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EDUCATION ADMINISTRATION IN FEDERAL INDIAN LAW:
LEARNING FROM A COLONIAL PROJECT TURNED TOOL OF LIBERATION

Ariel J. Liberman¹ and Douglas L. Waters, Jr.²

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I. INTRODUCTION

The principle of trust responsibility³ implies a commitment to upholding historic arrangements, protecting and acknowledging unique rights, and occupying a deferential role favoring the meaningful exercise of self-determination.⁴ The notion is a relatively foreign one in administrative law;⁵ indeed, unique entirely to the federal-tribal relationship where native societies strive constantly to undo the effects of repressive, assimilative and colonial practices that have marred generations and stunted economic and political development.⁶ As a model, it shapes the perspective and function of the federal government—now occupying a role that is supportive rather than dictatorial, nurturing rather than subsuming—in the decolonizing project of modern tribal education, which, in its dynamism, is helping to spur unprecedented cultural, spiritual, and national rebirth.⁷

Just as the federal-tribal trust relationship is somewhat anomalous, so too is the current Indian education paradigm when compared to the historic mainstream practices of federal education policy. If Indian education is today community-focused and responsive to specific substantive and procedural requirements grounded in shared cultural values, general public school education policy—whether authority toggles between the federal, state, or district agencies—has tended to be top-down, given to a standardization-interested approach.⁸ And, while criticisms have been consistently levied against standardization policies, focusing on matters as far-ranging as educational efficacy,⁹ resource efficiency,¹⁰ values learning,¹¹ and the

³ See *infra* Section IIA for a more extensive treatment of the trust relationship.

⁴ For a general discussion on the history of this term, its philosophy, and practice, see Donna Deyhle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self-Determination*, 22 REV. OF RESEARCH IN EDUC., 113, 114 (1997); referenced also in Exec. Order No. 13592, 76 Fed. Reg. 76603 (2011).

⁵ See Kevin Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUMBIA L. REV. 1 (2007) (discussing, among other points, the authoritative and necessarily constricting occupation of the federal government in administrative law).

⁶ Deyhle & Swisher, *supra* note 4, at 116. (Acknowledging the inherently unequal and racist subtext of this conception of trust responsibility—and the fact that it necessarily puts the government above the tribe—we use the term here in a way merely to describe the uniqueness of the governmental approach to dealing with sovereign Indian nations and support the whole notion of deference to those who know better).

⁷ For more general discussion on this, see, e.g., Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63 (2013).

⁸ See, e.g., Patrick McGuinn, *Schooling the State: ESEA and the Evolution of the U.S. Department of Education*, 1 RUSSELL SAGE FOUNDATION J. OF SOCIAL SCIENCES 76 (2015) (discussing the history of the federal role of education, including especially the No Child Left Behind Act, Every Child Succeeds Act, and Common Core).

⁹ See, e.g., Gwendolyn J. Dean, *Learning is Not Child's Play: Assessing the No Child Left Behind Act*, 26 MCNAIR SCHOLARS RESEARCH J., 33 (2016).

¹⁰ See, e.g., Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 966 (2015).

¹¹ See, e.g., Dean, *supra* note 9, at 33.

social consequences of such governance, particularly on schools catering to disenfranchised communities, works that discuss alternatives from a legal perspective are less prevalent.¹²

To be sure, the negative cultural and social consequences of the federal administrative interference— methodologically, institutionally, and culturally—in Indian education over America’s early years have been contemplated considerably for over a century.¹³ The current model of self-determinative education law in the tribal context is borne out of the pivotal Meriam Report,¹⁴ which, in 1928, began criticizing the federal practice of pushing natives to boarding schools out of an assimilative interest. The report noted “[that Indian educational] methods must be adapted to individual abilities, interests, and needs. Individual tribes and individual Indians within the tribes vary so greatly that a standard content and method of education, no matter how carefully they might be prepared, would be worse than futile.”¹⁵ These ideas would simmer for the next four decades—a time fraught with legislative contradictions and injurious assumptions relative to tribal sovereignty¹⁶—but, at the turn of the ‘70s, the Meriam Report’s potential would become realized with the Indian Education Act in 1972 (“IEA”),¹⁷ and the Self Determination and Education Assistance Act in 1975 (“ISDEAA”),¹⁸ which, together, began a movement towards acknowledging tribal sovereignty over education governance, and towards self-governance.¹⁹

¹² See, e.g., Helen F. Ladd, *No Child Left Behind: A Deeply Flawed Federal Policy*, 36 J. OF POLICY ANALYSIS AND MANAGEMENT 461 (2017); See also Gwendolyn J. Dean, *supra* note 9, at 33.

¹³ For bibliography on the subject, see *The Bibliography of American Education Studies* (1976); Deyhle & Swisher, *supra* note 4, at 113.

¹⁴ *Meriam Report: The Problem of Indian Administration*; National Indian Law Library, *Native American Rights Fund (NARF)*, National Indian Law Library, available at: <https://narf.org/nill/resources/meriam.html>. (The Meriam Report is regarded by many scholars as a pivotal point in the history of indigenous during which it was “uncovered” that the federal government was failing at its goal of protecting tribal communities. The report led to a systemic overhaul of the federal policy towards Native Americans, beginning with the Indian Reorganization Act of 1934).

