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Indian Control for Quality Indian Education

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INDIAN CONTROL FOR QUALITY INDIAN EDUCATION

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I. INTRODUCTION

Indian education, a national tragedy according to the Special Senate Subcommittee on Indian Education,[1] cannot be improved on a massive scale until two conditions are met: development of a sound legal theory to support the right of Indians to control their children's education; and creation of a system to provide responsive assistance to Indians to put that right into effect.

Such is the judgment of Indians, educators, politicans, and lawyers who have worked in Indian education and who have concluded that the prerequisite for better Indian education is basic structural reform designed to put Indian education back under Indian control. Until Indians acquire that automatic right to meaningful involvement in bringing up their children and until that right is vindicated through local Indian initiative, aided and abetted by competent legal assistance, the millions now spent on school programs for Indians are likely to remain as unproductive, indeed destructive, as in the past. In the words of the 1969 report by the Special Subcommittee on Indian Education: "American Indians have little, if any, influence or control in the education of their children in public schools [where two thirds of them are enrolled];"[2] "Indian parents and communities have practically no control over the BIA

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1. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, SPECIAL SUBCOMMITTEE ON INDIAN EDUCATION. INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. N. 501, 91st Cong., 1st Sess., (1969) [hereinafter referred to as S. REP. N. 501].
2. *Id.* at 52.

schools educating their children [where most of the other one third are enrolled];"[3]

The Report recommends: "That Indian boards of education be established at the local level for Federal Indian school districts; . . . that Indian parental and community involvement be increased;"[4] and "that State and local communities should facilitate and encourage Indian community and parental involvement in the development and operation of public education programs for Indian children."[5]

The contention which composes the thesis of this article—the need for Indian educational self-determination—represents a controversial and timely topic in view of the appearance of a recent Stanford Law Review article by Daniel M. Rosenfelt of the Center for Law and Education, Harvard University. That article was produced under a grant from the Office of Economic Opportunity to the Center and the Native American Rights Fund of Boulder Colorado for legal assistance in education to Indians.[6]

Mr. Rosenfelt's article is a thorough, well-written account of the legal history of Indian education from its earliest white influences to the present exciting innovations in local control at Rough Rock, Arizona; Ramah, New Mexico; Wind River, Wyoming; Busby, Montana; Rocky Boy, Montana, and other places. However, Mr. Rosenfelt errs when he states that:

> Although a state may establish public school districts coterminus with an Indian reservation, it does not follow that states must do so. Just as there is no federal constitutional right to "white" education, there is no constitutional right to an Indian education.[7]

This assessment is imprecise and misleading for it represents a conclusion based upon concepts derived from stringent legal analysis rather than from a more single-minded representation of Indian rights.

II. THE LEGAL ARGUMENTS FOR INDIAN CONTROL

In order to establish a foundation for a positive legal position to bolster the Indian education movement, it is first necessary to demon-

3. *Id.* at 101.
4. *Id.* at 119.
5. *Id.* at 135.
6. The article will be published in the second issue of the Stanford Law Review in the spring of 1973. Comments about it here are based on a draft provided to the author by Mr. Rosenfelt in September, 1972 [hereinafter cited as Rosenfelt]. The author and the editors of the North Dakota Law Review have been assured by the editors of the Stanford Law Review that no major revisions on the points discussed here will be made in the published version.
7. *Id.*

strate the existence of infinitely stronger legal arguments concerning the right of Indians to control their own schools than those put forward by Mr. Rosenfelt. To aid this analysis attention will be focused on one typical Indian community situation, in order to develop theories under which states are not simply *permitted* but *required* to create Indian-controlled school districts.

The Wind River Reservation, home of the Eastern Shoshones and Northern Arapahoes, is the only Indian reservation in Wyoming. It has a population of about 5,000, a low standard of living, health problems, unemployment problems and educational problems. The reservation was created in 1868 by a Treaty with the United States. Until the 1950's education remained the concern only of missionaries and the Bureau of Indian Affairs (BIA). But in the Eisenhower era, the Johnson O'Malley Act of 1934,[8] interpreted through the eyes of terminationists then in power, became the vehicle for the wholesale transfer of Indian education from federal hands to the states. At Wind River the single BIA school at Fort Washakie was closed, as, coincidentally, were two mission high schools—one for lack of funds, the other because of a disastrous fire.[9]

By agreement with the BIA, but without any meaningful consultation with the Indians or their knowing consent, the State of Wyoming extended its jurisdiction to the reservation,[10] creating three elementary school districts and extending a high school district to the reservation from an off-reservation city, Lander.

Since then most Wind River students have been educated in public schools, although a considerable number of high school students continue to enroll in off-reservation BIA boarding schools.[11] During the school year 1970-71, an average of 120 Indian high school students were enrolled at such institutions located in Utah, South Dakota, Oklahoma and elsewhere. They represented about one quarter of the secondary school aged children on the reservation.[12]

Wind River differs in one respect from many other Indian communities. Creation of the elementary school districts on the reservation, where the majority of the people are Indian, has provided an

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8. Johnson-O'Malley Act., Act of Apr. 16, 1934, ch. 147, 48 Stat. 596, *as amended,* 25 U.S.C. §§ 452-54 (1970).

9. Interviews with Mrs. Alberta Friday, teacher at the Mill Creek Elementary School, District 38, and member of the Fort Washakie Elementary School District, No. 21; Mr. Allison Sage, Sr., President, Wind River Indian Education Association, Inc.; and Father David Duncombe, Episcopal Mission, Ethete, Wyoming, conducted from September 1970 thru January 1973 [hereinafter referred to as Interviews].

10. 25 U.S.C. § 231 (1970) permits the Secretary of Interior to allow states to extend their jurisdiction to enforce state school laws to Indian reservations with the consent of tribal governments.

11. 25 C.F.R. § 31.1(a) (Supp. 1972).

12. Statistics from the Assistant Agency Superintendent for Education, Wind River Agency, Bureau of Indian Affairs.

opportunity for Indians to achieve control of the three public elementary schools operated by the districts. All three have been controlled by elected school boards with Indian majorities for several years. To a significant degree, Indian control of these schools is generally recognized as accounting for the wide-spread community support which exists for them and for the absence of many of the problems found in non-Indian controlled elementary schools.[13]

However high school education has, if anything, deteriorated. All students above the elementary level must leave the reservation to obtain a high school education. Those in federal boarding schools are totally segregated—enrollments in boarding schools are virtually 100 per cent Indian.[14] Those in Lander Valley High School and Riverton High School—the two largest off-reservation public high schools to which Indian students go—are predominantly Anglo: 82 per cent at Lander and 95 per cent at Riverton (the latter has a small Mexican-American enrollment as well).[15]

In addition to Indians in school, there are those not in school—the dropouts, or as Indians prefer to call them, pushouts. Statistics on them are very uncertain. They are often invisible. If a child does not enroll anywhere at the beginning of the year, he may not show up on anyone's tabulation. Current estimates of the dropout rate in Freemont County, site of the Wind River Reservation, vary from 25 to 40 per cent,[16] although the real figure may be much higher due to the statistical uncertainties.

