

THE DECLINE OF INDIAN TRIBAL SOVEREIGNTY
IN THE NINETEENTH CENTURY

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1. George F. Rains, *How War was Fought*, 1870.
 2. Charles G. Boyer, "Indian Land Decisions to the U.S.,"
 Bureau of American Ethnology, Annual Report, 1900-1901, p. 559.

The artificial air of the Nineteenth Century was filled with such pious asininites as "the white man's burden" and "saving the heathen from hell". To our cynical generation this jargon of concealed desires seems the ultimate in hypocrisy but it should be remembered that such an attitude was not an isolated phenomenon; it was merely one of the high points in an imperialism which is as old as modern civilization.

Conquest is almost synonymous with man who, motivated by the conflict between inertia and the necessity of existence, will whenever possible force some weaker people to do his work and take their possessions. However, since the conqueror may be threatened by a later comer he usually cloaks his economic motives with sanctimonious expressions of morality and justice. The capacity of the human mind to fool itself is infinite.

Thus the strong of Europe have exploited the weak of Asia, Africa, and America. The early Spanish and French invaders of the latter continent disregarded any claims of the natives to the soil; they were heathen and savages and hence could have no rights.¹ The British justified their claims by the ancient legal doctrine that an uninhabited country belonged to the discoverer; they simply ignored the existence of the Indians.² It is true that in 1763 the

1. George E. Ellis, Red Man and White Man. 220

2. Charles C. Royce, "Indian Land Cessions to the U.S." Bureau of American Ethnology, Annual Report, 1896-97. II 559

British Government made some attempt to protect the Indians from white intruders³ but it was by no means a disinterested move and it came too late to do much good.

The colonists did not practice these high-handed theories because they lacked the power to do so. They were weak and scattered; their very existence was in doubt for a while and was dependent on the goodwill of their savage neighbors. Because of these circumstances the immigrants naturally began a policy of buying their lands from the Indians.⁴

With the rapid expansion of the United States it was inevitable that the Indian title to all those immense lands should be questioned. In 1795 four land companies bribed the Georgia state legislature to sell them from 35,000,000 to 50,000,000 acres of land (it was not surveyed) for \$500,000, or a little over a cent an acre. The furious Georgians turned out the crooked legislature and elected another which quickly passed a rescinding act. In the meantime the land companies had hurriedly unloaded as much of the land as possible on New Englanders. When Georgia tried to deprive them of their title they appealed to the Supreme Court which held that although fraudulently acquired the contract could not be abrogated.⁵ A part of the lands sold had belonged to Indians and it had been argued before the Court that Georgia had no right to

3. Proclamation of George III, October 7, 1763. American Archives, 4th series, I, col. 174.

4. C. C. Royce, *Op. cit.* 562

5. *Fletcher v. Peck* 6 Cranch 87 (1810)

sell such lands. Chief Justice Marshall answered cautiously "the majority of this court is of the opinion that the nature of the Indian title, which is certainly to be respected by all of our courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seizure in fee on the part of the State." Although not very explicit it seemed that both the Indians and the state had title to the same lands.

The squabble over the Yazoo frauds was settled in 1802 when Georgia agreed that for \$1,250,000 she would cede her claims to the vast territory between the Chattahoochee and Mississippi Rivers to the federal government which was to settle the Yazoo claims and extinguish all Indian titles to lands within the state of Georgia as soon as it could be "peaceably obtained on reasonable terms."⁶

In 1823 the Supreme Court was called on to give a clearer statement of the Indian title to land. Two men laid claim to the same land: one had obtained his title from the Indians, the other held a patent from the United States. The Court decided that the Indians had a right of occupancy only, and although they could not be forced to move, neither could they sell the land,⁷ for the title rested in the United States which had obtained it from Great Britain in

6. This story is well told in E. Merton Coulter's Short History of Georgia. 187-92.

7. In 1873 the Supreme Court ruled that the Indians could not even sell timber from their lands. United States v. Cook 19 Wallace 591.

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3. Proclamation of George III, October 7, 1763. American Archives, 4th series, I, col. 174.
4. G. C. Hoyle, pp. 211-212.
5. Wheat v. Esch 6 Cranch 57 (1810).

1783 (Great Britain's title being that of conquest).⁸ This case⁹ settled conclusively the nature of the Indian land title. The Indians could not be forced to give up their lands but if and when they did the lands belonged to the government, which could of course persuade the Indians to cede parts to them.

None of the foreign governments interested in America ever tried to meddle with Indian tribal government nor did any of the colonies. Their independence was accepted as a matter of course.¹⁰ When the Revolutionary War began the colonists were anxious to get the Indians to remain neutral; to do so the Continental Congress delegated commissioners to offer them presents and friendship and to affirm their intention of respecting Indian freedom and independence.¹¹ The first Indian treaty which the new government made was in 1778;¹² it recognized the independence of the Delawares in these words: "the United States do engage to guarantee to the aforesaid nation territorial rights in the fullest and most ample manner." In 1791 the government made a similar treaty with the Cherokees, tacitly recognizing their right of self-government.¹³ In 1802

8. In 1839 the Court upheld the right of the government to give to individuals title to Indian lands, subject of course to the Indian right of occupancy.

