CHAPTER 8

PERSONAL RIGHTS AND LIBERTIES OF INDIANS

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SECTION 1. INTRODUCTION

To analyze the personal rights and liberties of Indians is to assume that Indians are persons. This proposition has not always been universally accepted. The first authoritative determination that Indians are human beings is to be found in the Bull *Sublimis Deus* of Pope Paul III, issued June 4, 1537. This Bull declared:

> The enemy of the human race, who opposes all good deeds in order to bring men to destruction, beholding

and envying this, invented a means never before heard of, by which he might hinder the. preaching of God's word of Salvation to the people: He inspired his satellites who, to please him, have not hesitated to publish abroad that the Indians of the West and the South, and other people of whom We have recent knowledge should be treated as dumb brutes created for our service, pretending that they are incapable of receiving the catholic faith.

We, who, though unworthy, exercise on-earth the power of our Lord and seek with all our might-to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we define and declare by these our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property ;-nor should they be in anyway enslaved ; should the contrary happen, it shall be null and of no effect.[1]

Despite this pronouncement, doubts as to the human character of Indians have persisted until fairly recently, particularly among those charged with the administration of Indian affairs. These doubts are reflected in the statement on "Policy and Administration of Indian Affairs" contained in the "'Report on Indians Taxed and Indians Not Taxed, at the Eleventh Census: 1890," which declares:

> An Indian is a person within the meaning of the laws of the United States This decision of Judge Dundy, of the United States district court for Nebraska, has not been reversed; still, by law and the Interior Department, the Indian is considered a ward of the nation and is so treated.[1a]

The doubts that have existed as to whether an Indian is a person or something less than a person have infected with uncertainty much of the discussion of Indian personal rights and liberties. Clear thinking on the subject has been sacrificed in the effort to find ambiguous terms which will permit us, by appropriate juggling, to maintain three basic propositions:

(1) that Indians are human beings ;

(2) that all human beings are created equal, with certain inalienable rights ; and

(3) that Indians are an "inferior" class not entitled to these "inalienable rights."

Experience shows that it is possible to pay due deference to these three propositions, inconsistent though they are with each other, by means of a skillful juggling of words of many meanings, such as "wardship" and "incompetency."

In 1842, Attorney General Legare wrote :[1b]

> * * * There is nothing in the whole compass of our laws so anomalous-so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand towards this government, and those of the States (P. 76.)

Eight decades later, when the eminent jurist, Judge Cuthbert Pound, wrote of "Nationals without a Nation." [2] the anomalies attendant upon the legal status of. the Indian had not disappeared.

In part, the difficulties of the subject derive from the unique international relationship existing between the United States and Indian tribes, treated as "'domestic, dependent nations" with which we entered into treaties that continue in force to this day.

The complexity of the problem has been very much aggravated by the host of special treaties and special statutes assigning rights and obligations to the members of particular tribes, all of which creates a complex diversity that can be simplified only at the risk of ignoring facts and violating rights. Attempts have been made, of course, in *some* judicial opinions, as well as in less authoritative writings, to ride roughshod over the facts and to lay down certain simple rules of alleged universal applicability, most of which have turned out to be erroneous.

Whatever the causes of this confusion may be, the fact remains that erroneous notions on the legal. status of the Indian are widely prevalent? Large sections of our population still believe that Indians are not citizens, and recent instances have been reported of Indians being denied the right to vote because the electoral officials in charge were under the impression that Indians have never been made citizens. Indeed, some people have persuaded Indians themselves that they are not citizens and can achieve citizenship only by selling their land, by having the Indian Office abolished, or by performing some other act of benefit to those advisors who have volunteered aid in the achievement of American citizenship.

Another prevalent misconception is the notion that "ward Indians," whatever that term may mean, have no capacity at law to make contracts or to bring or defend law suits.

These are but two examples among a host of more or less widespread misconceptions that are woven about such terms as "'citizenship," "wardship," and "incompetency."

We shall be concerned in this chapter to analyze the legal position of the Indian with-respect to ten matters :

(a) Citizenship (sec. 2).
(b) Suffrage (sec. 3).
(c) Eligibility for public office and employment (sec. 4).
(d) Eligibility for state assistance (sec. 5).
(e) Right to sue (sec. 6).
(f) Right to contract (sec. 7).
(g) Incompetency (sec. 8).
(h) Wardship (sec. 9).
(i) Civil liberties (sec. 10).
(i) Status of freedmen and slaves (sec. 11).

[1] Translation from F. A. MacNutt, Bartholomew de Las Casas: His Life, His Apostolate, and His Writings (1909), pp. 429, 431.
[1a] H. Ft. Misc. Doc. No. 340, 52d Cong., 1st sess., part 15 (1894), p. 64.
[1b] 4 Op. A. G. 75 (1842).
[2] (1922), 22 Col. L. Rev. 97.
*OP. Sol., I. D., M.28869, February 13. 1937.

SECTION 2. CITIZENSHIP

Since June 2, 1924, all Indians born within the territorial limits of the United States have been citizens, by virtue of the act of that date.[4] This act provides:

> That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

The substance of this section was incorporated in the Nationality Act of October 14, 1940.[4a]

Prior to the Citizenship Act of 1924 approximately two-thirds of the Indians of the United States had already acquired citizenship in one or more of the following ways:

(a) Treaties with Indian tribes.

(b) Special statutes, naturalizing named tribes or individuals.

(c) General statutes naturalizing Indians who took allotments.

(d) General statutes naturalizing other special classes.

A brief analysis of each of these methods of acquiring citizenship may suffice to explain those current misconceptions on the subject of Indian citizenship which are a survival of what was once actual law.

A. METHODS OF ACQUIRING CITIZENSHIP

(1) Treaties with Indian tribes.—Some early treaties between the United States and Indian tribes provided for the granting of citizenship.[5] In some eases, citizenship was made dependent upon acceptance of an allotment of land in severalty,[6] and sometimes the alternative to accepting an allotment was removal with the tribe to a new reservation.[7]

Implicit in this arrangement was the thought that citizenship was incompatible with continued participation in tribal government or tribal property. This supposed incompatibility, removed from its specific treaty context and generalized, has become one of the most fruitful sources of contemporary confusion on the question of Indian citizenship.

The later treaties usually require the submission of evidence of fitness for citizenship, and empower an administrative body or official to determine whether the applicant for citizenship conforms to the standards in the treaty. To illustrate, the Treaty of November 15, 1861,[8] with the Pottawatomies, requires the President of the United States to be satisfied that the male heads of families are "sufficiently intelligent and prudent to conduct their affairs and interests," and the Treaty of February 23, 1867,[9] forbids tribal membership to Wyandottes who had consented to become citizens under a prior treaty, unless they were found "unfit for the responsibilities of citizenship." [10]

(2) Special statutes.—Before and after the termination of the treaty-making period, the members of several tribes were naturalized collectively by statute.[11] The tribe was in a few cases dissolved at the same the and its land distributed to the members.[12] Sometimes other conditions were embodied in the statute, such as adopting the habits of civilized life, becoming self-supporting, and learning to read and speak the English language.[13]

After the ratification of the Fourteenth Amendment, several acts were passed naturalizing Indians of certain tribes. Most of these statutes were similar to the Act of July 15, 1870.[14] By section 10 of this law a Winnebago Indian in the State of Minnesota could apply to the Federal District Court for citizenship. He was required to prove to the satisfaction of the court that he was sufficiently intelligent and prudent to control his affairs

[4] 43 Stat. 253, 8 U. S. C. 3. This act naturalized 125,000 native-born Indians. Rice, The Position of the American Indian In the Law of the United States (1934), 16 J. Comp. Leg. 78, 86; Ron. Hubert Work, Secretary of the Interior, Indian Policies: Comments on Resolutions of the Advisory Council on Indian Affairs (U. S. Govt. Printing Office 1924, p. 6); *cf.* Fifty-fifth Annual Report of Board of Indian Commissioners (1924) pp. 1 and 2. On the legislative history of this act, see Chapter 4, sec. 15.

[4a] Pub. No. 853, 76th Cong., sec. 201 of which declares:

> The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.