Educationally the high school programs open to Indians from the reservation are disastrous, especially in the public schools. From interviews with parents and administrators[17] the picture which emerges corresponds in every way with the tragedy described by the Senate Subcommittee's Report.

Very few Indians graduate from high school. Those who do graduate rarely go on to college. Curricula in the public high schools are not geared to Indian needs and wishes. There are few, if any, Indian teachers and no administrators. There is no effective Indian representation on the boards which control the high schools. Further, adequate representation for Indians cannot be achieved even if Indians were to vote in a bloc since they are far outnumbered in the high school districts, where elections are held

13. Interviews, *supra* note 9.
14. 1971 BIA, ANN. REP. ON STATISTICS CONCERNING INDIAN EDUCATION.
15. 1970 ANN. REP. OF WYO. STATE PLAN FOR JOHNSON-O'MALLEY FUNDS.
16. *Id.*
17. Including Silas Lyman, Superintendent, Mill Creek Elementary School District No. 38.

on an "at large" basis. Subtle forms of discrimination against Indians abound in one of the off-reservation high schools, which has the largest Indian enrollment, and is present to a considerable degree in other schools. On numerous occasions Indian parents have tried to get relief from school authorities, without success. (At least once, reservation parents were not even permitted to speak before one of the high school boards about the problems.)[18] According to Mr. Lyman, the superintendent of the Mill Creek Elementary School District (controlled by an Indian-majority board), the really unfortunate thing is that the Indian children are happy, eager and responsive until they graduate from elementary school and enter the high schools. The troubles begin there. The Indians rebel. They dropout. They refuse to study.

As a result of this crisis, Indian parents were forced to search for other means to remedy what they consider to be a worsening situation. They focused on the Wyoming School Code of 1969 and its chapter on School District Reorganization.[19] This law mandates statewide school district consolidation. Seeking a chance for meaningful structural reform, Wind River parents felt that if a unified (kindergarten through grade twelve) district were created on the reservation, they would be able to maintain control of the three elementary schools and extend their control to a reservation high school. If, on the other hand, consolidation ignored the reservation entity and the wishes of its inhabitants, then Indian control of the elementary schools would be lost and elementary education would likely deteriorate to the level of secondary education. As a result the Wind River parents have, since 1969, worked to demonstrate community support for a reservation unified school district.[20]

The Wind River situation is not unique. The Senate Subcommittee's Report demonstrates this. Commenting on public schools for Indians, the Report says:

> At the heart of the matter, educationally at least, is the relationship between the Indian community and the public school and the general powerlessness the Indian feels in regard to the education of his children. . . . 'This relationship frequently demeans Indians, destroys their self-respect

18. Interviews, *supra* note 9.

19. Chapter 6, §§ 21.1-105 *et seq.*, Wyo. Stat. (1957).

20. This effort has produced referenda in each of the 3 elementary school districts showing a two to one majority in favor of the plan; a petition of support signed by over 900 people, the most ever to sign a petition in the history of the reservation; a resolution of support from the Arapahoe Business Council; and creation of a private, community-run high school at Ethete, Wyoming, the Wind River Indian High School, financed by the BIA to serve as a nucleus for an eventual reservation public high school. The school has an enrollment of about 100, all former dropouts.

21. S. REP. N. 501, *supra* note 1, at 24.

> and self-confidence, develops or encourages apathy and a sense of alienation from the education process, and deprives them of an opportunity to develop the ability and experience to control their own affairs through participation in effective local government.'. . .[21]
>
> The Subcommittee found this climate of disrespect and discrimination common in off-reservation towns which educate many Indian students in their public schools.[22]
>
> The Indian is despised, exploited, and discriminated against . . . but always held in check by the white power structure so that his situation will not change.[23]

Assessing the reasons for the abominable conditions, the Report states:

> I. The dominant policy of the Federal Government towards the American Indian has been one of coercive assimilation.
>
> A. The policy has resulted in the destruction and disorganization of Indian communities and individuals.
>
> B. A desperately severe and self-perpetuating cycle of poverty for most Indians. . . .
>
> III. The coercive assimilation policy has had disastrous effects on the education of Indian children. It has resulted in:
>
> A. The classroom and the school becoming a kind of battleground where the Indian child attempts to protect his integrity and identity as an individual by defeating the purposes of the school.
>
> B. Schools which fail to understand or adapt to, and in fact often denigrate, cultural differences. . . .
>
> D. Schools which fail to recognize the importance and validity of the Indian community. . . .
>
> E. A dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children. . . .
>
> IV. The coercive assimilation policy has two primary historical roots:
>
> A. A continuous desire to exploit, and expropriate, Indian lands and physical resources.
>
> B. A self-righteous intolerance of tribal communities and cultural differences.[24]

From these comments and the circumstances at Wind River it should be clear that unresponsive education for Indians is endemic

22. *Id.*
23. *Id.*
24. *Id.* at 21.

in white-dominated school systems on or near Indian reservations. The question is whether these inherent, historical infirmities are open to other than a piece-meal legal challenge.

The above circumstances tend to outrage people of good will and provide a mandate for Indians and non-Indians alike, necessitating *structural* reforms such as those that the Wind River people desire.

It is on this ground that Mr. Rosenfelt and I so strongly differ, for he still believes, it would seem, that Indians can work within existing systems, while I do not. This difference also accounts for our disagreement on the state of the law. For I maintain that the United States Constitution, interpreted in light of these facts and given the special status of Indians under federal law,[25] gives Indians a right to educate their children in schools that they control.

The problem, in terms of the Wind River situation, is whether the State of Wyoming must reorganize school districts in Fremont County in order to give Indians their own school district coterminus with the reservation? The answer, I believe, is that they must.

1. EQUAL PROTECTION APPLIED

The heart of the outrage produced by the circumstances of Indian education is its fundamental unfairness. While everyone else can choose his own life style, culture and beliefs, Indians are being singled out by the dominant non-Indian society for especially brutal treatment designed to force them to accept middle-class Anglo mores. It is this element of special, harmful treatment which gives rise to two interrelated Equal Protection arguments to support the Wind River people's effort and the efforts of other Indians to obtain and control their own school districts. First, the Equal Protection Clause may arguably prohibit coercive assimilation which can be shown to damage Indian children educationally and emotionally. Secondly, the Equal Protection Clause (as well as the Fifteenth Amendment) may further prohibit coercive assimilation since it represents a denial to Indians of equal access to political power.

