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THE LEGAL CONSCIENCE

Selected Papers of Felix S. Cohen

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TO GENE AND KAREN

con amore

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The Spanish Origin of Indian Rights in the Law of the United States

I. Foreword

To trace the origins of our Federal Indian law is a difficult task. The law of the United States with respect to Indian tribes is a curious historical patchwork in which may be found the product of many looms and many weavers. One may divide this strange patchwork into its component patches and find nearly four hundred federal treaties with Indian tribes, about four thousand federal statutes, and an even larger number of judicial and administrative decisions which, by and large, attempt to interpret and to apply these treaties and statutes. The fact that there are Spanish threads in this patchwork is of no greater significance than the fact that some of the finest of our old Navajo Indian rugs contain red threads (*bayeta*) that were secured by unraveling the red woolen underwear of Spanish soldiers. What is really important, after all, about the Spaniards and the Navajo rugs is that the Spaniards (largely through the intermediary of the Pueblo Indians) introduced into the country of the Navajos the sheep and the wool of which Navajo rugs are made, and introduced into the life of the Navajos the ways of the sheepherder and weaver, which supplanted ways of the raider and hunter. These were the real Spanish contributions to the Navajo rug.

So it is with our law. We should have a poor idea of the Spanish influence upon our Federal Indian law if we divided that tapestry and noted which patches and threads were of Spanish origin. For then we should lose the pattern and the creative principles of this law, and it is this pattern and these creative principles that are the distinctive contribution of Spanish juristic thought to our Federal Indian law. This is not merely a fact of antiquarian interest. It is a fact of some importance to the world of today and tomorrow. If our law of Indian affairs were the result of a purely local adaptation of Anglo-American common law,

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or a pure product of independent national legislation, we might not expect it to have much relevance to the problems of inter-racial and inter-cultural relations in other parts of the world. But if, on the other hand, the spirit of this law and its creative principles came to us across wide waters, and across wider gulfs of polity, religion, and culture, there must be in this spirit and these principles something that is not merely local and particular, something that is universal and enduring, something that can be carried to other lands across wide waters and wider gulfs of polity, religion and culture. Such is the significance of what might otherwise be an interesting but unimportant problem for legal antiquarians.

Today, more than ever before, we need to study the legal relations that have served to bind together in common cause and common effort peoples of different races, different creeds, different social structures, and different ways of life. In such a study we cannot afford to overlook the relations of the United States to the Indian tribes within our territory. The comparatively small number of Indians involved does not diminish the importance of such studies. The fact is that there is probably no dependent people in any part of the world which rallied to the support of democracy with more devotion than the tribal Indians of the United States. In the rate of volunteering for the armed services (particularly in World Wars I and II) they far surpassed the white or black populations of the United States. In the proportion of their funds which they voluntarily placed at the disposal of the Federal Government, through subscription to war bonds or otherwise, they have again far surpassed the rest of the country. They gave not only of blood and sweat and tears but of brains as well. Descendants of great Indian strategists earned important positions in our armed forces. It was to a member of the Osage Tribe, Major General Tinker, that the all important job or rebuilding the air forces in Hawaii was entrusted after Pearl Harbor, and he more than any one else deserves credit for our air victory in the Battle of Midway, where he himself lost his life. Had the United Nations found as staunch defenders in the peoples of Egypt, Indo-China, the East Indies, Malaya or Burma, what pen could rewrite the history of the early years of World War II?

It may be doubted whether our tribal Indians are to be distinguished in physical strength or courage or health or pugnacity or intelligence from native populations in some other parts of the world that have not rallied to the support of their governments in time of stress. At least the hypothesis is worth examining that what has distinguished our tribal Indians from these other native populations lies on a legal plane, that it is, in essence, a relation to government capable of evoking loyalty, and

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that in other parts of the world, where a similar relationship between peoples exists, as in the Philippines, a similar loyalty is likely to appear.

What is the nature of this legal pattern that has so dramatically shown its capacity to evoke loyalty?

II. The Pattern of Federal Indian Law

Let us be clear, in the first place, about the object of our search. We are to trace the history of certain social ideals, ideals which have seldom corresponded exactly to the realities of living but which have been close enough to reality to attain the force of law. We are to look for origins of pattern, spirit, principle, that bind together thousands of statutes and decisions. To do that we must first reduce the maze of our Indian law to a manageable scheme and take account of its basic principles. That is no easy task, but the most comprehensive effort thus far made in this direction has traced the manifold detail of existing Federal Indian law to four basic principles:

(1) The principle of the legal equality of races; (2) the principle of tribal self-government; (3) the principle of Federal sovereignty in Indian affairs; and (4) the principle of governmental protection of Indians.[1]

A brief examination into the legal content of these principles must suffice for our present purposes.

1. Legal Equality

The legal status of tribal Indians, although different from, is not inferior to, that of their white countrymen. Today all Indians born in the United States are citizens of the United States.[2] As citizens they are entitled to the rights of suffrage guaranteed by the Fifteenth Amendment to the Federal Constitution,[3] and they are likewise entitled to hold public office.

1. See Introduction, by Solicitor Nathan R. Margold, to Cohen, *Handbook of Federal Indian Law* (1941) pp. vii to xv.

2. This has been true since the adoption of the act of June 2, 1924, 43 Stat. 253, 8 U.S.C. § 3 (1934). Prior to that time most Indians had become citizens under special laws and treaties. See, e.g., Treaty of September 27, 1830, with Choctaws, art. 14, 7 Stat. 333, 335.

3. This Amendment declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Supreme Court, interpreting this provision in *United States v. Reese*, 92 U.S. 214 (1875) at p. 218, asserted: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." Accord, *Neal v. Delaware*, 103 U.S. 370 (1880).

