Indian Schools and Community Control

Daniel M. Rosenfelt*

CONTENTS

I. INDIAN EDUCATION POLICY REVIEWED .......................... 492
   A. Federal School System .................................. 493
   B. Federal Assistance to State Schools ....................... 496
      1. The Johnson-O’Malley Act ............................. 496
      2. Impact aid ............................................. 497
      3. Termination ............................................. 500
   C. Legal Obligation to Provide Educational Services .......... 502
      1. Federal obligation ..................................... 502
      2. State obligation ....................................... 505
   D. Need for Increased Indian Control ......................... 506

II. THE RENAISSANCE OF INDIAN EDUCATION ..................... 507
   A. Federal Schools ........................................ 508
      1. Rough Rock Demonstration School ..................... 508
      2. Ramah Navajo High School ............................ 509
      3. Busby School .......................................... 510
      4. Chemawa Indian School ................................ 511

* A.B. 1963, The Johns Hopkins University; LL.B. 1966, Columbia Law School. Senior Staff Attorney, Center for Law and Education, Harvard University; formerly Staff Attorney, California Indian Legal Services, Native American Rights Fund Division.

The research for this Article was performed pursuant to a grant from the Office of Economic Opportunity, Washington, D.C. The opinions expressed herein are those of the author and should not be construed as representing the opinions or policy of any agency of the United States Government or of any other organization or institution.
B. Public Schools

C. Control of Federal Programs in Public Schools
   1. Johnson-O'Malley contracts
   2. Title I programs
   3. Indian Education Act of 1972

III. Control of Federal Versus State Schools

A. Control of Federal Schools
   1. General limitations
   2. Politics and bureaucracy

B. Control of State Schools
   1. Advantages and disadvantages
   2. New districts

IV. Indian Schools and the Constitution

A. The Unique Status of Indians

B. Due Process Applied
   1. Political question
   2. Standards of review
   3. Civil rights statutes
   4. Federal contract schools
   5. Indian control

C. Equal Protection Applied

V. Conclusion
In most Indian communities today, people are demanding community control of education. This position has substantial support. In 1969, the Special Senate Subcommittee on Indian Education, after more than two years of intensive study, recommended that the United States set as a national goal the achievement of "[m]aximum Indian participation in the development of exemplary educational programs for (a) Federal Indian schools; (b) public schools with Indian populations; and (c) model schools to meet both social and educational goals. . . ." The following year, President Nixon declared, "[W]e believe every Indian community wishing to do so should be able to control its own Indian schools."2

Approximately 250,000 Indian, Eskimo, and Aleut children now attend this nation's public, federal, and private schools.3 Roughly 70 percent of these students attend public schools, 25 percent attend federal schools operated by the Bureau of Indian Affairs (BIA), and 5 percent attend religious or other schools.4

The education of Indian children receives substantial federal financial support. In fiscal year 1972 the BIA spent almost $3,000 per pupil for its 52,000 students (36,000 boarding and 16,000 day), while the federal government provided about $700 for each Indian student to supplement state and local expenditures in the state public schools.5 This nearly doubles the nationwide average per-pupil expenditures in public schools of $858.6

The purpose of this Article is to discuss the legal and practical considera-


4. U.S. Dep't of Interior, Fiscal Year 1971 Statistics Concerning Indian Education 1 [hereinafter cited as Statistics]. The vast majority of the 52,000 children attending federal schools comes from one of three places, the Navajo Reservation in Arizona, New Mexico and Utah (23,436), the Sioux Reservations in North and South Dakota (6,438), or the State of Alaska (6,605). Almost every child attending federal Indian schools resides on an Indian reservation.

On a nationwide basis, approximately 50% of Indian people live off reservations. Of these nonreservation Indians, many live in rural settlements or in small towns near the reservations while others live in major urban areas. There is a substantial variation in the economic and social conditions of Indian communities throughout the nation. Some tribes have thousands of members; many others have less than 300. The Aqua Caliente in Palm Springs, California, own small but valuable property, much of which is leased at favorable rates to entrepreneurs in that resort area, while the barren Cocopah Reservation in southwestern Arizona is one of the most desolate settlements in the nation. The degree of acculturation also varies significantly from tribe to tribe.


tions which face Indian communities as they begin to move toward transforming the rhetoric of "Indian control" into the reality of quality education. First, the Article presents a brief history of federal and state Indian education policies, followed by a description of the contemporary movement for community control. Next, the Article considers alternative strategies and possible guidelines for Indian community control of education. The Article concludes with a review of constitutional issues which are posed by the existence of Indian schools.

I. INDIAN EDUCATION POLICY REVIEWED

It should come as no surprise that formal Indian education is termed "A National Tragedy" or "Mental Genocide." For the last 400 years the white man in the name of education has been primarily interested in changing or "civilizing" the American Indian. For 300 years, beginning in 1568 with the Jesuit mission school for Florida Indians, the various denominations of the Christian church provided most of the formal education of Native Americans. The young federal government, when confronted with skirmishes between Indian hunters and white settlers who sought to move West, adopted "civilization" as its overall Indian policy. The transformation of the Native Americans from hunters to farmers was also a change which would free millions of acres for non-Indian settlement. Education was perhaps the most important instrument through which civilization was to occur, as evidenced by the inclusion of education provisions in Indian treaties beginning in 1794 and continuing through the end of the treatymaking in 1889. Part of the consideration for these treaty promises...
of education was the cession by various Indian tribes of almost one billion acres of land to the United States.\footnote{44}

Throughout the early part of the 19th century federal efforts in support of Indian education remained modest, and continued to rely heavily on the work of missionary groups. It was through the missionary societies, for example, that the government distributed its annual $10,000 appropriation to introduce to the Indians “the habits and arts of civilization.”\footnote{45} For the 10-year period ending in 1855, expenditures for education among Indian tribes exceeded $2,150,000 of which only $102,107.14 was contributed directly by the federal government: “$824,160.61 was added from Indian treaty funds, over $400,000 was paid out by Indian nations themselves, and $830,000 came from private benevolence.”\footnote{46}

A. Federal School System

Although religious groups continued to receive federal subsidies to operate schools for Indians until 1897, the BIA, primarily to discharge treaty commitments, began to build its own educational system in the 1870’s.\footnote{47} This federal interest in enforcing treaty commitments coincided with the period in which many of the Plains tribes fought with great ferocity in the final defense of their homeland.\footnote{48} Indian children becoming “civilized” in government institutions would not be able to join the young warriors of their tribes in battle, and parents of students in federal schools, fearing possible reprisal against their children, would feel more reluctant to take up arms against the government.

In 1879, the House Committee on Indian Affairs submitted a report recommending the establishment of Industrial Training Schools for Indian

\footnotesize{\textit{Treaty with Sacs, Foxes, Iowas, Mar. 16, 1861, 12 Stat. 1171, 1172-73 (school, teacher, yearly stipend). For a more complete list of Treaties with education provisions, see U.S. SOLICITOR, DEP'T OF INTERIOR, FEDERAL INDIAN LAW 271 n.4 (2d rev. ed. 1958) [hereinafter cited as FEDERAL INDIAN LAW]. For a helpful explanation of some educational provisions, see ATT COMM'R ON INDIAN AFFAIRS, TREATY ITEMS, INDIAN APPROPRIATION BILL, H.R. Doc. No. 1030, 63d Cong., 2d Sess. (1914). The treaty provisions emphasized technical education in agriculture and in the mechanical arts. See generally FEDERAL INDIAN LAW, supra at 270-81.}}

\footnotesize{\textit{44. SUBCOMM. REPORT, supra note 1, at 11. For example, the Treaty with the Chippewas states: “In further consideration for the lands herein ceded, estimated to contain about two million of acres, the United States agree to pay the following sums, to wit: Five thousand dollars for the erection of school buildings upon the reservation . . . four thousand dollars each year for ten years . . . for the support of a school or schools upon said reservation.” Treaty with the Chippewa Indians, Mar. 19, 1867, 16 Stat. 719-20 (emphasis added).}}

\footnotesize{\textit{45. F. PRUCHA, supra note 11, at 219, 222; see FEDERAL INDIAN LAW, supra note 13, at 273.}}

\footnotesize{\textit{46. REPORT OF THE SECRETARY OF INTERIOR, S. Doc. No. 1, 34th Cong., 1st Sess., pt. 1, at 561 (1855), quoted in FEDERAL INDIAN LAW, supra note 13, at 273 n.17.}}

\footnotesize{\textit{47. SUBCOMM. REPORT, supra note 1, at 147-48.}}

Youth. Pointing out that more than 12,000 Indian children were entitled to education under the treaties but "less than 1,000 have received schooling as provided," the Committee declared: "It is clear that the mutual interests and well-being of the Indians and the government, as well as the cause of civilization and humanity, alike demand that these [treaty] provisions be fully carried out and enforced." The Industrial Training Schools called for in the Committee Report would utilize abandoned army barracks and have the effect of removing Indian children from all tribal influence during the period of their education. The Committee believed its recommendations were the "true solution" to the Indian question, and that "a generation will not pass before the use of a standing army to protect our frontiers from Indian raids, depredations, barbarities, and murders will no longer be required."

In the same year the Carlisle Indian School was established in Carlisle, Pennsylvania, under the direction of Captain R. H. Pratt of the United States Cavalry. Carlisle was attended by Indian children from many of the western tribes, and its military format served as a model for the nascent federal boarding school system. Anthropologist Peter Farb gives the following picture of Indian boarding schools:

The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian — dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.

On July 31, 1882, Congress, acting upon the recommendation of the Committee on Indian Affairs, authorized the use of vacant army posts or barracks to establish a system of normal and industrial training schools "for
Indian youth from nomadic tribes having educational treaty claims upon the United States." Although the federal school system was to be based upon treaty claims of specific tribes, the practice first established at Carlisle of drawing students from many different tribes resulted in the creation of a system which operated without regard to any particular treaty. And, as the number of BIA schools increased, new facilities were constructed in addition to the vacant army facilities authorized by the 1882 statute. In 1921, Congress gave the BIA board authorization to spend monies for "[g]eneral support and civilization, including education."

The BIA's authority under the statute, although clearly influenced by treaty obligations, is not limited to the discharge of treaty commitments. After 1900, the federal system included not only boarding schools but an ever increasing number of local day schools, including several hundred small day schools which had previously been operated by the Oklahoma tribes.

Today, the BIA school system varies dramatically among different regions and between elementary and secondary facilities. In Alaska, where most of the Native population resides in isolated villages, there are numerous small elementary day schools run by the BIA. Elementary school children are not sent to boarding school in Alaska. By contrast, most elementary school students on the Navajo reservation attend one of 48 relatively large reservation boarding schools. A third variant is found on the Rosebud Sioux reservation in South Dakota where the BIA maintains a dormitory, but the elementary and secondary school students attend a public school rather than a BIA facility. The present BIA boarding school program is not designed to serve all of the children who attend BIA day school. Rather, as discussed below, BIA policy is, and for many years has been, to encourage Indian students to attend state public schools wherever possible.

26. 25 U.S.C. § 13 (1971). The 1921 Act has become the basic statutory source of federal authority to provide for Indian education. It is the authority for the entire BIA school system.
27. COMM. ON INDIAN AFFAIRS, AUTHORIZING APPROPRIATIONS AND EXPENDITURES FOR THE ADMINISTRATION OF INDIAN AFFAIRS, S. REP. No. 294, 67th Cong., 1st Sess. (1921). The Pueblo Indians of New Mexico and Alaska Natives, for example, have attended BIA schools over the years even though they have no treaty with the United States.
28. FEDERAL INDIAN LAW, supra note 13, at 274–75.
29. Indian, Eskimo, and Aleut.
30. All but four of the 53 BIA elementary day schools have enrollments of less than 150 and 18 schools enroll fewer than 150 children. STATISTICS, supra note 4, at 20–21.
31. Id. at 13.
32. Id. at 13–15, 22.
33. Id. at 25. This is one of 19 such facilities. The dormitory at Rosebud and most of the others serve both elementary and secondary students. Id.
34. See text accompanying notes 83–84 infra.
35. STATISTICS, supra note 4, at 5. The BIA still operates a total of 77 boarding schools. Those located on the reservations serve elementary and in some instances secondary students. The off-
B. Federal Assistance to State Schools

Prior to the Citizenship Act of 1924, governmental responsibility for the education of Indians rested with the federal government. Most Indians were not citizens, and therefore did not possess the right of citizens to attend state supported public schools. Even where Indians had become citizens through treaty or the General Allotment Act of 1887, the public systems did not accept large numbers of Indian students without financial subsidies from the federal government.

The state public school systems are financed in large measure by local property taxes. Title to most Indian land, including reservations and allotments, is held in trust by the United States Government for the benefit of either the Indian tribe or the individual and is not subject to local property tax. Accordingly, the influx of substantial numbers of Indian children places a financial burden on the state school systems. This burden has been alleviated by a variety of federal financial assistance programs.

Federal support to induce states to accept Indian children in the public school systems began as far back as 1890. After 1900, the practice of paying "nonresident tuition" to state schools to educate Indian children developed rapidly. The most important programs to subsidize the transfer of Indian children to the state school systems have been the Johnson-O'Malley Act of 1934 and two Impact Aid laws passed in the 1950's. These Acts, which authorize financial assistance to the state schools, also play an important role in facilitating the integration of Indians into non-Indian society.

1. The Johnson-O'Malley Act.

The Johnson-O'Malley Act of 1934 has been the most significant program through which the federal government has brought about the transfer...
of Indian children from federal to state schools. Basically, the Act authorizes the BIA to make contracts with any state for the education of Indians.44 From 1944 to 1969, Congress appropriated more than $132,200,000 for payments to the states under Johnson-O'Malley (JOM).45 In 1969, the estimated expenditure of $11,552,000 meant that public school districts received approximately $174 for every eligible Indian student.46 Recently, JOM appropriations have increased dramatically—from $11,552,000 in 1969 to $22,652,000 in 1972.

Under existing regulations, the JOM program is administered "to accommodate unmet financial needs of school districts related to the presence of large blocks of nontaxable Indian-owned property in the district. . . ."47 The result is that local school districts have been able to serve Indian students from the reservations without placing an inordinate burden on school budgets.48

2. Impact aid.

In recent years, an even more substantial federal subsidy to public schools has been provided through the two "Impact Aid" laws, Public Law 818-815 and Public Law 81-874.49 Enacted in 1950 to assist public school districts burdened by the impact of federal installations (primarily military bases), these statutes are applicable to districts with large Indian populations living on tax-exempt land. Public Law 81-815, known as the School Facilities Construction Act, authorizes, inter alia, grants for the construction of public schools attended by Indians. Section 14 of the Act is expressly designed to finance facilities in districts attended by large numbers of Indians where the immunity of Indian land from taxation impairs the ability of the public

44. 25 U.S.C. § 452 (1970). Contracts with private corporations, institutions, Indian tribes, or tribal organizations are also permitted, but such authorization has not been used until recently. See SUBCOMM. REPORT, supra note 1, at 38-47; Rosenfelt, New Regulations for Federal Funds, 10 INEQUALITY IN EDUC. 22 (1971); Yudof, Federal Funds for Public Schools, 7 INEQUALITY IN EDUC. 20, 23-27 (1971).
45. SUBCOMM. REPORT, supra note 1, at 47.
46. Id. at 39.
47. 25 C.F.R. § 33.4(a) (1972) (contracts with public schools). Most commentators find this regulation inconsistent with the original intent of Congress which was to aid communities where "the Indian tribal life [was] largely broken up and in which the Indians [were] to a considerable extent mixed with the general population." H.R. Rep. No. 864, 73d Cong., 2d Sess. 1-2 (1932); COMM. ON INDIAN AFFAIRS, CONTRACTS WITH STATES FOR EDUCATION AND RELIEF FOR INDIANS, S. REP. No. 511, 73d Cong., 2d Sess. 1 (1934). See, e.g., SUBCOMM. REPORT, supra note 1, at 38-44; Rosenfelt, supra note 44, at 22-23; Sclar, Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Services, 33 MONT. L. REV. 191, 199 (1972). JOM funds are concentrated in such states as Arizona, Alaska, and New Mexico which contain large blocks of tax-exempt Indian land.
48. See text accompanying notes 53-57 infra.
school district to finance necessary construction.\textsuperscript{50} In the 1950's, funding under Public Law 81–815 was generous. For example, during the 19-year period from 1951 to 1970 (under all sections of the Act) Arizona received $43 million, New Mexico $47 million, and Montana $13 million.\textsuperscript{51}

During the last decade, appropriations under Public Law 81–815 have decreased dramatically, and such funds as have been appropriated have been earmarked for disasters (section 16) or for temporary federal activities (section 9). There have been almost no new school construction funds available to assist Indians. In fiscal years 1968, 1969, and 1970, not a single section 14 construction project was funded.\textsuperscript{52} This unavailability of construction funds has necessarily slowed down the transfer of Indian children from federal to state schools.