The basis for these two arguments is summarized by the following two questions:

1. What happens when integration produces *unequal* educational opportunity for a racial or ethnic minority?

25. See text *infra* accompanying notes 91-96. When speaking of Indians I mean those Native Americans who live in geographically- and ethnically identifiable communities on or near Indian reservations.

2. What happens when integration produces *unequal* access to the political process for a racial or ethnic minority?

To arrive at the conclusion in answer to both questions that the United States Constitution requires structural reform to return control of schools to Indian parents and communities, it is necessary to discuss coercive assimilation. This is a form of racial discrimination that differs fundamentally from that practiced against other racial minorities, notably blacks. The legal theories put forward here depend on the realization that racial discrimination in this country is multi-formed. While the dominant society may be biased against all minorities, the means it uses to implement its prejudices varies from group to group. These differences are crucial to an analysis of the legal effect of coercive assimination for Indians because they relate to the fundamental conclusion that: The remedies for eliminating discrimination against one minority may be inappropriate, indeed harmful, to another.

The nature of the difference between discrimination as practiced against blacks and Indians is characterized by fundamentally divergent influences. Where blacks have been forcibly *excluded* (segregated) from white society by law, Indians—aboriginal peoples with their own cultures, languages, religions and territories —have been forcibly *included* (integrated) into that society by law. That is what the subcommittee meant by coercive assimination—the practice of compelling, through submersion, an ethnic, cultural and linguistic minority to shed its uniqueness and identity and mingle with the rest of society. It is the practice of forcing an historically separate people into a melting pot which scalds rather than warms; as compared with segregation—the practice of forcibly expelling a people from a society of which they wish to be a part.

(a) *Educational Deprivations as Violations of The Equal Protection Clause—The Brown Case*

The outstanding characteristic of schools for Indians under their present administrative structure is the incredibly poor job they do in educating Indians and the shocking rates of emotional disturbance they cause among Indian children. Correspondingly, these same schools do not excel in educating the non-Indian, but at least the

bulk of the non-Indian students graduate and emerge without visible harm from the public schools. This contrast poignantly illustrates the basis of the Equal Protection argument advocating return of control of Indian education to Indians. Support for this contention inheres in the Supreme Court's opinion in *Brown v. Board of Education.*[26]

Brown elucidates certain universal principles concerning application of the Fourteenth Amendment to racial discrimination. The confusion concerning *Brown's* application to the Indian educational situation stems from the fact that *Brown* involved a racial minority suffering from a form of discrimination different from that applied to Indians. The Brown Court came to its conclusions about the evil of segregation in large measure because of a mass of social science data submitted by the plaintiffs showing severe educational and psychological damage to black children:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[27]

The Court went on to note that:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[28]

If it were shown that integration of Indian children in white-dominated schools had the same negative educational and emotional effects which segregation was held to have on blacks in *Brown,* then a major basis for the Court's decision ordering an end to state-imposed segregation would not apply to Indians. That such is in fact the case is attested to by the Special Senate Subcommittee whose chairmen—Robert Kennedy, Wayne Morse and Edward Kennedy—were in the vanguard of Senatorial supporters of civil

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26. Brown v. Board of Educ., 347 U.S. 483 (1954).

27. *Id.* at 494.

28. *Id.* For a contemporary assessment of this finding in light of the current controversy about the educational value of integration, *see* Hodgson, *Do Schools Make A Difference?* THE ATLANTIC, Mar. 1973, at 35-46.

rights. They nevertheless saw a distinction between the situation of blacks, whose drive for integration they staunchly defended, and Indians:

> Ever since the policy of educating Indians in public schools was adopted, it was assumed that the public schools, with their integrated settings, were the best means of educating Indians. The subcommittee's public school findings—high dropout rates, low achievement levels, anti-Indian attitudes, insensitive curriculums—raise serious doubts as to the validity of that assumption.[29]

However, focusing on the racial make-up of the classrooms in which Indians are educated distorts the underlying policies mandating improved Indian education: It is not the physical presence of whites in Indian classrooms that is educationally harmful; rather, it is the administration of the school program which has the damaging effect.

The plaintiffs' claims in *Brown* were aimed at laws forbidding the mixing of children from different races in public schools—the racial composition of the classroom—while the Indian educational question focuses upon control. This is a crucial distinction. For it questions an aspect of Indian education not raised by blacks in the integration cases—the powerlessness of Indians to influence the educational process. It therefore differs fundamentally from the core issues raised in *Brown*.

Actually, alteration of school district lines to give Indians control of their own schools will in most cases have little if any appreciable effect on enrollments. (At Wind River, for example, creation of a reservation unified school district would have no effect on the racial composition of the elementary schools—they would remain substantially Indian and would merely transfer a portion of the Indians now in off-reservation public schools with predominantly white enrollments to a reservation high school which would be predominantly, though not entirely, Indian. The off-reservation boarding school students, on the other hand, would return to a high school at least partially integrated as compared with the total segregation of the schools they now attend.)

So *Brown*, to the extent it dealt with a different racial minority asking for relief from a discrimination not affecting Indians, is not relevant. Yet of course, in its more universal aspects it serves as a significant precedent for the proposition that states are under

29. S. REP. N. 501, *supra* note 1, at 31.

an affirmative duty to place control of Indian education in Indian hands.

The fundamental principles propounded in *Brown* and subsequent cases are as follows:

1. State classification on the basis of race is inherently suspect;

2. Racial classification by a state becomes invidious when it produces harm to the minority affected;

3. States are under an affirmative duty to end discrimination on the basis of race;

4. When states refuse to act to meet their responsibility, courts may fashion remedies suitable to removing the particular form of discrimination present;

5. Discrimination by race is especially onerous in education because of the importance of education today. ("Today, education is perhaps the most important function of state and local governments.")[30]

All of these elements are present at Wind River:

1. There has been state action—the creation of school district lines;

2. State action results in classifying Indians in the same class as everyone else when their needs, backgrounds and condition obviously put them in a different situation;[31]

3. There has been enormous harm to Indian children resulting from this racial classification;

4. The best remedy to correct the infirmities in public schools educating Indians is to put them under Indian control;

5. The courts have power to fashion appropriate remedies including the power to redraw school district lines to overcome the effects of racial discrimination.[32]

Given the history of Indian education and the underlying bases for the *Brown* decision, there is no reason to question a state's obligation to construct school districts or fashion other structures placing actual control of education in the hands of Indians—

30. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See generally* Kirp, *Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970).

