Each of the community control models described in this 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 Burke or the creation of a new staff at Rough Stock. Other considerations are not so readily apparent. This Part will attempt to identify some of the less obvious 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 RIA facilities as was done at the Burke School. There is, however, no means to compel the federal government to build schools to serve any particular community. When President Nixon said, “We believe every Indian community 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 plant of funds to expand or modernize its school system because the RIA education function is being slowly phased out. Indeed, the basic federal education policy for the last 50 years has been to encourage state governments to assume full responsibility for the education of Indians.
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 employers may retain this status, once a community takes over, future employees will work for the tribes 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 changing funds from the BIA to finance construction, expansion, or modernization of the physical plant. At present, the BIA has a $380 million backlog in school construction requests. For fiscal year 1973, the BIA is seeking only $10 million for school construction.

As the different Indian communities gain experience in managing their schools, it seems inevitable, and probably desirable, that ties to the Bureau will weaken. This will create political problems for 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, though, many of them have given substantial support to administration policies. Requests from the Indian 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 concern-

144. Indian Legal Information.但本杰明.路易斯.谢恩,《印度教育法》,第1卷,第2期,第43年,第457页.第200页.
145. 《Public Schools, Indian Bureau, Non-Indian Schools.》
146. 《The self-determination movement is substantially supported. Indian Bureau Indian Education Program in the United States in 1984》, 美国局,第200页.第200页.第200页.
treated on a few schools, the sluggish bureaucracy of the BIA and the Department of the Interior is likely to be responsive to their needs.

In a few years, there may be as many as 350 community controlled schools. Because the poverty will have worsened 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 even as 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 each service as road construction, welfare, real property management, economic development, and education in his geographic area. The area director serves, 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 Oglala Sioux Tribe in South Dakota elected a new tribal chairman, the first 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 grant 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 gross mass 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

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130 Following the election of BIA bureaucrats in Washington for Indian affairs in November 1974, the Government of Interior announced implementation of a policy to further de-centralize and make additional power and resources in the field offices. The Report of Secretary Fowler, April 19, 1976, at 15 shows emphasis on funding and de-centralization of programs will be strong. A new BIA office will be established in Washington. While the new entity will be more responsive for local delegations or tribal agencies located in Washington. These delegates will be found at regular meetings of Indian groups in the District.
In the United States, the organization of education is divided into several levels. The most fundamental level is the local school district, which is governed by a board of education. Above the local level, there is a state government with a Department of Education, which oversees the educational system within the state. The federal government also plays a role, through agencies like the Department of Education and the Office of Educational Research and Improvement.

The role of the state government is to ensure that the educational system meets the needs of the state's population. This includes setting standards for schools, providing funding, and ensuring that schools are equipped with the necessary resources. The state government also works to improve educational outcomes for all students, regardless of their background or circumstances.

At the local level, schools are usually organized into districts, which are managed by a board of education. The board of education is responsible for hiring a superintendent, who is the head of the district and is responsible for overseeing the day-to-day operations of the schools. The superintendent is also responsible for ensuring that the district's educational goals are met.

The superintendent is responsible for ensuring that the schools in the district are well-staffed and well-equipped. This includes hiring teachers and other educators, as well as ensuring that the schools have the necessary facilities and resources for providing a quality education.

In addition to these responsibilities, the superintendent is also responsible for working with the state government to ensure that the district is following state educational standards and regulations. This includes working with the state Department of Education to ensure that the district is receiving proper funding and support.

Overall, the role of the superintendent is critical to the success of the educational system in a district. By working closely with the state government and other stakeholders, the superintendent can help ensure that schools are providing a high-quality education to all students.
In short, the Department of the Interior and its BIA are not organized in
tways which can result in the provision of efficient service to Indian com-

munity-controlled schools. As long as the BIA, as presently organized, con-
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tralizes the money which supports community schools, the "control" which the
community exercises may be more apparent than real.

B. Control of State Schools

Because 90 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. 36

1. Advantages and disadvantages.

An important advantage of the public school system is its freedom from
the BIA bureaucracy. If problems arise, they are solved at the local
school district or state capital rather than at the BIA area office or in Wash-

ington. Relevant in this regard is the fact that most of the states with large
Indian populations have relatively small populations, 37 and the state de-

partments of education tend to be small and informal. 38 The person with
decisionmaking authority is often readily accessible, and many problems
can be solved promptly. A public school district is also less likely to be

come involved in political issues, since it is a subdivision of the state

" "
entirely independent of the tribe.

Another advantage of participation in the public school system is the
assurance of continuous financial support. Although the Supreme Court

has held that absolute equality of financial expenditure between school dis-

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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 prevented 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 of the reservation and in many unreserved 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 the Indian president, 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 many wish to retain. This point was brought home forcefully in Warren Trading Post Co. v. Arizona Tax Commission: "...in holding that...

157. See Arizona Independent School Dist. v. McQuay, 32 A.2d 120 (1943). See also id. at 119-120 (on remand from the Arizona Supreme Court) ("We believe a successful defense can be made on grounds of compulsory attendance laws").