¹⁵ *Id.* at §2, 346. (This report is commonly referred to as “The Meriam Report.” For more information on this report and others, see Billie Graham Harrington, *Using Indigenous Educational Research to Transform Mainstream Education: A Guide for P-12 School Leaders*, 97 AM. J. OF INDIAN EDUC. 487, 500 (2013); Ryan Seelau, *Regaining Control over the Children: Reversing the Legacy of Assimilative Policies in Education, Child Welfare, and Juvenile Justice that Targeted Native American Youth*, 37 AM. INDIAN L. REV. 63 (2013)).

¹⁶ See DAVID E. WILKINS, *AMERICAN INDIAN POLITICS & THE AMERICAN POLITICAL SYSTEM*, 156-159 (2002).

¹⁷ S. 1017, 93d Cong. (1972).

¹⁸ Pub. L. No. 93-638, 88 Stat. 2203 (1975).

¹⁹ To be sure, this movement bears bruises, but also offers innovation. And, out of the immediately ensuing decades, sovereign nations established over seventy-five federally supported, tribally operated primary and secondary schools devoted to offering competitive educations that embrace study of indigenous culture, language, and history. Today, there are 131 tribally controlled primary and secondary schools that receive federal funding from the Department of the Interior’s Bureau of Indian Education (“BIE”), with another 56 schools directly operated by the BIE. See *Tribally Controlled Schools*, (last visited Nov. 16, 2022). As we will see, the notion of “tribally controlled” schooling means more than a restoration of power followed by federal abandonment, but rather is meant to confer a degree of school-specific empowerment and a federal acknowledgement of the uniquely situated position of communities to run their educational programs.

However, the struggle to decolonize Indian education is one aspect of what is a broader project of overcoming discrimination in education. Indeed, uniformity-based, standardized and federalized education policy has proven problematic socially and culturally for other minority and historically disenfranchised communities as well; it has yielded bitter fruit and, to this day, maintains, and, indeed, exacerbates, racial and socio-economic disparities. Presently, under the Every Student Succeeds Act, state departments of education serve as the gate-keepers of public education,²⁰ and, be it for lack of resources, accountability, or political bureaucratic influence,²¹ continue to fail some of our most desperate, vulnerable student populations in spite of a policy that explicitly contemplates their aid.²² Simply, the state-control paradigm for education, as with the federal-control paradigm under the No Child Left Behind Act before it, has proven demonstrably ill-equipped to determine the needs of diverse students across the communities they govern.

Nevertheless, comparative work that focuses on bringing to bear these similarities, and innovating community-focused policies based in the discussions in the tribal school context, are not taking place. To be sure, the policy foundations of Indian education can be exemplary; they offer a useful tool for breaking with standard-operating procedures and innovating what remains a challenged and controversial system of governance. *This article proposes the implementation of decolonizing, community-focused education policy universally in education in the United States and discusses how ideas rooted in federal Indigenous education policy²³ would serve the government in empowering, especially, the most vulnerable populations in our national schooling network.* We maintain that rooting the public-school governance paradigm in these important philosophies will go a long way in improving educational outcomes, aiding in the larger projects of equity and racial justice, the depolarizing school boards and politics, and, in turn, strengthening belief, affinity, and participation in American democracy: all problems that are deeply rooted for non-Indigenous minority communities in the United States.

Before entering this discussion, however, it is essential to note that the true picture of the damage exacted by the policies of settler colonialism over Indigenous children, their families, and societies, has yet to emerge. The summer of 2021 saw the unearthing of unmarked graves of

²⁰ Billie Graham Harrington, *Using Indigenous Educational Research to Transform Mainstream Education: A Guide for P-12 School Leaders*, 97 AM. J. OF INDIAN EDUCATION 487, 505 (2013).

²¹ For bibliography on this, see KIMBERLY JENKINS ROBINSON, EDUCATION FEDERALISM: WHY IT MATTERS AND HOW THE UNITED STATES SHOULD RESTRUCTURE IT,” THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (2021), available at <https://doi.org/10.1093/oxfordhb/9780190697402.001.0001>; Derek Black, *Abandoning the Federal Role in Education*, 105 CAL. L. REV. 1309, 1312 (2017).

²² See, e.g., Linda Darling-Hammond, *New Standards and Old Inequalities: School Reform and the Education of African American Students*, 69 THE JOURNAL OF NEGRO EDUCATION 263-287 (2000) (discussing the separate and unequal nature of public school for the black community).

