CITIZENSHIP AND SUFFRAGE: THE NATIVE AMERICAN STRUGGLE FOR CIVIL RIGHTS IN THE AMERICAN WEST, 1830–1965

Willard Hughes Rollings*

I. INTRODUCTION

Native Americans occupy a unique place in this country. They are the direct descendants of people who first arrived in this land 30,000 years ago.[1] Despite their longtime residency in North America and the support of many tribes in the war for independence, the leaders of the newly created United States did not deem Indian people worthy enough to become citizens of their country. In fairness, few Native peoples sought American citizenship in the eighteenth century, for they were citizens of their own powerful tribal groups who owned and controlled most of the land of North America. Their considerable power guaranteed their sovereignty and protected their lives and cultures, hence few Indians were interested in becoming members of the new small country of strangers.

This new country of strangers, however, would grow as immigrants flocked there, and the growing population would move west onto Indian lands. Indian people, sometimes with compromise, but more often with violence, resisted this invasion. The Indian victories on the battlefields were only momentary. As the United States continued to grow in size and power, the temporary battlefield victories were soon replaced by permanent defeats. The military defeats took land and power from the Indian people; but in time, some tribes took their battles to new venues and began challenging the invaders in the courtroom.

These legal challenges, however, were seldom successful, for they were always conducted in the white peoples' courtrooms where all the rules and procedures were those of their opponents. The protections provided by the Bill of Rights and the U.S. Constitution had not been extended to Indian people; thus, Indian people rarely won their battles in the courtrooms of the United States. Throughout the nineteenth century their battlefield and courtroom

* Professor of History, University of Nevada at Las Vegas. I would like to thank Daniel McCool, Susan Olson, Jennifer Robinson, and Barbara J. Williams-Rollings for their help with this paper.

[1] Recent excavations of native village sites in Siberia indicate that native people may have been in North America as early as 30,000 years ago. John Noble Wilford, *Discovery May Bring New Clues Into Peopling of the Americas*, N.Y. TIMES, Jan. 6, 2004, at F3.

defeats combined to deprive Indians of their lands and severely undermine their sovereignty.

In hopes of escaping the violence and mass deportations of the nineteenth century, some Indian people began to seek citizenship in the United States. With few exceptions, citizenship and the promises of equality and freedom were denied to those Indian people who sought it. Most Americans did not consider Indian people civilized or intelligent enough to become American citizens and opposed any efforts to make Indians citizens. The federal government, however, in attempts to avoid violence and make room for white colonization, began to offer citizenship to specific tribes in exchange for their homelands. These early piecemeal efforts in the 1830s grew until the 1870s when the Dawes Act extended the citizenship for land trade to all Indians. By the beginning of the twentieth century, thousands of Indians had been made citizens of the United States in exchange for millions of acres of their homelands.

Thousands of Indians, however, who refused to surrender their land and resources were denied citizenship until 1924 when Congress, filled with the spirit of Progressivism and inspired by the rhetoric of World War I, passed the Indian Citizenship Act and granted U.S. citizenship to all Native Americans born in the United States. This tardy naturalization, unfortunately, did not extend to Native Americans the constitutional civil rights guaranteed to other American citizens. For example, Native Americans were not allowed to vote in city, county, state, or federal elections; testify in courts; serve on juries; attend public schools; or even purchase a beer, for it was illegal to sell alcohol to Indians. Frustrated with this unequal treatment, Indian citizens began to demand their civil rights, taking their battles for these rights to the courtrooms in the twentieth century.

These battles were largely western battles, for after the purchase of Louisiana Territory in 1804, President Thomas Jefferson began to encourage Native Americans living in the East to move across the Mississippi to the West. In 1830, with the passage of the Indian Removal Act, the suggestions of Jefferson became the official policy of President Andrew Jackson who began the forced deportation of all eastern Indians to the West. Since most of the nation's Native Americans were forcibly removed to the Trans-Mississippi West, this paper will focus on their struggle for civil rights in the American West. Furthermore, while the federal government and states have denied Native Americans all their civil rights, this paper will only examine two of the most fundamental of American civil rights: the rights of citizenship and suffrage.

II. BACKGROUND

In order to comprehend the history of Indian people, it is vital to understand that Indians do not exist. Indian is a generic term for the original inhabitants of North America and their descendants. It disguises the incredible cultural diversity of the 548 federally recognized tribes.[2] It is perhaps best to

[2] The racism that demands that identity has to be federally recognized is best left for another article.

think of the word Indian the way we think of the word European, for Indian tribes, like European countries, are separate and distinct. They are separated by culture, language, polity, and religion. No one would claim to speak European, yet some claim to speak Indian and understand Indian sign language. That is foolishness, for Indian people are made up of separate and distinct tribal cultures. They do not speak the same languages, share the same values, worship the same gods, or have the same political structure. They are and wish to remain separate and distinct.