[5] Treaty of September 27, 1830, with Choctaws, Art. 14, 7 Stat. 333, 335. For illustrations of treaties conferring citizenship on heads of families, see Treaty of July 8, 1817, with Cherokees, Art. 8, 7 Stat. 156, 159; Treaty of February 27, 1819, with Cherokees, Art. 2, 7 Stat. 195, 196.

[6] Treaty of June 28, 1862, with Kickapoos, Art. 3, 13 Stat. 623, 624; Treaty of July 4, 1866, with Delawares, Arts. 3 and 9, 14 Stat. 793, 794, 796. Treaty of February 23, 1867, with Senecas and others, Art. 13, 15 Stat. 513, 516, interpreted in *Wiggan* v. Connolly, 163 U. S. 56 (1896); Treaty of February 27, 1867, with Pottawatomies, Art. 6, 15 Stat. 531–533; Treaty of April 29, et *seq.*, 1868, with Sioux, Art. 6, 15 Stat. 635, 637. Act of March 3, 1873, 17 Stat. 631 (Miamies). Also see Appropriation Act to effectuate this provision, Act of June 22, 1874, 18 Stat. 146–175; and 2 Op. A. G. 462 (1831). It was hoped to eliminate reservations and to cause the disintegration of the tribe. Varney, The Indian Remnant in New England (1901), 13 Green Bag 399, 401–402; Thayer, A People Without Law (1891), 68 Atl. Month. 540, 546–547; Kyle, How Shall the Indians Be Educated (1894), 159 N. A. Rev. 434; Krieger, Principles of the Indian Law and the Act of June 18, 1934 (1935), 3 Geo. Wash. L. Rev. 279, 295; United States v. *Rickert*, 188 *U. S. 432, 437* (1903); *Choteau* v. Burner, 283 U. S. 691 (1931); *Oakes* v. *United States*, *172* Fed. 305 (C. C. A. 8, 1909).

[7] Treaty of September 27, 1830, with Choctaws, Arts. 14 and 16, 7 Stat. *333, 335-336.*

[8] Art. 3, 12 Stat. 1191, 1192.

[9] Art. 13, 15 Stat. 513, 516 (Senecas and others); also see Arts. 17, 28, 34 for other provisions regarding citizenship.

[10] Also see Treaty of July 4, 1866, with Delawares, Arts. 3 and 9, 14 Stat. 793, 794, 796; Act of March 3, 1873, 17 Stat. 631 (Miamies). Unusual provisions are contained in the Treaty of February 27, 1867, with Pottawatomies, Arts. 4 and 6, 15 Stat. 531–533, which permits women who are heads of families or single women of adult age to become citizens in the same manner as males, and authorizes the Tribal Business Committee and the agent to determine the competency of an Indian to manage his own affairs. By the Treaty of June 24, 1862, Art. 4, 12 Stat. 1237, 1238, the Ottawa tribe, which was to be dissolved after 5 years, was given money to assist the members in establishing themselves in agricultural pursuits and thus gradually increase their preparation for assuming the responsibilities and duties of citizenship. *Also* see Treaty of July 31, 1855, with Ottowas and Chippewas, Art. 5, 11 Stat. 621.

[11] Act of March 3, 1839, 5 Stat. 349, 351 (Brothertown); Act of March 3, 1843, sec. 7, 5 Stat. 645, 647 (Stockbridge); Act of March 3, 1921, sec. 3, 41 Stat. 1249, 1250 (Osage). The right of the Cherokees to be naturalized was discussed in *Raymond* v. *Raymond*, 1 Ind. T. 334 (1896), reversed in *83* Fed. 721 (C. C. A. 8, 1897).

[12] Act of March 3, 1839, sec. 7, 5 Stat. 349, 351 (Brothertown); Act of March 3, 1843, sec. 7, 5 Stat. 645, 647 (Stockbridge).

[13] Act of March 3, 1865, sec. 4, 13 Stat. 541, 562, discussed in *Oakes* v. *United States*, 172 Fed. 305 (C. C. A. 8, 1909); Act of August 6, 1846, 9 Stat. 55 (Stockbridge).

[14] Sec. 10, 16 Stat. 335, 361-362. By the Act of March 3, 1873, sec. 3, 17 Stat. 631, 632, similar provision was made for the naturalization of adult members of any of the Miami Tribe of Kansas and their minor children.

and interests; that he had adopted the habits of civilized life and for the preceding 5 years supported himself and his family. If satisfied with the proof, the court would declare him a citizen and give him a certificate, which would enable the Secretary Of the Interior to issue a patent in fee with powers of alienation of the land already held by the Indian in severalty and to pay to him his share of tribal property.^15 Thenceforth, the Indian ceased to be a member of the. tribe and his land was subject to levy, taxation and sale the same as that of other citizens. Again, the statutory formula seems to rest on the assumed incompatability between tribal membership and United States citizenship.

The same idea underlay the Indian Territory Naturalization Act,[16] which provided :

> * * *. That any member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application as provided in the statutes of the United States * * *. Provided, That the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong

(3) General statutes naturalizing allottees.—Prior to the Citizenship Act, the General Allotment Act,[17] generally known as the Dawes Act, was the most important method of acquiring citizenship.[18] This law conferred citizenship upon two classes of Indians born within the limits of the United States:

> (1) An Indian to whom allotments were made in accordance with this act, or any law or treaty.
>
> (2) An Indian who had voluntarily taken up within said limits, residence separate and apart from any tribe of Indians therein and adopted the habits of civilized life.

President Theodore Roosevelt described this important law in his message to Congress of December 3, 1901, as "a mighty pulverizing engine to break up the tribal mass" whereby "some sixty thousand Indians have already become citizens of the United States." [19]

By an amendment adopted May 8, 1906,[20] known as the Burke Act, the Indian became a citizen after the patent in fee simple was granted instead of upon the completion of his allotment and the issuance of a trust patent.^21 It has been administratively, held that an. Indian to whom an allotment *was* made subsequent to the Burke Act is a citizen upon the issuance of a patent in fee for part of his allotment,[22] because the conveyance was also an adjudication that the Indian allottee is "competent and capable" to manage his own affairs.

The Supreme Court of the United States in the ease of *United States* v. *Celestine* [23] suggested "that Congress in granting full rights of citizenship to Indians, believed that, it had been too hasty." The purpose of the Burke Act was stated by the court in *the* case of *United States* v. *Pelican:* [24] distinctly to postpone to the expiration of the trust period the subjection of allottees under that act to state laws."

(4) General statutes naturalizing other classes of Indians.—Indian women marrying citizens became citizens by the Act of August 9, 1888,[25] and Indian men who enlisted, to fight in the World War could become citizens under the Act of November 6, 1919.^25

B. NONCITIZEN INDIANS

Until the Citizenship Act of 1924 those Indians who had not acquired citizenship by marriage to white men, by military service, by receipt of allotments, or through special treaties or. special statutes, occupied a peculiar status under Federal law. Not only were they noncitizens but they were barred from the ordinary processes of naturalization. open to foreigners. Such remained the status of Indians living in the United States who were born in Canada, Mexico, or other foreign lands, since the 1924 Act referred only to "Indians born within the territorial limits of the United States.^27

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[15] Beginning with the Act of March 3. 1865, sec. 4, 13 Stat. 541. 562. the statutes granting citizenship to Indians abandoning their tribal relationships safeguarded their rights in tribal property. Act of February 8, 1887, sec. 6, 24 Stat. 388. 390, 25 U. S. C. 349; amended by Act of May 8, 1906, 34 Stat. 182; Act of August 9, 1888, sec. 2, 25 Stat. 392, 25 U. S. C. 182: also see *Oakes* v. *United States,* 172 Fed. 305, 308-309 (C. C. A 8. 1909); *United States ex rel. Besaw* v. *Work,* 6 F. 2d 694, 697 (App. D. C. 1925).

[16] Act of May 2, 1890. sec. 43. 26 Stat. 81. 99-100. This section also grants citizenship to the Confederated Peoria Indians. residing in the Quapaw Indian Agency, who accept land in severalty.

