Chapter 8

PERSONAL RIGHTS AND LIBERTIES OF INDIANS

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1: Introduction</td>
<td>151</td>
</tr>
<tr>
<td>Section 2: Citizenship</td>
<td>153</td>
</tr>
<tr>
<td>A. Methods of acquiring citizenship</td>
<td>153</td>
</tr>
<tr>
<td>(1) Treaties with Indian tribes</td>
<td>153</td>
</tr>
<tr>
<td>(2) Special statutes</td>
<td>153</td>
</tr>
<tr>
<td>(3) General statutes naturalizing all Indians</td>
<td>154</td>
</tr>
<tr>
<td>(4) General statutes naturalizing other classes of Indians</td>
<td>154</td>
</tr>
<tr>
<td>B. Noncitizen Indians</td>
<td>154</td>
</tr>
<tr>
<td>C. Effect of citizenship</td>
<td>156</td>
</tr>
<tr>
<td>Section 3: Suffrage</td>
<td>157</td>
</tr>
<tr>
<td>A. Indian disenfranchisement</td>
<td>157</td>
</tr>
<tr>
<td>B. Constitutional protection of Indian voting rights</td>
<td>158</td>
</tr>
<tr>
<td>Section 4: Eligibility for public office and employment</td>
<td>159</td>
</tr>
<tr>
<td>A. Public office</td>
<td>159</td>
</tr>
<tr>
<td>B. Preference in Indian and other governmental service</td>
<td>159</td>
</tr>
<tr>
<td>(1) Extent of employment</td>
<td>159</td>
</tr>
<tr>
<td>(2) Civil service</td>
<td>159</td>
</tr>
<tr>
<td>(3) Treaties and statutes</td>
<td>160</td>
</tr>
<tr>
<td>(a) Treaties</td>
<td>160</td>
</tr>
<tr>
<td>(b) General statutes</td>
<td>160</td>
</tr>
<tr>
<td>(4) Statutes of limited application</td>
<td>160</td>
</tr>
<tr>
<td>(a) Construction work on reservation</td>
<td>160</td>
</tr>
<tr>
<td>(b) Purchase of Indian products</td>
<td>161</td>
</tr>
<tr>
<td>(c) Military service</td>
<td>161</td>
</tr>
<tr>
<td>(d) Youth</td>
<td>161</td>
</tr>
<tr>
<td>Section 5: Eligibility for state assistance</td>
<td>162</td>
</tr>
<tr>
<td>Section 6: Right to sue</td>
<td>162</td>
</tr>
<tr>
<td>Section 7: Right to contract</td>
<td>164</td>
</tr>
<tr>
<td>A. Power of attorney</td>
<td>164</td>
</tr>
<tr>
<td>B. Cooperatives and business organizations</td>
<td>164</td>
</tr>
<tr>
<td>C. Rights of creditors</td>
<td>165</td>
</tr>
<tr>
<td>Section 8: The meanings of &quot;incompetency&quot;</td>
<td>167</td>
</tr>
<tr>
<td>A. General lack of legal capacity</td>
<td>167</td>
</tr>
<tr>
<td>B. Restricted meanings</td>
<td>167</td>
</tr>
<tr>
<td>(1) Inability to alienate land</td>
<td>167</td>
</tr>
<tr>
<td>(a) Statutes</td>
<td>167</td>
</tr>
<tr>
<td>(b) Treaties</td>
<td>167</td>
</tr>
<tr>
<td>(2) Inability to receive or spend funds</td>
<td>169</td>
</tr>
<tr>
<td>(3) Inability to earn wages</td>
<td>169</td>
</tr>
<tr>
<td>(4) Inability to serve in the military</td>
<td>169</td>
</tr>
<tr>
<td>Section 9: The meanings of &quot;wardship&quot;</td>
<td>170</td>
</tr>
<tr>
<td>A. Words as domestic dependent nations</td>
<td>170</td>
</tr>
<tr>
<td>B. Words as subjects to congressional power</td>
<td>170</td>
</tr>
<tr>
<td>C. Words as individuals subject to congressional power</td>
<td>171</td>
</tr>
<tr>
<td>D. Words as subjects of federal court jurisdiction</td>
<td>171</td>
</tr>
<tr>
<td>E. Words as beneficiaries of a trust</td>
<td>172</td>
</tr>
<tr>
<td>F. Words as beneficiaries of a public trust</td>
<td>172</td>
</tr>
<tr>
<td>G. Words as noncitizens</td>
<td>172</td>
</tr>
<tr>
<td>H. Wardship and inequality of bargaining power</td>
<td>172</td>
</tr>
<tr>
<td>J. Words as subjects of federal bounty</td>
<td>173</td>
</tr>
<tr>
<td>Section 10: Civil liberties</td>
<td>173</td>
</tr>
<tr>
<td>A. Discrimination</td>
<td>173</td>
</tr>
<tr>
<td>(1) Discriminatory state laws</td>
<td>173</td>
</tr>
<tr>
<td>(2) Discriminatory federal laws</td>
<td>174</td>
</tr>
<tr>
<td>(3) Oppressive federal administrative action</td>
<td>175</td>
</tr>
<tr>
<td>(a) Concentration of administrative power</td>
<td>175</td>
</tr>
<tr>
<td>(b) Confinement on reservations</td>
<td>176</td>
</tr>
<tr>
<td>B. Remedies</td>
<td>177</td>
</tr>
<tr>
<td>(1) The right of expatriation</td>
<td>177</td>
</tr>
<tr>
<td>(2) Antidiscrimination statutes and treaties</td>
<td>178</td>
</tr>
<tr>
<td>(a) Federal statutes affecting Indians only</td>
<td>178</td>
</tr>
<tr>
<td>(b) Federal statutes affecting all races</td>
<td>179</td>
</tr>
<tr>
<td>(c) State statutes affecting all races</td>
<td>179</td>
</tr>
<tr>
<td>(d) Treaties affecting all races</td>
<td>179</td>
</tr>
<tr>
<td>Section 11: The status of freedmen and slaves</td>
<td>179</td>
</tr>
<tr>
<td>A. Subsistence</td>
<td>179</td>
</tr>
<tr>
<td>B. Rights of freedmen and slaves</td>
<td>179</td>
</tr>
<tr>
<td>C. Rights of emancipated Indians</td>
<td>179</td>
</tr>
<tr>
<td>Section 12: The status of dependent nations</td>
<td>181</td>
</tr>
<tr>
<td>A. The status of dependent nations</td>
<td>181</td>
</tr>
<tr>
<td>B. The status of dependent nations</td>
<td>181</td>
</tr>
</tbody>
</table>

