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RACE AND POWER POLITICS AS ASPECTS OF FEDERAL GUARDIANSHIP OVER AMERICAN INDIANS: LAND-RELATED CASES, 1887-1924

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Federal guardianship theories have been used extensively to explain and justify government control over Indian land and government intervention into the lives of this country's aboriginal inhabitants. To fully understand the legal status of Native Americans and of Indian land, and to appreciate the current pressure from some Indians for a return of the land base and sovereign recognition by the federal government of Indian tribal government,[1] a study of guardianship is mandatory. The scope of this examination will be limited to the period during which guardianship matured as a significant factor in Indian law and will concentrate on land-related cases between 1887 and 1924—dates representing the passage of the General Allotment Act[2] and the Citizenship Act,[3] two axes upon which federal Indian policy has turned. The principal cases have been studied for their use of guardianship theory. When required for understanding and background, cases predating 1887, which deal with similar issues, are presented.

Land—especially in the context of American greed for it and the consequent Indian removal—has been at the center of most federal dealings with Indians. Because the native inhabitants were recognized by the Supreme Court as the ". . . rightful occupants of the soil, with a legal as well as just claim in it . . .,"[4] attempts to construct a legal foundation for the unrelenting acquisition of Indian land by the United States were necessary. The Constitution offered only minimal assistance in this respect.[5] Justice Miller wrote in *United States v. Kagama*[6] that "[t]he Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders."[7] The framers of the Constitution did not elaborate on Indian policy because it had already been established that the primary responsibility for relations with Indian tribes was in the central government.[8] Unfortunately, the framers did not specify the

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political status of Indian tribes as either separate nations or as groups falling under the jurisdiction of the United States—an oversight which has caused much tortured reasoning and an ambiguous flow of language from jurists.[9]

The United States in 1789 did not anticipate the expansion movement that would ultimately consume the breadth of the continent. Realization came much later that space enough for both white Americans and the native inhabitants to share the land would not always exist.[10] Early government policies directed toward Indian tribes, then, consisted mainly of minimizing contact by moving the tribes into the vastness of the westward lands, which it was believed could be solemnly pledged to the Indians for eternity.[11] Cultural independence and a separate existence were assumed.[12] Best exemplifying this early posture of nonassimilation was the government policy of treating Indian tribes as entities to be dealt with by treaty,[13] rather than looking upon tribal members as citizens to be brought under the laws of the nation.

After the Indian civilization was engulfed by American expansion,[14] the idea of a separate Indian culture was discredited and "progressive" thinkers began to espouse an assimilation theory.[15] Enforced acculturation became, for a period, the official policy of the Indian affairs bureaucracy,[16] but the more humane and gradual "civilization process" which stressed land ownership and education evolved as the major tool of the assimilation effort.[17] Federal power over individual Indians, while cloaked in the paternalism of bettering the lives of a backward and dependent population, solidified during this post-Civil War time and acquired characteristics still evident today. No longer did the federal government deal with tribal entities by treaty.[18] The relationship between government and Indian became one of a superior federal power handling the affairs of the individual.[19] Indians were deprived of their land base, and the traditions of a strong tribal affiliation loosened.[20] The specter of federal control which had haunted the Indian from the earliest days of the American Republic[21] ceased to be an apparition and became a reality. Guardianship was the embodiment of that control.

Early Indian land law cases were instrumental in establishing two general sources of federal power over Indians—sovereign land ownership and federal guardianship.[22] Both powers were enlarged by executive, legislative, and judicial action during the latter nineteenth century and further extended after 1900, but it was guardianship that offered the greater flexibility and control. The cases between 1887 and 1924[23] demonstrate that sovereign land ownership and the trust

responsibility assumed by the federal government over Indian lands related closely to the growth of guardianship. Important as the land relationship was, however, federal guardianship as it developed during the period studied cannot be said to rest solely on matters of property. The question is, then, just what did form the foundation of guardianship as assumed during the years immediately preceding the passage of the Citizenship Act? The inescapable conclusion provided by the cases is that raw power, exercised by a strong civilization over a weakened one, and unashamedly presented in racial terms, ultimately underpinned federal guardianship over the Indians. Guilt, benevolence, and genuine compassion for the Indians' plight intertwined strangely throughout the subject period, but overriding all, one concludes, was the brutality of power politics and the belief that the red race was inferior to the white. In 1823 John Marshall referred to the treatment of Indians as racially inferior people.[24] One hundred years later, the cases demonstrate that perceptions had not changed. This thesis is best substantiated by looking to the language of the cases themselves. In the cases studied, government guardianship over Indians was justified by a variety of theories framed within certain fact situations. The courts seemed to say, "but for this fact, the power of federal guardianship could not be upheld." However, one need only proceed through the guardianship cases to find another situation where, although the allegedly critical and dispositive fact was not in evidence, guardianship powers were still sustained. One by one, the apparent conditions precedent to the exercise of the federal power of guardianship were found not to be required at all. Ultimately only the power of the conquering sovereign and assumed racial superiority were left as the pegs of rationalization upon which guardianship hung.

Before tracing the development of the various justifications and theories used by the courts to uphold and strengthen federal control through guardianship, it is necessary to discuss the applicability of private law principles to the guardian-ward relationship of the federal government and the Indian between 1887 and 1924. The fact is that private law principles were not applied in any meaningful way to the relationship, but because of the presumptions raised by the terminology in the cases, the matter should be discussed. The study of guardianship cannot be isolated from considerations of tribal sovereignty and status, nor from questions dealing with the nature of Indian title and right to land, so these concepts—as presented in the cases under discussion—will also be explored.

Application of Private Law to the Federal Government-Indian Relationship

An understanding of guardian-wardship must begin with the realization that the relationship existing between the federal government and Indians has never evidenced the consistency and legal status that the application of private trust[25] or guardian law could confer.[26] The very use of the terms "trust," "trustee," "guardian," and "ward" in Indian law are thus misleading. Such terms imply recognized legal concepts, yet the enforceable fiduciary duties arising out of the United States-Indian relationship and the exact nature of the federal responsibility remain unclear.[27]

Between 1887 and 1924 the idea of imposing a fiduciary duty—like that of trustee or guardian in private law[28]—on the United States government in its capacity as arbitrator over Indian affairs was entertained. In the cases studied, the concept surfaced first in the Court of Claims[29] and then in federal district courts.[30] During these years the courts toyed with the language and logic of private law, but it was not until 1910 that a case squarely confronted the question of whether the private law of guardian and ward applied to the measures of the federal government in dealing with its Indian wards.[31] The answer was no.[32] This pronouncement came from the Eighth Circuit Court of Appeals and was reiterated two years later by the Supreme Court.[33]

Attempts to analyze the application of private law in these cases are made difficult by the indiscriminate and interchangeable designation of the federal government as a trustee and as a guardian. In private law a trustee and a guardian are distinguishable, although both are said to be fiduciaries.[34] The term "fiduciary," while probably the most appropriate term for the federal government, was infrequently used by the courts. The guardian-trustee distinction was usually ignored and terminology was applied with little regard for its aptness according to private law definition or the government action in question. As a result, the federal government was often labeled a guardian but given court sanction for the exercise of powers more characteristic of a trustee. The chart shows some of the distinctions between the guardian and the trustee as defined in private law.[35]

In cases where the United States acted as the holder of legal title to property managed for the benefit of the Indian, the designation of the federal government as "trustee" was arguably appropriate.[36] A trustee is allowed to fully represent the beneficiary of trust property,[37] and the federal government often assumed a trust responsibility

Kind of Fiduciary	Beneficiary Represented	May Maintain a Legal Action	Title in Property of Beneficiary
Guardian	Ward	Only in representative capacity with ward as an indispensable party	Holds no legal title
Trustee	*Cestui que trust*	In own capacity and acting alone	Holds legal title

over Indian land and tribal funds.[38] In conformity with private law principles, the federal government was liable for proven breach of the trust duty and was from time to time sued by Indian beneficiaries.[39] Trustees are said to act for the *cestui que trust*, or beneficiary of the trust. Courts infrequently conformed to this language when speaking of trust situations. Indian beneficiaries were called the *cestui que trust* in only one case studied;[40] more commonly the Indian was referred to as a ward.

In contrast to the trustee, the guardian in private law is said to hold no legal title to the property which is placed under his charge, and the guardian is limited to acting in the name of the ward who becomes an indispensable party to any action for his benefit.[41] When government action rested on the assumption that the Indian was laboring under a disability, needing special care and protection or otherwise in wardship status, the term "guardian" was, under private law principles, more appropriately applied to the government than was the term "trustee."[42] Because guardians act only in a representative role and lack capacity to sue in their own right, to term the federal government a guardian and to apply guardian law was to deny the government access to the courts except in a representative capacity with the Indian as a party to the action. Government attorneys often ignored this private law distinction and forcefully argued in numerous cases[43] that the United States, acting alone, had capacity to enter court as the Indians' guardian.

The roles, rights, and responsibilities of guardians and trustees under private law, while distinctly different from each other, particularly as to the holding of legal title and the power of representation in legal actions, were applied by the courts in apparent disregard of the differences. Amplifying the problem of correct application was the traditional misuse of the terms in landmark Indian law cases.[44] Incorrect usage appeared as more Indian law cases were decided; as these cases were quoted and cited as authority, the confusion was compounded. Besides the contradictory federal stance regarding the

legal nature of its duty, plenary power justifications and political considerations intervened to prevent the use of private law to measure the federal government's conduct in dealings with the Indians. The increasing tendency to term the federal power over Indians as plenary[45] reduced the need to find a private law basis or justification for federal action *vis-à-vis* the Indians. Plenary power, being full and complete, could not be limited by accepted principles of private law. Moreover, the courts could have found themselves in an untenable political position had they attempted to impose the strict rules of trustee and guardian law upon the legislative branch of government. Both trustees and guardians are expected to work for their beneficiaries with single-minded loyalty and to eschew private gain.[46] It is difficult to see how congressional actions, particularly those which relieved the Indian tribes of large land holdings, could have met this strict test. Further tensions and constitutional questions would have arisen if the courts had accepted the private law guardian principle that the guardian, normally appointed by the court, is regarded as an officer of the court and often must have court approval before he acts.[47] The Supreme Court consistently disclaimed any such authority[48] by stating that the power of Congress over Indians was not subject to control by the courts.[49] Application of strict private law principles to the United States in its dealings with the Indians was thus doomed by practical, political, and constitutional considerations. The following case discussions demonstrate the misuse of terminology and the timid rise and ultimate rejection of the application of private law in Indian cases decided between 1887 and 1924.

In *Chicksaw Nation v. United States,*[50] the Court of Claims applied some elements of fiduciary law and referred to the federal government as both a trustee and a guardian, while denying that the rules of law applicable to controversies between the United States and the Indian tribes were as strict as those governing differences between private guardians and wards.[51] The Court broadened the government's treaty and self-imposed responsibility as "more important in essence than that of trustees to *cestui qui trust,* or even that of guardian and ward," urging that, in effect, it resembled "the relation of parent and child."[52] Both *cestui que trust* and ward terminology were, however, used to describe the Indian. The trust responsibility was termed "peculiar" and personal in nature.[53] Reluctance to assess interest on an unauthorized government disbursement of Chickasaw tribal trust funds could explain the Court's failure to apply trust law in a strict fashion to the government. That the interest would be due in an action between individuals, the Court had no doubt, but on the theory that the sovereign does no wrong,

the Court refrained from expressing any opinion on the interest assessment and referred the matter to Congress.[54] Six years later, the Court of Claims did allow interest on a Shawnee claim,[55] but hedged straight trust law application by not calculating the interest according to "the strict rule of the common law."[56] In entering judgment against the United States, the Court found that as trustees and guardians the government was liable where it had breached its duty.[57] Liability was established in language like that of private trust law: ". . . a guardian cannot excuse a breach of trust because of the employment by him of an incompetent or dishonest agent"[58] who, while acting in the scope of his employment, harms the beneficial interest.

Federal district (circuit) courts applied elements of fiduciary law to reach results favorable to the federal government as plaintiff and guardian or trustee of Indian interests. In 1895, two cases arose from United States efforts to set aside conveyances that impinged on possessory rights of Indians in their land. Federal capacity to bring a suit to set aside timber contracts was found in *United States v. Boyd*,[59] despite the fact that the land was held in fee by the Indian grantors and that these Cherokee owners were state citizens.[60] In conformity to guardian law, the suit was brought with the Indians as parties to the government action. Continuing guardianship over Indians, regardless of citizenship status, was affirmed and likened to the guardian care of the government over seamen, who were also wards of the United States.[61]

The theory of trust duty was used in *United States v. Flournoy*,[62] a Nebraska case. The court allowed the United States, in its own right as trustee, to proceed in equity to oust the defendant real estate company from Indian lands held in federal trust and to restrain the company from further inducing the Indians to sign leases violating the restriction against alienation imposed on their allotted lands.[63] The defendant's contention that ejectment presented an adequate remedy at law was dismissed on the finding that the proper performance of the federal trustee's duties could not be accomplished by a legal remedy.[64] The *Flournoy* case was cited and a similar result was reached in a subsequent Alaska case.[65] The Alaska case blurred the guardian-trustee distinction by finding that there was a federal right and duty to act alone as "guardian or trustee" for the natives, who were termed "wards of the United States of America."[66]

The Supreme Court avoided the use of private guardian-trustee law more than lower courts in deciding Indian cases. Private law concepts are implied in Supreme Court cases or casually introduced through the adoption of lower court language. Trust law language

was not used in *Cherokee Nation v. Hitchcock*,[67] but the Court found authority for the federal government to make tribal property productive (as the trustee is usually required to do) once the government had undertaken an administrative responsibility for the land.[68] The role of the government in making the land productive was not framed as a fiduciary duty, however, since the Court pointedly refused to consider whether the proposed federal action would operate beneficially to the interests of the Cherokees.[69] In the same term of the Court, Justice Harlan strongly affirmed the responsibility of the federal government toward Indians while rejecting appellee's notion that the responsibility grew out of contract.[70] The Court allowed the United States to maintain the action as trustee[71] holding legal title to Indian land.[72] Dicta asserts the extraordinary power and duty of the federal government which, while not termed a guardian, was said to be engaged in policies to benefit and control the Indian ward, who was in a state of dependency and entitled to care and protection.[73]

McKay v. Kalyton,[74] decided by the Supreme Court in 1907, strengthened the federal fiduciary role through legislative interpretation. In 1894, Congress had designated circuit courts of the United States as the proper forums for the commencement, prosecution, or defense of any action or proceeding involving claims to allotted land.[75] Under the statute, there was no provision making the United States a necessary party to any such action.[76] The *McKay* Court deemed that through a later amendment[77] the United States did become an indispensable party to allotment controversies, noting that the requirement clearly demonstrated an active trustee interest by the United States in the disposition of Indian lands.[78]

The Supreme Court was eventually led to reject private law applications in Indian cases by following the reasoning of the Eighth Circuit Court of Appeals, which seemed to be cognizant of guardian-trustee distinctions[79] and sympathetic to the federal government's intention to manage Indian affairs with powers going beyond those of the private guardian or trustee.[80]

In 1910, the Eighth Circuit, without citing authority, attempted to clarify the confusion caused by the guardian-ward terminology used to describe the relationship between the national government and the Indian. Although frequently used, guardian-ward terms were but words of illustration and not of definition, stated Judge Amidon in *United States v. Allen*,[81] and ". . . to attempt to reason from the private law of guardian and ward to the measures of the federal government in dealing with the Five Civilized Tribes leads only to confusion and a subversion of the real scheme of govern-

ment."[82] By declining to confine actions of the federal government to guardian law, the court was able to allow the United States to bring a suit to cancel almost 4,000 Indian allottee conveyances without naming the allottee-trust beneficiaries as indispensable parties.[83] There was no effort to demonstrate the federal right to sue through the application of trust law in the case.