Thus, in order to understand Native American history one has to be aware of their cultural diversity. This diversity has often prevented Indians from uniting in common cause efforts. Indians, unlike African-Americans and Latinos who are more closely connected by a common language, religion, and familiar and similar culture, lack these shared cultural traits. These tribal distinctions are intensified by the unique and special relationship Indian tribes have with the federal government, which is defined by 367 ratified treaties, 73 ratified agreements, and over 100 individual statutes.[3] These individual tribal treaties with the federal government have defined their unique position, and linked their tribal identity with their individualized rights and privileges as defined by treaty. This variety of agreements and different rights and privileges, combined with the cultural diversity of each tribe, make it extremely difficult for Indians to unite for common causes.

One pan-Indian organization that has managed to survive is the National Congress of American Indians (NCAI) established in 1944. NCAI has tried to bring Indian people together and unite them behind a common purpose. They have sought to inform and enlighten the public about Indian people and their cultures, preserve Indian languages and cultures, secure and preserve Indian treaty rights, and seek an equitable adjustment of tribal affairs. To those ends, NCAI is currently trying to get Indian people to register to vote and vote for candidates and issues beneficial to all Indian people.[4]

Another powerful pan-Indian organization is the Native American Rights Fund (NARF), based in Boulder, Colorado. NARF, established in 1971, is an organization that employs lawyers and legal assistants to protect Indian people and their civil rights. NARF is always engaged in a multitude of legal cases protecting the rights and privileges of Indian people guaranteed by the Constitution and federal and state statutes. NARF and NCAI also seek to preserve and protect Indian treaty rights.[5]

Although treaty rights are a vital element of Indian life, this paper will not examine those rights. This article will instead pursue a narrower topic – citizenship and suffrage. When we speak of Native Americans' struggle for civil rights, however, special treaty rights must be acknowledged. Often these treaty rights created the very context for their struggle for civil rights accorded under

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[3] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994) (Describing Indian treaties as a political anomaly and providing background information on their development).

[4] *See National Congress of American Indians (NCAI)*, http://www.ncai.org/indexto.asp (last visited Aug. 23, 2004).

[5] *See* Native American Rights Fund (NARF), http://www.narf.org/intro (last visited Aug. 23, 2004).

the Constitution. It must be remembered that treaties recognized the sovereignty of Indian tribes, and when the Constitution was written and ratified, Indian people were not included or protected by its provisions. As members of sovereign states, they were considered to be separate and distinct from the United States.[6]

The nature of that sovereignty, however, is constantly being challenged and redefined. A review of any recent Supreme Court case involving Native American issues will reveal the ongoing struggle for Indian sovereignty.[7] Such sovereignty is a vital and defining element of Native American life and their survival as a distinct people. Nevertheless, the issue of Indian sovereignty will be carefully avoided for the most part. It is examined only when necessary and used to explain their special status in the struggle for Constitutional civil rights.

III. Discussion

The first struggles for Native American civil rights were often launched and led by non-Indians. Throughout the nineteenth and twentieth centuries, well-intentioned white people sought to protect the Indians; however, they believed that Indian people could only survive if they abandoned their culture and embraced the white European way of life. These so-called friends of the Indians rallied for the assimilation and inclusion of Indian people into the American fabric, but not as Indians, rather, as assimilated "white Indians." These friends often supported the few Indians who called for citizenship and suffrage, because they believed that such efforts would hasten the death of Indian culture and speed the assimilation of Indian people into white society.[8]

There were many Indians, however, who feared that citizenship and suffrage would accelerate the death of Indian culture. Accordingly, they resisted the drive for citizenship and suffrage. They saw the effort as an attack on their culture and were convinced that the price of survival was too high; thus, they refused to participate in the struggle. They viewed the attempts to civilize and assimilate the Indian as merely efforts to "colonize" the Indian people and take even more from them.[9]

Thus, in the eighteenth century, few Indians or whites were interested in extending citizenship to Indian people. In time, however, white demands for Indian land grew and treaties were negotiated between the federal government

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[6] *See generally* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS (1994).

[7] *See, e.g.*, Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701 (2003); MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002), *cert denied sub nom.* Riggs v. San Juan County, 539 U.S. 902 (2003), *reh'g* denied, 539 U.S. 975 (2003); Al Coushatta Tribe v. Am. Tobacco, No. 1:00-CV-596 (E.D. Tex.), *aff'd*, 46 Fed. Appx. 225 (5th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003); Runyon *ex rel.* B.R. v. Ass'n of Vill. Council Presidents, 84 P.3d 437 (Alaska 2004). *See also* VINE DELORIA, JR. AND CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY (1984).

[8] *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIANS, 1865-1900 (1976).