The process of conferring citizenship upon Indians has been a slow process. It began with a ringing declaration in 1776 "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The process reached its conclusion only in 1924, when the last non-citizen Indians gained citizenship. But throughout the years when many or most Indians were non-citizens, their legal status as human beings was not subordinated to that of their white countrymen. Their lives and property were held to be entitled to legal protection against violence. When the United States Army attempted to exercise military control over a group of peaceful Indians who refused to remain on the reservation assigned to them, the Indians were freed from army control by the issuance of a writ of habeas corpus.[4] Indians were recognized as having legal capacity to sue,[5] to make contracts,[6] to hold public office,[7] and to enjoy all the civil liberties guaranteed to their white neighbors, citizen or alien.[8] Their legal status was, and is, peculiar only because they are members of special political bodies, tribes, which largely take the place that states and municipalities occupy towards other citizens of the United States. The political conception of the tribe is thus the origin of whatever is distinctive about the legal position of the Indian in the law of the United States.

Statutes in three states, Washington, Arizona, and New Mexico, purport to restrict the constitutional right of Indians to vote. Such statutes have been declared unconstitutional by two Attorney Generals of the State of Washington (Op. Att'y. Gen. W. V. Tanner, June 15, 1916; Op. Att'y. Gen. G. W. Hamilton, April 1, 1936); and by the Solicitor of the Department of the Interior (Op. of Solicitor, M. 29596, Jan. 26, 1938); but have been upheld by the courts of Arizona, *Porter v. Hall*, 34 Ariz. 308, 271 Pac. 411 (1928). [Ed. note: In 1948, as General Counsel of the Association on American Indian Affairs, Felix Cohen presented the brief for the Arizona Indians which won them the right to vote (*Harrison v. Laveen*, 67 Ariz. 337, 196 Pac. 2d 456, 1948). In the same year he argued the voting case for the New Mexico Indians before a three-judge court and won a unanimous decision on the constitutional right of Indians to the franchise (*Trujillo v. Garley*, D.C., N.M. 1948, unreported). See below, pp. 328–29.]

4. *United States, ex rel. Standing Bear v. Crook*, 25 Fed. Cas. 695, No. 14,891 (C.C. Nebr. 1879).

5. *Felix v. Patrick*, 145 U.S. 317, 332 (1892); *Deere v. St. Lawrence River Power Co.*, 32 F. (2d) 550 (C.C.A. 2d, 1929).

6. *Jones v. Meehan*, 175 U.S. 1 (1899); and see *United States v. Paine Lumber Co.*, 206 U.S. 467 (1907).

7. 13 Op. Att'y. Gen. 27 (1869), holding an Iroquois Indian, General Parker, eligible for the post of Commissioner of Indian Affairs.

8. Cohen, "Indian Rights and the Federal Courts" (1940) 24 *Minn. L. Rev.* 145; Cohen, op. cit. supra, note 1, pp. 177–81.

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2. *Tribal Self-Government*

The principle that an Indian tribe is a political body with powers of self-government was first clearly enunciated in the jurisprudence of the United States by Chief Justice Marshall in the case of *Worcester v. Georgia*.[9] Indian tribes or nations, he declared, ". . . had always been considered as distinct, independent, political communities, retaining their original natural rights, . . ." To this situation was applied the accepted rule of international law: ". . . the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection."

From these premises Chief Justice Marshall concluded that the State of Georgia had no right to interfere with the laws and territory of the Cherokee Tribe. Following this decision, the federal courts have held that Indian tribes have all the powers of self-government of any sovereignty except in so far as those powers have been modified or repealed by act of Congress or by treaty.[10] Hence over large fields of criminal and civil law, and particularly over questions of tribal membership, inheritance, tribal taxation, tribal property, domestic relations, and the form of tribal government, the laws, customs, and decisions of the proper tribal governing authorities have, to this day, the force of law.

3. *Federal Sovereignty*

At the present time it may be laid down as a rough general rule that Indians on an Indian reservation are not subject to the local law of the state in which they reside.[11] This exemption is of particular importance in the fields of criminal law and taxation. The general rule has been modified only in a few particulars by congressional action conferring upon states specific powers over certain subjects.[12]

9. 6 Pet. 515, 559–560 (U.S. 1832).

10. *Ex parte Crow Dog*, 109 U.S. 556 (1883); *Standley v. Roberts*, 59 Fed. 836 (C.C.A. 8th, 1894); *Talton v. Mayes*, 163 U.S. 376 (1896); *Waldron v. United States*, 143 Fed. 413 (C.C.S.D. 1905); *Jones v. Meehan*, 175 U.S. 1 (1899); *Buster v. Wright*, 135 Fed. 947 (C.C.A. 8th, 1905), *app. dism.* 203 U.S. 599 (1906); *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894); *United States v. Quiver*, 241 U.S. 602 (1916); *Turner v. United States and Creek Nation*, 51 Ct. Cl. 125, *aff'd*, 248 U.S. 354 (1919); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927).

11. *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Sutton*, 215 U.S. 291 (1909).

12. The most important of such laws is the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348 (1934), which subjects Indian estates to state laws of inheritance.

The fact that Indian tribes are largely exempt from the operations of the local laws of the states and their political subdivisions derives from the fact that the Constitution of the United States vests in the national government rather than in the states the three powers upon which our law of Indian affairs is primarily based—the war-making power, the treaty-making power, and the power to regulate commerce with Indian tribes. In practice, this centralization of federal sovereignty over Indian affairs has proved a powerful weapon against oppression. Again and again the federal courts have intervened to restrain the attempts of local authorities to infringe upon Indian rights.[13] As the Supreme Court of the United States once said: "These Indian tribes are the wards of the nation. . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." [14]

The functional significance of this principle of federal sovereignty over Indian affairs lies in the fact that Indians, in conflicts of interest with non-Indian neighbors, have been able to call upon the Federal Government to aid in the protection of Indian rights.[15]

4. *Federal Protection of Indians*

Intercourse between people of widely disparate cultural levels inevitably affords opportunities for exploitation, oppression, and debauchery. The first white traders in America offered the natives new weapons, new drinks, and new tools, all of which were capable of destroying native life, health, and culture. In exchange for these deadly but apparently irresistible gifts, the whites were able to demand surrender of the land from which the Indian drew his sustenance. Warped, poisoned, and armed with deadly weapons, the displaced tribe would be pushed on to the lands of another tribe to spread the seeds of destruction. This was the basic pattern; local bounties for native scalps and the sale to Indians of blankets infected with small-pox were obscene and unnecessary embellishments.[16]

13. See Cohen, supra note 8, 24 *Minn. L. Rev.* 145.

14. *United States v. Kagama*, 118 U.S. 375, 383 (1886).

