American Indian Law Review

Volume 4 | Number 1

1-1-1976

The Question of Nonresident Tuition For Tribal Citizens

J. Youngblood Henderson

THE QUESTION OF NONRESIDENT TUITION FOR TRIBAL CITIZENS

*J. Youngblood Henderson**

The increase in the number of American Indians entering state-supported colleges and universities has created new problems for these traditional institutions, yet these are old problems for the legal system in America. Most of these new problems are familiar to the institutions since they revolve around requirements for admission, financial aid, and socially relevant curricula. But as more Indians search for relevance in higher education, they must choose between the instructional competencies of different colleges and universities for their elected path in life. They are confronted with a problem as old as the history of the United States: the interrelationship of federal wardship, tribal identity, and the validity of state regulation.

In the context of state-supported higher education, this problem is currently manifested in statutory durational residency requirements. These statutory enactments by the state are utilized to determine whether a student is a resident or not. If the student is deemed not to be a resident, then he or she must pay a higher tuition fee to attend the state-supported school. These statutory schemes, while valid on their face, when applied to tribal citizens become a suspect classification which conflicts with federally protected rights of tribal citizenship.

For the last fifteen years, non-Indian students have attacked these statutory requirements with little success;[1] however, there has been no test case for American Indians yet.

The purpose of this article is to confront the theoretical question of whether state-supported university systems have a legal right under federal law to extend a state statutory durational residency requirement and classification system[2] to tribal citizens, or whether such extension of the state statutory classification system is an unreasonable and illegal infringement of the relationship between the federal government and the Indian tribes. Additionally, this article shall confront the question of whether a state has the right to classify tribal citizens in the categories of residents or nonresidents or whether such classification conflicts with the comprehensive and preemptive congressional scheme for regulating tribal affairs. Finally, it will

* Assistant Professor, Native American Studies, University of California, Berkeley.

address the issue of whether state tuition systems that impose higher financial burdens on tribal citizens merely because they reside outside the boundary lines of the state are discriminatory.

The answers to these questions will be discussed, first, from the unique legal framework which defines the relationship and status of Indian tribes to both the federal and state governments under American constitutional federalism. Second, this article will analyze the applicability of state boundaries as standards by which a state may discriminate between tribal citizens under the protection of the privileges and immunity clause of the fourteenth amendment, as well as determine the appropriate judicial test under the equal protection clause of the fourteenth amendment. Lastly, this article will inaugurate a request for positive action to resolve the present situation.

Background

Chief Justice Marshall of the Supreme Court, in the threshold analysis of the relationship of the Indians to the federal government, accurately stated in 1831 that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."[3] Today, this statement is still valid, but for different reasons from those given in 1831. Marshall and his colleagues were primarily concerned with problems raised in legal theory by the unique condition of the tribes. The modern problem is the lack of uniformity in the numerous treaties and "arrangements" made with the various tribes and state governments. Second, while the relationship of the tribes lacks any definitive analysis in terms of the limitations of federal government intervention in tribal affairs, the role of the states in federal-tribal affairs appears almost crystal clear in comparison.

The Supreme Court has consistently condemned any state encroachment on essential tribal affairs because Indian tribes are under the plenary power of the federal government. The regulation of the affairs of tribal government is an exclusive subject matter completely under federal control; state regulation is prohibited unless an explicit act of Congress has delegated part of the federal control to the state and the tribe consents to the state regulation.[4] Thus, the supersession or preemption doctrine of constitutional law has been applied to state action in the absence of a statutory delegation of power from Congress and tribal consent.[5] The best and most relevant illustration of the complete domination of the affairs of Indian tribes by the federal government is the 1886 case of *United States v. Kagama*.[6] Kagama had allegedly murdered a fellow Indian in the boundaries

of the state of California, but within the limits of an executive-order reservation. The circuit court, on a certification of division of opinion, asked the Supreme Court whether federal or state courts had authority to try and punish the Indian on the basis that the offense was situated wholly within the limits of a state of the Union.

Justice Miller, speaking for the Court, acknowledged that, "It will be seen at once that the nature of the offense (murder) is one which in almost all cases of its commission is punishable by the Laws of the States, and within the jurisdiction of their courts."[7] A problem that Justice Miller saw which distinguished this offense was that "it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States," and that the Indian offender "belonged to that or some other tribe."[8] Because of these factual circumstances, Miller held that the offense was "within the competency of Congress" rather than the state courts. He stated:

> It does not interfere with the process of the State courts with the reservation, nor with the operation of State Laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. . . .
>
> These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feelings, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
>
> . . .
>
> The power of the General Government . . . must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied and because it alone can enforce its laws on all the Tribes.[9]

The complete dominance of the federal interest in regulating tribal affairs is thus based on the historic necessity of federal-tribal relationships. This does not mean that Indian tribes have no authority to regulate their affairs. Under the legal doctrine of "inherent, residual sovereignty of Indian Tribes," the tribes retain exclusive

jurisdiction over essential matters in the absence of specific congressional limitations. An illustration of this undefined power is found in the case of *Merrill v. Turtle*[10] where the Navaho Nation was held to have the sole power to determine extradition of a Cheyenne Indian to a state because this power bears an "essential and intimate relationship" to tribal self-government.

As an exclusive federal concern, the issue of the parameters of state action has been fully outlined by the federal courts. The states have no power to infringe on the federal-tribal relationship because no such power was allocated to the states in the Constitution of the United States.[11] In the most recent major decision, *McClanahan v. Arizona Tax Commission*,[12] the Supreme Court held that tribal citizens and their property on an Indian reservation are not subject to state taxation, except by virtue of expressed authority conferred upon a state by a statutory enactment by the Congress of the United States. Justice Marshall, speaking for the unanimous Court, went to considerable lengths to establish that by federal treaties and statutes the Indian tribe was intended to have sovereign powers. Moreover, these sovereign powers were federally protected to prevent any state interference or infringement. This decision illustrated, with a great deal of force, that while the power of taxation is an inherent power of the states, this power is limited not only by the fourteenth amendment of the Constitution and the state constitution, but the power is also limited if it infringes on the rights or privileges of an Indian tribe without specific statutory authority from Congress.