[9] *See* Robert Porter, *The Demise of the Unguehoweh and the Rise of Native America: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

and the numerous eastern Indian tribes. Treaties were forged after battlefield victories, sometimes after defeats, and often to avoid confrontation and violence altogether.[10] Elements of such treaties were also some of the earliest means used to naturalize Indian people and make them citizens of the United States. Federal treaty negotiators, in hopes of convincing Indian people to sign the treaties and cede their lands, would sometimes promise U.S. citizenship to Indian people in exchange for their homelands. Accompanying these grants of citizenship were demands that these new Indian citizens abandon their tribal communities, move to separate individual land allotments, and begin to live "civilized" lives. In the early nineteenth century, despite the treaty promises, few Indians were interested in abandoning their lands and way of life to become citizens of the United States.

Indians saw no advantage in abandoning their culture to become assimilated into the white culture, so in the early nineteenth century, few were interested in U.S. citizenship. When the assimilation efforts stalled and the press of white settlement on eastern Indian land grew, the presidents and Congress sought new ways to remove the Indian presence. One such plan was to remove all of the eastern Indian people West, across the Mississippi, out of the way of white settlement and expansion. Congress naively believed that the evacuation of the eastern lands by the Indians would provide adequate land for the land-hungry whites. They thought that the time required for whites to settle and occupy the East would provide the Indian people removed to the West the opportunity to become white people. Thse assimilated Indians would then welcome the white settlers when they eventually crossed the Mississippi to settle the West.[11]

In 1830, Congress, under intense pressure from eastern politicians and President Andrew Jackson, passed the Indian Removal Act that called for the removal of all eastern tribes to lands west of the Mississippi. This massive removal forced over 80,000 Indians to surrender their homelands and move west. Under the Act, the government was required to negotiate treaties of removal with all of the eastern tribes. These "removal treaties" also provided opportunities for Indian people to become citizens.

Few Indian people, however, were interested in moving away from their homelands; thus, in early attempts to secure the required signatures for the removal treaties, the government offered individual Indian families the opportunity to stay on their land and avoid removal. These removal treaties provided individual families the opportunity to retain small individual portions of land and become American citizens.

This section of an 1830 removal treaty with the Choctaw is typical of these agreements:

> Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so by signifying his intention to the Agent within six

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[10] *See* PRUCHA, *supra* note 3.

[11] *See* RONALD SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA (1975); FRANCIS PAUL PRUCHA AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962).

> months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, . . .[12]

Yet, only a few hundred Indians accepted the offer and remained in the east, becoming citizens in the process. They found, however, that citizenship provided them no protection from white attacks, and many fled their eastern lands to rejoin their kin in the West.[13]

The practice of offering citizenship in exchange for land continued after the removal period, as whites quickly occupied the eastern lands and began crossing the Mississippi into Indian Territory to seek more land. The federal government, eager to appease them and avoid the costs of war, continued to coerce Indian tribes into ceding their lands in the West. These treaties, like those of the removal period, granted small portions of tribal land and citizenship to individual tribal members in exchange for the cession of their joint tribal land holdings. The price of citizenship proved to be very costly, for many of these later treaties would also demand all of the tribe's land and the complete dissolution of the tribe in exchange for citizenship. The Treaty with the Wyandot in January 1855 is typical of such an agreement:

> Article 1. The Wyandott Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and their relations with the United States as an Indian tribe shall be dissolved and terminated on the ratification of this agreement . . . and from and after the date of such ratification, the said Wyandott Indians, and each and every one of them, except as hereinafter provided, shall be deemed, and are hereby declared, to be citizens of the United States, to all intents and purposes . . . .[14]

Thus, prior to the Civil War, few Indians were granted citizenship, and fewer still were granted suffrage. With the end of the Civil War, however, Americans revived their interest in western settlement and thousands began moving west onto Indian lands. These white invasions onto Indian lands were often violent, for white settlers seldom sought the Indians' permission or consent when they seized and occupied their lands. Indian people fought the white invaders in an effort to protect their property and way of life.[15]

Western Americans wanted the federal government to remove the Indians from western lands, confine them on small reservations, or exterminate them; and they used their considerable political power to push such programs through Congress. While western interests sought to confine or kill the Indians, there was a growing movement in the East, where Indians had already been removed or exterminated, to save the Indian people. Their salvation still required, however, that they surrender their culture and live like white people.

Some Indian people were willing to adopt the white way of life in hopes of surviving the white invasion of their lands. They had left their tribal homes and

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[12] Article XIV in Treaty with the Choctaw, 1830, 7 Stat. 333. Also found in CHARLES J. KAPPLER, INDIAN TREATIES 310-317, (1904).

[13] *See* ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS (1970); GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1932).

[14] Article 1. Treaty with the Wyandot, 1855, 10 Stat. 1159. Also found in KAPPLER, *supra* note 12, at 677-81.

[15] ROBERT M. UTLEY, FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIANS, 1866-1891 (1973)

began living among the whites as assimilated and "civilized" Indian people. Living as white people convinced some that they now had the rights and responsibilities of citizens, and with the addition of the Fourteenth and Fifteenth Amendments to the Constitution they sought the right to vote and participate in western politics.