SECTION 1. INTRODUCTION

To analyze the personal rights and liberties of Indians it 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 envy ing 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 have 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 any way 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 of 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.2

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 skilful juggling of words of many meanings, such as “wardship” and “incompetency.”

In 1842, Attorney General Legare wrote: 3

*  *  *  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, J. Judge Cuthbert Pound, wrote of “Nationals without a Nation,” 4 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).
(j) Status of freedmen and slaves (sec. 11).

1 Translation from Fr. A. MacNutt, Bartholomew de Las Casas: His Life, His Apostolate, and His Writings (1909), pp. 249, 431.
SECTION 2. CITIZENSHIP

Since June 2, 1824, all Indians born within the territorial limits of the United States have been citizens, by virtue of the act of that date. 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, 1906. 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. In some cases, citizenship was made dependent upon acceptance of an allotment of land in severality.6

* * *


Pub. No. 853, 76th Cong., sec. 201 of which declares:

The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe.

*Treaty of September 27, 1830, with Choctaws. Art. 14, 7 Stat. 333. 335. For Illustrations of treaties conveying citizenship on heads of families, see Treaty of July 8, 1817, with Cherokees, Art. 8, 7 Stat. 156. 157; Treaty of February 27, 1819, with Cherokees, Art. 2. 7 Stat. 156. 157.


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 incomparability, 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 earlier 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, 1801, 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, forbids tribal membership to Wyanotties who had consented to become citizens under a prior treaty, unless they were found " unfit for the responsibilities of citizenship. 8

(2) Special statutes.—Before and after the termination of the treaty-making period, the members of several tribes were naturalized collectively by statute. The tribe was in a few cases dissolved at the same time 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. 9

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. By section 10 of this law a Wyanottie 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.

* Arts. 12. 13 Stat. 1191, 1192.
* Arts. 13. 15 Stat. 513, 516 (Senecas and others) also see Arts. 17. 28, 34 for other provisions regarding citizenship.
* 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, Arts. 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.
* Sec 10. 16 Stat. 335. 361-362. By the Act of March 3, 1873. sec. 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 court, the proof 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 severity 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 incompatibility between tribal membership and United States citizenship.

