American Indian Law Review

Volume 7 | Number 2

1-1-1979

Health Care for Tribal Citizens: A Criticism of White v. Califano

Mario Gonzalez

J. Youngblood Henderson

HEALTH CARE FOR TRIBAL CITIZENS: A CRITICISM OF *WHITE V. CALIFANO*

*Mario Gonzalez**
and
*J. Youngblood Henderson***

I. *Introduction*

When Ms. Florence Red Dog was refused emergency inpatient mental health care at the South Dakota Human Services Center after the Oglala Sioux Tribal Court found her to be mentally ill and in need of immediate commitment for her own protection, a great legal controversy arose in the federal courts. The questions presented by the facts were many, but the federal courts narrowed the questions to one: whether the federal government or the state of South Dakota had to pay for emergency inpatient mental health care for an indigent member of the Pine Ridge Indian Reservation.

In justifying its refusal to provide the emergency medical treatment to an Indian resident of the Pine Ridge Indian Reservation, the state argued that federal law and treaties required that South Dakota treat Indian persons residing on an Indian reservation differently from other persons in South Dakota. Moreover, it argued that South Dakota was precluded by federal law and treaty from assuming jurisdiction over the commitment of a mentally ill person residing on the reservation.[1]

The federal government argued that it was not its duty to provide the required medical treatment. It asserted that the action of South Dakota in preventing the emergency medical treatment was a violation of the due process and equal protection clauses of the fourteenth amendment to the Constitution, as well as of Title 27 of the South Dakota Compiled Laws. As a remedy, it sought to enjoin the officials of South Dakota from continuation of such illegal practice.[2] The attorney for the guardian *ad litem* argued the same position.[3]

The district court rejected the federal government's arguments. It held that on the basis of the infringement of tribal government

*J.D., North Dakota, 1972. Tribal Attorney, Oglala Sioux Legal Department, Pine Ridge, S.D.

**Assistant Professor of Law, University of California, Hasting College of Law. Guidance provided by *Ababinilli* and *Ma'heo'o*. Errors of interpretation are mine.

1. White v. Matthews, 420 F. Supp. 882, 884 (D.S.D. 1976).
2. *Id.* at 885.
3. *Id.* at 884.

test[4] the state and counties of South Dakota had no power to initiate or to carry out the commitment of an allegedly mentally ill Indian person who resides on an Indian reservation.[5] The Eighth Circuit Court of Appeals affirmed that decision.[6]

The rationale of the federal courts was that the law imposes no duty on the state of South Dakota to provide mental health care for members of tribes who reside upon an Indian reservation, that federal policy placed responsibility for health care upon the United States and that the federal government cannot evade that responsibility by insisting that the state of South Dakota assume the primary burden for providing health care for Indians residing upon an Indian reservation.[7]

All parties to this litigation stipulated to the facts in the case. Their interpretation of the facts, however, were quite selective. To illustrate this point, neither South Dakota, the Department of Justice, nor the plaintiff's attorney stressed the fact that a tribal extradition order by Judge Steven Hawk authorized the commitment of Florence Red Dog to the nearest facility to protect her as well as other people on and off the reserve. This occurred after the mental hospital had rejected the request of a federal psychiatric social worker. The Attorney General of the state of South Dakota refused to comply with the tribal court order. He stated that state facilities did not have jurisdiction to commit tribal members who are located within the boundaries.[8]

All parties stipulated that the Indian Health Service hospital on Pine Ridge Indian Reservation, which is operated by the federal government, did not have the facilities to treat people with mental illnesses that require civil commitment or physical restraint or who constitute a serious danger to themselves. All parties also stipulated that patient care monies were available to the state facility from the federal government at the contemporary rate. All parties also agreed that the selected state facility was the nearest and was equipped to provide the necessary treatment.[9]

It is difficult to understand how the facts could yield to a determination that South Dakota was justified in not accepting a tribal court order on the grounds that it would infringe on the powers

4. Williams v. Lee, 358 U.S. 217 (1958).
5. White v. Califano, 437 F. Supp. 543 (D.S.D. 1977).
6. 581 F.2d 697 (8th Cir. 1978).
7. *Id.* at 697-98.
8. White v. Califano, 437 F. Supp. 545-47 (D.S.D. 1977).
9. *Id.* at 551-52.

of tribal government over the reservation. If anything, the facts seem to urge that the question of the nature of tribal extradition orders is controlling on the issue of "full faith and credit." On the other hand, from a constitutional perspective, issues arise concerning the right of a public health facility to deny emergency services to an indigent person on the basis of that person's residence and federal-tribal citizenship, and whether eligibility for state-provided services are limited solely to citizens of the state. Also raised is the issue of discrimination in federally subsidized mental health services in South Dakota.

The failure of the federal courts to address these fundamental issues is a failure of the judicial process. Issues were avoided by the lawyers and the courts that in good conscience ought not to have been ignored. They failed to apply familiar principles of law to the facts because the person was a member of an Indian tribe. Instead of looking to federal law in general, the lawyers and judges confined themselves to the concept of tribal sovereignty in federal Indian law. While in most cases this is appropriate, in this case of first instance, it is the writers' position that courts must reason downward from the constitutional relationship between tribes and the United States of America to relevant federal laws addressed in the subject matter, *then* to federal Indian law. Such a method, we suggest, can restore continuity and principles to the federal law respecting the rights of the tribe and its members in allocating governmental powers in American federalism.

II. *Infringement or Extradition?*

The Supreme Court in *Williams v. Lee*[10] held that state courts had no jurisdiction over civil suits for causes of action arising on reservations. The declaration by the Court of the relationship between state jurisdiction and tribal jurisdiction stated that "absent [any] governing Act of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them."[11] Under this test the question of whether a state action infringed on the rights of tribal government is found only if there is no applicable federal statute.

Based on the stipulated facts of the case, it is difficult to conclude that an extradition and commitment order of a tribal court

10. 385 U.S. 217 (1958).
11. *Id.* at 220.

is a grant of jurisdiction to South Dakota that infringed upon the right of tribal government. There was no question raised in the court that the tribal court order was unlawful or that it was an unauthorized delegation of tribal power to the state. Yet, the district court viewed the situation as an issue of utilization of state jurisdiction on a reservation because it failed to consider the refusal of the state to honor the tribal court order. When it did look at the crucial tribal order, it was viewed as a prohibited delegation of civil jurisdiction to South Dakota.[12] The court of appeals ignored these issues totally in reviewing the case.[13]

The analysis of the state procedures for involuntary commitment, resulting from the view that the tribal order was a prohibited delegation of civil jurisdiction to South Dakota, was correct as to the infringement test of *Williams v. Lee*, *supra*. However, it was an unnecessary analysis because there was no absence of federal law governing the situation: treaties, constitutional provisions, the Indian Reorganization Act, and relevant federal law concerning health service delivery were all in existence. More important, however, the state of South Dakota had modified its position in the pleadings to assert that Indians who are physically present within state boundaries are within the jurisdiction of the state. This change in pleading should have crystallized the issues of extradition and full faith and credit between subordinate units of American federalism. It did not.

To understand this conceptual failure by the lawyers and federal courts, we shall first have to provide a conceptual standard to review the court's actions. That standard is the relationship between treaty federalism and constitutional federalism. Second, we shall address the issue of an extradition order of a tribal court under treaty federalism and federal law.

A. *Constitutional Authority and Treaty Federalism*

Federalism in the United States is not always a question of federal and state sovereignty and jurisdiction. While the issue of federal and state sovereignty is the controlling focus of constitutional federalism, there is also the question of treaty federalism in certain states of the Union.

Treaty federalism is an analytical concept that describes the legal relationship between the Indian tribes and the federal and

12. White v. Califano, 437 F. Supp. 543, 550 (D.S.D. 1977).
13. White v. Califano, 581 F.2d 697 (8th Cir. 1978).

state governments. It was created in the legal history of certain territories as the boundaries merged to either tribal reservations or states.[14] In those certain areas, of which the state of South Dakota and the Pine Ridge Reservation are a part, the federal government and the Indian tribes agreed to limit the tribal domain and delineated "permanent" homes for the Sioux tribes.[15]

Subsequently, however, the federal goverment forged the ceded tribal territory into a territory, and then admitted the territory to the Union as a state. In recognizing the territory, which surrounded the tribal reservation as a state, the federal government and the state agreed that the state was not to have any jurisdiction over the territory of the Indian tribes, *i.e.*, tribal reservations.

The Enabling Act for the state of South Dakota states:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . [N]othing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his Tribal relations, and has obtained from the United States or from any person a title . . . save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation.[16]

In the Constitution of South Dakota, Article XXII, called "Compact with the United States," which is irrevocable without the consent of both the United States and the people of South Dakota, states:

> [T]he people inhabiting the State of South Dakota, do agree and declare that we forever disclaim all right and title to lands

14. R. BARSH & J. HENDERSON, THE ROAD, INDIAN TRIBES AND POLITICAL LIBERTY (1980).

15. *See* 1 S.D. COMP. LAWS ANN. §§ 103-20 (1967).

16. *Id.* at §§ 184-85.

> [South Dakota], . . . owned or held by any Indian or Indian tribes; . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his Tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation.[17]

These legal compacts establish the condition of both constitutional federalism and treaty federalism working within what appears administratively as the territory of the state. No mention is made in the federal-state compacts as to tribal jurisdiction. Both are seen as analytically separate, even though in the same geographical boundaries of road maps. Legally they are separate entities united by different instruments to the federal government.

Under these conditions, the questions of jurisdiction have two distinct levels of analysis. The first level is of constitutional federalism, while the second level is treaty federalism. The first question is whether under the constitutional allocation of sovereignty the federal government or state government controls the affairs of Indian tribes. The second question is whether the federal government has limited the inherent sovereignty of the Indian tribes over their citizens, or has delegated some federal authority to the states which is confirmed and ratified by the tribal citizens in accordance with Section 1326 of Title 25 of the United States Code.[18]

The "great outline" of constitutional federalism was expounded by the Supreme Court of the United States in *McCulloch v. Maryland*,[19] while the "great outline" of treaty federalism was expounded by the Court in *Worcester v.*

17. *Id.* at 490. This is the key section of the South Dakota constitution that state defendants urged in their Memorandum in opposing summary judgment (Jan. 17, 1977). They state: "What the United States overlooks is that it withheld from South Dakota the jurisdiction to incarcerate mentally ill reservation Indians. So the United States is left with the argument that, by following the jurisdictional disclaimer imposed by the United States, South Dakota is racially discriminating. . . . All South Dakota laws must be read in light of this federally created and imposed disclaimer." *Id.* at 2.

18. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 80.

19. 17 U.S. (4 Wheat.) 316 (1819).

Georgia.[20] The author of both of these opinions was Chief Justice Marshall, the great federalist.

Under the first level of analysis, the Constitution of the United States is controlling. The Constitution allocated competence and political power to both the federal and state governments. It allocates jurisdiction and competence to either the federal government by its expressed terms, or to the state governments under the ninth and tenth amendments. Article VI of the Constitution established the principle that federal treaties, laws, and statutes are the supreme law of the land.[21] The Executive and the Senate are granted the power to create treaties with the Indian tribes, and Congress is granted the ultimate bounds of competence and power to regulate commerce with the Indian tribes.[22] Under the authority of the Constitution, the states were divested of any competence or jurisdiction they had over Indian affairs under the Articles of Confederation.[23]

The second step of analysis is treaty federalism. The controlling authorities are the treaties and the legislation that implemented the treaties against the background of constitutional federalism. The fundamental principle of treaty federalism is that Indian tribes have inherent sovereignty based on the consent and will of tribal citizens.[24] This power could only be limited by the federal government under the Constitution, as only the federal government could make treaties and regulate the commerce with Indian tribes. Thus, the mechanism of limiting the power of the Oglala Sioux Tribe was by treaties and agreements with the federal government.

Under Article VI of the Constitution, Indian treaties are the supreme law of the land.[25] As the supreme law of the United States, they created a political compact between the federal government and the Oglala Sioux Tribe similar to the position the states held under the Articles of Confederation, as well as defined the basic framework of the rights and obligations of each party under the political alliance.

Once a framework of political compact was agreed upon, both the Oglala Sioux Tribe and the federal government implemented

20. 31 U.S. (6 Pet.) 515 (1832).

21. U.S. CONST. art. 6, § 2.

22. *Id.*, art. 1, § 8, ¶ 3.

23. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-60 (1832).

24. F. COHEN, FEDERAL INDIAN LAW (1958 ed.) [hereinafter cited as FEDERAL INDIAN LAW].

25. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

the obligations. Under the authority of the commerce clause, Congress passed legislation implementing the federal government's promises and obligations to the tribes, and under tribal law the Oglala Sioux Tribe implemented its promises and obligations.

In the earliest decision of the Supreme Court on the relationship of Indian tribes to constitutional federalism, the Court firmly established the framework of treaty federalism. Treaties, according to the Court in *Worcester v. Georgia*, explicitly

> recognize the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protections, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.
>
> To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.
>
> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate.[26]

Similarly, Felix Cohen noted in his *Handbook of Federal Indian Law* that:

> The substantive provisions of the first Indian trade and intercourse act fulfilled some obligations assumed by the United States in treaties with various Indian tribes.
>
> The foregoing analysis of statutes as fulfillments of treaty obligations would probably apply equally to each of the later Indian trade and intercourse acts, culminating in the permanent act of June 30, 1834.[27]

This is not to say, however, that the Oglala Sioux Tribe became an instrument or creation of the federal government. Like all Indian tribes, the Oglala Sioux was a separate sovereignty from the

26. *Id.* at 556-57.

27. FEDERAL INDIAN LAW, *supra* note 24, at 64-70. *See also* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962).

federal government, united by their treaties into a confederation with the United States of America.[28] The Supreme Court has consistently held that the tribal governments are distinct from the federal government.[29]

Rather than federal instrumentalities, the Indian tribes are said to be merely under the protection of the federal government against any encroachments on their rights to tribal sovereignty and government. This concept of dependence and protection is the core of treaty federalism.

In *Worcester v. Georgia*, the Chief Justice clearly established the nature of this "dependence." Dependence, was, he implied, a legal pretense, which tribes had tolerated out of ignorance of its implications:

> Not well acquainted with the exact meaning of the words, nor supposing it to be material whether they were called the subject, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.[30]

Even when a tribe had expressly consented by treaty to have the United States "regulat[e] trade with the Indians, and to manag[e] all their affairs," this cession did not abrogate their right to self-government or sovereignty. As the Chief Justice held:

> To construe the expression . . . into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. . . . It is equally inconceivable that they could have supposed themselves, by a

28. HAINES, THE ROLE OF THE SUPREME COURT IN GOVERNMENT AND POLITICS, 1789-1835 (1960), at 90-98.

29. United States v. Wheeler, 435 U.S. 313 (1978); United States v. Mazurie, 419 U.S. 544 (1975); Mescalero Apache Tribes v. Jones, 411 U.S. 145 (1973); Talton v. Mayes, 163 U.S. 376 (1895); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

30. 31 U.S. (6 Pet.) 515, 546-47 (1832).

> phrase slipped into an article on another and most interesting subject, to have devested [*sic*] themselves of the right of self-government on subjects not connected with trade.[31]

Dependence, therefore, is merely descriptive of the federal government's legal and political obligation to protect tribal governments from foreign and internal encroachments on their treaty rights and inherent sovereignty. "This relation was that of a nation claiming and receiving the protection of one more powerful," the Court concluded in *Worcester*, "not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[32] Therefore, "[p]rotection does not imply the destruction of the protected."[33]

The states, under the controlling principles of treaty federalism, have no original jurisdiction over Indian tribes. They have neither civil nor criminal jurisdiction. In *Worcester* the Supreme Court summed up this position when it stated, "The treaties and laws of the United States contemplate the Indian territory as completely spearated from the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."[34] Whatever jurisdiction the states could possess over Indian tribes had to be specifically delegated to them from the federal government.[35] Accordingly, absent such specific delegation of federal jurisdiction to the states, coupled with the consent of the involved tribe or tribes, either the federal government or the tribal government has such jurisdiction. This

31. *Id.* at 554.

32. *Id.* at 555.

33. *Id.* at 552.

34. *Id.* at 558. *See* United States v. Kagama, 118 U.S. 375 (1886); FEDERAL INDIAN LAW, *supra* note 24, at 116-17.

35. *See* FEDERAL INDIAN LAW, *supra* note 24, at 117. *See also, e.g.*, Pub. L. 280, 25 U.S.C. §§ 1321 *et seq.* This is a thorny constitutional problem. Whether the federal government can delegate its constitutional power to regulate commerce to the states is an unresolved question. The Supreme Court has not yet spoken to this issue. The position of the tribe is that it cannot. This is an issue that was originally resolved by the ratification of the Constitution by the thirteen state conventions, where the states firmly delegated their power over Indian tribes to the federal government. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). Only an amendment to the Constitution could effect any new allocation of political power under the Constitution.

It should be remembered that state representatives establish federal law and policy. While there is a distinction between federal and state interests in constitutional federalism, the lack of representation of tribal interests in Congress creates a merger between federal and state interests in every congressional law.

concept is the foundation of the "plenary power of Congress over Indian tribes" or "federal preemption."[36]

Similar to the principles of constitutional federalism, the essence of treaty federalism is the allocation of law-making and law-applying competence between the federal and tribal governments on the reservations. This allocation of competence or jurisdiction, *i.e.*, the power of the legislature and the courts to create and affect legal relationships with respect to persons or property in such a way as will be given recognition in courts of another state or federal government, in principle and application, respects and effectively accommodates both tribal and federal interests.[37] Similar to the position of the state law in constitutional federalism, the displacement of tribal law by federal law is interstitial. Federal law and policy begins with respect for tribal sovereignty, builds upon the concept, and takes account of federal and state interests before passage of any limitations on tribal sovereignty.

The process of accommodating the interest of constitutional federalism, *i.e.*, state and federal interest, with the framework and interests of treaty federalism, always involves a federal statute or a court's general acknowledgment of tribal power and specific delineations of when the tribes cannot exercise law-making and law-applying competence, as well as when particular state and federal interests can limit tribal power. In the modern federal statutory scheme, the accommodation is acknowledged in the Indian Reorganization Act of June 18, 1934,[38] delineated by the Indian Civil Rights Act of 1968,[39] and supplemented by the Indian Self-Determination Act of 1975.[40]

In *United States v. Wheeler,*[41] a unanimous Court reaffirmed that the controlling law between tribal and federal jurisdiction, interests, and power is the inherent theory of tribal powers and specific limitation that Congress has placed on the exercise of that power. Tribal powers are not delegated power from the federal government but are only limited by specific treaty obliga-

36. Bryan v. Itasca County, 426 U.S. 373 (1976); FEDERAL INDIAN LAW, *supra* note 24, at 119-21.

37. See the last paragraph of note 35 *supra.*

38. 25 U.S.C. § 476 (1970).

39. 25 U.S.C. §§ 1301 *et seq.*

40. 25 U.S.C. §§ 450 *et seq.*

41. 435 U.S. 313 (1978).

tions and stipulations and specific congressional limitations of tribal power.[42]

In *United States v. Wheeler*, the Court also emphasized that in matters that "involve only the relations among members of a tribe," the power of self-government is necessarily greater than the power to regulate the affairs of non-Indians. The Court also noted that both the Indian Reorganization Act of 1934, *supra*, and the Indian Civil Rights Act of 1968, *supra*, merely affirmed the inherent sovereignty of the tribes. These acts did not create the source of tribal government.

B. *The Extradition Order of the Tribal Court*

As a principle of treaty federalism, the Oglala Sioux Tribe under the 1868 Treaty of Fort Laramie has the sole right to inter-sovereign extradition. The source of this authority is the first article of the 1868 Treaty of Fort Laramie, which provides:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the [tribe] herein named solemnly agree that they will, on proof made to their agent and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished. . . .[43]

The judicial interpretation of an identical treaty provision in *State ex rel. Merrill v. Turtle*[44] established the principles that (1) the Indian Reorganization Act substituted the Indian tribe, *i.e.*, the tribal courts, for the federal agent in terms of authority on the reservation; (2) the state does not have extradition jurisdiction over Indian residents on the tribal reservation (a Cheyenne Indian on the Navajo Reservation) unless (a) it can point to a specific congressional statute that authorizes such delegation, or (b) a valid order has been entered by the tribal court; and (3) absent either a tribal court order or specific delegation, the states cannot assume or share in the extradition proceedings without infringing on the right of tribal self-government of the Indian tribe on the tribal reservations.[45]

42. *Id.*

43. Incorporated into 1 S.D. COMP. LAWS §§ 104-20 (1967).

44. 413 F.2d 683 (9th Cir. 1969).

45. *Id. See also* Extradition of Indian Reservations of Indian Fugitives, 57 I.D. 344 (1941).