Public Law 81–874, known as the Federally Impacted Areas Act, provides public school districts with funds for general operating expenses. Monies are appropriated "in lieu of taxes" from nontaxable federal property. Unlike Public Law 81–815, the congressional appropriations for Public Law 81–874 have been generous, reaching between 90 and 100 percent of the total authorization.\textsuperscript{53} In several school districts located largely or entirely on Indian reservations, Public Law 81–874 funds provide the major portion of operating revenue.\textsuperscript{54} In fiscal year 1972, appropriations under Public Law 81–874 relating to Indian land totalled $26,390,000, thus making it the single largest program of federal support for Indian education in the public schools.\textsuperscript{55}

There is an apparent duplication between Public Law 81–874 and the Johnson-O'Malley program, for both provide funds to public school districts to meet financial needs caused by the presence of nontaxable land. When Public Law 81–874 funds became available in 1958, JOM regulations were amended to require that districts eligible for Public Law 81–874 aid must use JOM funds to meet educational problems "under extraordinary or exceptional circumstances."\textsuperscript{56} Thus, Public Law 81–874 funds provide gen-

\textsuperscript{51} Id. at 116–20, 151–53, 156–57. This generous funding may be explained in part by the increased burdens imposed upon the public schools by the transfer of large numbers of Indians from BIA to state public schools beginning in the 1950's. See notes 64–69 infra and accompanying text.
\textsuperscript{52} COMM'R OF EDUC., supra note 50, at 21. There is nothing to suggest that the failure to appropriate funds is connected in any way with federal Indian policy; rather, the freeze on construction seems to be part of an overall move to combat inflation on a nationwide basis.
\textsuperscript{54} SUBCOMM. REPORT, supra note 1, at 37.
\textsuperscript{55} Id.
\textsuperscript{56} 25 C.F.R. § 33.4(c) (1970). Although the language of the regulation is far from clear, both the BIA and a federal district court in New Mexico construe the language in the following manner: in the absence of extraordinary or exceptional circumstances (undefined), districts using Impact Aid may use JOM only to meet the special needs of Indian children, thereby avoiding duplication be-
eral operating revenue "in lieu of taxes," while JOM funds are devoted to special programs for Indians. 57

57. This limitation has not always been respected. See An Even Chance, supra note 5, at 11-26. Unhappily, the Department of Interior's choice of the words "extraordinary or exceptional circumstances" in 25 C.F.R. § 33.4(c) (1970) created unnecessary ambiguity which persists to this date. As originally enacted Pub. L. 81-874 monies were not to benefit federal lands or programs receiving aid from other federal sources, and accordingly JOM and Impact Aid were deemed mutually exclusive. Act of Sept. 30, 1950, Pub. L. No. 81-874, § 2, 64 Stat. 1100. Another section of Pub. L. 81-874 expressly excluded Indian children. Id. § 9(2), 64 Stat. at 1108. A third section was a nonduplication provision, prohibiting the use of appropriations to other government agencies for the same purposes as Impact Aid appropriations. Id. § 8(d), 64 Stat. at 1108.

In 1953 the Impact Aid Act was amended. The express exclusion of Indian children, cited above, was deleted and a new section was added to the Act, section 10(a), defining the procedures for determining Impact Aid for Indian children. This section states: "The governor of any State may elect to have the provisions of this section apply to such State. . . ." Act of Aug. 8, 1953, Pub. L. No. 83-248, § 10(a), 67 Stat. 536, amending 20 U.S.C. § 236 (1970). The BIA interpreted the amended law to make the two programs, JOM and Impact Aid, mutually exclusive, with the governor of each state electing coverage of one or the other. It would have been equally consistent with the amended law to interpret the election to preclude JOM funds only for "normal school services" but still permitting them to go for "special extra-educational payments." This was the position of the Office of Education, whose views included the quoted phrases in the last sentence. Hearings on the House Comm. on Educ. and Labor, 83rd Cong., 1st Sess. 146, 342-47 (1953). This remained the view of the Office of Education during the following five years. Hearings on Proposed Amendments to Pub. L. 81-815 and 81-874, 81st Cong., Before the House Comm. on Educ. and Labor, 85th Cong., 1st and 2d Sess. 66 (1957-58). Nevertheless, the BIA during the years 1953-58 usually refused to provide any JOM aid to states that elected to accept Impact Aid funds for their Indian areas. (The BIA was not wholly consistent: funds from both sources were provided to the State of Oklahoma. Id. at 730-72.)

In 1958, the Bureau of Indian Affairs supported an amendment to Pub. L. 81-874 to allow individual school districts, rather than the governor of each state, to choose between Pub. L. 81-874 and JOM funds. However, Representative (now Senator) Metcalf introduced an amendment to the bill to permit school districts to receive special services from JOM at the same time that they receive operational and maintenance money from Pub. L. 81-874. The BIA opposed the Metcalf amendment on the ground that it might lead to duplication of funds. See Hearings on Proposed Amendments to Pub. L. 81-815 and 81-874, supra at 66. The Act as finally passed incorporated the Metcalf idea. Act of Aug. 12, 1958, Pub. L. No. 85-620, 72 Stat. 548, amending 20 U.S.C. § 237 (1970). Section 201(b) of this enactment, 72 Stat. 559, amended the Impact Aid Act to except from its original antiduplication provisions "appropriations under . . . the Johnson-O'Malley Act." The House Committee report sets out the intention of this amendment: "H.R. 11378 makes a significant change in the treatment of school districts educating Indian children, by enabling them to accept payments under Public Law 874 without forfeiting the right to obtain payments under the Johnson-O'Malley Act for special services and for meeting educational problems under extraordinary or exceptional circumstances. . . . H.R. 11378, in amending Public Law 874 in this connection, prevents any duplicate payments for the same services." H.R. Rep. No. 1532, 85th Cong., 2nd Sess. 3 (1958).

25 C.F.R. § 33.4(c) (1959), promulgated in 1958, must be viewed against this background. Section 33.4(c) provides: "When school districts educating Indian children are eligible for Federal aid under Pub. L. 81-874, § 2 and Pub. L. 81-815, § 4, and also receive JOM funds under the Act of April 16, 1934 [JOM] . . . will be limited to meeting educational problems under extraordinary or exceptional circumstances." The following year the Department of the Interior's request for JOM money decreased $43 million. In its justification for budget requests, the Department explained: "These costs were borne in 1958 by the Bureau but will be borne by the Department of Health, Education and Welfare in the budget year. . . . Johnson-O'Malley aid will be . . . limited entirely to districts not qualifying for Public Law 874 aid and to meeting the needs under extraordinary and exceptional circumstances when the district is eligible for Public Law 874 funds." Hearings on Department of Interior and Related Agencies Appropriations for 1960 Before a Subcomm. of the House Comm. on Appropriations, 86th Cong., 1st Sess. 732-33 (1959).

Clearly, the intent of Congress in authorizing Impact Aid for school districts educating Indian children included an intent to avoid any duplication of use between Impact Aid funds and JOM funds. Those districts receiving Impact Aid funds are paid JOM funds only to meet the special needs of Indian children for which Impact Aid funds are not intended. JOM in these districts is accordingly supplemental, categorical aid for Indian children. JOM can be used for general aid in lieu of taxes only in those districts not eligible for Impact Aid.
3. Termination.

The development of the national Indian education policy is inextricably related to overall federal Indian policy. The civilization policy designed to bring about the assimilation of Indians into white society has been discussed above. Through the treaties, and because Indians were not state citizens, there developed a special relationship between Indians and the federal government which, according to Chief Justice John Marshall, "resembles that of a ward to his guardian."58 The treaties, the judicially evolved theory of guardianship, and the constitutional directive of Article I, Section 8 to regulate commerce with Indian tribes, have provided the sources of power for Congress to pass a series of laws for the special benefit of Indians and establish the Bureau of Indian Affairs to carry out those programs.

After World War II both the executive and legislative branches of government sought to "terminate" the special relationship between Indians and the federal government, and to promote the full integration of Indians into the mainstream of society. Termination contemplated the division of tribal assets among members of the tribe, the withdrawal of BIA and Public Health services, and the implementation of a program to encourage Indians to relocate from the reservations to urban areas where they would be trained to fill available jobs in the cities.59 The termination philosophy was articulated in House Concurrent Resolution 108 of the 83rd Congress which expressed the congressional desire to end the status of Indians "as wards of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship."60

Specific laws terminated the existence of the Menominee tribe of Wisconsin, the Klamath tribe of Oregon, four Paiute bands in Utah, the Uintah and Ouray Indians of Utah, several rancherias in California, and the Alabama and Coushatta tribe of Texas.61 In 1953, Public Law 83–280 brought about the wholesale transfer of civil and criminal jurisdiction from the federal government to the states.62 The effect of this legislation has been to

place power for law enforcement, administration of justice, and the enactment of rules of conduct in state rather than federal or tribal governments. Termination connotes the destruction of tribal government and with it tribal culture.

The movement to transfer federal responsibility for the education of Indians to the states gained its greatest momentum during the termination era (the 1950's). In 1952, the BIA closed down all federal schools in Idaho, Michigan, Washington, and Wisconsin. The following year 19 federal boarding and day schools were closed. The Impact Aid programs provided the necessary additional funds to enable public school districts to absorb Indian children living on tax-exempt land into the system. The construction funds under Public Law 81-815 were particularly crucial, for in many cases it was necessary to erect new buildings or additions to existing buildings which the local districts could not have financed alone.

Most Indian people opposed compulsory transfer to the public schools. For example, the leaders of the San Felipe and Santo Domingo Pueblos in New Mexico kept all children out of school for the entire year of 1956 rather than send them to public school. Only after negotiation of an agreement between the Pueblos, the public school district, and the BIA, guaranteeing Indian children rights to an education equal to the best in the state did the Santo Domingo and San Felipe Pueblos permit their children to attend public school.

The all-out drive for termination ended on September 18, 1958, when Secretary of the Interior Fred Seaton announced that no tribe would be terminated without its consent. The shock and anguish felt by Indian people during the 1950's continues to play a key role in the Indian's assessment of any new proposal or policy. Writing in 1969, Vine Deloria asserted that “termination is the single most important problem of the American Indian people at the present time.” The fear of termination continues as a serious issue because of the tremendous economic and social pressures which are in fact pushing Indian people into the mainstream of society. In order to overcome the extreme poverty which confronts most Indian tribes, it is necessary to undertake economic development projects. To succeed, Indians will have to learn the white man's methods of doing business and be able to deal comfortably with non-Indians. The acquisition of a quality education is rapidly becoming a necessity for Indian people. But, if Indian

63. For example, as a result of Pub. L. No. 83-280 county building ordinances may now apply to reservation Indians.
64. SUBCOMM. REPORT, supra note 1, at 163.
66. SUBCOMM. REPORT, supra note 1, at 14.
67. V. DELORIA, supra note 59, at 75.
people succeed in their economic development plans, if they acquire decent educations, and if they are able to take care of their own affairs, then there will be no need for the guardianship relation with the federal government and some form of termination will be desirable. By contrast, if Indian people fail in these efforts to become self-sufficient, then it will be necessary for the government to continue special programs for the benefit of Indian people. The dilemma is real. Most tribes today are committed to economic development but there remains the lingering fear that the federal government will cut off support before Indian tribes or communities have reached a secure position of self-sufficiency. This fear is pervasive and cannot be ignored in attempting to understand contemporary Indian issues.

The Kennedy, Johnson and Nixon administrations have repudiated the policy of forced termination.\(^6\)\(^8\) In education, however, the policy of transferring responsibility from the federal government to the states has continued, and the percentage of Indian children in state public schools increases yearly.\(^6\)\(^9\)

C. Legal Obligation to Provide Educational Services

In reviewing Indian education policy, reference must be made to the legal relations between the Indians and the state and federal governments. Who has the legal responsibility for providing educational services to Indians, and how is this responsibility reflected in policy?

1. Federal obligation.

Generally, the federal government has no legal obligation to provide educational services for Indian children. The Congress has authorized the Bureau of Indian Affairs to provide educational services and has regularly appropriated funds for that purpose, but no statute requires the continuation of educational programs.\(^7\)\(^0\) The BIA, which operates some 200 schools for Indians, could probably close them all next year. Federal policy reflecting this legal relation was set forth recently by a BIA spokesman:

[T]he Federal Government takes the position that legal responsibility for Indian education rests with the States. . . . When public schools are not accessible because of geographical isolation, nontaxable status of Indian lands, or for other reasons, the Federal Government recognizes its responsibility to continue to meet the educational needs of Indian children until such time as the States are able to assume full educational responsibility for all of their children.\(^7\)\(^1\)

---

68. See, e.g., President's Message, supra note 2, at 1-4.
The United States did agree in many treaties to provide teachers and other educational services. In some instances the obligation is for a limited number of years long since past; in others, the duration is to be determined by the President; and, in a few, there is no period of time specified. Even if the treaty promises were legally enforceable, it is not at all clear that an Indian tribe could obtain effective relief. Most of the treaties do not specify how the government shall discharge its obligations, and the government in most instances can argue that its programs of financial assistance to public schools are sufficient to discharge whatever obligation remains. Several of the more specific treaty provisions, moreover, obligate the government to provide services, such as millers or blacksmiths, which may not be appropriate for contemporary needs.

Some treaty education provisions, however, may still maintain validity. One successful instance of educational treaty enforcement occurred when the Mesquakie Indians of Tama, Iowa, relying upon a treaty, brought suit in federal district court in 1968 to enjoin the BIA from closing the day school at the Indian settlement. After the plaintiffs secured a preliminary injunction, the Indians and the BIA reached an agreement and the case never went to trial.

Even though there may be no specifically enforceable federal obligation to provide educational services, there is a strong moral duty derived from the history of the federal government’s dealings with the Indians and the general guardianship or trust relation expounded by the courts. The classic statement of the general federal obligation is found in United States v. Kagama, in which the Court upheld congressional authority to vest federal rather than state courts with jurisdiction over cases involving major crimes between Indians occurring on Indian reservations. The Court explained:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . Because of the local ill feeling, 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, there arises the duty of protection, and with it the power.

72. See text accompanying notes 12–14 supra.
73. See, e.g., Treaty with the Cheyenne Indians, May 10, 1868, 15 Stat. 655.
74. See, e.g., Treaty with Sacs, Foxes, and Iowas, Mar. 6, 1861, 12 Stat. 1171, 1173 (“so long as the President . . . may deem advisable”).
75. See, e.g., Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667, 669 (not less than 10 years).
77. 118 U.S. 375 (1886).
78. Id. at 383–84 (emphasis in original), cited with approval in Tulee v. Washington, 315 U.S.
The precise nature of the "wardship" relation has never been defined by the Congress or the Court. Arguably, the "duty of protection" mentioned in Kagama may give rise to a legally enforceable federal obligation to assure that Indian children are provided an equal educational opportunity by either the state or federal government. It seems clear that the wardship doctrine is valid today. Thus, President Nixon, summing up his administration's Indian policy, stated: "[W]e have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can best be fulfilled."

Present education policy reflects a wardship or trust responsibility for only a limited class of Indian people. Enrollment in federal day schools is limited to children of at least one-fourth Indian blood and who reside on Indian land under the jurisdiction of the BIA. Approximately 90 percent of these students enter first grade with little or no English language facility and are ill-equipped to confront a foreign language and a foreign culture in the public schools.

Enrollment in federal boarding schools is limited to children who are eligible to attend day school, when there are no other appropriate school facilities available, or when the children come from broken or unsuitable homes. In practice, the boarding schools serve a large number of orphans, children from non-English-speaking families, the academically retarded, dropouts from public schools, or children having special problems which the public schools are not equipped to meet. The BIA appears to be converting its boarding schools to specialized institutions designed to deal with highly specialized needs of Indian children. Although most boarding schools still offer a general educational program, the boarding school at Santa Fe, New Mexico, serves artistically talented Indian children from throughout the nation, the boarding school at Pierre, South Dakota, serves primarily children with social problems, and the newest boarding school at Albuquerque, New Mexico, provides vocational education. Concomitant with the increasing specialization of federal schools, basic education
programs for Indian children are provided by the states to an ever increasing extent.

2. State obligation.

State governments, unlike the federal government, do have an obligation to provide public education for Indians. The Supreme Court has ruled emphatically that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."  

Indian children who reside on remote reservations not now served by public schools have a constitutional right to education from the state. Under the equal protection clause of the fourteenth amendment, state action which differentiates between two classes of people on the basis of race is subject to strict scrutiny by the courts and will be upheld only if necessary to promote a compelling state interest. Indians are a distinct racial group and are thus able to trigger this rigorous constitutional test.