31. *See* text *infra* accompanying notes 85-107 for discussion of the special status of Indians.

32. Bradley v. School Bd. of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), *rev'g* 338 F. Supp. 67 (E.D. Va. 1972), *cert. granted*, 41 U.S.L.W. 3388 (U.S. Jan. 15, 1973).

in order to promote the best interests of Indian children. There is no case law directly in point on this matter—since the racial desegregation cases have all dealt with non-Indians. Yet their underlying principle—that racial classifications which are harmful to a racial minority are illegal—applies here as well.

(b) *The Deprivations of Fourteenth and Fifteenth Amendment Political Rights—The Gomillion Case*

I have chosen the Wind River situation as a focus for attention because it so neatly poses a second basis for claiming that white-dominated schools for Indians deny them Equal Protection of the Laws and other analogous constitutional rights (a basis which is present in most Indian communities but not in the same illustrative fashion). This aspect concerns the existing Indian control of the three elementary schools on the reservation. These schools are Indian-controlled only because the districts in which they are located are predominantly Indian. Indians have *elected* representative school boards.

If Fremont County were to be reorganized without provision for a unified reservation district, Indians would surely lose their control of the elementary schools. Their votes would be diluted in a sea of non-Indians who have demonstrated traditional hostility towards them.

Such action by the State of Wyoming would offend the Fifteenth Amendment to the United States Constitution as did the re-drawing of the city boundaries of Tuskegee, Alabama, in *Gomillion v. Lightfoot.*[33] From a position of political influence made possible by the alignment of present political boundaries, the Indians—like the blacks in *Gomillion*—would be removed from meaningful participation through the vote in the political process governing the education of their children. Given the history of Anglo-Indian relations in Fremont County, the absence of a compelling state interest to ignore the reservation entity,[34] and the vigor with which Indians have brought this issue to the attention of the state, a court could only conclude that the state's motivation appears centered on the deprivation of the political power of the Indians for discriminatory reasons.

Gomillion involved Alabama legislative action redefining the boundaries of Tuskegee. From a square, the legislature devised

33. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

34. *See* text *infra* accompanying notes 63-78. It is also significant that an ulterior motive for incorporating the reservation into white-dominated off-reservation districts would be to gain access to the mineral wealth of the reservation and the fund of federal assistance for Indians enrolled in public schools, *see* text *infra* accompanying notes 41-43.

an "uncouth twenty-eight sided figure"[35] which effectively excluded virtually all of the city's Negro voters. "The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residents in Tuskegee, including, *inter alia,* the right to vote in municipal elections."[36]

While the Court recognized "the breadth and importance" of the . . . "State's unrestricted power . . . to establish, destroy, or reorganize by contraction or expansion its political subdivisions,"[37] it reaffirmed that "such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."[38]

That was the Court's conclusion despite the absence of actual proof, beyond the effects of the redistricting, of a specific intent on the part of the Alabama Legislature to discriminate.

> If these allegations upon a trial remained uncontradicted, the conclusion would be irresistable, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.[39]

A similar result would occur here if the three elementary school districts were included in a white-dominated district or districts, unless meaningful provision were made for local control of schools on the reservation by Indians (a practical impossibility under the Wyoming School Code)[40] because such action could only lead to the inference, as in *Gomillion,* that it was taken simply to deny Indians their existing power to control the elementary schools attended by their children.

The inference would be bolstered by these facts:

1. Coercive assimilation, with its characteristic deprivation to Indians of influence in the educational process, is tremendously harmful to Indian children;

2. The racial composition of the three reservation elementary schools would remain unchanged, even if they were consolidated into a large, white-controlled district;

3. The reservation's high tax base is coveted by off-reservation

35. Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960).
36. *Id.* at 341.
37. *Id.* at 342.
38. *Id.* at 347.
39. *Id.* at 341.
40. Chapter 6, §§ 21.1-105 *et. seq.,* Wyo. Stat. (1957).

non-Indians as is the federal money which attaches to each Indian child enrolled in a public school through such laws as Public Law 874 (Impacted Area Funding),[41] Public Law 815 (school construction in impacted areas),[42] Johnson O'Malley, and the various title programs.[43]

4. Reservation inhabitants have indicated their desire to remain politically distinct in education;

5. Indian children seeking a more integrated education could easily be permitted to attend schools outside the reservation, if they so desire, under provisions of the Wyoming School Code;[44]

6. The Wyoming School Code provides for only at-large voting for school trustees in reorganized districts, further diluting the political strength of the minority Indian vote.[45]

If Fremont County were reorganized without regard for the reservation entity, the resulting situation would be the mirror image of *Gomillion*. In *Gomillion*, the racial discrimination, characteristic of bias against blacks, was carried out by systematically excluding Negroes from a political subdivision to deprive them of political power. Here the same consequence would have been accomplished by systematically including Indians in a political subdivision which would be unrepresentative and therefore harmful to them. The two analogous circumstances produce the same effect, and under the reasoning of *Gomillion*:

> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens.[46]

Discriminatory inclusion would also violate the Constitution. It would make little sense to hold the *Gomillion* situation unconstitutional and yet uphold the converse circumstance though equally discriminatory. Both involve invidious, racially discriminatory state action. It is a truism, moreover, to say that discrimination can take various forms; that what is harmless to one person or group may be disastrous to another. It is the effect of state action which determines its constitutional validity.[47] So the mere fact that Wyo-

41. Pub. L. No. 874, 20 U.S.C. §§ 236-241, 242-254 (1970).
42. Pub. L. No. 815, 20 U.S.C. §§ 631-647 (1970).
43. Johnson-O'Malley Act of Apr. 16, 1934, ch. 147, 48 Stat. 596, *as amended*, 25 U.S.C. §§ 542-54 (1970).
44. Chapter 4, §§ 21.1-67 *et. seq.*, Wyo. Stat. (1957).
45. Chapter 6, § 21.1-125(a), Wyo. Stat. (1957).
46. Gomillion v. Lightfoot, 364 U.S. 339, 342 (1960).
47. Williams v. Illinois, 399 U.S. 235 (1970); Wisconsin v. Yoder, 406 U.S. 205 (1972).

ming's school district reorganization applies to all citizens of the state uniformly is of no special relevance. In fact it heightens the suspicion that Indians' special needs and unique history are being wilfully ignored.