The same idea underlay the Indian Territory Naturalization Act, 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 forfeit or lose any rights, privileges or immunities 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, generally known as the Dawes Act, was the most important method of acquiring citizenship. 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


** Act of May 2, 1890, sec. 43, 26 Stat. 81, 99-100. This section also grants citizenship to Civilized 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 (Port 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. Stimson, 231 U. S. 341 (1913); United States v. Rickett, 188 U. S. 432 (1903); 42 L. D. 489 (1913); Taliaferro v. J. 193 (1898). On pollen or general allotment Act, Act of June 28, 1906, 34 Stat. 539, see Levindale Lead Co. v. Coleman, 241 U. S. 432 (1916) and Chapter 23. sec. 12a.

18 Senator Orville H. Platt of Connecticut wrote: "Modern observation and thought have reached the conclusion that allotment of land in severalty is the indispensable condition of Indian progress. Problems in the Indian Territory (1905), 190 Am. Rev. 195. 200. See also Thayer, A People Without Law (1861), 68 Atl. Monthly, 940. 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 he desired to become a citizen.

The Act of June 22, 1874. 18 Stat. 140, 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 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."

By an amendment adopted May 8, 1906, 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, 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 case of United States v. Celestine 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; distinctly to postpone to the expiration of the trust period the subject of allotments 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, and Indian men who enlisted, to fight in the World War could become citizens under the Act of 1919.

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."


26 Stat. 182.

27 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), 5 Indiana at Work, No. 8, pp. 24-26.


30 232 U. S. 442, 450 (1914).


32 41 Stat. 350. This measure was encouraged by the Commissioner of Indian Affairs. Only a few Indians acquired citizenship in this way.


34 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, who were regarded as domestic subjects or nationals. As members of domestic dependent nations, owning allegiance to their tribe, they were analogized to children of foreign diplomats, born in the United States.

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.

Caleb Cushing, Attorney General of the United States, formulated the following theory of the status of Indians:

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, in mere right of birth, citizens of the United States.

But they cannot become citizens by naturalization under existing general acts of Congress. (C. K. Kent’s Com., p. 72.)

These 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, these 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. (181 Fed. Cas. 15045 (D.C. N.D. Wash. 1915).)

This theory was reiterated after the adoption of the Fourteenth Amendment, which defined federal citizenship. At the time of its adoption, eminent lawyers differed on its effect on the Indians. Hope that a liberal interpretation would make Indians citizens was shattered by an early case, 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 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-governance, 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, and the dicta of United States v. Wong Kim Ark, 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 justifications for this unique status of the Indians, which departed from the common-law doctrine of jus soli. One writer believed that the economic interests of the land grabbers and Indian traders caused them to exercise citizenship. 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, because they would add to burdens imposed by naturalization of aliens, and because they enjoyed special privileges, such as exemption from taxation.

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 disfranchisement 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."

The Indians, however, frequently did not welcome federal citizenship; 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."

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 Camillo, 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 by the Act of July 14, 1870, sec. 7, 16 Stat. 254, 255.


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, in fact, a ward of the Government and entitled to the consideration and assistance of our diplomatic and consular officers. (P. 147.)


33 To clarify its effect, the Senate Judiciary Committee filed a report pursuant to Senate Resolution of April 7, 1870, which concluded that the Indians did not attain citizenship by the Fourteenth Amendment; S. Doc. No. 268, 41st Cong., 3d sess. (1870), pp. 1-11.


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).


43 See Chapter 3, secs. 42, 48.


familiar with the significance of federal citizenship and some times recanted choosing it."

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 or affect tribal existence.51 Statutes or treaties naturalizing Indians often expressly permit those who become citizens to retain their tribal rights. Citizenship and tribal membership are not incompatible.52

3. Citizenship, though it is today usually a prerequisite of suffrage, does not confer the right4 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.53

4. Citizenship is not incompatible with federal powers of guardianship.54

4. 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, unwilling to continue in the exercise of the responsibilities of citizenship of the United States, and likely to become a public charge."

5. Op. J. D. M. 28898, 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. I Rev. 83, 167-180. On taxation of Indians, see Chapter 13.