Under this judicial interpretation of tribal power, the tribal courts are the sole courts that have the civil power to bind the residents personally to obedience. It is the sole court that has sufficient "contacts" and subject matter jurisdiction over residents to order their extradition to federal or state authorities.

The state of South Dakota has no subject matter jurisdiction or *in personam* jurisdiction on tribal reservations. Only a tribal court can order a reservation resident extradited to the jurisdiction of the state. Once a tribal citizen is physically present in the state, then the state has *in personam* jurisdiction.

The district court lost sight of this principle in its original holding, when it held that the state had no jurisdiction over tribal citizens.[46] Later, it attempted to correct this holding and concluded that the state procedures for admission to the county health facility would infringe on tribal sovereignty and self-government.[47] The tribe fully agrees. But a crucial fact is ignored by the district court. This crucial fact is that the state should respect and honor the tribal procedures as a matter of "full faith and credit" in civil matters. Otherwise, there is no method under the current law to obtain jurisdiction over a person on a tribal reservation.

The central case on this point is *United States v. Cox*.[48] In *Cox* the Court concluded:

> Th[e Indian] tribes are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the federal government as a territory did in its second grade of government, under the Ordinance of 1787 [under the Articles of Confederation]. Such territory passed its own laws, subject to the approval of Congress, and its inhabitants were subject to the Constitution and Acts of Congress. The principal difference consists in the fact that the [Indian tribes] enact their own laws [under the restriction of treaties and acts of Congress]. . . . This, however, is no reason why the laws and proceedings of the [Indian tribes], so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory . . . under our Constitution and laws.[49]

46. White v. Califano, 437 F. Supp. 543 (D.S.D. 1977).
47. *Id.*
48. 59 U.S. (18 How.) 100 (1855).
49. *Id.* at 103.

A more recent case is *Jim v. CIT Financial Services Corp.*[50] In this case, the Supreme Court of New Mexico rejected the repossession of a pickup truck from the Navajo Reservation as legal because the agents of the finance corporation failed to file an action of replevin with the appropriate tribal court. In reaching its conclusion, the court stated:

> We agree with the dissenting opinion of Judge Hernandez insofar as he held that the laws of the Navajo Tribe of Indians are entitled by Federal law, 28 U.S.C. § 1738, to full faith and credit in the Courts of New Mexico because the Navajo Nation is a "territory" within the meaning of that statute.[51]

The court also recognized that a state need not subordinate its own statutory policy to a conflicting public act of another sovereign.

The tribe agreed with the reasoning of the New Mexico Supreme Court and urged this as controlling law. In *White v. Califano*,[52] a county medical facility rejected a tribal court order for commitment of a tribal citizen in a dangerous mental state. The tribal court did not request a waiver of state statutes and standards; it merely authorized the involuntary commitment and extradition to obtain medical care of a tribal citizen. The county could have applied the state procedure after receipt of the patient. There is no necessity for the state to intrude where the tribal judiciary has the sole power and duty to maintain orderly relations among its citizens under the modern federal statutory accommodation.[53] From this perspective, the central question presented is not jurisdiction of either the state or tribe but a matter of intergovernmental cooperation.

The position of the state on this issue is a source of confusion. In its initial pleadings, it took the position that tribal citizens residing on the reservation were not subject to state court jurisdiction, even if physically present.[54] In later pleadings, it modified its position and said that tribal citizens are within state jurisdiction if physically present off the reservation at the time the petition is filed.[55] Nevertheless, from a reading of the state's

50. 533 P.2d 751 (N.M. 1975).
51. *Id.* at 752.
52. 437 F. Supp. 543 (D.S.D. 1977).
53. 25 U.S.C. § 476 (1970).
54. Government's Brief at 16, n.52.
55. *Id.* at 16. n.53.

Memorandum and the two district court opinions, *White v. Matthews*[56] and *White v. Califano*,[57] the state continued to argue its original position that this was an "on the reservation issue" over which the state had no jurisdiction. This theory is in conflict with the facts. This admission should have been dispositive of the issue of jurisdiction in the case.

Both the actions of the county board and the Attorney General raise a novel issue. They contend that the state of South Dakota does not have *in personam* jurisdiction over tribal residents in the state because they do not have subject matter jurisdiction over conduct of tribal citizens on tribal reservations. If this is still the position of the state of South Dakota, then the Oglala Sioux Tribe can argue the converse position: that the state has no criminal and civil jurisdiction over tribal citizens in the ceded land called South Dakota.

In rejecting any responsibility for forcing Florence Red Dog to remain on the reservation by confusing *in personam* jurisdiction for subject matter jurisdiction, the state argued in its Memorandum that:

> Like the Plaintiff, Federal Defendants overlook the federally imposed disclaimer of jurisdiction over Indian activities on Indian reservations. The Fall River County Board of Mental Illness, as a creation of the South Dakota legislature, can have no more jurisdiction over Indian activities of the Pine Ridge Indian Reservation than the legislature possessed pursuant to the State Constitution.[58]

The foregoing statement is correct as a principle of constitutional federalism, but the facts simply do not support its application.

The state maintains this position even when a tribal citizen is physically present in the state (outside the reservation). This is the original position of the state that created this litigation. This must apply to criminal as well as to civil jurisdiction. "All South Dakota laws," according to the Attorney General of South Dakota in his Memorandum to the district court, "must be read in light of this federally created and imposed disclaimer."[59]

56. 420 F. Supp. 882 (D.S.D. 1976).
57. 437 F. Supp. 543 (D.S.D. 1977).
58. Government's Brief at 2.
59. *Id.*

The state cannot reject the delivery of medical and mental care to tribal citizens because of their place of residence, on one hand, and then on the other hand, arrest and incarcerate tribal citizens for criminal violations when they are physically present in the state. The disclaimer of jurisdiction in the South Dakota constitution must be applied uniformly and equally.[60]

In terms of financial burden, the incarceration of tribal residents in the prison system of South Dakota is more costly to the state than the provision of medical services to indigent tribal citizens where the federal government cannot provide medical services.

Moreover, the state's position may have some logical consistency with the recent holding in *Oliphant v. Suquamish Indian Tribe*.[61] In *Oliphant* the Court held that the criminal jurisdiction of the tribal courts is limited only to tribal citizens or Indian residents, but does not extend to state citizens. By converse logic, based on the same policy the Court expressed in *Oliphant,* about the foreign legal culture and racial juries, a court could hold that state courts only have criminal jurisdiction over state citizens and not over tribal citizens. If this is the logic of the state of South Dakota, then the Oglala Sioux Tribe is in full agreement. This position appears to be consistent with comments of the Attorney General of South Dakota, as quoted in a newspaper.[62]

As an issue of federalism, however, this position may be repugnant to the court or Congress. Judging by the amended judgment of the district court, entered on October 17, 1977, this would appear to be the situation. Hence, the question is one of "federalism," not residence. This issue is whether a member state of the United States can ignore a just and proper tribal court order for involuntary commitment, where the tribal court is the only authorized court under federal law that can commit the federal and tribal citizens within its jurisdiction. Alternatively, it is a question of whether a member state of the United States can reject a request by the federal government under authority of a tribal court for involuntary commitment, where the federal government has custody of the federal and tribal citizen. The

60. *See* S.D. CONST. art. 22.

61. 435 U.S. 191 (1978).

62. Rapid City Journal, Mar. 9, 1978, at 2. The paper reported that the Attorney General stated, "That test case which went to the United States Supreme Court yesterday (Monday) was a test case from the State of Washington, but it was basically funded by the State of South Dakota. That was really our lawsuit." He also stated that about $20,000 was spent in preparation of the brief by the state of South Dakota.

answer these writers urge is that as principles of federal citizenship or treaty federalism, there is no jurisdictional bar to a tribal extradition and commitment order to a state or county medical facility in the absence of federal facilities.

We can see no difference between involuntary commitment to a federal facility or a state facility. Neither a federal nor a state facility are part of tribal government or tribal jurisdiction. It is an odd argument of federalism that holds that an Indian can be committed to a federal institution on the authority of a tribal court order, but cannot be committed to a state institution on such an order. The Court has already determined that in terms of law and order, there is a distinction between tribal interests and federal interests.[63] It would necessarily follow that there is also a distinction between tribal interests and state interests.

The district court decided that such intergovernmental cooperation, which is common in constitutional federalism, is violative of the Supreme Court's holding in *Kennerly v. District Court.*[64] Our position is that this case is quite distinguishable from the instant case. In *Kennerly* the question was of a tribal council vesting in the courts of a state jurisdiction over civil matters. The Court held that this was impermissible under the Indian Civil Rights Act of 1968 unless a majority of the tribal citizens voted for such transfer of jurisdiction.[65] In the instant case, the tribal court is not transferring jurisdiction to the state but rather is only authorizing the extradition of a tribal citizen to a state facility under the custody of the federal government for medical treatment. It is not a permanent transfer or delegation of subject matter jurisdiction but merely consenting to the intersovereignty extradition for a specific and humane purpose. In short, it was merely an exercise of judicial power that Congress has acknowledged is proper for tribal government in both the Indian Reorganization Act and in accord with the process established in the Indian Civil Rights Act of 1968.

III. *The Citizenship Issue*

Both the federal government and the guardian *ad litem* argued that Florence Red Dog, as a state citizen, had a right to medical services in a state facility under the privileges and immunity clause of the fourteenth amendment to the Constitution. This was

63. United States v. Wheeler, 435 U.S. 313 (1978).
64. 400 U.S. 423 (1970).
65. *Id.* at 483.

in rebuttal to the infringement argument of South Dakota. For some reason they failed to utilize an extradition argument. The Oglala Sioux Tribe responded that the argument of the federal government was an infringement on tribal government more than state jurisdiction was.

The position of the tribe, on a practical level, was that it does not seem responsible governmental practice to allow tribal citizens to wander off into state jurisdiction without authority from tribal courts. While it acknowledges that the tribal members can voluntarily leave the reservation and take up residence anywhere in the United States without interference from tribal government, involuntary commitment of a tribal member must be reviewed by tribal court. The tribe's theory is that if the tribal government did not take direct responsibility for extradition of residents on the reserve, it would be possible for either the federal or the state government to commit tribal citizens to mental institutions against their will.

Moreover, the Oglala Sioux Tribe argued that as a matter of treaty federalism and federal law, its tribal citizens were federal citizens; as federal citizens they were entitled to medical care in county public health facilities as derivative of the right to travel. They also argued that this should have been the principle argued by the federal government.