15. Thus, for example, the act of March 3, 1893, 27 Stat. 612, 631, 25 U.S.C. § 175 (1934), provides: "In all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity."

16. In 1704, for example, Connecticut offered bounties from the public treasury of five pounds for every Indian scalp. *Conn. Records*, IV, 463.

Lord Jeffrey Amherst, English Commander-in-chief, wrote to Colonel Bouquet, in 1763 or 1764: "You will do well to try to inoculate the Indians [with small-pox]

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The problem facing our central government from the start was how to stop, or at least minimize, this process of exploitation and extermination. The answer chosen was the imposition of a rigid control over all intercourse between its own subjects and the native population. This control, designed to protect the Indian without absolutely forbidding intercourse between the two races, has been the guiding motif of federal legislation on Indian affairs down to the present date.

In 1790 the first Federal Congress adopted the policy of regulating trade with the Indians through a system of licensing traders.[17] Except for a brief period, from 1796 to 1822, when a system of government trading houses was maintained,[18] the principle of control of Indian trade through licenses has been in force. Under this system federal supervision of the character and quality of goods sold and prices charged has been possible. Sales of liquor, and of firearms and ammunition not needed for useful purposes, have been banned.

The most important subject of trade between Indians and whites was inevitably the land which the Indians possessed and which the white immigrants needed. It was about trade in land that the most stringent restrictions have been placed by the Federal Government. For many decades transfers of Indian land could not be made by private transaction but required for their validity a formal treaty between the Indian tribe and the United States.[19] Down to the present day tribal land may not be sold except by a special act of Congress. Where, however, Indian lands have been individualized, general legislation permits the sale of the individual allotments under conditions designed to safeguard the interest of the Indian vendor.[20] Generally, such safeguards include either the requirement that the Indian vendor must hold the land for a fixed period of time, usually 25 years, before receiving a "fee patent" entitling him to sell the land, or a requirement that the particular transaction should be approved by the Secretary of the Interior.

by means of blankets, as well as to try every other method that can serve to extirpate this execrable race. I should be very glad your scheme for hunting them down by dogs could take effect." Channing, *History of the United States*, Vol. 3 (1912), "The American Revolution—1761–1789," pp. 15, 27, n. 2.

17. Act of July 22, 1790 (1 Stat. 137).

18. Act of April 18, 1796 (1 Stat. 452); act of April 21, 1806 (2 Stat. 402); act of March 2, 1811 (2 Stat. 652); act of March 3, 1815 (3 Stat. 239); act of March 3, 1817 (3 Stat. 363); act of April 16, 1818 (3 Stat. 428); act of March 3, 1819 (3 Stat. 514); act of March 4, 1820 (3 Stat. 544); act of March 3, 1821 (3, Stat. 641). The system of government trading houses was terminated by the act of May 6, 1822 (3 Stat. 682).

19. Act of July 22, 1790 (1 Stat. 137). The first federal statute containing this restriction on land transfers was reenacted from time to time and is now embodied in 25 U.S.C. § 177 (1934).

20. See Cohen, op. cit. supra, note 1, c. 11.

The leasing of Indian lands for short periods has been allowed in recent years, but only under conditions designed to protect the Indian lessors. In most Indian leases, whether tribal or individual, the approval of the Secretary of the Interior or of some subordinate officer is required.

By maintaining its control over the transactions by which Indians dispose of land, the Federal Government has been able to establish a large degree of control over the income received by the Indians from such disposition. Sale or leasing of land has been a major source of income for most Indian tribes, and control of this income has permitted the Federal Government to direct a considerable portion of the Indian income into educational, health, and other public services for Indians. A substantial part of our Federal Indian law today is concerned with the Federal disposition of Indian moneys.

The principle of federal protection of Indian rights has proved to be of special importance in the maintenance of Indian land rights. By treaty and by statute the United States undertook to protect the Indian tribes in their possession of vast areas of land. It is true that this Indian possession was not considered a perfect title, and in the cases it is commonly said that legal title to such lands is in the United States, with a right of use and occupancy in the Indians. But these are subtleties of feudal legal theory which meant nothing to the Indians. Our courts have repeatedly said that the Indian right of occupancy and use is as sacred as the fee title,[21] and it is certainly more substantial than the naked legal title which legal theory locates in the Federal Government. Indeed, it may be said that lands held by "Indian title" are worth more to the Indian holders than are lands held in fee simple; for lands of the former sort are exempt from state taxation and from execution under the process of state courts, these being two channels through which much individually owned Indian land has slipped out of Indian hands.

It is important to realize that what the Federal Government undertook to protect was not only the welfare of the Indians—a slippery phrase which might have been twisted to justify a governmental oppression worse than that of private oppressors[22]—but the *rights* of the Indians. Such rights included rights of personality, rights of self-government, and rights of property. Of the Indian's rights of personality and self-government we have already briefly spoken. Of the Indian property rights, the most important was the right of the tribe to land occupied from time immemorial. This right federal jurisprudence has consistently recognized.

21. See *Mitchel v. United States*, 9 Pet. 711, 747 (1835); *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938); 1 Ops. Att'y. Gen. 465, 466 (1821); 34 Ops. Att'y. Gen. 181, 187 (1924).

22. See pp. 235–36, infra.

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The most recent instance of such recognition may be found in the opinion of the United States Supreme Court in the case of the Walapai Tribe.[23] In that case a railroad claimed certain lands in northern Arizona under a Congressional land grant made in 1866 in aid of railroad construction.[24] These lands were claimed by the Walapai Tribe as part of its ancestral homeland. The Supreme Court, reversing the decision of two lower courts, held that the railroad was not entitled to any land which had been occupied by the Walapai Tribe before the grant to the railroad and had not been voluntarily relinquished by the Indians. Thus was reaffirmed the principle laid down by Chief Justice Marshall more than a century ago [25] that the Indian tribes have a full and complete legal right to lands which they have continuously and exclusively occupied, and that this right will be protected by the federal courts against any interference by private parties or by unauthorized public officials.