At its foundation, the prohibition against state action which interferes or infringes on the rights of Indian tribes and their citizens is the legal principle of the inviolability of the federal-tribal compact.[13] The federal statutory scheme and various treaties with Indian tribes show that the tribes have entered into a "confederation" with the federal government. This confederation can, perhaps, be analogized to the Articles of Confederation which was the loose compact established between the 13 colonies prior to the Constitutional Convention. The main distinction is that Title 25 of the United States Code and the collection of treaties signed with tribes prior to 1871 establish an "informal" confederation agreement, while the United States Constitution delineates the explicit allocation of powers between the states and the federal government. Nevertheless, because the states are not parties to these informal agreements, unless specifically included by Congress, they have no inherent power over Indian tribes. Commenting on the essential nature of such a confederation, Madison stated in Number 43 of *The Federalist*: "The more intimate the nature of such a union may be, the greater interest have the

members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be substantially maintained."[14]

The federal government and tribal governments, while disagreeing on the extent of federal control over inherent tribal authority, have historically attempted to prevent any interference or infringement by the states on the terms of their compact. Thus, state power has been consistently prohibited in areas considered essential and necessary to the growth and evolution of tribal government by the constitutional law doctrine of supersession of federal control.[15]

An example of such specific delegation of power to the states by Congress is Public Law 280.[16] This law granted to several states a limited criminal and civil jurisdiction over Indian tribes within those states. This statutory enactment by Congress, however, was not a plenary grant and was limited by restrictions which were designed to protect the federal relationship and power over tribal citizens within the states. It must be recognized that Public Law 280 only delegated specific federal responsibilities for Indian affairs and removed specific federal laws which applied to these tribes. The Act did not terminate the plenary power of the federal government over these Indian tribes. To illustrate this point, Congress, in the Indian Civil Rights Act of 1968,[17] repealed Section 7 of Public Law 280 which allowed any state arbitrarily to assert its jurisdiction over the tribal reservation. This Act made the assumption of jurisdiction by the state contingent upon the *consent* of the tribes at special elections[18] and allowed for piecemeal jurisdiction to resolve particular needs of the tribes based on the resources of the tribe.

Inapplicability of State Boundaries

Viewing the state classification scheme which divides tribal citizens into in-state and out-of-state residents, with the subsequent financial burden being placed on those determined to have out-of-state residence, from the perspective of the impact of the preemption and supersession doctrine, it must be determined whether such classification is discriminatory. If it is discriminatory, which test should the courts utilize to determine the validity of the classification system?

The threshold question is whether any state can utilize its boundaries to discriminate against the wards of the federal government. The boundaries of the various states were determined by both the states and Congress and are binding on all the respective states and their citizens. These boundaries silently illustrate where one state

sovereignty begins and ends while all those sovereignties are subject to federal control. These boundaries exist as agreements between the people of the states and the United States. They are *not only* sources of political boundaries that make a division of affiliations, expectations, and loyalties, but are sources which create their own inevitable corollaries such as lawbreakers and laws. Nonetheless, they exist solely as legal fictions validated by the consent of both the persons within the boundaries and those outside. This fundamental view is founded on principles in the Constitution of the United States.

Yet, when viewed from the perspective of the federal-tribal compact, these state boundary lines fade into the ecological boundaries of the nation that exist between the woods and plains, plains and mountains, or mountains and deserts. In the federal-tribal perspective there are only international borders and tribal borders, not state borders. The validity of this perspective is found in *United States v. Kagama*[19] where the Supreme Court did not seek to determine whether the offender was a California Indian before it passed judgment. Instead, it merely stated that "the fair inference is that the offending Indian shall belong to that or some other tribe."[20] The Court determined that there are no state boundaries when the rights of the Indian tribes are at issue, because they are "*wards* of the nation." This was not a novel interpretation, but rather a consistent legal doctrine dating back to the case of *Worcester v. Georgia* in 1832.

While *Worcester*, the seminal case, concluded that the Indian tribes were an exclusive federal concern independent of their position within the boundaries of the state of Georgia, the best illustration of this doctrine is the case of *United States v. Forty-three Gallons of Whiskey*.[21] This case, decided in 1876, concerned the power of an Indian tribe to insert into a treaty with the federal government a total prohibition of liquor in the land they ceded to the United States. The ceded land was subsequently granted to the state of Minnesota and incorporated as an organized county within and of the state. In its endeavor to enforce this prohibition in the county, the federal government's right to exercise this power was questioned on the grounds that it infringed on the rights of the states. Speaking through Justice Davis, the Supreme Court held that this prohibition was a valid exercise of federal powers. The rationale of this decision was founded on the concept that the tribe had affirmatively requested this provision in the treaty, and it was the duty of the federal government to protect and enforce the tribal desires, even if such enforcement was to the detriment of the state. Once again, the fact that the prohibi-

tion was enforced within the boundaries of the state of Minnesota was irrelevant. The Court stated:

> The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to *all* Indian tribes occupying a particular country, whether within and without the state lines. Based as it is exclusively on the Federal authority over subject matter, there is no disturbance of the principle of State equality.[22]

In short, in an area of exclusive federal authority the federal-tribal compact is "lodged solely with Congress and unrestricted as it is by State lines."[23]

While *Forty-Three Gallons* deals with tribal authority to request treaty provisions an earlier case, *United States v. Holliday*,[24] illustrates the power of congressional control on tribal citizens. In *Holliday* it was contended that the sale of liquor to an Indian who lived in the state outside of the boundaries of the reservation and who voted in state elections and paid taxes was a matter of state regulation, with which Congress had no authority. The Supreme Court rejected this contention and held that congressional power was not confined to any locality; rather, it extended within the limits of the state to regulate the intercourse between individual members of the Indian tribes and citizens of state and federal governments. In regard to the matter of the power of a state to regulate the affairs of a tribal citizen, the Court delineated:

> Neither the Constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislature of the State the supreme law of the land, instead of the Constitution of the United States, and laws and treaties made in pursuance thereof.[25]

Both of these cases illustrate that the federal government's power is supreme in Indian affairs. They illustrate that regardless of whether a treaty or the general regulatory power of Congress is involved, the result is the same. Moreover, they illustrate that the federal court will enforce tribal rights and liabilities regardless of state boundaries. State boundary lines are nonexistent in the federal-tribal compact. It should also be added that certain international boundaries dis-

appear as well, especially the Canada-United States border to the Eastern Indian under the Jay Treaty.[26]

