rule on reservations. Thus, Indians held a unique status of citizenship at four levels of government.

Some states, however, were not willing to accept Indians as equals, especially when it came to political rights. This was evidenced by numerous constitutional provisions, state laws, and court cases. In 1936 the attorney general of Colorado opined that Indians had no right to vote because they were not citizens of the state (Cohen 1942, 158). According to Peterson, as late as 1938, seven states "still refused to let Indians go to the polls" (Peterson 1957, 121). This situation finally began to change, along with many other dramatic social changes, because of World War II.

When the draft was instituted at the beginning of World War II, a Choctaw chief wrote to President Franklin Roosevelt: "[our] white friend[s] here say we are not allowed to vote. . . . If we are not citizens, will it be right for Choctaws to go to war"? (quoted in Bernstein 1991, 24). The answer turned out to be yes; Indians who were denied the right to vote were nevertheless expected to fight for their country. The 1947 report of the President's Committee on Civil Rights noted that "In past years, American Indians have also been denied the right to vote and other political rights in a number of states. . . . Protests against these legal bans on Indian suffrage in the Southwest have gained force with the return of Indian veterans to those states" (40). Indian veterans, returning home after service in World War II, played a pivotal role in fighting for the

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right to vote. By the end of the war, over 25,000 Indians were in military uniform – a larger proportion than that of any other ethnic group in the nation (Holm 1985, 153). Their attitude was summed up by a Navajo veteran: "We went to Hell and back for what? For the people back home in America to tell us we can't vote?" (Rawls 1996, 19). Clearly, the struggle for Indian suffrage would require more than a federal declaration of citizenship; it would require a concerted effort at all levels of government. The resistance to Indian voting ran deep and had a long history.

Limitations on Indian Voting

Official opposition to Indian voting goes back to the formative era of the nation and continues throughout its history. Several different strategies were used by states to prevent or limit Indian voting.

State Constitutions

Limitations on Indian voting were written into a number of state constitutions. In California, the writers of the state constitution in 1850 faced a special challenge

> . . . while California was not opposed to admitting true Mexicans to the suffrage, there was great opposition to giving the Indians any chance to vote. . . . The convention passed the burden on to the legislature. All white male citizens were to vote, including Mexicans . . . and the legislature was given the duty of excluding Indians in appropriate terms. (Porter 1918, 127)

The California legislature took the hint and limited the voting right to white citizens (Cohen 1942, 157). Other state constitutions withheld the right to vote from Indians not taxed. The constitutions of Idaho, New Mexico, and Washington contained such language (Cohen 1942, 158). The North Dakota Constitution restricted voting to "civilized persons of Indian descent who shall have severed their tribal relations" (Art. 2, Sec. 121). The South Dakota Constitution limited suffrage to citizens of the United States, which effectively excluded most Indians at that time (1889). Minnesota took a slightly different tack, granting the right to vote only to those Indians who had "adopted the language, customs, and habits of civilization" (Art. 7, Sec. 1).

The passage of the Fifteenth Amendment in 1870 barred states from limiting voting on account of race, so states had to find other ways to limit Indian voting. The following section examines six rationales used by states to prevent Indians from voting.

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