²³ We must qualify that this is not meant to treat the critical right of Indigenous nations towards self-determination, as established in international law, with any lightness. Indeed, self-determination and the policies of sovereignty were acquired through anticolonial struggle, and that is the basis of their political self-government. Our adoption of this policy more squarely focused on a “localized” or “derivative” self-determination separate and apart from the question of sovereignty and self-determination in the tribal context.

students of historic Indian residential schools in Canada and the United States.²⁴ Churches in Canada were set alight, and monuments to historical antagonists of Native rights and freedom were toppled, including a statue of Queen Victoria on the grounds of the provincial government headquarters in Winnipeg, Manitoba.²⁵ The United States government, which, unlike Canada, has never compiled a truth and reconciliation commission, has been dilatory in coming to terms with its shameful past of destructive Indian education policies.²⁶ Indeed, the federal-tribal trust relationship in its current iteration can be viewed as the obverse, and, ideally, corrective of, the ‘white man’s burden’ and attending theories of Euro-Christian cultural, religious, and political domination that for the federal government legitimated and was the pretext for a *mission civilisatrice* and targeting its Indigenous “wards.”²⁷ This article will not detail this history, however, which demands more and immediate academic, as well as political, attention and action. Nonetheless, this article is aware of, and so much a response to, the history of abuse and violence, which offers a powerful and sobering lesson of the need for community control over education as a matter of sovereignty as much as health and well-being.

Moreover, the article is premised on the understanding that normative white supremacy, legislated and embodied in numerous regulatory and social practices, has been experienced not only by Indigenous Americans, but also other racial minority groups, in different, albeit also, corrosive and socially disaggregating ways, including in the context of education.²⁸ It extrapolates from data revealing poor outcomes in inner city schools and among other vulnerable and historically-oppressed populations the signature of a colonialist and racist heritage, which in operation systemically exploited and significantly disadvantaged entire communities. The effects remain in place, even though the formal policies, and the ideas behind them, and by which they were enacted, may have been repudiated. We, indeed, argue for a community-based model of education which eschews the paternalism of centralized control of education, is anti-colonialist, and is grounded in awareness of historic and systemized injustice. This community-based model regards self-determination as the starting point and goal of education governance because it sees in this principle the difference between a future of academic advancement and the stagnation and disempowerment, which has deep roots in the past.

²⁴ See Hilary Beaumont, *Inside the US Push to Uncover Indigenous Boarding School Graves*, ALJAZEERA (Dec. 17, 2021), <https://www.aljazeera.com/news/2021/12/17/inside-us-push-to-uncoverindigenous-boarding-school-graves>.

²⁵ See Devon McKendrick, *Statues of Queen Elizabeth II, Queen Victoria Toppled at Manitoba Legislature*, CTV NEWS, (July 1, 2021), <https://winnipeg.ctvnews.ca/statues-of-queen-elizabeth-ii-queen-victoria-toppled-at-manitobalegislatre-1.5493572>.

²⁶ See *supra* note 24; for the key findings of the Canadian Truth & Reconciliation Commission see THE TRUTH AND RECONCILIATION COMMISSION OF CANADA, HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA (2015), https://publications.gc.ca/collections/collection_2015/trc/IR4-7-2015-eng.pdf.

²⁷ See *Cherokee Nation v. Georgia* 30 U.S. 1, 18, 8 L. Ed. 25 (1831) (“The relation to the United States resembles that of a ward to his guardian”).

²⁸ See Darling-Hammond, *supra* note 22.

Part II of this article considers the post 1970s history and current structure of the Indigenous education governance model, surveys recent initiatives that focus on empowering and rebuilding tribal community through education and emphasizes the role of the government as a partner rather than conservator. Part III offers case examples of the Indian education and tribal-federal partnership at work, extolls the virtues of this unique administrative model for discrete tribal communities, and lays the foundation for a comparative argument for applying this governance paradigm to the American education context. Part IV compares the tribal school governance model with the American model, arguing that the current structure inhibits any ability to meet diverse school needs — and those of their unique communities — in an effective, individualized way. Part V explains the benefits of a direct-to-school funding pipeline, like the unique government-tribal school grant structure, to better achieve educational goals. Focusing on vulnerable education communities and how a new structural model might help empower students, and frames a new governance model as its own ‘decolonial’ project. Part VI concludes by reinforcing the importance of diverse voices in education and the virtue of a partnership model for our American system.

II. TRIBAL SOVEREIGNTY, TRIBAL EDUCATION DEPARTMENTS, AND THE FEDERAL GOVERNMENT SINCE 1975

With its professed emphasis on realizing tribal self-determination, the current era of Federal Indian Law can be intellectually traced to a speech delivered by President Richard Nixon to Congress in 1970.²⁹ The catalog of serious social problems were so much evidence, the president argued, that the federal government had comprehensively failed in the discharge of its moral debt and solemn responsibilities to the “first Americans.”³⁰ A clarion call for policy change, the speech would augur a shift in federal policy that would endure long after Watergate and the end of the Nixon Administration. Unsurprisingly, education reform would form the subject matter of one of the first critical pieces of legislation to emerge in the wake of the new federal commitment to self-determination.

Since before the American Revolution, Indian education had been not so much a specialized branch of pedagogy expressing Indigenous knowledge and philosophies, but rather a colonial policy, imposed from the outside, which purposed to bring the lights of Euro-Christianity to peoples with thousands of years of cultural and economic history behind them stereotyped as “infidels,” “savages,” and, later, in an analogy drawn by the United States Supreme Court, “pupils.”³¹ Indian education was itself a form of colonial violence, calculated to destroy tribal identities among Indigenous children. Tellingly, administrators were often drawn from the ranks of the same United States military that in frontier zones was waging campaigns

²⁹ See Richard Nixon, President, Special Message on Indian Affairs (July 8, 1970), available at <https://www.epa.gov/sites/default/files/2013-08/documents/president-nixon70.pdf>.

