The Legal Status of Indian Suffrage in the United States

By Act of Congress of June 2, 1924, all non-citizen Indians born within the territorial limits of the United States were made citizens thereof.[1] Therefore, in so far as national citizenship may constitute a qualification for voting in any state, Indians were placed on an equality with other citizens.

Yet the Supreme Court of Arizona, by a two to one decision, held Indians living on reservations in Arizona to be ineligible to vote.[2] This decision appears to be the first one involving the right of the newly made Indian citizens to vote. Since the principles of law enunciated by the majority opinion in this case may, in the future, be involved in similar cases affecting the voting privilege of large numbers of Indians in the several states, the matter warrants some analysis of the legal status of Indian suffrage in general, and of the authorities bearing on the Arizona case in particular.

Certain Indians, members of the Pima tribe residing on the Gila River Reservation in Arizona, sought to register in Pinal County preparatory to voting in the election on November 6, 1928. When the county recorder refused to permit them to do so, the Indians sought a writ of mandamus directing the recorder to enter their names on the register of the county, alleging that they possessed all the qualifications for suffrage as set forth in the constitution and laws of the State of Arizona.

In her answer, the recorder alleged: first, that plaintiffs were not properly to be considered "residents" of the State of Arizona, as required by the constitution of Arizona of all voters; and second, that they were specifically disqualified from voting by the Arizona constitution by virtue of their being "persons under guardianship."[3]

In support of the first contention, it was set forth that the Indian reservation, being subject to the exclusive jurisdiction and control of the laws of Congress and the administration of the national government, could not be considered to be a part of the State of Arizona "either politically or governmentally," although being physically within the geographical boundaries of the state.

The court overruled this contention, holding: (1) that "all Indian reservations in Arizona are within the political and governmental, as well as geographical boundaries of the state"; (2) that, in so far as the

[1] (1924) 43 STAT. 253, (1926) 8 U. S. C. §3.
[2] Porter v. Hall (1928) 34 Ariz. 308, 271 Pac. 411.
[3] Article 7, §2.

enabling act which provided for the admission of Arizona established an exclusive national jurisdiction over Indian lands, it "applies to the Indian lands considered as property, and not as a territorial area withdrawn from the sovereignty of the State of Arizona"; and (3) that plaintiffs were, therefore, "residents of the State of Arizona" within the meaning of the constitution of Arizona.

In reaching this conclusion, the court relied on the general principles that whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation or the sole and exclusive jurisdiction over that reservation, it has done so by express words; and that unless the sole and exclusive jurisdiction has been reserved to the national government, the state has jurisdiction within the area of an Indian reservation within its boundaries for purposes of enforcing state law as regards cases between persons other than Indians.[4]

Having thus decided that Indians living on reservations are residents of the state, the court then addressed its attention to the second contention of the recorder; namely, that Indians on reservations being "under the laws, rules and regulations of the United States government," and not being subject to the jurisdiction of the State of Arizona are not *sui juris*, but are "under guardianship," within the meaning of the Arizona constitution, which provides that "no person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election."[5]

Defining a "person under guardianship" as "any person who, by reason of personal inherent status, age, mental deficiency, or education, or lack of self-control, is deemed by the law to be incapable of handling his own affairs in the ordinary manner, and is therefore placed by that law under the control of a person or agency which has the right to regulate his actions or relations towards others in a manner differing from that by which the actions and relations of the ordinary citizen may be regulated," the court held that "all Indians are wards of the federal government, and as such are entitled to the care and protection due from a guardian to his ward."[6] Referring to the case of *Winton v. Amos*,[7] in which it is set forth that "It is thoroughly established that Congress has

[4] Citing Blue-Jacket v. Johnson County Commissioners (1867) 72 U. S. (5 Wall.) 737; Harkness v. Hyde (1878) 98 U. S. 476; Langford v. Monteith (1880) 102 U. S. 145; United States v. McBratney (1881) 104 U. S. 621; Draper v. United States (1896) 164 U. S. 240, 17 Sup. Ct. 107.