However, they were mistaken, for western courts did not believe that they had become citizens, and this was made clear in a series of cases. In *MacKay v. Campbell*,[16] *U.S. v. Osborne*,[17] and *Elk v. Wilkins*,[18] the western courts ruled that Indians were not yet citizens and that the Fourteenth and Fifteenth Amendments did not apply to them. In *McKay*, a mixed-blood Chinook (who was, according to the court, "seven-sixteenth white and nine-sixteenths Indian blood") was not allowed to vote, despite his argument that he had left his tribe and had lived as a white man for several years. The court ruled that because of his Indian blood, he had not been born subject to the jurisdiction of the United States; therefore, he had not met the qualifications demanded by the Fourteenth Amendment and was not a citizen.[19]

U.S. v. Osborn did not involve suffrage, but the issue of Indian citizenship was central to the case. When Frank Osborne sold liquor to Indian Joe, he was arrested for selling liquor to an Indian, which was illegal at the time. Osborne brought Indian Joe to court to testify on his behalf, and Indian Joe argued that he had lived apart from his people for over ten years; thus, he was no longer an Indian. Moreover, since he was no longer an Indian, Osborn had not violated the law when he sold him liquor. The court ruled, however, that Indian people could not make themselves citizens, that only the United States government had that power. Despite Indian Joe leading a separate and "civilized life" he was still not considered a citizen.[20]

In *Elk v. Wilkins*, the United States Supreme Court not only agreed with the earlier decisions, but it also introduced additional barriers to Indian citizenship and suffrage. John Elk, an Omaha Indian, left his tribe in northern Nebraska and moved to Omaha where he began his life as a white man. He lived and worked in Omaha for several years, and in the spring of 1880, he went to the courthouse to register to vote. The registrar, Alvin Wilkins, refused to let him register, and when Elk tried to vote the following day, Wilkins prevented him from entering the polling place. Elk took Wilkins to court claiming that the Fourteenth Amendment had made him a citizen, and that accordingly, the Fifteenth Amendment had given him the right to vote.

Elk, however, lost the case because the Court ruled that the Fourteenth Amendment did not apply to Indians. The Court maintained that Section Two

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[16] 16 F. Cas. 161 (D. Or. 1871).

[17] 2 F. 58 (D. Or. 1880).

[18] 112 U.S. 94 (1884).

[19] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U. S. CONST. amend. XIV, § 1.

[20] United States v. Osborne, 2 F. 58 (D. Or. 1880):

> But an Indian cannot make himself a citizen of the United States without the consent and cooperation of the government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but this is not enough to make him one.

of the Fourteenth Amendment specifically excluded "Indians not taxed" from being included in any state reapportionment counts. The Court held that since Indians were not taxed, they were not citizens; therefore, the Fifteenth Amendment did not apply to Indians. Not content with simply denying Elk's claim of citizenship and suffrage, the Court reaffirmed earlier cases and insisted that only the national government could determine whether Elk and other Indians were civilized and able to become citizens:

> The national legislature has tended more and more toward the education and civilization of the Indian, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.[21]

Since the Fourteenth Amendment did not extend citizenship to Indians and only the federal government could grant them citizenship, new efforts were launched by Indian supporters in the East. These white sympathizers lobbied for new legislation to hasten the civilization of Indians. Convinced that the communal nature of Indian culture prevented the conversion of Indians into civilized assimilated Americans, eastern supporters began to call for the break up of the tribal land holdings. They believed the path to civilization and survival called for the destruction of the culture of Indian people and that dividing reservation lands into small individual plots would hasten the process of civilization and assimilation.

Ironically, while eastern Indian backers were calling for an end to Indian reservations in their effort to save the Indians, rivals and opponents of Indian people in the West, eager to acquire rich tribal lands and resources, joined with the Indian supporters. Together, they lobbied Congress for the break up of the western reservations. With the combined support of these two very different groups, Congress passed one of the most significant pieces of Indian legislation in United States' history. The General Allotment Act of 1887(more commonly known as the Dawes Act) was the law that Theodore Roosevelt praised as "a mighty pulverizing engine to break up the tribal mass . . . ."[22]

This pulverizing engine called for the voluntary individual allotment of Indian lands; however, the allotment was seldom voluntary and almost always coerced.[23] The law authorized the President to allot the Indian land to individual Indians. Initially, the government allotted 160 acres to each head of the family, 80 acres to each single person over the age of eighteen and all orphans under the age of eighteen, and 40 acres to all single persons under the age of eighteen. However, because of the resistance to allotment and the confusion accompanying the process of dividing up the lands, the government revised the law and began granting every tribal member, regardless of age and status, 160 acres (1/4 section) of land. The land that remained unclaimed after the individ-

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[21] Elk v. Wilkins, 112 U.S. 94, 106-107 (1884).