One of the many appeals from *Allen* reached the Supreme Court in 1912.[84] Having lost in the Eighth Circuit, Heckman and another grantee of allottee conveyances appealed on the grounds that the government lacked standing to maintain the suits it had brought.[85] In affirming the Circuit Court of Appeals and allowing the United States to maintain its actions, Justice Hughes discussed federal control over Indian land, not as evidence of trusteeship, but of guardianship.[86] The private law principles that trustees hold property for beneficiaries and that trustees, not guardians, can enter court in their own right to enforce a trust, was totally ignored. Obviously, there was no intent to contain federal actions within private law limits and it would be naive to attribute the *Heckman* result simply to confusion and misunderstanding of the law. Rather, *Heckman* was used as an opportunity to confirm that federal power over Indians was plenary and not dependent on the acquiescence of the Indians.[87] As the Eighth Circuit had previously held, the power did not rest upon conventional law concepts and was not circumscribed by rules which govern private relations.[88] Other appeals taken from *Allen*[89] adopt the *Heckman* rule and are turned on legislative interpretation, with almost no mention of trustee or guardian precepts.

For the cases under discussion, the pronouncements in *Heckman* ended the judicial flirtation with the application of private law to the federal handling of Indian affairs. Private law was never really applied in a meaningful way. Thus, when "guardian," "ward," "trust," and "trustee" appear in the Indian law cases decided between 1887 and 1924, no private law concept should be inferred. The courts simply did not hold the government to the legal standards implied by those words and the terms should be looked upon as having minimal legal import. They were but designations applied through mistake and confusion, or merely used for convenience to facilitate some expression, however inaccurate, of the relationship existing between the federal government and the Indians. The guardianship exercised over Indians is, therefore, a power going beyond that of the private law guardian. It inculcates elements of trustee power and responsibility, but is not as limited or as demanding as the rights and duties of trustees. Federal guardianship rests not on private law principles; rather, it is grounded on the ability

of a sovereign to act in a self-serving, convenient manner provided it can effectively maintain its assumed power to do so. As sovereign, the United States chose to assume comprehensive power in dealing with Indian matters. It demonstrated that it had the strength to effectively maintain those powers and to define its guardianship in its own terms.

Tribal Status and Indian Sovereignty

Depending on the sources consulted, the American approach to Indian tribal status and sovereignty is termed either unique[90] or as consistent with international law and the approach of other sovereign nations containing aboriginal populations.[91] The former school claims that political history fails to disclose another instance of a relation like that between the United States and American Indians.[92] Those who give the American approach a traditional designation place it in the context of international law, which recognizes the protective nature of the relationship between sovereign and aborigine.[93] The dichotomy of the theorists' approach can be reconciled if one accepts the idea that the relationship between the United States and the aborigines conformed to tradition at the outset, but developed unique features as United States expansion began to substantially affect the Indian way of life. North American colonization by European nations, while touching and influencing Indian groups, did not result in a substantial alteration of the aboriginal civilization. The growth of the United States did. Abstract theories about the nature and origin of the American approach to tribal status give perspective, but they are largely academic because of the realities of the situation.[94] Although the national character of Indian tribes was recognized in treaties—the very making of which seems to denote sovereign status—it is clear that from the earliest time the tribes were but dependent nations under the protectorate of the United States.[95] It is an oversimplification to attribute nation-state sovereign status to the Indian tribes solely because the United States entered into treaties with them.[96] Moreover, that assumption ignores the influence of the long historical tradition of European-North American Indian relations. First the Continental Congress, and then the United States government adopted the traditional approach of England, which reflected the practices of other European nations in their Indian relations.[97] Characteristic of this tradition was the extension of "protection" over the Indian tribes.[98] The new government of the United States fell heir to the accepted Indian policies of the Spanish, French, Dutch, and English—four nations which had

assumed a protectorate stance in relations with the North American Indians.[99]

It can be argued, of course, that Indian tribal status should not be defined by applying the perceptions of colonial powers. It is true that when Indian tribes lived unmolested and free of the European influence, their independence, self-government, and power over a land base were such that the tribes were sovereign.[100] However, the power to remain independent, the power to protect the right of self-government, and the ability to defend the land base are required elements of sovereign existence. As against the Europeans, the Indian tribes lacked the strength to manifest these essential attributes of sovereignty.[101] Unless voluntarily limited, the power of a sovereign nation extends as far as its power can be effectively enforced. The European nations that claimed land in North America were able to extend their protective power over Indian tribes because their superior strength allowed effective enforcement of the assumed power. When the "protectors" became involved in the internal affairs of sovereign tribes and found they could enforce their will, a compromise of the tribal status away from full sovereignty was effected. Tribal sovereignty was weakened and the pattern for its eventual destruction by the United States government was set. The definition of Indian tribal status, after the arrival of the Europeans, became a political matter because true sovereignty no longer existed within the Indian tribes. Tribal status and Indian sovereignty could thus mean whatever the Europeans determined it to mean and if the Indians were disadvantaged by the circumscribed definition of their rights and powers, there was really very little they could do about it.

It was within this framework of established political power over the Indians that the United States came into being as a sovereign nation. It soon demonstrated, despite some setbacks, that it, like its European predecessors, had the power to enforce its will against the Indians.[102] Once the United States had established its superior strength, it assumed the role of definer of Indian tribal status,[103] thereby carrying on the tradition established in 200 years of European dealings with the North American tribes.

By the time the General Allotment Act was passed in 1887, tribal status had undergone over fifty years of conflicting judicial definition and an even longer period of statutory buffeting. Initially, both the courts and Congress had been willing to recognize the tribal unit as a political society with substantial powers of self-government.[104] Thus, while tribes were not accorded the status of independent foreign nations[105] with all the attributes of sovereignty, they were allowed some autonomy over internal matters.[106] The continuation of

the tribal unit helped justify the decision to remove Indians from state jurisdiction and made management of Indian affairs through treaties more convenient.

A turn away from traditional recognition and bolstering of the tribal unit was an inevitable consequence of the acquisitive land policy of the United States and the subsequent Indian land loss. For the United States to successfully accomplish its acquisition of land and deal with the displaced Indians, the power of Congress over the Indians as individuals had to be enlarged and the strength of the tribal unit had to be diminished. The relative ease with which the government implemented this redistribution of power validates the theory that tribal status was entirely definable by the United States and that the very existence of the tribal unit was at the sufference of the American sovereign.

The allotment legislative series[107] proved useful in serving two interests of the United States. It furthered land policies by providing for land cessions from Indian tribes and it soothed the federal conscience by giving the land grab the gloss of a social engineering program. But, allotment and its offer of citizenship to the Indians raised enigmatic questions about the continuation of tribal existence.[108] Allotment was touted as a means of civilizing the Indians and bringing them to the full responsibilities of citizenship.[109] In 1896 the Supreme Court ruled that a treaty dissolving tribal organization was a valid source of power for determining the political and property rights of the Indians involved.[110] The tribal unit had traditionally been the conduit through which federal power over Indians had been funneled, so the Court drew the conclusion that citizenship was an alternative to continuing in a tribal relation with the United States,[111] and thus was a move away from guardianship. Although this was a logical conclusion to draw from the allotment philosophy, it soon became apparent the Congress had no intention of ending its guardianship or reducing its powers over Indians.[112] *In re Heff*[113] therefore became a serious judicial misstep because of the conclusion that allotment was evidence of the beginning of the end of federal guardianship over Indians.[114] In ruling that an allottee who had gained state and national citizenship was no longer under the federal police power, the Court undoubtedly thought it was carrying out the aims of Congress.[115] The Court became aware of its misreading of congressional purpose[116] and spent the next ten years distinguishing and working around the *Heff* ruling so as to bring decisions in line with congressional intent.[117] To this end, the Supreme Court held that citizenship did not end the jurisdiction of the United States over an individual with a tribal affiliation.[118] Neither did the holding of land

through allotment, although coupled with citizenship, terminate the Indians from their tribal relations,[119] although this might be affected by the duration of the federal trust period over allotted land.[120]

The work of the Court was made easier when it finally overruled *Heff*[121] after ten years of struggling with the inconsistencies it raised. In *United States v. Nice*[122] the tribal status of an allottee Indian citizen was specifically affirmed[123] and the Allotment Act was held not to have ceased the tribal relationship.[124] These findings allowed the Court to validate federal prosecution of a defendant who had sold liquor to an Indian in violation of federal law.[125]

The obsession with tribal status in *Nice* and in other cases between *Heff* and *Nice* seems somewhat unnecessary because of concurrent cases which firmly solidified congressional power over Indian life and effectively destroyed any real powers of the tribes. *United States v. Kagama*,[126] handed down the year before the General Allotment Act in 1887, set the tone for the new assumption of federal power relative to its guardianship over Indians. In sustaining the constitutionality of the Major Crimes Act,[127] the Supreme Court admitted that this extension of federal criminal jurisdiction did not rest on constitutional powers.[128] It was based instead on powers arising from the guardianship duty.[129] The case demonstrated that federal power could be substituted for that of Indian tribes in internal matters (*i.e.*, criminal jurisdiction over reservation Indians),[130] and that the federal government could derive powers from a willingly assumed duty.[131]

In a series of cases after 1887, the courts continued to exercise the power to define tribal status, or to uphold the right of Congress to do so. Often this required the imaginative finding of sources of federal power. The *Cherokee* cases of this period are excellent examples of newly conceived powers and the effort to dispose of the lingering legal question of Indian sovereignty which the Cherokees so persistently raised. The incursion of the Southern Kansas Railway onto Cherokee land brought the tribe back into court in 1890.[132] Eminent domain powers of the federal government underscored the decision allowing the railroad to cross Indian land,[133] but the Court took the opportunity to reiterate the absence of Indian tribal sovereignty[134] and the continuing wardship of the Cherokees.[135]

A second *Cherokee* case[136] avoided the tribal contention that their land was held in fee simple with the statement, "[w]hatever title the Indians have is in the tribe and not in individuals . . .,"[137] and upheld the power of a federal agent to make administrative decisions about management of tribal land, even if the tribe objected.[138] The power of Congress to provide for leasing of tribal lands was said to derive

from its previously assumed power to determine the membership of the tribe[139]—a strange deduction, but one consistent with the diminishing role of the tribe in handling its internal affairs. If the tribe was stripped of the power to determine something so basic as its own membership, its destruction as a self-governing unit was nearly complete. Congressional power to determine tribal membership clearly rested on the plenary powers of Congress.[140]

Any barriers that treaty obligations imposed on the expansion of federal power over Indians were cast aside by the significant finding in *Lone Wolf v. Hitchcock*,[141] which broke new ground by distinguishing six earlier cases[142] dealing with Indian land. Here, the controversy was over the power of the Congress to administer tribal property,[143] although the significance of the case lies in its finding that Congress had the power to legislate concerning tribal property, despite conflict with earlier treaties. Congress also had the power to abrogate treaty provisions.[144] The plenary power of Congress and its paramount authority over Indians because of guardianship[145] allowed Congress to disregard stipulations of a treaty whenever convenient.[146]

This ruling, along with the official end of treaty-making that had come in 1871,[147] was indeed a shift away from the tradition of allowing the Indians a degree of autonomy and of paying lip service to the recognition of the tribes as separate entities under a federal umbrella of protection. The changing land scene was largely responsible. For many Indians self-sufficiency was gone,[148] and the federal government was beginning to face the reality that its policies were destroying a civilization. Assumptions of power were, in truth, regarded as giving the government some duty to these wards, many of whom were now literally dependent, but the duty was given a paternalistic and superior cast.[149] The government of the United States had never remained at arm's length from the affairs of the Indians, but its land policies brought about conditions that would have made withdrawal from Indian affairs unthinkable. Caretaker responsibilities for the education, health, and welfare of individual Indians were added to the many responsibilities already assumed.[150] In this dimension, the guardianship of the United States took on its unique characteristic of providing direct supervision, through a huge bureaucracy, over almost every aspect of the individual Indian's life.

The Nature of Indian Title and Rights to Land

In-depth studies[151] have discussed Indian land title, aboriginal use and occupancy, the distinctive character of Indian communal prop-

erty, the application of the doctrine of discovery, and other major facets of Indian land law. For purposes of this paper, a brief outline is presented to describe the evolution of events leading to the Indian land situation on the eve of general allotment.

By applying the doctrine of discovery, the United States established its legal title to lands used and occupied by Indians[152] and denied the native inhabitants the right to alienate their lands to any party, save the federal government.[153] Although Indian title was not one of fee simple,[154] Indian possession was to be respected by state governments,[155] private citizens,[156] and, technically, the federal government,[157] in that Indian land was not to be taken without consent and compensation.[158] The cession of lands through treaty became the established method for gaining Indian lands and extinguishing Indian title.[159] Cession and removal worked to disengage the Indians from land wanted for white settlement and still give the Indians large tracts upon which to settle, as long as western land remained plentiful.

The increasing scarcity of desirable land after the Civil War caused land-hungry settlers to look to the lands that had previously been reserved to the Indians in the removal treaties. Allotment, overhauled from its original form[160] and given a new social significance,[161] provided a means to acquire parts of formerly reserved land. Generally, allotment acts required members of the tribes to select individual tracts of land and then for the tribe to cede "surplus" land back to the United States for sale to white settlers.[162] Previous agreements or treaties that guaranteed to Indians certain land holdings[163] or that set conditions under which cessions could occur,[164] proved to be no obstacle to the ultimate power of Congress to regain Indian land.

This brief summary of events prior to 1887 is not intended to imply that a simple, consistent Indian land policy existed in the United States. The only consistency was in the federal government's assertion of a paramount and unrestrained power over the handling and disposition of Indian land. In acquiring land, the government could impose small barriers for itself, as it did in recognizing occupancy rights, but the facts demonstrate that no constitutional limit,[165] treaty guarantee,[166] or rule of real property[167] could stand between Indian land and the power of the federal government to acquire it, if desired. Neither were there limits to the power of the government to control the land held by the Indians. Who among the tribes would get land,[168] how it would be managed,[169] and how or whether it could be alienated[170] were controls found to be within the guardian and plenary powers of the United States. Indian title

and the Indian right to land was, as other Indian matters, totally at the discretion of the federal government to define and interpret.

Between 1887 and 1924, Indian land issues dominated the federal Indian policy. The cases reveal the problems encountered by the government in its assumption of an omnipotent guardian role in the distribution and management of Indian land and the tragic inability of the Indian to assert any right adequate to preserve his original holding or control the land assigned to him. State versus federal powers, and the problems rising out of restrictions on alienation, the management of Indian land, and the wedding of allotment and citizenship are addressed in the decisions.