³⁰ *Id.*

³¹ See Cherokee Nation, 30 U.S. at 18 (“Meanwhile they are in a state of pupilage”).

against recalcitrant tribes. Colonel Pratt, who oversaw the Carlisle Industrial School in Pennsylvania, summarized his, and really the entire project of, Indian education, in the statement of infamy, “kill the Indian, save the man.”³²

The strategic importance of Indian education in the settler-colonialism war plans are evident in the fact that, unlike rights to land, rights to educate tribal youth, along with rights to care and custody, were often indefensibly transferred to the federal government: according to the terms of some treaties, federal resources were denied Tribes that refused to surrender their children to Euro-American indoctrination.³³ Because such tribes had, not accidentally, come to rely on support of the United States government, this was a demand that could not be ignored. With destitute Tribes submitting to such arrangements, cultural genocide via Indian education occurred in a piecemeal and gradual basis. Collectively, the loss of sovereignty over education would go on to significantly weaken Indigenous societies and individuals, making possible the domination of North America by Anglo-Europeans which passed by the name “Manifest Destiny.” The geographical as much as familial and epistemological dislocation of the boarding school experience would directly contribute to the ignominious statistics highlighted by President Nixon in his speech. In a report issuing from the Obama Administration in 2014, it was recognized that as diffuse social problems as suicide, alcohol and substance abuse, and domestic violence, all disproportionately affecting Native Americans and Alaska Natives, could be traced back to its odious legacy.³⁴

With this as the historical background, the 1970s represented a turning point in the larger story of self-determination in indigenous education. While embodying a discourse of Native autonomy, the Meriam Report and in particular the Indian Reorganization Act (IRA) of 1934 had either failed to materialize change or, worse, had led to internal diversion within tribal societies on the basis of allegiance to IRA-enacted governments. This was especially true for the Choctaw, but more on this later.³⁵ What had become clear from the Nixon Administration’s own disastrous policy of “Vietnamization” was that sovereignty had to be more than a slogan; the work of nation-building was not something that could be imposed exogenously. Political power

³² See DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE* (2020) (Conditions at this school, as with others, were such that cultural and spiritual genocide often went hand-in-hand with biological genocide. Unmarked graves of children are today being discovered on school grounds); see also Richard Luscombe, *Researchers Identify 102 Students who Died at a Native American School*, *THE GUARDIAN*, (Nov. 15, 2021), <https://www.theguardian.com/us-news/2021/nov/15/nebraska-native-american-boarding-school-students-died>.

³³ See, e.g., Treaty with the Yankton Sioux, 11 Stat. 743 (1858), available at [https://treaties.okstate.edu/treaties/treaty-with-the-yankton-sioux-1858.-\(0776\)](https://treaties.okstate.edu/treaties/treaty-with-the-yankton-sioux-1858.-(0776)).

³⁴ See EXECUTIVE OFFICE OF THE PRESIDENT, 2014 NATIVE YOUTH REPORT 13, (December 2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf.

³⁵ For full bibliography, see Geoffrey Strommer & Stephen Osborne, *The History, Status, and Future of Tribal Self Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 36 (2015).

has to emanate organically from within an embodied people that also are a historical subject, and reflect the cultural, economic, and spiritual values without which there is no shared identity. The use of puppet governments to rubber-stamp objectives issuing from Washington had resulted in the demise of United States' aspirations for what the French had called Indochina. Domestically, if Native Americans were themselves not to be subjected to a failed political experiment *a la* South Vietnam, they would have to be partners in the project of their own liberation.³⁶ Such an effort would have to involve the tribes in the construction as well as management of the policies affecting their societies. This was abundantly clear in the context of Indian education, which had typically been forged with no input from the Indigenous nations whose children were to fall under its ambit. If self-determination in the space of education was to be realized, it would have to draw upon the strengths and involvement of tribal communities themselves.

At the same time, to realize this vision would require changes—to both policy and mindset. An ingrained culture of dismissiveness to Indigenous capabilities (i.e., racism,) within the Department of the Interior (DOI), the authoritative agency on these matters, as well as in such legal theories like the Doctrine Discovery is the foundation of Federal Indian Law and United States sovereignty.³⁷ Because the status of Native American and Alaska Native society was, as Nixon recognized, one of total immiseration, contributions from the federal government in the form of funding as well as institutional support would be critical. It was no solution to past injustice to have the federal government simply end its support for tribal government: this had been the lesson of the preceding and disastrous “Termination Era.”³⁸ A new and cooperative

³⁶ There are many parallels between the United States government's strategy in South Vietnam and its historic Indian policies. The formation of “strategic hamlets,” into which the residents of ancient villages were emptied, and where progovernment and anticommunist propaganda was disseminated, recalls not only the reservations of the Great Plains and American West but also the assimilationism of much of historic Indian education. See YEVGENI DENISOV, *US IMPERIALISM IN SOUTHEAST ASIA* 112-113 (1972). In throwing its support behind a government dominated by a Roman Catholic clique, alienated from the Buddhist majority population which it also deprived of the full measure of religious liberty, Washington was showing its preference for a “Christianized” simulacrum of Vietnamese politics and society. See SETH JACOBS, *AMERICA'S MIRACLE MAN IN VIETNAM: NGO DINH DIEM, RELIGION, RACE, AND U.S. INTERVENTION IN SOUTHEAST ASIA* (2005) (discussing the importance placed by American policymakers upon Christianity as a test of political and cultural loyalty for the leadership of South Vietnam).