[5] Article 7, §2.

[6] Citing Cherokee Nation v. State of Georgia (1831) 30 U. S. (5 Pet.) 1; United States v. Kagama (1886) 118 U. S. 375, 6 Sup. Ct. 1109; Jones v. Meehan (1899) 175 U. S. 1, 20 Sup. Ct. 1; United States *ex rel.* West v. Hitchcock (1907) 205 U. S. 80, 27 Sup. Ct. 423; Williams v. Johnson (1915) 239 U. S. 414, 36 Sup. Ct. 150; United States v. Board of County Commissioners of Osage County (1919) 251 U. S. 128, 40 Sup. Ct. 100; LaMotte v. United States (1921) 254 U. S. 570, 41 Sup. Ct. 204.

plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it," the court pointed out that the federal statutes make tribal Indians on their reservation subject to national authority, and not to state authority; that for crimes committed on the reservation they are subject, not to the laws of the State of Arizona, but to the laws of the United States and their own tribal customs. And, stating that "this is based on the fact that they are wards of the United States, and not that they are without the territorial jurisdiction of the state,"[8] the court held that "so long as the federal government insists that, notwithstanding their citizenship, their responsibility under our law differs from that of the ordinary citizen, and that they are, or may be, regulated by that government by virtue of its guardianship, in any manner different from that which may be used in the regulation of white citizens, they are, within the meaning of our constitutional provision, persons under guardianship, and not entitled to vote."[9]

In support of this position, the court quoted from *Opsahl v. Johnson,*[10] in which the Supreme Court of Minnesota stated that "It cannot for a moment be considered that the framers of the Constitution intended to grant the right of suffrage to persons who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who do not come within the operation of the laws of the state, nevertheless shall have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which he need not obey."

Summarizing, it appears: (1) that the court considered Indians living on reservations to be residents of the state; (2) that the majority of the court held Indians living on reservations to be "persons under guardianship," as wards of the national government, within the meaning of the constitution of Arizona; and (3) that the fact that Indians on a reservation are not subject to the laws of the state for any action or conduct on the reservation, irrespective of their citizenship, constitutes the dominant factor underlying the majority opinion.[11]

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[7] (1921) 255 U. S. 373, 391, 41 Sup. Ct. 342, 349.

[8] Citing United States v. Kagama, *supra* note 6, and Donnelly v. United States (1913) 228 U. S. 243, 33 Sup. Ct. 449, Ann. Cas. 1913E 710.

[9] Porter v. Hall (1928) 34 Ariz. 308, 331, 271 Pac. 411, 419.

[10] (1917) 138 Minn. 42, 48, 163 N. W. 988, 990.

[11] The position of Ross, C. J., who dissented, will be treated at a later point.

While the case before the court involved only the voting status of Indians living on reservations, the question immediately arose as to whether Indians who do not

Any analytical study of the situation would appear, therefore, to involve at least brief treatment of the following phases of the subject: (1) the evolution of Indian citizenship; (2) Indians as "wards of the national government"; (3) Indians as persons "under guardianship" as meant by state constitutions containing that condition as a disqualification for voting; and (4) the disfranchisement of Indians on reservations by state action.

I. Evolution of Indian Citizenship

Prior to the adoption of the 14th Amendment in 1868 there was no definition of citizenship in the Constitution of the United States. The 14th Amendment declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Interpreted literally, this definition would have made citizens of the Indians. But in an early case involving an interpretation of the point,[12] the federal District Court for Oregon held the 14th Amendment to be merely declaratory of the common law rule of citizenship by birth. "To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience. . . . But the Indian tribes within the limits of the United States have always been held to be distinct and independent political communities, retaining the right of self-government, though subject to the protecting power of the United States." Thus, the amendment was interpreted as though it read, "all persons born . . . in the United States [and born] subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside." Later the United States Supreme Court held that Indians born in tribal allegiance were not "born in the United States and subject to the jurisdiction thereof."[13] They have been described by the Department of Justice as "domestic subjects"[14] of the United States.