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


13. In some states citizenship is the only qualification. Calif. Const. (1879), Art. 1, sec. 1, "Every native citizen of the United States shall be entitled to vote at all elections." The contrary opinion of the United States Supreme Court in Matter of Heff, 197 U. S. 468 (1900) holding that Congress could not regulate the sale of liquor to Indians who were citizens expressly overruled by United States v. Nice, 241 U. S. 591, 598 (1916), which held: "Citizenship is not incompatible with tribal existence or continued use of reservation lands, and may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.

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


18. See Chapter 13, sec. 3.


21. For discussion of the status of Pueblos of New Mexico, see Chapter 20; and of the Alaskan Indians, see Chapter 21.
Although prior to the Citizenship Act, 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

Protection by the Government with the right to acquire and possess property of every kind, and to pursue happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole. (Pp. 315-318.)

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 disfranchisement of the Indians has been a slow and is still an incomplete process.71 In most states Indians meeting the ordinary suffrage requirements can and do vote. In some of the sparsely settled western states, where they form a large proportion of the population, their vote is of considerable importance in close primaries and elections.72 While at first it was asserted that unscrupulous whites could enthrone the vote of the ignorant,73 many Indians are becoming sufficiently aware of their political power and responsibility, and are directing considerable attention to matters directly affecting them, such as tribal claims and water rights.74

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 specifically 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,75 reappears in section 2 of the Fourteenth Amendment and the civil Rights Act of April 9, 1866,76 declaring who shall be federal citizens, and was used to exclude Indians in the apportionment of representatives to a territorial or state legislature77 or constitutional convention, or from participation in a referendum to determine whether the inhabitants of a territory desired statehood.78

17 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 1893, cited in Houghton, The Legal Status of Indian Suffrage in the United States (1881), 19 Calif. L. Rev. 507, 515, fn. 39, removed them from voting. It appears in one section 112 U. S. 525 (1854).

18 How. 525 (1854). This is the most important in the original Constitution. The First Amendment and the Civil Rights Act of April 9, 1866, directed considerable attention to matters directly affecting the vote of the ignorant. Many Indians are becoming sufficiently aware of their political power and responsibility, and are directing considerable attention to matters directly affecting them, such as tribal claims and water rights.

SECTION 3. SUFFRAGE

Various state and federal laws enacted from the beginning of the nineteenth century to the early part of the twentieth disenfranchised "Indians not taxed," 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 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."82 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 or such racial discrimination are found in the constitutions of the States of Idaho,84 New Mexico,85 and Wash-


18 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. 267. 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.


22 Goodrich, op. cit., p. 91.

23 Ibid.

24 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.

25 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 the 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.
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 provisions87 denying suffrage to "persons under guardianship." 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.88 The Utah Attorney General, on January 22, 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.89

B. CONSTITUTIONAL PROTECTION OF INDIAN VOTING RIGHTS

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 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.90

The year following the passage of the Civil Rights Act of 1870,91 the United States District Court for Oregon stated92 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. 186.) As was said by the United States Supreme Court in the case of United States v. Reese,93

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 guarantee 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,94 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 vote 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. (P. 8.)

Two Attorneys General of the State of Washington have ruled that the Indian disenfranchisement clause in the Constitution of Washington is invalid.95

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.96

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 Am. 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, supra.
90 United States v. McIntosh, 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.
92 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, adopted 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.)
94 Act of May 31, 1870, 16 Stat. 140.
98 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.
ELIGIBILITY FOR PUBLIC OFFICE AND EMPLOYMENT

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.196 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.197

Many early statutes disqualified noncitizen Indians from holding public offices by limiting, incumbents to citizens of the United States 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.198 These acts were implemented by the Act of April 20, 1871.199 A number of Indians were elected as delegates to the Constitutional Convention of the Territory of Oklahoma.200 Nevertheless, even now a few states still bar Indians from public office, by provisions which are probably unconstitutional.