By invoking the supremacy clause, the federal government successfully managed to exclude state governments from most Indian matters. After the General Allotment Act, new conflicts arose from states' efforts to tax allotted land. The resulting litigation analyzed the interest in land acquired by an allottee.

United States v. Rickert[171] was decided on guardianship principles and demonstrated that, although the Indian had been declared a citizen, he was still being "prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship."[172] During the period of preparation, he did not hold allotted land in fee and was not subject to South Dakota taxes. According to *Rickert*, federal restrictions kept the legal title in the United States and allottees occupied land only with its consent and authority.[173] The allottee had no right to enter contracts or make conveyances affecting his land.[174] The only allottee right was to occupy and cultivate the land.[175] Federal protection against state taxation also extended to improvements and personal property on an allotment because such property had to be safeguarded if the federal wards were to be educated to adopt the habits of civilized life. The improvements and chattels were, in fact, the property of the United States.[176]

Choate v. Trapp[177] denied the state's right to tax, despite federal legislation that would have allowed it. This Oklahoma case came to the Supreme Court for interpretation of legislation allotting land of the Five Civilized Tribes. Legal title to the land in question had been held by the tribes for common use of tribal members[178] prior to the decision to allot the land[179] in preparation for Oklahoma statehood. Within the special allotment legislation, brief periods of nontaxability and nonalienability were set,[180] and citizenship of tribal members was provided for. The Court stated that it was ". . . fair to assume that . . . much of the land was alienable and all of it was non-taxable when . . . Oklahoma was admitted to the Union."[181] After statehood, Congress passed an act removing re-

strictions from alienation that might have remained on some land and subjecting that land to taxation.[182] The Indians who had brought suit in *Choate* to enjoin state taxation were found to hold land to which this legislation applied. A constitutional issue—rare in these cases—was framed by the Court: Had the plaintiffs acquired rights under the original legislation, which excepted their land from taxation, that were vested property rights and thus protected by the fifth amendment?[183] Plaintiffs' interest in the land was delineated in answer to the question. The individual Indian was said to have had an equitable interest in property to which his tribe once held legal title. The interest gained by the individual in an allotment plot was determined to be consideration sufficient to satisfy and extinguish the former equitable interest.[184] Because of the original terms of the allotment legislation, to accept land in severalty was to accept a piece of nontaxable land.[185] This tax protection, the Court concluded, was a property right that vested in the Indian accepting an allotment and relinquishing his claim to title in common.[186] The tax exemption was attached to the land and it became constitutionally protected property. Congress could not impair a vested private right by legislation allowing the land to be taxed, despite the plenary guardianship that existed over the political and personal status of the Indian allottee.[187]

State interference was also discouraged by *McKay v. Kalyton*.[188] The Oregon Supreme Court had found that the United States was not a necessary party when the question of possession of allotted land was at issue, and upon appeal, the plaintiffs contended that the United States Supreme Court had no jurisdiction to hear the case.[189] The federal right to intervene in allotment controversies and federal jurisdiction were both upheld in *McKay* and in state courts were denied jurisdiction in allotment cases, even though the allottees were state citizens.[190] *Rickert* was quoted to describe the Indian interest in land.[191] Because the United States held legal title to allotted land,[192] and in furtherance of acts of Congress,[193] only federal courts could hear disputes over allotments.

A state could have jurisdiction over former Indian-occupied land if it derived a title from the federal government. In *Beecher v. Wetherby*,[194] two parties claimed land that had been recognized as belonging to the Menominee Tribe[195] which ceded the land to the United States. One party claimed under a United States patent and the other under a state patent. The state patent was validated because the land was in a Section 16 township which, under the Wisconsin Enabling Act, had been reserved by the federal government for the state.[196] The land in Section 16 thus had never become public

land to be distributed by the federal government to settlers. Indian title and land rights received much attention in the *Beecher* case. Before ceding their land, the Indians were said to have had a right of occupancy that could be interfered with only by the federal government.[197] While considerations of "justice as would control a Christian people"[198] were presumed, the right of the United States to dispose of legal title to Indian-occupied lands was unquestioned.[199]

This result seemed to diminish the land rights that occupancy previously was held to bestow on the Indian. Just two years before *Beecher*, the Court had made one of its strongest statements on the sacred nature of those rights in the *Leavenworth Railroad* case.[200] Indian occupancy was said to give Indians an unquestioned right to occupy land—a right that could only be extinguished by a voluntary cession.[201] The occupancy right was as sacred as the right of the United States to the fee and the government had an obligation to enforce it.[202] For all practical purposes, the Court stated, the Indians owned the land, and if they so chose, they might hold it forever.[203] The impact of this language is tempered by consideration of the critical factual difference between the *Beecher* and *Leavenworth* cases. In *Beecher*, a treaty of cession had been signed by the Indians. In *Leavenworth*, Indian land was being appropriated for a railroad right-of-way with no formal cession having occurred. The *Leavenworth* Court indignantly refused to "presume that an act so injurious to the Indians [as appropriating their land before a formal cession had occurred] was intended"[204] by Congress because such a taking would be "wrong."[205] At the same time, the Court cast a cynical eye on the voluntariness of formal cessions with its comment that "constraint, in theory at least" had not been placed on the Indians to cede occupied land.[206] Indian occupancy rights were to be protected, but only until the admittedly sham ritual of a cession treaty was concluded. Judicial justification for terminating the Indian right of occupancy reeked of social Darwinism: a "higher civilization" was replacing the "semi-barbarous" tribes.[207]

In *United States v. Boyd*,[208] Cherokee Indians who had remained in North Carolina rather than remove west with their tribe, were found to be citizens of the state, but not of the United States.[209] They were, however, under United States guardianship and this gave the federal government power to join with individual Indians in a suit to cancel a timber contract made by tribal leaders on land owned without alienation restrictions and in fee simple by the tribe.[210] Guardianship also brought the case under federal court jurisdiction. As state citizens, the Eastern Cherokees were subject

to North Carolina's taxes and criminal laws, and their land was held under state sovereignty and tenure.[211] Yet, in adjudicating an Indian's interest in the land, the state courts were without jurisdiction.[212] The land was burdened with a condition[213] that required review of conveyances allegedly imposed to protect the Indians from fraud.[214]

The Indian's interest in his allotted land was greatly compromised by restrictions on alienation that were imposed in allotment legislation.[215] Controversies relating to alienation of allotted land were muddled by the unfortunate legislative drafting that called for a "patent" to issue to the Indian upon allotment.[216] Patents commonly confer fee simple title to public land,[217] but the first allotment patent conveyed no fee. In the cases involving allotted land, the courts were kept busy explaining when a patent was not really a patent.

In deciding *United States v. Rickert*, the Court said that the first patents which were issued at the time of allotment were but memoranda in writing, designed to show that the United States held legal title to the allotted land for a twenty-five year trust period.[218] At the end of the trust period (which the President could extend),[219] the title in fee would be conveyed to the Indian, presumably by a "regular patent."[220] According to the General Allotment Act, any conveyance or contract touching the land during the trust period would be deemed absolutely null and void.[221] A better distinction between the first and second patent was made in *Monson v. Simonson*.[222] The first instrument issued to the allottee was inaccurately termed a patent, the Court explained, because it was in reality an allotment certificate.[223] Under the certificate, the allottee held a very limited property interest. The purpose of the severe restrictions was to safeguard the Indians "against their own improvidence"[224] while overseeing their evolution from a state of "dependent wardship to one of full emancipation."[225]

Cases in which alienation or encumbrances on the land were made prior to the issuance of a fee patent were frequently adjudicated after 1887. They usually involved the efforts of whites to acquire Indian land by purchase or lease. Ironically, the Indian owners were shunted aside in most of the litigation over their allotted land. The federal government entered court in the name of protecting its own interests and the rights that flowed from its guardian status; opportunistic parties argued the case for Indian land rights so they themselves could acquire the land. To this end, parties defending conveyances made during the trust period argued that citizenship gave Indians the right to lease allotted land. It was urged in *Beck v. Flournoy*[226]

that citizenship could not be conferred without giving Indians the unrestricted power to use, sell, and control all property in which they had an interest.[227] This was not so, the Eighth Circuit determined, because in its sovereign power the United States could hold title to land in trust, especially for a ". . . dependent race like the Indians, who [had] always been regarded as wards of the government."[228] The dignity or value of citizenship, the court maintained, was not lessened by holding an estate in land that was inalienable.[229]

Allotment land restrictions were normally imposed by statute, but in *Wiggan v. Conolly*[230] it was held that treaties could also place valid restrictions on alienation of land belonging to a minor allottee, even if the restriction did not take effect until after a final fee patent had been issued.[231] The restriction on alienation was found to run with the land in *Bowling v. United States*,[232] so that heirs of an allottee were bound by the restriction and could not convey the land without special legislation.[233] Where the nature of an allottee's interest in land was unclear because of conflicting legislative and treaty language, and the allottee executed a warranty deed to convey the land, the Court stated that language should be construed to benefit the Indian[234] trying to disclaim the conveyance. In *Starr v. Long Jim*,[235] the Court decided that the Indian would not be benefited by the construction that his title to land was a fee simple.[236] The warranty deed did not operate to estop the allottee from denying the grantee's title[237] because it would have been against public policy to deprive the Indian of his land.[238]

Two cases studied are distinguishable from the general nonalienability line of decisions that dominated during the years after general allotment. In one case, *Jones v. Meecham*,[239] an Indian was found to hold a fee simple title. The fee simple was passed to Chief Moose Dung by an unrestricted special reservation in a Chippewa treaty of cession.[240] By the treaty, Chippewa land was to be distributed in severalty[241] with tribal leaders receiving special reservations of land.[242] Moose Dung's title was not one of mere occupancy, because the treaty converted his right to the sections of land reserved to him into an alienable property title.[243] The second case relied on interpretation of congressional intent to determine that an allottee Indian of mixed blood on the White Earth Reservation in Minnesota was excepted from legislation restricting alienation of allotted land.[244] The federal control over this class of Indians could not be tied to land, the Court concluded, although in other respects they might be wards of the government.[245]

Determination of the land interest held by the Cherokees presented unique questions because grants of land to the tribe after the

eastern removal had been made in fee simple. However, the fee simple title was held to be of "no consequence" in the federal taking of Cherokee land for a railroad right-of-way.[246] Since the fee patent was issued to the Cherokees for land to be held in common, no title was vested in severalty to members of the tribe.[247] Neither did land interest granted the Cherokees by treaties conveying title, possession, and jurisdiction[248] insulate the tribe from federal control. The treaties evidenced no ". . . intention upon the part of the Government, to discharge them from their condition of pupilage or dependency. . . ."[249] To further the discharge of its guardian duties, the federal government had the power to review the manner in which the tribe executed its responsibilities as the holder of the land fee in trust for tribal members.[250] If the federal government was dissatisfied with tribal administration, it could intervene to protect individual members of the tribe in their personal and property rights.[251] This included the right to lease tribal land for the benefit of the collective members of the tribe and neither individuals nor the tribe itself held property interests which would preclude this action.[252]

The question of what rights accrued to a member of the Five Civilized Tribes upon addition to the tribal rolls and declaration of eligibility for an allotment received contradictory answers. According to one case,[253] no vested right was passed to a Choctaw or Chickasaw Indian when it was determined by a congressional commission that he was a tribal member and potential allottee.[254] The commission was but a creature of Congress. Although called a Territorial Court,[255] it lacked judicial powers and its rulings vested no right.[256] In fact, Congress could inquire further and change any of the commission's findings as to tribal membership.[257] A Chickasaw, on the other hand, was said to have acquired "valuable rights" upon the addition of his name to the tribal rolls and his certification for allotment.[258]

Pueblo and Alaska native rights to land would appear to present a special case because international treaties, rather than the doctrine of discovery, brought these groups under United States jurisdiction. The potential difficulties caused courts, bent on extending federal guardian control over all Indians, little trouble. *United States v. Sandoval*[259] applied liquor control laws to the New Mexico Pueblos. Their title to land was compared to that of the Five Civilized Tribes in that, while a fee simple, it was a communal title.[260] Federal guardian care of the Five Civilized Tribes had not been precluded because of their land interest, therefore adequate precedent[261] to support federal control over the Pueblos existed. Whether their land

was within the original territory of the United States or in territory subsequently acquired was irrelevant.[262] Native Alaskans were found by territorial courts to have a right of occupancy in which they should not be disturbed until Congress legislated as to the means by which title to occupied land could be acquired.[263] No right of alienation existed with the natives, and Congress could exert guardianship over their land interests.[264]

In reviewing these cases, it can be seen that the right of occupancy, which had been reserved to the Indian from the earliest days, proved to be meaningless. Once the land was needed for a purpose conflicting with undisturbed occupancy, only a formal extinguishment ritual was necessary to acquire the land. Allotment gave no real interest to the Indian initially and even worked to deny him an interest in his personal property. The grant of citizenship which accompanied allotment was a mockery because it imparted no constitutional rights which courts consistently respected as a matter of law, equity, or fairness. Undeniably, the Indian right and interest in land was greatly diminished by the cases decided after 1887. Federal guardianship, buttressed by the plenary power of Congress, was the powerful tool used to accomplish that dimunition.

Judicial Definition and Justification of Federal Guardianship

Prior to the passage of the General Allotment Act in 1887, the courts had indicated that federal guardianship over Indians was a temporary arrangement, leading to full citizenship status after an appropriate "training" period. The Indian was said to be dependent and in a state of pupilage as he advanced from his "savage" condition.[265] Various legislative measures for the Indian were directed at aiding the native in becoming self-supporting and in "acquiring the arts of civilized life,"[266] and this was seen as a movement to render the Indian fit for citizenship.[267] Many perceived the allotment of Indian land in severalty as the final step in the civilization process and thus the linking of allotment and citizenship very appropriate.[268] The major provisions of the General Allotment Act[269] were to grant Indian heads of families and single persons specified acreages, to place the lands under a federal trust to restrict alienation, and to grant citizenship to all allottees who abandoned their tribes and adopted civilized habits.

