very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen. (Pp. 383–384.)

Though state courts have justified the regulation of Indian tribes by the doctrine of state wardship,[200] it is settled that federal guardianship does not terminate with the admission of a state into the Union.[200] Although the power ascribed to wardship is not unlimited and is subject to constitutional restrictions,[200] the practical significance of the wardship concept in these cases is to justify certain types of legislation that would otherwise be held unconstitutional. There is thus not only an important difference but indeed a striking contrast between the use of the wardship concept in relation to Indian tribes and the use of the concept in private law. In private law, a guardian is subject to rigid court control in the administration of the ward's affairs and property. In constitutional law the guardianship relation has generally been invoked as a reason for *relaxing* court control over the action of the "guardian."[201]

C. WARDS AS INDIVIDUALS SUBJECT TO CONGRESSIONAL POWER

When Congress legislates with reference to tribal rights and duties it necessarily affects, indirectly, the rights and duties of the individual members of the tribes. Thus the courts, in holding that Congress had extraordinary powers over Indian tribes as "wards," were indirectly holding that Congress had extensive powers in dealing with the members of such tribes in matters affecting their tribal relations. The courts soon made this logical implication explicit and came to apply the term "wards" to individual Indians, signifying the susceptibility of individual Indians to an extraordinary measure of congressional control in matters affecting their tribal relations.[202]

The use of the concept of wardship to justify a very broad exercise of power is also exemplified by judicial utterances to the effect that state control is superseded because of federal wardship.[203]

D. WARDS AS SUBJECTS OF FEDERAL COURT JURISDICTION

The term "wards of the United States" has been applied to Indians in still a fourth sense, as equivalent to the phrase "subject to the jurisdiction of the federal courts."[204] Certain federal laws are, in terms, applicable only to Indians. By such laws, and by treaties, Indians have been subjected to federal court jurisdiction in many realms where non-Indians are amenable only to courts of the states. It would be foolish to quarrel with this use of the term "wardship" to express a jurisdictional relationship, but it is important to recognize that "wardship" in this sense has no necessary connection with the other senses of the term that have been examined. A group of individuals, whether identified by race or in any other manner, may be subjected to a particular set of laws administered by federal courts, and in this sense they might be considered "wards of the Federal Government." This might be the case even though the extent of constitutional power vested in Congress over the group in question were no greater than the extent of the power which Congress could exercise, but has not exercised, over other groups. Thus the fact that certain individuals are "wards" in the jurisdictional sense does not mean that they must be "wards" in the constitutional sense. Conversely, individuals may be "wards" in the constitutional sense, and yet if Congress has not actually exercised its powers over that group but has allowed them to be dealt with by the states, the individuals concerned would not be "wards" in the sense of "subjects of federal jurisdiction."

E. WARDS AS SUBJECTS OF ADMINISTRATIVE POWER

Still another distinct sense of the term "wardship" involves the concept of administrative power. To say that the United States has certain extraordinary powers over Indians is to say that the President and the Senate, by treaty, and that Congress, by statute, may exercise certain extraordinary powers over the Indians, powers which could not constitutionally be exercised over non-Indians generally, and it is to say that courts and administrators may thereupon enforce such measures. It is however, another thing entirely to say that administrators, in the absence of such laws or treaty provisions, may in their wisdom govern Indians by issuing and enforcing administrative regulations. There is, therefore, an important distinction between the concept of an Indian tribe or an individual Indian as a "ward of the United States" and the concept of an Indian tribe or individual as a "ward of the Interior Department." To identify these concepts is to identify the United States with a particular branch of its government and to assume that the powers of the Interior Department over the Indians, in the absence of treaty or statutory authorization, are as broad as the powers of Congress. The error of this assumption is ob-

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[200] For a case holding that the New York Indians are under the wardship of New York State, see *George* v. *Pierce*, 85 Misc. 105, 148 N. Y. Supp. 230 (1914). Also see *John* v. *Sabattis*, 69 Me. 473 (1879):

> The wandering and improvident habits of the remnants of Indian tribes within our borders led our legislature at an early period to make them, in a manner, the wards of the state, and especially to take the control and regulate the tenure of their lands. (P. 476.)

and *Moor* v. *Veazie*, 32 Me. 343 (1850), aff'd on other grounds, 55 U. S. 567 (1852):

> By the agreed statement it appears, that the Penobscot tribe of Indians "always have been, and now are under the jurisdiction and guardianship of this State." This tribe cannot, therefore, be one of those referred to in the constitution of the United States. (P. 368.)

Also see Minnesota Laws, 1925, chapter 291, p. 365; 13 Yale L. J. (1904) 250; Rice, *The Position of the American Indian in the Law of the United States*, 16 J. Comp. Leg. (1934), pp. 78–80, and memorandum filed by the Attorney General of the United States in *United States* v. *Hamilton*, 233 Fed. 685, 686–690 (D. C. W. D. N. Y. 1915).

[200] *United States* v. *Ramsey*, 271 U. S. 467 (1926); *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651 (1930).

[200] *Choate* v. *Trapp*, 224 U. S. 665 (1912). Also see Chapter 5 sec. 1.

[201] Consider the significance of the word "although" in the following sentence, referring to the Five Civilized Tribes, taken from the opinion of the Supreme Court in *Ex parte Webb*, 225 U. S. 663 (1912): "Although those tribes had long been treated more liberally than other Indians, they remained none the less wards of the Government, and in all respects subject to its control." (P. 684.)

[202] In *Elk* v. *Wilkins*, 112 U. S. 94, 106 (1884), the Court said:

> * * * But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of a state of pupilage, * * * is a question to be decided by the nation whose wards they are * * *.

5 Op. A. G. 36, 40 (1848):

> * * * The government deals directly not only with the tribe, but with the individuals of the tribe. It exercises a parental or guardian authority over them as a dependent people, in a state of pupilage. * * *

See also *United States* v. *Pelican*, 232 U. S. 442 (1914); 19 Op. A. G. 161, 165 (1888).

[203] *United States* v. *Kagama*, 118 U. S. 375, 383 (1886); *Ward* v. *Love County*, 253 U. S. 17 (1920); but see *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13 (1925). On the sharp difference of opinion among Indians on the question of termination of guardianship see Meriam, *op. cit.* pp. 100, 103.

[204] See *United States* v. *Thomas*, 151 U. S. 577, 585 (1894), and see Chapters 5, 6, 18 and 19.

vious and the implications of this error have elsewhere been analyzed.[305]

F. WARDS AS BENEFICIARIES OF A TRUST

The term "ward" has sometimes been loosely used as a synonym for "beneficiary of a trust" or "cestui que trust." Thus when land is held by the United States in trust for an Indian tribe or in trust for an individual or group of individuals, it is sometimes said that this creates a wardship relationship by virtue of which Indians are unable to alienate the land. The futility of this method of argument is shown by the fact that even where no trust relationship is found, and the land of an Indian tribe is vested in fee simple in the tribe itself, the land is nevertheless inalienable (except in certain special cases) by virtue of general federal legislation.[306] There is thus no practical justification for the use of the term "ward" as synonymous with "cestui que trust." Obviously property, real or personal, may be held in trust for a perfectly competent individual who is nobody's ward, and on the other hand perfect title to land or any other property may be vested in a lunatic or a minor whose every act is subject to a guardian's physical and legal control.

G. WARDS AS NONCITIZENS

Occasionally the term "ward Indian" has been used as synonymous with "noncitizen" Indian. This appears to be the case, for instance in the following sentence from the opinion of the Supreme Court (*per* Harlan, *J.*) in the case of *United States* v. *Rickert:*[307]

> * * * It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship.

The frequent confusion regarding the supposed incompatibility of the terms "wardship" and "citizenship" has already been discussed in this chapter. It has been seen that the extent of congressional power over Indians is not diminished by the grant of citizenship. As was said by the United States Supreme Court in *United States* v. *Waller*:[308]

> * * * The tribal Indians are wards of the Government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens *the relation of guardian and ward for some purposes* may continue. On the other hand, Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property or give to them a partial emancipation if it thinks that course better for their protection. *United States* v. *Nice*, 241 U. S. 591, 598, and cases cited. (Pp. 459–460.) [Italics added.]

H. WARDSHIP AND RESTRAINTS ON ALIENATION

The term "ward" has sometimes been applied to an Indian allottee who holds land subject to restraints upon alienation. According to this usage, when the Indian has received a fee patent, or has been adjudged "competent" to manage his own affairs and his property has been released from the protection of the Federal Government, he ceases to be a "ward." The distinction between this use of the term "ward" and the constitutional sense of the term discussed above becomes apparent in the situation in which Congress reimposes a restriction on alienation which has already expired. The individual allottee ceased to be a "ward," in the sense that he was freed from restrictions upon alienation, but the courts say that Congress can reimpose those restrictions because the Indian is a "ward" of the Federal Government.[309] It is obvious that in this situation the term "wardship" is being used in two distinct senses.