[17] Act of February 8, 1887. sec. 4, 24 Stat. 388, 389; amended, Act of February 28. 1891, 26 Stat. 794. For other allotment acts see Act of March 3, 1875, 18 Stat. 420; Act of March 3. 1921. 41 Stat. 1355 (Fort Belknap); see also Chapter 11. In the Act of June 4. 1924, 43 Stat. 376 (Cherokees of North Carolina), providing for the allotment of land, which was enacted after the Citizenship Act, there was a provision in accordance with the old formula that each allottee shall become a citizen of the United States and of the state where he resides, with all the privileges *of* citizenship (sec. 19, p. 380). The Act of January 25. 1929, c. 101, 45 Stat. 1094. stated that it was not the purpose of the former act to abridge or modify the Citizenship Act. Also see *Monson* v. *Simonson,* 231 U. S. 341 (1913); *United States* v. *Rickert,* 188 U. S. 432 (1903); 42 L. D. 489 (1913); 7 Yale L. J. 193 (1898). On policy of Osage Indian Allotment Act, Act of June 28, 1906, 34 Stat. 539, see *Levindale Lead Co.* v. *Coleman,* 241 U. S. 432 (1916) and Chapter 23. see. 12A.

[18] Senator Orville H. Platt of Connecticut wrote: "Modern observation and thought have reached the conclusion that allotment of land in severalty, and citizenship. are the indispensable conditions of Indian progress." Problems in the Indian Territory (1895), 160 N. Am. Rev. 195. 200. See also Thayer, A People Without Law (1891), 68 Atl. Month. 540. 676, 680. Usually the children of tribal members who elected citizenship received a smaller allotment. The Treaty *of* July 4. 1866. with the Delaware Indians. 14 Stat. 793, 796, contained an unusual provision permitting a child reaching majority to elect whether be desired to become a citizen.

The Act of June 22, 1874. 18 Stat. 146, 175. appropriated money to enable the Secretary of the Interior to pay to the children of the Delaware Indians who had become citizens of the United States their share of the tribal funds.

[19] 35 Congressional Record. Pt. 1, 57th Cong., 1st sess. (1901), p. 90. *Cf.* Kyle, How Shall the Indians be Educated7 (1894), 159 N. Am. Rev. 434. 437. According to Wise, Indian Law and Needed Reforms (1926), 12 A. B. A. Jour. 37, there were about 150,000 Indians holding tribal lands not yet allotted.

[20] 34 Stat. 182.

[21] "This change was due largely to a misunderstanding as to the real legal significance. At that time it was the belief that wardship and citizenship were incompatible." Flickinger, A Lawyer Looks at the American Indian, Past and Present. (1939), 6 Indians at Work, No. 8, pp. 24. 26.

"Op. Sol. I. D., M.4018, July 29. 1921.

[22] 215 U. S. 278, 291 (1909).

[23] 232 U. S. 442, 450 (1914).

[24] Sec. 2, 25 Stat. 392, 25 U. S. C. 182.

[25] 41 Stat. 350. This measure was endorsed by the Commissioner of Indian Affairs. Only a few Indians acquired citizenship in this way. Annual Reports of Commissioner of Indian Affairs (1920). pp. 10–11; (1921). p. 33. *Cf.* special provision relating to honorably discharged alien veterans of foreign birth, Act of July 19, 1919, 41 Stat. 163, 222.

[26] See *Morrison* v. California. 291 U. S. 82, 95 (1934). This restriction was eliminated by sec. 303 of the Nationality Act of October 14. 1940 (Public No. 853. 76th Cong.), which declares :

> The right to become a naturalized citizen under the provisions of this Act shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere.

The naturalization laws applied only to free white persons and did not include Indians,[28] who were regarded as. domestic subjects or nationals.[29] As members of domestic dependent nations, owing allegiance to their tribe, they were analogized to children of foreign diplomats, born in the United States.[30]

Thus noncitizen Indians were not able to secure passports, but were sometimes granted documents specifying that they were not citizens but requesting protection for them.[31]

Caleb Cushing, Attorney General. of the United States, formulated the following theory of the status of Indians: [32]

> The fact, therefore, that Indians are born in the country does not make them citizens of the United States.
>
> The simple truth is plain, that the Indians are the subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States.
>
> * * * * *
>
> But they cannot become citizens by naturalization under existing general acts' of Congress. (ii Kent's Com., p. 72.)
>
> Those acts apply only to *foreigners*, subjects of another allegiance. The Indians are not foreigners, and they are in our allegiance, without being *citizens* of the United States. Moreover, those acts only apply to "white" men.
>
> * * * * *
>
> Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress. (Pp. 749–750.)

This theory was reiterated after the adoption of the Fourteenth Amendment, which first defined federal citizenship. At the time of its adoption, eminent lawyers differed on its effect on the Indians.[33] Hope that a liberal interpretation would make Indians citizens was shattered by an early case,[34] holding that the amendment was merely declaratory of the common-law rule of citizenship by birth and that Indians born in tribal allegiance were not born in the United States and subject to the jurisdiction thereof, because :

> To be a. citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience. * * * But the Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States. (Pp. 165, 166.)

This view was sustained by two leading naturalization opinions of the Supreme Court of the United States, the holding of *Elk* v. *Wilkins*,[35] and the dicta of *United States* v. *Wong Kim Ark*,[36] which excepted from its doctrine of citizenship by birth "children of Indian tribes owing direct allegiance to their several tribes."

Other theories have been advanced as additional justification for this unique status of the Indians, which departed from the common-law doctrine of *ius soli*.[37] One writer [38] believes that the economic interests of the land grabbers and Indian traders caused their opposition to citizenship for the Indians. They feared the destruction of their business with the coming of Indian suffrage, which was expected to accompany citizenship. Other writers maintained that citizenship should be denied Indians because they were strangers to our laws, customs, and privileges,[39] because they would add to burdens imposed by naturalization of aliens,[40] and because they enjoyed special privileges, such as exemption from taxation.[41]

The Indian question, which had been overshadowed.-after the Civil War by discussion of the economic welfare, freedom, and citizenship of the Negro, became a live issue toward the close of the nineteenth century. Many writers realized the incongruity of disenfranchisement and. noncitizenship of Indians in a country founded on the principle of the equality of man and agreed that "the ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants." [42]

The Indians, however, frequently did not welcome federal citizenship; [43] they often chose to leave their homes in order to retain their tribal membership.^44 A report of, the Bureau of Municipal Research submitted in 1915 to a Joint Commission of Congress which requested its preparation, stated that "the Indian (except in rare individual cases) does not desire citizenship." [45]

The delegates of the Five Civilized Tribes opposed the grant of federal citizenship to their people because they feared it would terminate their tribal government.^46 Indians were often un-

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[28] An Indian was not regarded as "a white person" within the naturalization laws. In *re Camille*, 6 Fed. 256 (C. C. Ore. 1880) ; *In re* Burton, 1 Alaska 111 (1900) : 13 Yale L. J. 250, 252 (1904). In 1870 these laws were extended to include aliens of African nativity and to persons of African descent, Act of July 14, 1570. sec. 7, 16 Stat. 254, 255.

[29] 7 Op. A. G. 746 (1856).

[30] Pound, Nationals Without a Nation (1922). 22 Col. L. Rev. 97, 99 ; *Elk* v. *Wilkins*, 112 U. S. 94, 102 (1884) ; *cf. United States* v. *Elm*, 25 Fed. Cas. No. 15045 (D. C. N. D. N. Y., 1877).

[31] Hunt, The American Passport (1898). pp. 146–148. Manuscript instructions of the Department of State provided :

> Even if he [an Indian) has not acquired citizenship, he is a ward of the Government and entitled to the consideration and assistance of our diplomatic and consular officers. (P. 147.)

^327 Op. A. G. 746 (1856).

[32] To clarify its effect. the Senate Judiciary Committee filed a report pursuant to Senate Resolution of April 7. 1870, concluding that the Indians did not attain citizenship by the Fourteenth Amendment; Sen. Rept. *No. 268*, 41st Cong., 3d sess. (1870), pp. 1-11.