The language of the cases after 1887 reveal the minimal effect of allotment and citizenship on the judicial characterization and application of guardianship. Although theoretically diminishing it, the federal guardianship was upheld and actually expanded and strength-

ened by the court decisions between 1887 and 1924. Characterizations of guardianship continued the pre-1887 pattern that expressed a federal duty to the Indian, although the origin of the duty was not agreed upon. Language from *United States v. Kagama*,[270] decided the year before the General Allotment Act was passed, survived the grant of citizenship. The *Kagama* language, directly quoted in full or part, in cases spanning the years 1890 through 1923,[271] termed the power of the government over the remnants of the once powerful Indian race as necessary for Indian protection because they had become a weak and diminished people.[272] The Indians were owed a duty because their condition came about largely through the course of dealings of the federal government with them.[273] Even when the *Kagama* language was not used, the duty to protect was often tied to the dependence of the Indian.[274] Obligations growing from treaty agreements were said to impose on the United States a duty to protect,[275] as did the fee ownership of Indian land,[276] even in situations where alienation was not restricted and no trust arrangement existed.[277]

The federal assumption of duty was also required because of the "ignorant" and injudicious nature of the Indian,[278] and his need to be shielded from the cunning of white persons seeking to take his property or harm him,[279] or in the reverse, because of the need to protect whites from unfriendly Indians.[280] Proof or evidence of guardianship was said to lie in the government's protection of Indians from the evils of alcohol[281] (a protection justly due a weak people from a strong nation,[282] according to one case) and in the restrictions on alienation which secured the Indian in his property.[283] Only a few cases stated that the Indians had always been wards of the nation,[284] but several dealt with the question of when wardship would end and how the Indian would be emancipated from his state of dependency, tutelege, or pupilage. This was a political question, the courts agreed, and one sometimes in the hands of the executive,[285] but more frequently left to Congress.[286]

Contrary to the expectations of the "civilization" proponents, then, citizenship and allotment did not mean an end to guardianship. Numerous cases[287] made it very clear that the Indian continued to be a ward of the federal government, despite the enactment of the General Allotment Act. It became quite apparent that the courts were more than willing to act in concert with popular opinion, as reflected in legislative enactments, to further reduce the sphere within which Indians could make their own choices about how to conduct their lives. Dramatic changes of judicial position were required to uphold guardianship during the period studied. Several examples

illustrate the willingness of the courts to abandon justifications they had previously set up as apparent conditions precedent to the exercise of federal guardianship. When essential elements of the conditions were not in evidence, the courts chose not to free the Indian from his wardship, but rather to simply give it a new justification. In all cases studied except three, one of which was later overruled, guardianship was upheld. A reading of all the cases calls into question the validity of every propounded legal foundation set forth to support the assumption of guardianship by the federal government during the post-allotment period.

Tribal Status. A first example of the fluid position of the courts is found in cases dealing with tribal status, or the political position of Indians. Judicial bouts with the problems of defining tribal status and Indian sovereignty have already been explored in this paper. The discussion showed how allotment was initially interpreted as being a solvent of the tribal organization, with citizenship becoming the alternative to an Indian's tribal affiliation. Although reasonable, this interpretation had to be reconsidered and eventually abandoned because it did not conform to congressional intent or revisionary legislation. The courts were understandably confused. The federal government had generally dealt with tribal units, rather than individual Indians,[288] and in court decisions there was a traditional linking of guardian-wardship to the tribal relation.[289] The possible disappearance of tribal organizations presented the courts with a situation they did not know how to handle. At first blush, citizenship, as conferred by the General Allotment Act, seemed to legislate an end to tribal organizations. Did this mean that Congress no longer intended to deal with Indians in their tribal relation, and *a fortiori*, to end its guardianship? As previously discussed, the Supreme Court did reach this conclusion in *In re Heff*,[290] only to reverse itself later.[291] Another interpretation would allow the termination of tribal relations to remove the organizational insulation of the tribe and free the federal government to extend guardianship directly to the individual Indian.[292] A third way of handling the complexity of the tribal status issue was to ignore it.[293] The cases between 1887 and 1924 are illustrative of all these approaches. Obviously, a tribal relation was not, then, an absolute condition to guardianship. Guardianship would be upheld, with or without that factor.

Two Court of Claims cases have contradictory language on the exercise of guardianship over Indians considered to be in a tribal relation. In 1887,[294] the court said that the individual tribal members were not the wards of the government, but that the Chickasaw Nation was the ward.[295] Six years later, in the second case, the court

characterized the issue in a claim as being between the federal government and individual tribal members who were the wards of the nation.[296] In an unrelated Supreme Court case, *Cherokee Nation v. Hitchcock*,[297] sympathy for the concept of guarding the individual was shown. The tribal unit was recognized, but it was bypassed to allow the federal guardian to administer tribal property for the protection of the tribal members in their individual personal and property rights.[298]

In reaching the ill-fated *Heff*[299] result, the Court had essentially accepted, then modified, the argument of government attorneys who related guardianship to the individual Indian as well as to the tribe[300] and maintained that the power of guardianship was not dependent on the tribal relationship.[301] The Court agreed that individuals may have become subject to the direct legislation of Congress after treaty-making had ended in 1871,[302] but that since then, citizenship had intervened to emancipate the Indian from federal guardianship.[303]

Before *Heff* was overruled, the Court decided *United States v. Celestine*,[304] in which it vented some of its frustration over the awkward position in which its perfectly reasonable decision in *Heff* had placed it. Perhaps, the Court observed, Congress had been hasty in granting citizenship to the Indian.[305] In any event, the Court would take no future position as to how or when guardianship would end, but it would "wisely insist" that any legislation on the subject make clear the intent of Congress.[306] In moving away from *Heff* and back to the position that guardianship continued, the Court half-heartedly tried to reconstruct the tribal relationship that it had earlier held to be a condition precedent to guardianship. The effects of citizenship and allotment had to be minimized to accomplish this, so it was held in *Celestine* that citizenship did not revoke the reservation or emancipate the Indian from all control.[307] The reservation continued under the supervision of the federal government, even though the land was allotted,[308] and federal jurisdiction extended to an individual allottee on the reservation, even though a citizen.[309]

Heff was completely undone by the curious ruling that citizenship was not incompatible with a tribal existence.[310] A few years later the Court found that in applying guardianship, a tribal existence really did not matter anyway because the political status of an Indian—tribal membership, state or national citizenship—did not condition or restrict the power of the federal government.[311] Guardianship could be applied directly to individual Indians.[312] Therefore, tribal status or the existence of a tribal relation were irrelevant.

Property Affiliation. Guardianship was justified in some cases as a by-product of sovereign land ownership, or alternatively, the arrange-

ment by which the federal government held Indian land in trust. Where no property or trust vehicle existed, however, the courts were not deterred from extending the guardian powers. Thus, the property or land relationship between the federal government and the Indian is a second example of the pseudo-conditions said to underpin guardianship, but found to be unnecessary upon further analysis.

The previously presented review of the nature of Indian title and rights to land explained how the United States asserted a paramount authority over the legal title to all Indian land, leaving only a right of occupancy with the native holders. It also described the unrelenting pressures which flailed away at the occupancy protections and ultimately allowed federal fee ownership to justify the massive Indian land cessions that accompanied removal and then allotment. Federal control of the land has been specifically cited as a source of power over Indians,[313] and in one exceptional case,[314] the effect of which was later reversed,[315] the government was not allowed to act as guardian for the Pueblo Indians because it did not hold fee title to their land.[316] References to exercising power over Indians because of their residence within the geographical limits of the United States appeared in *Kagama*[317] and even earlier in *United States v. Rogers*.[318] The power of Congress was considered well settled by the time *Cherokee Nation v. Southern Kansas Ry.*[319] was decided in 1890, but a later case[320] showed how the Court tied control of tribal lands to guardianship:

> ... [A]s regards tribal property subject to the control of the United States as guardian of the Indians, Congress may make such changes in management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of guardian of a trustee in possession.[321]

Four cases demonstrate that guardianship was not dependent on the land connection as expressed in the above cases. In *Heckman v. United States*,[322] the "peculiar" relationship between Indians and the federal government was said to create a protectable national interest encompassing more than mere property considerations.[323] *United States v. Sandoval*[324] clumsily distinguished an earlier ruling on Pueblo guardianship and redefined Pueblos as dependent people. They were, therefore, wards entitled to the fostering care and protection of the federal government,[325] even though the United States did not hold legal title to their land.[326] Guardianship turned on considerations other than Pueblo status under Spanish and Mexican rule,[327] and Pueblo title to land was said not to affect the guardian

powers of the United States.[328] Federal control over Indians was also said to reach far beyond property consideration in *United States v. Nice.*[329] In *Nice,* the education and civilization duties of the government were seen as extra responsibilities of the guardian that were in no way dependent on land control. Any remaining doubt that guardianship was conditioned by land ownership or trust duties was finally extinguished by *United States v. Waller.*[330] In *Waller,* the Court clearly acknowledged that guardianship could exist without land control: "... in whatever *other* respects the Government holds these Indians as wards, they are not controlled by lands."[331]

Civilization. Guardianship was most frequently justified as a necessary protection to bring Indians into a civilized state and prepare them for citizenship. This justification for the exercise of federal authority over all phases of Indian life was accepted by nineteenth-century writers[332] and appeared consistently in judicial language.[333] Civilizing the Indian required a period of pupilage,[334] but the Indian was said to be emerging from guardianship[335] so that emancipation could ultimately occur.[336] Civilization seemed to mean, above all, restraint from warmaking and the adoption of a settled agrarian life.[337] This, too, proved to be a contrived condition to guardianship, for guardianship powers were extended over Indians even when they met the presumed criteria for being civilized. A good example is in *Cramer v. United States,*[338] where the Court plainly stated that the nomadic life had been abandoned by a group of Indians who had settled in one area and farmed and improved the land for over fifty years.[339] Despite this evidence of "civilization," as the term had been defined by the Court itself, the Indians were said to be wards and still unemancipated from federal control and guardianship.[340] The Pueblo cases previously discussed present the most dramatic example of the civilization justification for guardianship. The Court's absolute determination to extend guardianship is perhaps nowhere better illustrated than by comparing the *Joseph* and *Sandoval* decisions. In the 1876 *Joseph* case, the Pueblos were exempted from guardian care by the Supreme Court because they were found to have maintained a civilized culture for centuries—living in fixed communities, governing themselves, and leading a pastoral and agrarian life of peace.[341] The Court even questioned if they should be termed Indians, because they had nothing in common with the nomadic tribes who so "obviously" required guardian care.[342] Thirty years later the Supreme Court adopted a totally contrary view of the Pueblos in order to justify calling them wards and placing them under guardianship for purposes of controlling liquor traffic.[343] The pastoral Pueblos were indeed a tribe like all other Indians, according

to the second case, and they had conveniently become "wild Indians" requiring federal supervision because of their primitive customs and limited civilization.[344]

Citizenship. Attaining citizenship proved no more a safeguard to escaping federal guardian control than did meeting the criteria of a "civilized" life. Although guardianship had long been justified as a training period for citizenship, it was determined in case after case[345] that citizenship and guardianship were not incompatible. The Ninth Circuit articulated what seemed to be the prevailing attitude about Indian citizenship when it cautioned that "fanciful qualities" should not be attributed to the Indian, merely because of a legislative enactment.[346] Citizenship neither revoked the reservation nor emancipated the Indian from control.[347] In *Mullin,*[348] the treaty obligations of the United States were said to continue after citizenship, and this allowed federal protection over the Indian to abide.[349] Although citizens, the Indians remained minors in the eyes of the law[350] and subject to liquor laws that were designed to protect Indian wards, whether citizens or not.

Plainly, the period of pupilage and dependence to prepare the Indian for the privileges of citizenship would continue, even though the citizenship grant had been made.[351] Over twenty-five years of additional preparation to assume the full status of citizens had elapsed by 1914 when *Bowling v. United States*[352] was decided. Was the Indian any closer to the goal of emancipation? The defendant grantees of allotted land thought so, and argued that guardianship had surely ceased because of the citizenship bestowed a quarter of a century earlier. *Bowling* was negative on emancipation and the opinion echoed the familiar words: citizenship did not end guardianship;[353] governmental rights arose from the federal duty to a dependent people; the federal authority could not be impaired.[354] Two years later the result was the same. Guardianship continued in 1916[355] and it continued in 1923,[356] the year before the passage of the general grant of citizenship to all Indians. Clearly the citizenship which had accompanied general allotment in 1887 did little for the personal or political freedom of the Indian. It is equally clear that citizenship was not the key to freedom from guardianship.

Ownership of Allotted Land. Lastly, the application of guardianship was not conditioned by ownership of land in severalty. This was shown to be true, despite the language of the General Allotment Act, which provided that all rights, privileges, and immunities of United States citizenship were to accompany allotment.[357] Freedom from guardianship would seem to follow, and this was anticipated by the winning side in the congressional debates on general allot-

ment. Legislators declared that the allotment system would at last enable the Indian to acquire civilization[358] because with severalty ownership the Indian would have access to the elements upon which civilization was thought to rest—family, home, and property.[359] The illusory nature of individual land ownership as a step away from guardianship was exposed by the more than 25 cases between 1887 and 1924 in which allotment in severalty was held not to end guardianship.[360] It would be more accurate to say that federal intervention into the individual Indian's life was actually increased after allotment because the trust relationship became personalized.

In applying guardianship between 1887 and 1924, the courts constructed justifications and apparent conditions grounded on Indian tribal status, federal land ownership, the civilization process, citizenship, and ownership of land in severalty. Elements of one or more of these justifications surfaced in nearly all the opinions studied, but no court found them to be absolute, enforceable limits on the federal power of guardianship. The courts failed to consistently adhere to any justification, so none proved to be an ultimate limit to the federal authority, even though judicial language implied that each new justification was establishing a power parameter. The justifications were but ad hoc legal responses. In actuality, there simply was no judicially imposed condition or limit to the guardian powers. The judiciary yielded to the reality that Congress would not be limited in its handling of Indian matters and accepted the totality of Congress' unfettered plenary power to control Indians as wards under federal guardianship.

Power Politics, Race, and Guardianship

The true basis of guardianship, as revealed by the cases between 1887 and 1924, was nothing more than raw power applied to a subjugated people who were considered to be racially inferior. By proceeding through the cases, denominators that seem to underlie guardianship are seen eventually to cancel each other out and only power and race remain as constants in the judicial outpouring on the subject.

The federal power over the Indian was plenary: full, entire, complete, unabridged; of that, the cases leave no doubt.[361] There was a paramount[362] and supreme[363] authority assumed over the Indian. The power to invoke such authority assumed obligation and duty of a strong and superior government to guard over a weak and depleted race.[364] Gradually, like the slow turning of a key in a lock, the decisions twisted obligations into rights and rights into powers[365]—pow-

ers that locked the Indian into the pervasive grip of the plenary authority of Congress.

The racial element is not misted in subtlety, but is strongly evident in the cases studied. Racism had pervaded Indian-white relations from the days of the Europeans' arrogant assumptions of superiority;[366] it can be identified in colonial American white attitudes,[367] and it continued forward to the period of assimilation experiments and allotment. Racial prejudice provided psychological comfort to the dispossessors of the Indians, and by having little appreciation for the value of native culture, they could feel justified in replacing a primitive race with a Christian society.[368] Exploitation of the Indians to gain their land was not only permissible under this philosophy, but actually encouraged.[369] Dicta in *Beecher v. Weatherby*[370] epitomized the philosophy and showed how it could work to lessen the judicial inclination to protect Indian occupancy rights. The *Beecher* Court tacitly approved actions by the government done in anticipation of "civilized" white expansion, although the extinguishment of the once protected Indian title was an inevitable consequence of the action.[371]

Assimilation itself can be described as racist, in that it presupposes the abandonment of an inferior native lifestyle and its replacement with one echoing the dominant culture.[372] The generalization and stereotyping that are hallmarks of racial prejudice served especially well to fix the image in the public mind of the Indian as an uncivilized, heathen nomad. The inference ignored the many tribes who were settled into sophisticated political societies and dependent on farming or herding for a livelihood, but it made white land acquisition more excusable,[373] gave allotment an ostensible social purpose, and justified federal assumptions of power over people believed to be in need of civilizing influences. In the cases studied, the Indian need of training for a civilized life at the hands of the "superior" white guardians clearly comes across in references to the non-Christian Indian culture,[374] the lack of traditional schooling,[375] the inferiority of communal life,[376] the need to prohibit liquor consumption,[377] and in generalizations about the lack of industry and judiciousness[378] displayed by Indians—character traits that required efforts by the federal government to protect the Indian from himself.[379]

Source material for court language on these subjects sometimes came from official agent or committee reports on the Indian condition. Because many Indian agents were appointed from missionary groups,[380] the strong bias of the Christian ethic is revealed in the comments that influenced the courts. The retraining chore under-

taken by an agent was directed at preparing his charges for citizenship, yet there was little willingness to extend the constitutional protections of religious liberty to Indians. Native religious customs were obviously misunderstood and mistrusted. One report, later incorporated into a Supreme Court decision,[381] dismissed a dance ritual as "little less than a ribald system of debauchery."[382] The time had come, the agent concluded, when Indians had to give up pagan customs and become citizens in fact.[383] Apparently, citizenship and traditional customs were seen as being mutually exclusive. Well-meaning bigots, like the agent who wrote that report, were the greatest source of information for congressmen and judges who were called upon to make decisions about the lives of Indians—people they neither knew nor understood. These on-the-scene reporters could easily mold the thinking of decision-makers who were already disposed to consider the Indian as savage and uncivilized because of the white tradition of pervasive racism and the stereotyped literary image of the Indian in the nineteenth century.