9. Johnson v. McIntosh 8 Wheaton 543.

10. In Worcester v. Georgia, Marshall's review of this problem contains the statement: "Certain it is that our history furnishes no example from the first settlement of our country of any attempt on the part of the crown to interfere with the internal affairs of the Indians." 6 Peters 547.

11. Bureau of Education, "Indian Education and Civilization". Executive Document of the Senate, no. 95. 48th Cong. 2nd Sess. 106-7

12. United States Statutes at Large VII, 13

13. Ibid, 39

Congress asserted the right of the tribes to govern themselves in a law to regulate the Indian trade.¹⁴ It forbids white men to enter Indian territory without a passport. If an Indian came into a state or territory and committed depredations on white men, the injured persons were to apply to the Indian superintendent who was to demand that the tribe make reparation. However, if the Indians refused to recognize the demand there was no provision for forcing them to do so; the treaty included the normal rules for relations between two independent nations. In the first two decades of the Nineteenth Century the government made similar treaties with numerous tribes, most of them granting the Indians the right to punish white intruders and to govern themselves.¹⁵

No attempt was made by the federal government to govern the Indians. It sent ambassadors to the tribes; it entered into formal treaties with them; it recognized their right to make war and peace. Thus at the beginning of the Nineteenth Century the Indian tribes were for all practical purposes independent peoples. The only demand which the government made on them was that they place themselves under its protection and form no treaties with foreign nations, but in all else the Indians were allowed to do as they pleased. They owed no allegiance to the United States Government and although they might make war against it they were not guilty of treason. They paid no taxes nor did they serve in the army.

14. March 30, 1802. Ibid II 139

15. These treaties are contained in American State Papers, Vols. IV and V

Indian tribal sovereignty was never seriously questioned until 1829 and even then it was a means to another end rather than a policy inspired by logic or necessity. In 1802 the federal government had promised Georgia to extinguish all Indian titles to lands in that state as soon as it could be done peaceably and on reasonable terms. Washington was treating the Cherokees and Creeks in Georgia with a curious two-handed policy. At the same time that it was carrying out its obligation to Georgia by gradually purchasing the Indians' lands it was sending missionaries and agents among the Indians to civilize them. They were taught agriculture and encouraged to abandon their ancient nomadic life. As they did so they naturally became less willing to give up their lands and move into a wilderness. The government was defeating its purpose and although it kept urging the Indians to move beyond the Mississippi the Indians finally refused to cede any more of their lands. At the same time Georgia was rapidly filling up and the demands for the Indian lands became more insistent. The Cherokees held about six million acres¹⁶ of valuable land in the northern part of the state in the twenties (although they had already sold more than half of their original holdings to the government) and the Creeks held a somewhat smaller amount in the west of the state. Georgia politicians began to accuse the federal government of bad faith in not carrying out the agreement of 1802, and another attempt was made to remove

17. Anna H. Rouse, "Indian Civilization," *American Historical Association*, Annual Report, 1906, p. 100.

16. John B. McMaster, History of the People of the United States IV 175

the Indians. Just before Monroe went out of office his commissioners, with the help of agents of Georgia, negotiated a treaty of removal with the Creeks. They were to vacate within a year but Georgia, eager to divide the lands among her citizens, began to survey them before the time limit was up. The Creeks complained to Washington that the treaty was fraudulent; only a small number of minor chiefs had signed it and they had been bribed. The Indians expected the federal government to defend them and used force to stop the survey. The Governor (Troup) called out the militia and President Adams sent an agent to investigate the charges of fraud, notifying Georgia to desist from the survey until the matter could be settled. There was abundant proof that the treaty had been unfairly obtained.¹⁷ General Gaines, after an investigation, declared that forty-nine-fiftieths of the Creeks were opposed to it. However, Congress was not as eager to back Adams as the state legislature was to back Troup and the President was urged to try to make a more favorable treaty with the Indians. This was done,¹⁸ the Creeks were made to realize that Georgia was determined to be rid of them and they reluctantly consented to removal.

The Cherokees, however, were not so tractable because they were more powerful and more civilized. In the twenties they had made amazing progress in civilization - so much so that their communities

17. Annie H. Abel, "Indian Consolidation," American Historical Ass'n., Annual Report, 1906 I 350

18. Treaty of Washington, March 1826, U.S. Statutes at Large VII 286

were hardly distinguishable from white ones.¹⁹ They were rapidly learning to farm; their country was dotted with good houses, thriving villages, and well-kept farms.

About this time one of the Cherokees, Sequoyah, invented a simple alphabet which the others were rapidly learning. With the help of the missionaries, the Indians established a newspaper in the native language, the Cherokee Phoenix. This led them to want a written constitution and a well organized government. The constitution which they adopted was modeled on that of the United States.

There were other reasons why the Cherokees did not want to move. Several years before some of them, desiring to continue their old roving life, had gone to the wilderness beyond the Mississippi but some of them returned with tales of woe. It had been difficult to live and they had been attacked by savage Indians. The way was long and through a wilderness that would extract much suffering. The Cherokees had a religious attachment to the lands of their fathers.