A modern example of federal courts limiting state interference with the rights and privileges of tribal citizens in terms of tuition at a state institution of higher education is *Tahdooahnippah v. Thimmig*.[27] The right involved in *Tahdooahnippah* was the grant of certain lands to Colorado by an act of Congress. The land, a former site of a Federal Indian School, was given with a condition that the state maintain an institution where "... Indian pupils shall at all time be admitted to such school free of charge for tuition and on terms of equality with white pupils."[28] In 1906, the state accepted the land with this condition, but in 1972 the legislative assembly passed a bill which limited the tuition waiver to "Indian students who were Colorado residents who needed such financial assistance."[29] The federal government brought suit against the state on the grounds that such statutory limitation by the state violated the terms of the grant, which was a contractual relationship. The federal district court agreed, holding that a contract did exist which was to be enforced. Moreover, the court held that under the contract the state of Colorado could not define Indians based on residency nor financial need. Under the contract, the court held, the state had undertaken the obligation to educate *all* Indian students, regardless of residence, tuition-free.[30] The state of Colorado appealed to the federal court of appeals. The court of appeals affirmed the judgment of the trial court on the grounds that the acceptance of the grant by the state created an obligation of the state to provide free tuition to federal wards as embodied in the statute. This obligation could not be altered by the state. It also affirmed that any interpretation of "Indian" based on residence and boundaries of the state of Colorado was in violation of the contractual obligations.

These cases illustrate that the boundaries of the states are not a legally acceptable standard by which to discriminate against children of Indian tribes, or to validate an interpretation of the state of its responsibilities to tribal citizens.

Residence Classification Discriminatory

Having illustrated the legal inapplicability of state boundaries as standards to discriminate against citizens of Indian tribes, we shall turn to the fourteenth amendment for a solution to this discrimination. The out-of-state tuition classification invidiously discriminates against citizens of Indian tribes because it places a higher financial burden on the basis of the geographic locations of the residence of

the tribal citizen, his parents, or the Indian tribe. Neither the Bureau of Indian Affairs[31] nor indigent parents, in most cases, are willing or able to pay the higher tuition fee, and as a consequence, children are deprived of privileges and immunities of federal citizenship and trusteeship granted to them by Congress. Moreover, as education is a fundamental interest in the federal government's plan to further develop the tribes, the state classification system infringes on an area considered essential and necessary to tribal government.[32]

"No State," the first section of the fourteenth amendment declares, "shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." In *Twinning v. New Jersey*,[33] the Supreme Court held that the rights encompassed by the privileges and immunities clause are only those arising out of the nature and essential character of the national government, or alternatively, those specifically granted or secured to all citizens by the United States Constitution or federal laws. Most important of these rights and privileges of national citizenship which may not be infringed by state action are the right to pass freely from state to state and the right to inform the federal authorities of violation of its laws. The most important exclusion of rights to citizens of the states are the first eight amendments. In the *Slaughter-House Cases*[34] it was held that the first eight amendments to the Constitution were not "privileges and immunities of national citizenship" so as to protect citizens of a state from action under the fourteenth amendment privileges and immunity clauses. This case created a reliance on the due process and equal protection clauses of the fourteenth amendment in civil rights cases as it seems to foreclose protection of citizens of the state from discriminatory state action.

In the case of citizens of Indian tribes, it appears, nevertheless, to be an adequate remedy to state action.[35] As Justice Miller observed in the *Slaughter-House Cases*, "[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.[36]

It was just the different characteristics and circumstances of tribal citizens which have prevented them from becoming citizens of a state, while being considered after 1924 as citizens of the United States. That tribal citizens were not regarded as citizens of either the United States or the states before the adoption of the fourteenth amendment is clear. In *Dred Scott v. Sandford,*[37] Chief Justice Taney explained:

> Although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. . . . These Indian governments were regarded and treated as foreign governments. . . . It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage. . . . But they may without doubt, like subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[38]

After the adoption of the fourteenth amendment, it was strongly contended that the tribal citizens could become state citizens by severing their tribal relations and submitting themselves completely to the jurisdiction of a member state of the United States. This contention was subsequently annulled by the Senate Judiciary Committee Report which held that the fourteenth amendment had no effect whatever upon the status of Indian tribes because they were never subject to the jurisdiction of the United States in the first place.[39] This position was affirmed by the federal court and the Supreme Court in *United States v. Osborne*[40] and *Elk v. Wilkins.*[41] In *Osborne,* the conclusion was:

> [A]n Indian cannot make himself a citizen of the United States without the consent and cooperation of the [federal] government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States but does not of itself make him one.[42]

Mr. Justice Gray expounded the same principles for the Supreme Court of the United States in 1884:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born with the domain of that government. . . . Such Indians, then, not being citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute.[43]

Obtaining citizenship by treaty was attempted on several occasions during the century of treaty-making, but these terms were usually too indefinite to make clear the intentions of the federal government in this matter.[44] In any case, the citizenship granted to Indians was United States citizenship, not state citizenship, and usually discretionary or conditional. Statutory citizenship, *i.e.*, naturalization, after 1871, was still discretionary and United States citizenship.[45] The most inclusive act, passed June 2, 1924,[46] provided that

> . . . 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: Provided, that the granting of such citizenship shall not in any manner impair or otherwise affect the right of an Indian to tribal or other property.

The citizenship rights obtained by tribal citizens was federal citizenship, *i.e.*, United States citizenship. But as Justice Van Deventer stated for the Supreme Court, that United States citizenship ". . . is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indian or placing them beyond the reach of Congressional regulation adopted for their protection."[47]

One of the purposes of Public Law 280 was to *permit* tribal citizens to become full and equal citizens of their respective states; but in contrast to this laudable goal discussed in the House of Representatives Report,[48] the Act did not remove the trust status of the reservation or the prohibitions against the alienation, encumbrance, or taxation of any real or personal property in a manner inconsistent with any federal treaty, agreement, or statute.[49] One of these property

rights is the right to retain tribal citizenship rather than accepting the alternative of state citizenship.

Thus, as long as an Indian remains in volitional allegiance to his tribe he is a United States citizen as well as a tribal citizen. He may reside within the boundaries of a state, but he cannot be considered a citizen of the state unless he expatriates himself from the tribe and asserts his volitional allegiance and intent to become a citizen of that state.