No state could demonstrate a "compelling interest" in denying Indians access to its public school system. In the remote areas of the Navajo Reservation or in sections of Alaska there are no state schools. Alaska natives need not be sent to federal boarding schools in Oklahoma or Oregon and Navajos need not be bussed 400 miles to the Intermountain School in Utah. Indian people might successfully bring suit to compel the state to provide public schools. The courts have long held that the exclusion based on the availability of federal Indian schools cannot be justified under either federal or state constitutions. Nor could such a rule be countenanced in the name of education. In Piper v. Big Pine School District the Supreme Court of California, with a tacit slap at the quality of education provided by the federal schools, flatly rejected the contention that the availability of federal schools was a fact which justified the exclusion of Indians from California public schools:

The public school system of this state is a product of the studied thought of the eminent educators of this and other states of the Union, perfected by years of trial and experience. . . . Each grade is preparatory to a higher grade, and, indeed, affords an entrance into schools of technology, agriculture, normal schools, and

86. E.g., Loving v. Virginia, 388 U.S. 1, 11 (1967). Strict scrutiny will also be applied to classifications which differentiate with regard to a fundamental interest. While education has been held not to be a fundamental interest under the federal equal protection clause, strict scrutiny may still be applied to educational disparities under state constitutions. See San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973) and notes 194–200 infra and accompanying text.
87. See, e.g., Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965) (three-judge court), aff'd, 384 U.S. 209 (1966) (Indians can only be defined by their race).
90. 193 Cal. 664, 226 P. 926 (1924).
the University of California. In other words, the common schools are doorways opening into chambers of science, art and the learned professions. . . .

D. Need for Increased Indian Control

The inadequacy of the present system of formal Indian education in both public and federal schools is suggested by the following statistics compiled by the Senate Subcommittee: (1) dropout rates for Indians are twice the national average; (2) more than 20 percent of Indian men have less than 5 years of schooling; (3) 40,000 Navajo Indians, nearly a third of the entire tribe, are functional illiterates in English; and (4) only 18 percent of the students in federal Indian schools go on to college (the national average is 32 percent).

A review of the testimony of Indian leaders in hearings held by the Senate Subcommittee and by other congressional committees reveals a strong consensus that the single most important reason for this deplorable condition in both public and federal schools has been the exclusion of Indian parents and community members from participation in, and influence or control over, the kind of education which their children receive. Most Indian children are taught by persons from a foreign culture with foreign values who speak a foreign language. Other factors are also operating to make many Indian children uncomfortable in white schools. These factors include the historical fact that Indian people have been treated by non-Indians as inferior, that non-Indians have usurped Indian lands, and that non-Indians control all important private and public organizations.

After almost 200 years of a federal “civilization” policy, one-half to two-thirds of Indian children enter school with little or no skill in the English language, and only a handful of teachers and administrators speak Indian languages. Even where language itself is not a barrier, very few federal or public school teachers fully understand and share the values of their Indian students. At school, the curriculums, textbooks, and educational philosophy are designed to instill values such as competitiveness and indi-
vidual self-aggrandizement which are alien to Native American cultures.97
In short the present education system is simply not equipped to cope with the cultural and linguistic disparities presented by Indian students.

Today there is a rapidly growing awareness in Indian communities that a bilingual-bicultural education built upon Indian values and Indian traditions presents a viable alternative to present forms of instruction. There is no intrinsic reason why education must take place in a foreign language and instill foreign values. Indian parents, however, must play an active role in reshaping the schools if they are to become more relevant to the needs of Indian children. Fortunately, the importance of education is becoming increasingly apparent to Indian people eager to escape poverty or hoping to join the force of skilled and professional workers in the economic development of their reservations. In this regard, Indian parents and community members are taking a new look at the educational institutions which purport to serve their children.

The call for "Indian community control of Indian education" has struck a responsive chord among Indian communities. Reports of the exciting experiment at the Rough Rock Demonstration School in Arizona contrast sharply with the blanket condemnations of existing public and federal programs, and are now leading many Indian communities to adopt new approaches to education.

II. THE RENAISSANCE OF INDIAN EDUCATION

The movement for community control of Indian education is a reaction to the coercive assimilation through education which was imposed upon Indian communities. Indians, like other groups in the nation, are demanding that education be relevant to their needs, their culture, and their language.

This Section focuses attention on Indian control in the federal and state systems which provide education for 95 percent of Indian children. Examples of Indian community control within the federal system include the Rough Rock, Ramah, Busby, and Chemawa Schools; models of Indian control within state public school systems are represented by Rocky Boy and Hoonah City. In some communities, control of the entire school system may not be feasible or desirable. Indian control of less than an entire school system may be achieved through the administration of Johnson-O'Malley contracts or through parent advisory committees under Title I of the Elementary and Secondary Education Act of 1965,98 JOM, or the new Indian Education Act of 1972.99

97. SUBCOMM. REPORT, supra note 1, at 27, 53, 101; see R. HAVICHURST, supra note 1, at 30-31.
98. See text accompanying notes 133-39 infra.
At the outset, it is necessary to note that "Indian control" and "community control" are not always identical. For example, the Navajo Indian Reservation, spanning parts of Arizona, New Mexico, and Utah, with an area roughly equivalent to that of West Virginia, encompasses several distinct communities. The Reservation is governed by an elected tribal council, but the acts of the tribal council, or the tribal officers, may not always be in harmony with the wishes of a particular community. This, of course, is simply an incident of representative government. On some of the smallest reservations, the tribal council consists essentially of all the adults in the village, and, for all practical purposes the council is the community. Intertribal, regional, and national organizations each play important roles in the contemporary Indian education scene, but the focus here is on the individual community.

A. Federal Schools

1. Rough Rock Demonstration School.

The oldest and perhaps best known of the new Indian schools is the Rough Rock Demonstration School. Located near the geographical center of the Navajo Reservation in Arizona, Rough Rock is supported by funds from the BIA and the Office of Economic Opportunity, and by private grants. Founded in 1966 as a private, nonprofit corporation by three Navajo educators with assistance and encouragement from OEO and BIA, the school emphasizes Navajo bilingual education, cultural identification, school-community relations, adult education, and control of policy decisions by the local all-Navajo school board. The Rough Rock School started with a new $3,000,000 facility turned over by the BIA together with $307,000 of BIA funds which the Bureau would have spent to operate the school. In addition, OEO granted $329,000 in 1966 for intensive experimentation with innovative programs. Perhaps most important, Rough Rock did not inherit an entrenched bureaucracy, instead it was free to recruit a fresh staff of interested and dedicated persons — both Navajo and Anglo. By all accounts, the Rough Rock Demonstration is a great success: students are eager to come to school and stay there; the teachers and administrators are enthusiastic.

Without denigrating the project at Rough Rock and the enthusiastic participation by community people in the school, it is necessary to point out that Rough Rock has flourished under unique conditions. First, the demonstration was conceived not by members of the Rough Rock community but

by outsiders, both Navajo and Anglo. In addition, it has received generous financial support from many sources. Even more important, the school has attracted extraordinarily talented personnel and consultants, both Navajo and Anglo, from outside the community. Moreover, the school is maintained as somewhat of a showcase for touring bureaucrats, educators, and journalists. Indeed, in its first 22 months of operation, this remote boarding school serving 317 children attracted 15,000 visitors!

The Rough Rock School has shown that an educational experience which involves the entire community and which incorporates the positive elements of Indian life and culture can succeed with substantial outside support. Because Rough Rock is a “demonstration,” it is unlikely that the BIA, OEO, and other agencies will commit equivalent resources to many other communities. Accordingly, while many of the educational theories developed at Rough Rock can be adapted for use in other types of schools, those who wish to emulate Rough Rock must carefully assess the extent to which necessary financial and human resources will be available.

2. Ramah Navajo High School.

The second of the modern Indian-controlled schools was established at the Ramah Navajo community in New Mexico in 1969. Ramah High School had been operated as part of the public school system of the Gallup-McKinley school district until 1968, when the county school board closed the school as an economy measure. Ramah Navajos were left with the choice of attending either distant federal boarding schools or the consolidated high school 20 to 30 miles away. The latter alternative became unfeasible when the Gallup-McKinley school district decided that it would be unable to provide transportation for Indian children. The subsequent failure of a suit which sought to reopen the Ramah High School left Ramah citizens with the prospect of sending their children to the distant federal boarding schools. At this point, some members of the community, with the assistance of legal services attorneys, decided to establish their own high school.

In February 1970, the community elected and incorporated a private school board which, with the aid of a small interim grant from the Anne Maytag Shaker Foundation of New York and additional legal assistance from the Robert F. Kennedy Memorial, secured a commitment from the Commissioner of Indian Affairs to provide the school board with funds...

102. For example, Dr. Robert Bergman, a nationally famous psychiatrist, flies to Rough Rock regularly to work on a project with traditional Navajo medicine men.
103. Roessel, supra note 100, at 11.
104. Community Control, 7 INEQUALITY IN EDUC. 8, 10 (1971).
106. Indian children residing on federal trust land are eligible to attend federal boarding schools when there are no other appropriate school facilities available to them. 25 C.F.R. § 31.1(a) (1972).
equivalent to what it would have cost the BIA to educate Ramah students in federal boarding schools. The $368,068 which was provided by this formula was enough to allow the community to operate a private school for grades 7 to 12.107

The Ramah contract formula, based on the sum which the BIA would have spent to educate the Indian children in federal schools, could easily be applied to other Indian communities. There are several built-in limitations, however, which require careful consideration. First, since the formula does not include money for construction, or even renovation, there must be an adequate physical plant available at a reasonable cost.108 Second, the funding level does not allow for the development of new, experimental, or innovative programs, although the community is free to seek outside funding to supplement the basic budget. Finally, under present BIA regulations not all Indian children are entitled to attend federal schools or, presumably, to receive funds under the Ramah formula. To attend a BIA day school, a child must be of at least one-fourth Indian blood and reside on an Indian reservation or allotment.109 To attend boarding school, it is further required that no other appropriate school facilities be available or the child must come from a broken or unsuitable home.110 The Secretary of the Interior has some discretion to waive these requirements,111 but unless Congress or the BIA is prepared to modify its policy of looking to the states to provide for educational services,112 there will be many Indian communities ineligible to adopt the Ramah plan.


The Busby School on the Northern Cheyenne Reservation in Montana was, until recently, a traditional BIA boarding and day school serving 98 boarders and 223 elementary and secondary day students.113 In its more than 50 years of existence, no graduate of Busby was known to have completed college. Consultants to the Senate Subcommittee reported to Senator Edward M. Kennedy that "[t]he Busby School, both day and boarding students, seems to be operating as a custodial institution."114 Further, the school was reputed to have an unusually high suicide attempt rate.115

108. The facilities at Ramah are in poor condition, and this poses a serious problem.
110. Id. at § 31.1(a).
111. "[W]here permitted by law and ... in the best interest of the Indians." Id. § 1.2.
112. See text accompanying notes 70-71 supra.
The initial step in the movement for local control at Busby was to attempt to bridge the barriers between the community and the school. This effort was aided by the parent participation requirements of Title I, and a "Parental Involvement Program in Education" project funded by the Donner Foundation of New York. Gradually a consensus formed among the community that it, rather than the BIA, should operate the Busby School. The BIA, in turn, seemed eager to relinquish control of the school. In July 1972, an elected Busby School Board assumed control of the school under a $795,000 contract.

The arrangement for Indian community control of Busby differs from the Rough Rock and Ramah experiences in several respects. First, unlike Rough Rock and Ramah, where the local communities formed private corporations to deal directly with the BIA, the parties to the Busby contract are the BIA and the Northern Cheyenne Tribal Council. Although relations between the Tribal Council and the community are excellent at present, the possibility of future difficulties should not be ignored. The Northern Cheyenne Reservation encompasses several other communities, and the Council may not always reflect the interests of the Busby community alone.

A second major difference is that the Busby School inherited an existing staff, whose members retained their civil service status. In some ways the community was limited in this regard, for many of the nonprofessional staff are tribal members whose desire to retain civil service benefits was stated clearly. In addition, the non-Indian teachers and administrators could have fomented further bad feeling. The Busby School, because of its inherited staff, may move more slowly in the direction of educational reform, a style which seems to suit the relatively conservative Busby community. Stability is the great advantage to the Busby model. As the school board members begin to assume their responsibilities, they may be aided by experienced personnel in coping with any crises which might arise. New staff members can be brought in gradually as many of the existing staff members either retire or transfer.


During the last three years the BIA has responded to the Indian movement for control of education by establishing parent "Advisory School Boards" for each of the federal schools. While the establishment of a recognized board which enables parents to visit the school is itself a major innovation, so far the advisory boards have not had a major impact. In the
case of the off-reservation boarding schools, the problem of distance makes it difficult for the board to meet more than two or three times a year.

The Chemawa Indian School near Salem, Oregon, has developed a procedure which may help overcome the barrier of physical distance between parents and the school. Chemawa serves 859 students from Alaska, Montana, Idaho, Washington and Oregon. In the fall of 1971, the BIA entered into a $25,000 contract with the Advisory School Board which enabled the Board to hire its own Executive Secretary to act as a full-time liaison between the Board and the school. The Executive Secretary is given office space at the school, and also spends considerable time traveling to meet with Board members in their home areas. These procedures are based on the hope that communication will be increased in two ways: the Executive Secretary disseminates news from the school; and he also acts as the advocate for the Advisory Board at school in the absence of Board members.118

BIA advisory school boards may make suggestions and recommendations, and, as a practical matter, have the power to remove the school superintendent.119 Aside from this ultimate power, however, the advisory boards cannot be said to have meaningful “control.” While it does not play a decisive role in determining curriculum, selecting personnel or evaluating academic standards, the Chemawa Board does set out general guidelines for the Superintendent to follow, and Board members, selected to represent different geographical areas, act as ombudsmen for the parents and students from their home areas.

The cost of the Advisory School Board with its Executive Secretary is substantial, but if board members and the Executive Secretary are conscientious and competent, the benefits to the overall school program will easily justify the cost. The Chemawa model seems well adapted to other BIA schools. A board could surely be more effective where the distance between the parents and school can be measured in tens of miles rather than thousands.

B. Public Schools

Many Indian people have been reluctant to exercise their right to vote for members of public school boards because of fear that it will lead to the termination of their special status as wards of the United States and open the way to state taxation of their land.120 As more Indian children attend

118. Telephone interview with Albert Ouchi, Superintendent, Chemawa Indian School, June 26, 1972.
119. The BIA is sufficiently committed to the concept of respecting the requests of duly organized and recognized Indian boards or councils that it does respond when a direct, formal demand is made. This observation is based on the author’s 5 years of experience as a practicing attorney dealing with the BIA in Washington, BIA Area Offices in Phoenix, Sacramento, Juneau, Aberdeen, Minneapolis, Window Rock, Billings, and Albuquerque, and with local BIA agencies in Albuquerque, Santa Fe, Parker, Ariz., Sells, Ariz., Riverside, Calif., Lame Deer, Mont., and Winnebago, Neb.
120. See text accompanying notes 161-64 infra.
public schools, however, their parents have seen that they must vote in order
to have a significant influence over local educational policy. Predominantly
Indian communities can control public school boards through the ballot
box. There are 78 public school districts in the country with predominantly
Indian school boards. These elected school boards have power to hire and
fire school personnel, develop curriculum (consistent with state require-
ments), negotiate contracts, and organize or reorganize the manner in
which the district is operated. Indian controlled boards can bring in Indian
administrators, Indian teachers, and Indian personnel, and can insist upon
the development of a curriculum relevant to Indian needs. Even where
Indians are not in the majority, it is still possible to bring about change
through coalitions with other minority groups. For many communities this
is the easiest and most direct path to making public schools responsive to
Indian needs.

This tactic may be most successful in small districts where the Indian
community can have an excellent opportunity to influence the operation of
the schools. Such is the case in Hoonah, Alaska. In some instances, how-
ever, districts may be so large that meaningful “community control” cannot
be easily exercised. The Indian controlled Gallup-McKinley district in New
Mexico, for example, serves more than 7,000 Navajo and Zuni children from
communities scattered over thousands of square miles. The Navajos on the
school board cannot represent any single community and, accordingly, In-
dian control of the school board does not necessarily assure community
control.