[34] *McKay* v. Campbell, 16 Fed. Cas. No. 8840 (D. C. Ore. 1871).

[35] 112 U. S. 94 (1884). The Court also held that citizenship was not acquired by abandonment of tribal membership. *Also see United States* v. *Osborn*, *2 Fed. 58* (D. C. Ore. 1880). . On the effect of tribal membership upon citizenship see *Katzenmeyer* v. *United States*, 225 Fed. 523 (C. C. A. 7, 1915).

[36] 169 U. S. 649, 693 (1898).

[37] Krieger, Principles of the Indian Law and the Act of June 18, 1934 (1935). 3 Geo. Wash. L. Rev. 279, 282-283.

[38] Abel, The Slaveholding Indians (1915). vol. 1, p. 170.

[39] Russell, The Indian Before the Law. (1909), 18 Yale L. J. 328 ; Canfield, Legal Position of the Indian (1881), 15 Am. L. Rev. 21, 27-28. 37: *cf.* Lambertson, Indian Citizenship (1886), 20 Am. L. Rev. 183, 189; Harsha, Law for the Indians (1882), 134 N. Am. Rev. 272, 277 : Blackmar, Indian Education (1892). 2 Am. Acad. Pol. & Soc. Sci. 813, 833; *Labadie* v. United *States*, 6 Okla. 400, 51 Pac. 666 (1897).

[40] Krieger, Principles of the Indian Law and the Act of June 18. 1934 (1935). 3 Geo. Wash. L. Rev. 279. 286 ; Lambertson, Indian Citizenship (1886), 20 Am. L. Rev. 183. 187-189.

[41] Lambertson, Indian Citizenship, 20 Am. L. Rev. (1886). 183, 188. For a discussion of the discrimination against Indians because of exemption from taxation. see sec. 10 ; on tax exemption generally, see Chapter 13.

[42] Abbot, Indians and the Law (1888). 2 Harv. L. Rev. 167. 174. Also see Harsha, Law for the Indians (1882). 134 N. A. Rev. 272 ; Blackmar, Indian Education (1892), 2 Am. Acad. Pol. & Soc. Sci. 813, 834. U. S. Senator J. H. Kyle contended that the Indians have a good character for citizenship. How Shall the Indians be Educated? (1894), 159 N. A. Rev. 434. 441. *Contra* Canfield, Legal Position of the Indian (1881), 15 Am. L. Rev. 21. 36-37.

[43] Leupp, The Indian and His Problem (1910). p. 35. Sometimes Indians were made citizens willy-nilly. Willoughby, The Constitutional Law of the United States (1929). pp. 390-391.

[44] See Chapter 3. secs. 4E. 4G.

[45] Administration of the Indian Office (Bureau of Municipal Research Publication *no. 65)* (1915). p. 17.

^46Memorial relating to the Indians, Choctaw delegates. Sen. Misc. Doc. No. 7, 45th Cong., 2d sess., December 10. 1877, vol. I; Memorial against bill to enable Indians to become citizens. Sen. Misc. Doc. No. 18. 45th Cong., 2d sess., January 14, 1577. vol. I. The Five Civilized Tribes were excluded from the General Allotment Act of February 8, 1887 secs. 6 and 8. 24 Stat. 388, 390, 391.

familiar with the significance of federal citizenship and sometimes recanted choosing it.[47]

C. EFFECT OF CITIZENSHIP

Many people who know that Indians are citizens are unaware of the legal consequences of citizenship.^48 The more common errors in this field may be disposed of briefly.

1. By virtue of the Fourteenth Amendment to the Federal Constitution, Indians, as citizens of the United States, automatically become citizens of the state of their residence.^49

2. Except when a special statute or treaty has provided otherwise, citizenship does not impair the force of tribal law[50] or affect tribal existence.^51 Statutes or treaties naturalizing Indians often expressly permit those who become citizens to retain their tribal rights.[52] Citizenship and tribal membership are not incompatible.[53]

3. Citizenship, though it is today usually a prerequisite of suffrage, does not confer the right%4 Before securing the franchise, a voter must comply with the requirements of the state law, which regularly include attainment of the age of majority and residence in the state for a specified period, and sometimes include payment of poll tax, literacy, or other special requirements.[54]

4. Citizenship is not incompatible with federal powers of guardianship.[55]

The United States Supreme Court has said:[57]

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it. (Pp. 391-392.)

Citizenship does not affect the rights of the United States Government over the Indian. It retains jurisdiction over a citizen Indian for offenses committed within the reservation.^58 Citizenship does not impair the government's right to sue on behalf of a citizen allottee to protect his restricted lands,[59] nor affect its power to prevent state taxation of his property while he is living on the reservation,[60] or to exercise control over tribal property,^61 or to exclude bill collectors from coming on the reservation on days when payments are made to the Indians,[62] or to exempt unrestricted property from levy, sale, or forfeiture.[63] Many rights, such as the right to sue or contract, are not derived from or dependent on citizenship.[64]

It has been held that the citizenship of the Pueblos and many of the Alaskan Indians did not terminate their subjection to federal jurisdiction.^65 The conferring of citizenship does not

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[47] This is shown by Art. 13 of the Treaty of February 23. 1867. with the Senecas and others, 15 Stat. 513. 516, which provides that a member who changes his mind after becoming a citizen shall not be allowed to rejoin the tribe unless the agent shall signify that he is "through poverty or incapacity, unfit to continue in the exercise of the responsibilities of citizenship of the United States. and likely to become a public charge."

[48] Op. Sol. I. D.. M.28869. February 13. 1937. p. 5. When the Citizenship Act was passed in 1924. many tax officials in New Mexico thought that all Indians were subject to taxation. Goodrich. The Legal Status of the California Indian (1926), 14 Calif. L. Rev. 83, 167. 180–181. On taxation of Indians. see Chapter 13.

[49] *Deere v. State of New York,* 22 F. 2d 851, 852 (D. C. N. D. N. Y. 1927). Also see *Porter v. Hall,* 34 Ariz. 308, 271 Pac. 411 (1928).

[50] *Yakima* Joe *v. To-is-lap,* 191 Fed. 516 (C. C. Ore. 1910). Also see Chapter 7.

[51] See *Cherokee Nation* v. *Hitchcock,* 187 U. *S. 294, 308* (1902); *United States* v. *Celestine,* 215 U. *S. 278.* 288–290 (1909); *Hallowell* v. *United States,* 221 U. S. 317, 324 (1911); *Tiger* v. Western *Investment* Co., 221 U. S. 286 (1911); *United States* v. *Sandoval, 231* U. S. 28, *38* (1913); *United States* v. *Noble, 237* U. S. 74 (1915); *Williams* v. *Johnson, 239* U. S. 414 (1915); *United States* v. Nice, 241 U. S. 591 (1916); *Winton* v. *Amos, 255* U. S. 373 (1921). Also see Knoepfler, Legal Status *of* American Indian and His Property (1922). 7 Ia. L. B. 232. 240–241; and Chapter 14. sec. 2.

[52] Act of May *2, 1890.* sec. *43. 26* Stat. 81, 99, provides *for* the naturalization of the Indian tribes in the Indian Territory and states that Indians *who* become citizens retain their rights as tribal members.

[53] *United States* v. *Nice,* 241 U. S. 591 (1916); *Halbert* v. *United States,* 283 U. S. 753, 762-763 (1931). rev'g *United States v. Halbert,* 38 F. 2d 795 (C. C. A. 9, 1930). cert. granted 282 U. S. 818; *United States* v. *Boylan,* 265 Fed. 165, 171 (C. C. A. 2, 1920). aff'g 256 Fed. 468 (D. C. N. D. N. Y. 1919). app. dism. 257 U. S. 614 (1921); *Farrell* v. *United States,* 110 Fed. 942 (C. C. A. 8, 1901).

[54] See sec. 3, *infra.* Also see Act of June 19, 1930, 46 Stat. 787, 8 U. S. C. 3a (Cherokee Indians resident in North Carolina).

[55] See *United States* v. *Rickert,* 188 U. S. 432. 445 (1903); 8 Op. A. G. 300 (1857). In some states citizenship is the only qualification. Calif. Const. (1879), Art. II, sec. 1, "Every native citizen of the United States . . . shall be entitled to vote at all elections . . .