³⁷ For full bibliography, see Adam Creppelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 *NYU REV. L. & SOC. CHANGE* 529 (2021) (“The modern-day trust relationship between tribes and the federal government is just a less paternalistic way of stating the relationship between tribes and the federal government is like ‘that of a ward to his guardian.’”); see also Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 *N. ILL. U. L. REV.* 115, 115–16 (1997); see also Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 *YALE J. ON REG.* 451, 471–74 (2015).

³⁸ It is perhaps useful to consider the “Termination Era” and the foreign policy leading to the Vietnam War as a unit. In both, the United States government evinced disregard for the political sovereignty of non-European and historically colonized peoples. It did so on theories of the superiority of Euro-American civilization and Christianity. See FEDOR KOZHEVNIKOV & VIKTOR MENZHINSKIY, *US AGGRESSION IN VIETNAM & INTERNATIONAL*

relationship would have to be formed, drawing upon the both the financial resources of the United States government and the cultural and spiritual resources, long maligned and disregarded, of Indigenous societies. The contemporary federal-tribal trust relationship was taking shape.

It was within this crucible that work on the construction of a decolonized system of Indian education commenced. The project is, nearly fifty years on, a work-in-progress, negotiating the revolutionary thesis behind its creation with the malfeasance, bureaucratic mishandling, and mistrust on both sides that slows change. Nevertheless, this transformation of the roles of tribal governments, the DOI and the Department of Education (DOE) though oftentimes confused—represents an inflection point in American and broader post-Columbian history. It embodies a critique of the cultural racism that European civilization had, since the time of Columbus, used as theoretical justification for the subjugation and dispossession of the Indigenous peoples of the Western Hemisphere.³⁹ The colonial trope which placed the European as master/educator and the Aboriginal as primitive/student was now being repealed. In restoring collective rights to educate Indigenous youth, settler-colonialism was, at least discursively, creating a space in which could be acknowledged the validity of Indigenous pedagogies, systems of knowledge, and institutions. Here, as living testaments to the attributes of resiliency and innovation that sustained their ancestors, a generation of Indigenous educators indeed set to work. The efforts of some will later be examined as paradigmatic of what is a wider story of the re-assertion of community control. However, the federal government, led by its legislative branch, embarked on actualizing its own goals. This article will look at the guiding pieces of legislation which metamorphosized Indian education from a genocidal mechanism into a paradigm for cultural sovereignty. These slow steps show a government trying to change, with Congress leading a path-breaking effort to ameliorate a history of abuse, disenfranchisement, assimilation, and degradation.

A. The Federal Acts: Establishing Relationships and Funding

Enacted in 1972, the IEA represents the pivotal first step towards tribal sovereignty in education. The IEA allowed the federal government to authorize special grant programs to assist Indigenous students in public schools, chief among those being a “formula grant program for the special educational needs of Indians.”⁴⁰ This *required* open consultation by the public school

LAW 27 (1968) (“The US Secretary of State tried to block the proposal for general elections [as called for in the 1954 Geneva Agreements] using the conventional colonialist allegation of Vietnam’s immaturity.”); for discussion of the Termination Era as being connected to geopolitics, see WALTER R ECHO HAWK, *IN THE COURTS OF THE CONQUERER: TEN WORST DECIDED CASES IN FEDERAL INDIAN LAW* (2012).

³⁹ See e.g., Robert A. Williams, JR., *Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism against American Indian Tribes*, 39 FED. B. NEWS & J. 358 (1992).

⁴⁰ See Melody L. McCoy, *Tribalizing Indian Education: The Evolution of Tribal Sovereignty over Education in Federal Law Since 1965*, NATIVE AM. RIGHTS FUND 1, 15 (2005).

districts—which already educated over eighty-percent of the Indigenous student population—with Indian parents, and even the establishment of Indian parent committees.⁴¹ Since the IEA’s enactment, legislation has *mandated* Indian parent involvement when public schools use federal funding from the Johnson O’Malley Act⁴² or Title IX.⁴³ This is, of course, *in theory*, and we do know that communities still fight to see that such involvement occurred when so many schools “circumvented the letter and spirit of the law, claiming unawareness.”⁴⁴ Nevertheless, with the IEA, the federal government expended its first efforts at considering Indigenous parents as important participants in programming and even governance decisions.⁴⁵