Nevertheless in 1828-9 several events happened which made Cherokee removal inevitable. Gold was discovered in their country and the Georgians were more determined than ever to have it. Worse yet, Andrew Jackson was elected to the presidency and Washington would no longer protect the Indians. Jackson was a Westerner, an

19. Robert C. Walker, Torchlights to the Cherokees. 113

Indian fighter, and a land speculator; his sympathies were all with Georgia. Smarting under what he considered a crooked deal in the House of Representatives in 1824, he apparently promised the Georgia politicians that if he were elected in 1828 he would not hinder them from forcing the Cherokees out.²⁰ The Indians themselves gave Georgia an excuse to act by adopting a written constitution. Georgia immediately took up the cry that the Cherokees were erecting an unconstitutional state within a state and Jackson echoed the cry in his first Annual Message.²¹ This was of course not true because the Cherokees had always been independent, and as the Supreme Court observed later²² both Georgia and the federal government had many times recognized that independence. Since there was nothing to prevent her now Georgia decided that she would make life so miserable for the Cherokees that they would be glad to move. This new policy was soon embodied in a series of laws:²³

1. The jurisdiction of Georgia was extended over all the Indians within its borders and all their laws declared void; Indian councils were forbidden to meet.
2. All the Indian lands were annexed to the state. The Indians were forbidden to take any gold from the land.

20. Jackson to Gov. Lumpkin of Ga., June 22, 1832. Correspondence IV, 450. See Appendix #1 for copy.

21. James D. Richardson, Messages and Papers of the Presidents II 457.

22. Worcester v. Georgia 6 Peters 515

23. Passed on Dec. 19, 1829 and Dec. 22, 1830. Summarized in the case Worcester v. Georgia 6 Peters 515

3. No Indian could act as witness in a legal suit in which a white man was defendant. All contracts between Indians and whites were voided unless supported by two white witnesses.

This means that as long as there were no white witnesses, or none who would tell, white men could rob or murder an Indian with impunity (and there were plenty of examples of this being done²⁴).

4. All whites living among the Cherokees must henceforth secure a permit from the governor and take an oath of allegiance to the state.

This was aimed at the Yankee missionaries who, the Georgians thought, and rightly, were encouraging the Indians to resist removal.

When these laws were passed the Cherokees sent a delegation to Washington to ask the President to protect them since they had treaties with the federal government which guaranteed their right to govern themselves²⁵ but to their dismay Jackson replied that Georgia was a sovereign state within her own borders so he could do nothing. He advised them that their only hope was to remove beyond the Mississippi.²⁶ The Federalists, however, still controlled one stronghold, the Supreme Court; enemies of the Jackson administration encouraged the Indians to appeal to this tribunal for protection. Under such guidance, the Cherokees engaged the professional opinion of William Wirt, an eminent constitutional lawyer who had been

24. Robert S. Walker, Torchlights to the Cherokees. 258

25. Treaty of Holston, July, 1791. U.S. Statutes at Large VII 39

26. Niles Weekly Register, June 13, 1829, reprints the "talk".

John Q. Adams' Attorney-General. Wirt believed that the Georgia laws were unconstitutional; he and John Sergeant were engaged to carry the case to the Supreme Court.

On the assumption that Indian tribes were foreign independent nations, Wirt appealed to the Supreme Court in original jurisdiction for an injunction to prevent the enforcement of the laws. Marshall, speaking for the Court, ruled however that Indian tribes were not independent in the meaning of the Constitution and he added that famous puzzling statement: "they may more correctly perhaps be denominated domestic dependent nations."²⁷ He did not explain how an entity could be a nation and yet be dependent and for the next fifty years Indian tribes were treated in some respects as if they were foreign nations and in other ways as if they were dependent possessions.

Although Marshall refused the injunction because the approach was wrong, he expressed his strong sympathy for the Indians and hinted that if they would try a different attack the Court might help them. This opportunity was unwittingly provided by Georgia itself the next year. Some of the missionaries, led by Samuel A. Worcester, had refused to apply for permits and take the oath of allegiance because they wanted to encourage the Indians by their resistance.²⁸ They maintained that they were not subject to the

27. Cherokee Nation v. Georgia 5 Peters 1 (1831)

28. Worcester, letter to Gov. Gilmer of Ga., June 10, 1831
Althea Bass, Cherokee Messenger 132

jurisdiction of Georgia since they were in Indian territory. The special guard created for the enforcement of these laws arrested Worcester and ten other missionaries and with a great deal of wanton brutality dragged them off to jail.²⁹ The Georgia authorities were trying to frighten and cajole the missionaries either into submission or into leaving the state because Jackson had already warned them not to let a case get into the federal courts.³⁰ The missionaries were sentenced to four years of hard labor but were promised a pardon if they would comply with the law. Eight of them consented, but Worcester and two others remained adamant, determined to test the constitutionality of the law and to encourage the Cherokees by their determination. They were encouraged by their Board because it was good advertising.³¹ A Georgia historian has condemned the missionaries as headstrong fanatics³² but if they had yielded there would probably be no other opportunity to test the laws, since an Indian tribe could not sue in the courts. Lawyers for the missionaries took the case to the Supreme Court on a writ of error, arguing that the laws were unconstitutional because Georgia had no jurisdiction over the Indian territory and therefore the missionaries were unjustly imprisoned.