The classification of tribal members into out-of-state and in-state resident categories violates the right of a tribal citizen as a federal citizen to travel throughout the United States to attend the best public schools to further his education. Moreover, as the federal government has not seen fit to establish an institution of higher education for Indians, but rather to allocate land to the various states for them to create such institutions, it would appear that as solely federal-tribal citizens, Indians would have an inherent right and privilege to be exempt from out-of-state tuition charges by any state university. Thus, any state-supported institution of learning should not be allowed to abridge the privilege of tribal citizens, unless the state can point to a congressional statute which permits the state to infringe on the exclusive power of Congress over Indian affairs.

The issue of residence in regard to the right of a tribal citizen of an Indian tribe to county welfare assistance has been raised in *Acosta v. County of San Diego*.[50] In this 1954 case, a Mission Indian residing on the Pala Reservation sued to establish her rights to county welfare assistance. The California District Court of Appeals held that the special jurisdictional relationship between the federal government and Indian tribes did not preclude the Indians from meeting the state residency requirement for receipt of county welfare assistance. The court also stated that the extension of state jurisdiction was limited to matters which do not interfere with controls exercised by the federal government over Indian reservations.[51] The validity of the residence requirement is highly questionable, for in 1969, in the case of *Shapiro v. Thompson*,[52] the Supreme Court held that the residence requirements, which penalize the exercise of constitutional rights by new residents by disqualifying them from some vital governmental benefit that is necessary to life, are invalid and unconstitutional. The durational residency requirements for public welfare, which did so discriminate, were unconstitutional. While the courts have rejected this theory in cases brought by state citizens questioning out-of-state tuition, the legal and impoverished circumstances of tribal citizens within the United States are conducive to the applica-

tion of the *Shapiro v. Thompson* test to state systems of higher education as they prevent the exercise of a tribal right.

Justification of Classification System

The out-of-state tuition classification system is appropriate to state citizens because they have agreed to the various boundaries of state sovereignty within the United States and residence in a state means access to a state-supported school. But the classification system clearly discriminates against tribal citizens without congressional authority in violation of the equal protection clause of the fourteenth amendment. Congress has not enacted a statute which legitimates such distinction between tribal citizens in any state institution of higher learning. In fact, the federal agency in charge of tribal citizens, the Bureau of Indian Affairs, has absolutely rejected paying out-of-state tuition for children of tribal citizens, presumably because it is discriminatory for a state institution to distinguish between tribal citizens based on any considerations of state boundaries. As previously discussed, in the federal-tribal compact there exist no state boundaries.

Assuming that there may exist a legitimate state interest in the classification system which is not in violation of the comprehensive and preemptive congressional power, the state must prove a compelling state interest in their classification system to justify it. This is not an easy task. First, education of tribal citizens has been declared by Congress as a national goal and an urgent fundamental interest. The state of California has already established education as a fundamental interest. Because education of tribal citizens is a fundamental or basic right as defined by Congress and the state of California, a compelling state interest is required to infringe on the right. But, irrespective of a fundamental interest, the classification is subject to strict scrutiny: when applied to tribal citizens, it is based on the "suspect" criterion of discrimination on the basis of nationality, alienage, and race. A court must view any state infringement on tribal affairs which distinguishes between tribes based on state boundaries, through a classification system, with strict scrutiny.

In the Indian Self-Determination and Educational Assistance Act of 1975,[53] Congress declared in Section 3(c) that:

> [A] major national goal of the United States is to provide the *quantity* and *quality* of educational services and opportunities which will permit Indian children to compete and excell in the life areas of their choice, and to achieve the measure of self-

determination essential to their social and economic well-being. [Emphasis added.]

This Act was a result of congressional determination that "the Indian People will never surrender their desire to control relations among themselves and with non-Indian governments, organizations, and persons."[54] Moreover, Congress affirmed that "true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles."[55] This is a clear statutory mandate that Indian education is a national fundamental interest for the development of tribal citizens and their government. This fundamental interest is the supreme law of the land and binds all the states to participate affirmatively to provide educational services to fulfill the proclaimed goals. California has already determined that education is a fundamental interest in *Serrano v. Priest*[56] and for Indian children in *Piper v. Big Pine School District*.[57] Therefore, there is little question that the "quantity and quality" of Indian education is a fundamental interest to be protected by the federal government from state interference or infringement.

It is an established constitutional law doctrine that a statute that treats persons differently based on their nationality, alienage, or race is "suspect," and that even though it is enacted pursuant to a valid state interest, it bears a heavy burden of justification and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible and important state policy. To distinguish between tribal citizens based on their alleged residence in states required a demanding, extraordinary justification. The residence of Indian tribes, like their race, is beyond their control today. The residence of Indian tribes in states is a neutral factor. It is a direct result of a federal-tribal compact based on tribal desires and the administrative convenience of the federal government before the states came into existence. The states can neither praise nor blame Indian tribes for their residency, therefore, it should not be a legitimate basis for granting rewards or imposing penalties.

The Supreme Court has not distinguished among classifications based on national ancestry, ethnic origin, and race, but has held all of these to be suspect under the equal protection clause.[58] But there can be little doubt that all of these are applicable to Indian tribes as a "discrete and insular" minority.[59] As the Supreme Court has struck down Pennsylvania and Arizona statutes which, respectively, denied welfare assistance to resident aliens who were noncitizens of the United States, as well as to noncitizens who had not resided in the

United States for fifteen years,[60] it would be a strange construction to deny such protection to Indian tribes. In the same line of thought, in *Jagnandan v. Giles*,[61] the federal district court held that imposition of higher tuition rates by a state-supported university on in-state aliens than those charged in-state citizens violated the equal protection clause of the fourteenth amendment. In this case, the court rejected a reasonable classification for a compelling state interest test. Moreover, the court found the statutory classification system violated the due process clause of the fourteenth amendment.

The same results must be applied to tribal citizens. No state should be able to impose a greater financial burden on tribal citizens solely because of their parental and tribal residency. Residency of their parents and tribes are a matter of the plenary power of Congress and tribal consent. Any distinctions made by the state to the detriment of tribal citizens are inherently suspect as violative of the equal protection clause.

On June 27, 1975, the Court of Appeals of the Eighth Circuit[62] held that a state may not, through residency requirements, disenfranchise tribal citizens from voting in county elections, even if they reside on a part of the reservation, rather than the county. If the tribal citizens have a substantial interest in such elections, they have a right to make a choice by voting to determine the elected official who will have some control over them. Rejecting the rational basis test of the district court as well as its conclusion, the appeals court held that a compelling state interest is needed to disenfranchise those tribal citizens through a residency requirement and prevent them from manifesting their choice. The same result is seen in the instance of residency requirements determining tuition rates.