Indian control of school boards may similarly be achieved by realigning
school district boundaries to insure that large Indian communities control
their own districts. This technique has succeeded in the Rocky Boy Public
School District in Montana. The principal problems inherent in this de-
vice are discussed in later sections of this Article. They include the precarious

---

121. 117 Cong. Rec. 16,129 (daily ed. Oct. 8, 1971). Thirty-one of the districts are located in
eastern Oklahoma, and the rest are scattered throughout the West.
122. See notes 166-69 infra and accompanying text.
in Hoonah, Alaska, are Tlingit Indians. The board, moreover, is aided by a 14-member Native Educa-
tion Advisory Committee. The Hoonah School has an enrollment of 200 elementary and 120 sec-
secondary students and operates on a budget of $600,000. The education program includes a Title I
project in Tlingit culture (both language and heritage), teacher aides (most of whom are Alaska na-
tives), Headstart, Follow-Through, and a state-funded day-care center.
124. The Rocky Boy District is roughly coterminous with the Rocky Boy Reservation. In 1959,
the Reservation was incorporated into the Havre Public School District, a predominantly white com-
nunity, whose center is located 30 miles from the Rocky Boy Reservation. Elementary school students
continued to attend school on the Reservation but under the auspices of the Havre District. In July
1970, school district lines were redrawn, and the Rocky Boy Public School District became an inde-
pendent district controlled by a five-member, all-Indian board of education. Because the district con-
tains no taxable property, the basic support for the operation of the Rocky Boy District and school is
provided by Impact Aid funds, without which the Rocky Boy District could not exist. State public
school funds, Title I, and Johnson-O'Malley funds augment the Impact Aid monies, but none of these
sources alone can provide a separate basis for the district's existence.
nature of a "community school" which is absolutely dependent on federal
and state financial assistance, the question of the deliberate creation of a
racially imbalanced public school district, the obstacles to the formation
of new districts presented by state education codes, and the imposition
of state educational requirements upon the Indian community.

C. Control of Federal Programs in Public Schools

It may not be necessary to take control of a school in order to exercise
substantial power over the educational program. Many of the programs of
federal assistance to public schools have requirements for community par-
ticipation which, if exercised, will make a difference. Often such federal
funds constitute the major portion of the school budget.

1. Johnson-O'Malley contracts.

The Johnson-O'Malley program is designed primarily to provide sup-
plemental aid to meet the special educational needs of Indian children in the
public schools. To discharge this function, the BIA may contract with
"any appropriate State or private corporation, agency, or institution." Until 1971,
the BIA invariably contracted with the state departments of
education, but recently there has been an increasing tendency to find Indian
tribal groups "appropriate." Thus, contracts have already been made with
the United Tribes of South Dakota, the United Tribes of North Dakota, the
All-Indian Pueblo Council, the Nebraska Inter-Tribal Development Cor-
poration, and the Omaha Indian Tribe. The contractors have in turn chosen
to subcontract with public school districts.

Through the administration of a Johnson-O'Malley program, a com-
munity can control a significant segment of the educational program in the
public schools. The Omaha Tribe, for example, occupies a small reservation
in Macy, Nebraska. Through a $215,000 contract with the BIA, the tribal
education committee was able to establish an Indian culture and language
program in the public school. In addition, JOM funds were used to hire
Indian teacher aides and to reimburse Indian parents for out-of-pocket
charges imposed by the school.

There is no reason why contracting should be restricted to Indian inter-
tribal organizations or tribal councils. The BIA, or one of the intertribal
groups, could contract directly with a community Indian education com-
mittee. The committee could then contract with a public school or ad-
minister its own program.

125. See text accompanying notes 156-60 infra.
126. See notes 338-65 infra and accompanying text.
127. See notes 186-88 infra and accompanying text.
128. See note 166 infra and accompanying text.
129. See notes 44-47 & 56-57 supra and accompanying texts.
Some of the items which can be included in a Johnson-O'Malley program are: special language classes, extracurricular travel, athletic equipment, clothing, and additional teacher aides or home-school coordinators. In addition, there are a number of important indirect benefits which may result from having Indian tribes or communities administer JOM contracts. The responsibility for administering the contract will help give some Indian people valuable experience which they would not otherwise receive. It may, moreover, provide a means by which the Indian community can learn more about the operation of the entire educational program at the school. Finally, in school districts where JOM funds constitute a substantial portion of the budget, a dissatisfied community will have the ultimate recourse of directing the funds to other areas outside the school.\textsuperscript{131}

Apart from contracting to administer JOM funds, a community may play a role in influencing the JOM program by participation on a JOM parent advisory committee. Although existing JOM regulations do not require that there be a parent advisory committee to review the JOM program in each school or district, the BIA has actively encouraged the formation of these committees in almost every school district which receives JOM funds. Ordinarily, parent advisory committees for JOM programs do not have a major impact on public school education because they have no power. The BIA currently has under consideration, however, new regulations which would give parent advisory committees an effective veto over the use of JOM funds in their communities.\textsuperscript{132}

2. \textit{Title I programs.}

Title I of the Elementary and Secondary Education Act of 1965\textsuperscript{133} provides funds for compensatory programs to meet the needs of educationally deprived children.\textsuperscript{134} On October 14, 1971, HEW promulgated new regulations requiring parental involvement in the Title I programs.\textsuperscript{135} The new regulations require each local educational agency to:

\begin{quote}
[E]stablish a council in which parents (not employed by the local educational agency) of educationally deprived children residing in attendance areas which are to be served by the project, constitute more than a simple majority, or designate for
\end{quote}

\textsuperscript{131} The community could use JOM funds for a supplemental program entirely outside the school. This might include trips to historic places, an arts and crafts program, the maintenance of a community center, or educational workshops. For example, at Deer River, Minnesota, the non-Indian school board was unable to reach agreement with the local Indian advisory committee on the use of JOM funds, and ultimately it voted not to accept any further JOM funding. The Indian parents then formed their own non-profit corporation and now operate a JOM program outside the school. See Letter from Robert B. Elion, Leech Lake Legal Services, Minn., to the author, Aug. 23, 1972, on file with Stanford Law Review.

\textsuperscript{132} See Rosenfelt, supra note 44.

\textsuperscript{133} 20 U.S.C. §§ 241(a)–(m) (1970).

\textsuperscript{134} See Yudof, supra note 44, at 27–29.

\textsuperscript{135} 45 C.F.R. § 116.17(o) (1972).
that purpose an existing organized group in which such parents will constitute more than a simple majority . . . .136

Without giving the parents' council outright control of the Title I program, the regulations allow a well-organized parents' group to provide substantial input into school decisionmaking. There must be "adequate procedures to insure prompt response" to suggestions from the parents' council,137 and the parents' council must have an opportunity "to submit comments to the State educational agency" on the proposed Title I program.138 Thus, the parents' council will have direct contact not only with the local, but also with the state education agencies. If those agencies prove nonresponsive, a complaint can be filed with the Office of Education in Washington.139

3. Indian Education Act of 1972

The movement toward Indian community control of education should receive significant support from the Indian Education Act of 1972140 which authorizes funds for a series of new programs in elementary, secondary, and higher education. Some of the programs will be merely supplemental to the regular school program and designed to meet the special educational needs of Indian students; others will be innovative and experimental.

The requirements for parent, community, and Indian involvement in these new programs are the most stringent ever enacted into federal law. Section 305(b), which applies to supplemental programs, provides that applicants for funds must demonstrate that the proposed project has been developed:

(i) in open consultation with parents of Indian children, teachers, and, where applicable, secondary school students, including public hearings at which such persons have had a full opportunity to understand the program for which assistance is being sought and to offer recommendations thereon, and

(ii) with the participation and approval of a committee composed of, and selected by, parents of children participating in the program for which assistance is sought, teachers, and, where applicable, secondary school students of which at least half the members shall be such parents . . . .141

136. Id. § 116.17(o)(2). A tribal education committee might insist that it be "designated" as the parents' council under this regulation.
137. Id. § 116.17(o)(2)(vii).
138. Id. § 116.17(o)(2)(viii).
139. The Office of Education has not been particularly aggressive in responding to complaints; however, it does investigate, and it will bring pressure on local educational agencies where there is a clear violation of law. The Title I parent participation regulations may not be effective where the parents' council is divided, or where the members have been carefully selected by the local school superintendent because of their passivity. Nevertheless, they most certainly do provide an opportunity for meaningful community involvement in school programs.
141. Id. § 411, 86 Stat. 337 (emphasis added).
Thus, the parents' committee is given a flat veto over all proposals submitted under Part A of the Act. The parent participation requirements under Part B of the Act, providing for discretionary grants for innovative programs, are not as rigid. In the latter instance, the statute requires only that the Commissioner of Education be "satisfied . . . that there has been adequate participation by the parents of the children to be served and tribal communities in the planning and development of the project, and that there will be such a participation in the operation and evaluation of the project." Since funds have not yet been obligated under the new Act, it is too soon to tell how the parent participation requirements of Part B will be interpreted.

III. CONTROL OF FEDERAL VERSUS STATE SCHOOLS

Each of the community control models described in the preceding Part has distinct advantages and disadvantages. Some of the factors which require further consideration are obvious, such as the inheritance of an existing staff at Busby or the creation of a new staff at Rough Rock. Other considerations are not so readily apparent. This Part will attempt to identify some of the less conspicuous legal and practical factors which may be of importance to educational leaders in Indian communities.

A. Control of Federal Schools

1. General limitations.

Under present policies, communities or tribes may by contract take over existing BIA facilities as was done at the Busby School. There is, however, no means to compel the federal government to build schools to serve any particular community. When President Nixon said, "[W]e believe every Indian community wishing to do so should be able to control its own Indian schools," he referred to Indian communities now served by existing federal schools. The Bureau has no substantial plans or funds to expand or modernize its school system because the BIA education function is being slowly phased out. Indeed, the basic federal education policy for the last 40 years has been to encourage state governments to assume full responsibility for the education of Indians.

142. Part A of the Act provides funds for educational agencies to develop and execute programs to meet the special educational needs of the Indian students. Id. § 411, 86 Stat. 334–39.
143. Id. § 421, 86 Stat. 341.
144. President’s Message, supra note 2, at 6.
145. The phasing out of the BIA school system has slowed considerably in the last few years. Thus, from 1970 to 1971 enrollment in grades k–4 decreased by only 708 pupils and total enrollment actually increased by 396. Statistics, supra note 4, at 1, 4; U.S. Dep’t of Interior, Fiscal Year 1970 Statistics Concerning Indian Education 1. The slight increase probably reflects a more widespread recognition of the importance of education among Indian people rather than a change in Bureau policy.
The contracts with community controlled schools help to accelerate the liquidation of the federal schools program. At BIA schools, all present employees enjoy civil service status. While current employees may retain this status, once a community takes over, future employees will work for the tribe or a nonprofit corporation, not for the federal government. Gradually, the school will lose its identity as a federal institution.

For the foreseeable future, the contract schools will probably receive adequate funding through the BIA to meet operating expenses. They are few in number and do not have much effect on the Bureau's overall budget. There will be difficulty, however, in obtaining funds from the BIA to finance construction, expansion, or modernization of the physical plants. At present, the BIA has a $450 million backlog in school construction requests. For fiscal 1973, the BIA is seeking $22 million for school construction.

As the different Indian communities gain experience in running their schools, it seems inevitable, and probably desirable, that ties to the Bureau will slacken. This will create political problems of a very special sort.

2. Politics and bureaucracy.

The Nixon administration is committed to making its Indian "self-determination" policy a success. There is no apparent opposition from the Democrats in Congress who are active in Indian matters; indeed, many of them have given substantial support to administration policies. Requests from the initial BIA contract schools are now given the kind and type of attention in Washington which is usually reserved for major corporations and labor unions. With substantial political and media interest concen-


\[147\] Id. Public schools, however, have similar problems.

\[148\] The self-determination concept is essentially nonpartisan. Indians have advocated it for years, and President Lyndon Johnson called for a program of "self-determination" in his Indian message to Congress in March 1968. President Johnson Presents Indian Message to Congress, INDIAN RECORD, Mar. 1968, at 5.

On February 9, 1972, Senators Jackson, Mansfield, and Allott introduced a bill called the "Indian Self-Determination Act of 1972," S. 3157, 92d Cong., 2d Sess. (1972). The bill did not pass, but it will be reintroduced this year. The bill would give the Secretaries of HEW and Interior authority to contract with tribal groups. This position is also supported by President Nixon. Similarly, S. 2724, 92d Cong., 1st Sess. (1971), recognizes and endorses the Indian desire for self-determination. Indeed, the entire movement for Indian community control is part of a self-determination policy. In this instance, the Administration has implemented a preexisting policy upon which there is general consensus.

\[149\] The early activities of the Coalition of Indian Controlled School Boards in pushing the BIA bureaucracy to process one of the early contracts for a school at Wind River, Wyoming, is sketched in Gaillard, We'll Do It Our Own Way Awhile, [1] RACE RELATIONS REP., Jan. 3, 1972, at 21, 27: "They [the Coalition] traveled to Washington, organized a lobby group of Congressional aides, persuaded William Greider of the Washington Post to write a sympathetic article, and then confronted the BIA. Sen. Gale McGee (D) of Wyoming sent two of his aides to the confrontation, called personally to see how things were going, and helped arrange a similar call from Vice President Agnew's office." Gaillard does not note that the group of 15 to 20 Indians from different reservation communities was received cordially by Bradley Patterson of the President's staff in the White House, by Senators from each person's home state, and by several high-ranking Department of Interior officials. Needless to say, the Wind River contract was signed. (The author was present at most of these meetings.)
trated on a few schools, the sluggish bureaucracy of the BIA and the Department of the Interior is forced to be responsive to their needs.

In a few years, there may be as many as 150 community controlled schools. Because the novelty will have worn off and because many of the problems which arise, such as funding, are common to all the schools, the BIA will undoubtedly develop institutional procedures to deal with issues of general applicability. As a result, no single school board will be likely to require or receive such easy access to the White House, the leaders of Congress, or the press. Instead, the school board will deal with one of the thirteen BIA area directors. Each Bureau area director controls directly such services as road construction, welfare, real property management, economic development, and education in his geographic area. The area directors serve, first and foremost, the tribal leaders within their areas. Where tribes are small, the tribal council usually represents the interests of the community. The governments of many large tribes, however, like governments of other large entities, cannot always reflect the interests of each community. Apart from questions of pure representation, it may be noted that partisan politics is a subject of some familiarity to Indian tribes. When a new faction takes control of a tribal council, it also, as a practical matter, takes control of almost all discretionary BIA functions affecting the tribe. For example, recently the Ogallala Sioux Tribe in South Dakota elected a new tribal chairman. The prior chairman had arranged for the funding of a five-year bilingual education program through the BIA for an Indian community-controlled non-profit corporation. The program was established at the BIA day school and ran the first year without incident. When the new tribal chairman indicated a desire to change the grantee of the bilingual program, the BIA deferred to his wishes. Thus, where the tribe sponsors or tribal leaders are seriously concerned about community-controlled schools such as Busby, the area office is likely to be helpful. Unfortunately, in most cases tribal leaders have other priorities—for example, economic development, water rights, or housing. In some cases tribal leaders may be hostile to a grass roots community education movement and insist that the tribal council operate and control all programs on the reservation. Such a posture on the part of tribal leaders would constitute a serious threat to the concept of Indian community control of education.

More disquieting is the extraordinarily rigid manner in which the BIA

150. Following the occupation of BIA headquarters in Washington by Indian militants in November 1972, the Department of Interior announced implementation of a policy to further decentralize authority and concentrate additional power and personnel in the area offices. See Dep't of Interior News Release, Jan. 18, 1973, at 1. Most decisions on funding and allocation of priorities will be made at the area level rather than in Washington. When decisions are in fact being made in Billings, Montana, Juneau, Alaska, and Anadarko, Oklahoma, there will be far less occasion for tribal delegations to travel to Washington. One by-product of this policy will be decreased visibility of Indian groups in the nation's capital.
functions, particularly at the "area" and "agency" levels. Within each area there are several agencies, each headed by a superintendent. The superintendent's functions on a local level correspond to those of the area director. Both the agencies and the area offices have staffs of specialists for education, economic development, engineering, and community and other services. Line authority runs through the superintendent, to the area director, to the Commissioner of Indian Affairs, and ultimately, to the Secretary of the Interior. Typically, the agency and area offices are far removed from the schools. Vital school functions, such as building maintenance, are handled through the agency rather than at the school itself. This is true not only for the regular BIA schools but also for community-controlled schools such as Busby.

This organizational structure may have further unfortunate consequences for a community-controlled school which has a problem that cannot be handled routinely at the local agency. The education specialist at the agency will prepare a memorandum explaining the problem to the superintendent, and the superintendent will then make recommendations to the area director. The area director will refer the matter to the area education specialist who in turn will prepare a report for the area director. The area director will then take such action as he deems appropriate, and advise the superintendent. Since few superintendents or area directors view education as the priority issue, this process may take months.

BIA employees tend to operate "by the book," the massive BIA manual. If they are unsure about the legal ramifications of any issue, they quite naturally seek legal advice. At this juncture, the community-controlled school is in for further delay. The BIA does not employ house counsel; it must rely on the staff attorneys of the Solicitor's Office of the Department of the Interior. Offices of "Regional" and "Field" solicitors are scattered around the West. Some are located in the same city as BIA area offices, others are not. The solicitor's office handles the legal problems of several Interior bureaus, including Land Management, Sports Fisheries and Wildlife, the Bureau of Mines, the U.S. Geological Survey, the National Park Service, the Bureau of Commercial Fisheries, and the BIA.