The ISDEAA, following closely in 1975, began a more hyper-focused campaign addressing the specific needs of the student populations in then-BIE controlled schools, separate from, but not to the exclusion of, the public schools in which most Indigenous students learned. As early as the 1960s, through processes to be discussed later in this piece, tribes had begun taking charge of schools within the ambit of the BIE.⁴⁶ The ISDEAA offered the federal government’s position as a supportive resource for the students on reservations in BIE schools, a stance rooted—for better or worse—in trust responsibility.⁴⁷

At this point, we find it prudent to pause and treat, albeit boldly and briefly, the principle of trust responsibility. The doctrine is a contentious aspect of the federal-tribal conversation, attracting far-ranging critical attention, especially in recent years.⁴⁸ While a full discussion of the

⁴¹ *Id.*

⁴² *Id.* at 9 (The Johnson O’Malley Act allows the federal government to contract with states, private entities, and Indian tribes for services formerly provided by the government. In a way, it represents a further delegation of power. “With respect to education, under [the Act] the government contracted out education programs specifically to assist Indians”).

⁴³ Carol Robinson Zanartu & Juanita Majel-Dixon, *Parent Voices: American Indian Relationships with Schools*, 36 J. OF AM. INDIAN EDUCATION 33, 34 (1996).

⁴⁴ *Id.*

⁴⁵ *Id.* (Interestingly, Indian parental involvement has remained relatively low into the present-day despite this empowerment. “Current educational outcomes from Indian children, then, must be considered reflections of schools operating essentially without parent input or cultural context.” Unfortunately, non-natives look at this as emblematic of a parental population who do not care about education, which completely misses the systemic issues that might really be the cause of the poor turnout. The question remains: how would the system be if there were more involved parents? How can the government help ensure this? These questions, among others, should be considered.)

⁴⁶ See *infra* notes 69-81.

⁴⁷ *Id.*

⁴⁸ The inexactness of the trust doctrine and the attending federal-tribal relationship has been observed by commentators. See, e.g., *Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 2, 422 (1984) (“Thus, despite the central role that the trust doctrine plays in Indian law, its precise legal contours remain uncharted and its various interpretations inconsistent with one another”). Despite its mutability and lack of clear guidance as to its content, the trust relationship remains a framework that is appealed to by advocates for legal and social reform that see a positive role for the federal government vis-à-vis Native American and Alaskan Native nations and individuals. See Heather Whitney-Williams & Hillary Hoffmann, *Fracking in Indian Country: The*

details, criticisms, and virtue of the trust responsibility is beyond the scope of this paper, suffice to say any discussion of the virtues of this self-determination principle, especially as made manifest in the context of Indian education, would be incomplete without a short word on the subject.

To be sure, the trust responsibility principle—as articulated in 1975 and operative even to this day—represents a mixed bag. The ideal stems from a patriarchal residue of colonialism, white saviorism, and an imposed idea of tribes as defenseless, so much so that some would be founded in arguing for its abolition. But, out of this unquestionably assorted past, including the counterproductive rulings, legal discourse, and political stances from the Supreme Court,⁴⁹ the trust responsibility—as we see made evident and apparent in the context of Indian education especially—takes new life in the ISDEAA legislation: a force for self-determination that, though by no means flawless, operated (and operates) as a device for anti-colonial change.⁵⁰ Consider, for example, the following from the policy statement:

“Congress [recognizes] the obligation of the United States to respond to the strong expression of the Indian people for *self determination* by assuring *maximum Indian participation* in the *direction of educational* as well as other

Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Waters, 32 YALE J. ON REG. 2,

450 (2015) (calling for the federal trust relationship to play a constructive role in the context of wastewater effluvia on tribal lands); see also Scott Stern, *Rebuilding Trust: Climate Change, Indian Communities, & a Right to Resettlement*, 47 ECOLOGY L.Q. 1, 179 (2020) (arguing that in view of the trust responsibility the federal government has the affirmative obligation to resettle Indigenous communities affected by climate change); the failure of the federal government to realize high fiduciary standards in specific areas of legislative policy also elicits criticism. See, e.g., Lauren Schneider, *Trust Betrayed: The Reluctance to Recognize Judicially Enforceable Trust Obligations under the Indian Health Care Improvement Act (IHCIA)*, 52 LOY. U. CHI. L.J. 4, 1099 (2021) (asserting in the context of tribal health services a deviation from principles of trust management under the common law); the impetus for the reforms of the current era of Federal Indian Law such as ISDEAA and ICWA which call for protecting the rights of Indigenous children to their culture and tribal identity can be traced to an operative and reconceptualized trust framework. See Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children & the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 891-892 (2016); of equal moment is the consideration of Indigenous perspectives of the trust responsibility and how these relate to internal political theories on international relations. See David Wilkins, *‘With the Greatest Respect and Fidelity’: A Cherokee Vision of the ‘Trust Doctrine’*, 34 SOC. SCI. J. 4, 495-510 (1997).

⁴⁹ See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S. Ct. 2313, 180 L. Ed.2d. (2011) (The Supreme Court has complicated the issue by holding that the federal-tribal trust relationship is an anomaly of federal Indian policy that cannot be equated with the common-law trust format.); This cynical and retrogressive decision has been faulted for offering an invalid and precedentially false legal theory that threatens to upend the tribal-federal trust framework. See Daniel W. Hart, *United States v Jicarilla Apache Nation: Why the Supreme Court’s Refusal to Apply the Fiduciary Exception to Attorney-Client Privilege Stands to Diminish the Federal-Tribal Trust Relationship*, 36 AM. INDIAN L. REV. 527, 528 (2012).