The undisguised contempt for the native culture was unrelieved by an open-minded assessment in any of the principal cases studied. Rather, the Indians were described as semi-barbarous,[384] savage,[385] primitive,[386] degraded,[387] and ignorant.[388] The relationship between the federal government and the Indian was frequently termed as one between a superior and an inferior.[389] The white race was called more intelligent and highly developed.[390] There was no question but that a higher civilization was thought to be justly replacing that of a passing race whose time was over and whose existence could no longer be justified. The very weakness of the Indians in resisting the tide seemed to be one of their greatest moral shortcomings, but not as serious as the Indian communal tradition. To the white observer, the lack of proprietary interest generally displayed by tribal members was repulsive and backward.[391] Removing the "herd" instinct was deemed by some to be the key to civilizing the Indian.[392] This prejudice against communal holding assisted the Supreme Court in dismissing the value of Indian title and reaching the results in *Cherokee Nation v. Southern Kansas Ry.*[393] and *United States v. Sandoval*,[394] both significant guardianship cases. More importantly, it underscored the whole allotment philosophy and was instrumental in terminating the semi-independent existence of the Five Civilized Tribes in Indian Territory, later Oklahoma.

Many of the post-1887 cases deal with the land wrangles of the Five Civilized Tribes. In designing legislation for allotment of the Indian Territory, Congress relied heavily on the prejudicial Dawes Report.[395] Courts later turned to the Dawes language as well. The

Dawes Commission had been appointed to enter into negotiations with the Five Civilized Tribes to extinguish tribal title to their land and to report on the conditions in the Indian Territory.[396] The Report condemned the existing tribal governments,[397] found the Indian system non-American,[398] and called for its total replacement by a massive federal intervention.[399] The uncritical acceptance of the Report by the Supreme Court in *Stephens v. Cherokee Nation*[400] again demonstrates the influence of the writings of first-hand observers of the Indian scene. It illustrates the prevailing presumption that the Indian way was the wrong and inferior way and unacceptable to white America. Guardianship fed on these superior attitudes. The cases relating to the Five Civilized Tribes showed that no limits would be placed on the government's guardian powers as it entered Indian Territory to dismantle the tribal governments,[401] extinguish land titles,[402] and divide the land in severalty.[403]

More concrete evidence of the racial overtones of guardianship exists in cases where laws relating to Indians were interpreted by the courts. Indians were often distinguished in legislation in degree of Indian blood. Guardianship was held to apply to Indians of full blood in two Supreme Court cases,[404] while it did not, because of legislative enactment, apply to those of mixed blood. These cases illustrate that racial distinction alone could be used to uphold restrictions on land alienation and allow the United States, as guardian, to enter court and cancel conveyances of allotted land. This seems to undercut the frequent federal posture that justified guardianship as being in the interest of protecting those who could not manage their land. The education, culture, and knowledge of property matters of the mixed-blood members of a tribe could be expected to compare to that of the fullbloods. The Court did observe in one case that the legislative judgment characterizing mixed-bloods as more capable of managing their own affairs might be mistaken.[405] The facts of the case demonstrated that to be true.[406] Yet, the congressional discrimination, sometimes called legislative wisdom, was upheld by the Supreme Court, and it was based solely on the genetic heritage of a class of Indians.

Race also surfaced as an issue in criminal jurisdiction cases, especially after the passage of the Major Crimes Act[407] and of liquor prohibition legislation.[408] In *United States v. Celestine*,[409] the Court found that federal jurisdiction extended over an Indian committing a crime on a reservation, although the land was allotted and the defendant a citizen. The defendant and the victim "remained Indians by race,"[410] the Court stated, and even with citizenship, Congress had not clearly renounced its jurisdiction over the "individual mem-

bers of this dependent race."[411] Restrictive legislation denied the Indian access to alcohol purely on a racial basis. Race or color was said to be significant in one liquor case[412] because the Indians, as wards of the government, were the intended beneficiaries of laws to protect them from liquor.[413] However, the race of the seller did not matter.[414]

When *In re Heff*[415] held that guardianship was ended by citizenship, Justice Brewer was surely unaware of how well his rhetorical question[416] in the decision summarized the racial overtones of guardianship. The United States had argued in *Heff* that it could punish a liquor sale between state citizens if the purchaser was an Indian, although it claimed no such police power if neither party to the sale was an Indian. If the government claimed this power, although the Indian had become subject to the civil and criminal laws of a state, Brewer reasoned that the logic implied that the United States could never release itself from the obligation of guardianship.[417] Congress, it appeared, could repudiate the granting of all rights and privileges of national (and therefore state) citizenship and reassume guardianship at its will.[418] The Indians would thus be denied the benefits of the laws of the states where they resided.[419] "Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of a special class over whom the General Government may in its discretion assume the rights of guardianship which it has once abandoned," Brewer asked, "and this whether the State or the individual himself consents?"[420]

The cases between 1887 and 1924 provide an affirmative answer to that question. *Heff*, and Justice Brewer's point of view, were but momentary diversions from the clear path of decisions which led the Indian into the ever-restricting web of federal guardianship. Even before *Heff* was overruled,[421] the final answer was plain. The government could, in its discretion, and because of its superior strength, assume the rights of guardianship over a special class: those who had Indian, and only Indian, blood in their veins.

NOTES

1. V. Deloria, Behind the Trail of Broken Treaties: An Indian Declaration of Independence (1974).

2. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. The General Allotment Act is also known as the Dawes Act. A detailed and fully documented account of the Act and its consequences up to 1900 appears in D. Otis, The Dawes Act and the Allotment of Indian Lands (1973). This work is a reprint of the original work, first printed in 1934 as a part of the hearings before the House of Representatives Committee on Indian Affairs.

3. Act of June 2, 1924, ch. 233, 43 Stat. 253.

4. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823). In this case, Chief Justice Marshall was called upon to determine the character of Indian title to occupied land. The terms "occupancy" and "possession" are interchangeably used to describe the Indian right in the land, but Marshall reached the conclusion that Indian title was not a fee such as to give a right of alienability. Apparently, Marshall hoped to lay to rest the whole question of Indian versus United States title to land by a very long, historically documented opinion tracing federal power as sovereign back to the fifteenth century. Although territory was occupied by Indians, ". . . the exclusive right of the United States to extinguish their title . . . has never, we believe, been doubted." *Id.* at 584. Significantly, the issue was not settled by the *Johnson* case, but the opinion "substantially compromised" the Indian interest. *See,* Swindler, *Politics as Law: The Cherokee Cases,* 3 AM. INDIAN L. REV. 7, 10-11 (1975). Even before the *Johnson* case reached the Supreme Court, some recognition of Indian possessory rights, based on prior occupancy, was evidenced in reports of the government officials charged with formulating Indian policy. G. HARMON, SIXTY YEARS OF INDIAN AFFAIRS 55 (1941).

5. Two references to Indians appear in the body of the Constitution. In apportioning representatives, "Indians not taxed" were to be excluded in the count. U.S. CONST. art. I, § 2. Congress was given the power to "regulate commerce . . . with the Indian Tribes." U.S. CONST. art. I § 8.

6. 118 U.S. 375 (1886).

7. *Id.* at 378.

8. S. TYLER, A HISTORY OF INDIAN POLICY 37 (1973) [hereinafter cited as TYLER]. It should be noted that Indian-white conflict had been a problem from the earliest days of the American colonies, but by 1789 there was a century-old history of white dealings with the North American Indians. Trade, land encroachment, war, treaties, and Indian removal were established concepts by the time the Constitution was written and Indian policy invited no special attention in the document. *See generally,* W. JACOBS, DISPOSSESSING THE AMERICAN INDIAN, INDIANS AND WHITES ON THE COLONIAL FRONTIER (1972).

9. Courts at various times defined the Indian tribes as having a "national character" or being a "nation of people," Kansas Indians, 72 U.S. (5 Wall.) 737, 757, 760 (1866); or as "foreign states . . . alien nations, distinct political communities," or "independent political communities." Elk v. Wilkins, 112 U.S. 94, 99, 109 (1884). The *Kagama* Court determined that while regarded as having a "semi-dependent position," Indian tribes were not nations and not possessed of the full attributes of sovereignty, but that they were a separate people not brought under the laws of the Union or any state. United States v. Kagama, 118 U.S. 375 (1886). Yet, the Indians' existence as a separate and a distinct people with rights which constituted them as states or separate communities was recognized, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 583 (1832), although tribes still fell short of being sovereign nations. Cherokee Nation v. Kansas Ry., 135 U.S. 641 (1890).

10. *See generally,* F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1921). Turner describes the long-held American belief that the frontier would always be available for new settlement and expansion.

11. Numerous treaties pledged land to the Indians in perpetuity. *See* INDIAN TREATIES (C. Kappler com. 1972). An example of the perpetuity covenant is found in Treaty with the Western Cherokees, art. 2, 7 Stat. 311 (1828): "The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, seven million acres of land . . . and . . . a perpetual outlet. . . ." Article 8 of the treaty states that the Cherokees "and their

posterity" will be freed from the "harassing and ruinous effects consequent upon location amidst a white population."

12. Typically, early Indian treaties included the drawing of a line beyond which the Indians were to stay and the white settlers were not to enter. W. JACOBS, DISPOSSESSING THE AMERICAN INDIAN, INDIANS AND WHITES ON THE COLONIAL FRONTIER 98-101 (1972). The colonial precedent for this policy is discussed in TYLER, *supra* note 8, at 29-30.

13. The United States followed the British practice of making treaties with the "Indian nations." B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 223-29 (1967). *See* the discussion of colonial treaty practices and the concept of protectorate status over the tribes in TYLER, *supra* note 8, at 7-31. Flowing from the recognition of tribal sovereignty was the vesting of the power to govern relations with the Indians in the federal government, rather than individual state government. This principle was established by the Continental Congress and was carried over into the Constitution. F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 6-25 (1962). Prucha's analysis of the flow of power should be questioned in light of the theory that tribal sovereignty was only recognized by the United States in terms of its own definition of that sovereignty. This idea is expanded on in the "Tribal Status and Indian Sovereignty" section of this article.

14. The military conquest of the Plains tribes was the turning point in the final destruction of an independent Indian civilization in this country. A contemporary account of the military campaigns against the "savage" tribes appears in G. MANYPENNY, OUR INDIAN WARDS (1880). A recent work on the federal taking of Indian lands is K. KICKINGBIRD & K. DUCHENEAUX, ONE HUNDRED MILLION ACRES (1973) [hereinafter cited as K. KICKINGBIRD].

15. Some of the best examples of the insistent and articulate reform literature of the assimilation movement is found in F. PRUCHA, AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 (1973). While assimilation propaganda reached its apex in the post-Civil War period and had the greatest influence on public thinking and national policy during this time, the idea was not a new one. In 1820, John C. Calhoun had stated that the American Indian should be "brought gradually under our authority and laws. . . . It is impossible with their customs, that they should exist as independent communities in the midst of civilized society." AMERICAN STATE PAPERS, *Indian Affairs*, No. 162, 200-201. [hereinafter cited as AMERICAN STATE PAPERS]. In the colonial period, Harvard, William and Mary, and Dartmouth colleges all expressed an interest in educating Indian youth so that they could "take their place" in American society. ADMINISTRATION OF THE INDIAN OFFICE, No. 65, 12 (1915).

16. The policy of enforced acculturation exemplifies, perhaps more tragically than any other reform effort that has been forced upon the American Indian, the abuses of a dominant and self-righteous society set loose upon a minority culture and bent upon remaking that culture in its own image. The arrogance of a society that considered itself civilized in the extreme, Victorian morality, and the convictions of a Christian people combined to do battle with and solve, once and for all, the "Indian problem." The ultimate solution was believed to lie in the destruction of the language, religious customs, and attitudes that made Indians different. Once the differences were eliminated, Indians would be like all other Americans and the problems of an alien culture within the United States would be solved. Boarding schools, to get children away from the "bad influence" of home, were established. Native customs and religious ceremonies were banned on reservations. Rigid discipline and enforced work routines were imposed to impart the American work ethic. Language, dress, and hair-

style was Americanized. A contemporary account appears in COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORT 10-11 (1872).

17. The passage of the General Allotment Act, Act of Feb. 88, 1887, ch. 119, 24 STAT. 388, best demonstrates the determination to use land ownership as the means of assimilating the Indians. Enthusiasts expected the Act to result in the "total fusion . . . of the white and red races," and predicted an Indian assimilation comparable with that of other ethnic groups in America. W. BARROWS, THE INDIAN'S SIDE OF THE INDIAN QUESTION 6 (1887). *See also Special Subcomm. on Indian Educ., Comm. on Labor & Public Welfare, Indian Educ.: A National Tragedy—A National Challenge*, S. REP. No. 501, 91st Cong. 1st Sess., 9 (1969).

18. The practice officially ended with the enactment of a law stating that no Indian nation or tribe within the territory of the United States would be acknowledged or recognized as an independent nation, tribe, or power with whom the United States could contract by treaty. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566.

19. A former Commissioner of Indian Affairs described the assumption of responsibility over individuals as "a comprehensive guardianship over the persons of individual Indians." Address by Philleo Nash, Dec. 6, 1962, in THE INDIAN IN AMERICA'S PAST 131 (J. Forbes ed. 1964). The federal superintendence over individual Indians was probably an inevitable corollary to the assimilation policy and its attendant termination of tribal entities having power to act for Indian groups. Johnson, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 988-89 (1973). The Supreme Court stressed the right of Congress to enact protective legislation for Indians in United States v. Kagama, 118 U.S. 375 (1886). The power of Congress over Indians has been called a "political" one not subject to control by the courts. Until Congress declares that government guardianship over the Indians shall cease, its full and exclusive legislative power over them continues. The power has been described as not resting on any specific grant of legislative authority, but on the implied authority which subjects the conduct of dependent persons to governmental tutelage. Pound, *Nationals without a Nation: The New York Tribal Indians*, 22 COLUM. L. REV. 97, 102 (1922). ". . . [J]urisdiction has been taken by Congress in many matters which appear to be removed from the matters of commerce with Indians tribes." Knoepfler, *Legal Status of American Indian and His Property*, 7 IOWA L. BULL. 232, 234 (1922). *See also* the sources of congressional power described in United States v. Sandoval, 231 U.S. 28, 34 (1913).