But it has been a policy of the national government to encourage the Indians to abandon their tribal relations and to adopt the life and customs of civilization. Looking to this end, various treaties with the Indian tribes, and special acts of Congress, have provided for allotment of lands to individual Indians, which lands were ultimately to become their personal property. Such Indians have been required to sever their tribal relations, live on their allotments, and adopt the life and habits of

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reside on reservations should be considered eligible to vote, and the Arizona Attorney General, John W. Murphey, gave an opinion in which he ruled that "any Indian under government guardianship, regardless of residence, is not entitled to vote."

[12] McKay v. Campbell (1871) Fed. Cas. No. 8840, 16 Fed. Cas. 161.

[13] Elk v. Wilkins (1884) 112 U. S. 94, 5 Sup. Ct. 41.

[14] (1856) 7 Op. Atty. Gen. 746.

civilized white men.[15] As a further inducement to complete abandonment of their tribal status and old ways of living, Indians to whom such allotments were granted were made citizens of the United States. The Act of Congress of February 8, 1887, known as the "Dawes Act" provided that "Every Indian born within the territorial limits of the United States, to whom allotments [of land] shall have been made under the provisions of this act, or under any law or treaty, . . . is hereby declared to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizen."[16] An Act of Congress of March 3, 1901, amending the "Dawes Act," conferred citizenship on the same terms to all Indians in the Indian Territory.[17] And finally, on June 2, 1924, Congress enacted "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."[18]

II. INDIANS AS "WARDS OF THE NATIONAL GOVERNMENT"

In the case of *Cherokee Nation v. State of Georgia*,[19] decided in 1831, Chief Justice Marshall spoke of the Indian tribes as being in a "state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." This decision had no relation whatever to the matter of Indian suffrage, and was not concerned with the status of the individual Indian, but with the question of whether the national courts could properly exercise jurisdiction in cases to which Indian tribes were parties. In this connection, Chief Justice Marshall stated that "It is not perceived how it is possible to escape the conclusion that they [Cherokee Nation] form a sovereign state. They have always been treated as such by the government of the United States."[20]

This policy of treating the Indian tribes as a species of independent state to be left alone in their conduct of their own affairs was ultimately somewhat altered. The early plan of dealing with the tribes by means of treaties was abandoned in 1871, when Congress adopted the policy of governing them by means of Acts of Congress.[21] And yet Mr. Chief

[15] See, for example, the Treaty of September 27, 1830, with the Choctaw Indian Nation (1830) 7 STAT. 333, and the "Dawes Act" of February 8, 1887, (1887) 24 STAT. 388.

[16] (1887) 24 STAT. 388 §6.

[17] (1901) 31 STAT. 1447.

[18] (1924) 43 STAT. 253.

[19] (1831) 30 U. S. (5 Pet.) 1, 17.

[20] It was pointed out, however, that, although the Cherokee Nation was a sovereign state, it could not be considered a "foreign state" within the meaning of the constitution, but rather was a "domestic dependent nation."

[21] (1871) 16 STAT. 566. See Lone Wolf v. Hitchcock (1903) 187 U. S. 553, 23 Sup. Ct. 216.

Justice Marshall's allusion to the "sovereign" Indian tribes as occupying a status "resembling wardship to the nation" was adapted by the United States Supreme Court to the new set of conditions. In the case of *United States v. Kagama*,[22] decided in 1886, the power of Congress to confer jurisdiction upon the national courts over certain crimes committed on Indian reservations within a state[23] was questioned. Upholding the power of Congress, the Court said: "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

It thus appears that the concept of wardship of the national government with respect to tribal Indians has, from the very beginning, been associated with the idea of the somewhat exclusive jurisdiction of that government over tribal Indians. Of course reservation lands are exempt from state taxation, as are also lands allotted to individual Indians, during the period of occupancy prior to their acquiring fee titles, usually 25 years, and personal property of Indians on such allotted lands when bought by government funds.[24]