[22] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS, 671 (1984).

[23] *See* BLUE CLARK, LONE WOLF V. HITCHCOCK: TREATY RIGHTS & INDIANS LAW AT THE END OF THE NINETEENTH CENTURY (1999).

ual allotments were made was deemed surplus and would be opened to white settlement.[24]

To make the allotment more palatable, and to speed along the process of assimilation, the Dawes Act granted U.S. citizenship to the individual Indians when they received their allotment of land. Ironically, to protect the new citizens, their land was placed in a twenty-five year trust, a trust that would prevent these new citizens from renting, leasing, or selling their lands.[25]

There was strong opposition to combining citizenship with the land trust, for it seemed a contradiction to grant citizenship to the Indians while at the same time denying them the rights to control their land. Many argued that if they were not competent to manage their land, how could they be considered competent enough to assume the responsibilities of citizenship. Thus, in 1906, Congress passed the Burke Act that postponed the granting of citizenship to Indians until the end of their individual trust periods.[26]

The Burke Act also allowed the president to end the trust period at his discretion, which curiously quickened the process. After the Burke Act, many trust periods were shortened. With these changes, Indians reluctantly began to surrender their homelands and gradually became citizens. By 1890 there were 5,307 allottees who had become citizens; by 1900 there were 53,168 who were citizens; and in 1901 Congress awarded citizenship to another 101,506 Indian inhabitants of Indian Territory. In exchange for 90 million acres of land, approximately 154,674 Indians had become citizens. However, only about one-half of the Indian population of the United States was granted citizenship by the Dawes Act. There were some tribes who were able to resist allotment and postpone the loss of their homes.

While only one-half of the Indian population was naturalized by the Dawes Act, when World War I began thousands of citizen and non-citizen Indians volunteered to fight for democracy and freedom in Europe. Ironically, they were fighting for freedoms abroad that they did not possess at home. With the end of the war and the lingering spirit of Progressivism, Congress declared in 1919 that all Indians who had served in the war could become citizens if they had been honorably discharged.[27]

Despite the naturalizations caused by the Dawes Act and World War I military service, thousands of Indians remained non-citizens. Congress, who had only four years before granted the vote to American women, urged on by progressive politicians, finally decided in 1924 to extend citizenship to those Indians who had not yet surrendered their homelands or served in the World War I. In June 1924, Congress passed the Indian Citizenship Act that declared all non-citizen Indians born in the United States to be citizens.[28] Thus, only eighty years ago, Indians whose ancestors had inhabited this land for at least

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[24] PRUCHA, *supra* note 22, at 209, 668. *See also* LORING BENSON PRIEST, UNCLE SAM'S STEPCHILDREN: THE REFORMATION OF THE UNITED STATES INDIAN POLICY, 1865-1887 (1942); WILCOMB WASHBURN, THE ASSAULT ON INDIAN TRIBALISM: THE GENERAL ALLOTMENT LAW (DAWES ACT) OF 1887 (1975).

[25] PRUCHA, *supra* note 22, at 668. *See also* Michael T. Smith, *The History of Indian Citizenship*, 10 GREAT PLAINS J. 25-35 (1970).

[26] PRUCHA, *supra* note 22, at 773, 875.

[27] Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.

[28] Act of June 2, 1924, ch. 233, 43 Stat. 253.

30,000 years were finally naturalized and granted citizenship in the United States.

Some American Indians who had finally become citizens believed that they could now vote and participate in western elections. However, whites in the western states with large Indian populations, fearing they could not control the Indian vote, were reluctant to grant suffrage to Indian people. Soon these western whites resorted to tactics used in the South. The southern states had prevented African-Americans from voting by evading the provisions of the Fourteenth and Fifteenth Amendments. When they applied these same tactics to Indians, they achieved the same results.

From 1924 to 1956 many western states would deny Indians the right to vote. Despite the changes brought about by the Fourteenth and Fifteenth Amendments, the Constitution still granted the states great autonomy with regards to suffrage, and until the Voting Rights Act of 1965, states had almost unlimited power to make rules for franchise. The states used this unlimited power to exclude Indian citizens from voting. Using poll taxes, literacy tests, English language tests, and refusing to place polling places in or near Indian communities, western states were successful in their efforts to prevent Indians from voting.[29]

Western states used other means to keep Indians from voting. They used the special status of Indians living on reservations to prevent them from registering and voting. An early method of denying Indians the right to vote focused on their level of civilization. Some maintained that Indians living on reservations amid their Indian culture could not possibly be civilized enough to participate in the democratic process. A case in Minnesota used such an argument. In *Opsahl v Johnson*, a white man argued that reservation Indians had voted for a measure legalizing the sale of liquor in one county, when as reservation residents, they had no right to vote. The judge focused on the level of civilization of the reservation Indians. The Minnesota Constitution stated that Indians and mixed-bloods had to adopt the language, customs, and habits of civilization in order to vote, and it was not clear to the court that the full bloods had met those conditions; therefore, their votes were denied.[30] While using the civilization status of Indians to deny them the vote, the decision also introduced other issues that would later be used to prevent Indians from voting. The case noted that since the Indians were living on the reservation, they were not subject to state taxes; accordingly, if they did not pay state taxes, they did not have the right to vote in state elections. The court also ruled that since the Indians lived on a reservation and were not subject to the state laws, they had no right to participate in the making of those laws and could not vote in state elections. Further, the judge pointed out that Indians were wards of the government and as wards they were not competent enough to vote in any elections.[31]