[56] The contrary opinion of the United States Supreme Court in Matter of Heff, 197 U. S. 488 (1905) holding that Congress could not regulate the sale of liquor to Indians who were citizens was expressly overruled by *United States* v. Nice, 241 U. S. 591. 598 (1916), which held:

> . . . Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

Bledsoe, Indian Land Laws, 2d ed. (1913). though recognizing that citizenship does not remove the restrictions on allotments. pp. 34-36. does not share this view. pp. 3-33.

[57] See Op. Sol. I. D.. M.28869, February 13. 1937. p. 5; 20 L. D. 157. 159 (1895); 31 L. D. 439 (1902). and 55 I. D. 14, 20 (1934). In rejecting a claim by courts of the State of New York to jurisdiction over certain Indians for acts committed on an Indian reservation, the court in *United States* v. *Boylan, 265 Fed* 165 (C. *C. A. 2, 1920).* aff'g. *256* Fed. 468 (D. C. N. D. N. Y. 1919). app. dism. 257 U. S. 614 (1921), said:

> . . . even a grant of citizenship does not terminate the tribal status or relieve the Indian from the guardianship of the government. (P. 171.)

accord: *United States* v. *Abrams,* 194 Fed. 82 (C. C. A. 8. 1912). aff'g 181 Fed. 847 (C. C. E. D. Okla., 1910); United *States* v. *Noble. 237* U. S. *74, 79 (1915); Hallowell V. United States, 221* U. S. 317 (1911). Also see *Williams* v. *Johnson, 239* U. S. 414 (1915); *United States* v. *Sandoval,* 231 U. S. 28, 48 (1913). rev'g 198 Fed. 539 (D. C. N. M. 1912); *Farrell* v. *United States,* 110 Fed. 942 (C. C. A. 8. 1901); *Renfrow* v. *United States, 3* Okla. 161, 41 Pac. 88 (1895). The last sentence of the Citizenship Act clearly shows the congressional intention to continue federal trusteeship despite the conferring of citizenship. Butte. The Legal Status of the American Indian (1912), p. 17. criticizes the dual relationship of citizenship and wardship.

[58] *Winton v. Amos, 255* U. S. 373 (1921).

[59] Chapter 18. Also see *United States* v. *Celestine, 215* U. S. 278 (1909).

[60] *Bowling* v. *United States, 233* U. S. 528 (1914). aff'g 191 Fed. 19 *(C. C A. 8.1911): United States* v. *Sherburne Mercantile Co., 68* F. 2d 155 (C. C A. 9. 1933). Also see Chapter 19, sec. 2A(1).

[61] See Chapter 13. sec. 3.

[62] *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294. 308 (1902).

[63] *Rainbow* v. *Young,* 161 Fed. 835 (C. C. A. 3, 1908). rev'g. 154 Fed. 489.

[64] The Congressional intent must be clear. *Goudy v. Meath, 203* U. S. 146 (1906).

[65] See secs. 6. 7. Exceptions to this rule are cases in the federal courts dependent upon diversity of citizenship.

[66] For discussion of the status of Pueblos of New Mexico, see Chapter 20; and of the Alaskan Indians. see Chapter 21.

"necessarily end the right or duty of. the United States to pass laws in their interest as a dependent people."[66]

5. Citizenship is not inconsistent with restrictions on property and does not confer on incompetent persons, like minors, the right to control or dispose of their property.^67

Although prior to the Citizenship Act[68] Indian citizenship was often associated with the possession of unrestricted property, there is no intrinsic relation between the two. It does not detract from the dignity or value of citizenship when a person possessed of an estate is deprived of the right of alienation.^69

[66] *Hallowell* v. *United States,* 221 U. S. 317, 324 (1911). Even though the members of the Choctaw Nation were citizens of the United States and of the State of Mississippi, Congress by a series of acts from 1891 to 1908, cited in Houghton, The Legal Status of Indian Suffrage in the United States (1931), 19 Calif. L. Rev. 507, 515, fn. 39, rescued them from destitution, removed them to the Indian Territory, and equipped them with tools and food to last for 6 months.

[67] *The Supreme Court* in *Tiger* v. *Western Investment Co.,* 221 U. S. 286 (1911), said:

> "The privileges and immunities of Federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property. The privileges and immunities of citizenship were said, in the *Slaughter-House Cases,* (16 Wall. 36, 76). to comprehend: "Protection by the Government with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole." (Pp. 315–316.)

Also see *Brader* v. *James,* 246 U. S. 88 (1918); *United States* v. *Nice,* 241 U. S. 591 (1916); *United States* v. *Logan,* 105 Fed. 240 (C. C. Ore. 1900); *United States* v. *Sandoval,* 231 U. S. 28 (1913), rev'g 198 Fed. 539 (D. C. N. M. 1912); *Beck* v. *Flournoy Live-Stock and Real Estate Co.,* 65 Fed. 30 (C. C. A. 8.1894). app. dism. 163 U. S. 686; Contra: *Territory of N. Mex.* v. *Delinquent Taxpayers,* 12 N. M. 139 (1904).

[68] Act of June 2. 1924, 43 Stat. 253. 8 U. S. C. 8.

[69] *Williams* v. *Steinmetz,* 16 Okla. 104, 82 Pac. 986 (1906); Meriam, Problem of Indian Administration (1928), p. 753.

SECTION 3. SUFFRAGE

In a democracy suffrage is the most basic civil right, since its exercise is the chief, means whereby other rights may be safeguarded.[70] The enfranchisement of the Indians has been a slow and is still an incomplete process In most states Indians meeting the ordinary suffrage requirements can and do vote. In some of the sparsely settled western states, where they ferm a large proportion of the population, their vote is of considerable importance in close primaries and elections.[71] While at first it was asserted that unscrupulous whites could edntrol the vote of the ignorant^72 many Indians are becoming h&asingly aware of their political power and responsibility, and are directing considerable attention to matters directly affecting them, such as tribal claims and water rights.^73

A. INDIAN DISENFRANCHISEMENT

The term "Indians not taxed" has been frequently used in statutes excluding Indians from voting. It appears in one of the two places in the original Constitution relating spechlcally to the Indians: viz, Article 1, section 2, which declares that Indians not taxed shall not be counted as "free persons" in determining the representations of any state in Congress or in computing direct taxes to be levied by the United States. This phrase is used in the Act of March 1, 1790, providing for the first census,[74] reappears in section 2 of the Fourteenth Amendment and the civil Rights Act of April 9, 1866,[75] declaring who shall be federal citizens, and was used to exclude Indians in the apportionment of representatives to a territorial or state legislature[76] or constitutional convention, or from participation in a referendum to determine whether the inhabitants of a territory desired statehood.[77]

Various state and federal laws enacted from the beginning of the nineteenth century to the early part of the twentieth disenfranchised "Indians not taxed," [78] or limited voters to white citizens.[79]

Though permitted to vote in their former country, Mexico, the California Indians were disenfranchised by the constitutional convention which established a government for the State of California.[80] In order to leave a loophole for compliance with the spirit of the Treaty of Guadalupe Hidalgo,[81] the new constitution [82] permitted the legislature, "by a two-thirds concurrent vote, to admit to the right of suffrage 'Indians, or the descendants of Indians, in such special cases as such a proportion of the legislative body may deem just. or proper.' " As was expected, the first legislature restricted the vote to white citizens.[83]

Some state constitutions and statutes still reflect early legal 'theory that "Indians not taxed," being generally identified as persons born subject to the jurisdiction of the tribe of which they are members, were not citizens of the United States. The clearest cases Of such racial discrimination are found in the constitutions of the States of Idaho.^84 New Mexico,[85] and Wash-

[70] See Thayer. A People Without Law (1891), 68 Atl. Month. 540 Pp. 676. 682. 686.

[71] "* * * where they are a substantial element of the population candidates fox state office have found it worth while to hold rallies and barbecues, Democratic, Republican and Progressive, on the reservations." (Goodrich. The Legal Status of the California Indian (1926). 14 Calif. L. Rev. 83. 157. 179.)