Speaking of the privileged status of tribal Indians on reservations within a state, the Supreme Court of Minnesota, in the case of *Opsahl v. Johnson*,[25] stated that "The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the processes of its courts. He bears none of the burdens of civilization and performs none of the duties of citizens. . . . No matter in what respect tribal Indians, not citizens, would violate our election laws, they could not be punished therefor, provided the acts were committed on a reservation."[26]

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[22] (1886) 118 U. S. 375, 6 Sup. Ct. 1109.

[23] Act of March 3, 1885, (1885) 23 STAT. 385.

[24] United States v. Rickert (1903) 188 U. S. 432, 23 Sup. Ct. 478; Stephens v. Cherokee Nation (1899) 174 U. S. 445, 19 Sup. Ct. 722; Selkirk v. Stephens (1898) 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759; (1888) 19 Op. Atty. Gen. 161, 169.

[25] (1917) 138 Minn. 42, 48, 163 N. W. 988, 990.

[26] Of course, it must be understood that the mere fact that a party is an Indian, even a tribal Indian, does not necessarily exclude him from the jurisdiction of the state courts nor exempt him from state law. A tribal Indian may be prosecuted

The cases so far considered have had to do with the so-called "guardianship" of the national government over tribal Indians, and have not involved the status of citizen Indians. The language just quoted from the case of *Opsahl v. Johnson* would seem to infer that citizen Indians on reservations may occupy a status different from non-citizen Indians with respect to state jurisdiction over crimes committed on the reservation. What then, is the position of citizen Indians with respect to the "guardianship" of the national government and the jurisdiction of the state?

In general, the courts have held that the granting of citizenship to an Indian does not operate of itself to terminate the condition of "guardianship" over him by the national government. The United States Supreme Court has held that although an Indian had been given United States citizenship and citizenship of the state in which a reservation was located, the national government might still retain jurisdiction over him for offenses committed within the limits of the reservation.[27] The authority of Congress to exclude collectors from Indian reservations, even though the Indians concerned were holders of allotted lands and citizens of the United States, has been upheld,[28] as was also the power of Congress to prohibit the sale of liquor on allotted lands to Indians whose traditional "wardship" to the national government Congress had not expressly terminated or altered.[29]

An examination of the cases reveals the fact that the courts have shown no unwillingness to uphold the authority of the national government to regulate affairs within Indian reservations, in so far as concerns Indians, citizen or non-citizen,[30] unless Congress has definitely terminated, or altered their peculiar relationship to the national government.

In the "Dawes Act,"[31] which provided for allotments of lands in severalty to Indians and conferred citizenship upon the allottees, Congress definitely made such citizen Indian allottees subject to the laws and governmental authority of the states in which they lived, and extended to them all the privileges and immunities of citizens in their respective states. This action of Congress the United States Supreme Court inter-

in the state courts for a crime committed within the state but outside the reservation. *In re* Wolf (1886) 27 Fed. 606; United States v. Sa-Coo-Da-Cot (1870) Fed. Cas. No. 16, 121, 27 Fed. Cas. 923; Rubideux v. Vallie (1873) 12 Kan. 28; State of Washington v. Williams (1895) 13 Wash. 335, 43 Pac. 15. Moreover, unless specific stipulation is made in the enabling act giving the national government jurisdiction over Indian reservations within a state, the state has jurisdiction within the reservations to enforce state law with respect to persons, other than Indians. See cases cited *supra* note 4. See also Painter v. Ives (1875) 4 Neb. 122; State of Nebraska v. Norris (1893) 37 Neb. 299, 55 N. W. 1086.

[27] United States v. Celestine (1909) 215 U. S. 278, 30 Sup. Ct. 93.

[28] Rainbow v. Young (C. C. A. 8th, 1908) 161 Fed. 835.