Conclusion

There appears to be no reasonable or compelling state interest for classifying students from an Indian tribe within the United States as out-of-state students and charging to those Indian students the higher tuition rate. The regulation of Indian affairs is an exclusive federal concern, unless delegated to the state; thus, any interest of the states is subordinated to Congress.

There are no existing federal statutes which can validate the intervention of state classification on tribal citizens for the purposes of determining residence. Yet, most states have not attempted to evaluate their tuition classification systems in regard to tribal citizens, even though some state-supported colleges have created some American Indian Studies or Native American Study courses. It is time that

such a reevaluation be initiated by either the federal government or Indian tribes. Tribal citizens are being denied the right to attend the institution of higher education of their choice by both the policies of the educational departments of the Bureau of Indian Affairs and the statutory authority of the various states. It appears clearly inconsistent to penalize the beneficiaries of the Indian Self-Determination and Educational Assistance Act of 1975, which seeks to utilize the competencies of state institutions of higher learning, by requiring them to pay the more costly out-of-state tuition based on state boundaries.

The problem appears not as a calculated plot but rather as a new situation in which the older, valid classification system, in part, has become discriminatory to one group. This situation should be corrected in line with federal policy and the rights and privileges of tribal citizens. To assume that the durational residence of a tribal citizen at a state university is not an immediate and pressing need for the preservation of his tribe is to ignore the congressional mandates of the Indian Self-Determination and Educational Assistance Act of 1975. Moreover, to assume that by attending a state university a tribal citizen must renounce his tribal citizenship and residency and accept state citizenship and residency is a violation and infringement of his tribal rights as given in the Indian Reorganization Act of 1934 and the Indian Citizenship Act of 1924. The distinction made which validates the residence requirement in some decisions, on the basis that it is a reasonable attempt to achieve a partial equalization between those who pay taxes and contribute to a state's economy and those who do not, is utterly without merit in the circumstances of Indian tribes under the federal-tribal compact.

NOTES

1. Non-Indian students attending universities or colleges in states different from their parents' established residency, have challenged these state-created requirements on the grounds that such classification and requirements were unconstitutional violations of the due process and equal protection clauses of the fourteenth amendment, as well as unconstitutional interference with the right of state citizens to interstate travel and commerce. Despite these attempts, the courts have consistently upheld the constitutionality of such durational residency requirements. The rationale was that the higher tuition differentials which nonresident students must pay, for essentially the same education, is meant to equalize the burden between state taxpayers and nontaxpayers. Moreover, through utilizing tuition differentials, the state is attempting to make nonresident students pay that share of their education which resident students, or their parents, have paid through state taxes. These tuitional differentials have been viewed by the courts as a reasonable means for retarding an undesired influx of out-of-state students to limited facilities in higher education within a state, thereby insuring and affording a greater number of places in the system for residents.

The courts have uniformly found the durational residency requirement and the higher tuition differential to be a reasonable method of classifying students which is rationally related to the legitimate objective of partial cost equalization between state taxpayers and nontaxpayers. It should be noted, however, that these cases have created the development of compacts between states, such as the Southern Regional Education Board, which waive the nonresident tuition differentials for students enrolling in graduate programs not offered in their home state.

There are unresolved legal questions concerning residency classification systems. These questions revolve around the criteria for determining residence and the validity of a stricter domicile test, which many states are adopting in place of residency criteria. Domicile requires intent to become a state citizen, while residency requirements and criteria denote temporal bodily occupancy within the state for a specified length of time. Both of these classification systems are repugnant to the federal-tribal compact and shall be dealt with as the same in this paper. *See* Starnes v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *hearing denied* C.A. No. 25734 (Cal. 1969), *appeal dismissed for lack of federal question*, 396 U.S. 554 (1970); Kline v. Vlandis, 346 F. Supp. 526 (D. Conn. 1972), *reversed* 93 S.Ct. 2230 (1973); Hooban v. Boling, 371 F. Supp. 111 (D. Tenn. 1973), *aff'g* 503 F.2d 648 (6th Cir. 1974); Montgomery v. Douglas, C.A. No. 74-F-720 (D. Colo. 1974); Covell v. Douglas, 501 P.2d 1047 (D. Colo. 1972); Hasse v. Board of Regents, 363 F. Supp. (D. Hawaii 1973); Clarke v. Redeker, 406 F.2d 883 (D. Iowa 1966); Hayes v. Board of Regents, 362 F. Supp. 1172 (E.D. Ky. 1973); Peletetreau v. Savage, 381 F. Supp. 582 (D. N.H. 1974); Robertson v. Board of Regents, 350 F. Supp. 100 (D. N.M. 1972); Weaver v. Kelton, 357 F. Supp. 1106 (E.D. Tex. 1973); Walters v. Hoover, C.A. No. 69-C-304 (D. Wis. 1970); Sturgis v. State, 368 F. Supp. 38 (W.D. Wash. 1973); Haper v. Board of Regents, 108 Ariz. 223, 495 P.2d 453 (1972); Weitzel v. State, 306 So. 2d 188 (Fla. App. 1974); Twist v. Redeker, 406 F. 2d 878 (C.A. Idaho 1969); Newman v. Board of Education, 82 Idaho 90, 349 P.2d 716 (1960); Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

2. For an example of these state statutory codes, *see* CAL. EDUC. CODE §§ 23054, 23055, 23056 (West, 1969):

§ 23054. "Resident student" defined; determination of resident status

" 'A resident student' means any person who has been a bona fide resident of the State for more than one year immediately preceding the opening day of a semester during which he proposes to attend the university.

"The residence of each student shall be determined in accordance with the rules for determining residence prescribed by Sections 243 and 244 of the Government Code. The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian, except that:

"(a) Where immediately prior to first entering any California institution of higher learning the minor child has lived with and been in the continuous direct care and control of any person or persons other than a parent for a period of not less than two years, the residence of the minor child is the residence of the persons or persons having such care and control after the expiration of that two years. As used in this subdivision, 'California institution of higher learning' means any public or private university, college, or junior college in the State.

"(b) Any person who qualifies for residence status under subdivision (a) of this section or under Sections 243 and 244 of the Government Code shall not lose such residence status by virtue of his marriage to a nonresident who lives in California nor shall such person be required to re-establish residency upon reaching his or her majority.