This time Marshall agreed with them completely.³³ He lambasted the claims of Georgia without reserve. "The extravagant and absurd

29. Ibid, 138

30. See letter in appendix #1.

31. Althea Bass, op. cit. 140-1

32. E. Merton Coulter, A Short History of Georgia, 219

33. Worcester V. Georgia, 6 Peters 515

idea that the feeble settlements made on the seacoast, or the companies under whom they were made, acquired legitimate power by them to govern the people or occupy the lands from sea to sea, did not enter the mind of any man." The only right the Europeans acquired by discovery and conquest was "the exclusive right of purchasing such lands as the natives were willing to sell." Although the Indians had placed themselves under the protection of the United States they had not given up the right of self-government. In reviewing the treaties between the Cherokees and the United States Marshall declared that the latter regarded the former as a nation. He then coldly concluded his logical discourse with:

The Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights.... All the rights which belong to self-government have been recognized as vested in the Indian nations.... In the management of their internal concerns the Indians are dependent on no power. They punish offenses under their own laws, and in doing so they are responsible to no earthly tribunal. They make war and form treaties of peace. The exercise of these and other powers gives to them a distinct character as a people....

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.

In this great case Marshall stated the independence of Indian tribes not only from the interference of state governments but from the federal government as well. This independence was recognized in at least two other important cases. In the Dred Scott Decision³⁴ Taney remarked: "These Indian governments were regarded and treated

34. Sanford v. Scott, 19 Howard 393 (1857)

as foreign governments, and their freedom has constantly been acknowledged to the present day." In United States v. Kagama,³⁵ the Court said:

The United States regarded [the Indian tribes] as having a semi-independent position; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the States wherein they reside.

The Supreme Court was defending the old order; the Georgia-Jackson factions were proclaiming a new one. The results of the Worcester Decision were curious; neither the state nor the federal government wanted to enforce it and they tried to evade the issue. It was after this decision that Jackson is supposed to have said: "John Marshall has made his decision; now let him enforce it," but there is no substantial proof that he did so. Horace Greeley³⁶ apparently originated the tale; he got the story, he says, in a footnote, from George N. Briggs who was then a member of Congress from Massachusetts. It is strange that if Jackson made such an important statement no one else recorded it. The truth seems to be that anti-administration papers were freely predicting at the time that if the Court gave a decision adverse to Georgia, Jackson would refuse to enforce it; thus the rumor was started.³⁷ The fact is that Jackson never had a chance to enforce, or refuse to enforce, the decision because Georgia prevented it. Already the

35. 118 U.S. 375 (1886)

36. The American Conflict I 106

37. Charles Warren, The Supreme Court in U.S. History II 222

trouble with South Carolina over nullification had started and Jackson had made clear his position on national supremacy. Hence Georgia did not dare test him in the Cherokee case³⁸ and the politicians redoubled their efforts to get the missionaries to accept the law. Pressure was put on the missionary Board which now advised Worcester and the others to recognize the law.³⁹ They submitted and were pardoned; the legislature repealed the voided law and there was no longer any reason to enforce the decision.

Despite the Supreme Court's declaration that the Indians had a right to occupy their lands as long as they wished, the Cherokees were forced out of Georgia by the connivance of state and federal officials. The Cherokees received the same under-handed treatment that the Creeks had been dealt a few years before. In 1835, the Reverend J. F. Schermerhorn was sent by Jackson to make another attempt to secure a treaty of removal. Finding a great majority of the Indians obdurate, the man of God bribed a small minority of them (about 500 out of 12,000) to sign such a treaty.⁴⁰ The rejoicing of the administration was soon cut short by overwhelming proof of the fraud⁴¹ but the Senate was sick of the business and ratified the

38. Ibid, 236

39. Althea Bass, Cherokee Messenger 158-9

40. Treaty of New Echota, Dec. 29, 1835. U.S. Statutes at Large. VII 478.

41. Charles C. Royce, "The Cherokee Nation of Indians," Bureau of American Ethnology, Annual Report, 1883-84, 281

treaty anyhow.⁴² Nevertheless the Cherokees could not believe that they would be made to carry out a treaty to which they had never agreed, and they made no preparations for the journey. When the allotted time was up (1838) the army under General Scott rounded them up by force and marched them across the Mississippi. This is only one of the tragic tales in the history of American domestic imperialism but it seems particularly brutal when the actualities are compared with the elaborate promises made in the treaty.⁴³ A third of the Indians died on the harsh journey through the wilderness⁴⁴ because of inclement weather, brutal treatment, and starvation resulting from the greed of grafting contractors. They were not furnished subsistence for a year and more of them starved; others were killed by hostile Indians because they were not protected by the army;⁴⁵ nor were they left undisturbed forever after all their suffering.

Georgia had attempted to govern the Indians only to secure their removal, and once the Indians were west of the Mississippi their tribal government was not disturbed. At this time there was no real interest in meddling with tribal affairs because there was no need. The Indians lived to themselves; there was little mixing of the two races yet and the Indians were disturbed only when the

42. It was done behind closed doors in executive session but T. H. Benton tells the story in his Thirty Years' View, I 625.

43. See Appendix #2 for essence of treaty.

44. Flora W. Seymour, The Story of the Red Man, 184

45. Charles C. Royce, "Cherokee Nation of Indians," op.cit. 296

whites wanted more of their lands. Tribal life was still intact and the Indians were well governed. The theory of the Supreme Court that the Indians had the right to govern themselves was in keeping with their ability to do so.