I. WARDSHIP AND INEQUALITY OF BARGAINING POWER

Doubtful clauses in treaties or agreements between the United States and Indian tribes have often been resolved by the courts in a nontechnical way, as the Indians would have understood the language and in their favor. The Supreme Court of the United States stated, *per* Justice Matthews, in the case of *Choctaw Nation* v. *United States:*[310]

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. (P. 28.)

The principle of construction in favor of the Indians is also applicable to congressional statutes.[311]

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[305] See Chapter 5, sec. 8. *Cf.* comment of court in *Ex parte Bi-a-lille*, 100 Pac. 450 (Ariz. 1909):

> Indians are not wards of the executive officers, but wards of the United States, acting through executive officers, it is true, but expressing its fostering will by legislation. (P. 451.)

[306] See Chapter 15, sec. 18; Chapter 20, sec. 7.

[307] 188 U. S. 432, 445 (1903).

[308] 243 U. S. 452, 459–60 (1917). In *United States* v. *Nice*, 241 U. S. 591 (1916), the court said:

> Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial. 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. (P. 598.)

Congress has the exclusive power to determine when guardianship shall terminate. *Tiger* v. *Western Investment Co.*, 221 U. S. 286 315 (1911). Accord: *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651, (1930); *Dewey County, S. D.* v. *United States*, 26 F. 2d 434 (C. C. A. 8, 1928), aff'g sub nom. *United States* v. *Dewey County, S. D.*, 14 F. 2d 784 (D. C. S. Dak. 1926), cert. den. 278 U. S. 649 (1928); *Katzenmeyer* v *United States*, 225 Fed. 523 (C. C. A. 7, 1915); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903). Also see Chapter 5.

[309] *Cf. Brader* v. *James*, 246 U. S. 88 (1918); *Tiger* v. *Western Investment Co.* 221 U. S. 286 (1911).

[310] 119 U. S. 1 (1886), rev'g 21 C. Cls. 59 (1886). Also see Chapter 3, sec. 2; *United States* v. *Seufert Bros. Co.*, 249 U. S. 194 (1919), aff'g sub nom. *United States ex rel. Williams* v. *Seufert Bros. Co.*, 233 Fed. 579 (D. C. Ore. 1916). "* * * there is no rule that the language of Congressional statutes giving rise to a controversy between the Indians and the states should likewise be construed in favor of the Indians." (Brown, The Taxation of Indian Property (1931), 15 Minn. L. Rev., pp. 182, 185, referring to *Goudy* v. *Meath*, 203 U. S. 146 (1906).) Justice Stone, while Attorney General, referred to the judicial "disinclination to invoke technical rules of law to the prejudice of Indian tribes or members thereof * * *." 34 Op. A. G. 202, 304 (1924).

[311] Legislation of Congress is to be construed in the interest of the Indian. *United States* v. *Celestine*, 215 U. S. 278, 290 (1909). *Red*

The Supreme Court has said: [812]

> But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases. (P. 675.)

The theory also helps to explain the rule of statutory construction, often recited but not always followed, that general acts of Congress do not apply to Indians, if their application would affect the Indians adversely,[813] unless congressional intent to include them is clear.[814]

It should be clear that the use of the terms "guardian" and "ward" in these cases has no necessary connection in the other senses in which the ward concept has been invoked.

J. WARDS AS SUBJECTS OF FEDERAL BOUNTY

The terms "wardship" and "guardianship" have been frequently used to convey the thought that Indians have a racial right to receive rations and other special favors of various sorts from the Federal Government. The error of this notion has been pointed out in other chapters,[815] and the fact that this notion does not logically follow from, or imply, any of the other senses of the terms discussed in the foregoing pages is too clear for argument.

Bird v. *United States*, 203 U. S. 76 (1906); 34 Op. A. G. 439, 444 (1925). *United States* v. *First National Bank*, 234 U. S. 245 (1914), aff'g 208 Fed. 988 (C. C. A. 8, 1913), excludes from this rule statutes having none of the features of an agreement. This decision is critized by R. C. Brown, The Taxation of Indian Property (1931), 15 Minn. L. Rev., pp. 182, 185, fn. 17. It is also a settled rule, the Supreme Court has said, "that as between the whites and the Indians the laws are to be construed most favorably to the latter." *Cherokee Intermarriage Cases*, 203 U. S. 76, 94 (1906).

[812] *Choate* v. *Trapp*, 224 U. S. 665 (1912); quoted with approval in *Blackbird* v. *Commissioner of Internal Revenue*, 28 F. 2d 978 (C. C. A. 10, 1930). Accord: *Gleason* v. *Wood*, 224 U. S. 679 (1912); *English* v. *Richardson, Treasurer of Tulsa County, Oklahoma*, 224 U. S. 680 (1912).

[813] *Ex parte Crow Dog*, 109 U. S. 556 (1883); 12 Op. A. G. 208 (1867). See *Lewellyn* v. *Colonial Trust Co.*, 275 U. S. 232 (1927). *Cf. McCandless* v. *United States ex rel. Diabo*, 25 F. 2d 71 (C. C. A. 3, 1928), aff'g sub nom. *United States ex rel. Diabo* v. *McCandless*, 18 F. 2d 282 (D. C. E. D. Pa. 1927); *United States* v. *Rickert*, 188 U. S. 432 (1903).

[814] *Cherokee Tobacco*, 11 Wall. 616 (1870), aff'g sub nom. *United States* v. *Tobacco Factory*, 28 Fed. Cas. No. 16,528 (D. C. W. D. Ark. 1870); *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188 (1876); 21 Op. A. G. 466 (1897); *Elk* v. *Wilkins*, 112 U. S. 94, 100 (1884).

[815] See especially Chapter 12, sec. 1.

SECTION 10. CIVIL LIBERTIES

The term "civil liberties" has been used in many senses. In this chapter we shall use the term to cover those immunities from governmental interference which are enjoyed by individuals and which are not derived from the ownership of property. The category of "civil liberties" thus defined includes certain subjects which are elsewhere treated in this chapter, such as the rights of citizenship, the right to vote, the right to sue, the right to contract, and the right to hold public office. These rights, of course, are fundamental in the field of civil liberties. There are other rights, however, which are of great importance.

The civil liberties of the Indian are, generally speaking, those liberties which have been conferred constitutionally or otherwise upon all citizens of the United States.[816] The legal problems arising in the defense of Indian civil liberties, however, differ fundamentally from those problems which arise in the defense of the civil liberties of other groups. This is because infringements upon civil liberties are byproducts of Government action and the action of the federal and state governments with respect to Indians constitutes a special, and in many ways peculiar, body of law and administration. In this mass of special legislation and special administration we find a number of civil liberties problems that have not arisen elsewhere in American law.

The principle of government protection of the Indians runs through the course of federal legislation and administration. The line of distinction between protection and oppression is often difficult to draw. What may seem to administrative officials and even to Congress to be a wise measure to protect the Indian against supposed infirmities of his own character, may seem to the Indian concerned a piece of presumptuous and intolerable interference with precious individual rights. These differences in appraising a given measure of government regulation are natural where differences in standards of value exist. In the interaction between two groups with divergent histories, traditions, and ways of life, such differences of value standards are common. They must be continually reckoned with by one who seeks to understand divergent viewpoints in the field of Indian civil liberties.

A. DISCRIMINATION

(1) **Discriminatory state laws.**—One set of problems in the field of Indian civil liberties arises out of discriminatory state statutes and state constitutional provisions. Laws and constitutional provisions which deprive Indians of their privileges of voting,[817] serving on a jury,[818] or testifying in a lawsuit [819] have already been discussed.

Some states enacted a series of discriminatory and oppressive laws against the Indians. After discussing some of the flagrant laws of this type passed by the early legislature of California,[820] Mr. Goodrich concludes:

> * * * Enough has been said to indicate what the legal status of the Indian was in the California of the fifties and sixties, without touching upon the treatment meted to him outside the law. The legislation affecting him reflects the pioneer spirit, one of whose necessary virtues is ruthlessness toward any element, human or other, which may be thought to endanger the new community. The swift economic development of California was bought at

[816] *In re Sah Quah*, 31 Fed. 327 (D. C. Alaska, 1886), holding that, despite custom, slaveholding was illegal after the passage of the Thirteenth Amendment. In *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1879), the Supreme Court of the United States said that the colored race was entitled to all "the civil rights that the superior race enjoy." The court held in *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), that the guarantees of protection of the Fourteenth Amendment extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, color, or nationality, and that a statute, though impartial on its face, was unconstitutional if "applied" and administered with an evil eye and an unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances (p. 374).

[817] See sec. 3, *supra*.

[818] See sec. 6, *supra*.

[819] See sec. 6, *supra*.

[820] Goodrich, The Legal Status of the California Indian (1926), 14 Calif. L. Rev., pp. 83, 91–94; also see pp. 157, 170–176.

> a certain cost of human values. It was the Indian who paid the price.[221] (P. 94.)