The validity of Indian possessory rights has been upheld by the Supreme Court even against the statutory protector of the Indian, the Secretary of the Interior, in days when that officer proved less solicitous for the rights of the Indian than is the present incumbent of that position.* Thus, in the case of *Lane v. Pueblo of Santa Rosa*,[26] the Supreme Court held that a group of Papago Indians had legal capacity to bring suit against the Secretary of the Interior to prevent that officer from disposing of Indian lands under laws relating to the public lands. Likewise, in 1924, when the later notorious Secretary of the Interior Albert Fall sought to dispose of minerals in certain Indian lands without Indian consent, Attorney General Stone issued an opinion holding that the Secretary of the Interior had no right to dispose of such minerals in the manner proposed, for the reason that the minerals in question belonged to the Indians, whose property rights were "complete and exclusive." [27]

The foregoing examples, while they are very far from giving the full content of the principle of federal protection of Indians, show at least the direction in which that principle has guided the development of our law and the intimate inter-dependence of this protective principle and

23. *United States, as Guardian of the Indians of the Tribe of Hualpai v. Sante Fe Pacific R.R. Co.*, 314 U.S. 339 (1941).

24. Act of July 27, 1866 (14 Stat. 292).

25. *Johnson v. McIntosh*, 8 Wheat. 543 (U.S. 1823); *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832).

26. 249 U.S. 110 (1919).

27. 34 Op. Att'y. Gen. 181 (1824). Advice to the same effect had been given to Secretary Fall by the Solicitor of the Department of the Interior (Opinion of Feb. 12, 1924. A. 2592).

* [Ed. note: The reference is to Harold L. Ickes.]

the companion principles of the political equality of races, the right of tribal self-government, and the doctrine of Federal sovereignty in Indian affairs.*

III. The Pattern of Spanish Indian Law

In the Anglo-American literary and historical tradition the Spaniards' treatment of the Indian has been so long held up to view as a pattern of cruelty and treachery that it may be considered heretical to argue at this late date that the humane principles which guide our own law in Indian affairs all faithfully follow the teachings of Spanish theologians and the edicts of Spanish kings. And yet this thesis will not sound so startling once we recognize that although the behavior of our own citizens and officials towards the Indians has frequently been marked by acts of cruelty and treachery, it is by our own courts and laws that these acts of cruelty and treachery have been denounced, the perpetrators of these acts punished, and the victims of these acts, or their descendants, recompensed in the only kind of measure that human compensation for such acts can follow.[28] So it was with Spain. It would be childish to gloss over the inhumane aspects of the Spanish conquest of the New World. Yet there is an important difference between these aspects of the treatment of Indians in the New World in the fifteenth and sixteenth centuries and what Nazis have done in the Old World in the twentieth. Against the cruelties of the Spanish invaders the clear voice of protest was raised by loyal Spaniards and faithful Catholics to the King of Spain and to the Pope himself,[29] and both King and Pope repeatedly denounced the acts

* [Ed. note: In a later decision the Supreme Court did not go so far as to hold that Indian possessory rights not recognized by Congress were under constitutional protection. (*Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).)]

28. At the present time [1942] there are pending before the federal courts, by authorization of Congress, Indian suits claiming an aggregate of more than $250,000,000 for violations of treaties and other injuries. [Ed. note: Many additional claims were subsequently filed under the Indian Claims Commission Act which was passed in 1946 (60 Stat. 1049). Much of the legal draftsmanship of the act had been entrusted to the author in his position as Associate and Acting Solicitor of the Department of the Interior.]

29. The report to the Emperor Philip, *Brevissima Relacion de la Destruyccion de las Indias*, completed by Fra Bartholomew de las Casas at Valencia on December 8, 1542, contains perhaps the most trenchant criticism of Spanish administration in the New World that has ever been written. It is presented to the Emperor by the writer on the basis of the stated assumption of the rectitude of royal hearts: "If any defect, wrong, and evil is suffered, there can be no other cause than that the Kings are ignorant of it; for if such were manifest to them, they would extirpate them with supreme in-

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of oppression committed by brigands that brooked no transoceanic control. So it is that while the acts of cruelty and treachery of lawless men wrought a havoc that eventually brought Spanish rule in the New World to an end, the legal ideals which Spanish teachers proclaimed, and which Crown and Holy See ratified, provided a humane and rational basis for an American law of Indian affairs.

1. *Legal Equality*

Of the first principle of our own Indian law, the equality of races, the works of the Spanish theologian and jurist, Francisco de Vitoria, offer eloquent elucidation. In an attempt to justify the denial to Indians of the rights enjoyed by other humans, the argument had been widely advanced that Indians were heretics, tainted with mortal sin, and irrational. To this argument Vitoria replied that even heretics and sinners were entitled to own property and could not be punished for their sins without

dustry and watchful diligence." The following sections of the report typify the story that is told in some detail, largely on the basis of the personal observations of Las Casas. These observations were, to be sure, supplemented by testimony presented in various law courts and further supplemented by the observations of some of the co-workers of Las Casas in the Western Hemisphere.

"The Indies were discovered in the year fourteen hundred and ninety-two. The year following, Spanish Christians went to inhabit them, so that it is since forty-nine years that numbers of Spaniards have gone there: and the first land, that they invaded to inhabit, was the large and most delightful Isle of Hispaniola, which has a circumference of six hundred leagues.

. . . .

"Among these gentle sheep, gifted by their Maker with the above qualities, the Spaniards entered as soon as they knew them, like wolves, tigers, and lions which had been starving for many days, and since forty years they have done nothing else; nor do they otherwise at the present day, than outrage, slay, afflict, torment, and destroy them with strange and new, and diverse kinds of cruelty, never before seen, nor heard of, nor read of, of which some few will be told below: to such extremes has this gone that, whereas there were more than three million souls, whom we saw in Hispaniola, there are today, not two hundred of the native population left.

. . . .