[72] Leupp. The Indian and His Problem (1910), pp. 35, 64; also see Pp. 358. 360.

[73] Meriam, Problem of Indian Administration (1928), pp. 756–757.

[74] 1 Stat. 101; also in subsequent census statutes. See Act of June 18. 1929, sec. 22, 46 Stat. 21. 26.

[75] Sec. 1. 14 stat. 27.

[76] "Act of June 19, 1878. 20 Stat. 178, 193; Act of March 3, 1887. sec. 22. 24 Stat. 635. 639 : Act of March 3. 1891, 26 Stat. 908, 930 : Act of July 16. 1894. 28 Stat. 107. For other terms of exclusion see Act of March 3. 1849, sec. 4, 9 Stat. 403, 404 : Act of September 9, 1850, 9 Stat. 446: Act of June 3. 1880. sec. 5. 21 Stat. 154

[77] Act of May 4, 1858, sec. 3, 11 Stat. 269, 271: Act of June 19, 1878, 20 Stat. 178. 193.

[78] See *United States* v. *Kagama,* 118 U. S. 375. 378 (1886); *Elk* v. *Wilkins,* 112 U. S. 94, 99 (1884); Act of June 16. 1906, sec. 25. 34 Stat. 267. 230. New Mexico still excludes Indians on this ground. This state was admitted to statehood under a special compact with the United States exempting Indian lands from taxation; and with a constitution excluding "Indians not taxed" from the electorate. New Mexico constitution, Art XII. sec. 1.

[79] Act of October 25. 1914, 3 Stat. 143: Act of March 2, 1819, sec. 4, 3 Stat. 489, 490 : Act of April 20. 1836, c. 54, sec. 5, 5 Stat. 10, 12; Act of March 2. 1861, sec. 5, 12 Stat. 209, 211; Act of May 3, 1887, sec. 22, 24 Stat. 635. 639. By the Act of February 28, 1861, sec. 5, 12 Stat. 172, 173. whites and citizens recognized by Treaty with Mexico were eligible to vote and bold office.

^80 Goodrich, The Legal Status of the California Indian (1926); 14 Calif. L. 'Rev., 83-99.

[81] Signed February 12. 1848, ratification exchanged May 12, 1848, Treaty proclaimed July 4. 1948, 9 Stat. 922, discussed in Chapter 25. sec. 3. See United *States* v. *Ritchie,* 17 How. 525 (1854).

[82] Goodrich, op. oft., p. 91.

[83] *Ibid.*

[84] Idaho Constitution. Art. 6. sec. 3. This restriction is applicable to "Indians not taxed," who have not severed their tribal relations and adopted the habits of civilization.

[85] Art. 7. Cf. Act of June 20. 1910. sec. 2, 36 Stat. 557. providing that the Constitution of New Mexico shall make no distinction in civil or political rights on account of race or color and shall not be repugnant to the Constitution of tbe United States and the Declaration Of Independence. Also Provision Fifth providing that the State shall not restrict the right of suffrage on account of race, color, or previous condition of servitude.

ington,[86] which deny the right to vote to "Indians not taxed," while granting the ballot to whites not taxed.

The laws of a few other states, though not specifically discriminating against Indians, are construed and applied so as to result in discrimination. In Arizona, Indians are denied the right to vote on the ground that they are within the provisions^87 denying suffrage to "persons under guardianship." [88] The law of South Dakota excludes from voting Indians who maintain tribal relations, but has not been enforced for many years.

The Attorney General of Colorado rendered an opinion on November 14, 1936, that Indians had no right to vote under Colorado law because they were not citizens, This ruling is clearly erroneous.[89] The Utah Attorney General, on January 23, 1937, held that Indians, residing on a reservation within the state were not residents and therefore not entitled to vote. This ruling conflicts with the opinion of the United States Supreme Court, holding that the land of an Indian reservation is part of the state within which the reservation is located.[90]

B. CONSTITUTIONAL PROTECTION OF INDIAN VOTING RIGHTS [91]

On March 30, 1870, the Fifteenth Amendment to the United States Constitution was adopted, providing:

> SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SEC. 2 The Congress shall have the power to enforce this article by appropriate legislation.

With the passage of the Citizenship Act in 1924, considerations of disability because of allegiance to a tribe became irrelevant to the question of citizenship. The provisions of state constitutions and statutes based on these considerations which would operate to exclude Indian citizens from voting are probably void under the Fifteenth Amendment.[92]

The year following the passage of the Civil Rights Act of 1870,[93] the United States District Court for Oregon stated [94] that an Indian * * * who is a citizen of the United States * * * cannot be excluded from this privilege [of voting] on the ground of being an Indian, as that would be to exclude him on account of race." (P. 166.) As was said by the United States Supreme Court in the case of *United States v. Reese*,[95]

> If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second Section of the amendment, Congress may enforce by "appropriate legislation." (P. 218.)

This doctrine was applied in the case of *Neal* v. *Delaware*,[96] which invalidated a provision of the Delaware Constitution restricting suffrage to the white race. The court declared:

> Beyond question the adoption of the Fifteenth Amendment had the effect. in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. (P. 389.)

These cases leave no doubt that, under the Fifteenth Amendment, Indians are protected against all legislation which discriminates against them in prescribing the qualifications of voters, and that it is immaterial whether the disenfranchisement is direct or indirect. This view does not conflict with the theory of *Elk* v. *Wilkins*, *supra*, which held simply that a noncitizen Indian might be disenfranchised by state legislation along with noncitizens of other races.

On January 26, 1938, the Solicitor of the Department of the Interior issued an opinion on the question of whether a. state can constitutionally deny the franchise to Indians. The opinion concluded:

> * * * I am of the opinion that the Fifteenth Amendment clearly prohibits any denial of the right to rote to Indians under circumstances in which non-Indians would be permitted to vote. The laws of Idaho. New Mexico, and Washington which would exclude Indians not taxed from voting in effect exclude citizens of one race from voting on grounds which are not applied to citizens of other races. For this reason I believe such laws are unconstitutional under the Fifteenth Amendment. Similarly, the laws of Idaho and South Dakota which would exclude Indians who maintain tribal relations from voting are believed to be unconstitutional as such laws exclude citizens from voting on grounds which apply only to one race.[97] (P. 8.)

Two Attorneys General of the State of Washington have ruled that the Indian disenfranchisement clause in the Constitution of Washington is invalid.[98]

The Attorney General of New York in 1928 rendered an opinion to the effect that Indians resident upon reservations in that state are entitled to vote the same as any other qualified citizen.[99]

Congress has implemented the provisions of the Fifteenth Amendment in various general and special statutes.

The Reconstruction Acts, providing for the admission of the Confederate states to the Union, prohibited these states from depriving of the right to vote any class of citizens of the United

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[86] *Art. 6.*

[87] Arizona Laws, 1933, Chapter 62.

[88] *Porter' v. Hall, 34 Ariz. 308, 271* Pac. 411 (1928); discussed by N. D. Houghton, The Legal Status of Indian Suffrage in the United States (1931). 19 Calif. L. Rev. 507, 509, 518. The decision was based on the ground that Indians living on the reservations are "persons under guardianship" and hence "wards of the national Government" within the meaning of the Constitution of the State of Arizona. This opinion appears to be based on an erroneous conception of the status of Indians, especially of the relationship of guardian and wards. See contra: *Swift* v. *Leach, 45 N.* D. 437. 178 N. *W.* 437 (1920). cited in the dissenting opinion in the *Porter case.* Also see sec. 9, *infra.*

[89] See discussion of citizenship, sec. 2. *supra.*

[90] *United States* v. *McBratney,* 104 U. S. 621 (1881).

[91] No attempt is made in this chapter to treat of the rights of Indians to vote in tribal elections. This subject has been covered in Chapter 7. It may be noted, however, that many of the Indian constitutions contain bills of rights. including guarantees of the right of suffrage. Thus. for example, the Constitution of the Blackfeet Tribe, approved December 13, 1935. provides: "Any member of the Blackfeet Tribe, twenty-one (21) years of age or over, shall be eligible to vote at any election when he or she presents himself or herself at a polling place within his or her voting district." (Art. VIII. sec. 1.)