20. Jacob, *Uncle Sam—The Great White Father*, 23 CASE & COMMENT 703, 705 (1917); U.S. BUREAU OF INDIAN AFFAIRS, A SKETCH OF THE DEVELOPMENT OF THE BUREAU OF INDIAN AFFAIRS AND OF INDIAN POLICY 6 (1956). Most of the militarily conquered Indians were reduced to what has been called "law imposed pauperism." The federal government was unwilling to "deliberately starve" the Indians after depriving them of the means to continue an independent existence, so a ration system was devised to supply food and other necessities. F. LEUPP, THE INDIAN AND HIS PROBLEM 26 (1910).

21. The guardianship terminology is generally cited as originating in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), wherein Chief Justice Marshall analogized the relationship of the federal government to the Indian as like unto a guardian to his ward. *Id.* at 21. Nine years earlier, however, Marshall had written that the laws of the United States treated Indians "as an inferior race of people . . . under the perpetual protection and pupilage of the government." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567 (1823). Earlier still, John C. Calhoun had written that the Indians ". . . should be taken under our guardianship; and our

opinions, not theirs, ought to prevail, in measures intended for their civilization and happiness." AMERICAN STATE PAPERS, *supra* note 15.

22. Congressional power to legislate for American Indians has been held to flow from one of five sources: first, the treaty-making power; second, the power to regulate interstate commerce; third, the power to regulate commerce with Indian tribes; fourth, the ownership as sovereign of lands to which Indian title has not been extinguished; fifth, the plenary authority arising out of the nation's guardianship of the Indians as an alien but dependent people. United States v. Sandoval, 231 U.S. 28, 34 (1913). The first three sources of power are based on constitutional powers granted to Congress. The remaining two are constructed powers and have been used to deal with almost every facet of the lives of the Native American population.

23. Fifty-two cases, decided within the thirty-six years inclusive of 1887 to 1924, were studied for their use of guardianship principles in upholding federal power over Indian affairs. Fifteen landmark cases decided prior to 1887 were also consulted. Of the 52 principal cases, 33 were decisions of the United States Supreme Court, eight were decided by a Circuit Court of Appeals, seven by federal district courts, two by the Court of Claims, and two by territorial courts. The facts giving rise to the cases varied. Seventeen grew out of criminal charges and criminal jurisdictional questions, two were tax related, 10 presented Indian claims, and four involved railroad-Indian land disputes. The remaining number of cases originated from contested land conveyances selling or leasing Indian land or land formerly under Indian control. The cases were analyzed for their use of private law concepts in defining the federal responsibility to Indians and 15 cases were found to be on point. Twenty-seven cases discussed the nature of Indian title to land and 14 dealt with questions of Indian tribal sovereignty and status. Forty-three of the 52 cases contained language directed at defining, limiting, or enlarging the role of the federal government as guardian or trustee and confirming the Indian status as a ward of the government.

24. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 568 (1823), quoted at note 21 *supra*.

25. Private law is used here to mean law as administered between citizen and citizen.

26. Note, *Indian Tribal Trust Funds*, 27 HASTINGS L.J. 519 (1975).

27. Chambers, *Judicial Enforcement of Federal Trust Responsibility*, 27 STAN. L. REV. 1213, 1215 (1975).

28. There is no doubt that the guardian is in one of those intimate relations usually called fiduciary and that he therefore is in the same class with the trustee. G.G. BOGERT & G.T. BOGERT, TRUSTS AND TRUSTEES § 13, at 59 (2d ed. 1960) [hereinafter cited as BOGERT].

29. Blackfeather v. United States, 28 Ct. Cl. 447 (1893); Chickasaw Nation v. United States, 22 Ct. Cl. 222 (1887).

30. United States v. Flournoy, 69 F. 866 (D. Neb. 1895); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895).

31. United States v. Allen, 179 F. 13 (8th Cir. 1910).

32. *Id.* at 16.

33. Heckman v. United States, 224 U.S. 413 (1912).

34. BOGERT, *supra* note 28.

35. *Id.*, §§ 1-13.

36. *Id.*, § 1, at 5.

37. *Id.*

38. Chambers, *Judicial Enforcement of Federal Trust Responsibility*, 27 STAN. L. REV. 1213 (1975).

39. Blackfeather v. United States, 28 Ct. Cl. 447 (1893), and Chicksaw Nation v. United States, 22 Ct. Cl. 222 (1887) are examples from the cases presented here.

40. Chicksaw Nation v. United States, 22 Ct. Cl. 222, 225 (1887).

41. BOGERT, *supra* note 28, § 13, at 59, 61.

42. *Id.* at 58-59.

43. Cramer v. United States, 261 U.S. 219 (1923); United States v. Waller, 243 U.S. 452 (1917); Tiger v. Western Inv. Co., 221 U.S. 286 (1916) (United States intervened by leave of the Court); Bowling v. United States, 233 U.S. 528 (1914); Heckman v. United States, 224 U.S. 413 (1912); Mullen v. United States, 224 U.S. 448 (1912); Wallace v. Adams, 204 U.S. 415 (1907); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Rickert, 188 U.S. 432 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

44. A variety of definitions, assumptions, and conclusions can be drawn from the way in which the courts have expressed the nature of the guardian-ward relationship between the United States and Indians. FEDERAL INDIAN LAW 557-66 (1958) [hereinafter cited as FEDERAL INDIAN LAW].

45. United States v. Sandoval, 231 U.S. 28 (1913); Choate v. Trapp, 224 U.S. 665 (1912); Heckman v. United States, 224 U.S. 413 (1912); Wallace v. Adams, 204 U.S. 415 (1907); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

46. BOGERT, *supra* note 28, § 13, at 59.

47. *Id.*, § 14, at 63.

48. "It is not within the power of the Courts to overrule the judgment of Congress." The power of Congress to continue or abandon its guardianship over Indians is unquestioned. United States v. Celestine, 215 U.S. 278, 290 (1909).

49. "The power existing in Congress to administer upon and guard the tribal property . . . the manner of its exercise is a question within the province of the legislative branch . . . and is not one for the courts." Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902).

50. 22 Ct. Cl. 222 (1887).

51. *Id.* at 248.

52. *Id.*

53. *Id.* at 249.

54. *Id.* at 265.

55. Blackfeather v. United States, 28 Ct. Cl. 447 (1893).

56. *Id.* at 461.

57. *Id.* at 456.

58. *Id.* at 460.

59. 68 F. 577 (W.D.N.C. 1895).

60. *Id.* at 579, 580, 583.

61. *Id.* at 579.

62. 69 F. 886 (D. Neb. 1895).

63. *Id.* at 890-91.

64. *Id.*

65. United States v. Berrigan, 2 Alas. 442 (1905).

66. *Id.* at 443-44.

67. 187 U.S. 294 (1902).

68. *Id.* at 307.

69. *Id.* at 308.

70. United States v. Rickert, 188 U.S. 432, 442 (1903).

71. *Id.* at 444.
72. *Id.* at 436.
73. *Id.* at 443.
74. 204 U.S. 458 (1907).
75. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.
76. McKay v. Kalyton, 204 U.S. 458, 468 (1907).
77. Act of Feb. 6, 1901, ch. 217, 31 Stat. 760, *amending* 28 Stat. 286.
78. McKay v. Kalyton, 204 U.S. 458, 469 (1907).
79. The Eighth Circuit made a distinction in Mulligan v. United States, 120 F. 98 (8th Cir. 1903), between an Indian under wardship and an Indian who came under federal supervision because his land was held in trust. After the Eighth Circuit determined in United States v. Allen, 179 F. 13 (8th Cir. 1910), that the private law of guardian did not apply in Indian cases, it scrupulously avoided the use of the terms "guardian," "trustee," and "ward" in writing the subsequent decision in United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912) and United States v. Gray, 201 F. 291 (8th Cir. 1912).
80. The Eighth Circuit strongly supported the right of the United States to come into court to protect and further the aims of its Indian policy. The court stressed the dependence and susceptibility of Indians in Beck v. Flournoy, 65 F. 30 (8th Cir. 1894); found that citizenship of the Indian did not prevent Congress from prohibiting liquor sales to them in Mulligan v. United States, 120 F. 98 (8th Cir. 1903); that the Indian dependence allowed the Commissioner of Indian Affairs to act for their protection in Rainbow v. Young, 161 F. 835 (8th Cir. 1908); that allottees were not necessary parties in a suit brought by the United States to protect allottee land in United States v. Allen, 179 F. 13 (8th Cir. 1910); that theft of the personal property of an allottee infringed on federal rights and the means of carrying out Indian policies so as to give the government a cause of action for damages for wrongful taking in United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); and that the civil or political status of the Indian does not condition the power of the government to protect Indian property rights and carry out policies to civilize the Indian, United States v. Gray, 201 F. 291 (8th Cir. 1912).
81. 179 F. 13, 16 (8th Cir. 1910).
82. *Id.*
83. *Id.* at 22.
84. Heckman v. United States, 224 U.S. 413 (1912).
85. *Id.* at 416-20.
86. *Id.* at 436.
87. *Id.* at 445.
88. *Id.*
89. Deming Inv. Co. v. United States, 224 U.S. 471 (1912); Goat v. United States, 224 U.S. 458 (1912); Mullen v. United States, 224 U.S. 448 (1912).
90. Wise, *Indian Law and Needed Reforms,* 12 A.B.A.J. 37 (1926). If the recognition afforded the Indian tribes by the federal government is considered to be that of one sovereign acknowledging another, the very unusual and "solecistic relationship of *imperium in imperio*—a sovereign within a sovereign," was created. Johnson, *Sovereignty, Citizenship and the Indian,* 15 ARIZ. L. REV. 973-74 (1973). *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).
91. A. SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS 29-30, 55 (1921).
92. Wise, *Indian Law and Needed Reforms,* 12 A.B.A.J. 37, 90 (1926). Tribal

status gave rise to "unique rights" for Indians. E. SCHUSKY, THE RIGHT TO BE AN INDIAN 55 (1970).

93. It has been called "modern practice" to "discourage tribal organization and to deal with the aborigines as individuals under guardianship." A. SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS (1921). Parallels have been drawn between the American experience with the Indians and other situations where the government has had a guardianship responsibility. The United States' naval administration of Micronesia under United Nations trusteeship and the War Location Authority's management of relocated Japanese-Americans during the Second World War have been cited as being analogous. The French in Indo-China, the Japanese in Formosa, and the British in the West Indies have demonstrated "social characteristics" similar to the Americans in managing indigenous populations. In every instance, "the administrator . . . regards himself smarter than the people he is guiding and so better equipped to make policy decisions on their behalf. The administrator also feels he is protecting his people against sinister outside forces. . . ." Embree, *The Indian Bureau and Self Government*, 8 HUMAN ORGANIZATION No. 2, at 11 (1949).

94. The viewpoint expressed here is in no way intended as a justification of the acts described or as a vindication of the "might makes right" philosophy. It is an effort to survey the political facts in a dispassionate manner and leave moral judgments to the discretion of the individual reader.

95. FEDERAL INDIAN LAW, *supra* note 44, at 152-53. *See generally*, Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21 (1881).

96. A contemporary critic of the policies leading to the Cherokee removal from the eastern states strongly argued that treaties and executive conduct toward Indian tribes constituted a stipulation which would estop the United States from denying Indian nationhood. "We should be obliged to submit to the inconvenience resulting from our stipulations. . . ." J. EVARTS, ESSAYS ON THE PRESENT CRISIS AND CONDITION OF THE AMERICAN INDIANS 21 (1829). Rarely do sovereign nations willingly "submit to inconvenience" when they have the power to do otherwise and wish to achieve a national policy goal. In this instance, the goal was Indian removal from desired land. Whatever the moral considerations, the United States meant to achieve that goal and had the power to do so.

97. TYLER, *supra* note 8, at 27-30.

98. *Id.* at 30. The early protective policy of the United States toward Indians was pronounced by George Washington in 1790: "The General Government will never consent to your being defrauded, but will protect you in all your just rights." AMERICAN STATE PAPERS, *supra* note 15, at 142.

99. TYLER, *supra* note 8, at 23-31.

100. *Id.* at 30. BLACK'S LAW DICTIONARY defines sovereignty as "the possession of sovereign power; supreme political authority . . . the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation. . . ."

101. TYLER, *supra* note 8, at 30.

102. Total independence of Indian tribes has not existed since the founding of the American government. Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21, 23 (1881).

103. If the power over Indian affairs is properly characterized as external in nature, constitutional authority for the wide range of powers assumed over the Indian is not required; the power is an attribute of national sovereignty. Johnson, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 981 (1973).

104. Court recognition came in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Legislative recognition can be implied from the willingness of Congress to leave Indians outside the scope of legislative acts for almost 100 years. Treaties and acts passed by Congress have at times specifically recognized tribal governmental power. FEDERAL INDIAN LAW, *supra* note 44, at 402-10.

105. Justice Marshall stated that the tribes were not foreign nations in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 23 (1831).

106. Indian tribes have controlled tribal membership, regulated domestic relations, controlled descent and distribution of property, taxed themselves, and administered justice. FEDERAL INDIAN LAW, *supra* note 44, at 413-52.

107. *Id.* at 773-76. Allotments were provided for as early as 1798 in treaties, but it was not until the 1850's that allotment became a pattern. All earlier legislation was capstoned by the General Allotment Act of 1887.

108. *Id.* at 774. The 1958 revision of Cohen's HANDBOOK OF FEDERAL INDIAN LAW states that ". . . [A]llotment came to be used in connection with terminating tribal status. Allottees surrendered their interest in the tribal estate and became citizens." This view is not supported by the major case interpreting the effect of allotment and citizenship on tribal status. *See* United States v. Nice, 241 U.S. 591 (1916) (tribal status continued after allotment and citizenship).

109. OTIS, *supra* note 2, at 8-32. Otis discusses some of the congressional debate on the General Allotment Act. While the benefits of the land severalty plan were stressed, there was a minority view claiming that the real aim of the bill was to get land away from the Indian and open it for white settlement. *Id.* at 19.

110. Wiggan v. Conolly, 163 U.S. 56, 60 (1896).

111. *Id.* at 62.

112. Congress particularly demonstrated that it would not free the Indian from laws restraining liquor sales, which was the substantive issue in several cases involving the effect of allotments. The Eighth Circuit summarized the matter: ". . . [U]nder all the changes of policy with reference to the Indians for more than a century there has been but one sentiment as to the debauching effect of intoxicating liquors upon this primitive people, and but one purpose on the part of Congress, and that has been to absolutely suppress the traffic with them and shield them from its debasing influences." United States Exp. Co. v. Friedman, 191 F. 673 (8th Cir. 1911).

113. 197 U.S. 488 (1905).

114. *Id.* at 499.