"Now in God's name consider, you, who read this, what sort of deeds are these, and whether they do not surpass every imaginable cruelty and injustice, and whether it squares well with such Christians as these to call them devils; and whether it could be worse to give the Indians into the charge of the devils of hell than to the Christians of the Indies.

. . . .

"There are others, who go hunting with their dogs in the morning and when one is asked on his return for dinner how it has fared with him, he replies; 'it has fared well

trial[30] and that the Indians were at least as rational as some of the peasants of Spain.[31] Implicit in the argument of Vitoria, who cites as precedents in support of Indian rights the cases of heretics and sinners in Europe and ancient Palestine whose rights were acknowledged by the highest Church authorities, is the doctrine that certain basic rights inhere in men *as men,* not by reason of their race, creed, or color, but by reason of their humanity.

with me, because I have left perhaps fifteen or twenty villeins killed by my dogs.'

"I was induced to write this work I, Fray Bartholomeus de las Casas, or Casaus, friar of St. Dominic, who by God's mercy do go about this Court of Spain, trying to drive the hell out of the Indies, and to bring about that all those numberless multitudes of souls, redeemed with the blood of Jesus Christ, shall not hopelessly perish forever; moved also by the compassion I feel for my fatherland, Castile, that God may not destroy it for such great sins, committed against His faith and honour and against fellow creatures. . . ." See MacNutt, *Bartholomew de Las Casas, His Life, His Apostolate, and his Writings* (1909) pp. 311, 314, 315–16, 330, 411–12.

Here and there, in this terrible chronicle, a happier tale is told, as when Las Casas tells of the visit of Fray Jacomo, with four Franciscan monks, to Yucatan in 1554:

"They sent ahead certain Indians from the province of Mexico as messengers, to inquire whether the natives were satisfied that the said monks should enter their country, to bring them news of the one only God, who is God and true Lord of all the world.

"They [the Indians] assembled many times and consulted about the thing, having first made many inquiries as to what sort of men these were, who called themselves *fathers* and *brothers,* and as to what they laid claim; and in what they were different from the Christians from whom they had suffered so many offences and such injustice.

"They resolved at last to receive them, on the condition that they came alone with no Spaniards. . . .

"And afterwards they gave them their own children, whom they love more than the light of their eyes, that they might train them. And they built them churches, monasteries and houses: and friars were invited to other provinces, to preach and bring the natives to the knowledge of God and of him whom they called the great king of Castile.

"And, persuaded by the monks, the Indians did a thing never done again up to the present day; and all that some of those Tyrants pretend about those kingdoms being destroyed by the friars, is falsehood and lies.

"Twelve or fifteen lords, each ruling many vassals and large territories, assembled their people and, after taking their votes and consent, subjected themselves of their own will to the dominion of the kings of Castile, receiving the Emperor, as King of Spain, for their supreme and universal sovereign; and they made some signs, like signatures, which I have in my possession, together with the attestations of the said friars." Id. at pp. 365–67.

30. Victoria, *De Indis et de Jure Belli Relectiones* (Nys' ed. 1917) § 1, pars. 4–19. These dissertations were delivered in 1532 at the University of Salamanca where Franciscus de Victoria (or Francisco de Vitoria) was professor of theology.

31. Id., par. 24.

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This doctrine of Vitoria was given papal support in 1537 by the Bull *Sublimis Deus,* in which Pope Paul III proclaimed:

> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. Desiring to provide ample remedy for these evils, we define and declare by these our letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that, notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[32]

Almost word for word, this declaration of human rights is repeated in the first important law of the United States on Indian relations, the Northwest Ordinance of 1787, adopted two years before the Federal Constitution, which proclaims:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

In the Spanish Laws of the Indies one finds a consistent adherence to the principle of racial equality. Thus Book 4, Title 12, Law 9, declares: "We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong." [33] A further provision included in the Laws of the Indies is one requiring special proceedings to determine whether farms owned by Spaniards are located to the prejudice of the Indians, and requiring the removal of any such farms.[34] Other provisions of the Laws of the Indies provided that Indians might establish mining claims in the same manner as Spaniards.[35]

32. MacNutt, op. cit. supra note 29, p. 429.

More significant perhaps than any of these positive affirmations of Indian rights is the negative fact that the Laws of the Indies contain no provisions which place the Indian in a position legally inferior to that of the Spaniards. This is not to say that Indians were not widely oppressed under Spanish rule but merely to suggest that the oppression was in defiance of, rather than pursuant to, the laws of Spain.

As the American Colonies appealed to the traditional legal rights of Englishmen when they rebelled against a royal administration that had violated those rights, so the peoples of Latin America appealed again and again to the humane Spanish legal ideal of racial equality in rebelling against administrations which had been faithless to that ideal. Thus it was that the Plan of Iguala, in which the Mexican War of Independence proclaimed its ideals, asserted: "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of this monarchy, with the right to be employed in any post according to their merit and virtues." [36]

In this respect, then, the guiding legal principle of United States law is one with the principle of Spanish jurisprudence, whatever may have been the failure, on both sides, to make practice conform to ideal.

2. *Tribal Self-Government*

Again one may find in the writings of Vitoria the first clear formulation of the principle of tribal self-government. The factual basis of this right the Spanish jurist found in the fact that "there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion." [37] Against the pretensions of Spanish administrators who claimed Indian consent to their tyrannies, Vitoria

33. Law of June 11, 1594 (*Recopilación de Leyes de Los Reynos de las Indias* [1681] bk. 4, tit. 12, law 9).
34. Id., bk. 2, tit. 31, law 13 (Instructions to Viceroys, 1596, c. 21).
35. Id., bk. 4, tit. 19, laws 14–16.
36. *United States v. Ritchie,* 17 How. 525, 538 (U.S. 1854).
37. Vitoria, op. cit. supra note 30, § 1, par. 23.