"(c) Any minor child, a citizen of the United States, or any alien, who is a minor child, who has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the laws of the United States, who does not receive and has not for a period of more than one year immediately preceding the opening day of a semester during which he proposes to attend the university received, directly or indirectly, any support or financial assistance from his father, if the minor lives with his mother, who is and has been for a period of more than one year immediately preceding the opening day of the semester actually present in the State with the intention of making her permanent home therein, is a resident student. (Stats. 1959, c. 2, p. 1385, § 23054. Amended by Stats. 1961, c. 915, p. 2539, § 2.)

"§ 23055. Alien students; classification of certain students as resident students

"Every alien student is deemed to be a nonresident student unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the laws of the United States.

"Nothing in this section or in Sections 243 and 244 of the Government Code prevents the regents from causing to be classified as a resident student any alien who has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the laws of the United States or any citizen of the United States if such citizen or alien has attained his majority in accordance with the laws of this State and for a period of one year immediately preceding the opening day of a semester during which he proposes to attend the university, has been entirely self-supporting and actually present in the State, with the intention of acquiring a residence therein. (Added by Stats. 1961, c. 915, p. 2540, § 4.)

"§ 23056. Administration of oaths for taking testimony relative to residence status

"The general counsel for the Regents of the University of California and any person appointed by him for the purpose of ascertaining the residence status of students and prospective students of the university may administer oaths or affirmations in connection with the taking of testimony relative to any residence status. (Stats. 1959, c. 2, p. 1386, § 23056. Amended by Stats. 1961, c. 626, p. 1784, § 3.)"

Residence in the Government Code is defined in Sections 243 and 244:

"§ 243. Residence. Every person has, in law, a residence. (Stats. 1943, c. 134, p. 901, § 243.)

"§ 244. Determination of place of residence. In determining the place of residence the following rules are to be observed:

"(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

"(b) There can only be one residence.

"(c) A residence cannot be lost until another is gained.

"(d) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child.

"(e) The residence of the husband is the residence of the wife, provided that a married woman who is separated from her husband may establish her own residence.

"(f) The residence of an unmarried minor who has a parent living cannot be changed by his own act.

"(g) The residence can be changed only by the union of act and intent. (Stats. 1943, c. 134, p. 901, § 244, as amended Stats. 1965, c. 1765, p. 3950, § 1.)"

The statutes on their face seem appropriate, but for a tribal citizen and resident

they may cause him to lose his federal and tribal benefits. If every person has, in law, a residence, as CAL. GOV'T CODE § 244(a), then what is the residence, in law, of a tribal citizen? The tribal reservation or a state? This problem is compounded by §§ 244(b), (c), and (g), which state that a residence cannot be lost until another is gained, that a person can only have one residence, and that the one residence can only be changed by the union of act and intent. This could be construed as depriving the tribal citizen of his tribal identity and rights if he accepts residence in the state of California or other states to gain lower tuition.

This loss of tribal identity has its precedent in the Eastern states, when tribal citizens recorded their land under colonial or state records. The theory behind such recordation of tribal land was merely to reduce tensions and questions concerning the ownership of land, but at a subsequent date the jurists construed the recordings as evidence of expressed consent to state jurisdiction. This writer submits that the same theory of residency of the state might have the same effect on contemporary tribes. Indian tribes exist solely because their members assert their tribal personal sovereignty to the tribe and not to the state. ROSEBUD SIOUX TRIBAL CONST., Preamble; F. COHEN, FEDERAL INDIAN LAW 122 (1945). If tribal citizens by "the union of act and intent" assert this allegiance to a state, this might weaken, if not destroy, the notions of tribal sovereignty. This would be especially true under § 23056 of the CAL. EDUC. CODE. As both citizenship and residence are a matter of intention and it has been held that a "floating intention" is insufficient to overcome undisputed evidence of facts establishing actual residence, tribal citizens must be wary of such potential harms of asserting any allegiance to the states.

It should be noted that unmarried minors whose parents are members of the federal military services stationed in California are deemed residents of the state during the duration of the parents' stay. CAL. EDUC. CODE § 23057. The same standards ought to apply for a tribal citizen away from his tribe seeking to complete his education.

3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

4. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1858), *rev'd*, 358 U.S. 217 (1959). The Court held that "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*Id.* at 220). This has usually been called the "infringement test" by the courts and legal scholars where the courts balance the state and federal interests in Indian affairs. *See* Warren Trading Post v. Tax Comm'n, 380 U.S. 685 (1965) (Court reversed Arizona Supreme Court attempt to use *Williams* test to extend state's taxation power onto the Navaho Reservation because of federal preemption); State *ex rel.* Merrill v. Turtle, 413 F.2d 683 (1969) (Ninth Circuit Court of Appeals held Arizona could not extradite an Indian fugitive to Oklahoma after tribe had refused extradition. Tribal legislation preempted the state.) McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) (Court held tribal citizens on reservations are not subject to state taxation except by virtue of expressed authority conferred on state by act of Congress.) *See also*, in the unique Alaskan context, Organized Village of Kake v. Egan, 369 U.S., (1962) and Metlakatla Indian Community v. Egan, 369 U.S. 75 (1962).

5. The suppression doctrine holds that Congress has the power to either permit state regulation or to prohibit, by expressed statute or by implication, state regulation. To the extent that Congress has prohibited state regulation, the federal power is exclusive and no state regulation is allowed. In the context of tribal rights, the supersession of state law results because Congress has acted under the Indian commerce clause (U.S. CONST., art. I, § 8, cl. 3) and the supremacy clause (U.S. CONST., art. VI, § 2) to provide complete regulation of the subject matter. See note 4 *supra*.

6. 118 U.S. 375 (1886). This case holds that the federal government's preemption or supersession of state law over tribal citizens was constitutional.

7. *Id.* at 383.

8. *Id.*

9. *Id.* at 383-85.

10. 413 F.2d 683 (9th Cir. 1969). See also note 4 *supra.*

11. U.S. CONST. art I, § 8, cl. 3, *See* Worcester v. Georgia, 31 U.S. 350, 379 (6 Pet) 515, 559 (1832). *See also* F. COHEN, FEDERAL INDIAN LAW 89 (1945).

12. 411 U.S. 164 (1973).