Attorneys in the regional or field solicitors' offices spend almost all of their time on natural resources and property issues. Few of these attorneys have much experience with many of the legal problems likely to be raised by an Indian, community-controlled school. Accordingly, in too many instances education matters are referred to the Washington office, and on such occasions a delay of several months can be expected.

151. On extremely rare occasions the Area Director will refer the matter to the Commissioner of Indian Affairs, who in turn will ask the Assistant Commissioner for Education to make recommendations. Generally this occurs only when a politically explosive issue arises in which the Area Director wishes to maintain neutrality, such as a conflict between two tribes.
In short, the Department of the Interior and its BIA are not organized in ways which can result in the provision of efficient service to Indian community-controlled schools. As long as the BIA, as presently organized, controls the money which supports community schools, the "control" which the community exercises may be more apparent than real.

B. Control of State Schools

Because 70 percent of all Indian children now attend public school, a major portion of the movement for Indian control of Indian education will probably take place within the public school system.152

1. Advantages and disadvantages.

An important advantage of the public school system is its freedom from the BIA bureaucracy.153 If problems arise, they are resolved at the local school district or state capitol rather than at the BIA area office or in Washington. Relevant in this regard is the fact that most of the states with large Indian populations have relatively small populations154 and the state departments of education tend to be small and informal.155 The person with decisionmaking authority is often readily accessible, and many problems can be resolved promptly. A public school district is also less likely to become involved in tribal politics, since it is a subdivision of the state totally independent of the tribe.

Another advantage of participation in the state public school system is the assurance of continuing financial support. Although the Supreme Court has held that absolute equality of financial expenditure between school dis-

---

152. The fact that 70% of Indian students now attend public schools can be misleading in the context of a discussion of "Indian control." Two-thirds of those students attend predominantly non-Indian schools. S. REP. No. 384, 92d Cong., 1st Sess. 23 (1971). Many of these schools, moreover, will have no Johnson-O'Malley program because the district does not include Indian reservation land, and the Title I program, in some instances, may be "controlled" by other minority groups. The only avenue to "Indian control" in these districts may be the new Indian Education Act of 1972.

153. The freedom is not absolute, for the BIA's Johnson-O'Malley program provides a significant source of funds to many public school districts. The BIA in the past, however, has simply served as a conduit for funds to the states and has almost never inquired into the use of JOM funds. There is some indication that this passive attitude may be changing. The publication and dissemination of allegations of misuses of funds in An Even Chance, supra note 5, the decision of the federal district court in Nationabah v. Board of Educ., 335 F. Supp. 716 (D.N.M. 1973) holding that JOM funds have been misused, and the budget consciousness of the Nixon Administration, are three obvious factors. Further, according to James Hawkins, Assistant Commissioner for Education, BIA, the BIA is now auditing JOM expenditures in several school districts. Interview with James Hawkins in Cambridge, Mass., Mar. 2, 1973.

154. E.g., total population: South Dakota (665,507); New Mexico (1,016,000); Arizona (1,770,900); Oklahoma (2,559,229); Montana (694,409). Total Indian population: South Dakota (32,365); New Mexico (72,788); Arizona (95,812); Oklahoma (98,468); Montana (27,130). POPULATION DIV., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS, UNITED STATES SUMMARY I-293 (1972).

155. Relations between Indians in the public schools and state administrators are not always harmonious. In some areas there is an undercurrent of mutual mistrust and suspicion between state officials and Indian people. This is often the result of their cultural differences and disparate political and economic interests.
districts is not required by the federal Constitution, an unbroken line of recent decisions by state supreme courts interpreting education provisions in state constitutions mandate equivalent support for all public schools within the affected state. In addition, the federal government, through Johnson-O'Malley, Impact Aid, Title I, Title VII, Manpower Training, and the Indian Education Act of 1972, provides additional financial assistance to public school districts. Although the competition for funds from discretionary federal programs may involve a certain amount of salesmanship, federal Impact Aid, Title I, and state funds are received as a matter of right.

The public school lobby in Washington, led by the National Education Association, has succeeded in obtaining substantial federal assistance for public schools. The existence of a strong education lobby relieves each public school district from devoting its time and resources to fund raising at the federal level. By contrast, the absence of a strong education lobby for federal schools either within or without the BIA is striking. The National Congress for American Indians has proved ineffective, and the National Indian Education Association is precluded from lobbying because it is supported by private foundation funds.

Finally, the public school system is more widely respected in the West than the Bureau system or the new and as yet unproven contract schools. Graduates from the accredited public schools will probably find admission to state universities easier than will graduates from other Indian schools. Part of the reason for the greater prestige of the public schools may be attributed to anti-Indian prejudice, but, more significantly, the BIA school system has never been noted for its high academic standards. Indian people who desire a high quality education for their children are more likely to find it in the public schools than elsewhere, especially as Indian communities begin to require modification of the curriculum to suit the special educational needs of their children.

Integration into the state educational system, however, constitutes a genuine threat to the special status which Indians have long enjoyed—a status which most wish to retain. This point was brought home forcefully in Warren Trading Post Co. v. Arizona Tax Commission. In holding that

156. San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973). But see id. at 1292 n.60 for the suggestion that there may be a limit to permissible disparities.
161. See text accompanying notes 65-67 supra.
the federal government's comprehensive regulation of traders on Indian reservations pre-empted the field and rendered traders exempt from state sales taxes, the Supreme Court said:

Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians. . . . And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the state the privilege of levying this tax.\textsuperscript{163}

The unmistakable implication is that as Indians begin to draw upon services provided by state government, the Indian claim to freedom from state regulation, taxation, and control will be weakened. In short, Indians who wish to protect the vestige of tribal sovereignty have reason to be wary of accepting state services.\textsuperscript{164}

For most Indian people the almost irrevocable choice for integration into the state education system has already been made. More than two-thirds of all Indian children now attend public school. Only a limited number of Indian communities are presented with a reasonable alternative to joining the state public school system. Although it seems improbable that the refusal of a few Indian communities to join the public school system could have an effect on the legal status of their tribes, there is precedent for according different legal status to different tribes within the same state.\textsuperscript{165}

A second possible disadvantage of affiliation with the state public education system is the necessary recognition of a certain degree of control by the state. The state can and does prescribe required courses, qualifications for teacher certification, and the number of days per year in which the school shall be open.\textsuperscript{166} In recent years, states have begun to recognize the need to allow for and encourage cultural diversity in the public schools,

\textsuperscript{163} Id. at 690-91 (emphasis added).
\textsuperscript{164} In McLanahan v. State Tax Comm'n, 93 S. Ct. 1278 (1973), a unanimous Supreme Court held that Arizona may not tax the income of Navajo Indians whose earnings are wholly derived from reservation sources. In response to the state's contention that it provides education and welfare services to the Navajo Reservation, the Court noted that substantial portions of the state expenditures are defrayed by the federal government. Id. at 4459 n.12.

Still to be decided by the Court this term is whether the State of Washington may tax and regulate an Indian-owned retail business on the Colville Reservation, Tonasket v. Washington, 79 Wash. 2d 607, 488 P.2d 281 (1972), prob. juris. noted, 407 U.S. 908 (1972). This decision may shed further light on evolving tribal-federal-state relations.

\textsuperscript{165} When, for example, Congress in 1953 transferred civil and criminal jurisdiction of matters arising on Indian lands to the State of Minnesota, it excepted the Red Lake Chippewa Tribe from that transfer. See 28 U.S.C. \S 1360(a) (1970). See also 25 U.S.C. \S 1323(b) (1970). Some 17 years later, in Commissioner v. Brun, 386 Minn. 43, 174 N.W.2d 120 (1970), the Supreme Court of Minnesota held that Red Lake Chippewa tribal members who worked on the reservation need not pay state income tax, because the tribe was not subject to general state jurisdiction.

\textsuperscript{166} This relative disadvantage is mitigated, however, by the fact that the BIA has required its contract schools, with the exception of Rough Rock, to conform to state standards.
and today most states permit bilingual and bicultural programs financed by federal funds.167

A strong argument can be made that public schools not only may, but must, provide a bilingual, bicultural curriculum for non-English-speaking children in order to afford them an equal educational opportunity. In Alaska168 and Massachusetts169 state laws now require the provision of bilingual education. More significantly, the Department of Health, Education and Welfare—in the course of implementing the nondiscrimination provisions of Title VI of the Civil Rights Act of 1964170—sent a formal memorandum to all public school districts on May 25, 1970, which states:

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.171

Failure to take "affirmative steps" could result in the cutoff of all federal funds to the school district.172

Apart from specific legislation, a series of recent cases suggests that bilingual-bicultural education programs may be required by the equal protection clause of the Constitution. In Serna v. Portales Municipal Schools,173

---


168. ALASKA STAT. § 14.08.160(a) (Cum. Supp. 1972) provides: "A state-operated school which is attended by at least 15 pupils whose primary language is other than English shall have at least one teacher who is fluent in the native language of the area where the school is located. Written and other educational materials, when language is a factor, shall be presented in the language native to the area."


170. 42 U.S.C. § 2000d (1970) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

171. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (1970) (emphasis added). The rectification of a language "deficiency" will not automatically result in the provision of a relevant curriculum, but it is surely a step in that direction.

172. The Office for Civil Rights of the Department of Health, Education and Welfare is not known for its vigorous enforcement of Title VI. Recently, a federal district court ordered HEW to take effective action to bring offending school districts in the South into compliance. Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972).

One example of the kind of broad review of educational programs authorized by Title VI is reflected in the review of the operation of the Shawano School District in Wisconsin by a team from Region V (Chicago) of the Office for Civil Rights. In its letter of Oct. 4, 1972, to the Superintendent of Schools, the Office for Civil Rights found noncompliance in the following areas: (1) provision of less adequate and effective educational services to American Indian students, including failure to provide programs related to their cultural environment; (2) discriminatory assignment of American Indian students to special education classes for the educable mentally retarded; (3) discriminatory assignment of American Indian students to lower "tracks" without educational justification; (4) discriminatory operation of disciplinary regulations and policies with regard to American Indian students; and (5) provision of less effective guidance and counseling services to the district's American Indian students and the operation of extracurricular activities in such a way as to substantially impair the participation of American Indian students. Letter from Kenneth A. Mines, Office for Civil Rights, HEW, to Arnold A. Gruber, Superintendent of Schools, Shawano, Wis., Oct. 4, 1972, on file with Stanford Law Review.

a federal district court found that Spanish-speaking children who received substantially the same educational program as other children in the Portales, New Mexico, School District did poorly on standardized tests, particularly in English language expression, and suffered negative impacts from being placed in a school atmosphere which did not adequately reflect their educational needs. The court held that "these Spanish-surnamed children do not in fact have equal educational opportunity and that a violation of their constitutional right to equal protection exists," and it directed the school district to establish or enlarge bilingual-bicultural programs in all of its schools and to recruit and hire more Spanish-speaking teachers and teachers' aides.

In United States v. Texas, a desegregation suit involving Mexican-American children, a federal court ordered the defendant school district to develop and submit a comprehensive plan to ensure equal educational opportunity for all students in the district. This plan was to include "bilingual and bicultural programs, faculty recruitment and training, and curriculum design and content." The detailed and revolutionary plan ordered by the court required fundamental changes in the educational program and was based on the following three principles:

1. That the cultural and linguistic pluralism of the San Felipe Del Rio Consolidated Independent School District student body necessitates the utilization of instructional approaches (in addition to those now used) which reflect the learning styles, background and behavior of all segments of the student community: modification of curriculum design, and the development of new instructional skills and materials are part of the development of pluralistic instructional approaches.

2. That the educational program of the district should incorporate, affirmatively recognize and value the cultural environment and language background of all of its children so that the development of positive self-concepts in all children of the district can proceed apace, toward both the immediate and ultimate goals of these children functioning effectively in a pluralistic society.

3. That language programs be implemented that introduce and develop language skills in a secondary language (English for many Mexican-American students, Spanish for Anglo students), while at the same time, reinforcing and developing language skills in the primary language, so that neither English nor Spanish is presented as a more valued language, even though it will be called to the attention of the students that English is the basic language of the United States.

The court's use of its broad and sweeping equitable powers to delve into the details of the educational program was predicated upon the constitutional mandate to "eliminate discrimination root and branch," and to

174. Id. at 1282.
175. Id. at 1283.
178. Id. at 5.
create a unitary school system that did not contain racially identifiable schools.

In Serna, the court held that the school district’s failure to provide adequate bilingual and bicultural programs was unconstitutional. In United States v. Texas, the cultural isolation and racial segregation of minority students was found to be discriminatory. What appears to be emerging from these cases is the frank recognition that a public school district which ignores the learning styles, languages, and cultural backgrounds of minority students discriminates against them just as surely as would a requirement that minority students attend separate schools. Under the theory of Serna and United States v. Texas, educational programs designed to effect the “coercive assimilation” of Indian students would be unconstitutional.

In a more recent decision, however, a divided panel of the Ninth Circuit Court of Appeals held in Lau v. Nichols180 that the failure of the San Francisco school district to provide bilingual instruction for Chinese-speaking children did not violate the Constitution or other provisions of law. Distinguishing the equal educational opportunity mandate in United States v. Texas and other desegregation cases as limited to circumstances in which the challenged practice perpetuated the effects of past de jure segregation,181 the majority found that the “language deficiency” giving rise to the suit was created by the children “themselves failing to learn the English language” and not by any discriminatory practices of the state.182 Similarly, the majority rejected the argument based on analogy to criminal cases where the Supreme Court has required the state to make special provisions for indigent persons on the ground that wealth bears no rational relationship to the purposes of the criminal justice system. By contrast, the court reasoned that the state’s use of English as a language of instruction in its schools is “intimately and properly related” to the purposes for which schools are established.183

There is certain to be further litigation in the bilingual-bicultural area in the near future184 and the result will, of course, have profound implications for the future viability of Indian education within the public school system. In some areas, the educational philosophy reflected in United States

---

180. 472 F.2d 909 (9th Cir. 1973).
181. Id. at 915.
182. “[T]he State’s use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation.” Id. at 916.
183. Id.
184. See, e.g., Aspira of N.Y. v. Board of Educ., Civil No. 72-4002 (S.D.N.Y.) (Puerto Ricans); Denetclarence v. Board of Educ., Civil No. 8872 (D.N.M. Apr. 2, 1971) (Navajo Indians). A full explication of the possible theories which might be used to support constitutional demands for bilingual-bicultural education is beyond the scope of this Article. Plaintiffs in Aspira argue that they are denied due process when they are compelled to attend school but do not receive a meaningful educational program. Cf. Inmates of Boys’ Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970).
v. Texas can be realized through strong leadership by Indian controlled school boards without intervention by the courts. Elsewhere, litigation may be required.

2. New districts.

Some public school districts are too large, or the people too divided in educational philosophy, to permit meaningful community control. In such instances it is possible to create new districts. Most state education codes either permit or encourage the formation of new school districts. Generally, this will require the division of an existing school district, a matter within the discretion of local and state officials. It is necessary, therefore, for Indian communities to convince state and local officials that a predominantly Indian district should be created. Because Indian students typically generate substantial funds through the various federal programs, the financial impact on the remaining district should receive careful consideration.

The state has a legitimate interest in making certain that each district is able to administer its responsibilities. South Dakota, for example, expresses this interest as follows:

Each school district . . . must contain real and personal property in such value and amount as will provide the district with sufficient taxable valuation to support an educational program which will meet the current minimum requirements for accreditation as adopted by the state board of education. Arizona requires that "the real property valuation per child must be sufficient to support the school in a manner comparable to other districts of similar size." All states have similar requirements.

Because of the tax-exempt status of Indian reservation lands, Indian reservation communities do not appear to meet the taxable valuation requirements of the state codes. There are two approaches which can be used to clear this statutory roadblock: either federal Impact Aid revenue can be viewed as in lieu of real property taxes, or, in the alternative, a case can

185. See, e.g., note 124 supra.
186. Even in Hawaii, which has a single statewide district, the statute permits the creation of multiple districts. See Hawaii Rev. Stat. § 298-17 (1968). There is no uniformity in the statutory schemes among the states, and it is beyond the scope of this Article to catalogue the requirements of each.
187. There may be remote regions of the Navajo Reservation where no public school district now exists. The formation of a new district in these areas is a relatively simple matter. The Arizona Code provides: "New school districts may be formed on presentation to the county school superintendent of a petition which shall: 1. Be signed by the parents or guardians of at least ten school census children. 2. Be residents of the proposed new district. 3. reside more than four miles from any district school house. 2. Set forth the boundaries of the proposed district." Ariz. Rev. Stat. Ann. § 15-404 (1956).
be made that the real property valuation requirements are unconstitutional.