Given the proper case, the Court would hold that a move to deprive Indian people of control of schools, in light of the circumstances of Indian education, is an invidious discrimination and must be enjoined. In *Fortson v. Dorsey*,[48] a reapportionment case in which certain multi-member voting districts in Georgia were attacked as unconstitutional on their face, the Court reversed the lower court's issuance of an injunction supporting the claim, stating:

> [A]nd our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constitutency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[49]

But in the main the multi-member voting district cases must be distinguished from the situation at issue. In *Whitcomb v. Chavis*, for example, a state law (superseded by another which provided for single-member districts)[50] provided for apportionment of the State of Indiana for its general assembly elections by creating eight multi-member districts out of thirty-one senatorial districts and twenty-five multi-member districts out of thirty-nine house districts. In that case, a group of inner city blacks from a ghetto within Marion County challenged the constitutionality of the multi-member district of which they were made a part, claiming among other things that the statutes in question "invidiously diluted the force and effect of the vote of Negroes and poor persons living within . . . 'the ghetto area'."[51]

In reversing a three-judge panel's decision agreeing with that claim, the Court relied primarily on the factual situation actually presented: "[T]he real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated,"[52] and the alleged effect of the inclusion of the ghetto in a larger, multi-member district with a non-black majority could be said to

48. Fortson v. Dorsey, 379 U.S. 433 (1965).
49. *Id.* at 439.
50. Whitcomb v. Chavis, 403 U.S. 124, 128 n. 1 (1971); *See also* Owens v. School Committee of Boston, 304 F. Supp. 1327 (D. Mass. 1969).
51. *Id.* at 128-129.
52. *Id.* at 146.

deny blacks effective representation in the legislature only as a result of losing partisan elections and not because of racial prejudice.[53]

Here the facts are sufficiently different (at least partly because the minority community here is federally recognized and protected)[54] to warrant the conclusion that the *Gomillion* reasoning, which the *Whitcomb* Court explicitly approved,[55] would sustain an injunction to prevent deliberate dilution of the Indians' voting strength by inclusion in a predominantly white district.

The history of Indian-white relations nationally as well as in Fremont County discloses that the accepted democratic theory which justifies majority rule, and which is explicitly applied in *Whitcomb*,[56] works to the inevitable disadvantage of Indians whenever they are placed in political entities where they are in the minority. Democratic theory is based on the supposition that majority rule is justified because any minority has an equal chance with the majority to gain political power through the process of political interchange and persuasion. This seems to be the basis for the *Whitcomb* Court's opinion which states that:

> On the record before us plaintiffs' position comes to this: That although *they have equal opportunity to participate in and influence the selection of candidates and legislators*, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections.[57]

The conclusion reached by the Court in *Whitcomb* appears founded upon circumstances not present in typical Fremont County situations. Indians do *not* have equal access with Anglos to political power. Their numbers are too small, their interests too divergent and the antagonism of whites toward them too great. Even when Indians manage to elect a single representative on a board with a non-Indian majority, such representation does not suffice to protect the interests of the Indian community. So one-sided is the relationship that the only effective remedy for protection of the group's political rights is to acknowledge the inherent flaws in the democratic theories concerning majority rule and to allow Indians in these cases to retain control within their own district.

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53. *See id.*
54. *See* text *infra* accompanying notes 91-96.
55. Whitcomb v. Chavis, 403 U.S. 124, 149 (1971).
56. *Id.* at 153.
57. *Id.* (emphasis added).

There is no legitimate or overriding state interest which justifies depriving Indians in Fremont County of their right to exercise control over the education of their children. Hence, balancing[58] the interests of the state in consolidating the reservation with off-reservation areas and the costs to Indian interests stemming from such state action, a court should favor the Indians.

In addition to the implications of the Indians' relationship with the federal government, which significantly strenthen their claim for special treatment, it is not difficult to show that Wyoming's interest in combining the Indian territory with off-reservation white areas is insignificant when compared with the interest of Indians in retaining control of their schools.

The Wyoming School Code's principal purpose is to create districts which are "efficient administrative units"[59] and that have "a ratio of average daily membership to assessed valuation as nearly equalized as practicable among the unified districts in the various counties."[60] Two points emanate from these purposes. First, "efficient administrative units" is nowhere defined in the code. If it relates to the goals of school consolidation nationally for economic reasons as previous reorganizations under the code indicate, then there is a serious question whether such a goal is educationally defensible,[61] and whether it thus serves a legitimate state interest. Moreover, would such a purpose—to save money—be sufficient to justify the damage to Indians through loss of control of their children's education in the Wind River case?

Secondly, the Wyoming School Code, in the provisions cited above,[62] is patently unconstitutional if recent judicial theories about school finances and equal protection are applied.[63] For the code provides for equalized school district valuations—and hence incomes—only within counties, not statewide.

The Wyoming Reorganization Law appears presently susceptible to judicial scrutiny. This conclusion becomes even more compelling when the present composition of the United States Supreme Court and the philosophies of its members are taken into account. Recently the four Nixon appointees to the Court united in a pair of

58. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972). Most constitutional litigation involves balancing the rights and interests of the litigants.

59. Chapter 6, § 21.1-109(a), Wyo. Stat. (1957).

60. Chapter 6, § 21.1-109(3), Wyo. Stat. (1957).

61. *See* I. ILLICH, DESCHOOLING SOCIETY (1971); C. SILBERMAN, CRISIS IN THE CLASSROOM (1970).

62. Chapter 6, § 21.1-109(a), (e), Wyo. Stat. (1957).

63. Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). [On March 22, 1973, by a 5 to 4 vote, the United States Supreme Court decided San Antonio Independent School District v. Rodriquez, 41 U.S.L.W. —— (U.S. Mar. 22, 1973), which will affect this argument. However, this issue was at press and it was therefore impossible to have the author rewrite the section above. (Editor)].

cases dealing with redistricting of local school districts in the South.[64] All four took a very strong position in favor of local control of schools.[65]

The first of the two cases, *Wright*,[66] dealt with the constitutionality of a Virginia city's withdrawal from a county-wide school system in the midst of an on-going school desegregation law suit. The court's majority concluded that the city's action, coming as it did just two weeks after a federal district court judge ordered a new county-wide desegregation plan into effect, was simply a subterfuge to further delay the implementation of the plan.[67]

But the President's appointees, Justices Blackmun, Powell and Rehnquist, with Chief Justice Burger, disagreed. Under the previous arrangement, the City of Emporia had concluded a contract for the education of its children with the county school board. In exchange for an annual sum, the county agreed to educate the city's children. However, the plan failed to provide the city a share in control of the schools. The city now wanted to break away from the county's schools in order to reestablish control of the education of its children. The Court's majority saw the merit in this goal but believed in context that it simply was not good enough to overcome the strong evidence that the city was acting merely to avoid integration. Nevertheless, it voiced a forthright defense of local control.