[29] United States v. Sutton (1909) 215 U. S. 291, 30 Sup. Ct. 116.

[30] See cases cited *supra* note 4.

[31] (1887) 24 STAT. 388.

preted as an express alteration of the traditional condition of "guardianship" of the national government as to the particular Indians affected by the act. With respect to these Indians the Court has distinguished between the authority of Congress over their allotted lands and their tribal property, on the one hand, and the authority of Congress in matters of "police regulations," on the other hand. The former power is considered to be unimpaired either by the granting of citizenship to Indians or by making them subject to state authority, and it continues to give even citizen Indians living on allotted lands a status of "wardship" to the national government. But, the power of Congress with respect to "police regulations" has been held to be terminated as regards Indians on allotted lands, when they are granted citizenship and the status of other citizens of the state. So, the authority of Congress to prohibit the sale of liquor to citizen Indians who had received patents to their lands allotted under the "Dawes Act," and who had, therefore, been subjected to state authority, was held not to exist, prior to the adoption of the 18th Amendment. "We are of the opinion," said the Court in *In re Heff*,[32] "that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The authority of Congress over citizen Indians with respect to their allotted lands and property interests, has thus been conceded by the courts. And Congress has placed restrictions upon the right of citizen Indians holding allotted lands to lease, sell, or otherwise encumber such lands.[33] An Act of Congress of March 3, 1893, provided for allotment of lands in severalty to Indians in the Indian Territory.[34] All Indians in the Indian Territory were made citizens of the United States by the Act of March 3, 1901.[35] In 1902 Congress placed certain very definite restrictions upon the privilege of these Indians to sell or dispose of their allotted lands, requiring approval of the Department of the Interior for all such transactions.[36] It was contended in the case of *Tiger v. Western Invest-*

[32] (1905) 197 U. S. 488, 509, 25 Sup. Ct. 506, 512.

[33] See Beck v. Flournoy Live-Stock and Real Estate Co. (C. C. A. 8th, 1894) 65 Fed. 30.

[34] (1893) 27 STAT. 645.

[35] (1901) 31 STAT. 1447.

[36] (1902) 32 STAT. 500.

ment Co.[37] that "Conferring citizenship upon the members of the Five Civilized Tribes, with all the rights, privileges, and immunities thereof, operated to sever the relation of guardian and ward . . . between the United States and the members of the Five Civilized Tribes." But the United States Supreme Court stated that "it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage. . . . Our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian Lands," and "that it rests with Congress to determine when its guardianship shall cease."[38]

It appears to be clearly established, therefore, that the condition frequently designated by the courts as "guardianship" of the national government over the Indian remains unimpaired by the grant of citizenship, so far, at least, as the guardianship relates to the power of Congress over the lands and property of such citizen Indian. That is, citizen Indians living within a state, outside a reservation, may enjoy, by virtue of this relationship to the national government a position of special privilege and protection, in certain respects, not enjoyed by other citizens of the state.[39] As regards citizen Indians living on reservations in tribal relations, the authority of the national government is readily recognized. "The jurisdiction of the nation over the Indian in his tribal relation is supreme,"

[37] (1911) 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, 742.

[38] See also Lone Wolf v. Hitchcock (1903) 187 U. S. 553, 23 Sup. Ct. 216; United States v. Sandoval (1913) 231 U. S. 28, 34 Sup. Ct. 1; United States v. Waller (1917) 243 U. S. 452, 37 Sup. Ct. 430.