The Impact Aid Law provides federal financial assistance to local public school districts in order to meet general operating expenses where the nontaxable nature of federal property places a burden on local public agencies. The program has been a reliable source of revenue for those districts with tax-exempt Indian land. In apparent recognition of this fact, Montana enacted legislation waiving the minimum real property valuation requirements where a new elementary district includes 50,000 or more acres of nontaxable Indian land.

It may be possible to persuade a state department of education, or a state legislature, to treat the real property valuation requirement as satisfied based on the availability of Impact Aid funds. The state's interest is the financial stability of the district; the state should have no further cause for concern if that interest is satisfied by federal funds. The failure of a state to waive its statutory requirement in instances where there are ample and reliable sources of funding effectively discriminates against Indians and others who live on federal reservations.

The argument can be made that federal subsidies cannot be relied on to support Indian districts because these subsidies are of uncertain duration and amount. Ultimately, however, this argument is unconvincing. The state would face the same situation if there were economic problems within any district. In order to allow the formation of a new school district, the state need not guarantee that the district will be maintained forever. Accordingly, there are persuasive reasons for the states to view federal Impact Aid funds as in lieu of local taxable property.

Alternatively, Indian communities may argue that provisions of state education codes which make the right to form a public school district dependent on the amount of taxable real estate within the proposed district deprive them of equal protection of the laws under the applicable state constitutions. Although these statutes apply to all communities in the state, a law nondiscriminatory on its face may be grossly discriminatory in its operation, and therefore unconstitutional. Here, the taxable property requirement is uniquely prejudicial in its effect on Indian communities because of the nontaxable status of Indian land.

A classification uniquely affecting members of a particular race will be
upheld only if it is necessary to protect a compelling state interest. The state does have a legitimate interest in the financial responsibility of its school districts. However, if that interest is satisfied through the flow of federal funds, the state should not be able to justify a law which prevents Indian communities from exercising the right to form public school districts.

Apart from race, the recent decisions interpreting state constitutions in Serrano v. Priest, Van Dusartz v. Hatfield, Milliken v. Green, and Robinson v. Cahill lend strong support to the contention that when education is concerned, classifications based on wealth are impermissible. These cases involved inequality of resource allocations among the school districts in the state, and held that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole. When subject to minimum property valuation requirements, the right to organize a public school district to improve the quality of education delivered to children in Indian communities is made a function of the taxable wealth of the proposed school district. If the taxable property requirements based on wealth effectively deny Indian communities an equal opportunity to influence the education of their children through the formation of new districts, these statutes should fall as a denial of equal protection.

The knowledge that a state requirement may eventually be adjudged unconstitutional provides little immediate comfort to Indian communities attempting to organize public school districts. Litigation to test the validity of these requirements will take time. If it is determined that new legislation is required, a direct approach to sympathetic state legislators might be equally effective. The Montana statute, which authorizes the creation of districts consisting of at least 50,000 acres of tax free land, might be used as a model. Since the state boards of education are generally empowered to approve new districts, Indian communities might request an opinion from the state attorney general on the validity of the real property requirements as applied to them. A favorable attorney general’s opinion would likely enable the state boards to approve the new district.

There are other important factors which the local and state governments may properly consider before approving the creation of a new public school district. There should be a reasonably large number of students who would attend school in both the old and new districts. It is expensive to administer and equip modern schools, and, therefore, it would ordinarily be reasonable

197. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
201. MONT. REV. CODES ANN. § 75-6517 (Supp. 1971).
to insist that all school districts serve a large enough number of students to justify this expense. Furthermore, the state and local governments may reasonably require that a proposed new district have adequate buildings and equipment. Often, Indian communities can obtain buildings for these purposes from the federal government at little or no cost, under a specific statutory authorization for the transfer of title of federal facilities to public school districts. The proposed district should also have adequate roads and a means of transporting students to school. It would not be reasonable, however, for the state to require better transportation facilities for a new district than it does for existing districts. Finally, the new district should ideally form a discrete geographic unit. Sound administration requires that the district be reasonably compact. In addition, in order to pass constitutional muster, the new district and the state may be called upon to demonstrate that the purpose of creating the district was not racial. Such a showing would be difficult if, in fact, the new district were gerrymandered along racial lines.

IV. INDIAN SCHOOLS AND THE CONSTITUTION

The discussion of "Indian controlled schools" brings into play two important bodies of constitutional law: one concerns Indians, the other civil rights. This Part will examine the relationship between those bodies of law in the context of Indian schools.

The specific questions which arise include the following: May the federal government establish and maintain racially identifiable schools for Indians? May the federal government support Indian community-controlled schools? May federally supported Indian-controlled schools exclude non-Indians or may they give preference to Indian applicants for admission? May a state deliberately create a racially imbalanced school district at the request of Indians?

A. The Unique Status of Indians

In Brown v. Board of Education, the Supreme Court, construing the equal protection clause of the fourteenth amendment, declared that "[s]eparate educational facilities are inherently unequal" and that they deprive...

---

202. In the rural communities of Alaska, however, consolidation of children from widely dispersed villages into a single school is not physically possible. The Alaska legislature has determined that all children should attend school in their communities of residence even though this policy decision will necessarily result in higher costs in the rural areas. See ALASKA STAT. § 14.03.080(a) (Cum. Supp. 1972) and the Department of Education's implementing regulation, ALASKA ADMIN. CODE, tit. 4, § 06.020(a) (1972), which provides: "Every child of school age shall have the right to a secondary education in his community of residence, whether in a city district, a borough district, or the state-operated school system."


204. While it may often be difficult to create a new district, this was accomplished at Rocky Boy in Montana. See note 124 supra.

Negro children of equal educational opportunities. In *Bolling v. Sharpe*, the Court ordered the federal government not to maintain racially segregated schools in the District of Columbia, stating: "In view of our decisions that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." It does not follow, however, that the general equal protection and due process standards developed by the Court in *Brown*, *Bolling*, and subsequent cases apply without modification to Indians. Several hundred years of history and a substantial body of law (5,000 statutes, 2,000 regulations, 389 treaties, 2,000 federal court decisions, and 500 Opinions of the Attorney General) have defined the unique status of Indians and Indian tribes in our society. The Constitution, the judicially evolved theory of guardianship, and the inherent power of the federal government derived from its ownership of the lands which Indian tribes occupy, are the principal sources of law which differentiate Indians from all other groups.

The Constitution empowers the Congress "To regulate Commerce ... with the Indian Tribes," and it grants to the President, with the advice and consent of the Senate, the power "to make Treaties." While the commerce and treaty clauses have been the most important constitutional sources of federal power over Indians, the war power, the power to control property of the United States, and the power to admit new states have also been significant.

Ever since the enactment of the first Trade and Intercourse Act in 1790, Congress has exercised its constitutional powers to pass laws which affect Indian tribes and thus, indirectly, Indian tribal members. For example, Congress has regulated the right of Indian tribes to enter contracts, authorized Indian tribes to supervise the employment of federal employees assigned to them, and prescribed procedures for the formal organization of Indian tribal government. From one perspective, then, these

---

206. Id. at 495.
207. Id. at 497.
208. Id. at 500.
211. U.S. Const. art. I, § 8, cl. 3.
212. Id. art. II, § 2, cl. 2.
216. U.S. Const. art. IV, § 3, cl. 1.
219. Id. § 48.
220. Id. § 476.
statutes are not racial classifications; rather they refer to particular groups defined in political or geological terms.\textsuperscript{221}

In \textit{Simmons v. Eagle Seelatsee},\textsuperscript{222} individual Indian plaintiffs claimed a statute which limited inheritance of interests in Yakima tribal allotments to tribal members of one-fourth or more Yakima blood\textsuperscript{223} was unconstitutional because it was based on a criterion of race contrary to the provisions of the fifth amendment. A three-judge federal district court, relying on congressional power to legislate with respect to Indian rights, dismissed the suit, and disposed of the fifth amendment claim as follows: "[I]f legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.' Indians can only be defined by their race."\textsuperscript{224}

The term "Indian," as contemplated by the Constitution and by the Congress, does not necessarily include all members of that racial group. The right to expatriate oneself from one's tribe was recognized as a "natural and inherent right" in \textit{United States ex rel. Standing Bear v. Crook},\textsuperscript{225} and on one occasion a white man adopted into an Indian tribe was held to be an "Indian."\textsuperscript{226} Whether or not a person is classified as "Indian" for a particular purpose may depend upon that individual's relation to a white or Indian community.\textsuperscript{227} When an enrolled member of a recognized Indian tribe possesses at least one-fourth Indian blood and resides on a reservation, he will, under all circumstances, be considered an "Indian." Absent either of those elements, the same individual may for some purposes be excluded from the group known as "Indians."

When an individual is classified as an Indian for a particular purpose, certain consequences will follow. In the leading case of \textit{Worcester v. Georgia},\textsuperscript{228} the Supreme Court held that the State of Georgia could not regulate the internal affairs of the Cherokee Nation. Chief Justice Marshall gave the following description of the status of Indians:

\begin{quote}
The Indian nations had always been considered as distinct, independent political communities . . . . The very term "nation," so generally applied to them,
\end{quote}


\textsuperscript{224} 244 F. Supp. at 814. The court also noted several other Indian laws based on blood quantum including 25 U.S.C. § 297 (1970) (education appropriations not for Indians of "less than one-fourth Indian blood"); id. § 482 (loans prohibited to Indians "of less than one-quarter Indian blood"); id. § 677-77aa (giving different rights to "full blood" and "mixed-blood" Ute Indians).

\textsuperscript{225} 25 F. Cas. 695 (No. 14,891) (C.C.D. Neb. 1879), cited with approval in \textit{Federal Indian Law}, supra note 13, at 5. Standing Bear led a group off the reservation in Oklahoma contrary to law. When arrested he successfully argued that he was no longer subject to orders from the military because he had renounced tribal membership.

\textsuperscript{226} Nofire v. United States, 164 U.S. 657 (1897).

\textsuperscript{227} \textit{Federal Indian Law}, supra note 13, at 5. \textit{Compare United States v. Joseph}, 94 U.S. 614, 616 (1876) (Pueblo Indians held not to be an Indian tribe for the purpose of statutory protection against land settlement by whites), \textit{with United States v. Sandoval}, 231 U.S. 28, 39-47 (1913) (Pueblo Indians held to be an Indian tribe for the purpose of the regulation of liquor sales under the commerce power).

\textsuperscript{228} 31 U.S. (6 Pet.) 214 (1832).
means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land ... admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

. . . .

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . . The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.229

More than one hundred years later, in Williams v. Lee,230 the Supreme Court held that Arizona state courts had no jurisdiction over a dispute between an Anglo and an Indian arising on the Navajo Reservation and that exclusive jurisdiction resided in the Navajo tribal court because the exercise of state jurisdiction would infringe on "the right of reservation Indians to make their own laws and be ruled by them."231 The Court relied heavily on Worcester v. Georgia, and observed that despite some modification over the years, "the basic policy of Worcester has remained."232 In Williams, the Court took notice of the Navajo Treaty of 1868 which "set apart" for "their permanent home" portions of what had been the Navajo native country. The Court observed: "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."233

The decisions in Worcester and Williams invoke Congress' policy in the exercise of its commerce clause power to recognize and promote Indian tribal autonomy. A prominent 20th century example of that policy is the Wheeler-Howard Act of 1934 (Indian Reorganization Act).234 This Act encouraged the strengthening of tribal governments by providing a means to enable tribal governments to organize more effectively for the purpose of dealing with the outside world; among other things, it vested tribal government with the power "[t]o prevent the sale, disposition, lease, or en-

229. Id. at 242-43.
231. Id. at 220.
232. Id. at 219.
233. Id. at 221-22. Most recently, in McClanahan v. Tax Comm'n, 93 S. Ct. 1257 (1973) (holding that Arizona may not tax the income of Navajo Indians residing on the Navajo Reservation whose income is wholly derived from reservation sources), a unanimous Supreme Court reviewed the Indian sovereignty doctrine articulated in Worcester and Williams. While acknowledging that Indians today are American citizens and have the right to vote, to use state courts, and to receive some state services, the Court pointed out that "it is nonetheless still true, as it was in the last century, that Indian tribes are regarded as having a semi-independent position "as a separate people, with the power of regulating their internal and social relations." Id. at 1262-63.
cumbrance of tribal lands, interests in lands, or other tribal assets without
the consent of the tribe."235 Several other statutes also recognize the prin-
ciple of tribal autonomy by requiring tribal consent as a condition pre-
cedent to federal action.236

More recently, the principle of Indian tribal autonomy received ex-

plicit congressional endorsement in the Civil Rights Acts of 1964237 and
1968.238 The 1964 Act prohibits discrimination in employment based on
race or sex, but it specifically excepts Indian tribes from its definition of
"employer."239 Here the power of Congress to regulate commerce with
Indian tribes led to a specific exception for Indians in a civil rights act
general applicability. In the Indian provisions of the Civil Rights Act
of 1968,240 tribal consent, acquired by majority vote at a special election
among the enrolled Indians affected,241 is made a condition precedent to
the assumption of state criminal242 or civil243 jurisdiction. The 1968 Act,
moreover, gives express recognition to tribal ordinances and customs.244

The treaty power in Article II provides a second constitutional support
for the federal government's dealing with Indian tribes. More than 389
treaties with Indian tribes or nations were signed between 1778 and 1871.245
Although the Act of March 3, 1871,246 prescribed an end to treatymaking,
the continuing obligations assumed by the United States and Indian tribes
still constitute an important source of federal Indian law.

The fact that the government dealt with Indian tribes by treaties under-
scores their historical separation from society; "as much so as if an ocean
had separated the red man from the white."247 Most treaties continued this
policy of separation by setting aside designated territory to be inhabited
and controlled by particular Indian tribes. This separatism is supported
today by a host of federal programs designed to improve the quality of life
in Indian reservation communities.

An independent source of federal power over Indians is the judici-
ally evolved theory of wardship. In Cherokee Nation v. Georgia,248 Chief Justice
Marshall characterized Indian tribes as "domestic dependent nations," in
"a state of pupilage," whose relation to the federal government "resembles

236. See, e.g., 25 U.S.C. § 324 (1970) (grants right of way); id. § 390 (concessions on reservoir
241. Id. § 1326.
242. Id. § 1321(a).
243. Id. § 1322(a).
244. Id. § 1322(c).
245. See Our Brother's Keeper, supra note 115, at 11.
246. Ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1970)).
that of a ward to his guardian.\textsuperscript{249} The Court later adopted the wardship theory suggested by the Marshall dictum in \textit{Cherokee Nation} as an alternative source of power—separate and apart from the commerce power—for regulation of liquor sales.\textsuperscript{250} More recently, two lower federal courts have applied fiduciary standards imposed by the wardship doctrine in reviewing Indian challenges to administrative decisions made by the Department of the Interior. In \textit{Kale v. United States}, a panel of the Court of Appeals for the Ninth Circuit found that the Bureau of Land Management had failed to consider a Chickasaw Indian’s application for an allotment in accordance with the standards required by “the fiduciary obligation owed to the Indians as wards of the nation,”\textsuperscript{252} and remanded the case for further proceedings. In \textit{Pyramid Lake Paiute Tribe v. Morton}, a case which involved the allocation of precious water in Nevada, a federal district court held that the Secretary of the Interior had no authority to attempt a rough accommodation of competing claims: “[T]o fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract” goes to the Pyramid Lake Paiute Indians.\textsuperscript{254}

In the exercise of its constitutional and other powers over Indians, Congress has enacted a comprehensive statutory scheme which affects almost every aspect of a reservation Indian’s life: education,\textsuperscript{255} health,\textsuperscript{256} civil liberties,\textsuperscript{257} welfare,\textsuperscript{258} transfers of land,\textsuperscript{259} validity of contracts,\textsuperscript{260} testamentary dispositions,\textsuperscript{261} expenditures of tribal funds,\textsuperscript{262} and preference in federal employment.\textsuperscript{263} If governmental action which was undertaken for the exclusive benefit of Indians were held constitutionally impermissible, then the tribal existence of Indian nations would be placed in grave jeopardy. It is against this backdrop that applicable due process and equal protection standards must be formulated.

\textsuperscript{249} Id. at 181. That the Court spoke of “tribes” rather than individuals supports the argument that the concern is with a political rather than a racial group.


\textsuperscript{252} Id. at .


\textsuperscript{254} Id. at 256. The court also noted that the United States, acting through the Secretary of Interior, “has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.” Id. See also text accompanying notes 77–80 supra.


\textsuperscript{256} See id.

\textsuperscript{257} See id. §§ 1301–03.

\textsuperscript{258} See id. § 306a.

\textsuperscript{259} See id. §§ 348, 391, 393.

\textsuperscript{260} See id. §§ 81, 84.

\textsuperscript{261} See id. §§ 371–80.

\textsuperscript{262} See id. §§ 122–25.