> A more weighty consideration put forth by Emporia is its lack of formal control over the school system under the terms of the contract with the county. . . .
>
> We do not underestimate the deficiencies, from Emporia's standpoint, in the arrangement by which it undertook in 1968 to provide for the education of its children. Direct control over the decisions vitally affecting the education of one's children is a need that is strongly felt in our society, and since 1967 the citizens of Emporia have had little of that control.[68]

The Court, however, in ruling against the city made a distinction between formal and actual control or influence. It is of particular significance that the majority denied Emporia's claim because the city displayed "obvious leadership ability" which would make itself felt in informal ways within the county system, thus mitigating

64. Wright v. City of Emporia, 407 U.S. 451 (1972); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).
65. Wright v. City of Emporia, 407 U.S. 451 (1972) (Burger, C. J., and Blackman, Powell, & Rehnquist, JJ., dissenting); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) (Burger, C. J., and Blackmun, Powell, & Rehnquist, JJ., concurring).
66. Wright v. City of Emporia, 407 U.S. 451 (1972).
67. *Id.*
68. *Id.* at 468-69.

the effects of lack of formal control.[69] That is precisely what is not present among Indians in Fremont County when it comes to influencing white-dominated power structures. The Wind River Reservation needs a separate school district because it has been repeatedly overwhelmed by the aggressive and voluble whites of Fremont County.

The Burger-led minority disagreed that this informal ability to influence the county system was relevant in meeting the overriding need for local school control:

> This limitation on the discretion of the district courts involves more than polite deference to the role of local governments. Local control is not only vital to continuing public support of the schools, but *it is of overriding importance from an educational standpoint as well.*[70]

The other distinction between *Wright* and the Fremont situation, aside from the lack of "obvious leadership ability" in relation to whites, is the absence of the segregation issue. Wyoming has never had a racially segregated school system.[71]

In *Wright's* companion case, *United States v. Scotland Neck Board of Education,*[72] the Nixon appointees sided with the majority, though in a separate opinion, holding that an action of the North Carolina Legislature creating a new school district, predominantly white, out of territory also subject to a desegregation order was invalid. In that circumstance the Burger-led concurrence found the new, separate school district, unlike Emporia (or the reservation), was a manufactured entity in no way deserving of a separate governmental status. The redistricting also stood to impede desegregation much more decisively and directly than in the *Wright* case.[73]

In other words, to the four new members of the Court, local control is a valid, if not overriding, factor for identifiable communities, such as Wind River—a federally created, treaty reservation granted its own government under the laws of Congress.[74]

The point is: Based on their expressions in these two cases, both of which concerned on-going desegregation law suits and efforts to circumvent them (factors not present in the Fremont County circumstance), it is clear that at least four of the nine justices

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69. *Id.* at 469.
70. *Id.* at 477-78 (emphasis added).
71. WYO. CONST. art, VII, § 10: "No Discrimination Between Pupils—In none of the public schools so established and maintained shall distinctions be made on account of sex, race or color."
72. U.S. v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972).
73. *Id.*
74. 25 U.S.C. § 476 (1970).

are deeply committed to local control. They view it as both a democratic and educational necessity. The other five also lean in favor of local control provided it is not used to thwart the purposes or defeat the jurisdiction of federal courts actively engaged in reforming unconstitutional practices stemming from *de jure* segregation.

It is arguable that under the circumstances of the Wind River Reservation the four Nixon appointees could unite with a majority of the Court to find that Wyoming's interest in consolidating Fremont County's school districts with the reservation is not as great as the Indians' interest in retaining control of those elementary schools. Additionally, aside from the Indian interest in educational self-determination, there are also present questions of the unsubstantiality of "efficient administrative units" as a basis for school district consolidation and the continued prospect of statewide disparities in school district finances even after reorganization, a factor already recognized by the Wyoming Supreme Court.[75]

2. FREE SPEECH AND FREEDOM OF RELIGION APPLIED

Three sweeping principles are now established law in this country:

1. Parents have the right to bring up their children.[76]

2. States may not compel children to attend public school if they are being given an adequate education privately.[77]

3. States may not compel the attendance of children in organized school programs when to do so seriously compromises and threatens the religious beliefs of their parents and their community life.[78]

These principles indicate that the Supreme Court recognizes a compelling interest in preserving individual freedom in the sphere of education.

It is but a logical step to a fourth proposition:

4. States must provide mechanisms for ensuring that religious and other First Amendment rights of parents are provided for within the public school system when no other means for protecting those rights exist.

This means that if people such as the Amish demonstrate their sincere religious conviction that public school education deprives them of religious freedom but, unlike the Amish, are unwilling to

75. Sweetwater Co. Plan Com. for Org. of Sch. D. v. Hinkle, 491 P.2d 1234, 1237 (1971).
76. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
77. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
78. Wisconsin v. Yoder, 406 U.S. 205 (1972).

withdraw from the educational system and unable to finance their own schools, then the state must provide resources for them to educate their children as they see fit.

To the extent that the state's own educational system imposes a foreign ideology upon the minority and this imposition approaches religious significance, the state must provide means for protecting diversity. Before justifying this statement in detail, it would be helpful to first examine the *Yoder* decision.

Yoder involved appeals of criminal convictions for violations of compulsory school attendance laws in Wisconsin. Several members of religious groups called the Old Order Amish and Conservative Amish Mennonite Church withheld their children from public schools beyond the eighth grade. They claimed that further public education would seriously violate tenets of their religion having to do with keeping themselves separate and apart from the world and worldly influence. The Wisconsin Supreme Court reversed their convictions[79] and the Supreme Court affirmed.[80] The Court's decision was unanimous, only Justice Douglas offering a partial dissent.[81]

In many ways, *Yoder* is one of the most remarkable of recent Supreme Court decisions. For perhaps the first time the Court recognized the vast influence of public schools in inculcating habits of thought, values, life styles and ideologies in children and conceded that these may have religious overtones.

> As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent state of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.[82] The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning—through doing, a life of 'goodness,' rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than

79. State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971).
80. Wisconsin v. Yoder, 406 U.S. 205 (1972).
81. *Id.* at 241.
82. *Id.* at 217-18.

> competition, and separation, rather than integration with contemporary worldly society.[83]
>
> Thus, a state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare [them] for additional obligations.'[84]
>
> *As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as it exists today; They must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.*[85]

This is the closest the Court has come to enunciating an inalienable right to be different.

The situation of Indians with regard to public education under white-dominated school administrations is essentially identical to the Amish, except perhaps that Indians have suffered even more than the Amish from the intolerances and subtle impositions of alien values and beliefs. Indian community life has already been seriously disrupted and, in the case of the Wind River Reservation, threatens to be even more disrupted if the present administration of the three elementary schools is altered.