13. The conceptualization of the federal-tribal compact is this writer's attempt to illustrate the dual role under which the federal government operates in American constitutional federalism. On the one hand, the United States Constitution forges a compact between the federal government and the states. On the other hand, the tribal-federal treaties and federal statutes form the substance of the federal-tribal compact. It is because the tribes were limited by the Constitution from entering treaties with the states, that the federal preemption is plenary. *See* U.S. CONST., art. I, § 2, cl. 3 (excluding Indians not taxed from apportionment); art. I, § 8, cl. 3 (grants Congress power over commerce with Indian tribes); § 10, cl. 1 ("No State shall enter into any treaty, alliance or confederation. . ."); § 10, cl. 3 ("No State shall, without consent of Congress, . . . enter into any agreement or compact with another State or with a foreign power").

14. THE FEDERALIST No. 43 (A. Hamilton).

15. See note 4 *supra* and accompanying text.

16. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part as 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1970).

17. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 301-22, 401-406, 82 Stat. 73, 78-80, codified 25 U.S.C. §§ 1311-12, 1313-16, *amending* 28 U.S.C. § 1360 (1970).

18. *Id.* at § 406, 82 Stat. at 8, codified at 25 U.S.C. § 1326 (1970).

19. 118 U.S. 375, 383-85 (1886).

20. *Id.* at 383 (emphasis added).

21. 93 U.S. (3 Otto) 188 (1876).

22. *Id.* at 196.

23. *Id.*

24. 70 U.S. (3 Wall) 407 (1866).

25. *Id.* at 419.

26. The arguments in these cases involving the Canada-United States border are similar to the arguments of the federal-tribal compact. *See* Akins v. Saxbe, 380 F. Supp. 1210 (D. Me. 1974), No. 74-11-03228 (U.S. Custom Ct.) (holds that Article III of Jay Treaty is still in force and confers an exemption on American Indians from the payment of duties of goods bought in Canada.) *Also see* McCandless v. United States, 25 F.2d 71 (3d Cir. 1928), *aff'g* 18 F.2d. 282 (E.D. Pa. 1927).

27. 481 F.2d 438 (1973), *aff'g* C.A. No. C-3846 (D. Colo. 1973).

28. *Id.* at 439, citing 36 Stat. 269.

29. *Id.*

30. C.A. No. 3-3846 (D. Colo. 1973).

31. The Higher Education Assistance Program of the Bureau of Indian Affairs is authorized under two legislative acts. The first source is the Act of June 18, 1934, 48 Stat. 986, 25 U.S.C. 471, which authorizes a program of assistance by educational loans. The second source is the Snyder Act, 25 U.S.C. 13, which provides for monetary grants to students in higher education. There are two classes of Bureau aid that is available to tribal citizens. These are loans and grants. Educational loans are administered

under the provision of 47 BIA Manual 10. Grant funds which may cover tuition, subsistence, required fees, textbooks, and miscellaneous expenses relating to attendance at college, are administered under 62 BIA Manual 5. The regulations are general and on their face do not restrict tribal citizens to institutions of higher learning in the state in which their tribal reservation is located. In fact, § 32.1, part 32, ch. I, tit. 25 of the Code of Federal Regulations was revised on June 4, 1968, "to permit the extension of higher education aids to Indian students in schools of their own free choice." 33 F.R. 9708. Nevertheless, the Bureau, faced with more eligible applicants than available funds, has developed a priority for "reservation-based undergraduates who are in good standing at a level of assistance to permit attendance at a public-supported within-state institution." Letter from Leroy Falling, Higher Education Assistance Specialist, Nov. 4, 1975. The reasoning behind this priority is that this category of student is in the most need of assistance because of isolation and lack of experience in seeking other funding. Moreover, in many cases, tribes are given the responsibility to establish priorities. Economic realities, in short, create a public-supported within-state limitation on the Bureau's Higher Education Assistance Program to tribal citizens. The public-supported within-state institutional costs are the standards by which out-of-state or private college tuition costs are evaluated. This usually means that those students are faced with the burden of paying the difference. Naturally, it could be stated that the Bureau is at fault, but to this writer, economic realities mandate that the solution lies in the invalidity of state regulations for out-of-state tuition.

32. *See* Indian Self-Determination Act and Education Assistance Act of 1975, P. Law 93-638, 25 U.S.C. § 450 (1975). See also notes 53, 54, 55 *infra.*

33. 211 U.S. 78 (1908).

34. 83 U.S. (16 Wall.) 36 (1873).

35. The position of tribal citizens today is very similar to that of the English in America after the Revolutionary War. This issue was determined by the subsequent adoption of the ideal of volitional allegiance and the concept of popular sovereignty, with the subsequent rejection of Coke's formulation of subjectship in *Calvins Case. See* the excellent article on this topic by Kettner, *The Development of American Citizenship in the Revolutionary Era: The Ideal of Volitional Allegiance,* 18 AM. J. LEGAL HISTORY 208 (1974). In their dissent in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), which was requested by Chief Justice Marshall, Justices Thompson and Story addressed the issue of citizenship and tribal Indians. They concluded that the members of the Cherokee Nation could not be considered as citizens of the state of Georgia, because that idea was "entirely inconsistent" with the federal-tribal treaties and the precedent of the state courts. *Id.* at 66. They concluded that if the members of the Cherokee Nation were "not citizens, they must be aliens or foreigners, and such must be the character of each individual belonging to the [Cherokee] nation." *Id.* Moreover, they cited with approval Chancellor James Kent's opinion in Jackson v. Goodel, 20 Johns Rep. 188, 193 (N.Y.S.C. 1822). This case involved the citizenship of an Oneida Indian, who had received a patent to the lands in question from the federal government because of his participation in the Revolutionary War as an officer for the colonies. The lower court had determined that he was a citizen, but Chancellor Kent held that, "In my view, they [the Oneida Indians] have never been regarded as citizens, or members of our [state of New York] body politic. They have always been and still are considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection and subject to our coercion, so far as the public safety requires it, and no further . . . . No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and

their land under the protection of the British crown; such a fact is of frequent occurrence between independent nations. One community may be bound to another by a very unequal alliance, and still be a sovereign state. Vat. B. 1., ch. 16, section 194. The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes." *Id.* at 66-67; Goodell v. Jackson, 20 Johns Rep. 693, 712 (N.Y. Ct. Eu. 1823), *reversing* Jackson v. Goodell. *Accord,* Lee v. Glover, 8 Lowen 189 (N.Y.S.C. 1828); Cornet v. Winton, 2 Yergen 143 (Tenn. S.C. 1826); Murray v. Wooden, 17 Wendell 531 (N.Y.S.C. 1837). *See also* State *ex rel.* Marsh v. District of York, 1 Bailey 215 (S.C. Ct. App. 1829) (race of people considered separate and distinct class theory rather than political allegiance). Thus, it was not the place of birth that determined citizenship, but the political choice of the Indians.