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[29] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Dan McCool, *Indian Voting, in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105-33 (Vine Deloria, Jr. ed., 1985).

[30] Opsahl v. Johnson, 163 N.W. 988 (Minn. 1917).

[31] *Id.* at 988, 990.

> [T]he persons referred to were tribal Indians, residing upon a reservation as wards of the government, owing no allegiance to the laws of the state, not taxable, and not bearing any of the

The ward status of Indians raised in this case was used by other state courts in the West. In 1928, two Pima Indians, Peter H. Porter and Rudolph Johnson, living on the Gila River Reservation tried to register to vote in Pinal County. The Pinal county recorder, Mattie Hall, refused to enter their names as registered voters because they were Indians. Porter and Johnson insisted they were citizens and had the right to vote, so they took Hall to court.

The two Pimas, however, did not fare well, for the Arizona court ruled that despite their citizenship they still remained Indians, and as Indians, they were wards of the federal government. Since they were wards, according to the Arizona Constitution, they could not vote in any Arizona elections. "No person under guardianship, *non compos mentis*, or insane shall be qualified to vote at any election . . . ."[32]

> The person falling within any of the classes is to some extent and for some reason considered by the law as incapable of managing his own affairs as a normal person, and needing some special care from the state . . . . The man who for any reason is exempt from responsibility to the law for his acts, who cannot be trusted to manage his own person or property, certainly as a matter of common sense cannot be trusted to make laws for the government of others . . . .[33]

Porter and Hall, however, were not exempt from any responsibility to the law, for their ward status was the unique ward status of Indian people as established in 1830. Chief Justice John Marshall in *Cherokee v. Georgia* held: "Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection, rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[34] Marshall was only referring to their special status as Indians, and for lack of a better word, he used ward. The ward status of Indians referred to by Marshall, however, was far different from that of white wards. Individual Indian people had long managed their personal lives and property, and the traditional definition of ward did not apply to them. In Arizona courts, however, the court held that their ward status denied them the right to vote, and the *Porter v. Hall* decision prevented Arizona Indians from voting for another twenty years.[35]

Although Franklin Roosevelt's Indian New Deal in the 1930s ended allotment and created the possibility of Indian self-determination, Indian suffrage

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> burdens to which other voters are subject . . . . but there are other cogent reasons urged by contestant against holding mixed bloods living on Indian reservations entitled to vote. The exercise of the elective franchise is a participation in government and in the making of the laws to which all the inhabitants of a nation, state, or municipality must yield obedience. It cannot for a moment be considered that the framers of the Constitution intended to grant the right of suffrage to persons who were under no obligation to obey the laws enacted as a result of such grant. . . .The idea is repugnant to our form of government. No one should participate in the making of laws which he need not obey. As truly said by contestant: 'The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the process of its courts. He bears none of the burdens of civilization and performs none of the duties of the citizens.

[32] Porter v. Hall, 271 P. 411, 414 (Ariz. 1928) (emphasis added).

[33] *Id.* at 416.

[34] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

[35] N.D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CAL. L. REV. 507 (1930-1931).

made little progress until the 1940s.[36] World War II raised vital issues for many Americans, but especially Native American citizens. Indians were drafted and served in all branches of the armed forces fighting in the Pacific and Europe for freedoms that they still did not have in the United States. The racism of the Axis powers created a new awareness among Americans that too many minorities were not enjoying the rights this country had fought so hard to save in the war. President Harry Truman was one of those Americans, and in 1947 he created a national committee to examine the status of minority civil rights in the United States. Truman charged the committee to determine "whether and in what respect current law-enforcement measures and the authority and means possessed by Federal, State and local governments may be strengthened and improved to safeguard the civil rights of the people."[37] The Committee conducted research and presented their report in 1947. While the focus of the Committee's work was largely on the civil rights of Blacks; Native Americans appeared in the committee's final recommendation. The Committee called on Arizona and New Mexico to grant suffrage to their Indian citizens.[38]

In 1948, Arizona was provided with the opportunity to change their Constitution when two Mohave–Apache Indians, Frank Harrison and Harry Austin, living on the Fort McDowell Indian Reservation near Phoenix tried to register to vote. The county recorder, Roger Laveen, refused them, arguing that they were Indians and wards of the government, and therefore they were not eligible to vote in Arizona. Harrison and Austin turned to the courts, and this time Arizona Indians would be granted the right to vote.