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sought to defend the principle of Indian self-government by pointing out that fear or ignorance on the part of the Indians would vitiate the legal force of such consent.[38] In this he set forth a principle which our federal courts have had frequent occasion to follow.[39] Nevertheless, Vitoria recognized, and the Spanish Crown recognized, as the United States has done, that by democratic process an Indian group might limit its own powers, transferring certain powers of sovereignty to another protecting nation,[40] without thereby destroying its internal autonomy. This, in effect, has been the basis of our 400 treaties with Indian tribes, and although the period of dealing with Indian tribes by treaty has passed, this principle of treating with tribes through voluntary agreement and majority rule characterizes the adoption of tribal constitutions and charters by Indian tribes today under legislation sponsored in 1934 by President Roosevelt.[41]

3. *Central Control of Indian Affairs*

While one could not expect to see the principle of federal sovereignty over Indian affairs, which dominates the law of the United States, directly paralleled in the jurisprudence of Spain, which was not a federal republic, the fact remains that the idea of central control, as distinguished from local control, was cardinal in both systems and served the same function. Just as the federal courts in the United States, and other federal officials, have had repeatedly to intercede for the protection of Indian rights threatened by white neighbors or local officials in Indian areas, so the Spanish Crown had repeatedly to intercede to protect the Indians

38. Id., § 2, par. 16.

39. While the federal courts have never invalidated an Indian treaty on grounds of duress, they have consistently held that in view of the inequality of bargaining power all ambiguities in such treaties must be resolved in favor of the Indians. *Worcester v. Georgia*, 6 Pet. 515 (U.S. 1832); The Kansas Indians, 5 Wall. 737 (U.S. 1866); *Winters v. United States*, 207 U.S. 564 (1908).

40. "A State can appoint any one it will to be its lord, and herefor the consent of all is not necessary, but the consent of the majority suffices. For, as I have argued elsewhere in matters touching the good of the State the decisions of the majority bind even when the rest are of a contrary mind; otherwise naught could be done for the welfare of the State, it being difficult to get all of the same way of thinking." Vitoria, op. cit. supra note 30, § 3, par. 16.

41. 48 Stat. 984, 25 U.S.C. 461 et seq. (1934). [Ed. note: The statute refers to the Wheeler-Howard Act of 1934, later known as the Indian Reorganization Act. It, as well as the tribal constitutions and charters adopted under it, was largely the result of the legal draftsmanship of the author in his official capacity as a member of the Solicitor's Staff of the Department of the Interior.]

against similar threats. To this end, the office of "General Protector of all Indians" was bestowed by the King of Spain in 1516 upon the leading champion of Indian rights against official corruption and incompetence, Bartholomew de las Casas,[42] much as four centuries later a similar office was conferred by President Roosevelt upon a worthy successor in the courageous tradition of Las Casas, John Collier. To this end, too, the Council of the Indies, in which supreme power over Indian affairs was vested, was established as a direct adviser to the King of Spain, and supreme over all local officials in questions pertaining to Indian affairs. Some such motive must have underlain the insistence of Fra Vitoria that Spaniards in the New World, even when unjustly attacked by Indians, could "build fortresses and defensive works" but could wage war only with *"the authorization of their sovereign"* [43] and provided that such war was not used as a pretext for slaying the conquered or despoiling them of their goods or seizing their cities.[44] How close these words are to the language of the Northwest Ordinance of 1787, which forbids local Indian wars by declaring: "and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress: . . ."

It is a striking fact that so often in the history of Spain, Spanish-America, and the United States, oppression of Indians has come from local neighbors and officials and help has come from a far-off central government. Perhaps it is easier for legal ideals to live in a place far enough from the facts to which they are applied so that perspective in judgment is possible and long-range values are not sacrificed to immediate, petty advantages.

4. *Protection of Indian Rights*

The doctrine that the Crown had a special responsibility for the protection of Indian rights was highly developed in Spanish law. Thus, for example, the King's attorneys were required to appear on behalf of the Indians in all land cases, and in all cases involving land grants, to which Indians might be parties.[45] Where the suit was between the Indians and the Crown the court was required to appoint a special attorney for the Indians.[46] That Spaniards often trespassed against Indian rights was

42. MacNutt, op. cit. supra note 29, p. 86.

43. Vitoria, op. cit. supra note 30, § 3, par. 6.

44. Ibid.

45. Law of May 24, 1571 (op. cit. supra note 33, bk. 2, tit. 18, law 36).

46. Law 35, approved Feb. 13, 1554.

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clear, as is manifest from the fact that in Spanish law, as in the law of the United States, a statute for the protection of Indian rights will often be substantially reenacted from time to time, indicating that the earlier enactment has come to be disregarded or entirely forgotten. Such a statute, for instance, is the Royal Cedula of June 4, 1687,[47] which reenacted long-standing prohibitions against trespass upon Indian lands and set forth the occasion of its enactment in these terms: Spanish ranch owners "are encroaching upon the lands of the latter [Indians], taking the same away from them, either by fraud or violence, by reason of the poor Indians abandoning their houses and settlements this being what the Spaniards long for and aim at, . . ."

Not only did Spain enact ordinances of special stringency to protect Indian lands against trespass, but it sought likewise to protect Indians against the superior bargaining power of the white race by outlawing all transfers of Indian property not made before an appropriate judicial officer under conditions of notice designed to bring to the Indian an adequate return for that which he sold.[48]

Where injuries were committed against Indians by Spaniards, the Spanish law required that such injuries should be punished more severely than similar injuries against Spaniards.[49]

Many other instances might be cited of specific laws exemplifying the responsibility of the Crown for the protection of Indian rights. In Spanish jurisprudence, however, as in our own, there was always danger that a concept of special responsibility for the protection of Indian rights might come to be transformed into a justification for the exploitation of Indians and the confiscation of their property. The institution of guardianship (*encomienda*) in Hispanic America, like the old "reservation system" in the United States, shows how easily this transition may take place. It must be said, however, that some of the early Spanish jurists clearly saw and warned against this danger. Thus, Vitoria in considering claims to a power of guardianship based upon the superior administrative capacities of the Spaniards as compared with the natives, while declining either to confirm or condemn such a claim, is careful to point out

47. Hall, *Laws of Mexico* (1885) p. 64.

48. Op. cit. supra note 33, bk. 6, tit. 1, law 27.

49. The Law of Dec. 19, 1593, provides: "ordenamos y mandamos que sean castigados con mayor rigor los españoles que injuriaren, u ofendieren, o maltrataren a indios, que si los mismos delitos se cometiesen contra españoles y los declaramos por delitos públicos."