Only two points distinguish the Wind River Arapahoes and Shoshones from the Amish: The Indian claim to special treatment because of religion is less well-documented, and Indians do not wish to be separated entirely from the larger society—they merely want to blend the skills and resources of the outer world with their own cultures and traditions. For reasons which will be explained below these distinctions are not significant and the Wind River Indian people's right to be different should be recognized equally with that of the Amish.

The religious bona fides of the Wind River Indian people *are* established. Their religious beliefs predate even the 200 year Amish tradition which the Court made so much of in *Yoder*.[86] True, the Arapahoes and Shoshones to an even greater extent appear to have lost much of their unique heritage.[87] However this is only a surface

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83. *Id.* at 211.
84. *Id.* at 214.
85. *Id.* at 218 (emphasis added).
86. *Id.* at 209-13, 218-19 235-36.
87. More so than many tribes of the Southwest such as the Navajos, Apaches and Pueblos who retain a vigorous ceremonial life as well as their own language.

impression. It can be shown that the majority of Arapahoes and a significant percentage of Shoshones (historically Shoshones became more acculturated than Arapahoes) retain their religious and cultural traditions from ancient times. The annual sundances of both tribes are indications of the vitality of these beliefs.

These ancient religious beliefs are completely bound up with the life styles of these people. As a result, this circumstance satisfies the other element of the *Yoder* ruling—that the religious beliefs must be inseparable from the community's life style. Indians have been dominated by whites, and their religious heritage forced underground, to such an extent that this point may not be clear. But the statement is essentially valid and can be authenticated in court through the testimony of medicine men, expert witnesses from outside the communities, and by Indian lay people themselves.

Of course *Yoder* is not on all fours with the Indian situation. For one thing, *Yoder* was a criminal case where stricter standards naturally applied to govern state action (although the Court realized that the issues concerned the welfare and continued existence of the whole Amish community and not just the five dollar fines which had been imposed). For another, the Amish merely wanted to be left alone. They were satisfied to be able to keep their children home after the eighth grade. They demanded nothing of the state. The Indians do demand state action. They are not retreating from the outside world. They want to rectify a tragically incompetent educational system which has threatened to destroy them. And they think they can do this best by assuming control of that system. Therefore, they want the state to continue to finance an educational program for their children on their terms.

In light of some recent lower court decisions and one Supreme Court case[88] it is imperative that the Indians' point be fully understood. They are *not* demanding the right to instruct their children in religion at state expense or to entangle the state in an incestuous relationship with parochial education. Rather, they seek state acknowledgement of the brutal and undeniable religious impact of the present educational system, controlled by non-Indians, upon them—a system of white values, customs and world views which clashes with their own. They seek escape from the white culture of the white-dominated classroom. They maintain that to escape from that culture does not require substitution of Indian religion in the classroom; it merely requires the removal of the Anglo, middle-class aura. Hence there is no real problem of religious

88. Lemon v. Kurtzman, 403 U.S. 602 (1971); Jackson v. California, 460 F.2d 282 (9th Cir. 1972); Brusca v. Missouri *ex. rel.* State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971). For an interpretation of *Yoder* that considers it an anti-integration case, *see* Berns, *Ratiocinations*, HARPERS, March, 1973, at 36-44.

establishment. A separate school is instead the only remedy for a circumstance becoming increasingly pronounced—*that the public schools themselves impose religious views on children.*[89] Wind River people want no more than to protect their prerogatives in the three elementary schools and extend their control to secondary education for their children—to add Indian history courses, to hire qualified Indian teachers who know and understand the children, to teach Arapahoe and Shoshone languages.

In effect, the Indians are saying: Your values and culture pervade the public schools which you control, and their merciless imposition on our children is harmful to them. Our children are made to feel inferior. They are made to question their parents' beliefs. You have failed to educate them properly. Let us have the power, as you have it, to infuse our schools with our values and culture so that there will be harmony between home and school.

The proven failure of white-controlled schools for Indians, coupled with the special status of Indians under federal law, makes the Indian claim for separate schools (in terms of control, not enrollments) even more compelling than the Amish claim for special treatment.

The point is that ideas about public education and its role in society are changing.[90] The Supreme Court's actions and other events show that public education is becoming less monolithic, though no less important. The claim that education is the sole panacea for society's ills, however, is being questioned. The following points represent a significant attitudinal change toward public education:

1. As stated earlier, the Supreme Court has recognized the merit and viability of local educational control;

2. The entire Court has recognized the Amish claim to a religious exemption from compulsory school attendance and thereby reaffirmed its conviction that no state may impose homogeneity upon its citizens;

3. School finance cases are being decided which are likely to have a revolutionary effect on the structure of the public school system;[91]

4. A movement is on to make education more responsive through

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89. At schools on Indian reservations teachers especially often carry on the work of early missionaries. At Ramah, New Mexico, for example, teachers in a white-dominated elementary school with a majority of Navajo pupils have been repeatedly reported to be instructing children in Christian religion.

90. I. ILLICH, DESCHOOLING SOCIETY (1971); Hodgson, *Do Schools Make A Difference?* THE ATLANTIC, March 1973.

91. *See A Better Way to Pay for Schools,* FORTUNE, Feb. 1973, at 112-20.

competition: voucher plans, performance contracts, "alternative-free schools," etc.

5. The President is on record as favoring state aid to parochial schools in order to protect educational diversity.

Indians now demand recognition that they are unique and have special needs and therefore rights. There is every reason to believe that their views would be treated favorably by the Supreme Court.

3. THE SPECIAL RELATIONSHIP OF INDIANS TO THE UNITED STATES

If none of the preceding arguments singly or together are considered persuasive, then certainly the existence of a continuing federal responsibility for the education and welfare of Indians establishes their right to federal action compelling states to recognize the reservation entities in drawing school district lines. If the federal government does not compel the states to act, then it should establish and finance federally-funded school systems on reservations itself.

Under the United States Constitution, commerce with Indian tribes is made the responsibility solely of Congress.[92] The United States has power to control and manage the affairs of Indians, as wards, in good faith and for their welfare.[93] It has been said that:

> In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed [sic] policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[94]

The relationship has been compared to that of guardian and ward:[95]

> From their (the Indians') very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it was promised, there arises the duty of protection and with it the power.[96]

Congress has placed plenary authority in the Secretary of the Interior to provide for the education of Indians.[97]

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92. U.S. CONST., art. I, § 9, cl. 3.
93. United States v. Klamath Indians, 304 U.S. 119 (1938); Williams v. Lee, 358 U.S. 217 (1959).
94. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).
95. Cherokee v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
96. United States v. Kagama, 118 U.S. 375, 384 (1896).
97. Snyder Act. 25 U.S.C. § 13 (1970); Johnson-O'Malley Act, Act of Apr. 16, 1934, ch. 147, 48 Stat. 596, *as amended,* 25 U.S.C. §§ 452-54 (1970).