The Arizona Supreme Court reversed *Porter v. Hall*, and Judge Levi S. Udall began his opinion with a stirring statement:

> We, have, however, no hesitance in re-examining and reconsidering the correctness of the legal principles involved because the civil liberties of our oldest and largest minority group (11.5% of State's population) of whom 24,317 are over twenty-one years of age (1940 U. S. census) are involved, and it has ever been one of the great responsibilities of supreme courts to protect the civil rights of the American people of whatever race or nationality, against encroachment . . . . We have made an extensive search of the proceedings of the Arizona Constitutional Convention and are unable to find the slightest evidence that "persons under guardianship" (section 2, article 7) should be denied the right of franchise, thereby intended that his phrase be applied to Indians as such . . . . In other words, the legislative department of government has not set up this barrier; rather we feel, it is a tortious construction by the judicial branch of the simple phrase "under guardianship", accomplishing a purpose that was never designed by its framers . . . . We hold that the term "persons under guardianship" has no application to the plaintiffs or to the Federal status of Indians in Arizona as a class."[39]

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[36] *See* KENNETH R. PHILP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920–1954 (1977).

[37] COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 161 (1947) [hereinafter "TO SECURE THESE RIGHTS"].

[38] *Id.* "In New Mexico, the constitution should be amended to remove the bar against voting by 'Indians not taxed.' This may not be necessary in Arizona where the constitution excludes from the ballot 'persons under guardianship.' Reinterpretation might hold that this clause no longer applies to Indians. If this is not possible, the Arizona constitution should be amended to remove it." TO SECURE THESE RIGHTS, *supra* note 37, at 161.

[39] Harrison v. Laveen, 196 P.2d 456, 458, 461, 463 (Ariz. 1948).

Finally, in the summer of 1948, Indian residents of Arizona were allowed to vote. That same year, Indian residents in the neighboring state of New Mexico would also be granted the right to vote. New Mexico, the home of Diné, Apache, and seventeen Pueblo communities, had long denied these Indian citizens the right to vote. New Mexico, like several other western states, argued that Indians living on reservations were not subject to state taxes, and since they were not taxed, they had no right to participate in state elections. Essentially the argument had been that there could be no representation without taxation.[40]

In June 1948, Miguel Trujillo, a member of the Isleta Pueblo, a World War II veteran and a BIA schoolteacher, decided to challenge the New Mexico law. Trujillo felt that as a citizen and a veteran, he had the right to vote in New Mexico. When he attempted to register, however, the county register Eloy Garley refused him. Trujillo challenged Garley in the federal district court in New Mexico and asked the court to extend to him the right to vote.

A three-judge panel in Albuquerque heard *Trujillo v. Garley* and ruled that the portions of the New Mexico Constitution and the statutes that denied Indians the right to vote were unconstitutional. The court held that they violated the Fourteenth and Fifteenth Amendments.[41] Judge Phillips wrote:

> Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote. An Indian, and only an Indian, in order to meet the qualifications to vote must have paid a tax. How you can escape the conclusion that makes a requirement with respect to an Indian as a qualification to exercise the elective franchise and does not make that requirement with respect to the member of any race is beyond me.[42]

Thus, by 1948 only two states, Utah and Maine, would continue to deny Indians the right to vote. It would not be until 1956 that an Indian challenged Utah and sought the right to vote.[43] Preston Allen, a Ute living on the Uintah Reservation in Duchesne County, attempted to vote, but Porter Merrell the county clerk refused him. The clerk cited a Utah law that stated that Native Americans residing on Indian reservations were not residents of the state; therefore, they could not vote in Utah elections[44]. Allen challenged Merrell in court, and despite decisions in neighboring western states, the Utah Supreme Court upheld the statute. The court held that the statute was not a denial of the right to vote on account of race, but residency, despite this racist sounding opinion:

> It is not subject to dispute that Indians living on reservations are extremely limited in their contact with state government and its units and, for this reason also, have much less interest in or concern with it than do other citizens. It is a matter of common knowledge that all except a minimal percentage of reservation Indians live, not in communities, but in individual dwellings or hogans remotely isolated from others and

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[40] N.M. CONST. art. VII, § 1 (1910) (amended 1967) (containing the provision "Indians not taxed," prohibiting voting in state elections.)

[41] *Id. See also* JOE SANDO, PUEBLO PROFILES: CULTURAL IDENTITY THROUGH CENTURIES OF CHANGE 59 (1998).

[42] Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 185-86 (1991).

[43] *See* John H. Allen, *Denial of Voting Rights to Reservation Indians*, 5 UTAH L. REV. 247 (1956).

[44] UTAH CODE ANN. § 20-2-14 (1953), *amended by* 1957 Utah Laws ch. 38, § 1.