[39] In 1830, a treaty with the Choctaw Nation providing for cession of Choctaw lands east of the Mississippi River and the removal of the Indians to lands west of the river, authorized land allotments to certain heads of families who should elect to remain and become citizens. By act of the Mississippi legislature of January 19, 1830, these Indians were made citizens of the state with all the privileges and immunities of other citizens. But the treaty stipulated that they should not lose their citizenship in the Choctaw Nation. After a period of time, many of these Indians disposed of their lands and reached a state of destitution. Thereupon a movement was instituted to have Congress remove them to the Indian Territory where they might enjoy certain privileges of their Choctaw citizenship. Even though they were citizens of the United States and of Mississippi, Congress, by a series of acts from 1891 to 1908, rounded them up and removed them, paying all expenses of the task, and equipped them with tools, food and provisions to last them six months in their new homes. See (1893) 27 STAT. 612; (1896) 29 STAT. 321; (1897) 30 STAT. 62, 83, 495, 503; (1900) 31 STAT. 221, 236, 237; (1902) 32 STAT. 641, 651, 652; (1903) 32 STAT. 982, 997. See also Wilton v. Amos (1921) 255 U. S. 373, 41 Sup. Ct. 342.

said the Supreme Court of Nebraska in 1893,[40] and the United States Supreme Court in 1921 declared: "It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from this condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of citizenship not being sufficient to terminate it."[41]

It is to be assumed that when Congress passed the Act of June 2, 1924, conferring citizenship upon all non-citizen Indians born in the United States,[42] it did so with complete appreciation that, unless specific provision were made for termination of the condition of "guardianship," that condition, in all its vigor, would attach to the newly made citizen Indians. No such termination was then, nor has since been, declared by Congress, the only stipulation being the provision of the act conferring citizenship, to the effect "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." It must be presumed, therefore, that the condition of "guardianship" of the national government with respect to Indians was in no way affected by the grant of citizenship.

III. Indians as Persons "Under Guardianship"

Mr. Chief Justice Ross of the Arizona Supreme Court, dissenting in the case of *Porter v. Hall*,[43] argued that the condition referred to by the courts as "guardianship" of the national government over Indians is not properly to be considered to have been contemplated by the framers of the Arizona constitution, when they included the clause disqualifying for voting any "person under guardianship, non compos mentis, or insane." "The status of guardianship disqualifying one to vote, in my opinion," said the Chief Justice, "is one arising under the laws providing for the establishment of that status after a hearing in court. It is not a status that 'resembles' guardianship [quoting from Chief Justice Marshall in *Cherokee Nation v. State of Georgia*],[44] but legal guardianship, authorized by law."

Provisions similar to that of Arizona, disqualifying for voting any "person under guardianship" are to be found in other state constitutions. Yet there seems to be no evidence that such provisions were placed in the constitutions with any design that they be applied to Indians as such. In fact, some state constitutions which contain this clause disqualifying "persons under guardianship" contain other provisions spe-

[40] State v. Norris (1893) 37 Neb. 299, 310, 55 N. W. 1086, 1090.
[41] Winton v. Amos (1921) 255 U. S. 373, 391, 41 Sup. Ct. 342, 349.
[42] (1924) 43 Stat. 253.
[43] (1928) 34 Ariz. 308, 271 Pac. 419.
[44] (1831) 30 U. S. (5 Pet.) 1.

cifically conferring suffrage upon certain Indians, who, prior to 1924, need not have been citizens, and who, in any event, were, and are, persons designated by the United States Supreme Court as "wards of the nation," and described as being under the "guardianship" of the national government.

The constitution of Minnesota stipulates that "no person under guardianship, or who may be non compos mentis, or insane, shall be entitled or permitted to vote at any election in this state."[45] Yet in the same article[46] it is provided that "persons of Indian blood[47] . . . who have adopted the language, customs, and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state," shall be qualified to vote. Thus, while Indians, as such, are not made unconditionally eligible to vote by the Minnesota constitution, certainly, by no recognized rule of legal construction may it be said that Indians, as such, are to be considered to be disqualified as persons "under guardianship." In fact, it is recognized by the Supreme Court of Minnesota that it has been a policy of that state to hold out the right to vote as an inducement to Indians to adopt the habits of civilization.[48]