115. *Id.* at 501-502. ". . . [T]he policy of the government has changed, and . . . an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the Government the relation of guardian and ward. . . ."

116. United States v. Nice, 241 U.S. 591 (1916), which overruled *Heff*, summarized the Court's reconsideration: ". . . the tribal relation and the wardship of the Indians were not to be disturbed by the allotments, . . . we find that both Congress and the Administrative Officers of the Government have proceeded upon that theory." *Id.* at 601.

117. Perrin v. United States, 232 U.S. 478 (1914); United States v. Sandoval, 231 U.S. 28 (1913); Tiger v. Western Inv., 221 U.S. 286 (1911); United States v. Celestine, 215 U.S. 287 (1909); United States Exp. Co. v. Friedman, 119 F. 673 (8th Cir. 1911); United States v. Allen, 179 F. 13 (8th Cir. 1910); Rainbow v. Young, 161 F. 835 (8th Cir. 1908).

118. United States v. Celestine, 215 U.S. 287, 289-90 (1909).

119. Rainbow v. Young, 161 F. 835, 836 (8th Cir. 1908).

120. Perrin v. United States, 232 U.S. 478, 487 (1914). In overruling *Heff*, the Court said that the tribal relation continued after guardianship, and "nothing is found to indicate that it was to terminate short of the trust period." United States v. Nice, 241 U.S. 591, 596 (1916).

121. United States v. Nice, 241 U.S. 591 (1916).

122. *Id.*

123. *Id.* at 599.

124. *Id.*

125. *Id.* at 601.

126. 118 U.S. 375 (1886). It should be noted that *Heff*, *Nice*, and related cases dealt with the control of liquor sales to Indians, and thus the "necessity" of interpreting tribal status could be attributed to the phraseology of statutes on that subject.

127. Act of Mar. 3, 1885, ch. 341, 23 Stat. 361. The Act extended federal criminal law to all Indian reservations.

128. 118 U.S. 375, 378 (1886).

129. *Id.* at 383.

130. *Id.* at 383-85.

131. *Id.* at 384.

132. Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).

133. *Id.* at 657.

134. *Id.* at 653-54.

135. *Id.*

136. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

137. *Id.* at 307.

138. *Id.* at 307-308.

139. *Id.* at 307.

140. *Id.* at 306-307.

141. 187 U.S. 553 (1903).

142. Beecher v. Wetherby, 95 U.S. 517 (1887); Leavenworth R.R. v. United States, 92 U.S. 733 (1875); United States v. Cook, 86 U.S. (19 Wall.) 591 (1873); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

143. 187 U.S. 553, 565 (1903).

144. *Id.* at 564-65.

145. *Id.* at 565.

146. *Id.* at 564. Congress would not have to gain the assent of the Indians to act in regard to land in the case of a "possible emergency."

147. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566.

148. F. LEUPP, THE INDIAN AND HIS PROBLEM (1910).

149. F. PRUCHA, AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 (1973). Those who considered themselves Indian "friends" rarely suggested that the native culture offered something worth preserving. There were several competing ideas on how best to change the life and habits of the Indian, but all agreed that something should be done "for" the Indian. In United States v. Kagama, 118 U.S. 375 (1885), the Court found a government duty arising out of the "very weakness and helplessness" of the Indians, which was "so largely due to the course of dealing of the Federal Government with them. . . ." *Id.* at 384.

150. The growth of the Bureau of Indian Affairs and the history of services offered Indians is discussed in FEDERAL INDIAN LAW, *supra* note 44, at 215-306.

151. Some important Indian land studies are: J. BENNETT, THE LAW OF TITLES

TO INDIAN LAND (1917); S. BLEDSOE, INDIAN LAND LAWS (1909); W. BLUMENTHAL, AMERICAN INDIANS DISPOSSESSED (1955); K. KICKINGBIRD & K. DUCHENEAUX, ONE HUNDRED MILLION ACRES (1973); C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES (1900).

152. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); KICKINGBIRD, *supra* note 14, at 4-5.

153. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

154. *Id.*

155. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

156. Early acts of the United States Congress were aimed at protecting the Indian in his possessory right. Trespass on Indian land was punishable by acts passed in 1790 through 1834, the latter law being made permanent. Other laws passed in 1867, 1884, and 1891 had the same thrust. Courts also strongly upheld Indian possession against interlopers. FEDERAL INDIAN LAW, *supra* note 44, at 633-38.

157. TYLER, *supra* note 8, at 34-35.

158. Although formal consent was usually obtained from the Indians when land was taken, "it is well known that they . . . yielded to a necessity to which they could not resist." U.S. BUREAU OF INDIAN AFFAIRS, cited *supra* note 20, at 6.

159. FEDERAL INDIAN LAW, *supra* note 44, at 174-75.

160. *Id.* at 773-74. Originally, allotment was a form of reserving land to individual members of a tribe when chiefs or councils of the tribe entered into treaties of land cession. The plots of land upon which individuals had settled or made improvements were reserved from the land cession and allotted to the individuals.

161. Contemporary writers could not find enough superlatives to describe the social miracle that general allotment would bring about. The settling of Indians on their own land and the granting of citizenship was seen as the final stage of the "civilizing" process. Judges were not immune from the fever. Land division in severalty would end the "indolence and shiftlessness" that had characterized Indian behavior, United States v. Kiya, 126 F. 879, 881 (D.N.D. 1903); it would cause Indians to "adopt the habits of an agricultural people," Hy-Yu-Tse-Mil-kin v. Smith, 194 U.S. 401, 412 (1904); and teach the "arts of civilized life," United States v. Gray, 201 F. 291, 293 (8th Cir. 1912), thereby advancing the Indian from his "semi-savage condition," United States v. Flournoy, 69 F. 886, 891 (D. Neb. 1895). Theodore Roosevelt more bluntly described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass." L. TYLER, INDIAN AFFAIRS: A WORK PAPER ON TERMINATION 5 (1964).

162. FEDERAL INDIAN LAW, *supra* note 44, at 710-11.

163. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890). The latter case is particularly revealing of the intent to handle Indian land as desired, despite earlier guarantees. The Court upheld the power of Congress to grant land to the railroad in an area that had been secured to the Cherokee Nation under treaties guaranteeing title, possession, and jurisdiction to the tribe. Simple eminent domain principles should have sufficed to reach the desired result, but the Court went one step further. "It would be very strange if the national government . . . could not exercise eminent domain . . . power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control." *Id.* at 656-57.

164. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

165. KICKINGBIRD, *supra* note 14, at 7. In the cases studied, one mention of constitutional limits on federal powers was made. This diversion from the general rule actually worked to further federal guardianship by extending protection from state

taxation to Indian groups in Oklahoma. In reaching this result, it was necessary for the Supreme Court to overrule an act of Congress so the law was found to be unconstitutional. The case was grounded on fifth amendment protections of property rights. Choate v. Trapp, 224 U.S. 665, 678 (1912). The *Choate* opinion is strangely out of tempo with every other case during the period. It was rendered in its style and approach as a contracts question. The idiosyncrasies of Justice Lamar, who wrote the opinion, provide one possible explanation. Lamar came to the Supreme Court from Georgia, where he had gained a reputation for his contract decisions while on the state supreme court. 3 JUSTICES OF THE SUPREME COURT (1969), at 1974-76.

166. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

167. Heckman v. United States, 224 U.S. 413, 437-38 (1912).

168. The power of Congress to establish a commission to determine tribal membership for purposes of land distribution is constitutional. Stephens v. Cherokee Nation, 174 U.S. 445 (1899).

169. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

170. Bowling v. United States, 233 U.S. 528 (1914); Monson v. Simonson, 231 U.S. 341 (1913); Starr v. Long Jim, 227 U.S. 613 (1913); Jones v. Meeham, 175 U.S. 1 (1899); Wiggan v. Conolly, 163 U.S. 56 (1896).

171. 188 U.S. 432 (1903).

172. *Id.* at 437.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 442-44.

177. 224 U.S. 665 (1912).

178. *Id.* at 667.

179. Allotment of land belonging to the Five Civilized Tribes was provided for by the Act of June 28, 1898, ch. 517, 30 Stat. 495; Act of July 1, 1902, chs. 1362, 1363, 32 STAT. 641, 657.

180. Act of June 28, 1898, ch. 517, 30 STAT. 507.

181. 224 U.S. 665, 670 (1912).

182. Act of May 27, 1908, ch. 199, 35 Stat. 312.

183. 224 U.S. 665, 671 (1912).

184. *Id.*

185. *Id.* at 672.

186. *Id.* at 673.

187. *Id.* at 677-78. *Choate* actually worked to enlarge federal guardianship by protecting Indians from state taxation, but the Court claimed that it had to overrule the legislation allowing Indian land to be taxed because it exceeded federal plenary powers. Clearly, the Act of May 27, 1908, would have allowed the state of Oklahoma to tax some Indian land. This enactment was out of the ordinary pattern of protecting Indians from the burdens imposed by a state. It required imaginative reasoning, but the *Choate* Court found a way to continue the tradition of protection.

188. 204 U.S. 458 (1907).

189. *Id.* at 460-61.

190. *Id.* at 467-69.

191. *Id.* at 466.

192. *Id.*

193. *Id.* at 469.

194. 95 U.S. 517 (1877).
195. *Id.* at 525.
196. *Id.* at 523.
197. *Id.* at 525.
198. *Id.*
199. *Id.*
200. Leavenworth R.R. v. United States, 92 U.S. 733 (1875).
201. *Id.* at 742.
202. *Id.*
203. *Id.* at 742-43.
204. *Id.* at 743.
205. *Id.* at 744.
206. *Id.* at 743.
207. 95 U.S. 517, 526 (1877).
208. 68 F. 577 (W.D.N.C. 1895).
209. *Id.* at 578.
210. *Id.* at 578-79.
211. *Id.* at 579.
212. *Id.*
213. *Id.* at 580.
214. *Id.*
215. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389.
216. *Id.*
217. BLACK'S LAW DICTIONARY (4th ed. 1951).
218. 188 U.S. 432, 436 (1903).
219. *Id.*
220. *Id.*
221. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389.
222. 231 U.S. 341 (1913).
223. *Id.* at 345.
224. *Id.*
225. *Id.*
226. 65 F. 30 (8th Cir. 1894).
227. *Id.* at 35. Presumably, the land interest was not diminished by easements or other estates.
228. *Id.*
229. *Id.* The Flournoy Company continued its efforts to gain leases on restricted land, despite the ruling in *Beck*. Subsequent to *Beck*, the United States brought suit to restrain further leasing activities. United States v. Flournoy, 69 F. 886 (D. Neb. 1895). In that case the Indian was deemed to have a right to present possession (at 890) in his allotted land, but in its duty as guardian, the federal government was entitled to restrict alienation. *Id.* at 893. Again, the real estate company argued that allotment in severalty and citizenship ended the federal guardianship. *Id.* at 891. The court affirmed that restriction and citizenship could coexist. *Id.* at 891.
230. 163 U.S. 56 (1896).
231. *Id.* at 63.
232. 233 U.S. 528 (1914).
233. *Id.* at 535.
234. Starr v. Long Jim, 227 U.S. 613 (1913).
235. *Id.*
236. *Id.* at 623.

237. *Id.* at 624.
238. *Id.* at 624-25.
239. 175 U.S. 1 (1899).
240. *Id.* at 21.
241. *Id.* at 4.
242. *Id.* at 5.
243. *Id.* at 16, 22.
244. United States v. Waller, 243 U.S. 452 (1917).
245. *Id.* at 463.
246. Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 656 (1890).
247. Cherokee Nation v. Journeycake, 155 U.S. 196, 207 (1894).
248. Stephens v. Cherokee Nation, 174 U.S. 445, 485 (1899). This case should be compared with Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902), for the Court's handling of the Cherokee claim of fee simple title.
249. *Id.*
250. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).
251. *Id.* at 302.
252. *Id.* at 307.
253. Wallace v. Adams, 204 U.S. 415 (1907).
254. *Id.* at 423.
255. *Id.* at 423-26.
256. *Id.* at 423.
257. *Id.*
258. Garfield v. United States *ex rel.* Goldsby, 211 U.S. 249, 263 (1908). Success in this case may have resulted from the petitioner's framing of the issues. The real question was whether the judiciary could reverse an unauthorized administrative act. *Id.* at 261.
259. 231 U.S. 28 (1913).
260. *Id.* at 48.
261. *Id.*
262. *Id.* at 46.
263. Johnson v. Pacific Coast S.S. Co., 2 Alas. 224 (1904).
264. United States v. Berrigan, 2 Alas. 442 (1905).
265. *Ex parte* Crow Dog, 109 U.S. 556, 569 (1883).
266. An example of this statutory language is in the Act of Mar. 3, 1871, ch. 120, 16 Stat. 566.
267. Elk V. Wilkins, 112 U.S. 94, 106 (1884).
268. Otis, *supra* note 2, at 8-11.
269. Act of Feb. 8, 1887, ch. 119, § 5, 24 Stat. 389.
270. 118 U.S. 375 (1886).
271. Cramer v. United States, 261 U.S. 219, 232 (1923); United States v. Nice, 241 U.S. 591, 597 (1916); Perrin v. United States, 232 U.S. 478, 482 (1914); Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903); United States v. Rickert, 188 U.S. 432, 437 (1903); Cherokee Nation v. Kansas Ry., 135 U.S. 641, 655 (1890).
272. 118 U.S. 375, 384 (1886).
273. *Id.*
274. Monson v. Simonson, 231 U.S. 341 (1913); United States v. Sandoval, 231 U.S. 28 (1913); Choate v. Trapp, 224 U.S. 665 (1912); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911); Rainbow v. Young, 161 F. 835 (8th Cir. 1908); Beck v. Flournoy, 65 F. 30 (8th Cir. 1894).

275. Starr v. Long Jim, 227 U.S. 613 (1913); Wiggan v. Conolly, 163 U.S. 56 (1896); *In re* Lincoln, 129 F. 247 (N.D. Cal. 1904); United States v. Belt, 128 F. 168 (N.D. Pa. 1904); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895); United States v. Mullin, 71 F. 682 (D. Neb. 1895).

276. United States v. Celestine, 215 U.S. 278 (1909); McKay v. Kalyton, 204 U.S. 458 (1907); Eells v. Ross, 64 F. 417 (9th Cir. 1894); *In re* Lincoln, 129 F. 247 (N.D. Cal. 1904); Blackfeather v. United States, 28 Ct. Cl. 447 (1893); United States v. Berrigan, 2 Alas. 442 (1905).

277. United States v. Waller, 243 U.S. 452 (1917); Heckman v. United States, 224 U.S. 413 (1912).

278. Monson v. Simonson, 231 U.S. 341 (1913); Starr v. Long Jim, 227 U.S. 613 (1913); United States v. Sandoval, 231 U.S. 28 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895); Chickasaw Nation v. United States, 22 Ct. Cl. 222 (1887).

279. United States v. Sutton, 215 U.S. 291 (1909); United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); United States v. Gray, 201 F. 291 (8th Cir. 1912); United States v. Allen, 179 F. 13 (8th Cir. 1910).

280. Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).

281. United States v. Belt, 128 F. 168 (N.D. Pa. 1904).

282. Perrin v. United States, 232 U.S. 478 (1914).

283. Heckman v. United States, 224 U.S. 413 (1912).

284. Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895).