Although laws of this type are less frequently passed today than in the early state history, some have never been repealed.[222]

A more recent picture of discrimination is given in the case of *United States* v. *Wright*,[223] dealing with the Eastern Cherokees:

> * * * the state of North Carolina has afforded them few of the privileges of citizenship. It has not furnished them schools, and forbids their attendance upon schools maintained for the white and colored people of the state. It will not receive their unfortunate insane or their deaf, dumb, or blind in state institutions. It makes no provision for their instruction in the arts of agriculture or for the care of their sick or destitute. It supervises their roads; but until comparatively recent years these were maintained by their own labor. * * * Politically they have been subject to the laws of the state, but economically they have been wards of the federal government and cared for as such under the provisions of its laws. (Pp. 304–305.)

(2) Discriminatory federal laws.—During much of the history of the United States, the original occupants of the continent were imprisoned on reservations.[224] As late as May 8, 1890, Congress provided that the Spokane Falls and Northern Railway Co. should prohibit the riding by the Indians of the Colville Indian Reservation upon any of its trains unless they were provided with passes signed by the Indian agent.[225]

The statute admitting Utah to statehood[226] illustrates a comprehensive form of discrimination:

> The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. * * *

Early laws, only recently repealed by the Act of May 21, 1934,[227] hampered freedom of speech, empowered the Commissioner of Indian Affairs to remove from an Indian reservation "detrimental" persons, and sanctioned various measures of military control within the boundaries of the reservations.

A summary of these repealed laws conveys an excellent insight into early congressional disregard of the civil liberties of Indians.

Sections 171, 172, and 173 of the United States Code were derived from the Trade and Intercourse Act.[228] They prohibited the sending or carrying of seditious messages to Indians and correspondence with foreign nations to excite Indians to war.[229] Like many other archaic espionage laws, they were broad, ambiguous, and liable to be applied to situations beyond the contemplation of the Congress,[230] as when the Federal Government arrested an individual who conferred with the Sandia Pueblo in order to join in opposing a Government engineering project in the Pueblo.[231]

Section 219[232] required foreigners[233] entering the Indian country to secure a passport from the Department of the Interior or officer of the United States commanding the nearest military post on the frontiers.

Section 220[234] empowered the superintendent of Indian affairs and the Indian agents and subagents to remove persons illegally in the Indian country and authorized the President to direct the military force to be employed in such removal.

Section 221[235] provided that a person returning after removal from the Indian country would be liable to a penalty of $1,000.

Section 222 authorized the Commissioner of Indian Affairs with the approval of the Secretary of the Interior to remove any person from a reservation whose presence in his judgment may be "detrimental to the peace and welfare of the Indians."[236]

In an opinion of the Solicitor of the Department of the Interior discussing this section, it was said:

> * * * The power of removal under this section has been held to cover not only collectors, but even an alderman of an incorporated town in a Territory. The alderman in that case was not a State official, since the reservation was not then included within a State, but the decision would be equally applicable if he were. *Ex parte Carter* (1903, 76 S. W. 102, 4 I. T. 539). The question of whether the presence of any person in Indian country is detrimental to the welfare of the Indians is one for the Commissioner of Indian Affairs and the Secretary of the Interior, and the courts will not review their decision. *United States* v. *Sturgeon* (1879, Fed. Cas. No. 16,413, D. C. Nev.). See *United States* v. *Mullin* (1895, 71 Fed. 682, 684, D. C. Neb.).[237]

The Attorney General held that the Commissioner and his agents have full discretion to remove from an Indian reservation any person not of the tribe entitled to remain thereon, and that they could not be interfered with by mandamus or injunction of any court.[238]

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[221] Schmeckebier, in The Office of Indian Affairs: Its History, Activities, and Organization (1927), writes:

> * * * public opinion on the frontier justified practically any action taken by settlers against the Indians, regardless of law or equity. (P. 23.)

The Government was powerless to prevent constant violation of treaty stipulations by the whites; *ibid.*, p. 62. Also see *United States* v. *Kagama*, 118 U. S. 375 (1886), and 19 Op. A. G. 511 (1890). The present attitude towards the Indian is described as follows:

> In the generation that has passed * * * the white neighbors have ceased to be deadly enemies in the physical sense, but in too many places they are deadly enough as regards the Indian's property. It is not true that all communities near the Indian are indifferent to his welfare, but it is an unfortunate fact that the Indian is too often regarded as legitimate prey and that public opinion is indifferent to the wrongs perpetrated upon him. * * *. (Schmeckebier *op. cit.* p. 11.)

Also see 9 Op. A. G. 110, 111 (1857).

[222] Considerable discrimination still exists against Indians in several states. Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78, 79.

[223] 53 F. 2d 300 (C. C. A. 4, 1931).

[224] Kinney, A Continent Lost—A Civilization Won (1937), pp. 168–170, 209, 231, 311, 314.

[225] Sec. 8, 26 Stat. 102, 103. A series of treaties in 1865 restricted the freedom of the Indians to leave the reservation without the written consent of the agent or superintendent. Treaty of August 12, 1865, with the Snake, Art. 3, 14 Stat. 683; Treaty of October 14, 1865, with the Cheyenne and Arrapahoe, Art. 2, 14 Stat. 703, 704; Treaty of October 18, 1865, with the Camanche and Kiowa, Art. 2, 14 Stat. 717, 718.

[226] Act of July 16, 1894, sec. 3, 28 Stat. 107, 108. A similar provision is found in the act providing for the division of Dakota into two states and enabling the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments; Act of February 22, 1889, sec. 4, 25 Stat. 676.

[227] 48 Stat. 787, repealing secs. 171–173, 186, 219–226 of title 25 of U. S. C. Some of these provisions are interpreted in 18 Op. A. G. 855 (1887).

[228] Act of June 30, 1834, 4 Stat. 729, 731. See Chapter 4, secs. 3, 6.

[229] A similar law, Act of January 17, 1800, 2 Stat. 6, expired by its terms (sec. 5) on March 3, 1802.

[230] See *In re Lelah-Puc-Ka-Chee*, 98 Fed. 429, 435 (D. C. N. D. Iowa, 1899).

[231] American Indian Life, Bull. No. 16, American Indian Defense Association, Inc. (1930), pp. 35–36.

[232] Derived from sec. 6 of the Act of June 30, 1834, c. 161, 4 Stat. 729, 730, R. S. § 2134. See Chapter 4, sec. 6.

[233] For the interpretation of "foreigner" see 18 Op. A. G. 555 (1887).

[234] Derived from sec. 10 of the Act of June 30, 1834, c. 161, 4 Stat. 729, 730, R. S. § 2147. See Chapter 4, sec. 6.

[235] Derived from sec. 2 of the Act of August 18, 1856, c. 128, 11 Stat. 65, 80, R. S. § 2148.

[236] Derived from sec. 2 of the Act of June 12, 1858, c. 155, 11 Stat. 329, 332, R. S. § 2149. See Chapter 4, sec. 8.

[237] Op. Sol. I. D., M.27487, July 26, 1933. Also see *Rainbow* v. *Young*, 161 Fed. 835 (C. C. A. 8, 1908).

[238] 20 Op. A. G. 245 (1891).

Sections 223, 224, 225 empowered the President to employ military forces for the enforcement of various laws and in the arrest of absconding Indians.[338a]

Section 226 authorized the marshal in executing process in Indian country to employ a posse comitatus, not exceeding three persons in any of the states respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country.[339]

(3) Oppressive federal administrative action.—Administrative oppression has often infringed on the civil liberties of Indians. The oppression depended upon two main factors: (*a*) The great concentration of power in administrative officials; (*b*) the practice of confining Indian tribes on reservations. Both of these conditions were described by the Court of Claims in the case of *Conners* v. *United States*,[340] involving Indians of the Cheyenne Reservation:

> These Indians, indeed, in 1878 occupied an anomalous position, unknown to the common or the civil law or to any system of municipal law. They were neither citizens nor aliens; they were neither free persons nor slaves; they were the wards of the nation, and yet, on a reservation under a military guard, were little else than prisoners of war while war did not exist. Dull Knife and his daughters could be invited guests at the table of officers and gentlemen, behaving with dignity and propriety, and yet could be confined for life on a reservation which was to them little better than a dungeon, on the mere order of an executive officer.

(*a*) *Concentration of administrative power.*[341]—All persons living in civilized society are subjected to the orders of many public officials and employees, including policemen, tax collectors, judges, and administrative boards, and numerous private agencies and individuals, such as employers, creditors, utility companies, and landlords. Up to a few years ago the 200,000 reservation Indians were subjected to perhaps the greatest concentration of administrative absolutism in our governmental structure. At that time the Indian Bureau, represented by the superintendent, combined, for these Indians, the functions of an employer, landlord, policeman, judge, physician, banker, teacher, relief administrator, and employment agency. According to the report of the Bureau of Municipal Research, "the Indian superintendent is a czar within the territorial jurisdiction prescribed for him. He is ex-officio both guardian and trustee. In both of these capacities he acts while deciding what is needed for the Indian and while disbursing funds."[342]

As early as 1834 the great power of Indian agents was commented upon by the House Committee of Indian Affairs in a report[343] which stated:

> The tribes are placed at too great a distance from the Government to enable them to make their complaints against the arbitrary acts of our agents heard; and it is believed they have had much cause of complaint. Hitherto they have suffered in silence. The agents, being subject to no immediate control, have acted under scarcely any other responsibility than that of accountability for moneys received. Although much is expected from the personal character of the agents, yet it is not deemed safe to depend entirely upon it. (P. 8.)