(We ordain and command that Spaniards who injure or offend or maltreat Indians shall be punished with greater severity than if the same tortious acts had been committed against Spaniards, and we declare such acts to be public offenses.)

that if such a claim is valid it would have to be subject "to the limitation that any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards. For this is the respect in which danger to soul and salvation lie." [50] An echo answers, 400 years after, in the voice of Justice Cardozo, distinguished descendant of Fra Vitoria's compatriots:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. . . . The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that 'would not be an exercise of guardianship, but an act of confiscation.'" . . . The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is "as sacred as that of the United States to the fee." . . . Spoliation is not management.[51]

IV. The Historic Connections Between Spanish Law and the Law of the United States

To show that the basic principles of the law of the United States relating to Indian rights were derived from Spanish sources, it is not enough to show a basic similarity of principle in the two legal systems. Conceivably such similarity might be fortuitous or the result simply of similar practical situations calling for similar legal treatment. But I think it can be shown that the similarities of principle noted in the foregoing parts of this paper were not fortuitous or the outcome of legal systems isolated from each other but were rather the result of definite Spanish influences which molded the development of legal doctrine in the United States.

To trace the historic ways in which Spain influenced this development of legal doctrine would call alike for space and for talents not available to this writer. At most we can attempt to deal with a few ways in which

50. Vitoria, op. cit. supra note 30, § 3, par. 18

51. *Shoshone Tribe v. United States*, 299 U.S. 476, 497–498 (1937). This was a case in which the Federal Government, after recognizing the claim of the Shoshone Tribe to certain lands, placed other Indians on part of these lands. The Supreme Court ultimately affirmed a judgment against the Federal Government in favor of the Indians in the amount of $4,408,444.23 plus interest. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

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such influences operated, trusting that these operations will be found by legal historians, upon further research, to be typical.

In the first place, we must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law, and that in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably by the author of the lectures *De Indis,* Francisco de Vitoria. It was Vitoria that the Seventh Pan-American Conference, on December 23, 1933, acclaimed as the man who "established the foundations of modern international law." [52]

While Vitoria himself is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria. It is thus clear that the tradition of legal teaching carried Vitoria's theories on Indian rights to the judges and attorneys who formulated our legal doctrine in this field. They remained free, of course, to reject Vitoria's theories, but they could not be ignorant of the idea that Indian tribes were dependent nations, possessed of certain rights of sovereignty and property, yet requiring special governmental protection. The history of American legal doctrine reveals that no intellectually satisfying substitute for this basic theory of Indian relations has ever been developed.

The influence of Spanish legal teaching upon the development of legal thought in the United States was supplemented by the influence exerted through official Spanish legal authority. Many of the early opinions of the United States Supreme Court in Indian cases freely cite Spanish decisions, statutes, and other authorities.[53] In part, this is a result of the theory that in international law the nationality of the source cited is of no special consequence. In part, however, the use of Spanish authorities is a result of the fact that most of the territory of the United States was once under Spanish dominion. Under the accepted doctrine of international law that the law of the prior sovereign remains in force in ceded territory until changed by the affirmative action of the new sovereign, all sorts of questions involving Indians require for their decision an examination of Spanish legal authorities.

52. See also the brochure on the *Spanish Origin of International Law* (1928) by James Brown Scott, former Solicitor for the Department of State and President of the American Institute of Law, the American Society of International Law, and the Institut de Droit International, which reaches the conclusion: ". . . in the lecture of Vitoria on the Indians, and in his smaller tractate on War, we have before our very eyes, and at hand, a summary of the modern law of nations."

53. *Johnson v. McIntosh,* 8 Wheat. 543 (U.S. 1823); *Mitchel v. United States,* 7 Pet. 711 (U.S. 1835); *Choteau v. Molony,* 16 How. 203 (U.S. 1853).

Moreover, the relevance of Spanish law was formally recognized in treaties by which the United States undertook to recognize property and other rights enjoyed by the inhabitants of the ceded territory under the prior sovereignty. In all Indian cases arising in former Spanish territory it became relevant to inquire into the rights of Indians under the former sovereign. But neither France, in the case of the Louisiana cession,[54] nor Mexico, in the case of the Mexican cession and the Gadsden Purchase,[55] had made any important changes in the fabric of Spanish law in this field. Thus, again, the trail of legal research in cases in the courts of the United States led directly to Spanish authorities.

The Walapai case,[56] to which reference has already been made, offers a recent illustration of the connection between the law of Spain and that of the United States. In that case eminent counsel employed by the rail-

54. The Treaty of April 30, 1803, for the cession of Louisiana, provided:

"Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

"Art. VI. The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon."

55. Thus the Treaty of Guadalupe Hidalgo (Treaty of Feb. 2, 1848, 9 Stat. 922) provided:

"Article VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. . . .

"In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected."

"Article IX. Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution: and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

56. 314 U.S. 339 (1941).

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road argued, and the courts below held, that although tribal occupancy rights had long been respected in other parts of the United States, the Walapai Tribe was located in the area of the Mexican Cession, and therefore, since Spanish law, it was argued, recognized no Indian right of occupancy, the Walapai Tribe came under the dominion of the United States without any land rights whatsoever. The Solicitor of the Interior Department, on the other hand, cited many passages from the writings of Vitoria and from the Laws of the Indies to show that Spain recognized tribal occupancy rights to the same extent as did the United States. In its final decision the Supreme Court rejected as unsound the argument of the railroad on Spanish law and held that Indians in former Spanish territory were in as favorable a legal position, with respect to land rights, as any other Indians in the United States, citing in support of this holding earlier cases which recognized the community of doctrine between Spain and this country on the point.