The federal courts declined to face up to their argument. The authors believe that as a matter of treaty federalism, constitutional law, and federal law, the position of the Oglala Sioux Tribe is correct. We will review the historical development of federal citizenship for the Oglala people, analyze the right of federal citizens to medical care under the equal protection clause of the fourteenth amendment, examine the proposition that tribal citizens *must* be state citizens, and conclude by examining these issues as they intersect with the infringement test the federal courts followed. Through this process, we can determine the cogency of the federal government's arguments and the court's decision.

A. *The Historical Development of Federal Citizenship for Tribal Citizens*

Originally tribal citizens were not citizens of either the federal government or state governments. This position was illustrated in 1856 in an opinion of the Attorney General of the United States to the Secretary of the Interior on the issue of Indian citizenship. The Attorney General stated: "The fact, therefore, that Indians

are born in this country does not make them citizens of the United States."[66] Moreover, the Attorney General pointed out that to become a citizen of the United States, an Indian must cease to be a member of his tribe and must throw off the privileges of tribal membership. This 1856 opinion refers to previous Attorney General opinions dating as far back as 1831 for this legal principle.[67] The Attorney General also established the theory that when a non-Indian voluntarily joins himself to a tribe of Indians, he loses his United States citizenship.[68]

This legal situation was not changed by the adoption of the fourteenth amendment. The amendment was interpreted as not including members of the Indian tribes owing direct allegiance to their several tribes.[69] The Supreme Court of the United States has continually affirmed this theory.[70] The only manner of gaining United States citizenship was to renounce tribal citizenship. However, Congress had to accept such expatriation before it became effective.[71] Treaties and special congressional statutes have adopted the same principles of an individual tribal citizen gaining United States citizenship.[72] The statutory formula of this period seemed to rest on the assumed incompatibility between tribal citizenship and United States citizenship.[73] Under those treaty provisions and statutes, American citizenship was granted to tribal citizens in exchange for abandoning tribal allegiance, tribal property rights, and federal services.

Tribal resistance to this formula of obtaining citizenship was extreme. From the beginning the efforts of the federal government to exchange tribal citizenship for federal citizenship was unwelcome and strongly opposed by the tribal citizens. This attitude is shown in a report prepared for Congress in 1915. The report declared that: "The Indian (except in rare individual cases) does not desire citizenship."[74] The main objection to the federal

66. 70 OP. ATT'Y GEN. (1856), at 746.

67. *Id.*

68. *Id.*

69. S. REP. NO. 268, Effect of the Fourteenth Amendment Upon Indian Tribes, 41st Cong., 3d Sess. (1870).

70. *See* Elk v. Wilkins, 112 U.S. 94 (1884); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898); Ozawa v. United States 260 U.S. 178, 195-96 (1922).

71. Elk v. Wilkins, 112 U.S. 94 (1884); United States v. Holliday, 70 U.S. (3 Wall.) 406 (1866).

72. *See* FEDERAL INDIAN LAW, *supra* note 24, at 153-54.

73. *Id.* at 154.

74. *Id.* at 155.

government formula was the Indians' fear of the termination of tribal citizenship and the right to tribal government.[75]

This position was modified in 1924, when Congress granted tribal citizens the right to become American citizens without the loss of tribal citizenship. By the Act of Congress of June 2, 1924, all Indians born within the territorial limits of the United States were made national citizens.[76] The Act specifically stated: "All non-citizen Indians born within the territorial limits of the United States be, and they are hereby declared to be citizens of the United States."[77] The grant of Congress was limited to federal citizenship.

That the new status of Indians as federal or national citizens of the United States did not affect their status as tribal citizens, or the rights and incidents of tribal citizens, is clear from the face of the Act: "The granting of such citizenship shall not in any manner impair or otherwise affect the rights of any Indian to tribal or other property."[78] The rights of tribal citizenship were clearly preserved by Congress for the Indians.[79]

Presumably, Congress could have granted the right to choose between tribal and state citizenship, but the Indian Citizenship Act of 1924 did not expressly grant this possibility. The clear intent of Congress was only to offer the tribal citizens the rights and privileges of federal citizenship, rather than to force both federal and state citizenship upon them.

There was no discussion of any basic issue of the bill on the floor of Congress. The Committee Reports are of little value. The House Report illustrates that the phrase "full citizenship" was re-

75. *Id.*

76. 43 Stat. 253 (1924), 8 U.S.C. § 3 (1926).

77. *Id.*

78. *Id.*

79. There is no doubt that tribal citizenship is a property right of members of the tribe. Since the right to tribal membership is the crux of tribal property rights under current law, this status as a member of the polity of the tribe is the source of property rights. Federal citizenship and tribal citizenship are not incompatible. *See* United States v. Nice, 241 U.S. 591 (1916) (discusses citizenship and wardship under the Allotment Act); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866) (Court held that even a grant of citizenship by the state of Minnesota to an Indian did not alter his special status as a tribal member.). *See* Indian Territory Naturalization Act of 1890. This Act clarifies the nature of the second sentence of the Indian Citizenship Act. The Naturalization Act of 1890 states "[t]hat the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong." 26 Stat. 81, 99-100, § 43.

jected for the phrase "be a citizen." The purpose or intent of the bill was stated as follows:

> At the present it is very difficult for an Indian to obtain citizenship without either being allotted and getting a patent in fee simple, or leaving the reservation and taking up his residence apart from any tribe of Indians. This legislation will bridge the present gap and provide a means whereby an Indian may be given citizenship without reference to the question of land tenure or the place of his residence. . . .[80]

The Act, entitled "To Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians," was a reversal of the policy of granting citizenship only to Indians expatriating themselves from the tribe or giving up tribal residency and rights under tribal land tenure. The Indian Citizenship Act, as it is now called, did not force federal citizenship on the tribal citizens. As a fundamental priniciple of law, citizenship could only be offered to the individual citizens of the tribe; it could not be imposed arbitrarily without the consent of the individual regardless of race or prior political allegiance. In *MacKenzie v. Hare*,[81] the Court held that: "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."[82]

The thrust of the intent of Congress, as well as the wording of the Indian Citizenship Act of 1924, is illustrated by comparing the wording of the fourteenth amendment to the Indian Citizenship Act. This comparison is also important to illustrate that the fourteenth amendment did not convey federal or state citizenship to tribal Indians.

The central purpose of the fourteenth amendment was to convey both federal and state citizenship on the "inferior and subject condition" of the black people under the common law of the United States.[83] In this case, Chief Justice Taney also explained that Indian governments were foreign governments, to distinguish

80. H. REP. No. 222, 68th Cong., 1st Sess. (1924).

81. 239 U.S. 299 (1915).

82. *Id.* at 311. *See also* Kennedy v. Mendoza-Martinez, 377 U.S. 144, 159 n.10 (1963); Kettner, *The Development of American Citizenship in the Revolutionary Era: The Ideal of Volitional Allegiance*, 18 AM. J. LEGAL HISTORY 208 (1974); Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 ILL. L. REV. (1926) (argues for compulsory citizenship, but unable to find legal support for the concept in law).

83. Dred Scott v. Sandford, 260 U.S. (19 How.) 293 (1856).

Indians from black people.[84] The framers of the fourteenth amendment intended to accomplish the task of incorporating the black people into the political society of the United States by an act of Congress, but finally realized that an amendment to the Constitution was the only sure way to guarantee such a result because of the history of slavery in America.

The first attempt to grant the black people a right of citizenship was in the provisions of the Civil Rights Act of 1866. This Act provided: "[A]ll persons born in the United States and subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, . . . shall have the same rights, in every state and territory in the United States. . . ."[85] Notice that this statute only conferred *federal* citizenship on black people.[86] Notice also the phrase that "Indians not taxed" were excluded from this Act. "Indians not taxed" is also a constitutional category excluded from political representation in the House of Representatives.[87] This provision had been interpreted to mean that Indians in a tribal relationship, *i.e.*, tribal citizens,[88] were not a part of the political community of the United States or the

84. *Id.* at 404. *See also* Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1867); J. TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 183-86, 208 (1951).

85. 14 Stat. 27, ch. 31 § 1, reenacted in Civil Rights Act of 1870, 16 Stat. 144, ch. 114, § 18, 42 U.S.C. § 1981 (1970).

86. This is a touchy constitutional issue, *i.e.*, whether an act of Congress can modify the status of blacks or Indians in the Constitution. In contrast to immigrants, the Constitution clearly excepted out the black people and "Indians not taxed" from membership and equal political status in the federal government. Hence, whether an act of Congress or a constitutional amendment is necessary to provide both federal and state citizenship is an open question. It should be noted that in Ozawa v. United States, 260 U.S. 178, 195-96 (1922), the Court suggested that neither blacks nor tribal Indians could be naturalized. It is the position of the Oglala Sioux Tribe that only an amendment to the Constitution, coupled with the consent of the tribe, could grant state citizenship to tribal members. Some commentators have sought to extract a theory of naturalization for Indians out of the wording of the Nationality Act of Oct. 14, 1940. The Act declared: "[t]he right to become naturalized citizens . . . shall extend only to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere." While it could be argued that this Act was directed to Indians, the vague wording, however, would urge another explanation, *i.e.*, that it allowed members of other than Indian background, *e.g.*, Mexicans and Canadians, to immigrate to the United States and become citizens.

87. U.S. CONST. art. 1, § 2, cl. 3.

88. *See* S. REP. No. 268, Effect of the Fourteenth Amendment upon Indian Tribes, 41st Cong., 3d Sess. (1870).

states or territories from which their reservations were exempted.[89]

To ensure both federal and state or territory citizenship to the black people, the fourteenth amendment was passed. It stated: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[90] The amendment was seen as a more secure form of political guarantee of citizenship than an act, which could be modified at any time by future congressional action.