> from contact with the outside world. Though such a state is certainly not without its favorable aspects, they have practically no access to newspapers, telephones, radio or television; a very high percentage of them are illiterate; and they do not speak English but in their dealings with others and even in their tribal courts, use only their native Indian languages. Under such conditions it is but natural that they are neither acquainted with the processes of government, nor conversant with activities of the outside world generally. Inasmuch as most governmental services are furnished them, it is patent that they would not have much concern with services and regulations pertaining to sanitation, business, licensing, school facilities, law enforcement and other functions carried on by the county and state governments. This is more especially so because they are not obliged to pay most of the taxes which support such governmental functions.[45]

Despite having written this racist passage, the court held that it was not race, but residency, that compelled them to deny Porter the right to vote. Thus, the old and discredited "Indians not taxed" argument that had been dismissed by all states remained law in Utah. The case was appealed to the U.S. Supreme Court, and the Court sent it back to Utah demanding that the court re-examine its ruling. While the case was making its way through the court system, the Utah legislature repealed the statute, and Indians residing on reservations in Utah were finally allowed to vote in 1957.[46] With Utah's surrender in 1957, Indian people in the American West were no longer denied the right to vote by state or federal statute.[47]

There was, however, another attempt to deprive western Indians the right to vote. In 1962, Democrat Joseph A. Montoya tried to revive the old residency issue and take the vote away from Diné (Navajos) in New Mexico. Montoya had run for lieutenant governor in 1960 but had been defeated by Republican Tom Bolack by only 279 votes. Montoya knew that 2,202 votes for Bolack had come from the Navajo Reservation voters in San Juan and McKinley Counties, near Bolack's longtime home. Montoya challenged Bolack's victory claiming Navajos living on the reservation should not have been allowed to vote. Because they resided on reservations, they were not residents of New Mexico for purposes of voting. He insisted that their votes should be removed from the electoral count, which would have given him a sixty-three vote victory. Montoya's arguments were heard, but were given little credence. In the end, the court ruled that the reservation was a part of the state and Indians had the right to vote.[48]

Joe Montoya's challenge to Indian voting would be the last effort to use direct statute to deny Indian citizens the right to vote; however, officials in western states would resort to other means in an attempt to continue to deny Indians the right to vote. States would print ballots only in English, thus preventing non-English literate Indian people from fully understanding the

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[45] Allen v. Merrell, 305 P.2d 490, 494-95 (Utah 1956).

[46] *See* Allen v. Merrell, 353 U.S. 932 (1957) (per curiam); *see also* Wolfley, *supra* note 42, at 189; McCool, *supra* note 29, at 105.

[47] Compare this to Indians in the East. Maine did not grant suffrage to the Passamaquoddy and Penobscot reservation people until July of 1967. *See* S. Glen Starbird, Jr. et al., *A Brief History of Indian Legislative Representatives*, *at* http://www.state.me.us/legis/lawlib/Indianreps.htm (updated Nov. 14, 2003) (last visited Aug. 25, 2004).

[48] *See* Montoya v. Bolack, 372 P.2d 387 (N.M. 1962).

issues and depriving them of their vote. Illiterate voters were not allowed to vote. Some western states refused to place ballot boxes on Indian reservations or near Indian communities. To dilute the Indian vote, western states sometimes created at-large representation districts. They also gerrymandered voting districts to break up concentrations of Indian voters or to isolate them and weaken their political power.[49]

The 1965 Voting Rights Act brought an end to some of these efforts to deprive or dilute Indian votes, and amendments to the law in 1975 and 1982 blocked specific states' efforts to deprive Indian people of the vote. Unfortunately, there are still individuals in western states who are trying to deny Indians their right to vote, as noted in a recent *New York Times* editorial.[50] These efforts are presently being challenged in court, and despite the heartfelt efforts of Thomas McKay, Indian Joe, John Elk, Peter Porter, Frank Harrison, Harry Austin, Miguel Trujillo, Preston Allen, and other Indian people who struggled to become citizens and enjoy those civil rights accorded others, the struggle by Native Americans to acquire their civil rights continues, and the struggle warrants more attention than it has garnered.[51]

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[49] *See* Susan Olson & Jennifer Robinson, *Voting, Rights, and American Indians* (paper presented at the Annual Meeting of the Law and Society Association in Pittsburgh, Pennsylvania) (2003).

[50] *Bad New Days for Voting Rights*, N.Y. TIMES, Apr. 18, 2004, at WK12.

[51] *See* SANDO, *supra* note 41, at 59 (1998); *see also* Susan Olson & Jennifer Robinson, *supra* note 49; Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975); Bone Shirt v. Hazeltine, 200 F. Supp.2d 1150 (D. S.D. 2002); Sanchez v. King, 550 F. Supp. 13 (D. N.M.), *aff'd*, 459 U.S. 801 (1982); Prince v. Bd. of Educ., 543 P.2d 1176 (N.M. 1975).