Since 1884, Indian Service officials and judges chosen and removable by the superintendent of the reservation could arrest, try, and imprison reservation Indians. This system has been subjected to continued criticism by Congressmen, Indians, and Indian welfare societies. Prior to the election of President Franklin D. Roosevelt, several earlier administrations initiated studies to reform this condition but few substantial changes resulted.[344]

On November 27, 1935, the Secretary of the Interior revoked the regulations of the office, in force since 1884,[345] which empowered the superintendent of an Indian reservation to act as judge, jury, prosecuting attorney, police officer, and jailer. A judicial system was established giving the defendants the right to formal charges, jury trial, power to summon witnesses, and the privilege of bail.

John Collier, Commissioner of Indian Affairs, has described the revised Law and Order Regulations in these terms:[346]

> * * * Indian Service Officials are prohibited from controlling, obstructing, or interfering with the functions of the Indian courts. The appointment and removal of Indian judges on those reservations where courts of Indian offenses are now maintained is made subject to confirmation by the Indians of the reservation. Indian defendants will hereafter have the benefit of formal charges, the power to summon witnesses, the privilege of bail, and the right to trial by jury. The offenses for which punishment may be imposed are specifically enumerated, the maximum of 6 months labor or $360 fine being imposed for such offenses as assault and battery, abduction, embezzlement, fraud, forgery, misbranding and bribery. * * *
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> * * * * *
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> The revision of law and order regulations is one step in the program of the present administration to eliminate obsolete regulations and bureaucratic procedures governing the conduct of Indians, and to endow the Indian tribes themselves with increased responsibility and freedom in local self-government. * * *
>
> These regulations are subject to modifications in the light of local conditions by each tribe organized under the Indian Reorganization Act.

Administrative control of Indian life, until recently, recognized no right of religious freedom.

Administrators who identified civilization with a particular sect infringed the religious liberty of the Indians and interfered, on the ground of immorality, with many of the dances and other cherished customs of some of the tribes.[347] On January 3, 1934,

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[338a] Section 223 is derived from secs. 21 and 23 of the Act of June 30, 1834, c. 161, 4 Stat. 729, 732, 733, R. S. § 2141; section 224, from sec. 23 of the same act, R. S. § 2150; and section 225 from sec. 19 of the same act, R. S. § 2151. See Chapter 4, sec. 6.

[339] Derived from sec. 3 of the Act of June 14, 1858, c. 163, 11 Stat. 362, 363, R. S. § 2153. An obsolete provision, which is still unrepealed is sec. 187, 25 U. S. C., which permits the Superintendent of Indian Affairs to suspend a chief or headman of a band or tribe for trespassing on allotments. See Chapter 4, sec. 9.

[340] 33 C. Cls. 317, 323–324 (1898).

[341] See chapter 5, secs. 7–13.

[342] Administration of the Indian Office (Bureau of Municipal Research Publication No. 65) (1915), p. 21. "'All offences,' wrote an Indian agent to the commissioner in September, 1890, 'are punished *as I deem expedient*, and the Indians offer no resistance.'" Thayer, A People Without Law (1891), 68 Atl. Month. 540, 551.

[343] 23d Cong., 1st sess., Repts. of Committees, No. 474, May 20, 1834.

[344] Annual Report of Secretary of the Interior (1936), pp. 165–166.

[345] Slightly modified in 1901. F. S. Cohen, Indian Rights and the Federal Courts (1940), 24 Minn. L. Rev. 145, 153, 194.

[346] Annual Report of Secretary of the Interior (1936), p. 166. For a history of Courts of Indian Offences, see Leupp, The Indian and His Problem (1910), pp. 241–247.

[347] Office of Indian Affairs, Circular No. 1665, April 26, 1921, reads in part:

> The sun-dance, and all other similar dances and so-called religious ceremonies are considered "Indian Offences" under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any [religious] dance which involves * * * the reckless giving away of property * * * frequent or prolonged periods of celebration * * * in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.

In all such instances, the regulations should be enforced. The Supplement to this Circular, February 14, 1923, contained recommendations endorsed by the Commissioner of Indian Affairs, including the following:

> That the Indian dances be limited to one in each month in the daylight hours of one day in the midweek, and at one center in

the employees of the Indian Service were warned against interfering with the religious liberties guaranteed by the Federal Constitution.[248]

Recent statutes, notably the Wheeler-Howard Act, have laid down a policy which is designated to grant greater self-government to the Indians and thus eventually lessen or end the great administrative powers now exercised by the Federal Government over Indians.[249] The monopolistic control of Indians by the Indian Office has been displaced by increased activities in matters affecting the Indians by many federal, state, and county agencies.[250]

(*b*) *Confinement on reservations.*—The great administrative power of the Indian Bureau was sometimes abused or misdirected.[251] One of the objectives of Indian Service policy, for many years, was the segregation of Indians.[252] The location of these settlements was changed as the white man moved westward.

The attitude of the administrators towards the reservation Indians may be gleaned from annual reports and judicial opinions. In *Dobbs v. United States*[253] the Court of Claims characterized Indians on a reservation as "little better than prisoners of war." The same court in the case of *Tully* v. *United States*,[254] said:

> General Ord, in his report for September, 1869 (Messages and Documents War Department, 1, 1869 and 1870, p. 121), in substance says that on taking command of the department he became satisfied that the few settlers and scattered miners of Arizona were the sheep upon which these wolves habitually preyed, and that a temporizing policy would not answer, and so he "encouraged the troops to capture and root out the Apaches by every means and to hunt them as they would wild animals." "This," he says, "they have done with unrelenting vigor, and as a result" he says, "since my last report over 200 have been killed, generally by parties who have trailed them for days and weeks into the mountain recesses, over snows, among gorges and precipices, lying in wait for them by day and following them by night."
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> In the table appended to this report, pages 127–129, it appears that 66 parties were sent out in search of Indians, traveling over 11,000 miles, and that as a result of these expeditions 207 Indians were killed, 75 wounded, and 65 men, women, and children taken prisoners, while 1 enlisted man was killed or captured and 3 wounded.

The Court of Claims in the case of *Conners* v. *United States et al.*,[255] described another illuminating incident. After telling of the surrender of Dull Knife's band, the last of the Northern Cheyennes to make peace, the court said:

> After a year of sickness, misery, and bitterness in the Indian Territory, and repeated prayers to be taken back to the country where their children could live, 320 of them, in September, 1878, broke away from the reservation. Dull Knife and Little Wolf were the leaders of this escaping party, which consisted of their bands.
>
> They were pursued and overtaken. A parley ensued in which Little Wolf, whom Captain Bourke characterizes as "one of the bravest in fights where all were brave," said, "We do not want to fight you, but we will not go back." The troops instantly fired upon the Cheyennes and a new Indian war began.
>
> That volley was one of the many mistakes, military and civil, which have been the fatality of our Indian administration, for the officer who ordered it thereby instituted an Indian war, and at the same instant turned hostile savages loose upon the unprotected homes of the frontier and their unwarned, unsuspecting inmates. (P. 321.)

After fierce fighting the Cheyenne surrendered and forty-nine men, fifty-one women and forty-eight children were carried as prisoners of war to Fort Robinson.

The court continued:

> * * * Dull Knife and his band were carried to Fort Robinson. There they persistently refused to return to the reservation and were kept in close custody. In January, 1879, orders from the Interior Department arrived at Fort Robinson peremptorily directing the commanding officer to remove them to the reservation. On the 3d of January, 1879, the Indians were told of this, and on the next day gave, through Wild Hog, their spokesman, their unequivocal answer, "We will die, but we will not go back."
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> The commanding officer apparently shrunk from shooting them down; removing them meant nothing short of that, or of actually carrying each one forcibly to the detested place from which they had escaped. The military authorities therefore resorted to the means for subduing the Cheyennes by which a former generation of animal tamers subdued wild beasts. In the midst of the dreadful winter, with the thermometer 40° below zero, the Indians, including the women and children, were kept for five days and nights without food or fuel, and for three days without water. At the end of that time they broke out of the barracks in which they were confined and

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each district; the months of March and April, June, July, and August being excepted.

That none take part in the dances or be present who are under 50 years of age.

That a careful propaganda be undertaken to educate public opinion against the dance. * * *

The religious persecutions caused by these circulars, as well as the Taos persecution, during which the education for the tribal priesthood of the boys of the ancient Pueblo of Taos in New Mexico was forbidden by the Indian Bureau, are discussed in two pamphlets of the American Indian Defense Association, Inc.: The Indian and Religious Freedom (1924), and Even as You Do Unto the Least of These, so You Do Unto Me (1924).

> * * * children enrolled in Government schools were forced to join a Christian sect, to receive instruction in that sect, and to attend its church. On many reservations native ceremonies were flatly forbidden, regardless of their harmless nature. In some cases force was used to make the Indians of a reservation cut their hair short. (The New Day for the Indians, edited by Nash (1938), p. 12.