By comparing the Indian Citizenship Act of 1924, which is still only an act of Congress, not a constitutional amendment, to the fourteenth amendment, the difference between tribal citizens and state citizens can be emphasized. In the Indian Citizenship Act, like the Civil Rights Act of 1866, only the citizenship of the United States is granted. There is in Indian legislation no similar provision to that found in the fourteenth amendment that grants tribal citizens the citizenship "of the State wherein they reside."[91]

In place of granting citizenship similar to the fourteenth amendment, Congress reserved the right of Indians to tribal rights and property.[92] Since the Indian Citizenship Act is subsequent to the passage of the fourteenth amendment, it is clear that Congress knew how to grant state citizenship to people in an inferior status if it so desired. There are no debates on the Indian Citizenship Act, thus the intent of Congress must be derived from its wording. It is clear from the wording of the statute that the Indian Citizenship Act did not intend that Indians on tribal reservations become state citizens. Furthermore, it is problematic whether Congress had the authority to naturalize tribal Indians to state citizenship without a constitutional amendment.[93]

89. FEDERAL INDIAN LAW, *supra* note 24, suggested that Indians automatically became citizens of the state of their residence through the fourteenth amendment. *Id.* at 156. This conclusion is in direct conflict with the intent and purpose of Congress as expressed in the Senate Report. It must be remembered in such conflicts that FEDERAL INDIAN LAW is an unofficial treatise of Indian law prepared by the federal government, which disclaims responsibility for every generalization and disclaims any legal force or nature of a cyclopedia. *Id.* at 20, 26. Instead, it states the authority is on the actual decision of the court's and statute's legislative history and wording. *Id.*

90. U.S. CONST. amend. 14, § 1.

91. *Id.*

92. Indian Citizenship Act, 43 Stat. 253 (1924).

93. Ozawa v. United States, 260 U.S. 178, 195-96 (1922); Elk v. Wilkins, 112 U.S. 94 (1884); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1866).

Once Indians became federal citizens in 1924, however, the privileges and immunity clause of the fourteenth amendment and the fifteenth amendment granted tribal citizens certain protections against the states. The privileges and immunity clause, which is relevant to the instant case, states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.[94]

As Justice Miller observed about the privileges and immunity clause in the *Slaughter-House Cases*[95]:

> [T]he distinction between citizenship of the United States and citizenship of a state is clearly recognized and established [by the] first section of the [fourteenth] amendment. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.
>
> It is quite clear, then, that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.[96]

This clause did not apply to tribal Indians until the Indian Citizenship Act of 1924, and then it granted them rights within the states, but not citizenship while on the tribal reservation. It is clear, however, that as federal citizens the states cannot abridge the privileges of federal citizens nor deprive tribal citizens of the equal protection of the law.

B. *The Rights of Federal Citizens to Medical Care*

Shapiro v. Thompson[97] is one of the profoundly seminal decisions of the Supreme Court. In *Shapiro v. Thompson* the

94. U.S. CONST. amend. 14, § 1.
95. 83 U.S. (16 Wall.) 36 (1873).
96. *Id.* at 39.
97. 394 U.S. 618 (1969).

Supreme Court applied the right to travel doctrine with broader scope than ever before and insured a mobile population the right to vital government benefits and privileges in the states to which they migrate. Under the doctrine of *Shapiro* any federal citizen can travel to any part of this land, free from any restrictions on travel and transfer. Four basic principles emerge from *Shapiro*: (1) A state may not deny welfare benefits to residents or transients of less than a year's duration; such a discrimination against new residents is invidious and denies equal protection of the law. (2) A one-year waiting period device is well suited to discourage the influx of poor families in need of assistance, "but the purpose of inhibiting migration by needy persons into the state is constitutionally impermissible."[98] (3) "[A] mere showing of a rational relationship between the waiting period" and legitimate state objectives is not enough to justify such a classification; a compelling governmental interest must be shown.[99] (4) The state may not condition on residence a denial of public benefits "upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[100]

From this nucleus, much case law had developed in a brief period. The same principles have been applied to health care restrictions and the hospitalization of mental patients.[101] In *Memorial Hospital*[102] the Court ruled that a state law requiring counties to deny free nonemergency medical care to recently arrived, indigent residents or transients failed to satisfy a compelling governmental interest. As a result the state law individiously discriminated against the indigent and denied the equal protection of the law.

Appellant Henry Evaro, an indigent, moved in June, 1971, from New Mexico to Maricopa County, Arizona. In July he had a severe respiratory ailment and was sent to Memorial Hospital, a private, nonprofit community hospital. Pursuant to an Arizona statute requiring county governments to provide free medical care to indigents, the hospital requested that Evaro be transferred to a public facility and claimed reimbursement for the care it had provided him. Relying on a one-year residency requirement con-

98. *Id.* at 629.
99. *Id.* at 634.
100. *Id.* at 627.
101. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Vaughan v. Bower, 313 F. Supp. 37, *aff'd mem.*, 400 U.S. 844 (1970).
102. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

tained in a different statute, Maricopa County rejected both requests. Both Memorial Hospital and Evaro sued in state court to overturn the county's refusal. The trial court held that the twelve-month residency requirement violated the equal protection clause, but the Arizona Supreme Court found the statutory scheme constitutional. The United States Supreme Court reversed.

Justice Marshall's opinion for the majority rejected the notion that either an intent to deter travel or actual deterrence was necessary to trigger the strict scrutiny test of the state law.[103] Rather, it determined that such intensive review was appropriate whenever the denial of a benefit to new persons to the state "penalized" exercise of the right to travel and settle in a new state.[104] Although the Court cautioned that withholding some services from recent immigrants or transients would not constitute a "penalty," it found that refusing them nonemergency medical care—"a basic necessity of life"—required intensive judicial review.[105] Since neither the administrative nor fiscal interest asserted by the state could withstand such strict scrutiny, the Court struck down the statute.[106]

The core question in the *Red Dog* case[107] is whether a state could discriminate against residents of an Indian tribal reservation by denying them the health care it would allow to persons who had recently migrated to the state on the theory of lack of jurisdiction.

Florence Red Dog is a citizen of the United States of America. She is also a citizen and resident of the Oglala Sioux Tribe which is located on the borders of South Dakota and Nebraska. In the trial court, it was alleged that because of her residence on the Pine Ridge Indian Reservation, the federally subsidized county public health facility had no jurisdiction to provide medical services to her, even though the Indian Public Health Service offered to pay the ordinary rate for her medical care.

The position of the Oglala Sioux Tribe was that the fact that she is a citizen and resident of the tribe is not controlling in determining her right to medical care, either in a federally subsidized or nonfederally subsidized public hospital of a county or state. While her citizenship and residence is a crucial fact in determin-

103. *Id.* at 257-58.
104. *Id.* at 256-59.
105. *Id.* at 259-61.
106. *Id.* at 262-69.
107. White v. Califano, 437 F. Supp. 545 (D.S.D. 1977).

ing which government, tribal or state, has the right to commit her for mental care and treatment, these factors should not be determinative of the issue of *where* she may receive such care and treatment.

The issue of state or tribal citizenship, which occupied so much time and attention in the tribal court and in arguments on appeal, ignored the higher citizenship that unites tribal and state citizens into the citizens of the United States of America. This narrow focus was not justified under the Constitution or the laws of the United States.

C. *Presumptions of State Citizenship*

In a series of opinions over the past few years, the lower courts have misunderstood the holding of *Elk v. Wilkins*[108] and the meaning of the Indian Citizenship Act of 1924 in relationship to the fourteenth amendment. These cases usually deal with voting rights of tribal residents in state elections and hold that under the fourteenth amendment tribal citizens are entitled to vote because they are United States citizens.

Most members of the legal profession presume that Indians are citizens of the state where their tribal reservation is located. Recently, some have attempted to prove this presumption through the use of the fourteenth amendment of the United States Constitution. Many lower courts have ignored the exact wording and legislative history of the Indian Citizenship Act and the holding of the Supreme Court in *Elk v. Wilkins*,[109] and have held that the fourteenth amendment did make the tribal residents into state citizens.

At the same time that these presumptions were being taken for law, the Supreme Court had developed a doctrine under the due process clause of the fifth and fourteenth amendments dealing with what has been termed "irrebuttable presumptions" or "conclusive presumptions."[110] These cases impose a different constitutional requirement on certain interpretations of statutory classifications. The statutes involved in these cases contain rules denying a benefit or placing a burden on all individuals based on a presumed characteristic. For example, a statute that provides that if fact "A" exists, fact "B" is also presumed to be present,

108. 112 U.S. 94 (1884).

109. *Id.*

110. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973).

contains the prohibited irrebuttable presumption. The presumed characteristic is interpreted as the "basic fact." A recent Supreme Court case has held that if it is not "necessarily or universally true in fact" that the basic fact implies the presumed fact, then the statute's irrebutable presumption denies due process of law.[111]

The near-perfect correspondence between the basic fact and the presumed fact demanded by the Court appears to impose even greater scrutiny of statutory classification than the strict scrutiny test of equal protection cases involving fundamental interests or suspect classifications.[112] Moreover, the court's concern with the accuracy of statutory classification bears more resemblance to the legislative means and ends associated with the equal protection clause than to the procedural aspect of due process.[113] The usual relief is to award a hearing to the aggrieved party, which conforms more to the popular notion of due process.

In practice, the Court has applied this as a rule of construction to invalidate only those statutes where the presumed facts infringed on a fairly fundamental interest.[114] Employing this limited procedural method of statutory interpretation and classification against state action, the Court can decide that the state interest was insufficiently compelling to justify a conclusive presumption in a statutory scheme and hold that due process required an individual hearing to allow a person to rebut the presumption, while not expanding the categories of fundamental interest or suspect classification.[115] Under this judicial process the Court could remand the statute to the state legislature to redraft the classification more narrowly.[116] In sum, the conclusive presumption analysis proscribes certain laws and regulations that place individuals or groups in disadvantageous categories based on legal presumptions but does not reach the question of whether the underlying categorization is itself unconstitutional.

In terms of asserting state citizenship for tribal residents, courts have held that if tribal citizens are citizens of the United States they are also citizens of the states. This is almost identical to the

111. Vlandis v. Kline, 412 U.S. 441 (1973).

112. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 519 (1973).

113. *Id.*

114. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (right to procreate, sex as a suspect class); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (wealth as a suspect class); Stanley v. Illinois, 405 U.S. 645 (1972) (sex as a suspect class).

115. *See* Gunther, *Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

116. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

proscribed interpretations addressed by the Supreme Court in its analysis of conclusive presumptions. It is also constitutional federalism with treaty federalism.

An example of this leap in logic is *Goodluck v. Apache County.*[117] In *Goodluck* the district court assumed that the first sentence in the fourteenth amendment applied to Indians.[118] At no time did the court look at the legislative history of the Indian Citizenship Act of 1924, but found that 8 U.S.C. § 1401(a)(2) was dispositive. Moreover, the court attempted to distinguish *Elk v. Wilkins*[119] and the Report of the Judiciary Committee on the theory that Congress overruled the Supreme Court when it enacted 8 U.S.C. § 1401(a)(2).[120]

The logic of the district court was that:

> Since Congress did act constitutionally in granting citizenship to reservation Indians, and since, under the Fourteenth Amendment, the Indians are also citizens of Arizona, and since the Arizona Constitution allows the Indians to vote, the defendants' equal protection and due process arguments appear to be premature for adjudication.[121]

The court failed, however, to point out that only federal citizenship was granted in the Indian Citizenship Act of 1924, which was codified later as a section of 8 U.S.C. § 1401. It also failed to understand that if its argument were correct, why would Congress have taken the time to pass the Indian Citizenship Act at all?