The constitution of North Dakota confers the right to vote at any election upon "citizens," and upon "Civilized persons of Indian descent, who shall have severed their tribal relations two years next preceding such election,"[49] and provides that "no person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election."[50] The case of *Swift v. Leach*[51] involved the question of the voting status of certain so-called "Trust Patent Indians," who, under provision of the Burke Act of May 8, 1906, had been given allotments of land, but who had not yet received fee titles. The record showed them to be persons who had taken up the ways of living of civilized white men more than two years before the election at which the validity of their votes was questioned. It was contended by contestants that these Indians were disqualified by the "gnardianship" clause of the North Dakota constitution, quoted above.[52] The court held that this provision "has no appli-

[45] Article 7, §2.

[46] *Ibid.* §1.

[47] Provision is made also that "Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization," shall be qualified to vote, along with "citizens of the United States for three months preceding any election."

[48] See Opsahl v. Johnson (1917) 138 Minn. 42, 163 N. W. 988.

[49] §121.

[50] §127.

[51] (1920) 45 N. D. 437, 178 N. W. 437.

[52] §127.

cation to this federal status of the Indian,"[53] and went on to say that "If it did have application, it would serve to disqualify the Indian from voting by reason of the status, whether he was a citizen of the United States or a civilized person of Indian descent who has severed his tribal relation." That the provision should be construed to disqualify citizen Indians, as such, the court obviously considered to be absurd.

When Arizona was admitted to the Union in 1912, the white population remembered too vividly the troublesome Indian experiences of the region for the framers of the constitution to have considered seriously making specific provision for Indian suffrage, as had been done in certain other states. On the other hand, not contemplating congressional action within the next twelve year period making citizens of the Indians, no specific disqualification was placed in the constitution with respect to Indians, as such. So, when the Supreme Court of Arizona was confronted with a case involving the eligibility of Indian citizens to vote, apparently the only provision of the state constitution that could at all feasibly be urged by counsel for the defendant recorder was the "guardianship" clause.

The majority of the court, and the dissenting Chief Justice, as well, were strongly affected by the legitimate question as to whether it would be good public policy to permit large numbers of tribal Indians living on reservations in the state, and entirely immune from the laws and governmental authority of the state, so long as they remain on the reservations, to participate in the formulation of state governmental policy and the election of state and local officials.[54] The Chief Justice, however, considered the proper function of the court to be that of applying the law as it stands, leaving to the political departments of the government the duty of changing the law, or making new law, when that may be necessary in order to declare and maintain sound public policy. He pointed out that it might be possible that tribal Indians on reservations ought not, as a matter of public policy, to be allowed to vote, but he expressed the opinion that further legal or constitutional action was necessary in Arizona in order legally to disqualify them.

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[53] This part of the opinion was quoted by Mr. Chief Justice Ross of the Arizona court in his dissenting opinion in Porter v. Hall, but no analysis of the constitutional provisions in North Dakota or elsewhere appears to have been presented to the court.

[54] The opinion of the Supreme Court of Minnesota in the case of Opsahl v. Johnson appears to have carried great weight with the majority of the Arizona court, although the case did not involve the same question at all, and although there is every indication that, had the Minnesota Indians concerned been citizens, it is at least doubtful that the court would have held as it did. But the case does show the unwillingness of the Minnesota court, even under the liberal terms of the suffrage provisions of that state, already referred to above, to hold non-citizen tribal Indians on reservations to have adopted the "customs and habits of civilization," so long as they were immune from state law and authority.

It is perhaps unfortunate that the United States Supreme Court should have introduced the term "guardianship" as a word descriptive of the special relationship existing between the Indian and the national government. In fact, as has been pointed out earlier, Chief Justice Marshall, who first referred to the concept in the case of *Cherokee Nation v. State of Georgia*[55] in 1831, said simply that the relationship "*resembles* that of a ward to his guardian." Even this expression was used, not with respect to individual Indians, but as to Indian tribes, and their status under the judiciary article of the Constitution of the United States. But, once the terms "guardianship" and "ward" were introduced, it became possible that they might at any time be construed literally, and confused with the generally accepted legal meanings of the terms.