However, in the next few decades the impact of white civilization was to play havoc with tribal life. The white man's greed, his whiskey and firearms, and his different standards of life caused Indian life to degenerate as the two races came closer together. When the white race decides to impose its superior civilization on a backward people, the vices are easy to introduce but the virtues are slow and difficult. With the steady expansion of America it was inevitable that Indian customs should be destroyed and that Indian government should decline.

Already in 1817 the federal government began to arrogate extra-territorial rights for its citizens in Indian territory. Congress legislated that henceforth white men who committed crimes in Indian territories should be subject to the federal courts just as if they were under the jurisdiction of the United States.⁴⁶ This was necessary because if the Indians punished white men, his fellow countrymen would raise an uproar. There was, of course, no provision for punishing Indians for anything but this was the first step in the invasion of Indian tribal sovereignty. In increasing numbers, whites were beginning to settle on Indian lands, openly violating

46. Discussed in "A People without Law," James B. Thayer, Atlantic, Oct. 1891. 549

laws and treaties to prevent such settlement. This led to outrages committed on both sides so that the federal government was forced to extend its jurisdiction. In 1817 Congress had provided for the punishment of whites who committed crimes in Indian territory against whites or Indians; in 1834 it empowered Indian agents to arrest and bring to trial before outside federal courts Indians committing crimes against white men,⁴⁷ but the crimes of Indians against Indians were still left to tribal government.

The constitutionality of these laws ~~were~~ ^{was} tested in 1845.⁴⁸ One white man had been arrested for the murder of another but he defended himself by the argument that he had been adopted by the tribe and was no longer a citizen of the United States and therefore not subject to its jurisdiction. The Court denied the validity of his plea, stating that he had retained his U.S. citizenship and Taney added in an obiter dictum, "the Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of a state, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian." Taney gave no justification for his sweeping reversal of Worcester v. Georgia,⁴⁹ contenting himself with saying, "we think it too clearly established to admit of dispute", but he would have had a hard

47. U.S. Statutes at Large, V 729

48. United States v. Rogers 4 Howard 567

49. 6 Peters 515

time finding legal precedents for his decision. However, it made little difference for the case was never used; the federal government did not want or need such power because the tribes were still capable of governing themselves. Anyhow twelve years later Taney himself recognized their independence.⁵⁰ When the government finally did need to legislate for the Indians in the eighties its power had to be established, nor was this case used for a precedent.

After 1865 white men began to pour into the western plains in great waves, restricting the Indian, taking his ancestral lands, killing his food supply, and introducing the vices of the more powerful civilization. Under these influences the tribal power rapidly disintegrated. The rougher elements began to dominate the tribes and white men, protected by the United States Army, began to abuse them. The Indian was in a peculiar legal position; he was neither an alien⁵¹ nor a citizen and could not appeal to the courts for protection.⁵² When tribal government broke down he had only one resource: retaliation; if he used it against the whites he was liable to be exterminated by the army or sent off to a wilderness somewhere. If he used retaliation against the other Indians, it meant anarchy on the reservation. He was the ward of the government whose duty it was to protect him but this duty was sadly neglected.

50. Scott v. Sanford, 19 Howard 393 (1857). See page ¹³~~16~~ of this essay.

51. Cherokee Nation v. Georgia 5 Peters 1 (1831)

52. Carl Schurz, when Secretary of Interior once declared that no Indian could appear in court to seek his own. William Harsha, "Law for the Indians". North American Review, March, 1882. 290

The means of his protection was supposed to be the army and the Indian agent but the former was more adept at eradication than regulation and the agents were usually political appointees and even if not dishonest were apt to be ignorant of the Indians and incompetent. The only alternative to chaos on the reservation was the absolutism of the Indian agent. The man who had formerly been an ambassador to a foreign court was forced to become a little czar. No law gave him the power; necessity drove him into this anomalous position. He was backed by the army post and the ability, which he used, to cut off the rations of Indians who disobeyed him.⁵³ This caused dissatisfaction among the Indians who sometimes took to the war-path which usually led to their being soundly beaten by the army.

The so-called Five Civilized Tribes in Indian Territory: Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles: had their own governments and a few of the wild plains tribes were still independent but the ordinary reservation Indian lived in a society of either anarchy or autocracy. The Commissioner of Indian Affairs once wrote:

As the Indians are taken out of their wild life, they leave behind them the force attaching to the distinctive tribal condition. The chiefs inevitably lose their power over them in proportion as they come into contact with the Government or with white settlers, until their government becomes in most cases a mere form, without power of coercion or restraint.⁵⁴

53. Result of an investigation of the Indian Rights Ass'n, Philadelphia, published in an unbound pamphlet in 1884.

54. Secretary of Interior, Annual Report 43 Cong., 1st Session, 373 (1873)

By 1870 tribal government had lost its power almost everywhere, according to the reports of the Commissioner of Indian Affairs. Every year from then until 1885 he pleaded with Congress to do something about this degrading situation - to provide some legal system for the protection of the Indian.