"Op. Sol. I. D.. M.29596. January 26, 1938; *Guinn* v. United States, 238 U. S. 347 (1915). holding unconstitutional the grandfather clause in the Constitution of Oklahoma; *Myers* v. *Anderson,* 238 U. S. 368 (1915), invalidating a similar clause in a Maryland statute; and see *Nixon* v. *Herndon, 273* U. S. *536* (1927).

[92] Act of May 31. 1870, 16 Stat. 140.

[93] *McKay v. Campbell,* 16 Fed. Cas. No. 8840 (D. C. Ore. 1871).

[94] *McKay v. Campbell,* 16 Fed. Cas. No. 8840 (D. C. Ore. 1871).

[95] 92 U. S. 214 (1875).

[96] 103 U. s. 370 (1880).

[97] Op. Sol. I. D.. M.29596, January 26. 1938.

[98] Op. A. G.. *W.* V. Tanner, June 15, 1916, and Op. No. 4086 of G. *W.* Hamilton, April 1, 1936.

[99] Op. A. G. N. Y. (1928), p. 204. Informal opinions have also been rendered to the same effect by attorneys general of many other states. For example, the Attorney General of Florida in a letter dated March 13. 1923, to the Chairman of the County Commissioners. Everglades. Fla.

States who are entitled to vote under the Federal Constitution, dealing similarly with the right to hold office.[100] There are also many general civil rights laws which are applicable to the disenfranchisement of Indians because of their race. In 1906 the Enabling Act for the State of Oklahoma expressly permitted members of an Indian nation or tribe in the Indian Territory in Oklahoma to vote for delegates [101] and prohibited any law restricting the right of suffrage because of race or color.^102

[100] Act of January 26, 1870, 16 Stat. 62, 63; Act of February 23, 1870, 16 Stat; 67; Act of March 30, 1870, 16 Stat. 80.

[101] Act of June 16. 1906. see. 2, 34 Stat.. 267, 268; also see Act. of June 20, 1910, secs. 2 and 20, 36 Stat. 557, 559. 569 (N. M.).

[102] Act of June 16, 1906, sees. 2 and 3. 34 Stat. 267. *Cf.* sec. 25, p. 279. applying to New Mexico and permitting discrimination against "Indians not tarea."

SECTION 4. ELIGIBILITY FOR PUBLIC OFFICE AND EMPLOYMENT

A. PUBLIC OFFICE

The fact that one is an Indian is not, generally speaking, a disqualification for public office. Exclusionary statutes based on race are probably unconstitutional.[103] General Parker, a Seneca Indian, was qualified, according to an opinion of the Attorney General of the United States, to hold the office of the Commissioner of Indian Affairs.[104]

Many early statutes disqualified noncitizen Indians from holding public offices by limiting, incumbents to citizens of the United States [105] or to whites.^106 After the Civil War, the acts admitting the Confederate states to the Union prohibited the exclusion of elected officials because of race, color, or previous condition of servitude.[107] These acts were implemented by the Act of April 20, 1871.[108] A number of Indians were elected as delegates to the Constitutional Convention of the Territory of Oklahoma.[109] Nevertheless, even now a few states still bar Indians from public office, by provisions which are probably unconstitutional. Idaho [110] prohibits from holding any civil office Indians not taxed who have not severed their tribal relations and adopted the habits of civilization. The law of South Dakota excludes Indians "while maintaining tribal relations." [111]

B. PREFERENCE IN INDIAN AND OTHER GOVERNMENTAL SERVICE.

(1) Extent of employment.—Congress has frequently manifested its intention to grant preferences to Indians in certain positions. Unfortunately, many such preferential statutes have become "dead letters," or been only partially fulfilled.[112] Officials have sometimes justified their failures in this respect by maintaining the impossibility of securing competent Indians. especially for the more important positions.[112] Some critics have ascrlb& this failure to the fact that many positions, like that of Indian agent, were regarded for decades as political plums,[114] and that the Indian Office comprised one of the largest fields for political plunder in the Federal Government.[115]

Some notable increases in Indian employment have been eff+xi in recent years.[116] The number of Indians employed in the Washington office increased between 1934 and 1937 from 10 percent of the total staff to about 35 percent. By 1939 Indians occupied more than half of the regular positions of the Indian Service and more than 70 percent of the emergency positions.^117

(2) Civil service.-The Indian Office was One of the first bureaus to he placed under civil service.[118] Indians entering the Office of Indian Affairs were required to qualify in regular civil service examinations, except that certain preferences were allowed in compliance with statutes providing that Indians shall be empioyed whenever practicable. The formulation of a competitive civil service for Indians under authority of the Indian Reorganization Act is now in progress.[119] Standards have been established and examinations conducted for nurses and organization field agents, and a number of appointments have been made from the registers established as a result of these examinations. Executive Order No. 8043 of January 31, 1939, permits the appointment of Indians of one quarter or more Indian blood to any position in the Indian Service without examination.[120] By Executive Order No. 8383 of March 28, 1940, Indians in the Office

[103] See *Nixon* v. *Herndon*, 273 U. S. 536 (1927).

[104] 13 Op. A. G. 27 (1869). A later opinion held that an Indian. *while* a member of a tribe and subject to tribal jurisdiction and residing in the Indian Territory, was not competent to take the official oath as postmaster. The basis for this ruling was that the government could not enforce the required bond because the Indian would be immune to suit. 18 Op. A. G. 181 (1885).

[105] Act of September 9, 1850. sec. 6. 9 Stat. 446, 449; Act of May 30. 1854, see. 5, 10 Stat. 277, 279; Act of August 18, 1856, sec. 21, 11 Stat. 52, 60, provided that noncitizens holding office in the Department of State shall not be paid.

[106] Act of August 14, 1848. sec. 5. 9 Stat. 323. 325; Act of March 3, 1849, sec. 5, 9 Stat. 403. 405; Act of March 2. 1853, sec. 5, 10 Stat. 172. 174; Act of December 22. 1869, sec. 6. 16 Stat. 59.

[107] Act of March 30. 1870. 16 Stat. 80, 81, admitting Texas to the Union.

[108] Act of April 20. 1871. sec. 2, 17 Stat. 5.

[109] Leupp, The Indian and His Problem (1910), pp. 341-342.

[110] Constitution of Idaho, Art. 6, sec. 3.

[111] Compiled Laws of S. D.. sec. 92 (1929).

[112] *See 3 (b) infra.*

[113] "* * * the policy of all administrations since Commissioner Morgan took office has been to give educated Indians every practicable chance to serve their people; but * * * the experiment of putting them into the places of highest responsibility has. except in rare instances, not worked so successfully. * * *." Leupp, The Indian and His Problem (1910), p. 110. Also see Schmeckebier, The Office of Indian Affairs. Its History, Activities, and Organization (1927), Pp. 295-296. and 7 Indians at Work (September 1939), No. 1, p. 41.

[114] Leupp, The Indian and His Problem (1910). pp. 98–99.

[115] Administration of the Indian Office (Bureau of Municipal Research Publication No. 65) (1915), pp. 24–25.

[116] Annual Report of the Secretary of the Interior (1937), pp. 241–242. In 1910 there were about 200 Indians in the Office of Indian Affairs. Leupp, The Indian and His Problem (1910), p. 96.

The Annual Report of the Secretary of the Interior for 1938 states:

> On July 1. 1937. there were authorized in the Indian field service and Alaska 6,933 permanent year-round positions. On April 30. 1938. there were 3,916 Indians employed in the Indian Service, of whom 3,627 were in regular year-round positions. Approximately one-half of the regular employees of the Indian Service are Indians. Slightly more than 40 percent of the Indians employed are full-bloods. (P. XIV.)

Slightly more than 70 percent of the Indians employed were of one-half or more degrees Indian blood. (*Ibid.*, p. 257.) The personnel records do not classify as Indians those with a smaller amount Of Indian blood than one-fourth.