\textsuperscript{263} See id. § 472. In \textit{Freeman v. Morton}, — F. Supp. — (D.D.C. 1972) the court decided, \textit{inter alia}, that the Indian preference statute requires the BIA to give preference to Indians in all initial hirings, promotions, lateral transfers, and reassignments in accord with the intent of Congress to make the BIA an “Indian” agency in the sense that it is to be staffed by Indians whenever possible.
B. Due Process Applied

The question of whether the federal government may operate and maintain a system of federal schools for Indians consistent with the requirements of the fifth amendment due process clause presents a useful point of departure for considering the proper constitutional standards to be applied to Indians. In a seemingly analogous situation in Bolling v. Sharpe, the Court found forced racial segregation in the public schools of the District of Columbia unrelated to any proper governmental objective and therefore held that such public school segregation was an arbitrary deprivation of the "liberty" of Negro students.

The constitutional propriety of federal schools for Indians presents an entirely different issue from the one decided in Bolling v. Sharpe, because Indian schools are a direct result of the government's policy of treating Indian tribes as distinct, independent, political communities. Through the exercise of the constitutional power to make treaties, wage war, and regulate commerce with Indian tribes, the federal government has set aside geographically and politically separate areas to be occupied by Indians. Although assistance has been provided over the years to those Indians who wish to relocate in urban areas, federal policy has been directed primarily toward support and protection of the integrity of tribal self-government on reservations.

1. Political question.

In deference to the constitutional basis for regulation of Indian affairs, the Supreme Court on numerous occasions has found the power of Congress to be "plenary." In Sioux Indians v. United States, the Court said: "Jurisdiction over [the Indians] and their tribal lands was peculiarly within the legislative power of Congress and may not be exercised by the Courts. . . ." And in United States v. Sandoval, the Court deferred to a congressional act prohibiting the introduction of intoxicating liquors on Indian land, and stated: "[T]he questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring

264. See U.S. CONSt. amend. V.
266. See text accompanying notes 228-33 supra.
268. Id. §§ 476-77.
270. 187 U.S. 653 (1903).
272. 231 U.S. 28 (1913).
the guardianship and protection of the United States are to be determined by Congress, and not the courts.\textsuperscript{278}

In defining the considerations which make a particular controversy nonjusticiable the Court has stated: "Prominent on the surface of any case held to involve a political question is found a \textit{textually demonstrable constitutional commitment} of the issue to a coordinate political department."\textsuperscript{274} The constitutional grant of the power to regulate commerce "with the Indian Tribes" to Congress is textually demonstrable.\textsuperscript{275} Indeed, it seems clear that the establishment and operation of schools for Indians is a "regulation of commerce" within the meaning of the Constitution. Schools would come under the commerce power if they are viewed as designed to train persons to take part in interstate commerce; if they are founded pursuant to treaties which regulate commerce; or if the establishment of the schools themselves is found to stimulate and affect commerce.\textsuperscript{276}

The Court may be further induced to refuse to adjudicate a dispute where the decision involves "complex matters of policy" which are traditionally committed to the political agencies of government because "there exists no standard ascertainable by settled judicial experience" which courts can apply to resolve an essentially political dispute or policy.\textsuperscript{277} Clearly federal Indian policy involves the kind of complex issues which are not normally appropriate for judicial intervention. Courts have little knowledge of the history and cultural factors affecting federal Indian policy. How is a court to decide, for example, whether a non-English-speaking child from an isolated portion of a remote reservation ought to attend an all-Indian school near his home or be transported hundreds of miles away from his family and off the reservation to attend public school classes taught exclusively in English? What standards could a court apply? History, language, geography, and especially culture make the courts peculiarly ill-suited to decide how and where Indian children should be educated.

Recently, in National Indian Youth Council, Intermountain Indian School Chapter \textit{v.} Bruce,\textsuperscript{278} the federal district court in Utah applied a similar analysis and dismissed a suit brought by Indian students who sought to compel the BIA to relocate an off-reservation federal boarding school to the Navajo Reservation in accord with a treaty provision. The court found that the manner in which education is provided for Indians is encompassed within the meaning of the term "status" and as such is within

\textsuperscript{273} Id. at 46. A more recent inclusion of questions concerning the status of Indian tribes within the political question doctrine is found in Baker \textit{v.} Carr, 369 U.S. 186, 215 (1962).


\textsuperscript{275} U.S. Const. art. I, \S 8, cl. 3.


\textsuperscript{278} No. NC 21-71 (D. Utah Mar. 13, 1972).
the exclusive authority of Congress. The court also found that the treaty claim presented a nonjusticiable political question, that there were no judicially discoverable or manageable standards to apply, and that the claim involved a policy decision of a kind not appropriate for judicial determination.279

There may be times when an issue which had been treated as political and nonjusticiable by the Court collides with overriding constitutional standards. Thus, in Baker v. Carr,280 the Court found such gross abuse of the freedom previously allowed the states in devising legislative apportionment schemes, that it felt compelled to intervene to protect the fundamental right to vote.

No doubt the Court would feel compelled to review congressional exercise of its plenary power over Indian affairs if a showing were made that Congress or the BIA had acted in total disregard of overriding constitutional requirements.281 For the limited purpose of meeting this threshold inquiry, it is relevant that enrollment in federal Indian schools is limited to residents of Indian reservations,282 that the overwhelming majority of students come from the largest tribes and most remote areas,283 and that more than 80 percent of the students are full blood.284 It is thus apparent that the federal schools serve those Indians who have maintained a geographic and social separation from the mainstream of society. It is relevant also that virtually all federal secondary schools have been accredited,285 for this indicates that the government schools do not depart radically from acceptable educational standards.

Finally, it is relevant to the threshold inquiry that for more than 60 years, white children have been eligible for enrollment in “Indian” day286 and boarding287 schools upon payment of a tuition not to exceed that charged by the state. Clearly, federal Indian schools result from the geographic and political separation of Indian nations and are not designed to

---

279. Id., slip opinion at 8-12.
Other cases have held that the federal government is limited by a flexible application of the fifth amendment in its dealings with Indians. McCurdy v. Steele, 353 F. Supp. 629, 637 (D. Utah 1973); cf. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946); United States v. Klamath & Moaoc Tribes, 304 U.S. 119, 123 (1938). But see United States ex rel. Brown v. Lane, 232 U.S. 598 (1914). Cases such as Balzac and McCurdy manifest an appreciation that cultural diversity is an important factor in the application of constitutional standards.
284. Id. at 37.
285. Id. at 2. There is one school which must improve its plant facilities in order to receive accreditation.
286. 25 U.S.C. § 289 (1970); see 25 C.F.R. § 31.3(b) (1972) which limits this right to areas “where there are no other adequate free school facilities available.”
promote racial segregation. The question of the propriety of federal schools, therefore, presents no occasion for the Court to interfere with the determination by the coordinate branches of the government that a limited class of Indians may voluntarily\textsuperscript{288} enroll in federal schools.

2. Standards of review.

If, however, the maintenance of Indian schools is found to present a justiciable issue because it involves a "racial" classification resulting in increased racial isolation,\textsuperscript{289} applicable constitutional standards ordinarily would make this educational practice "constitutionally suspect,"\textsuperscript{290} and "subject . . . to the most rigid scrutiny."\textsuperscript{291} Indian schools could survive this "rigid scrutiny" only if they were necessary to promote a compelling governmental interest,\textsuperscript{292} and if no less segregative alternatives were feasible.\textsuperscript{293}

A less rigid standard of review would apply if it could be shown with some certainty that the maintenance of an identifiable racial school conferred a benefit on Indian children. Lower federal courts have upheld racial classifications where the legislative purpose was compensation for past discrimination in employment or in school segregation.\textsuperscript{294} If, for example, the government discharged its trust responsibilities by operating schools designed to provide specialized training for gifted Indian artists from rural areas\textsuperscript{295} or to provide a higher quality vocational program than would otherwise be available to reservation Indians,\textsuperscript{296} the more permissive standard of review should apply. The constitutionality of such Indian schools should be upheld on the grounds that they are a rational means for


\textsuperscript{289} A distinction might be drawn between BIA schools on the reservation and the 19 off-reservation boarding schools, some of which are located in the midst of predominantly non-Indian communities.


\textsuperscript{291} Korematsu v. United States, 323 U.S. 214, 216 (1944) (Japanese exclusion from West Coast).

\textsuperscript{292} Id.

\textsuperscript{293} The cases do not clearly indicate whether or not it is necessary to negate all possible "less burdensome" or nonsegregatory alternatives. The first amendment cases clearly require such a showing. See Aptheker v. Secretary of State, 378 U.S. 500, 512–13 (1964); Shelton v. Tucker, 364 U.S. 479, 488 (1960). See also Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (voting rights). While the formulations in different cases have varied, it seems reasonably clear that consideration of available alternatives is required even if only to buttress the argument that the asserted government interest is "compelling."

\textsuperscript{294} Cf. Contractor Ass'n v. Secretary of Labor, 442 F.2d 150 (3d Cir. 1971) (minority preference hiring not prohibited); Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970) (color is a permissible criterion in an affirmative action program); CORE v. Redevelopment Agency, 395 F.2d 920, 921–22 (2d Cir. 1968) (racial classification allowed); United States v. Board of Educ., 372 F.2d 836 (5th Cir. 1966) (Constitution both color blind and color conscious); Springfield School Comm. v. Barksdale, 348 F.2d 261, 266 (1st Cir. 1965) (special attention to characteristics and circumstances occasioned by color valid). See also Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1107–17 (1969).

\textsuperscript{295} E.g., The Institute of American Indian Arts in Santa Fe, New Mexico.

\textsuperscript{296} E.g., The Southwestern Indian Polytechnic Institute in Albuquerque, New Mexico.
carrying out a legitimate government purpose.\textsuperscript{297} Unfortunately, there has been enough serious criticism of the federal school system\textsuperscript{298} to cast doubt on the benefits Indian children derive from federal schools. Accordingly, when federal Indian schools result in the racial isolation of Indian students, the government must meet the strict scrutiny test.\textsuperscript{299}

The government has a compelling interest as well as a trust obligation\textsuperscript{300} to assure that all Indian children receive a decent education. At present, many Indian children living in rural areas do not have access to state public schools.\textsuperscript{301} This circumstance is explained, in part, by the historical fact that many Indians were not citizens until 1924 and by the political difficulties of persuading state and local governments to provide schools financed by local property taxes for Indians who resided on tax-exempt land. For many reservation Indians the federal schools have been and still are the only schools available.\textsuperscript{302} Where access to public schools is readily available, however, there would seem to be no justification for maintaining a federal school to provide essentially the same basic educational program already available from the state.

Many Indian students, moreover, have special educational needs which are not met by the basic educational programs provided by the state public school system.\textsuperscript{303} Some children are especially gifted (artistically or otherwise), some have difficulty learning English because they come from non-English-speaking families, others may be mentally retarded or have behavioral problems. Courts have only recently begun to recognize that the public schools frequently do not provide adequate attention to children with special needs.\textsuperscript{304} Surely the BIA discharges a compelling interest if it provides programs to meet special educational needs which would otherwise be ignored. Where the enrollment in BIA schools is restricted, and

\textsuperscript{297} See note 294 supra.  
\textsuperscript{298} See, e.g., Subcomm. Report, supra note 1, at 99–104.  
\textsuperscript{300} See notes 77–78 supra and accompanying text.  
\textsuperscript{301} In Alaska, for example, the BIA operates day schools in 53 communities which are not served by public schools. Statistics, supra note 4, at 20–21. At least 124 predominantly Native communities have no secondary school facilities at all. Complaint § 47, Answer § 47, Hootch v. Alaska State-Operated Schools, No. 72-2450 (Alas. Super. Ct., 3d Dist., filed Aug. 10, 1972). The continued operation of 200 BIA schools in reservation communities signifies, in most instances, that public schools are not available.  
\textsuperscript{302} In areas where the states have failed to provide public schools the BIA might successfully compel the states to build schools. In addition to legal action, BIA could move administratively to cut off the flow of federal funds to a state on the ground that the state's failure to provide educational services for Indian children constitutes racial discrimination. See, e.g., 42 U.S.C. § 2000d (1970); 25 C.F.R. § 33.5(d) (1972). It is almost fifty years since the Citizenship Act of 1924, and the states would find it difficult to justify the failure to provide a basic education for a racially identifiable segment of the population.  
\textsuperscript{303} See Subcomm. Report, supra note 1, at 52–54. See also Schierbeck, Education = Cultural Politics, 7 INEQUALITY IN EDUC. 3 (1971).  
their curriculum is limited to programs designed to meet the special educational needs of Indian children, their constitutionality should be upheld.\footnote{It is by no means clear that BIA schools presently meet special educational needs. Almost four years ago the Senate Subcommittee released its report containing the following findings concerning BIA schools: "The primary cause of low achievement of Indian students is the inadequacy of instruction. A large proportion of the teachers in BIA schools lack the necessary training to teach disadvantaged Indian students effectively... The curriculum used in BIA schools is generally inappropriate to the experience and needs of the students. The schools fail to deal effectively with the language problems of the students, there is little understanding of cultural differences, and the vocational training is archaic and bears little relationship to existing job markets." \textit{Subcomm. Report}, supra note 1, at 101.}

Although BIA day schools are established and maintained primarily for the benefit of Indians, they are not segregated de jure\footnote{See 25 U.S.C. §§ 288-89 (1970); 25 C.F.R. § 31.3 (1972).} except to the extent that the creation of Indian reservations and the continued recognition of tribal society may be said to preserve segregation. It cannot be argued seriously that the Constitution \textit{requires} the destruction of tribal society. Moreover, Indian students have a right to attend state public schools\footnote{As the Court declared in \textit{Brown v. Board of Educ.}, 347 U.S. 483, 493 (1954): "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."} where adequate facilities are available.\footnote{In Alaska, for example, Natives who live in communities not served by public schools are offered the choice of attending BIA Boarding Schools or a State Boarding Home Program in which they may live for the academic year with families in Anchorage or Fairbanks and attend local public high schools.} By contrast, the Negro plaintiffs in \textit{Bolling v. Sharpe} had no choice at all.

Further, the transfer of children from BIA to public schools will not necessarily result in greater integration. Many reservation communities are great distances from neighboring Anglo communities. This physical separation, combined with the lack of adequate road systems,\footnote{In his formal statement to a Subcommittee of the House Committee on Appropriations, Commissioner of Indian Affairs Louis Bruce declared that only 10\% of the 21,664-mile BIA road system is paved and that there is now a road construction backlog of $815 million. \textit{Hearings on Dept. of the Interior and Related Agencies Appropriations for 1973 Before the Subcomm. on the Dept. of the Interior and Related Agencies of the House Comm. on Appropriations}, 92d Cong., 2d Sess., pt. 2, at 9 (1972).} often makes busing unfeasible. As a result, both federal and state public schools in many reservation communities will have predominantly Indian student populations.\footnote{On many reservations, however, there are significant Anglo populations. \textit{See Dodge v. Nakai}, 298 F. Supp. 26, 32 (D. Ariz. 1969).}

3. \textit{Civil rights statutes.}

The Civil Rights Act of 1964 makes it unlawful to exclude "any person" on account of race, color, or national origin from any program receiving financial assistance from the federal government.\footnote{42 U.S.C. § 2000d (1970).} While this legislation
was before the House Committee on the Judiciary, the Chairman asked the Department of Justice to advise it of the programs covered by the legislation. Deputy Attorney General Nicholas Katzenbach furnished the Committee with a list accompanied by the following comments:

Activities wholly carried out by the United States with Federal funds . . . are not included in the list. Such activities, being wholly owned by, and operated by or for, the United States, cannot fairly be described as receiving Federal “assistance.” . . . Programs of assistance to Indians are also omitted. Indians have a special status under the Constitution and treaties. Nothing in Title VI is intended to change that status or to preclude special assistance to Indians.812

The Secretary of the Interior has promulgated regulations to effectuate the provisions of Title VI.818 One section provides:

An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program which, in accordance with Federal law, is limited to Indians, natives of certain territories, or Alaska natives, if the individual is not a member of the class to which the program is addressed.814

The Snyder Act,815 the basic Indian education authorization statute, is listed in an appendix816 to the regulations as one of the programs included in the section quoted above. Thus, the federal Indian schools, when operated by the federal government, do not violate the Civil Rights Act of 1964.


In distributing educational services funded by federal programs designed by statute to be limited to Indians, an Indian tribe, like the federal government, is not bound by the prohibitions of Title VI of the Civil Rights Act of 1964. It is immaterial that the school is operated by an Indian tribe, under contract, rather than by the federal government; the Court has long recognized the power of the federal government to order federal-state relationships.317 Thus, the federal government has been able to contract with various tribes to operate a school, a function which the federal government could without question perform directly.318 The basic policy, basic purpose, and basis for funding remain the same. If the federal government may constitutionally operate an Indian school, there is no apparent reason

813. 43 C.F.R. § 17 (1972).
814. Id., § 17.3(d).
818. An example of this type of arrangement is found in the Busby school. See notes 113–17 supra and accompanying text. The Rough Rock Demonstration School may stand on different ground than Busby because it receives a substantial amount of operating funds from federal sources other than BIA and these funds may be sufficient to bring the school within the purview of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970).
why it may not enter into a contract with an Indian tribe to perform the same function.