Theoretically Congress had altered the situation in 1871. For half a dozen years the House of Representatives had been grumbling because Indian affairs, a domestic concern, were handled by treaty, which meant that the President and the Senate controlled them while the House only voted the necessary appropriations but had no hand in their distribution. Hence the House demanded that the policy of making treaties be abolished so it would have an equal voice in the matter and, although the Senate was unwilling, secured its wish finally by attaching such a provision to the annual Indian appropriation bill of 1871.⁵⁵ Thus the Senate was forced to accept it and in theory the independence of the Indian tribes was destroyed.⁵⁶ In actuality, however, the change had been merely political and for fifteen years there was no real difference in the treatment of the Indians. Instead of making treaties the government now made agreements. The best proof that the government contemplated no real change in policy is the fact that although the Indian Commissioner was pleading for legislation

55. For discussion of the Bill in the House and Senate see Congressional Globe. 41st Congress. 3rd Session. (1870-71) pp. 1811 and 1821-25.

56. U.S. Statutes at Large, XVI 566

Congress made no effort to provide any for over a decade.

In the beginning the reports of the Indian Bureau⁵⁷ were restrained. In 1871 the Commissioner wrote:

A serious detriment to the progress of the partially civilized Indians is found in the fact that they are not brought under the domination of the law, so far as regards crimes committed against one another.⁵⁸

But as the years went by and Congress continued to ignore a problem that was rapidly growing worse, the Commissioner became more plain spoken. In 1873 he reported:

A radical hinderance [to the progress of Indian relations] is in the anomolous relation of many of the tribes to the Government, which requires them to be treated as sovereign powers [another proof that the law of 1871 had not really changed the government's policy] and wards at one and the same time. We have in theory over sixty-five independent nations within our borders, with whom we have entered into treaty relations as being sovereign peoples; and at the same time the white agent is sent to control and supervise these foreign powers, and care for them as wards of the government.⁵⁹

This plain statement of affairs he followed with the perennial recommendations that the Indians be put under the law. The next year he presented the case from another angle:

57. The Bureau of Indian Affairs was created in 1832, (U.S. Statutes at Large IV 564) and placed under the Department of War. In 1849 it was transferred to the Department of Interior. In 1869, because of numerous scandals, Congress created a Board of Indian Commissioners to be composed of men distinguished for intelligence and philanthropy, serving without pay. They did some good work but their reports were usually politely ignored.

58. Secretary of Interior, Annual Report, 1871-72. I 432

59. Secretary of Interior, Annual Report 1873-74. 371

Frequent mention has been made in these reports of the necessity of legislation for the Indians... No officer of the government has authority by law for punishing the Indian for crime or restraining him in any degree; the only means of enforcing law and order among the Indians is found in the use of the bayonet by the military, or such arbitrary force as the agent may have at command. Among the Indians themselves all tribal government has been virtually broken down by their contacts with our Government.⁶⁰

And in 1876 he wrote again:

My predecessors have frequently called attention to the startling fact that we have within our midst 275,000 people, the least intelligent portion of our population, for whom we provide no law, either for their protection or for the punishment of crimes committed among themselves.⁶¹

So went the weary and pathetic tale, year after year, while the Indians continued to suffer from the arbitrariness of the army and the agents and the exploitation of white men. In 1885, Merrill E. Gates, President of Rutgers College and a member of the Board of Indian Commissioners, wrote a remarkably able report,⁶² summing up fifteen years of fruitless agitation for the improvement of the status of the Indian. He condemned the government's whole policy, declaring that "justice cannot be had by an Indian." He gave specific examples of Indians being defrauded by white men because the former could not go to the courts for protection,⁶³ and of lawlessness among the Indians themselves because they knew they would go unpunished.⁶⁴

60. Sec'y. of Interior, Annual Report, 1874-75. 324-5

61. Ibid, 1876-77. 387

62. Sec'y. of Interior, Annual Report, 1885-86 I 763-785

63. pp. 772-3

64. p. 771

Apparently Congressmen did not even read these reports because no results were forthcoming, but fortunately the proddings of the Indian Bureau were re-enforced by an outraged public opinion. Helen Hunt Jackson began her muck-raking⁶⁵ and many others preached and wrote the story of Indian injustice. It became a popular crusade. Indians toured the country lecturing, magazine articles poured from the press,⁶⁶ associations were formed. On the whole more interest than intelligence was displayed but there were many able men in the movement.⁶⁷ All sorts of panaceas were offered: destruction of tribal life, return to tribal life, close federal control, state control, immediate citizenship, special courts, and the standard remedy of all democrats of course: education -- these were bandied about with the usual ease, and ignorance, of reformers. Most of the sympathy came from the East where the people were sufficiently removed from the Indian problem to be easily sorry for them. Westerners resented the criticism of the Easterners and sneered at their simplicity. Many of the Western people had lived, and some still did live, under the hair-raising threat of being scalped; for them it was a little difficult to get sympathetic over the noble savage. Others saw valuable lands going to waste from their point of view on the reservations.

65. A Century of Dishonor was published in 1881

66. For the ten years 1882-92 Poole's Index lists 267 magazine articles on the American Indian.

67. Carl Schurz and James B. Thayer, professor of law at Harvard, wrote several articles.

Nevertheless the ancient Western solution of the Indian problem -- extermination⁶⁸ was losing favor even in the section of its origin,⁶⁹ although it took the army a long time to catch up with popular opinion.⁷⁰

Despite all this pressure from the Indian Bureau and the public, the government was in no hurry. In 1868 a treaty had been made with the Sioux which provided that:

If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian..... the Indians herein named solemnly agree that they will deliver up the wrong-doer to the United States to be tried and punished according to its laws.⁷¹

This was the first attempt of the federal government to assume jurisdiction over the Indians for crimes committed against Indians and it was done in a hesitant manner; the provision "the Indians herein named solemnly agree that they will deliver up" sounds like an extradition treaty between two foreign nations.