The district court also failed to see that the rights of tribal citizens as federal citizens are guaranteed under the fourteenth amendment as one of the "privileges and immunities." Such right is not guaranteed under the "citizens of the United States and of the State wherein they reside" clause of that amendment. This status is analytically distinct. The district court also failed to see that as a constitutional principle, it would take an amendment similar to the fourteenth amendment to grant full citizenship to tribal citizens (under their limited status in the Constitution), as well as the volitional consent of the tribes and their individual members.[122]

117. 417 F. Supp. 13 (D. Ariz. 1975).
118. *Id.* at 14-15.
119. Elk v. Wilkins, 112 U.S. 94 (1884).
120. Goodluck v. Apache County, 417 F. Supp. 13, 16 (D. Ariz. 1975).
121. *Id.*
122. See Section II B, *supra*, this article.

This case looks at state citizenship as mandated merely because the Arizona constitution allows the Indians to vote. This is exactly the evil (the "conclusive presumptions" standard) the Supreme Court seeks to prohibit. As an issue of judicial process, citizenship cannot be forced on any resident by a law or constitution. The question of citizenship in a state is voluntary. Citizenship cannot be forced on any person under the legal theory of "democracy."[123] In addition, there is no provision for tribal citizens under the court's theory of state citizenship. Unlike the Indian Citizenship Act, the state statute does not provide for tribal citizens.

There is no near-perfect correspondence between the basic fact of federal-tribal citizenship under the Indian Citizenship Act of 1924 and with state citizenship to justify the judicial presumption. A more correct approach to voting rights is the Eighth Circuit Court of Appeal's holding in *Little Thunder v. South Dakota*.[124] The Eighth Circuit held that the validity of restricting tribal citizens from voting in county government elections was to be determined from the constitutional test of a compelling state interest test, not the rational basis test.[125] Moreover, it held that there was no compelling state interest to justify the denial to tribal citizens of the right to vote for county government officials.[126] The key to this holding is that tribal citizens have a substantial interest in the choice of county officials independent from their status as reservation Indians. This is true because the county government appears to exercise substantial power over the affairs of individual Indians living in the unorganized counties.

The Eighth Circuit in *Little Thunder v. South Dakota* uses an "equal protection of the laws" argument, but it did not hold that the fourteenth amendment granted them status as state citizens. Moreover, its utilization of *Dunn v. Blumstein*[127] illustrates that the Eighth Circuit saw the problem as a right-to-travel case, *i.e.*, the rights and privileges of federal citizenship under the fourteenth amendment.[128]

State citizenship is not necessary for members of the tribe. As federal-tribal citizens, residents of the reserves can enjoy all the

123. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HISTORY 108 (1974).

124. 518 F.2d 1253 (8th Cir. 1975).

125. *Id.*

126. *Id.* at 1255.

127. 405 U.S. 330 (1972).

128. Little Thunder v. South Dakota, 518 F.2d 1253, 1255 (8th Cir. 1975).

rights and privileges of other citizens of the United States through the rights and privileges clause of the fourteenth amendment, as well as under the fifteenth amendment to the Constitution.

The right to vote, as explained by Cohen, is a right of the fifteenth amendment.[129] The fifteenth 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."[130] As federal citizens, tribal members are entitled to the rights of suffrage and entitled to hold public office.[131] No resort to arguments of state citizenship is necessary. No presumption of state citizenship is necessary to protect tribal Indians' rights in the surrounding states.

IV. *The Ignored Federal Laws*

Federal statutes resolve the central issue in the case. The federal district court discussed the Indian Health Care Improvement Act of 1976, but it failed to examine the more relevant federal statutory schemes for distribution of state aid for subsidizing and regulating state health services and the prevention of discrimination on the basis of race in federally subsidized health care services. These issues were raised only by the attorney for the Oglala Sioux Tribe on the appeal. The lawyers for the guardian of Florence Red Dog, the state of South Dakota, and the federal government were silent as to these points of law.

We shall present the federal scheme for regulating the distribution of state aid for health services and examine the declaration of South Dakota to determine if South Dakota committed itself to serve the mental health needs of reservation residents as a condition of continued federal funding, which is contrary to its arguments before the federal courts. Next, we shall determine the relevancy of racial discrimination issues in this case. Finally, we shall look at the Indian Health Care Improvement Act of 1976 to assess why these services were not provided on the reservation.

A. *The Federal Scheme for Regulating the Distribution of State Aid of Health Services*

Federal funding of state health and mental health services is chiefly governed by two acts: The Public Health Service Act of

129. Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 3 (1942).

130. U.S. CONST. amend. 15.

131. Cohen, *supra* note 129.

1944,[132] as amended by the National Health Planning and Resource Development Act of 1974[133] and by Title I of the Special Health Revenue Sharing Act of 1975[134], and the Community Mental Health Centers Act of 1963.[135] The amended Public Health Service Act authorizes funding of comprehensive health services delivery programs. The amended Community Mental Health Centers Act specially allocates funding for the decentralization of mental health programs.

Under both acts, certain enumerated territories[136] are the primary units of administration, eligible to apply for formula and project grants and accountable for program management. Nevertheless, neither act suggests any congressional intent that program beneficiaries be limited to citizens, residents, or eligible voters of the states and named territories. The explicit purpose of the Public Health Service Act is "to assure comprehensive health services for every person." Each state and territory is entitled to receive a proportion of annual appropriations adjusted to its "population and financial need" and must devote a minimum share of its allocation to the provision of mental health care.[137]

The concept of service population or clientele is geographical, not political, as made clear by Public Law 94-63's amendments to both acts. The Special Health Revenue Sharing Act, Public Law 94-63, defines the basic unit of mental health care planning and service delivery as the "catchment area," a purely geographical unit which may or may not coincide with existing political subdivision boundaries. The purpose of community mental health centers is to "bring comprehensive mental health care to all in need within a specific geographic area regardless of ability to pay."[138] Each federally funded center must provide services "to any individual residing or employed in such area regardless of his ability to pay for such services, his current or past health condition, or any other factor."[139] In the preamble of the amendments, Congress declared its policy to be that community mental

132. 58 Stat. 682.

133. Pub. L. 93-641, 42 U.S.C. § 300(K).

134. Pub. L. 94-63, 42 U.S.C.

135. Pub. L. 88-164, as amended by Title III of Pub. L. 94-63.

136. The enumerated territories are Guam, Puerto Rico, Samoa, the Trust Territories of the Pacific, and the Virgin Islands. The District of Columbia is also included. 42 U.S.C. § 246(g)(4)(B), *as amended.*

137. 42 U.S.C. § 246(d), *as amended.*

138. Pub. L. 94-63, § 32(a), 42 U.S.C.

139. 42 U.S.C. § 2689(a)(1)(B), *as amended.*

health centers are "a national resource to which *all* Americans should enjoy equal access."[140]

Similarly, the 1974 amendments to the comprehensive health provision of the Public Health Service Act defined the primary unit of health planning to be "health service areas," that is, "geographic region[s] appropriate for the effective planning and development of health services."[141] Like the Community Mental Health Centers Act amendments, the "umbrella act" avoided any hint of geographical discrimination. Congress specifically found that, "The achievement of equal access to quality health care at a reasonable cost is a priority of the Federal Government."[142] The amendments further gave priority to "primary care services for medically underserved populations, especially those which are located in rural or economically depressed areas."[143] This priority describes tribal citizens and residents of tribal reservations and contains no hint of an intent to exclude them.

In summary, the laws controlling federal funding of local health and mental health services are directed broadly at "all Americans" and "every person," and accordingly, while they designated the states and certain territories as eligible applicants, they make eligibility for receipt of services geographical rather than political. This is consistent with the constitutional requirement, discussed in section III, *supra*, that state and local agencies cannot deny services to indigents on the basis of local citizenship, residence, or alienage. Federally subsidized health and mental health care is a right of all persons who seek it from participating agencies under the modern statutory scheme for the delivery of health care and services.

Despite the repeated disclaimers of the office of the South Dakota Attorney General in a "Memorandum in Opposition to Federal Defendant's Motion for Summary Judgment and in Support of State Defendant's Motion for Summary Judgment," filed with the district court, the state of South Dakota participates in federal health funding, albeit to a lesser degree than most states.[144] About 68 percent of the state's community mental health center expenditures in fiscal year 1977 were from federal

140. Pub. L. 94-63, § 302(a) (emphasis ours), 42 U.S.C.

141. 42 U.S.C. § 300(1), amending former § 1511(a)(1).

142. Pub. L. 93-641, § 2, 42 U.S.C. § 300(k).

143. Pub. L. 93-641, § 3, 42 U.S.C. § 300(k)(2).

144. South Dakota Mental Health State Plan, Fiscal Year (FY) 1978, 279-80 [hereinafter referred to as Plan).

sources.[145] State projections place the federal share of the cost of all state mental health programs at 14 percent in FY 1977, increasing to 33 percent by FY 1979.[146] The state's plan, on which these figures are based, was prepared to make the state eligible for Public Health Service Act and Community Mental Health Centers Act funding.

The instant case involves the South Dakota Human Services Center, the state's mental hospital. From 1968 to 1977, the federal government contributed between 9 percent and 18 percent of the support for the Center.[147] The Honorable Richard Kneip, governor of the state of South Dakota, supplied figures for the Center's FY 1979 budget, indicating a 19 percent federal share.[148] The federal share includes Title XVIII-XX of the Social Security Act, as amended, and Medicaid reimbursements, as well as grants under the Public Health Services Act.

As a principle of federal law, the state of South Dakota cannot accept these funds while denying services to federal citizens, or "all Americans," and "every person" within the geographical area described in its applications to the federal government. Indians residing on reservations within the catchment areas, established by South Dakota expressly for the purpose of "enab[ling] mental health centers to qualify for and apply for federal funds through P.L. 94-63," are federal citizens and persons within the geographical area. Moreover, they are specifically included in the state's projections of further Human Service Center needs in the state's request for federal funding.[149] Thus, contrary to the Memorandum filed with the lower court by the state, the state does apply for federal aid on the basis of serving all persons—including all reservation Indians—within its exterior boundaries, just as federal law contemplates.[150]

Based on the foregoing analysis, Congress could, presumably, in the exercise of its treaty obligations as codified in the Snyder Act,[151] make separate provision for the delivery of health care

145. *Id.* at 294.