While the letter from Deputy Attorney General Katzenbach stated that programs of assistance to Indians are not covered by Title VI,\footnote{See text accompanying note 312 supra.} this does not mean that Indians are entitled to discriminate on the basis of race in administering any federal program. Some programs, such as the Johnson-O’Malley Act,\footnote{25 U.S.C. §§ 452-54 (1970).} are designed for Indians, while others such as Title I of the Elementary and Secondary Education Act of 1965\footnote{Pub. L. No. 89-10, 79 Stat. 27-36 (1965) (codified as amended at 20 U.S.C. §§ 241a-m (1970)).} are designed for a larger class (educationally disadvantaged children) which includes Indians. Title VI prohibits exclusion from this latter type of program on the basis of race, color, or national origin. If an Indian community school was supported to a significant extent by programs not designed “for Indians,” then the school probably could not give preference to Indians in admission nor could it in any other way discriminate on the basis of race.\footnote{In most Indian communities no actual problem is presented because a relatively small number of non-Indians poses no threat to the Indian majority. Rough Rock, for example, considers integration a positive value. Interview with Campbell Pfeiffer, former Rough Rock staff member, in Cambridge, Mass., May 22, 1972.}

5. Indian control.

A separate issue is whether an Indian community school which is funded by the federal government may exclude non-Indians from the school board. The answer in most cases should be “yes.” Often the fact of “Indian control” is the educational increment which induces agencies to make demonstration grants. Where Title VI of the Civil Rights Act does apply, it should be read to deal with participation in the substantive “program” but not with control over the organization receiving and administering federal funds. Any other interpretation would raise some question as to the eligibility of Indian tribes to receive grants. Where educational programs on the reservations are administered by Indian tribes, by tribally chartered corporations, the application of ordinary civil rights standards\footnote{The Federal Constitution has no direct applicability to Indian Tribes. Talton v. Mayers, 163 U.S. 376, 384 (1896); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967); Martinez v. Southern Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957).} should be modified to accommodate the constitutional policy of tribal sovereignty.\footnote{See McLanahan v. Tax Comm’n, 93 S. Ct. 1257 (1973) and cases cited therein for a review of the tribal sovereignty doctrine.}

Unquestionably, Congress has the power to modify the scope of tribal authority; it did so in enacting the Indian Civil Rights Act of 1968\footnote{25 U.S.C. §§ 1301-03 (1970).} which, \textit{inter alia}, prohibits a tribal government from denying “equal protection of its laws” and from depriving any person within its jurisdiction “of liberty...
or property without due process of law." While both Indians and non-
Indians are entitled to invoke the provisions of the Indian Civil Rights
Act, the courts have held squarely that its use of the terms "equal pro-
tection" and "due process" does not incorporate the full body of law ema-
nating from the Federal Constitution. In Slattery v. Arapahoe Tribal
Council, for example, the court held that the tribe's imposition of a blood
quantum requirement for tribal enrollment did not violate the "due pro-
cess" or "equal protection" provisions of the statute. In addition to limiting
tribal enrollment, it would seem permissible for an Indian tribe to restrict
to enrolled members of the tribe the rights to vote and to hold office in
tribally connected enterprises such as a reservation school board. As one
federal court has stated, the Indian Civil Rights Act was enacted "with a
view toward enhancing Indian civil rights without undermining cultural
identity [and it will be applied] in the light of tribal practices and circum-
stances. Essential fairness in the tribal context . . . is the standard against
which the disputed actions must be measured." Clearly, a strong argu-
ment can be made that on an Indian reservation the application of a tribally
sanctioned Indian control policy to school boards operating under auspices
of the tribe does not offend notions of essential fairness.

C. Equal Protection Applied

The question remaining is whether a state may deliberately create a
racially imbalanced school district at the request of Indians. Ordinarily,
such state action would not be consistent with applicable constitutional
standards. But, because of their historical relationship with the federal
government, Indians occupy a unique position under the fourteenth amend-
ment. Consequently, there are circumstances which will justify, or even
require, a departure from the general rule.

In many instances geography provides the compelling explanation for
the creation of racially imbalanced Indian school districts. In the West, there
are many districts which encompass large geographical areas, large num-
bers of Indian students, and significant amounts of Indian reservation land.
Originally, these districts served off-reservation Indians and predominantly

326. Id. § 1302(8).
328. Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971); Groundhog v. Keeley,
329. 453 F.2d 278 (10th Cir. 1971).
331. See, e.g., Haney v. Board of Educ., 410 F.2d 632 (8th Cir. 1969) (district lines drawn to
perpetuate racial separation); United States v. School Dist., 404 F.2d 1135 (7th Cir. 1968) (board
may not select sites to preserve segregation); Taylor v. Board of Educ., 294 F.2d 36 (3d Cir. 1961)
(district lines drawn to perpetuate racial separation).
332. For an example of a factual setting in which the creation of an Indian school district might
be constitutionally required, see note 364 infra.
Anglo communities located well outside the reservations. As a result of the termination and BIA transfer policies of the 1950’s, the boundaries of these Western school districts were extended dramatically to include reservation areas and large numbers of Indian children. In some instances, the BIA turned over its school buildings to the newly enlarged districts, while in other instances new or enlarged facilities were constructed with federal money under Public Law 81-815. In almost all such cases the newly enlarged districts received substantial federal subsidies intended to compensate the districts for any loss of revenue due to the tax exempt status of Indian land.

The incorporation of large numbers of Indians from the reservations into the newly enlarged districts often did not result in integration, especially at the elementary school level. While such districts could be described as integrated, the substantial distances between the reservation and neighboring Anglo communities often meant that schools on the reservations continued to be predominantly Indian. Where intradistrict busing or other devices which would integrate the schools within these large districts are not feasible, the incorporation of predominantly Indian schools into separate districts should not present major constitutional questions.

The creation of predominantly Indian school districts becomes a more difficult constitutional question where Indian children would otherwise attend integrated schools. Normally, when the effect of redrawing school district boundaries is to increase racial separation, serious equal protection problems are raised. When equal protection standards are applied in the context of Indian education, however, two unique factors emerge which make the creation of an Indian school district constitutionally permissible.

The first constitutional argument in support of Indian school districts is tied to the tradition of sovereignty enjoyed by Indian nations. In two recent school desegregation cases, Wright v. Council of the City of Emporia and United States v. Scotland Neck City Board of Education, at least

---

333. Prior to 1924, many Indians were not citizens and did not attend public schools. See text accompanying note 36 supra. The description in this section draws upon the author's experience in representing Indian communities throughout the western United States. See generally Natonabah v. Board of Educ., 716 F. Supp. 355 (D.N.M. 1973).
334. See text accompanying notes 58-69 supra.
335. See text accompanying notes 44-57 supra.
336. In Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 153 (5th Cir. 1972) (desegregation case), the court observed: "The length and time of travel for students under any plan must be considered in light of the age of the children, and the risk to health and probable impingement of the education process. The material consideration in assessing the probable effect on health and the educational process as to each particular child will be the time required for transportation as distinguished from distance" (citation omitted). See also notes 358-61 infra and accompanying text.
337. These facts are similar to those presented to the State of Montana by the Indian people of the Rocky Boy Reservation. The state created a racially imbalanced elementary school district at their request in 1970. See note 124 supra.
338. See note 331 supra.
339. See notes 228-46 supra and accompanying text.
four members of the Court found that the sovereignty of individual governmental entities justified the creation of separate school districts, even when the result was reduced integration. Both cases involved attempts by Southern public school districts to create two small school districts out of larger original districts. In *Scotland Neck*, the Court unanimously struck down North Carolina's attempt to create a new school district on the ground that it would provide a refuge for white students and thereby interfere directly with a court order to desegregate schools within the county.

Although five justices reached a similar result in the more difficult case of *Wright v. Council of the City of Emporia*, all four Nixon appointees to the Court dissented. Chief Justice Burger, joined by Justices Powell, Rehnquist, and Blackmun, argued that a district court's authority to enjoin the creation of a new public school district is limited where a separate political entity is involved. Explaining that under Virginia law the city of Emporia is independent from Greensville County, the Chief Justice said:

> This may be an anomaly in municipal jurisprudence, but it is Virginia's anomaly; it is of ancient origin, and it is not forbidden by the Constitution. To bar the city of Emporia from operating its own school system, is to strip it of its most important governmental responsibility, and thus largely to deny its existence as an independent governmental entity.342

The fact that four Justices concluded that a city's status as an independent governmental entity justified the creation of a separate school district, even in the face of a school desegregation order, clearly improves the chances that Indian school districts will pass constitutional muster. States which have created Indian districts are likely to occupy a more favorable constitutional position than that of Virginia in *Wright v. Council of the City of Emporia*. Indian tribes have a stronger claim to sovereignty than did the city of Emporia. Moreover, most of the states with large Indian populations are in the West and, unlike Virginia, have no history of de jure discrimination.434 Thus, they are unlikely to be under court orders to erase every vestige of a dual school system "root and branch."344

The second and stronger ground on which the constitutionality of Indian school districts may be upheld is the supremacy clause,345 which imposes federal Indian policy on the states. Federal policy considerations led to

---

342. 407 U.S. at 478. By contrast, Justice Burger noted in his concurrence in *Scotland Neck* that: "... Scotland Neck's action cannot be seen as the fulfillment of its destiny as an independent governmental entity. Scotland Neck has been a part of the county-wide school system for many years; special legislation had to be pushed through the North Carolina General Assembly to enable Scotland Neck to operate its own school system." Id. at 492.

343. This general proposition is subject to certain exceptions, however. For example, in 1924, the Supreme Court of California found that a state statute excluding Indian children from public schools on the basis of their race violated both the state and federal constitutions. *Piper v. Big Pine Dist.*, 193 Cal. 664, 226 P. 926 (1924).


345. U.S. Const. art. VI.
the creation of Indian reservations, and federal policy today calls for their perpetuation. As discussed previously, the exercise of the federal power over Indian matters is firmly grounded in the Constitution. The federal laws and treaties implementing that policy are the supreme law of the land and as such are binding on the states. Accordingly, on the numerous occasions when states have attempted to impose policies inconsistent with superseding federal Indian policy, the Court has upheld the federal interest.

The fourteenth amendment, of course, is also the supreme law of the land. If it could be shown that the dominant purpose and effect of maintaining Indian reservations is to separate Indians from others in order to relegate them to an inferior and subservient position in the society, a state might be justified in according greater weight to its unquestionably valid interest in preventing racial discrimination.

In light of the federal policy of promoting Indian independence, the creation of Indian school districts should not generate inferences of discrimination. While the government's motives have not always been totally benign in its dealings with Indians, the existence of a genuine and deep-rooted tradition of Indian tribal sovereignty and independence cannot be denied. The federal government's recognition of the continued vitality of Indian tribal ways of life is not generally considered invidious or discriminatory. Indeed, the disastrous policy of forced termination with its repudiation of the separate and unique status of Indians has been perceived by most as destructive.

The applicability of the federal policy of promoting tribal independence and sovereignty makes inapposite the equal protection cases which might otherwise bar the creation of a racially identifiable Indian school district. In Brown v. Board of Education, the Court found that the intentional maintenance of racially identifiable schools was discriminatory. This discrimination was manifested in a state policy which considered blacks inferior. To date, all of the Supreme Court's school desegregation decisions have involved states with similar histories of de jure school segregation.

Numerous lower courts have invalidated school districts which, while not

---

346. See text accompanying notes 205–63 supra.
347. See text accompanying notes 211–16 supra.
351. See SUBCOMM. REPORT, supra note 1, at 9–21.
353. See text accompanying notes 59–68 supra.
intentionally segregating students, were based on patterns created by private discrimination. In all of these cases segregation has been a manifestation of discrimination against blacks. While historically Indians have suffered their share of discrimination, the federal policy of tribal independence, coupled with demands from the Indian community, provides a nondiscriminatory basis for the creation of Indian school districts.

A practical consideration which is relevant to the constitutional validity of Indian school districts is that it is currently a common practice to bus Indian students to schools in Anglo communities. This occurs without the reciprocal busing of white students to the reservations. Under such arrangements, the burden of integration falls on Indian children to such a disproportionate extent that their rights under the equal protection clause may

356. In Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 522 (C.D. Cal.), aff'd, 427 F.2d 1352 (9th Cir. 1970), the court found that "the existence of residential segregation based upon discrimination may be inferred . . . from testimony that there are significant areas of a community in which black persons do not and have not resided." The court, therefore, held the existing school attendance areas based on residential patterns unconstitutional. Similarly, in Bradley v. Millikin, 338 F. Supp. 582 (E.D. Mich. 1971), the court after finding that black citizens resided in separate and distinct areas within the city and that segregation in the schools and in residences "resulting primarily from public and private racial discrimination" were interdependent phenomena, held: "The affirmative obligation of the defendant Board has been and is to adopt and implement pupil assignment practices and policies that compensate for and avoid incorporation into the school system the effects of residential segregation. The Board's building upon housing segregation violates the Fourteenth Amendment." Id. at 593. See also United States v. Board of School Comm'rs, 332 F. Supp. 655, 662, 663, 670, 673-74 (S.D. Ind. 1971).

The "segregation" of Indians on reservations has been the result of legitimate federal policy considerations, not private discrimination. The prohibitions against basing school districts on racially identifiable neighborhoods thus appears to be inapplicable to Indian schools. This position is reflected in the Joint Policy Statement of the Washington State Board of Education and the Washington State Board Against Discrimination, adopted April 24, 1970. The statement defines "racial segregation" and adopts statewide guidelines to eliminate it and contains other substantive requirements designed to assure "equality of opportunity in education." The statement expressly exempts "schools serving American Indian communities" from its racial balance requirements and acknowledges that "special attention should be given to American Indian communities because of the trust relationship with the federal government."


be violated. In *Spangler v. Pasadena City Board of Education,* for example, the court held unconstitutional a desegregation plan in which blacks were transported to predominantly white schools but no white children were bussed. In granting a preliminary injunction against a similar desegregation plan, the federal court in *Brice v. Landis* explained:

> The minority children are placed in the position of what may be described as second-class pupils. White pupils, realizing that they are permitted to attend their own neighborhood schools as usual, may come to regard themselves as “natives” and to resent the negro children bussed into the white schools every day as intruding “foreigners.”

In short, one-way busing of minority children—even when undertaken for the purpose of integration—may itself amount to racial discrimination, particularly where other alternatives are available.

The creation of a new school district with boundaries coterminous with the Indian reservation provides an alternative to the existing one-way busing. The state has a greater interest in preventing the social dislocation caused by one-way busing than it does in requiring racial balance in all of its schools or school districts. When this interest is added to that of promoting local control of schools and recognition of superseding federal Indian policy, it seems clear that in many instances a state would be fully warranted in creating a school district coterminous with an Indian reservation without running afoul of the equal protection clause.

Although a state may establish public school districts coterminous with an Indian reservation, it does not follow that states must do so in all circumstances. Just as there is no federal constitutional right to a “white” education, there is no abstract constitutional right to an Indian education.

A state, confronted with a request for the creation of a racially imbalanced school district on an Indian reservation should give greatest weight to the educational needs of the students. The room for discretion is wide, but it is not without limit. Due regard for federal Indian policy made binding

---


361. *Id.* at 978.


363. *See* Brunson v. Board of Trustees, 429 F.2d 820, 823 (4th Cir. 1970) (Sobeloff, J., concurring) (“whites” cannot constitutionally complain if schools have a majority of black students).

364. For example, until this year Alaska had only 28 school districts, *Alaska Dep’t of Education, 71-72 Alaska Educational Directory 5-93.* In the northern and western portions of the
on the states through the supremacy clause permits the establishment of public school districts on Indian reservations when the creation of these districts is consistent with the educational interests of the children.365

V. CONCLUSION

This Article has endeavored to set forth the many paths leading to the goal of increased community control of Indian education. Each alternative has inherent limitations, due in large measure to the inescapable fact that Indian communities must look to outside sources for financial support. In this sense, the schools are not and cannot ever be true community schools. Indian communities which seek increased control of their schools have no choice but to work within a system, be it BIA, the states, or local government. The challenge before those individuals concerned with community control of Indian education is to master this system and make it respond to the legitimate needs of Indian people.

365. In a slightly different context, the Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), expressly recognized the conflicts engendered between a traditional way of life and contemporary education, the right of parents to guide the upbringing of their children, and the possible validity of alternative modes of education. The Court balanced the state's interest in the enforcement of its compulsory education laws with other fundamental values. The Court's recognition in Yoder of the need for flexible application of constitutional standards in differing cultural contexts merits application to the issues discussed here.