> Official policy in the United States toward the religions of the Indians, through the 70 years preceding 1929, definitely ruled out the concept of liberty of conscience. * * * (7 Indians at Work, No. 8 (April 1940), p. 46.)

[248] Office of Indian Affairs, Circular No. 2970, January 3, 1934.

[249] The new policy and possible dangers in its consummation are described in the Annual Report of the Secretary of the Interior (1936):

> * * * Many of these legislative acts, as provided for in tribal constitutions, require formal approval by the Secretary of the Interior; also, many new and unsolved questions of law and policy have arisen * * *. It will be increasingly important, as organization takes effect among the tribes, that the Indian Office shall devise a new practice in Indian administration. The temptation will be great, on occasion, to make decisions in Washington on matters which, when referred to the Office or the Department for decision, should be returned to the point of origin for local action. With the best intentions in the world, the Office can in effect fasten a blight upon local self-government before it is ever an established fact. (P. 164.)

[250] McCaskill, The Cessation of Monopolistic Control of Indians by the Indian Office, Indians of the United States, contributions by the delegation of the United States First Inter-American Conference on Indian Life, Patzcuaro, Mexico, Office of Indian Affairs (April 1940), p. 69.

[251] Harold L. Ickes wrote in 1929: "There has been no more shameful page in our whole history than our treatment of the American Indians." Federal Senate & Indian Affairs (1930), 24 Ill. L. Rev. 570, 577. The attitude of some public officials and employees is exemplified by the cruel treatment of Indian children at some of the Indian schools; Schmeckebier, *op. cit.*, pp. 71–76. Meriam, The Problem of Indian Administration (1928), pp. 332–333, 779; and such educational policies as the forcible removal of children from their families to distant boarding schools; *id.*, 373–579. See also Chapter 12, sec. 2; Harsha, Law for the Indians (1882), 134 N. A. Rev. 272, 275, and *In re Lelah-Puc-Ka-Chee*, 98 Fed. 429 (D. C. N. D. Iowa, 1899).

[252] See Chapter 2, sec. 2.

[253] 33 C. Cls. 308, 317 (1898).

[254] 32 C. Cls. 1, 13 (1896).

[255] 33 C. Cls. 317 (1898).

rushed forth into the night. The troops pursued, firing upon them as upon enemies in war; those who escaped the sword perished in the storm. Twelve days later the pursuing cavalry came upon the remnant of the band in a ravine 50 miles from Fort Robinson. "The troops encircled the Indians, leaving no possible avenue of escape." The Indians fired on them, killing a lieutenant and two privates. The troops advanced; "the Indians, then without ammunition, rushed in desperation toward the troops with their hunting knives in hand; but before they had advanced many paces a volley was discharged by the troops and all was over." "The bodies of 24 Indians were found in the ravine—17 bucks, 5 squaws, and 2 papooses." Nine prisoners were taken—1 wounded man, and 8 women, 5 of whom were wounded. The officer in command unconsciously wrote the epitaph of the slain in his dispatch announcing the result: "The Cheyennes fought with extraordinary courage and firmness, and refused all terms but death." The final result of the last Cheyenne war was, that of the 320 who broke away in September, 7 wounded Cheyennes were sent back to the reservation. (Pp. 322–323.)

Although there never was any statutory authority for confining Indians on reservations, administrators relied upon the magic solving word "wardship" to justify the assertion of such authority. Thus the statement on "Policy and Administration of Indian Affairs" which appears in the "Report on Indians Taxed and Not Taxed, at the Eleventh Census, 1890" declares:

> The Indian not being considered a citizen of the United States, but a ward of the nation, he can not even leave the reservation without permission.[355a]

It is now recognized that there is no legal authority for confining any Indian within a reservation.

B. REMEDIES

The courts have pointed to two ways in which an Indian may meet injustices directed at him as an Indian. One way is to give up the status that subjects him to oppression: If he is a member of an oppressed tribe, he may give up his citizenship in that tribe. The other way is to attack the oppressive measure itself.

The former alternative is based upon the individual right of expatriation. The latter is based upon the right of a racial minority to be immune from racial discrimination. This latter right our Indian population shares with every other minority group in the United States, and since all the minority groups that have reason to fear discriminatory legislation make up together a great majority of our population, the asserted right to be immune from racial discrimination lies at the heart of our democratic institutions.

(1) The right of expatriation.[356]—Oppression against a racial minority is more terrible than most other forms of oppression, because there is no escape from one's race. The victim of economic oppression may be buoyed up in the struggle by the hope that he can improve his economic status. The victim of religious oppression may embrace the religion of his oppressors. The victim of political oppression may change his political affiliation. But the victim of racial persecution cannot change his race. For these victims there is no sanctuary and no escape.

If special legislation governing Indians refers to a racial group,[357] there is no way in which the individual Indian can avoid the impact of such laws. If, on the other hand, as we have elsewhere suggested,[358] such laws refer primarily to persons having a certain social or political status, then, presumably, the oppressed Indian, by changing that status, can escape the force of such legislation.

This issue never has been squarely before the United States Supreme Court, but the viewpoint here put forward is confirmed by the only statement the Supreme Court has made upon the question, the dictum of the majority opinion in the *Dred Scott Case:*

> * * * if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[359]

There is one federal case which squarely raised the question whether Indians can avoid oppression at the hands of the Federal Government by renouncing their allegiance to their tribe and abandoning the reservation assigned to their use.

The case of *United States ex rel. Standing Bear* v. *Crook*[360] arose out of an attempt of a band of Ponca Indians led by Chief Standing Bear to escape from a reservation in Indian Territory to which they had been removed by the Interior Department. After a few months on their new reservation they succeeded in escaping to Nebraska, where they took up a residence with friendly Omaha Indians. Brigadier General Crook, Commander of the Military Department of the Platte, was ordered to arrest Standing Bear and his followers and to return them to the Ponca Reservation in Indian Territory. Standing Bear managed to secure attorneys, who sued out a writ of habeas corpus against General Crook. The principal ground of the writ was the claim that Standing Bear and his followers had renounced their membership in the Ponca tribe. Since they were no longer members of the tribe, it was argued that neither the Interior Department nor the United States Army could force these Indians to live upon the Ponca Reservation.

The issue of fact was thus formulated by the court, *per* Dundy, *J.*:

> It is claimed upon the one side, and denied upon the other, that the relators had withdrawn and severed, for all time, their connection with the tribe to which they belonged; and upon this point alone was there any testimony produced by either party hereto.[361] (P. 696.)

On the issue of fact the court found as follows:

> Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused.

[355a] H. R. Misc. Doc. No. 340, 52d Cong., 1st sess., pt. 15 (1894), p. 68.

[356] Expatriation is the voluntary act of changing one's allegiance from one country to another. In Indian law it connotes the giving up of membership in a tribe. On the general subject of expatriation see 3 Moore International Law Digest (1906), pp. 552–735; Hunt, The American Passport (1898), pp. 127–144; Moore, American Diplomacy (1918), c. VII.

[357] The thesis that our law governing Indians is "racial law" is defended by Heinrich Krieger, of the Notgemeinschaft der Deutschen Wissenschaft, in an article, Principles of the Indian Law and the Act of June 18, 1934 (1935), 3 Geo. Wash. L. Rev. 279 (announced as part of a dissertation on "American Racial Law").

[358] See Chapter 14, sec. 1.

[359] *Dred Scott* v. *Sandford*, 19 How. 393, 404 (1856). A tribal council cannot prevent a member from expatriating himself. Memo. Sol. I. D., March 19, 1938.

[360] 25 Fed. Cas. No. 14891 (C. C. Nebr. 1879). See Canfield, The Legal Position of the Indian (1881), 15 Am. L. Rev. 21, 33. *Cf. The New York Indians* v. *United States*, 40 C. Cls. 448, 459 (1905), and *United States* v. *Earl*, 17 Fed. 75 (C. C. Ore. 1883), holding that an Indian who absented himself from the reservation to obtain liquor, did not expatriate himself.

[361] *Ibid.*, p. 696. *United States ex rel. Standing Bear v. Crook, supra.*

> in a great measure, no doubt, from change of climate; and to save himself and the survivors of his wasted family, and the feeble remnants of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, "he might live and die in peace, and be buried with his fathers." He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when thus employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or necessity, of removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. * * * (Pp. 698, 699.)

In view of the foregoing facts the court reached the conclusion that the Indian relators

> * * * did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.
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> If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of question as to the right can now exist. On the 27th of July of that year congress passed an act, now appearing as section 1999 of the Revised Statutes, which declares that: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship. * * * Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."
>
> This declaration must forever settle the question until it is reopened by other legislation upon the same subject. (P. 699.)