⁵⁰ *Id.* For a greater discussion on this, see *infra*—Section IIIC of this article.

Federal services to Indian communities so as to render such services *more responsive to the needs and desires of those communities.*”⁵¹

This self-empowerment principle, ever followed in subsequent legislation, formulates a special and significant administrative relationship built on collective *partnership* (government and tribe), responsiveness, and the knowledge that a broken system *can only be fixed from within the sovereign communities themselves*. This principle is reflected especially in the first two titles within the ISDEAA which deal with the prospect of self-governance and self-determination in Indian education.⁵² Thus, in our view, the trust responsibility, while not shedding its status as a mixed bag, in this case operates as a tool of empowerment and gateway to partnership.

With this said, to better understand the nuance with which this administrative ‘partnership’ was contrived, we must wade into the waters of the ISDEAA titles themselves. Title I gives all federally recognized tribes and tribal organizations the *rights and resources* to contract for the “programs, functions, services and activities” that support the delivery of services to Indigenous communities.⁵³ Contracts falling under Title I include administrative services already being provided by the DOI, like for BIE schools, and other federal agencies.⁵⁴ The notion of contractual power is important here, as—if only theoretically—this positioning recognizes a status of competency in tribes as partners with the federal government. As Geoffrey Strommer and Stephen Osborne state in their work on the history of tribal self-governance, “the intent of the contract theory was to allow tribes to build the capacity to better perform essential governmental functions, as well as improve their responsiveness to tribal needs.”⁵⁵ Title I additionally sets out the method of contracting, stipulating the quality of services to be rendered, and, in conferring in tribes the status of federal agencies, affords them the right to access federal resources.⁵⁶

Unsurprisingly and unfortunately, full appreciation for the principles of Title I is stymied by the inequalities of the federal-tribal relationship as much as bureaucratic inertia.⁵⁷ The DOI often serves as an, at-best, unenthusiastic partner exercising more authority over tribal

⁵¹ See McCoy, *supra* note 40, at 16-27 (emphasis added). There are a total of five sections, and five titles. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, (1996) (codified as Indians, 25 U.S.C. §§ 450–450n, 455–458e, 458aa–458hh, 458aaa–458aaa-18 (2012)) (Title I: contracting; Title II: education assistance programs; Title III: permanent self-governance programs with the DOI; Title V: permanent self-governance programs with the DHHS; Title VI: inclusion of sub-agencies within DHHS in self-governance demonstration project).

⁵² Self-Determination Contracts, 25 U.S.C. § 450f(a)(1).

⁵³ *Id.*

⁵⁴ Contract or Grant Provisions and Administration, 25 U.S.C. § 450j(f).

⁵⁵ Geoffrey Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 21 (2015).

⁵⁶ 25 U.S.C. § 450j(f).

⁵⁷ See Strommer, *supra* note 55, at 21.

operations than was originally contemplated.⁵⁸ Contracts under Title I were of a *special nature*, where “the federal government’s *trust responsibility* temper[ed] all of the ordinary contract rules.”⁵⁹ The practical consequence of this was a power imbalance manifesting in weighted agency review over tribal operations, corrupted reporting mechanisms, and the lack of tribal participation in interpretative rulemaking under this act.⁶⁰ In 1994, Title I was amended to allow for greater tribal participation in the promulgation of rules under Title I and ensured further protections for tribes in negotiating with federal departments.⁶¹

Title II focused on the education project specifically.⁶² Tribes, for the first time in history, had explicit rights to contract (or assume contracts) with the federal government to operate the BIE schools providing instruction to Indigenous youth.⁶³ Unfortunately, just as with Title I, this deference and empowerment to tribes was more theoretical than practical. For tribes to avail themselves of their new power, tribes had to navigate a complicated and unwieldy bureaucratic structure, where administration of schools had been (and remain) scattered among various Indian Affairs (“BIA”) offices, “resulting in management instability and lack of clear roles.”⁶⁴ Moreover, the fact of the matter is that while the ISDEAA may have offered the prospect of transferring responsibility, it accorded little practical assistance to the “Native American tribes less experienced than the federal government in the arena of planning, conducting, and administering programs.”⁶⁵ Furthermore, the funding itself was—and remains—grossly inadequate to support administrative costs, programming, or infrastructure.⁶⁶ These were factors that, despite their newfound position, tribes struggled with.⁶⁷ And, even today, the journey for both equal bargaining power *and* appropriate treatment remains arduous.⁶⁸

Acknowledging the disconnect between theory and practice, and out of a desire to see more tribal sovereignty in action, Congress convened the American Indian Policy Review Commission (“AIPRC”) to evaluate a path forward for Indian education.⁶⁹ The AIPRC issued a radical statement in 1977, arguing for *true* “Indian control of Indian education,” or the removal

⁵⁸ *Id.*

⁵⁹ S. REP. No. 100-274, at 36 (1988), reprinted in 1988 U.S.C.C.A.N. at 2655.