285. United States v. Flournoy, 69 F. 886 (D. Neb. 1895).

286. Cramer v. United States, 261 U.S. 219 (1923); United States v. Waller, 243 U.S. 452 (1917); United States v. Nice, 241 U.S. 591 (1916); *In re* Heff, 197 U.S. 488 (1905); United States v. Rickert, 188 U.S. 432 (1903); Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Rainbow v. Young, 161 F. 835 (8th Cir. 1908); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895).

287. United States v. Waller, 243 U.S. 452 (1917); United States v. Nice, 241 U.S. 591 (1916); Bowling v. United States, 233 U.S. 528 (1914); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Celestine, 215 U.S. 278 (1909); United States v. Rickert, 188 U.S. 432 (1903); United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); United States v. Gray, 201 F. 291 (8th Cir. 1912); United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911); Mulligan v. United States, 120 F. 98 (8th Cir. 1902); Eells v. Ross, 64 F. 417 (9th Cir. 1894); United States v. Kiya, 126 F. 879 (D.N.D. 1903); United States v. Logan, 105 F. 240 (D. Ore. 1900); United States v. Mullin, 71 F. 682 (D. Neb. 1895); United States v. Flournoy, 69 F. 886 (D. Neb. 1895).

288. The policy of making treaties with Indian tribes is most illustrative of this point. In 1866 the tribal relation was a key factor in finding the Kansas Indians to be under the protection of Congress and thus removed from the operation of state laws. Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866). United States v. Kagama, 118 U.S. 375, 383 (1886), refers to tribes, not individuals, as wards of the government.

289. United States v. Waller, 243 U.S. 452 (1917); United States v. Nice, 241 U.S. 591 (1916); Perrin v. United States, 232 U.S. 478 (1914); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Celestine, 215 U.S. 278 (1909); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Stephens v. Cherokee Nation, 174 U.S. 445

(1899); Wiggan v. Conolly, 163 U.S. 56 (1896); United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911).

290. 197 U.S. 488 (1905).

291. United States v. Nice, 241 U.S. 591 (1916).

292. Cramer v. United States, 261 U.S. 219, 232 (1923) explicitly extended guardianship to individuals.

293. The holding in *Heff* was distinguished in United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911) and not really dealt with at all in United States v. Allen, 179 F. 13 (8th Cir. 1910), except in the very strong dissenting opinion.

294. Chickasaw Nation v. United States, 22 Ct. Cl. 222 (1887).

295. *Id.* at 264.

296. Blackfeather v. United States, 28 Ct. Cl. 447, 459 (1893).

297. 187 U.S. 294 (1902).

298. *Id.* at 302.

299. 197 U.S. 488 (1905).

300. *Id.* at 495.

301. *Id.* at 496.

302. *Id.* at 498.

303. *Id.* at 509.

304. 215 U.S. 278 (1909).

305. *Id.* at 291.

306. *Id.* at 290.

307. *Id.* at 287.

308. *Id.* at 286.

309. *Id.* at 290.

310. United States v. Nice, 241 U.S. 591, 598 (1916).

311. Cramer v. United States, 261 U.S. 219, 232 (1923).

312. *Id.*

313. United States v. Sandoval, 231 U.S. 28, 34 (1913).

314. United States v. Joseph, 94 U.S. 614 (1876).

315. United States v. Sandoval, 231 U.S. 28 (1913).

316. United States v. Joseph, 94 U.S. 614 (1876).

317. 118 U.S. 375, 384-85 (1886).

318. 45 U.S. (4 How.) 572 (1846).

319. 135 U.S. 641 (1890).

320. Morrison v. Work, 266 U.S. 481 (1925), *aff'g* Morrison v. Fall, 290 F. 306 (1923).

321. *Id.* at 485.

322. 224 U.S. 413 (1912).

323. *Id.* at 437.

324. 231 U.S. 28 (1913).

325. *Id.* at 40-41.

326. *Id.* at 48.

327. *Id.* at 45.

328. *Id.* at 48.

329. 241 U.S. 591, 599 (1916).

330. 243 U.S. 452 (1917).

331. *Id.* at 463 (emphasis added).

332. Examples of contemporary writing on the Indian status and condition are in Gates, *Land and Law as Agents in Educating Indians,* 21 J. Soc. Sci. 113 (1885);

Note, *Indian Citizenship*, 20 AM. L. REV. 183 (1886); Note, *The Legal Position of the Indian*, 15 AM. L. REV. 21 (1881).

333. United States v. Nice, 241 U.S. 591 (1916); Perrin v. United States, 232 U.S. 478 (1914); United States v. Sandoval, 231 U.S. 28 (1913); Choate v. Trapp, 224 U.S. 665 (1912); Heckman v. United States, 224 U.S. 413 (1912); Tiger v. Western Inv. Co., 221 U.S. 286 (1911); United States v. Rickert, 188 U.S. 432 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); United States v. Gray, 201 F. 291 (8th Cir. 1912); Rainbow v. Young, 161 F. 835 (8th Cir. 1908); Beck v. Flournoy, 65 F. 30 (8th Cir. 1894); Eells v. Ross, 64 F. 417 (9th Cir. 1894).

334. Cherokee Nation v. Hitchcock, 187 U.S. 294, 306 (1902); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641, 654 (1890).

335. United States Exp. v. Friedman, 191 F. 673, 682 (8th Cir. 1911).

336. Perrin v. United States, 232 U.S. 478, 486 (1914); Monson v. Simonson, 231 U.S. 341 (1913).

337. The nomadic tribes were said to require guardian care. United States v. Joseph, 94 U.S. 614, 616-17 (1876).

338. 261 U.S. 219 (1923).

339. *Id.* at 226-28.

340. *Id.* at 232-33.

341. United States v. Joseph, 94 U.S. 614, 616 (1876).

342. *Id.* at 617.

343. United States v. Sandoval, 231 U.S. 28, 48 (1913).

344. *Id.* at 43.

345. United States v. Waller, 243 U.S. 452 (1917); United States v. Nice, 241 U.S. 591 (1916); Bowling v. United States, 233 U.S. 528 (1914); Choate v. Trapp, 224 U.S. 665 (1912); United States v. Rickert, 188 U.S. 432 (1903); United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); United States v. Gray, 201 F. 291 (8th Cir. 1912); United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911); Mulligan v. United States, 120 F. 98 (8th Cir. 1903); Eells v. Ross, 64 F. 417 (9th Cir. 1894); United States v. Kiya, 126 F. 879 (D.N.D. 1903); United States v. Logan, 105 F. 240 (D. Ore. 1900); United States v. Flournoy, 69 F. 886 (D. Neb. 1895); United States v. Mullin, 71 F. 682 (D. Neb. 1895).

346. Eells v. Ross, 64 F. 417 (9th Cir. 1894).

347. United States v. Mullin, 71 F. 682 (D. Neb. 1895).

348. *Id.* at 684-85.

349. United States v. Logan, 105 F. 240, 241 (D. Ore. 1900).

350. Mulligan v. United States, 120 F. 98 (8th Cir. 1903).

351. United States v. Rickert, 188 U.S. 432, 437 (1903).

352. 233 U.S. 528 (1914).

353. *Id.* at 534.

354. *Id.* at 534-35.

355. United States v. Nice, 241 U.S. 591 (1916).

356. Cramer v. United States, 261 U.S. 219 (1923).

357. Act of Feb. 8, 1887, ch. 119 § 6, 24 Stat. 388.

358. OTIS, *supra* note 2, at 9.

359. *Id.* at 10.

360. United States v. Waller, 243 U.S. 452 (1917); United States v. Nice, 241 U.S. 591 (1916); Bowling v. United States, 233 U.S. 528 (1914); Perrin v. United States, 232 U.S. 478 (1914); Starr v. Long Jim, 227 U.S. 613 (1913); Monson v.

Simonson, 231 U.S. 341 (1913); Choate v. Trapp, 224 U.S. 665 (1912); Heckman v. United States, 224 U.S. 413 (1912); United States v. Celestine, 215 U.S. 278 (1909); *In re* Heff, 197 U.S. 488 (1905); United States v. Rickert, 188 U.S. 432 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); United States v. Fitzgerald, 201 F. 295 (8th Cir. 1912); United States v. Gray, 201 F. 291 (8th Cir. 1912); United States Exp. v. Friedman, 191 F. 673 (8th Cir. 1911); United States v. Allen, 179 F. 13 (8th Cir. 1910); Rainbow v. Young, 161 F. 835 (8th Cir. 1908); Eells v. Ross, 64 F. 417 (9th Cir. 1894); *In re* Lincoln, 129 F. 247 (N.D. Cal. 1904); United States v. Belt, 128 F. 168 (N.D. Pa. 1904); United States v. Kiya, 126 F. 879 (D.N.D. 1903); United States v. Logan, 105 F. 240 (D. Ore. 1900); United States v. Boyd, 68 F. 577 (W.D.N.C. 1895); United States v. Flournoy, 69 F. 886 (D. Neb. 1895); United States v. Mullin, 71 F. 682 (D. Neb. 1895).

361. Choate v. Trapp, 224 U.S. 665, 671 (1912); Heckman v. United States, 224 U.S. 413, 445 (1912); Tiger v. Western Inv. Co., 221 U.S. 286, 311 (1911); Wallace v. Adams, 204 U.S. 415, 422-23 (1907); *In re* Heff, 197 U.S. 488, 498 (1905); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306 (1902); United States Exp. v. Friedman, 191 F. 673, 680 (8th Cir. 1911); Rainbow v. Young, 161 F. 835, 838 (8th Cir. 1908).

362. Stephens v. Cherokee Nation, 174 U.S. 445, 488 (1899); United States v. Flournoy, 69 F. 886, 893 (D. Neb. 1895).

363. United States v. Flournoy, 69 F. 886, 893 (D. Neb. 1895).

364. United States v. Kagama, 118 U.S. 375 (1886).

365. "Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed." Heckman v. United States, 224 U.S. 413, 437 (1912). "A transfer of the allotments [when under a restriction on alienation] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.* at 438. ". . . [G]overnmental rights of the United States [arise] from its obligation to a dependent people. . . ." Bowling v. United States, 233 U.S. 528, 534-35 (1914). ". . . [T]here arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384 (1886). *See also* United States v. Nice, 241 U.S. 591, 597 (1916).

366. TYLER, *supra* note 8, at 25. Tyler notes the exception of the French explorers, who seemed to have a greater respect for the Indian and to have established a better relationship with them. *Id.* at 41.

367. *Id.* at 103.

368. *Id.* at 141. *See generally*, L. HANKE, ARISTOTLE AND THE AMERICAN INDIAN, A STUDY OF RACE PREJUDICE IN THE MODERN WORLD (1959).

369. TYLER, *supra* note 8, at 140.

370. 95 U.S. 517 (1877).

371. "Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race. . . ." *Id.* at 526.

372. TYLER, *supra* note 8, at 140.

373. *Id.* at 110-11.

374. United States v. Sandoval, 231 U.S. 28, 42 (1913).

375. The Indians were said to be an "unlettered people." Northern Pacific Ry. v. United States, 227 U.S. 355, 367 (1913).

376. "As long as they are permitted to live a communal life and exercise their ancient form of government, just so long will there be ignorant and wild Indians to civilize." United States v. Sandoval, 231 U.S. 28, 43 (1913).

377. ". . . [T]here has been but one sentiment as to the debauching effect of intoxicating liquor's [*sic*] upon this primitive people, . . . to absolutely suppress the traffic with them and shield them from its debasing influences." United States Exp. v. Friedman, 191 F. 673, 678 (8th Cir. 1911).

378. United States v. Allen, 179 F. 13, 16-17 (8th Cir. 1910); United States v. Kiya, 126 F. 879, 881 (D.N.D. 1903).

379. The Indian was to be safeguarded against his own "improvidence." Monson v. Simonson, 231 U.S. 341, 345 (1913); Starr v. Long Jim, 227 U.S. 613, 625 (1913).

380. TYLER, *supra* note 8, at 79-80.

381. United States v. Sandoval, 231 U.S. 28 (1913).

382. *Id.* at 42.

383. *Id.*

384. Beecher v. Wetherby, 95 U.S. 517, 526 (1877).

385. United States v. Flournoy, 69 F. 886, 891-92 (D. Neb. 1895).

386. United States Exp. v. Friedman, 191 F. 673, 678 (8th Cir. 1911).

387. United States v. Sandoval, 231 U.S. 28, 45 (1913).

388. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); United States v. Boyd, 68 F. 577, 581 (W.D.N.C. 1895).

389. United States v. Sandoval, 231 U.S. 28, 46 (1913); *In re* Heff, 197 U.S. 488, 498 (1905); United States v. Rickert, 188 U.S. 432, 443 (1903); United States v. Fitzgerald, 201 F. 295, 296-97 (8th Cir. 1912); United States v. Gray, 201 F. 291, 293 (8th Cir. 1912); United States v. Allen, 179 F. 13, 20 (8th Cir. 1910).

390. United States v. Sandoval, 231 U.S. 28, 46 (1913); United States v. Gray, 201 F. 291, 293 (8th Cir. 1912); United States v. Allen, 179 F. 13, 20 (8th Cir. 1910); United States v. Boyd, 68 F. 577, 583 (W.D.N.C. 1895).

391. OTIS, *supra* note 2, at 8-12.

392. *Id.* at 9.

393. 135 U.S. 641 (1890).

394. 231 U.S. 28 (1913).

395. S. Doc. No. 377, 53d Cong., 2d Sess. (1894). The Dawes Report is termed prejudicial because it presented a totally negative view of the conditions in Indian territory and suggested no remedy for the situation except federal intervention, which was a violation of all the treaties that had secured the Indian Territory to the resident tribes. The convenience of this remedy for the purposes of land-hungry whites can hardly be ignored.

396. Stephens v. Cherokee Nation, 174 U.S. 445, 446 (1899).

397. *Id.* at 449-53.

398. *Id.* at 451.

399. *Id.*

400. 174 U.S. 445 (1899).

401. In Stephens v. Cherokee Nation, 174 U.S. 445 (1899), the Supreme Court validated the constitutionality of legislation which allowed the Dawes Commission to enter Indian Territory and establish tribal membership. Jurisdiction for appeals was given to a special federal tribunal and tribal government was bypassed.

402. The allotment procedure and cession of tribal land to the federal government was unsuccessfully challenged in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

403. *Id.*

404. United States v. Waller, 243 U.S. 452 (1917); Mullen v. United States, 224 U.S. 448 (1912).

405. United States v. Waller, 243 U.S. 452, 462 (1917).

406. The allottees had been victims of fraudulent inducements to give timber deeds to their land.

407. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385.

408. Liquor prohibition to Indians was begun in colonial days. After the adoption of the Constitution the enactments controlling liquor were justified by the commerce clause.

409. 215 U.S. 278 (1909).

410. *Id.* at 290.

411. *Id.* at 291.

412. United States v. Sutton, 215 U.S. 291 (1909).

413. *Id.* at 295.

414. *Id.*

415. 197 U.S. 488 (1905).

416. *Id.* at 508.

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. United States v. Nice, 241 U.S. 591, (1916).