The federal court, in granting a writ of habeas corpus to Standing Bear against General Crook, established a precedent which many Indians since Standing Bear have followed, and which many administrators since General Crook have recognized. In the closing decades of the nineteenth century and down to very recent times, the trend of legislation and of administration with respect to Indian affairs was to decrease the area of tribal land and the authority of tribal councils, to multiply the restrictions upon the use that Indian tribes might make of their remaining property, and to break down tribal governments, tribal customs, and tribal social life. But always one door to freedom was left open: the individual Indian might accept an allotment of land, have the restrictions upon his land tenure removed, adopt "the habits of civilized life," abandon his tribal relations, attain citizenship, and thus achieve freedom from the oppression of Indian Bureau control. This was the way in which the Indian Bureau was to dissolve the Indian problem. The more intolerable the oppression of the Bureau upon the life of the tribe, the more successful was the Bureau in achieving its objective. The year's quota of spiritual refugees from the tribal life was, on each reservation, the criterion of the Indian superintendent's success.[302] It did not matter much that those who grasped at freedom through renunciation of tribal relations and federal property frequently reached their goal broken in spirit and swindled of their lands. To many Indians, as well as to many Indian administrators, this was an advance from serfdom to freedom, from barbarism to civilization.

The right of expatriation established by the Standing Bear case remains a significant human right, even where Indian tribes are actually moving in an organized way toward the ideal of freedom from Indian Bureau supervision. The right of expatriation is an answer not only to federal oppression but to tribal oppression as well. It would be remarkable if the development of Indian self-government failed to give rise to dissatisfied individuals and minority groups who considered their tribal status a misfortune. History shows that nations lose in strength when they seek to prevent such unwilling subjects from renouncing allegiance.

(2) Antidiscrimination statutes and treaties.—Against the somber background of discriminatory state and federal statutes, administrative oppression, and public discrimination, prejudice and unfair treatment, stand treaties, state and federal statutes and administrative rulings prohibiting discrimination against Indians or any races.[303]

Treaties ceding Louisiana, New Mexico, and Alaska to the United States contained guarantees of civil liberties to all the inhabitants of the ceded territory. Later, federal statutes provided for equality of treatment between Indians and whites. Many recent statutes prohibit discrimination against the Indians or against any races.

(a) *Federal statutes affecting Indians only.*—The Act of March 3, 1855,[304] granting bounty lands to soldiers, provided that Indians shall be granted lands on the same terms as white men. Recent statutes appropriating money or ceding land from a reservation for school purposes, often contain a condition that the

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[302] See Chapter 2, sec. 2.

[303] On legislative attempts to eliminate racial and religious discrimination, see 39 Col. L. Rev. 986 (1939).

[304] Sec. 7, 10 Stat. 701, 702.

schools shall be available to Indian children on an equality with white children.[365]

(*b*) *Federal statutes affecting all races.*—Civil-rights laws protect Indians as well as other races against various forms of governmental and public discrimination.[366] Some recent laws expressly prohibit discrimination against any races. An excellent illustration is a clause in section 8 of the Act of June 28, 1937,[367] establishing the Civilian Conservation Corps, which provides: "* * * no person shall be excluded on account of race, color, or creed." A frequent provision is a condition in grants of land to the state that its institutions shall be open to all races.[368]

Other statutes which do not contain express guarantees of equality, have been administratively interpreted to prohibit discrimination against Indians. A recent administrative ruling of this kind by the Solicitor of the Department of Agriculture on February 17, 1937, declared unlawful the exclusion of Indians and Indian lands from soil conservation benefit payments.[369]

(*c*) *State statutes affecting all races.*—Over one-third of the states have enacted civil rights statutes prohibiting various kinds of racial discrimination.[370]

(*d*) *Treaties affecting all races.*—The civil liberties of the Indians of the Territories of Louisiana and New Mexico and the Alaskan natives were protected by treaty guarantees until they became citizens.

Article 3 of the Treaty of April 30, 1803,[371] whereby the United States purchased the Territory of Louisiana from the French Republic, provides:

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

A provision along the same lines is contained in the treaties whereby the Territories of New Mexico[372] and Alaska[373] were ceded to the United States.

(3) **Constitutional protection.**—The right of the Indian to be immune from racial discrimination by Government officials is protected by the Fifth, Fourteenth, and Fifteenth Amendments of the United States Constitution.[374]

Although the Fourteenth and Fifteenth Amendments were primarily passed to protect the Negroes, they have been successfully invoked to protect the civil liberties of other races.

While the reasons for discrimination against Indians include economic competition and ignorance, the exemption of some of the Indians from property taxation perhaps constitutes the most common avowed reason for this discrimination.[375] Obviously this argument is inapplicable to the many Indians who do not possess exempt property.[376]

It is also probably invalid as to other Indians. Until recently state and federal officials were exempt from the income tax of the federal and state governments respectively. The possession of tax-exempt securities has never been considered a justification for denying a wealthy citizen possessing such securities the right to vote.

Another justification for discrimination, the grant of special federal benefits to the Indians, sometimes springs from the erroneous impression that the Government supports most Indians. The majority of the Indian population supports itself and does not receive direct and continuous federal dole.[377] This argument is clearly invalid in so far as it is applied to discrimination against political rights, unless it be applied equally to non-Indian beneficiaries of federal subsidies such as shipowners, farmers, beneficiaries of tariffs, and relief recipients. On the other hand, it may be argued with some force that special Government assistance and facilities rendered tribal Indians may give legal validity to a state law or regulation discriminating against such Indians in the dispensing of similar state benefits and services.

Indians, like other races, are constitutionally protected against legislative or administrative discrimination because of color or race.[378] In a leading early case, *Strauder* v. *West Virginia*,[379] the Supreme Court of the United States, in discussing the Fourteenth Amendment, said:

> * * * The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a

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[365] Act of August 21, 1916, 39 Stat. 524 (City of Flandreau, S. D.); Act of May 31, 1918, 40 Stat. 592 (Fort Hall Indian Reservation); Act of January 7, 1919, 40 Stat. 1053; Act of April 1, 1920, 41 Stat. 549 (Blackfeet); Act of June 4, 1920, 41 Stat. 751 (Crow); Act of March 3, 1921, 41 Stat. 1355 (Fort Belknap); Act of May 15, 1930, 46 Stat. 334 (Blackfeet); Act of February 14, 1931, 46 Stat. 1105 (Klamath); Act of February 14, 1931, 46 Stat. 1106 (Fort Peck); Act of June 7, 1935, c. 188, 49 Stat. 327; Act of June 7, 1935, 49 Stat. 330; Act of June 7, 1935, c. 198, 49 Stat. 331; Act of June 7, 1935, c. 199, 49 Stat. 331.

[366] Sec. 1 of the Act of April 20, 1871, 17 Stat. 13, provides for recovery in tort against any person depriving another person of civil rights guaranteed by the Constitution and laws. Other federal statutes protecting civil rights include Act of May 31, 1870, sec. 1, 16 Stat. 140, R. S. § 629, 2004; Act of March 4, 1909, secs. 19–20, 35 Stat. 1088, 1092.

[367] 50 Stat. 319, 320, extended until July 1, 1943, by Act of August 7, 1939, 53 Stat. 1253, 16 U. S. C. 584a. The original law creating a temporary Civilian Conservation Corps contains a similar provision, Act of March 31, 1933, c. 17, sec. 1, 48 Stat. 22, 23.

[368] Act of February 19, 1934, 48 Stat. 353; Act of May 21, 1934, 48 Stat. 786. And *cf.* Act of October 1, 1890, sec. 10, 26 Stat. 655 (Indian Territory), R. S. § 2434.

[369] See Chapter 15, sec. 10, fn. 511.

[370] Colorado: Statutes Annotated (1935), c. 35; Connecticut: Supplement to General Statutes (1935), c. 319, sec. 1676c; General Statutes (Revision of 1930), c. 323, sec. 6065–6066; Illinois: Revised Statutes (1939), c. 38, sec. 125–128; Indiana: Burns Annotated Statutes (1933) sec. 10–901, 10–902; Iowa: Code (1939), c. 602, sec. 13251–13252; Kansas: General Statutes (1935), c. 21, sec. 2424–2425; Louisiana: Dart's General Statutes (1939), title 13, sec. 1070–1073; Massachusetts: Acts and Resolves (1933), c. 117, (1934), c. 138; Michigan: Compiled Laws (1929), sec. 16809–16811; Minnesota: Mason's Minnesota Statutes (1927), c. 55, sec. 7321; Nebraska: Compiled Statutes (1929), c. 23, sec. 101–102; New Jersey: Revised Statutes (1937), title 10, c. 1, sec. 1–9; New York: Thompson's Laws of New York (1939), sec. 40, amended c. 810, Laws of 1939, and sec. 40a, 41 and 42; Ohio: Throckmorton's Ohio Code Annotated (Baldwin's) (1936), sec. 12940–12942; Pennsylvania: Laws of Pennsylvania (1935), Act No. 132; Rhode Island: General Laws (1938), c. 606, sec. 28; Washington: Remington's Revised Statutes (1932), title 14, c. 10, sec. 2686; Wisconsin: Statutes (1937), sec. 340.75.

[371] 8 Stat. 200, 202.

[372] Treaty of Guadalupe Hidalgo, signed February 2, 1848, 9 Stat. 922.

[373] Art. 3, 15 Stat. 539. See Chapter 21, sec. 3, for the text of this article.