160. This is true even though the BIA has not pursued this option.

161. U.S. Const. art. I, § 8, cl. 1 (granting power to regulate commerce with the Indians).


the federal government's comprehensive regulation of traders on Indian reservations precluded 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 their reservation and its affairs without state control, a policy which for automatically reserved districts of all borders for carrying on their own responsibilities. And in compliance with its treaty obligation the Federal Government has provided for roads, education and other services needed by the Indians . . . . And state federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended so long to bear the privilege of sharing this tax.109

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.108

For most Indian people the almost irresistible 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.109 A recent 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.108 In response to this problem it has begun to recognize the need to allow for and encourage cultural diversity in the public schools.

109. In McGreend v. State of Nebraska, 15 S. Ct. 23 (1915), a majority of Supreme Court held that Indians may not be the owners of Navajo Indians whose outline may shortly become free
110. In Paper Commonty public.
111. In Paper Commonty public.
112. In Paper Commonty public.
114. In Paper Commonty public.
117. In Paper Commonty public.
118. In Paper Commonty public.
and today most states permit bilingual and bicultural programs financed by federal funds.\(^6\)

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 Alaska\(^7\) and Massachusetts\(^8\) 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 1964\(^9\)—sent a final memorandum to all public school districts on May 25, 1970, which states:

Where language, in speech and print, constitutes a language barrier to educational advancement, or threatens to retarding educational progress, the language barrier may be removed only by affording bilingual instruction.

Failure to take "affirmative steps" could result in the denial of all federal funds to the school district.\(^10\)

Apart from specific legislation, a recent court case suggests that bilingual-bicultural education programs may be required by the equal protection clause of the Constitution. In Serna v. Portal del Municipal Schools,\(^11\)

\(^6\) See generally Redlich, A Model for Financing Bilingual Education Programs in Public Schools, 3 Mont. 105 (1966).

\(^7\) Alaska Admin. Code r. 16.04.090 (1971) provides: "A state accredited public school which is required to teach instruction in more than one language shall provide such instruction as may be necessary to teach the non-English-speaking children the basic subjects of English, arithmetic and reading in their native language." Where English is taught, it shall be presented in the language native to the student.


\(^9\) 42 U.S.C. 2000d (1970) provides: "The purpose of this title is to eliminate all forms of education discrimination in the areas of employment and instruction where such discrimination is found, and to ensure that all children receive a program of basic educational services in their native language.\"

\(^10\) See United States v. District of Columbia, 393 U.S. 263 (1969)."
federal district court found that Spanish-speaking children who received substantially the same educational programs 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 directed the school district to establish or enhance bilingual/bicultural programs in all of its schools and recruit and hire more Spanish-speaking teachers and teachers' aides."

In United States v. Texas,"¹³ 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."¹⁴ 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] For the cultural and linguistic enrichment 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 planning (instructional) approaches.

[2] That the educational program of the district should incorporate, alternatively 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 will proceed toward both the individual 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 perceived as a more valued language, even though it will be called to the attention of the student that English is the official language of the United States."¹⁵

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,"¹⁶ and to

¹³ See id. at 1156.
¹⁴ Id. at 1158.
¹⁵ Id. at 1159.
¹⁸ 71 F. Supp. 2d at 12.
¹⁹ Id. at 24 (citing U.S. v. D.H. 430 U.S. 373 (1977)).
create a unitary school system; that did not contain racially identifiable schools.

In essence, the court held that the school district’s failure to provide adequate bilingual and bi-cultural programs was unconstitutional. In United States v. Texas, the cultural integration 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 Brown and United States v. Texas, educational programs designed to effect the “cre-ative 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 Lee v. Nichols,190 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,191 the majority found that the “language deficiency” giving rise to the issue was created by the children “themselves failing to learn the English language” and not by any discriminatory process of the state.192 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 “unanimously and properly related” to the purposes for which schools are established.

There is certainly to be further litigation in the bilingual-bicultural area in the near future193 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 v. Texas has profound implications for public education in general. Further, the increasing trend toward bilingual education means that educational programs will be expanded to accommodate ever-increasing numbers of minorities. The litigating, of course, will not end here. The focus of the next chapter, and that the United States is quite likely to continue to vigorously litigate against the United States in the years to come.

190. See supra note 190.
191. See supra note 190, in which the court distinguished the equal opportunity mandate from a requirement that the school district provide bilingual instruction for children who do not speak English. See also supra notes 170 and 171.
192. See supra note 190.
193. See, e.g., Sosa v. New York, 597 F.2d 838 (2d Cir. 1979); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.2d 1007 (10th Cir. 1978); Roman v. Dep’t of Educ., 577 F.
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.11 Most state educational codes either permit or encourage the formation of new school districts.12 Generally,13 this will require the division of an existing school district, a matter within the discretion of local and state officials.14 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 various federal programs, the financial impact on the remaining district would 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:

[Excerpt school district ... [must] maintain 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 minimum requirements for accreditation as adopted by the state board of education.15]

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."16 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 the statutory roadblocks: either federal Impact Aid revenue can be viewed as in lieu of real property taxes, or, in the alternative, a case can

11. [Footnote]
12. [Footnote]
13. [Footnote]
14. [Footnote]
15. [Footnote]
16. [Footnote]
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 uncollectable amount of federal property taxes is based 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 included 30,000 or more acres of communally Indian land.