[117] Between July 1, 1933, and May 1, 1937, the number of Indians in the Washington office increased from 11 to 83. 4 Indians At Work, No. 20 (June 1, 1937). p. 39. According to data submitted by the Indian Office on November 7, 1939, 109 of the 384 employees of the Washington office were Indians.

[118] Administration of the Indian Office. (Bureau of Municipal Research Publication No. 65) (1915), p. 24.

[119] Aberle. Some Aspects of the Personnel Problem of the Indian Service in the United States in Indians of the United States, Contributions by the delegation of the United States First Inter-American Conference on Indian Life, Patzcuaro, Mexico, published by Office of Indian Affairs (April 1940). pp. 61. 64. Also see subsection 3(b) *infra.*

[120] There have been numerous Executive orders affecting the employment of Indians. *e. g.*, Executive orders of August 14, 1928; July 2, 1930; April 14. 1934; July 26. 1936.

of Indian Affairs on February 1, 1939, who met certain requirements were given a classified civil-service status.

(5) Treaties and statutes.-With a few exceptions. throughout the history of the United States Indians have generally been granted preference in the actual hiring of employees for public positions in the Indian, Service which require little or no skill or which, like the post of interpreter, can be filled only by them, or in the Army as scouts, because of their unusual qualifications,[121] or for laboring positions,[122] These positions, which. were often created by appropriation acts, usually paid low wages,[123] and were sometimes supported by tribal funds.[124] Similarly today most Indians in the Government Service are employed in clerical, stenographic, or laboring work, though a few hold supervisory positions.^125

(a) *Treaties.*—Treaties occasionally provided for preference in employment of Indians.[126] The Treaty of April 28, 1866,[127] between the United States and the Choctaw and Chickasaw Nations contains an interesting provision:

> And the United States agree that in the appointment of marshals and deputies, preference, qualifications being equal. shall be given to competent members of the said nations, the object being to create a laudable, ambition to acquire the experience necessary for political offices of importance in the respective nations.

(b) *General statutes.*—The Act of June 30, 1834, the first Important employment statute for Indians, gave them preference for positions as "interpreters or other persons employed for the benefit of the Indians," if "properly qualified for the execution of the duties." [128] Section 5 of the Act of March 3, 1875,[129] provided that "where Indians can perform the duties they shall be employed in Indian agencies. Again in the Act of March 1, 1883,[130] Congress manifested its desire to increase the employment of Indians in the Indian Service, by providing: "* * . preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies."

A broader provision, which also includes positions outside the Indian Bureau, appears in the General Allotment Act.[131] Offered as an additional inducement to the abandonment of tribal relations, it provides:

> • • • And hereafter in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

Seven years later a law provided for preference for "herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian service." [132]

Section 12 of the Wheeler-Howard Act,[133] the sixth major attempt in the space of a century, to give preference to Indians in the Indian Service, provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

This provision contemplates the establishment within the Interior Department of a special civil service for Indians alone. The failure of the Interior Department to complete such a system has been ascribed to lack of adequate appropriations.^134

(4) Statutes of limited application.-

(a) *Construction work on reservation.*—Agreements with Indian tribes [135] or statutes appropriating- money for the con-

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[121] For a discussion of the policy of preferring Indians for appointment In the Indian Service, see Meriam and Associates, Problem of Indian Administration (1928), pp. 156-159.

[122] Act of April 27, 1904, 33 Stat. 352. 354 (Crows), "• • • nothing herein contained shall be construed to prevent the employment of such engineers or other skilled employees, or to prevent the employment of white labor where it is impracticable for the Crows to perform tbe same." Also see Act of June 7. 1924. c. 318, 43 Stat, 606 (Navajo) : Act of March 1. 1926. 44 Stat. 135 (Quinaielts) : Act of April 19, 1926, 44 Stat. 303 (Quinaielts) : Act of July 3, 1926. 44 Stat. 888 (Chippewas) ; Act of May 12. 1928, c. 531, 45 Stat. 501 (Zuni) : Act of May 27. 1930. c. 343, 46 Stat. 430 (Wind River) ("only Indian labor shall be employed except for engineering and supervision") ; amended by Act of April 21, 1932, c. 123, 47 Stat. 88.

[123] Sec. 9 of the Act of June 30. 1834. 4 Stat. 735. provides that the pay of an agency Interpreter shall be $300 annually (congressional statutes regarding the Pay of interpreters are discussed in United *States* v. *Mitchell,* 109 U. S. 146 (1883)). while the Act of February 24, 1891. 26 Stat. 783, 784. provides for the employment of Indian scouts and guides without pay. In one of the treaties relating to the pensioning of Indians, the Treaty of September 27. 1830. with the Choctaws, Art. 21. 7 Stat. 333. 338. annual pensions of $25 were granted to a few surviving "Choctaw Warriors." not exceeding 20, "who marched and fought in the army with General Wayne." Provision was made for one of the few comparatively high-salaried Indians in the Treaty of August 7. 1790. unpublished treaty, Art. 3, Archives No. 17, which appoints McGillivray, Chief of the Creek Nation, as agent of the United States in said nation with the rank of brigadier general, and the annual salary of $1,200. Treaty of January 21. 1785. with the Wiandot, Delaware. Chippewa, and Ottawa Nations. 7 Stat. 16, Separate Article following Art. 10, which provides that two Delaware chiefs "who took up the hatchet" for the United States as lieutenant colonel and captain shall be restored to rank in the Delaware Nation as before the Revolutionary War. Also see Treaty of September 27. 1830, Art. 15. 7 Stat. 333. 335-336. providing that one chief of the Choctaw Nation when in military service shall receive the pay of a lieutenant colonel, and other chiefs the pay of majors and Captains in the United States Army.

[124] Act of April 27, 1904. 33 Stat. 352, 354 (Crows) ; Act of March 3. 1905. Art. IV. 33 Stat. 1016. 1017 (Shoshones) ; Act of June 7. 1924. 43 Stat. 606 (Navajos) : Act of March 1. 1926, c. 41. 44 Stat. 135 (Quinaielts) ; Act of April 19. 1926. c. 165. 44 Stat. 303 (Fort Peck and Blackfeet) ; Act of July 3, 1926, 44 Stat. 888 (Chippewas).

^125 Annual Report of the Secretary of the Interior (1937). p. 241.

^126 Article 11 of the Treaty of March 11. 1863. with the Chippewas, 12 Stat. 1249. 1251: "Whenever the services of laborers are required upon the reservation. preference shall be given to full or mixed bloods, if they shall be found competent to perform them" Also see Treaty of May 7. 1864. with the Chippewas. Art. 11. 13 Stat. 693: Article 13 of the Treaty Of October 21. 1867. with the Kiowas and Comanches. 15 Stat. 581. 585. provides: "The Indian agent. in employing a farmer blacksmith. miller. and other employees herein provided for. qualifications being equal. shall give the preference to Indians."

[127] Art. 8. cl. 12, 14 Stat. 769.

[128] Act of June 30. 1834. sec. 9. 4 Stat. 735. 737.

[129] 18 Stat. 402, 449.

[130] Sec. 6. 22 Stat. 432, 451.

[131] Act of February 8, 1887. sec. 5. 24 Stat. 388. 389-390. The Act of February 14. 1923. 42 Stat. 1246 (Piutes). extended the provisions of this act, as amended. to lands purchased for Indians.

[132] Act of August 15. 1894, sec. 10, 28 Stat. 286. 313. 25 U. S. C. 44. Also see Act of May 17, 1882. 22 Stat. 68. 88: Act of July 4. 1884. 23 Stat. 76. 97.

[133] June 18, 1934. sec. 12. 48 Stat 984. 986. 25 U. S. C. 472.

[134] 7 Indians at Work. No. 1, pp. 41-42 (1939) ; vol. 7. No. 5 p. 2 (1940).

[135] Act of June 10. 1896. Art. 3. 29 Stat. 321. 355: "It Is agreed that in the employment of all agency and school employees preference in all cases he given to Indians residing on the reservation. who are well qualified for such position." Also see Act of April 27, 1904, Art. 2 33 Stat. 352. 354 (Crows) ; Act of March 3, 1905. Art. 4. 33 Stat. 1016. 1017 (Shoshones).