From these pronouncements it follows that the Johnson O'Malley Act and contracts under it, which precipitated the transfer of immediate educational responsibility from the Secretary of the Interior to the states, does not in any way divest the United States of its continuing, overriding, fiduciary obligations to ensure that the education Indians receive in public schools is the best possible.[98] It must enforce its contracts with states in such a way as to fulfill its guardianship duties to Indians.[99]

It may also be true that states themselves in accepting federal money to educate Indians[100] become the agents of the federal government in carrying out the fiduciary obligations of the United States with respect to Indians. Alternatively, each contract between the United States and the various states for the education of Indians creates third party beneficiary rights in Indians which can be enforced.[101]

Either way, focusing on the federal government's duties or those of the states as agents of the United States, the best interests of Indians are paramount in developing educational systems for them.

The preceding discussion has disclosed that local control of education by Indian communities is in their best interest. Thus, it is incumbent upon the federal government, as well as the states, to ensure the creation of political subdivisions or other effective mechanisms that will give Indians the kind of participation and involvement in the education of their children which they so desperately need and want.

Both the Senate Subcommittee and the President recognize this need:

> One of the saddest aspects of Indian life in the United States is the low quality of Indian education. Drop-out rates for Indians are twice the national average and the average educational level for all Indians under Federal supervision is less than six school years. Again, at least a part of the problem stems from the fact that the Federal government is trying to do for Indians what many Indians could better do for themselves.
>
> The Federal government now has responsibility for some 221,000 Indian children of school age . . .
>
> Consistent with our policy that the Indian community should

98. The United States' continuing responsibility for the education of Indians is underscored by the fact that states exercise jurisdiction to enforce school laws on Indian reservations only with consent of the tribes. *See* 25 U.S.C. § 231 (1970).

99. *See* Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971).

100. NAACP LEGAL DEFENSE AND EDUCATION FUND, AN EVEN CHANCE (1971) describes the extent and nature of the assistance and its misuses [hereinafter cited as AN EVEN CHANCE].

101. *See generally* 4 A. CORBIN, CONTRACTS §§ 772-855 (1951, Supp. 1971).

> have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indians schools . . .[102]

The federal courts have broadly construed the federal government's fiduciary duties to Indians, and consequently they have required the federal government to exercise its obligations to the fullest in the best interests of Indians.[103] There is every reason to believe that they would respond accordingly with regard to education; that they would recognize the motives (money and assimilation) of the federal government in turning over Indian education to the states and would pierce the veil of state rather than federal involvement to find a continuing federal responsibility to insure the highest quality of education for Indians.[104]

III. CONCLUSION

If the above arguments do nothing else, they establish the point that Indians are different, unique, distinct, and that for these reasons the "neutral" application of state laws to them is indeed a discrimination. As the Court said in *Yoder*:

> Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[105]

Because Indian needs and desires are different, the courts must

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102. President Richard M. Nixon's Message to Congress, July 8, 1970, 116 CONG. REC. 23131 (1970).

> There is some question whether the President's use of the word community meant local Indian communities as distinguished from tribal governments. A telegram sent by the President to the Ramah Navajo School Board on September 11, 1970, seems to clear up this point:
>
> > This is a welcome opportunity to send greetings to the Ramah Navajo School Board and express my hope for the success of your community school. The establishment of this school as the first Indian controlled junior-senior high school in the country represents an important new direction in Indian education which my administration will actively encourage. As I said in my July 9 [sic] message to Congress, I firmly adhere to the principle that every Indian community wishing to do so should be able to control its own Indian schools. The time has come to extend local Indian control in many fields—At a rate and to the degree that the Indians themselves establish. I am pleased to see this example to [sic] Indian control in operation, and I wish you every success in your endeavor.

103. Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971).

104. *See* Rosenfelt, *supra* note 6 for a thorough discussion of the special status of Indians under federal law.

105. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

ensure that states, as well as the federal government, defer to them. Existing case law from *Brown v. Board of Education*[106] through *Yoder*[107] serves as a sufficient basis for claiming an independent Indian right to control their own education. Such a conclusion necessarily follows from the nature of the discrimination practiced against Indians. That discrimination is unique, differing totally from the discrimination practiced against blacks—although its consequences in terms of poverty, poor education, poor health and political powerlessness are similar to that suffered by all victims of racial or ethnic prejudice and discrimination. And so, just as the form of discrimination against Indians is different, so too must be the remedies. In the case of education, that means creation of mechanisms to ensure that Indians will control their children's education.

Most of the great victories in Indian education, those which are making or will make a difference in the lives of ordinary people, have been won through diplomacy, not law suits, a diplomacy springing from and associated with community organizing. Rough Rock, Ramah, and Wind River are examples of the power of persuasion, coupled with the judicious use of grassroots public relations, as a means for taking over control.

Diplomacy is often a lonely, quiet struggle. It sometimes takes a long time. But its rewards, when they come, are infinitely more valuable than a piece of paper signed by a judge telling an Indian-controlled school board not to discriminate against Indians.

In Wyoming, for example, it appears no test case to put the legal arguments of this article before a court will come about after all. The Wind River Indian Education Association, created and controlled by Indians on the reservation, is coming to the end of a three year effort to have a separate school district created on the reservation. On November 20, 1972, in a formal notice to the Fremont County School Planning Committee, the State Board of Education of Wyoming, sitting as the State Committee for School District Organization wrote:

> 1. It is recommended that the Fremont County School Planning Committee consider a plan of organization which reorganizes Fremont County into three (3) unified school districts. Said plan must provide a secondary school on the reservation, designed to meet the needs of the Indian children. All Indian children should be given the opportunity of attending the secondary school of their choice, with all tuition being borne by the school district in which they reside.

106. Brown v. Board of Educ., 347 U.S. 483 (1954).
107. Wisconsin v. Yoder, 406 U.S. 205 (1972).

2. It is further recommended that the Indian people have control over the operation and management of the educational program for Indian children.

3. The State Committee on School District Organization reiterates its direction that the County Committee document the special educational needs of Indian children and how they will be provided for.[108]

On March 2, 1973 the State Committee unanimously adopted a resolution creating a school district coterminous with the area populated by Indians, the first time that any state board of education has ever done so.

108. Rejection Notice, Re: Fremont County Plan of Organization, Submitted to the State Committee on November 11, 1972 and taken under advisement on that date. State Committee for School District Organizaion, November 20, 1972.