It may be possible to preserve 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 in 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 those districts 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 Impact Aid funds as an extension 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 ignore the desire for equal protection of the laws under the applicable federal Indian constitutions. Although these statutes apply to all communities in the state, a law ‘manifestly arbitrary on its face may be greatly discriminatory in its operation, and therefore unconstitutional.” Here, the taxable property requirement is uniquely prejudicial in its effect on Indian communities because of the measurable value 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 *Swann v. Board of Education of Prince Edward County,* *Van Dusen v. Hatfield,* *Milliken v. Green,* and *Robinson v. Cahill* lend strong support to the contention that when education is concerned, classifications based on race 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, those measures 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 constitutionality of the real property requirement as applied to them. A favorable attorney general’s opinion would likely enable the state boards to approve the new districts.

There are other important factors which the local and state governments may properly consider before approving the creation of a new public school district. These should be reasonable and 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...
to insist that all school districts serve a large enough number of students so 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. Social 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 these 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 Ultimate Status of Indians

In Brown v. Board of Education, the Supreme Court, reversing the prior protection stance of the fourteenth amendment, declared that "[s]egregate educational facilities are inherently unequal" and that they deprive

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189 In the report of the Senate Committee on Education of the 79th Congress, it was stated that: "The record shows that the schools in the United States are, in the main, non-segregated, with only a small percentage, perhaps five percent, of the total population in segregated schools."

190 See, e.g., 20 U.S.C. § 105 (1964), and the Department of Education's implementing regulations, 20 U.S.C. § 105 (1964), which provide: "No child of school age shall be denied the right to a non-segregated education in the common schools, whether in a city or a country, in the state or in the country school system."

191 See, e.g., U.S.C. § 105 (1964), and the id. § 105.
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 (1,500 statutes, 2,000 regulations, 350 treaties, 2,000 federal court decisions, and 350 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
In Simmons v. Eagle Insurance, individual Indian plaintiffs claimed a statute which limited the right to vote in tribal elections was a violation of the Fifth Amendment. The Court held that the statute was constitutional because it was based on a classification of persons 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: "[T]he legislation is to deal with Indians at all, the very reference to them implies the use of a classification of race. Indians can only be defined by their race."

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 participate therein from one's tribe was recognized as a "natural and inherent right in United States v. Crootch, and an occasional white man adopted into an Indian tribe was held to be an Indian, Whether or not a person is classified as "Indian" for a particular purpose may depend upon that individual's relationship to a white or Indian community. 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 these elements, the same individual may be for some purposes 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 Worcester v. Georgia, 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:

The Indian nations had always been considered as distinct, independent political communities. The very term "nation" is generally applied to them...
mean "a people distinct from others." The exception, by declaring tribes already made, as well as to be made, to be the supreme law of the land, will admit their rank among these powers who are capable of making treaties. The words "treaty" and "treaties" are words of our own language, selected in the diplomatic and legislative proceedings, by ourselves, having each a defined 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 an own territory, with boundaries accurately described to which the laws of Georgia can have no force. The whole intercourse between the United States and this nation is, by our convention and laws, vested in the government of the United States.

More than one hundred years later, in Williams v. Lee, 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." The Court relied heavily on Worcester v. Georgia, and observed that despite some modification over the years, "the basic policy of Worcester has remained." In Williams, the Court took notice of the Navajo Treaty of 1908 which "set apart" for "their permanent homes" portions of what had been the Navajo native country. The Court observed: "Saplic... in those treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the imperial affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed there.

The decisions in Worcester and Williams invoke Congress' policy in the exercise of its commerce clause power to recognize and protect Indian tribal autonomy. A prominent 20th century example of that policy is the Wheeler-Hoover Act of 1953 (Indian Reorganization Act). The 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 govern-
ent with the power "to prevent the sale, disposition, lease, or en-

229. 51 S. Ct. 47-49.
230. 2 D.L. 227 (1895).
231. Id. 720.
232. Id. 719.
233. 241 U.S. 682 (1916). Most recently, in Santa Clara v. Arizona, 321 U.S. 52 (1944) Professor Julian Sprague suggests that the courts of Navajo Indian reserves on the Navajo Reservation, whose jurisdiction is defined by a reservation agreement, therefore constitute "tribal courts" under the United States Constitution. However, courts within the boundaries of the Indian reservation are held to be mere "curtilage," and are not subject to the jurisdiction of the Navajo Tribal Court. The Navajo tribe is recognized as having "tribal self-government in all matters of Indian government with the power of regulating their internal and local affairs." 241 U.S. 682 (1916).