146. *Id.* at 298.

147. *Id.* at 126.

148. Letter of Mar. 17, 1978, to counsel for the Oglala Sioux Tribe.

149. Plan 67, *supra* note 144, at 106, 108, 147-50.

150. Based on the principle and authority of the Indian Self-Determination Act, 25 U.S.C. §§ 450, *et seq.*, the Oglala Sioux Tribe would be agreeable to a reduction of state projected need to exclude reservation Indians, provided that the Secretary of Health, Education and Welfare is agreeable to remitting the fiscal difference to the tribe for provision or purchase of services for its members.

151. 25 U.S.C. § 13 (1970).

and services to tribal residents—as indeed it has in the Indian Health Care Improvement Act of 1977.[152] Under treaty federalism, Congress has the obligation and power to provide specially for tribal Indians;[153] insofar as the classification is political, rather than racial, general federal laws are said to apply to Indians in the absence of express exemption.[154]

B. *The State Mental Health Plan of South Dakota*

Both Public Laws 93-641 and 94-63 require, as a precondition to federal funding, submission of a state plan to the Secretary of Health, Education and Welfare, and subsequent approval by the Secretary. Judging from the priorities and guidelines set out in these two amendatory acts, the intent of Congress was to require grantees to develop and implement plans to assure all persons access to coordinated, cost-effective, and nonduplicative health services facilities.

In amending the Public Health Service Act, Public Law 93-641 identified health service areas and mandated appointment of health service agencies and state health coordinating councils to prepare, annually review and revise, and assure the compliance of all applications for federal health funding with a state health services plan.[155] Each health service agency within a state is to propose its own local Health Systems Plan (HSP) and Annual Implementation Plans (AIP) and, subject to state council approval, "shall implement its HSP and AIP."[156] Approved plans therefore appear to be binding on the state, as well as a precondition for federal financial assistance.

Title I, Section 102 of Public Law 94-63 amends the Public Health Service Act to require that grantees assure the Secretary they will administer comprehensive health services in accordance with their approved plans and, moreover, to provide that the Secretary "may not approve" an application for funding if it is

152. Pub. Law 94-437, 42 U.S.C. (1970).

153. United States v. Antelope, 430 U.S. 641 (1977); Delaware Business Council v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974).

154. Squire v. Capoeman, 351 U.S. 1 (1956); Chateau v. Burnet, 283 U.S. 691 (1931). A different rule applies where a general act would have the effect of diminishing tribal authority or the size of the reservation, or delegating jurisdiction over a reservation to state government. Mattz v. Arnett, 412 U.S. 481 (1973).

155. 42 U.S.C. § 300(m), *as amended.*

156. 42 U.S.C. § 300(1)(2), *as amended.* Pub. L. 93-641 also created a new program of federally subsidized construction, requiring secretarial approval of Medical Facilities Plans to be administered by applicants. 42 U.S.C. § 300(o)(2), *as amended.*

found that applicants have not complied with assurances made in connection with prior grants.[157] Title III, Section 303 of the same law amends the Community Mental Health Centers Act to condition all grants on secretarial approval of a state plan, and to require the Secretary to accept grant applications only if he finds the applicants have "complied with the assurances which were contained in" previous applications.[158] A state's mental health plan must be consistent with its comprehensive health plan, and the applicant state agency is accountable for its administration.[159]

South Dakota's FY 1978 Mental Health Plan is replete with explicit commitments to improve, increase, and diversify mental health services for reservation citizens and residents; to include both the Indian Health Service and tribal governments in the planning process; and to arrange for nonduplicative or complementary sharing of service responsibilities with the federal and tribal governments.

It is astonishing that the state, which wrote the plan, and the United States, which accepted it and extended funding on the basis of it, both disclaimed any responsibility for tribal citizens and residents on reservations in terms of medical and mental health services. The South Dakota State's Memorandum, filed in the district court, is instructive of its legal position. The Attorney General of South Dakota stated:

> Medical services to Pine Ridge Indian residents, however, are 100% federally funded. . . . Once again, in their zeal to show that they are on the side of the Oglala Sioux, Federal Defendants make a very serious accusation without any basis of fact. The Fact is that this case is a result of Federal Defendants' smug refusal to carry out their responsibility to provide medical services, including mental health services, to Indian persons located on Indian reservations in South Dakota. . . . Two federal responsibilities specifically set forth in South Dakota law are armed forces personnel from military reservations (SDCL 27-4-15) and Indian persons from Indian reservations (SDCL 1-23-11). . . . In short, the South Dakota Human Services Center is neither funded or structured to carry out the

157. 42 U.S.C. § 246(d), *as amended.*

158. 42 U.S.C. § 2698(t), *as amended.* Each individual grant program reiterates the requirements of a mental health plan condition of application. 42 U.S.C. §§ 2689(a), (b), (c), (e), (j), (o), *as amended.*

159. *Id.*

> responsibilities of the tribe and the United States to provide mental health care to reservation Indians in South Dakota. Fiscal responsibility by a state agency is not constitutionally impermissible. . . . State Defendants are happy to fully discuss the history of responsibility to provide medical services to Indian persons residing on Indian reservations in South Dakota. State Defendants will not, however, allow the Federal Defendant to twist the facts or selectively present the facts so as to support their accusations of racism and divert the Court's attention from the real issue in this case (*i.e.* the responsibility of the United States to provide medical services, including mental health services, to Indian persons residing on Indian Reservations in South Dakota.[160]

Absent an amendment to the state law, it is arguable that the state of South Dakota and the Secretary of Health, Education and Welfare have complied with the mandates of the modern congressional scheme for accountability, without any expectation of consequent liability. South Dakota law makes it the "duty" of the Division of Mental Health and Mental Retardation "to accept the benefit of . . . federal statutes and acts . . . and to comply with the requirements thereof."[161] It is a class 1 misdemeanor for any state mental health officer to "intentionally refuse or neglect to perform his duty."[162]

Before the federal courts the state was unwilling or unable under the state law to comply with its submitted plan. The court could have required it to remit to the Secretary all federal funds received for the delivery of services to tribal residents and citizens, so that the Indian tribes would be free to receive those funds and apply them, as Congress intended, for the relief of reservation residents' medical and mental health needs.[163]

A brief summary of South Dakota's 1978 Mental Health Plan will establish a framework to evaluate its present policy. It will also illustrate the breadth of the commitments made to the federal government in consideration for federal financial assistance.

160. State Defendant's Memorandum, in Brief, at 5, 7-8, 9-10 (Jan. 17, 1977).

161. S.D. COMP. LAWS § 27A-3-3 and 27A-3-4.

162. *Id.* § 27a-1-6.

163. The Oglala Sioux Tribe, for its part, contemplates eventual assumption of primary responsibility for mental health care on the Pine Ridge Reservation, consistent with the policy of Congress declared in section 3 of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a.

The state plan identifies Indians as a "high-risk" population and declares an "urgent responsibility on the state to plan for additional services to this group."[164] The state admits having given "too little consideration of the special needs, desires, and culture of the Indian population served," and concludes that "[m]ental health planning in South Dakota will need to take into consideration the needs, desires, customs, and history of the Sioux people."[165] Ten pages of the text of the state plan are devoted to background information of the demography, economy, and mental health needs of the nine Indian reservations located within the state's borders.[166]

South Dakota employs the proportion of reservation Indians residing within a "catchment area" as one of eight indicators of relative need for mental health services expansion.[167] Rank-ordering of catchment areas by need is required by Public Law 94-63 and is the basis for interstate allocation by federal community mental health funds. Significantly, the state's Central and West River Catchment Areas, which surround the majority of tribal reservations, rank first and second, respectively, in the state's assessment of need. The state's plan, therefore, not only presupposes delivery of services to Indian reservations but expressly gives priority to reservation areas for federal financial assistance.

The state's mental health services' objectives, outlined in five-year (1978-1982) plans, include doubling services to Indians over what was provided in FY 1977 (when the state argued it provided no services to tribal residents in its Memorandum), "[e]stablish[ing] specialized services for Indian clients"; and "provid[ing] specialized services or approaches for Indian persons with emotional, behavioral, drug, or alcohol problems which are relevant to the cultural knowledge."[168]

The state mental health plan is explicit that "[t]he South Dakota Human Services Center, the state's mental hospital, serves all residents of the state, *including the reservation Indian population.*"[169] The state plan, moreover, explains that:

164. Plan, *supra* note 144, at 58-59, 61.
165. *Id.* at 51, 57.
166. *Id.* at 47-58.
167. *Id.* at 106, 108.
168. *Id.* at 192, 208.
169. *Id.* at 53 (emphasis ours).

> An amendment to the mental health law was passed by the 1977 legislature which makes it mandatory for the county to pay the $100 [montly fee] for indigent residents admitted to the Human Services Center. This now makes it possible for all residents of the state, *including Indians from reservations*, to receive needed mental health services regardless of ability to pay.[170]

Although the office of the Attorney General has continued to proclaim that the state will not accept direct commitment orders by tribal courts (see *supra* at note 160), the state declared as one of its goals for 1978 the preparation of a booklet on state commitment procedures to be sent both to state attorneys and to tribal court officers.[171] A reasonable interpretation of this is as follows: not only does the state pledge not to deny services to reservation Indians, but indeed the state will follow its own commitment procedures, which have already been prohibited by the district court opinion in this case.

The state's FY 1978 Mental Health State Plan further explains that while community mental health centers have generally not been serving reservation Indians, they hope to arrange to do so as soon as they are federally funded: "West River Mental Health Center and the Indian Health Service, Oglala Community College, and the tribal health board on the Pine Ridge Reservation are developing a written working agreement which will specify staff and service to be provided by the West River comprehensive grant on Pine Ridge."[172]

The state reported to the federal government that: "Most objectives regarding continuity of care between the Human Services Center and community mental health centers and among community providers (community mental health centers, Indian Health Service, and drug and alcohol programs) were achieved or partially achieved in 1977."[173]

According to the state plan, the Indian Health Service and tribal input and participation are promoted at every level. The Indian Health Service was involved in preparing the FY 1978 plan, and IHS is identified as a health resource for statewide mental health planning.[174] Richard Varner, Chief of Social Services and

170. *Id.* at 54 (emphasis ours).
171. *Id.* at 210.
172. *Id.* at 55.
173. *Id.* at 22.
174. *Id.* at 196.