A few years later a Sioux Indian was sentenced to death for the murder of another Indian by a federal court. He applied to the Supreme Court for a writ of error on the ground that there were

68. Succinctly expressed in the popular slogan: "The only good Indian is a dead Indian."

69. Francis A. Walker, The Indian Question. 17-18

70. Even high public officials admitted that the army had been more savage than was necessary. Carl Schurz, Sec'y. of Interior, wrote: "It is true that in some instances Indian wars were precipitated by acts of rashness and violence on the part of the military." "Present Aspects of the Indian Problem," North American Review. July, 1881. p.2

71. April 29, 1868. U.S. Statutes XV 635

no federal law to punish him, an Indian, for murder. The Court after an elaborate examination of numerous laws and treaties granted the writ because it had consistently been the policy of the government in the past to leave tribal matters to the Indians. It did not deny the right of Congress to pass such laws but since they were contrary to a long established policy, Congress must make its purpose obvious before that policy could be changed.⁷²

The release of this Indian, although logical, gave the reformers a powerful new argument because back on the reservation he became the hero of the wilder elements and since they knew now that they could not be punished, murder among them became more frequent.⁷³ Henceforth when the agent arrested criminals they merely applied to the federal courts for their freedom.

Congress had finally tried to do something to alleviate the situation in 1878 by creating an Indian police force.⁷⁴ However, even if it had not been inadequate it could not have solved the problem because it had no law to enforce it; its duties were merely to help the agents try to keep order. In 1882 the Indian Bureau instituted a court of Indian offenses⁷⁵ but it could accomplish very little because it was composed of Indians, its jurisdiction was very limited, and it had no legal method of enforcing its decisions.

72. Ex parte Crow Dog. 109 U.S. 556 (1883)

73. Sec'y. of Interior, Annual Report. 1885-86. I 770-71

74. U.S. Statutes at Large, XX. 86

75. Bureau of Education, "Indian Education and Civilization" Executive Documents of the Senate 48 Cong. 2 Sess. 1885 no. 95 p. 117

Finally in 1885 Congress was forced by public opinion and the chaotic state of affairs on the reservations to do something more definite. A law was passed which declared that any Indian committing murder, manslaughter, rape, assault with intent to kill, arson, burglary, or larceny against another Indian or any other person, whether the Indian be on or off a reservation, within or without the limits of a state,⁷⁶ should be tried as any other person would be for the same crime.⁷⁷

In the same year the Supreme Court passed on this law. The Court noticed that this was a departure from the policy of the government but agreed that it had the power to pass such laws. The attorneys for the government had argued that this power was encompassed in the Constitutional grant to regulate commerce with the Indian tribes⁷⁸ but the Supreme Court boldly swept this aside as inadequate and based the power to regulate the internal affairs of the tribes not on the Constitution but on necessity.

The Indian tribes are the wards of the nation. They are communities dependent on the United States..... From their very weakness and helplessness, so largely due to the course of dealing with them of the Federal Government, there arises the duty of protection, and with it power.⁷⁹

Thus the independence of the Indian tribes was destroyed completely and finally; the power of Congress to legislate for them was

76. The Supreme Court decision, U.S. v. Rogers, 1845, (4 Howard 567) had given Congress power to pass such laws for Indians in the territories but not within a state.

77. U.S. Statutes at Large XXIII 385

78. U.S. Constitution, Section 8, clause 3

79. United States v. Kagama. 118 U.S. 375 (1885)

never again questioned. In 1832 Marshall had stated that the tribes had the right to govern themselves⁸⁰ because they had the ability to do so and had always exercised that right; but in fifty years the influence of the white man had so demoralized the Indian that necessity forced the Supreme Court to reverse its theory and give Congress the power to govern them. No right was destroyed because they had already lost the power to exercise what had once been their right. It was for their own good that their now fictitious rights were destroyed in theory as well as in fact.

In 1887 the Dawes Bill⁸¹ provided for the dissolution of tribal life. After a trusteeship of twenty-five years the individual Indians were to be given land in fee simple, to be made citizens and placed under the laws of the state or territory wherein they resided. When this was accomplished the Indian as a legal entity ceased to exist altogether.⁸²

Sentimentalists have accused the government of reducing the Indian to the status of the Negro slave but there is little truth in the charge. It is true that neither the Indian nor the slave⁸³ could appear in the courts but there the similarity stopped. The slave was a piece of property with no rights at all; but the Indian belonged to a self-governing tribe and if he left the tribe to live among

80. Worcester v. Georgia, 6 Peters 515

81. U.S. Statutes at Large XXIV 388

82. In 1924 Congress declared that the Indians as a race were citizens. (43 U.S. Statutes 253)

83. Scott v. Sanford 19 Howard 393

white men as one of them he became an alien and was thereby entitled to the protection of the courts; even a freed Negro, however, could not bring a legal suit.⁸⁴ Moreover Congress did not have the right to make citizens of Negroes⁸⁵ although citizenship might be conferred on the Indians at any time⁸⁶ as it was done in many instances. Of course after the Civil War the Negro was elevated to a better legal position than the Indian but this was a political matter, and politics is a realm which logic rarely invades.