Finally, one must recognize that throughout the formative period of our Indian law the Indians themselves had a good deal to say about the disposition of their territory. For a long time they outnumbered the white immigrants, and while at first inferior in weapons they speedily acquired and mastered the white man's firearms. Moreover, they knew vastly more about their land and its agricultural [57] and military [58] uses

57. It has been estimated by competent authorities that four-sevenths of the total agricultural production in the United States (in farm value) consists of plants domesticated by Indians and taken over by whites, and it has been noted that where the whites took over plants they also took over Indian methods of planting, irrigation, cultivation, storage, and use. See Edwards, *Agriculture of the American Indian* (U.S. Dept. of Agriculture, 1933) p. v; *Bureau of American Ethnology Bulletin, 1*, No. 30, 25.

58. In the case of *Scott v. United States and Apache Indians*, 33 Ct. Cl. 486 (1898), the Court of Claims had to determine whether the destruction of certain property by Apache Indians had occurred by reason of a state of war. In answering this question in the affirmative, the court observed:

"The military forces engaged at the time of the surrender consisted, on the part of the United States, of 42 companies of cavalry and infantry; on the part of our ally, the Republic of Mexico, of 4,000 men; and on the part of the common enemy, the Apaches, of not more than 50 men and a few women.

". . . But the costly record of Geronimo is one which never can be questioned. His campaign taxed the powers of two great civilized governments; it involved a treaty which allowed the forces of the one to cross the frontier of the other; it received the energy and experience and ability of our two greatest masters of Indian warfare, General Crook and General Miles. The war was waged, on the part of the United States at least, with the best military appliances of modern warfare, including steam, electricity, and the heliostat; and, more valuable than any other element in the military case, it was an instance of Apache against Apache, for our troops were

led by Apache scouts, who faithfully and heroically served the Government. Yet Geronimo armed his band with the best of modern breech-loaders and ammunition, and even equipped them with field glasses taken from us, and drew his supplies from wherever he would, and inflicted incalculable damage on the country of both of his enemies, and carried on his last campaign successfully for five months. There is not, probably, in the history or traditions or myths of the human race another instance of such prolonged resistance against such tremendous odds.

"Moreover, the Indian soldier was successful even in the ending of his campaign; for the surrender of this paltry band involved more prolonged negotiation than the army of Burgoyne at Saratoga or of Lee at Appomattox, and concluded by the granting of terms that the surrender be 'as prisoners of war to an army in the field'—terms which effectually removed the sagacious savage and his followers beyond the jurisdiction of the civil authorities." (pp. 487–488).

than did the newcomers. By throwing their weight to the British they played a decisive role in wiping out the French Empire in North America. Their attitude towards Spain was a matter of great concern to British and American statesmen through the eighteenth and well into the nineteenth century. Britain and, later, the United States were in a very real sense competitors of Spain for Indian favor, and they could not hope to win that favor if they offered less attractive terms. If the Indians could gain security for their lands and respect for their tribal autonomy from Spain, they were not likely to accept the protection of Britain or that of the United States on less favorable terms. Thus, in the competition for acceptance, the doctrine of Indian rights first advanced by Vitoria had such an appeal to the Indians that Britain and the United States both felt compelled to accept it as a basis of bargaining. Later, of course, the pressure of competition was removed, but then the respect for the sanctity of the plighted word operated to prevent any wholesale repudiation of those principles which had once been dictated by practical necessity.

So, in these various ways, by teaching, by legal authority, by treaty, by the force of competition in the market-place of ideas, the doctrines that had been developed by Spanish jurisprudence came to play a guiding role in the development of the conception of Indian rights in the law of the United States. Whether these ideas will play a still larger role in the development of inter-racial and inter-cultural adjustments in the future is one of the most important issues before our generation. It is an issue on which the destiny of great as well as small nations is involved. That the loyalty of native groups can be secured to the democratic cause is proven by the full and generous aid that American Indians have rendered to the Federal Government in a time of crisis. What distinguishes the American Indians from other native groups is not an intrinsic element of racial character, but the nature of their relationship with a gov-

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ernment which, while protecting their welfare and their rights, is committed to the principles of tribal self-government and the legal equality of races.

In essence the situation in which Spanish juristic thought first operated on this continent is not dissimilar to that which obtains today over a large part of the world. Two factors now, as then, are involved: a native population in possession of areas rich in natural resources but without the techniques, or without the incentives, needed for the full development of these resources, and, on the other hand, a population with the desire and techniques to exploit these material resources. The problem now, as then, is to preserve the rights and liberties of native groups while permitting the fullest development of the world's resources. In seeking a modus vivendi for racial groups of varying cultures, those who will build a better postwar world can well afford to ponder the legal relationship of American Indians to the Federal Government, which, after three centuries of experience and experimentation, often bitter, conforms more closely today than ever before to the humane legal ideals first formulated by the theological jurisprudence of sixteenth century Spain.

Indians Are Citizens!

Why, 20 years after the last non-citizen Indian was endowed with citizenship by act of Congress, do so many well-meaning people think that Indians are not citizens?

I suppose that this very widespread misimpression is a natural product of the fact that Indians are frequently not permitted to spend their own money as they please, that they frequently hold lands which are exempt from state property taxes, that on their own reservations they are generally subject to tribal customs and ordinances rather than to state criminal laws, and that they receive various services from the Federal Government, services which, in our prevailing scheme of values—at least in the scheme of values that prevailed until recent years—are signs of inferior status. Now the fact is that all these legal peculiarities which we are so prone to consider marks of inferiority are either special rights which Indians have secured for themselves by contract, treaty, or statute or are incidental appendages to such special rights. Specifically, the right to hold ancestral lands free of state taxes is a right which was solemnly promised to the Indians by the United States in countless treaties and statutes. In exchange for this promise valuable lands were ceded to the Federal Government. This promise was expressly ratified by practically all of the states which are affected by it. This right of tax exemption, the Supreme Court has said, is a valuable property right of which the Indians may not be deprived without their consent. Similarly, the right to local self-government and the correlative right to be free from the obligation of state laws while on their own reservations are rights upon which most Indian tribes have insisted and which have been solemnly guaranteed to them in statute and treaty, parts of an original sovereignty which they have not surrendered and which Congress has never presumed to abrogate.

Even the laws which prohibit the sale of liquor to Indians must be viewed historically as a concession made by the Federal Government in response to solemn representations made by various Indian tribes asking

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