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,"[144] 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.[145] 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.

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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.* § 421, 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.[146] For fiscal 1973, the BIA is seeking $22 million for school construction.[147]

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.[148] 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.[149] With substantial political and media interest concen-

146. Indian Legal Information Dev. Service, Legislative Review, vol. 1, No. 7, April 1972, at 17.

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.[150] 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,[151] 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 populations,[154] 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-

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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 Natonabah 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 1–293 (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.

tricts is not required by the federal Constitution,[156] 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.[157] In addition, the federal government, through Johnson-O'Malley, Impact Aid, Title I, Title VII,[158] Manpower Training,[159] and the Indian Education Act of 1972,[160] 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.[161] This point was brought home forcefully in *Warren Trading Post Co. v. Arizona Tax Commission*.[162] 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.

157. Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 119 N.J. Super. 40, 289 A.2d 569 (1972).

158. 20 U.S.C. § 880b (1970) (providing grants for bilingual programs).

159. 42 U.S.C. §§ 2571–2628 (1970) (authorizing expenditures for job training programs conducted through state educational facilities).

160. Act of June 23, 1972, Pub. L. No. 92–318, tit. IV, 86 Stat. 334.

161. *See* text accompanying notes 65–67 *supra*.

162. 380 U.S. 685 (1965).

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.*[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.[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.[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.[166] In recent years, states have begun to recognize the need to allow for and encourage cultural diversity in the public schools,

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163. *Id.* at 690–91 (emphasis added).

164. In McClanahan 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 1459 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 (1971), *prob. juris. noted*, 407 U.S. 908 (1972). This decision may shed further light on evolving tribal-federal-state relations.

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. § 1360(a) (1970). *See also* 25 U.S.C. § 1323(b) (1970). Some 17 years later, in Commissioner v. Brun, 286 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.

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 Alaska[168] and Massachusetts[169] 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[170]—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]

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167. *See generally* Kobrick, *A Model Act Providing for Transitional Bilingual Education Programs in Public Schools*, 9 HARV. J. LEGIS. 260 (1972).

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."

169. Mass. Ann. Laws ch. 71A, §§ 1–9 (Cum. Supp. 1972).

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*.

173. 351 F. Supp. 1279 (D.N.M. 1972).

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,"[174] 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.[175]

In *United States v. Texas*,[176] 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."[177] The detailed and revolutionary plan ordered by the court required fundamental changes in the educational program and was based on the following three principles:

> [T]hat 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.
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> [T]hat 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.
>
> [T]hat 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.[178]

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,"[179] and to

174. *Id.* at 1282.
175. *Id.* at 1283.
176. 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd*, 466 F.2d 518 (5th Cir. 1972).
177. Court Order of Aug. 13, 1971, United States v. Texas, No. 5281 (E.D. Tex. 1971).
178. *Id.* at 5.
179. *See, e.g.*, Green v. County School Bd., 391 U.S. 430, 438 (1968).

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. Nichols*[180] 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 future[184] 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); Denezclarence v. Board of Educ., Civil No. 8852 (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.[185] Most state education codes either permit or encourage the formation of new school districts.[186] Generally,[187] this will require the division of an existing school district, a matter within the discretion of local and state officials.[188] 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:

> [E]ach 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.[189]

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."[190] 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. Persons who sign the petition shall: (a) Be residents of the proposed new district. (b) Reside more than four miles from any district school house. 2. Set forth the boundaries of the proposed district." ARIZ. REV. STAT. ANN. § 15-408 (1956).

188. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-404(B) (Supp. 1972); N.M. STAT. ANN. § 77-3-2 (1968); S.D. COMPILED LAWS ANN. § 13-6-38.1 (Supp. 1972).

189. S.D. COMPILED LAWS ANN. § 13-6-2(3) (1967).

190. ARIZ. REV. STAT. ANN. § 15-404(A) (Supp. 1972).

be made that the real property valuation requirements are unconstitutional.

The Impact Aid Law[191] 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.[192] 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.[193]

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.[194] 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.[195] 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

191. 20 U.S.C. §§ 236–442 (1970), *as amended*, 20 U.S.C. § 241 (Supp. 1, 1971).

192. *See* text accompanying notes 49–57 *supra*.

193. MONT. REV. CODES ANN. § 75-6517 (Supp. 1971).

194. The Supreme Court's decision in San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), probably forecloses an argument based on the Federal Constitution. *But see* text accompanying notes 197–200 *infra*.