[374] F. S. Cohen, Indian Rights and the Federal Courts (1940), 24 Minn. L. Rev. 145, 191.

[375] See Usher, Pan Americanism (1915), p. 296.

[376] It is estimated that approximately 100,000 Indians are totally landless and in many cases homeless. Indian Land Tenure, Economic Status, and Population Trends, Part X of the Supplementary Report of the Land Planning Committee to the National Resources Board (1935), p. 2.

[377] Indian Land Tenure, Economic Status, and Population Trends, Part X of the Supplementary Report of the Land Planning Committee to the National Resources Board (1935), pp. 2, 11.

[378] 45 Yale L. J. 1296 (1936).

[379] 100 U. S. 303 (1879). Also see *Nixon* v. *Herndon*, 273 U. S. 536 (1927); and see sec. 3, *supra*. The Court in *Buchanan* v. *Warley*, 245 U. S. 60 (1917), said that while a principal purpose of the Fourteenth Amendment "was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white and black, against discriminatory legislation by the States. This is now the settled law." (P. 76.)

> positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. (Pp. 307–308.) * * * Its aim was against discrimination because of race or color. * * * (P. 310.)

In this case the court held that discrimination by any state agency in selection for jury service because of race is a denial of equal protection of law. The court has subsequently reaffirmed this doctrine in many cases, usually involving a Negro, the most recent being *Norris* v. *Alabama*[380] and *Hale* v. *Kentucky*.[381]

While segregation *per se* is not held to be discriminatory,[382] the facilities offered must be substantially equal. This doctrine was reenunciated in the case of *Missouri ex rel. Gaines* v. *Canada*.[383] The petitioner Gaines, a Negro, was granted a writ of mandamus compelling the board of curators of the University of Missouri to admit him to the law school of the university. The qualifications of Gaines for admission, apart from race, were admitted. In holding that this discrimination constituted a denial of the Negro's constitutional right, Chief Justice Hughes, speaking for the majority of the court, said:

> * * * The basic consideration is * * * what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. (Pp. 349–350.)

As in the case of the Negro,[384] one of the principal battlegrounds regarding discrimination against the Indian is exclusion from public schools. The only case which has squarely considered the Indian's right to state education held that the Fourteenth Amendment requires a state to grant equal educational opportunities to persons of the Indian race.[385]

In 1924 admittance to a state public school was sought by Alice Piper, a full-blooded Indian, a citizen of the United States and of California, who had never lived in tribal relations with any tribe of Indians, nor owed or acknowledged allegiance or fealty of any kind to any tribe or "nation" of Indians, nor lived on an Indian reservation. A law of California declared that the governing body of the public school could exclude Indian children from attending, provided the United States Government maintained a school for Indians within the school district. Refused admission, she sought a writ of mandamus to compel the board to admit her. The Supreme Court of California granted the writ and held that the law violated the state and federal constitutions, saying:

> The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States. The federal Constitution does not provide for any general system of education to be conducted and controlled by the national government. It is distinctly a state affair. * * * But the denial to children whose parents, as well as themselves, are citizens of the United States and of this state, admittance to the common schools solely because of color or racial differences without having made provision for their education equal in all respects to that afforded persons of any other race or color, is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States * * *.[386] (Pp. 928–929.)

The following dicta in the *Piper* case indicate that, as in the case of Negroes, state laws segregating Indian pupils from white pupils are constitutional so long as there is no disparity between the educational advantages offered to both races. The California Supreme Court said:

> The establishment by the state of separate schools for Indians, as provided by the statute, does not offend against either the federal or state Constitutions. Questions of racial differences have arisen in various forms in the several states of the Union and it is now finally settled that it is not in violation of the organic law of the state or nation, under the authority of a statute so providing, to require Indian children or others in whom racial differences exist, to attend separate schools, provided such schools are equal in every substantial respect with those furnished for children of the white race. "Equality, and not identity of privileges and rights, is what is guaranteed to the citizen."[387]

Since the *Piper* case dealt with an Indian who was not a member of any tribe, the scope of the decision is not entirely certain.

Indian children are entitled to state educational benefits financed by federal grants-in-aid with the proviso that there shall be no discrimination against Indian children.[388] A federal statute disposing of Indian lands upon which schools are to be established may provide that Indian children shall be allowed to attend the schools.[389]

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[380] 294 U. S. 587 (1935).

[381] 303 U. S 613 (1938). On discrimination in housing, see *Buchanan* v. *Warley*, 245 U. S. 60 (1917), and *Harmon* v. *Tyler*, 273 U. S. 668 (1927). On barring Negroes from party primaries, see *Nixon* v. *Herndon*, 273 U. S. 536 (1927). Also see *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) and the *Slaughter-House Cases*, 16 Wall. 36 (1872). On discrimination against voting, see sec. 3, *supra*.

[382] *Plessy* v. *Ferguson*, 163 U. S. 537, 544 (1896); *McCabe* v. *Atchison, T. & S. F. Ry Co.*, 235 U. S. 151, 160 (1914); *Gong Lum* v. *Rice*, 275 U. S. 78, 85, 86 (1927). *Cf. Cumming* v. *Board of Education*, 175 U. S. 528, 544, 545 (1899).

[383] 305 U. S. 337 (1938).

[384] The Courts and the Negro Separate School (1935), 4 Journal of Negro Education, pp. 289 *et seq.*, especially pp. 351–441.

[385] *Piper* v. *Big Pine School Dist. of Inyo County*, 193 Cal. 664, 226 Pac. 926 (1924). For a subsequent law permitting the segregation of Indians, see Cal. School Laws, 1931, Div. III, c. 1, Art. 1, sec. 3.3–3.4, repealed by Act of June 15, 1935; Session Laws 1935, pp. 1562–1563. Also see Delaware Session Laws of 1935, Act of April 15, 1935, p. 700.

[386] *Piper* v. *Big Pine School Dist. of Inyo County*, 193 Cal. 664, 226 Pac. 926, 928–929 (1924). Also see *Crawford* v. *District School Board for School Dist. No. 7*, 68 Ore. 388, 137 Pac. 217, 219 (1913), wherein the court said:

> The facts stated in the amended writ show prima facie that the petitioner's children were entitled to be admitted as pupils of said school district No. 7, and to receive instructions therein in all respects as the white children. They and their parents are citizens of the United States and of the State of Oregon, and reside in said school district. They are not members of any Indian tribe, and they conform to the customs and habits of civilization. These children are half white, and their rights are the same as they would be if they were wholly white.

[387] *Piper* v. *Big Pine School Dist. of Inyo County*, 193 Cal. 664, 226 Pac. 926, 929 (1924). See also *McMillan* v. *School Committee*, 107 N. C. 609, 12 S. E. 330 (1890). For construction of legislative intent in this respect, see *Ammons* v. *School District No. 5*, 7 R. I. 596 (1864).

[388] Act of June 15, 1938, 52 Stat. 685, is typical in this regard.

[389] A typical provision is "*Provided*, That said school shall be conducted for both white and Indian children without discrimination." Act of June 15, 1938, 52 Stat. 685; also see Chapter 12, sec. 2.

Many important prohibitions, including the Bill of Rights[390] of the Federal Constitution, are limitations only on the power of the Federal Government. Other provisions limit the activities of state governments only,[391] or of the federal and state governments,[392] and hence are inapplicable to Indian tribes, which are not creatures of either the federal or state governments.[393]

The provisions of the Federal Constitution protecting personal liberty and property rights do not apply to tribal action.[394] In *Talton* v. *Mayes*,[395] the court held that the Fifth Amendment of the Federal Constitution, requiring indictment by a grand jury in most infamous crimes, does not apply to the acts of a tribal government.

[390] Amendments 1 to 10 inclusive.

[391] Articles 13 and 14.

[392] Amendment 10.

[393] *Talton* v. *Mayes*, 163 U. S. 376 (1896), and *Cf. Patterson* v. *Council of Seneca Nation*, 245 N. Y. 433, 157 N. E. 734 (1927); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *United States* v. *Kagama*, 118 U. S. 375 (1886); *Turner* v. *United States*, 248 U. S. 354 (1919), aff'g 51 C. Cls. 125 (1916); and *Roff* v. *Burney*, 168 U. S. 218, 222 (1897).

[394] Op. Sol. I. D., M.27810, October 23, 1934; Op. Sol. I. D., M.27810, December 13, 1934. See Chapter 7, sec. 2.

[395] 163 U. S. 376 (1896), discussed in Memo. Sol. I. D., August 8, 1938.

SECTION 11. THE STATUS OF FREEDMEN AND SLAVES

Although a minority race treated as inferiors, some of the members of the southern tribes, especially the plantation owners of mixed breed, possessed slaves.[396] Among some of the tribes, particularly the Choctaws, Chickasaws, and Seminoles, the slaves and freedmen[397] numbered from one-fourth to one-third of the population.[398]

The agents with the Cherokees, Choctaws, Chickasaws, and Creeks went over to the Confederacy.[399] After the Union troops withdrew despite treaty obligations to protect them,[400] their friendship was cultivated by Albert Pike acting for the Confederate State Department because of the strategic importance of the Indian country from a military and economic view.[401] The success of the southern troops in Arkansas aided his diplomacy.[402]

Although many of their members remained loyal to the Union and in consequence suffered great privation,[403] most of the southern tribes supported the Confederacy,[404] largely because of economic considerations.