Mental Health in the Indian Health Service's Aberdeen area, is identified as a member of the South Dakota Mental Health Advisory Council,[175] and the

> Indian Health Service and the state agencies agree that their services should be complementary, not duplicating, and that full, ongoing consultation is necessary to strengthen both systems. They also agree on the concept of a unified delivery system and the state and federal agencies will cooperate in developing such a system.[176]

Tribal governments were "invited to participate in all planning efforts in mental health," including "expanding services in catchment areas which are developing comprehensive centers and will be seeking funds under P.L. 94-63," and the development of a special Indian inpatient unit (we have been unable to locate any invitation to the Oglala Sioux Tribal Council, however).[177] "There is Indian representation on all mental health center boards which have reservations in their service areas," and "the mental health centers developing comprehensive services have or are in the process of developing working arrangements with tribal councils, tribal health programs, and Indian Health Service to supplement mental health services on reservations rather than setting up duplicative systems."[178]

Five-year objectives continue this theme, setting as goals "[e]stablishing an ongoing committee with representatives from tribal and Indian Health Service, and community providers of mental health, drug, and alcohol services for the purpose of planning services; educating community providers in special needs and service delivery considerations of Indian people"; and developing "strong ties and mutually supportive working relationships" with mental health training programs on the Pine Ridge and Rosebud reservations.[179] Committees are to be established that will include Indian Health Service representation for the purposes of developing Human Services Center admission policies and interagency transfer policies.[180] Overall, the plan em-

175. *Id.* at 38.

176. *Id.* at 15, 24, 189-90. The Plan also pledges coordination with the State Office of Indian Affairs. *Id.* at 17-18.

177. *Id.* at 18-19, 57.

178. *Id.* at 25.

179. *Id.* at 208, 270, 296.

180. *Id.* at 162-63.

phasizes existing and expanding relationships of cooperation and sharing of responsibility.

Upon reviewing the state plan, one would never suspect that the state of South Dakota denies mental health services to reservation Indians, or that the state and the United States would assume an adversary posture in the instant case. Although the state argues, correctly, that the Indian Health Service "has the primary responsibility for reservation Indian health care,"[181] the state, as a foundation for federal funding, consistently maintains that it is exercising a responsibility to serve reservation Indians' mental health needs and developing toward a unified, shared responsibility approach. In short, "intergovernmental cooperation."

If the state's representations to the federal government in its approved Mental Health Plan are materially false, or if stated guidelines and objectives are not complied with, the state should not be eligible for further Public Laws 94-63 or 93-641 funding. By default, then, tribal governments should be eligible for such funding; the health of tribal citizens and residents must not be harmed by the actions of the state of South Dakota and its officials.

Either the federal courts have a responsibility to compel the state to honor its commitments, or the United States has a responsibility to deny further funding to the state for services to tribal citizens and residents. But both courts have refused to act. The United States, by its appearance, chose a judicial rather than an administrative solution to rectify the actions of the state of South Dakota. We concede the parties have placed the courts in a most uncomfortable position by neglecting the clear and direct remedy of challenging the Secretary of Health, Education and Welfare to take action against the state as a whole.

It should be said that we do not imply South Dakota bears sole or even primary responsibility for Indian mental health care. Our argument is simply that by drafting a plan and accepting federal funds in accordance with it, the state had committed itself to provide those services described in the plan to the best of its ability. Compliance with the plan is both a condition subsequent to the use and enjoyment of funds already granted, and a condition precedent to all future applications for funding. The state may, if it chooses, alter its plan and remit from what it has received,

181. *Id.* at 52.

assuming the Secretary will approve the change as not inconsistent with the Public Health Service Act's sweeping mandate.

C. *Racial Discrimination Issue*

Title VI of the Civil Rights Act of 1964[182] prohibits discrimination in the provision of federally subsidized services. This prohibition is applicable to the Public Health Service Act and Community Mental Health Centers Act.[183] Accordingly, South Dakota in its Mental Health Plan gives assurance that, in compliance with these,[184] it will not discriminate on the basis of "race, color, creed, religion, sex, ancestry, or national origins."[185]

While tribal citizens or Indian residents on a tribal reservation are under federal law a political entity and not a racial classification,[186] once they exit the tribal boundaries they are viewed as representing a racial classification under existing federal law. Even if South Dakota's denial of services to Ms. Red Dog were permissible either as a geographical or political discrimination, it was certainly impermissible as discrimination on the basis of her birth into a race, or of her ancestry, or of her national origin. Would the Human Services Center have denied services to an indigent citizen of Nebraska or Canada under similar circumstances? South Dakota law provides for the transportation of a resident of another state "to a similar institution of such state," at South Dakota's expense,[187] but this does not preclude treatment of persons who cannot be moved or whose state of residence cannot provide services. Indeed, in 1976, seven percent of the persons treated by the Human Services Center were not identified as to any county of South Dakota.[188]

In addition, South Dakota subscribes to an Interstate Compact on Mental Health, which in Article I provides that

> the necessity of and desirability for furnishing such "proper and expeditious" care and treatment bears no primary relation to the residence or citizenship of the patient but that, on the

182. 42 U.S.C. § 2000(d).

183. 42 C.F.R. 51.8, app.

184. 42 U.S.C. § 2000(d) and S.D. COMP. LAWS § 20-13-24.

185. Plan, *supra* note 144, at 34, 308.

186. Fisher v. District Ct., 424 U.S. 382 (1976); Morton v. Mancari, 417 U.S. 535 (1974).

187. S.D. COMP. LAWS § 27A-4-15.

188. Plan, *supra* note 144, at 150 (Table 12).

> contrary, the controlling factors of community safety and humanitarianism requires that facilities and services be made available for all who are in need of them.[189]

In other words, South Dakota law declares residence and citizenship inappropriate standards for eligibility for "proper and expeditious" treatment. The tribe does not doubt, from the record below, the plaintiff's situation was one involving "community safety" and an absence of appropriate on-reservation facilities. South Dakota appears to have refused her, then, because of some other factor. We suggest it was her race. If we are correct, South Dakota failed to comply with its Mental Health Plan, thereby violating its own law as well as the laws of the United States.

The state holds that the reason was lack of jurisdiction over tribal citizens on the reservation, but the state of South Dakota should have been stopped from arguing residence on the reservation because it was the actions of the state and its officials that kept Florence Red Dog on the tribal reservation. The tribal court had ordered extradition of Florence Red Dog to the nearest health facility and the state's refusal created the residency question.

D. *The Indian Health Care Improvement Act*

The obligation and responsibilities of the federal government for Indian health is also statutory. The Indian Health Care Improvement Act of 1976[190] declares that: "Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique relationship with, and resulting responsibility to the American Indian people."[191] The Act's purpose is to raise Indian health "to the highest possible level" by providing the Indian Health Service with "all resources necessary" for attainment of that goal, including additional funding for direct care, facility construction, and training.[192] The Indian Health Care Improvement Act is an expansion and clarification of the health services provisions of the Snyder Act,[193] itself a compilation and

189. S.D. COMP. LAWS § 27A-6-1.
190. Pub. L. 94-437, 42 U.S.C.
191. 25 U.S.C. § 1601(a), 2(a).
192. 25 U.S.C. § 1601(b), 1602, 2(b), 3.
193. 42 Stat. 208 (1921), 25 U.S.C. § 13 (1970).

systematization of former treaty obligations for Indian health and welfare services.[194]

The Indian Health Care Improvement Act specifically authorizes the appropriation of funds, increasing to $5 million by FY 1980, and creation of one hundred new IHS positions for community mental health services, inpatient mental health services, residential treatment centers, and other mental health programs.[195] Most important, this authorization includes $800,000 and twenty positions for the kinds of inpatient and residential services the United States here argues it has neither facilities nor any obligation to provide. IHS inpatient mental health treatment is clearly mandated and funded.

The Act's mental health authorizations are to be used for "eliminating backlogs in Indian health care services and to supply known, unmet . . . Indian health needs."[196] For the purposes of the Act, an Indian is any member of an Indian tribe "irrespective of whether he or she lives on or near a reservation."[197]

Conclusion

The federal government did not explain why Public Law 94-437 funds are not available to serve and treat Florence Red Dog. If they have been spent elsewhere or on other forms of mental health services, the Secretary of Health, Education and Welfare is accountable to Ms. Red Dog to demonstrate that such expenditures are consistent with the purposes and priorities of the Act; Ms. Red Dog, through her guardian *ad litem*, would have standing to challenge an allocation that unreasonably denied her, and persons in her position, the benefits intended by Congress.

This may raise questions of the availability of administrative remedies within the Department of Health, Education and Welfare, to be pursued before appealing to the courts. Be that as it may, the Act creates a right for Florence Red Dog, and the Secretary, through budget allocation and spending policies, cannot deny her that right without due process of law and a showing of reasonable grounds.

The federal government attempted to use the concepts of wardship, conquest, and the plenary powers of Congress as justifica-

194. 61 CONG. REC. 4659-4691 (Aug. 4, 1921).
195. 25 U.S.C. § 1601(c)(4), 201(e)(4).
196. 25 U.S.C. § 1621(a), 201(a).
197. 25 U.S.C. § 1603(c), 4(c).

tion for nonfunding of mental services on the reservation. Its arguments sought to excuse the federal government from responsibilities for mental and health care on the reservations. It argued "specific expenditures and authorizations theory of appropriations," which existed before the Snyder Act, knowing full well that the delivery of post-1870 services are totally insufficient to meet the modern needs for either federal, tribal, or state citizens. Not only is this totally contrary to the intent and policy of Congress as established in the Snyder Act of 1921, the Indian Citizenship Act of 1924, the Indian Reorganization Act of 1934, the Indian Civil Rights Act of 1968, and the Indian Self-Determination and Higher Education Act of 1975, but it is also contrary to the general health care legislation outlined earlier.

Under this uniform congressional scheme, tribal citizens are eligible for the benefits of the privileges and immunities of federal citizens, but these do not interfere with their essential tribal relationship. The privileges and immunities of United States citizenship grants tribal citizens the right to state services as well as federal services, independent of their place of residence. This is the law of the land in conjunction with treaties. These are the substantive rights of the citizens of the Oglala Sioux Tribe under treaty and under constitutional federalism. This is contemporary congressional and tribal policy, in opposition to the misty propositions of "guardianship," "wardship," and "conquest" that were generated by the ideology of the social Darwinism of another era. To its credit, the federal courts were not convinced that the federal government had no responsibilities in the health care on the reservation. Unfortunately, they only saw one side of the issue. By holding the federal government responsible they limited the right of tribal residents to travel in the United States.