The Supreme Court had decided that the Indians were neither aliens nor citizens. When the United States acquired new possessions at the end of the century the same rule was applied to the peoples in them. Congress made them citizens of Puerto Rico, or Hawaii, or the Philippines, but not of the United States.⁸⁷ The Supreme Court was called on to decide if the Constitution applied to these dependencies. In the Dred Scott Case the Court had answered that it did apply to territories as well as states; the Court now at first agreed⁸⁸ but almost immediately reversed itself. In a strange decision⁸⁹ (it was 5 to 4, and each of the majority justices gave a different reason for concurring) the Court then decided that Taney had been unwisely prejudiced in the Dred Scott case and that only the

84. *Ibid.*, 454

85. Until the adoption of the 14th Amendment (1868)

86. *Scott v. Sanford*, *op.cit.* 420

87. *Foraker Act*, (1900) *U.S. Statutes at Large XXXI*, 77, did this for Puerto Rico, for example.

88. *De Lima v. Bidwell* 182 U.S. 1

89. *Downes v. Bidwell*, 182 U.S. 244

"fundamental" parts of the Constitution applied to the territories. (The Court itself would decide which parts were fundamental of course). Quoting Johnson v. McIntosh,⁹⁰ which had been the first step in the encroachment on the rights of the Indians, the Supreme Court agreed that "the title by conquest is acquired and maintained by force. The conqueror prescribes the limits." Although the Constitution did not protect these peoples, Congress must be restrained by "certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect"! Another case⁹¹ which had destroyed the rights of the Indians was quoted to uphold Congress' right to govern the islands without being bothered with the Constitution.

By the same arguments the inhabitants of the insular dependencies were reduced to the status of the Indians after 1885 - both protected only by whatever restraint Congress chose to exercise - but at least in the case of the Indians the Court had been more honest. Instead of the sophistical floundering which marked the Insular Cases it had candidly said that Congress had power to govern the Indians because such power was necessary. Another example of the poor logic of the Supreme Court was evinced when it passed on the status of the people of Alaska.⁹² This time the Court went back to 1857 and declared that the Constitution did

90. 8 Wheaton 543 (1823)

91. U.S. v. Kagama, 118 U.S. 375

92. Rassmussen v. the United States 197 U.S. 516 (1905)

apply to this group, arguing weakly that the treaty of purchase with Alaska indicated an intention of making the Alaskans citizens, whereas the Treaty of Paris with Spain showed a determination to leave the status of the various islanders to Congress. It is hard to see why, if one group: Indians, Islanders, or Alaskans: had rights, the others didn't also have them. The truth is that Congress has the right to do whatever is necessary,⁹³ regardless of the Constitution, but the Supreme Court apparently didn't have the courage to say so.

Theories of law and politics are made not by logic but by circumstances. Whatever a group wants or has to do it finds a reason for and when the wants and necessities change, the rationalizations soon change too. The first Europeans came to this continent with elaborate claims to the lands but not being able to enforce them, they soon began to recognize the independence and ownership of land of the Indians because the Indians had the power to enforce them. However, when the power of the Indian declined his land and his independence disappeared and the Supreme Court found a reason for reversing its own theories. Peoples have only those rights which they are able to enforce; if there is no power justice will rarely stand alone. When the power of the Indians was destroyed by the army in the second half of the Nineteenth Century they soon found

93. Since Alaska was in a more advanced state of civilization, it was not so difficult to govern and Congress did not need so much power.

themselves with no rights⁹⁴ and only after long years of miserable suffering on his part and much agitation by his white friends did the government make a tardy attempt to restore a part of what had been inevitably and ruthlessly destroyed by the influx of a superior civilization.

94. General Crook, an army officer who served in the West, once wrote: "The Indian commands respect for his rights only so long as he inspires terror for his rifle."

APPENDIX #1

To Governor Wilson Lumpkin of Georgia

Dear Sir,

"Your letter was received but as I believed you were well appraised of my personal friendship for you and my confidence in you, as well as my opinions on the Indian question I did not believe it either necessary or prudent for me to address you officially on that subject. I had spoken freely to Governor Troup¹ and other members of your state on the policy I thought would be most prudent to pursue with regard to the surveying of and disposition of the land lying within the Cherokee country — which I knew had been communicated to you. My great desire was that you should do no act that would give to the Federal Court a legal jurisdiction over a case that might arise with the Cherokee Indians -----

Andrew Jackson

June 22, 1832
Correspondence. IV, 450

1. Troup was governor of Georgia from 1823 to 1827, before Jackson was elected to the presidency.

APPENDIX #2

Treaty of New Echota, Dec. 29, 1835, between the United States and the Cherokee Nation.

1. The Cherokees ceded to the United States all their lands east of the Mississippi in return for which they were to get an equal amount on the other side (about 7,000,000 acres) and \$5,000,000 for spoliation claims.
2. The Cherokees should remain there undisturbed forever and they should be protected by the U.S. army from the attack of hostile Indians.
3. The United States was to remove the Indians and provide them with a year's subsistence.
4. The Cherokees were to remove within two years.
5. These new lands shall never be placed within the limits of any state or territory without the Cherokee's consent.

United States Statutes at Large VII 478

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