Influenced by the Emancipation Proclamation, the Cherokee Nation, when severing its connection with the Confederacy, abolished slavery in February of 1863.[405] The exact date when the slaves of other Indians were emancipated is doubtful. Some contend that they were freed by the Emancipation Proclamation prior to the Thirteenth Amendment of the Constitution of the United States,[406] which prohibits slavery within the United States or any place subject to their jurisdiction. Others[407] more accurately point out that the Emancipation Proclamation referred only to the states and did not extend to the Indian Territory. Although it has been suggested that the reasoning in *Elk* v. *Wilkins*[408] and *Jackson* v. *United States*,[409] holding that the Fourteenth Amendment to the United States Constitution did not grant citizenship to the Indians might also be applied in interpreting the Thirteenth Amendment,[410] it is now established that the Thirteenth Amednment freed the slaves of the United States,[411] and its incorporated territories,[412] of African, Indian, or mixed descent.[413]

The year following the adoption of the Fourteenth Amendment and 4 months after the end of the Civil War a convention of the principal southern tribes was held at Fort Smith.[414] Treaties were effected with each of the tribes, which provided for peace and recognized the abolition of slavery.[415]

Treaties containing provisions freeing slaves were also consummated with several northwestern tribes,[416] both before and after the Civil War.

[396] The Act of July 30, 1852, c. 76, 10 Stat. 734, authorized repayment to legal representatives of a general of Georgia for purchasing captured slaves from Creek warriors while these warriors were serving the United States against the Seminole Indians in Florida.

[397] The freedmen were persons of African descent embracing free slaves and their descendants who had been admitted to the rights of citizens *Goat* v. *United States*, 224 U. S. 458 (1912). See Abel, The Slaveholding Indians, vol. 3, p. 269 *et seq.*

[398] Sen. Ex. Doc. No. 71, 41st Cong., 2d sess., vol. 2, p. 3, March 24, 1870; *Goat* v. *United States*, 224 U. S. 458, 462 (1912). Reports of the Dawes Commission, p. 13 (1898). The earliest reference to slaves was found in the Treaty of September 17, 1778, with the Delawares, Art. 4, 7 Stat. 13, 14.

[399] Schmeckebier, The Office of Indian Affairs, *op. cit.*, p. 49. The *Chickasaw Freedmen* v. *Choctaw Nation and Chickasaw Nation*, 193 U. S. 115, 124 (1904). Part of the Osage, Quapaw, Seminole, and Shawnee tribes signed treaties of alliance with the Confederacy on October 2 and 4, 1861. The Cherokees signed such a treaty on October 7, 1861, and on October 28, 1861, adopted a declaration of independence. Wardwell, Political History of Cherokee Nation (1938), pp. 132–133, 139. Also see Op. Sol. I. D., M.27759, January 22, 1935. For a list of treaties negotiated by the Confederacy with the Indians, see Abel, supra, vol. 1 (1915), pp. 157, 158. Their terms are discussed at pp. 158–180. The Confederacy recognized slavery as a legal institution within the Indian country, p. 166.

[400] Abel, vol. 1, *supra*, pp. 14, 266.

[401] *Ibid.*, p. 14.

[402] Schmeckebier, *op. cit.*, p. 49.

[403] *Ibid.* The Cherokees, Creeks, and Seminoles were fairly evenly divided. Abel, vol. 1, *supra*, pp. 265, 266, vol. 3, *supra*, pp. 12, 304–306. Several appropriation acts authorized the President to expend part of the appropriations for the hostile tribes on the loyal members of such tribes, who were driven from their homes during the Civil War. Act of July 5, 1862, 12 Stat. 512, 528; Act of March 3, 1863, sec. 3, 12 Stat. 774, 793.

[404] See *The Chickasaw Freedmen*, *supra*, p. 116.

[405] Treaty of July 19, 1866, with the Cherokee Nation, Art. 9, 14 Stat. 799, 801. However, the large slave owners among the Cherokee Nation did not recognize this law until the fall of the Confederacy. Wardwell, *op. cit.*, pp. 173–174.

[406] Adopted September 3, 1865. *The Chickasaw Freedmen*, *supra*, p. 124. See Abel, vol. 3, *supra*, p. 269.

[407] Abel, vol. 3, *supra*, p. 269.

[408] 112 U. S. 94 (1884).

[409] 34 C. Cls. 441 (1899).

[410] See *Nunn* v. *Hazelrigg*, 216 Fed. 330, 333 (C. C. A. 8, 1914); Thompson, The Constitution & the Courts (1924), p. 556.

[411] *United States* v. *Choctaw Nation*, 38 C. Cls. 558, 566 (1903), aff'd sub nom. *Chickasaw Freedmen*, 193 U. S. 115 (1904). The day before the proclamation of the Thirteenth Amendment, the President approved the Joint Resolution of July 27, 1868, 15 Stat. 264, commissioning General Sherman to reclaim from peonage women and children of the Navajo Indians enslaved in the Indian Territory.

[412] *In re Sah Quah*, 31 Fed. 327 (D. C. Alaska, 1886) in which the court refused to recognize the tribal law of slavery because it contravenes the Federal Constitution.

[413] *Hodges* v. *United States*, 203 U. S. 1 (1906).

[414] Sen. Ex. Doc., No. 71, *supra*.

[415] Treaty of March 21, 1866, with the Seminoles, Art. 2, 14 Stat. 755, 756; Treaty of June 14, 1866, with the Creeks, Art. 2, 14 Stat. 785, 786; Treaty of July 19, 1866, with the Cherokee, Art. 9, 14 Stat. 799, 801.

[416] Treaty of January 22, 1855, with the Dwamish and others, Art. 11, 12 Stat. 927, 929; Treaty of January 26, 1855, with the S'Klallams, Art. 12, 12 Stat. 933, 935; Treaty of August 12, 1865, with the Snakes, Art. 1, 14 Stat. 683.

Even before the war there were many freedmen in the Indian Territory[417] and considerable intermarriage between Negroes and southern Indians.[418] Fearful that the emancipation of the slaves might cause prejudice against them, the United States Commissioners required the adoption of important provisions regarding the freedmen in many of the treaties, which included recognition as citizens, the granting of equal rights with Indians[419] and the right to share in tribal funds and property.[420]

The Court of Claims said:[421]

> * * * It is impossible to find in the history of the Seminoles a trace of hostility towards their slaves or freemen * * * *. (P. 464.)
>
> * * * The wife of Osceola, one of their most noted, brave, and celebrated chiefs, was a descendant of a fugitive slave, and it was on account of her recapture as a fugitive that this intrepid half-breed chief waged a cruel and protracted warfare against the whites * * *. (P. 459.)

The court added:

> An examination of the treaties made immediately after the close of the Civil War with the tribes who had entered into treaties with the Confederacy, unmistakably discloses that the predominant purpose and intent of the Government as to preexisting slavery was to protect and care for the freedmen. (P. 466.)

The setting up of the freedmen as worthy of special consideration at a time when the Indians were suffering from economic dislocation[422] caused increased prejudice and among the Choctaws and Chickasaws, a reign of terror.[423]

Until the passage of the Citizenship Act, tribal Indians were unable to become citizens by the regular naturalization laws, but by the Thirteenth Amendment Negroes who were formerly slaves could become citizens in this way.[424]

Other types of statutes distinguished between Indians and freedmen. For example, the prohibition against the execution and sale of improvements on Indian lands contained in the Act of May 2, 1890,[425] is applicable only to improvements owned by Indians by blood and not Indians by adoption or marriage.[426]

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[417] Abel, vol. 3, *supra*, p. 272.

[418] Abel, vol. 3, *supra*, p. 23, fn. 14. Even before the Civil War some Indians actively opposed slavery. Opposition to slavery was one of the main objectives of the Keetowah Society, secret organization of Cherokees, formed almost a century ago. Memo. Sol. I. D., July 29, 1937.

[419] Cherokee Treaty of July 19, 1866, 14 Stat. 799; Treaty of March 21, 1866, with the Seminole Nation, Art. 2, 14 Stat. 755, 756, interpreted by *Seminole Nation* v. *United States*, 78 C. Cls. 455 (1933).

[420] Treaty of March 21, 1866, with the Seminole Nation, Art. 15, 14 Stat. 755. See Chapter 3, sec. 4I. On the subsequent history of these provisions, see Chapter 23, sec. 4.

[421] *Seminole Nation* v. *United States*, 78 C. Cls. 455 (1933).

[422] Abel, vol. 3, *supra*, pp. 290–292, 295.

[423] *Ibid.* p. 273.

[424] *Cf. United States* v. *Wildcat*, 244 U. S. 111 (1917).

[425] Sec. 31, 26 Stat. 81, 95.

[426] *Hampton* v. *Mays*, 4 Ind. T. 503 (1902).