195. Griffin v. Illinois, 351 U.S. 12 (1956) (denial of transcript for appeal to indigents held unconstitutional); Guinn v. United States, 238 U.S. 347 (1915) ("Grandfather clause" of Oklahoma Constitution held to discriminate against Negroes). *See generally* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

upheld only if it is necessary to protect a compelling state interest.[196] 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*,[197] *Van Dusartz v. Hatfield*,[198] *Milliken v. Green*,[199] and *Robinson v. Cahill*[200] 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,[201] 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

196. McLaughlin v. Florida, 379 U.S. 184 (1964). *See* NAACP v. Alabama, 377 U.S. 288, 307–08 (1964).
197. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
198. 334 F. Supp. 870 (D. Minn. 1971).
199. 389 Mich. 1, 204 N.W.2d 437 (1972).
200. 118 N.J. Super. 223, 287 A.2d 187, 119 N.J. Super. 40, 289 A.2d 569 (1972).
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.[202] 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.[203] 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.[204]

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*,[205] 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(2) (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."

203. 25 U.S.C. § 2932 (1970). *See also id.* § 276.

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

205. 347 U.S. 483 (1954).

Negro children of equal educational opportunities.[206] In *Bolling v. Sharpe*,[207] 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."[208] 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)[209] 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.[210]

The Constitution empowers the Congress "To regulate Commerce ... with the Indian Tribes,"[211] and it grants to the President, with the advice and consent of the Senate, the power "to make Treaties."[212] While the commerce and treaty clauses have been the most important constitutional sources of federal power over Indians,[213] the war power,[214] the power to control property of the United States,[215] and the power to admit new states[216] have also been significant.

Ever since the enactment of the first Trade and Intercourse Act[217] 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,[218] authorized Indian tribes to supervise the employment of federal employees assigned to them,[219] and prescribed procedures for the formal organization of Indian tribal government.[220] From one perspective, then, these

206. *Id.* at 495.
207. *Id.* at 497.
208. *Id.* at 500.
209. OUR BICENTENNIAL'S KNEPLER, *supra* note 115, at 11.
210. *See generally* F. COHEN, FEDERAL INDIAN LAW 43–47, 89–93 (1958 ed.).
211. U.S. CONST. art. I, § 8, cl. 3.
212. *Id.* art. II, § 2, cl. 2.
213. *See* McClanahan v. Tax Comm'n of Arizona, 41 U.S.L.W. 4457, 4459 n.7 (U.S. Mar. 27, 1973).
214. U.S. CONST. art. I, § 8, cls. 1, 11, 12, 15, 16, 17.
215. *Id.* art. IV, § 3, cl. 2. Legal title to most Indian land is held in trust by the United States. U.S. DEP'T OF INTERIOR, ANSWERS TO YOUR QUESTIONS ABOUT AMERICAN INDIANS 9 (1970).
216. U.S. CONST. art. IV, § 3, cl. 1.
217. Act of July 22, 1790, ch. 33, 1 Stat. 137.
218. 25 U.S.C. § 81 (1970).
219. *Id.* § 48.
220. *Id.* § 476.

statutes are not racial classifications: rather they refer to particular groups defined in political or geological terms.[221]

In *Simmons v. Eagle Seelatsee*,[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[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."[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 *United States ex rel. Standing Bear v. Crook*,[225] and on one occasion a white man adopted into an Indian tribe was held to be an "Indian."[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.[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 *Worcester v. Georgia*,[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:

> The Indian nations had always been considered as distinct, independent political communities . . . . The very term "nation," so generally applied to them,

221. *See* Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966); Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145 (1940).

222. 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

223. 25 U.S.C. § 607 (1970).

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.* § 677–677a (giving different rights to "full blood" and "mixed-blood" Ute Indians).

225. 25 F. Cas. 695 (No. 14,891) (C.C.D. Neb. 1879), *cited with approval* in 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.

226. Nofire v. United States, 164 U.S. 657 (1897).

227. FEDERAL INDIAN LAW, *supra* note 13, at 5. *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), *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).

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.
230. 358 U.S. 217 (1959).
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.
234. Ch. 576, 48 Stat. 984–88 (1934), *as amended*, 25 U.S.C. §§ 461–79 (1970).