36. 83 U.S. (16 Wall.) 36, 39 (1873).

37. 60 U.S. (19 How.) 393 (1856).

38. *Id.* at 404. It should be noted that ten years later in United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866), the Court held that a grant of citizenship by the state of Minnesota to an Indian did not alter his special status as a tribal member.

39. *Effect of the Fourteenth Amendment upon Indian Tribes,* 41st Cong., 3d Sess., S. Rep. No. 268 (1870). This report put to rest any argument that the inclusiveness of section 1 of the fourteenth amendment included all native-born tribal members under the phrase . . . "subject to the jurisdiction, thereof are citizens of the United States and of the States wherein they reside." Because the Indian tribes were subject to the Constitution and to the laws of Congress, there was a strong presumption that the tribes were subject to the jurisdiction of the United States. The "fourteenth amendment to the Constitution," the Report began, "has no effect whatever upon the status of Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States." *Id.* at 1. "The Indians, in tribal condition," the report continued, "have never been subject to the jurisdiction of the United States, in the sense in which the term jurisdiction is employed in the fourteenth amendment to the Constitution. The government has asserted a political supremacy over the Indians . . . separate from the States of the Union within whose limits they are located, and exempt from the operation of State laws; and not otherwise subject to the control of the United States than is consistent with their character as separate political communities or states." *Id.* at 9-10. The matter of taxation was also commented on by the Report. It suggested that the reason the fourteenth amendment retained the provision "excluding Indians not taxed" from the Constitution, while excluding "three-fifths of all other persons," established an irresistible inference "that the amendment was intended to recognize no change in the status of Indians." *Id.* at 10. The Report concluded that, "The Indians were excluded because they were not citizens." *Id.*

40. 6 Sawyer 406 (1880). *See also* McKay v. Campbell, 16 F. 161, 165-66 (D. Ore. 1871).

41. 112 U.S. 94 (1884).

42. 6 Sawyer 406, 409 (1880).

43. 112 U.S. 94, 102, 103 (1884).

44. *See* Treaty with Cherokees, July 18, 1817, which provided that an allotment in fee simple of a section of land was to be made to all heads of Indian families "who may wish to become citizens of the United States." 7 Stat. 156. *Accord,* art. XIV, Choctaw Treaty of 1830, 7 Stat. 333. *See also* Stockbridge Tribe of Indians Treaty of 1848, 9 Stat. 955 and Treaty of 1856, 11 Stat. 663. For example of a treaty where the entire tribe exchanged its tribal organization for the privilege of full citizenship, *see* Treaty with the Wyandott Tribe, Jan. 31, 1855, 10 Stat. 1159 and Treaty with

Ottawa Indians of Blanchard's Fork and Roche de Beuf, 12 Stat. 1237 (1862) *See also* 15 Stat. 413. Another common procedure in treaties is illustrated by art. VIII of the Treaty of 1858, 12 Stat. 1037. *See further*, Elk v. Wilkins, 112 U.S. 94 (1884) for discussion.

45. *See* 15 Stat. 635; 24 Stat. 388; 31 Stat. 1447; 41 Stat. 350.

46. 43 Stat. ch. 233 (p. 253). The constitutionality of this act has never been asserted in federal courts. It should be noted, however, that in the case of Ozawa v. United States, 260 U.S. 178 (1922), the Supreme Court suggested that it was not possible for a tribal Indian to be a naturalized citizen of the United States. The *Ozawa* case concerned a Japanese person living in Hawaii. He had applied for naturalization as a United States citizen in the United States District Court for the Territory of Hawaii. The district court denied his petition on the grounds that he was a person of the Japanese race and not eligible for naturalization under Section 2169 of the Revised Statute which read: "The provisions of this Title shall apply to aliens, being free white persons, and aliens of African nativity and to persons of African descent." *Id.* at 190. The Supreme Court held that the meaning of the original Act was clear. "It may be true that these two races [Negroes and Indians] were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified." *Id.* at 195. The Court indicated, however, that it was unnecessary to determine precisely what groups the Congress intended to exclude under the naturalization laws. The Court stated, "It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded." *Id.* at 196. The Court concluded that Caucasians alone were intended to be within the original scope of the Naturalization Act until it was amended, after the Civil War, to include Negroes. In effect, the Court, despite its reasoning, denied to Japanese and the Indians application for naturalization as United States citizens. This left only treaties as the source for United States citizens. The Naturalization Act of Oct. 14, 1940, corrected this deficiency in the naturalization laws, in spite of the Act of June 2, 1924, to read: "The right to become a naturalized citizen under the provision of this Act shall extend only to white persons, persons of African nativity or descent, and decendants of races indigenous to the Western Hemisphere." F. COHEN, FEDERAL INDIAN LAW 521 (1945).

47. United States v. Nice, 241, U.S. 591, 598 (1916) (dealing with citizenship through the Allotment Act).

48. H.R. REP. No. 848, 83d Cong., 1 Sess. 5 (1953).

49. 18 U.S.C. § 1162(b) (1970); 28 U.S.C. § 1360(b) (1970).

50. 126 Cal. App. 2d 455, 92 P.2d 92, 96 (1954).

51. *Id.* at 463.

52. 394 U.S. 618 (1968).

53. P. Law 93-638, 25 U.S.C. § 450 (1975).

54. *Id.* at § 2(a)(2), 25 U.S.C § 450(a)(2).

55. *Id.* at § 2(b)(1), 25 U.S.C. § 450(b)(1).

56. 487 P.2d 1241 (1971).

57. 193 Cal. 664, 226 P. 926 (1924).

58. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Hernandez v. Texas, 347, U.S. 475 (1954).

59. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938).

60. Graham v. Richardson, 403 U.S. 365 (1971).
61. 379 F. Supp. 1178 (N.D. Miss. 1974).
62. Little Thunder v. South Dakota, 518 F.2d, 1253 (1975).