IV. The Disfranchisement of Indians on Reservations by State Action

Suffrage is, of course, almost entirely a state matter, so far as the problem of determining who shall be allowed to vote is concerned. Subject to certain restrictions in the national constitution with respect to how it shall be regulated by the states,[56] the whole matter of suffrage is controlled by the constitutions and statutes of the several states.

Recognizing, then, the fact that, as a matter of sound public policy, the advisability of suddenly extending the voting privilege to great numbers of tribal Indians living on reservations, and largely beyond the authority of state law and government, may be open to serious question; but, at the same time, recognizing that to rely upon the usual "guardianship" clause to disqualify citizen Indians, as a class, is, to say the least, open to serious question as a legally effective procedure, is it feasible and practicable otherwise legally to disqualify for voting, by state action, tribal Indians living on reservations?

Since any plan which might be worked out to accomplish the desired end could be embodied in the state constitution of Arizona, or of any other state, the question really becomes a question as to whether the object could be achieved conformably with the Constitution of the United States. Apparently the only obstacle that could be at all seriously urged would be the 15th Amendment, which provides that "The right of citizens of the United States to vote shall not be denied, or abridged by the United States or by any State on account of race, color or previous condition of servitude."[57]

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55 (1831) 30 U. S. (5 Pet.) 1.

56 See Article I, §§ 2 and 4; Article II, §2; 14th, 15th, 17th, and 19th Amendments.

57 The "equal protection" clause of the 14th Amendment was made the basis of a decision by the United States Supreme Court holding invalid the Texas White Primary Law in 1927. Nixon v. Herndon (1927) 273 U. S. 536, 47 Sup. Ct. 446.

As early as 1871, the United States District Court for Oregon held that "An Indian . . . who is a citizen of the United States . . . cannot be excluded from the [voting] privilege on the ground of being an Indian, as that would be to exclude him on account of race."[58] This is, of course, an obvious interpretation, and renders impractical any plan which would seek to disqualify Indians simply on the grounds of their being Indians. But, it is submitted that the national government itself has provided a convenient and perfectly proper basis for state discrimination, with respect to voting, between tribal Indians on reservations and other citizens within the state. The United State Supreme Court, which would be the final arbiter in any such discrimination, has, it has been pointed out, repeatedly recognized the peculiarly privileged status of Indian citizens, which it has designated "guardianship" of the national government. Paraphrasing the language of the majority opinion in *Porter v. Hall*, "so long as the federal government insists that, notwithstanding their citizenship, their responsibility under state law differs from that of the ordinary citizen, and that they are, or may be, regarded by that government, by virtue of its 'guardianship,' in any manner different from that which may be used in the regulation of white citizens,"[59] there appears to be ample ground for similar discrimination by the state governments whenever it may be deemed to be necessary or desirable. It would appear that such discrimination, which could be made by state constitutional provision or by statute in conformity with the state constitution, might take any form, ranging from a plan for selection of desirable Indian voters on some reasonable basis,[60] to absolute disfranchisement of Indians living on reservations and enjoying immunity from state authority. The terms of such discrimination might be general, applicable to all citizens in the state within the class described, or the language might be specific, definitely disqualifying Indians living on reservations and enjoying immunity from state authority.

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But it hardly seems likely that any question of "equal protection of the laws" could be raised effectively by a tribal Indian on a reservation, who is essentially placed beyond the scope of state law by virtue of his special relation to the national government. And, of course, no serious attempt has ever been made to enforce the second section of the 14th Amendment.

[58] McKay v. Campbell (1871) Fed. Cas. No. 8840, 16 Fed. Cas. 161, 166.

[59] (1928) 34 Ariz. 308, 331, 271 Pac. 411, 419.

[60] By educational tests or other means which were not clearly arbitrary, and which were not based purely upon race. A taxpaying requirement might be a feasible method, for example.