Idaho 201 prohibits from holding any civil office Indians not proved who have not severed their tribal relations and adopted the habits of civilization. The law of South Dakota excludes Indians "while maintaining tribal relations."202

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.203 Officials have sometimes justified their failures in this respect by maintaining the impossibility of securing competent Indians, especially for the more important positions.204 Some critics have

197 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 office of 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).
198 Act of September 9, 1850, sec. 6, 5 Stat. 446, 449; Act of March 30, 1854, sec. 3, 10 Stat. 277, 279; Act of August 13, 1856, sec. 21, 11 Stat. 52, 54, provided that noncitizens holding office in the Department of State shall not be paid.
200 Act of March 30, 1870. 16 Stat. 80, 81, admitting Texas to the Union.
201 Act of April 20, 1871, sec. 2, 17 Stat. 5.
202 Leupp, The Indian and His Problem (1910), pp. 341-342.
203 Constitution of Idaho, Art. 6, sec. 3.
204 Compiled Laws of S. D., sec. 92 (1929).
205 See 3 (b) infra.
206 11 F. 2d 293, 295 (C.C.A. 9th Cir. 1926).
207 The policy of all administrations since Commissioner Morgan took office has been to give education to Indians every practicable chance to serve their people; but the experiment of putting them into the places of highest responsibility, except in rare instances, not worked so successfully. Leupp, The Indian and

members of an Indian nation or tribe in the Indian Territory in Oklahoma to vote for delegates 208 and prohibited any law restricting the right of suffrage because of race or color.209

210 See 25, p. 279, applying to New Mexico prohibiting discrimination against Indians not employed.

211 "Eligibility for public and political office, 5th Amendment, right of suffrage, discriminations between citizens, 14th Amendment." 1910, pp. 88, 91.
212 "The Indian and His Problem (1910), p. 96.
213 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 men in year-round positions. On April 30, 1938, there were employed in the Indian Service 6,876 Indians in the Indian Service 6,876, 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 record books do not classify Indians those with a small amount of Indian blood than one-fourth.

11 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.
215 Leupp, The Indian and His Problem (1910), pp. 341-342.
216 Albert, Some Aspects of the Personal 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.
217 There have been numerous Executive orders affecting the employment of Indians, e.g., Executive orders of August 14, 1929; July 2, 1930: April 14, 1934; July 26, 1936.
of Indian Affairs on February 1, 1839, who met certain require-
ments were given a classified civil-service status.

(5) Treaties and statutes.—With a few exceptions, through-
out 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
qualifications122 or for laboring positions.123 These positions,
which, were often created by appropriation acts, usually paid
low wages,124 and were sometimes supported by tribal funds.125
Similarly today most Indians in the Government Service are
employed in clerical, stenographic, or laboring work, though a
few hold supervisory positions.126

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

And the United States agree that in the appointment of
marshals and deputies, preference, qualifications being

122 For a discussion of the policy of preferring Indians for appointment
in the Indian Service, see Meriam and Associates, Problem of Indian
Administration (1926), pp. 156-159.

123 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 the same." Also see Act of June 7, 1924, c. 318, 43 Stat. 606
(Navajo): Act of March 1, 1926, 44 Stat. 135 (Quinaietans): Act of April
(Chippewas): Act of May 12, 1926, c. 531, 45 Stat. 501 (Zuni): Act of
May 27, 1917, c. 346, 43 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.

124 Sec. 9 of the Act of June 10, 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 Chochatau, Art.
21, 7 Stat. 333, 336, 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 United States
in the pay of an interpreter as an agent of the United States Army.

125 Sec. 12 of the Wheeler-Howard Act,128 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, knowl-
dge, and ability for Indians who may be appointed,
without regard to civil-service laws, to the various posi-
tions 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


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


129 For a discussion of the policy of preferring Indians for appointment
in the Indian Service, see Meriam and Associates, Problem of Indian
Administration (1926), pp. 156-159.

130 Act of June 25, 1904, 33 Stat. 352, 354 (Crows); Act of March

131 Act of June 10, 1834, sec. 9, 4 Stat. 735. 737.

132 Act of June 10, 1834, sec. 9, 4 Stat. 735. 737.

133 Act of June 10, 1834, sec. 9, 4 Stat. 735. 737.


of February 14, 1923, 42 Stat. 1246 (Plutes), extended the provisions
of this act, as amended, to lands purchased for Indians.

Also see Act of May 17, 1882, 22 Stat. 68, 88; Act of July 4, 1884, 23
Stat. 76. 97.


138 7 Indians at Work. No. 1, pp. 41-42 (1939); vol. 7, No. 5. p. 2
(1940).

139 Act of June 10, 1896, Act. 3. 29 Stat. 321. 355: "It is agreed that
in the employment of all agency and school employees preference in
all cases be 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).