⁶⁰ See Strommer, *supra* note 55, at 21.

⁶¹ Rules and Regulations, 61 Fed. Reg. 32, 482-83 (June 24, 1996).

⁶² For further discussion on Title II, see Strommer, *supra* note 55, at 27-30.

⁶³ For further discussion on Title II, see Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 507–12 (1973).

⁶⁴ Brief for American Indian Law Scholars as Amicus Curiae Supporting Appellants, Stephen C., et al v. Bureau of Indian Education, et al., 2022 WL 808141, at *22 (9th Cir. 2022) (No. 21-15097).

⁶⁵ See S. Bobo Dean, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 TULSA L. REV. 349 (2000).

⁶⁶ See Strommer, *supra* note 55, at 28.

⁶⁷ See Dean, *supra* note 65, at 349.

⁶⁸ See Strommer, *supra* note 55, at 29.

⁶⁹ See McCoy, *supra* note 40, at 18.

of the BIA altogether from the Indian educational project.⁷⁰ It was, in their view, the role of the federal government to stop the “historic piecemeal approach” to education, and create an effective way for aid to go directly to tribes. The AIPRC maintained that it was best to allow tribes to contract for public schools, and for “tribes to receive federal funding to establish standards in and accreditation capability for their contract schools.”⁷¹ And, further, for teacher training, the development of their own curriculum, and other needs to operate their own education system.⁷² While, to date, little of this has been realized, progress has been made in other directions.

The Education Amendments Act of 1978 (“EAA”), Title XI,⁷³ took up the mantle of progress incepted by the ISDEAA. Changes made through the EAA were both structural and substantive. Structurally, the BIA was required to actively consolidate all responsibility for schools within one office: the Office of Indian Education Programs, now the BIE.⁷⁴ The BIE was to “facilitate Indian control of Indian affairs in all matters relating to education.”⁷⁵ Taking queue from the IEA, an active “government to government” consultative relationship was to be developed resulting in uniformity of practices and procedures for the governance of tribally-controlled schools. In terms of substance, the EAA ensured that even though the *responsibility* fell on the federal government to establish minimum standards of education, tribes had the right to revise “inappropriate” or “ill-conceived” standards as they relate to the specific needs of tribal children.⁷⁶ In turn, the DOI was obligated to defer to these standards.⁷⁷ To this day, the EAA’s legacy of protection, preservation, and empowerment showcases the makings of a government eager to do better against a backdrop of its horrid history.⁷⁸

Having now established the paradigms by which the tribal-federal relationship ought to be conducted, the movement’s focus turned to funding. Until the end of the 1980s, the contracting provision of Title I of the ISDEAA reflected the only way in which tribes could be directed funds to control BIE schools. The difficulties of navigating the bureaucracy, as well as

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 24.

⁷³ Pub. L. No. 95-561, Title XI, Part B, Act of Nov. 1, 1978, 92 Stat. 2143, 2316, as amended in Bureau of Indian Affairs Programs, 25 U.S.C., Chap. 22 (25 U.S.C. § 2000 et seq.).

⁷⁴ Evaluation of the Implementation of Pub. L. 95-561, 25 C.F.R. § 32.5. (The BIE was forged from the Office of Indian Education Programming and established in 2006).

⁷⁵ Policy for Indian Control of Indian Education, 25 U.S.C. § 2011(a).

⁷⁶ *Id.*

⁷⁷ Rules and Regulations, 25 U.S.C. § 1121(d) (2006).

⁷⁸ *Id.* (Subsequent amendments to this Act, specifically the 1984 Amendment, Pub. L. No. 98-511, Act of Oct. 19, 1984, 98 Stat. 2391, saw to it that the BIE’s formerly almost unilateral ability to close schools was tempered by procedure, and the 1988 Amendments, Pub. L. No. 100-297, Title V, Act of April 28, 1988, 102 Stat. 130, 385, as amended; Tribally Controlled School Grants, 25 U.S.C., Chap. 27, allowed for the erection of schools for tribes that had not previously had one and further articulating the scope of the obligation for the government to engage with tribes).

the realities of unequal partnership triggered a change in the form of the Tribally Controlled School Act of 1988 (“TCSA”).⁷⁹ The TCSA established grant-giving as another means for conferring to tribes the ability to operate BIE-funded schools, which proved to be a less cumbersome way of achieving self-determinative power in tribal education.⁸⁰ To date, this schema is the primary way by which tribally-operated schools receive their funding.⁸¹ Though grants come in different forms, two themed initiatives—one focusing on developing schools and the other on developing policy and law—are worth highlighting.

One school-specific program, presently the most popular grant provided to tribally controlled schools, is the Indian School Equalization Grant Program (“ISEGP”).⁸² The ISEGP is a formula-based initiative contemplated by federal statutes. ISEGP grant formulas consider school grade levels, students’ residential living status, gifted programming, language development needs, school size, and more.⁸³ Additionally, they provide extra funding for safety and security projects, parental participation projects, technical assistance for teaching at-risk students, and allotments for unique budgeting or programming needs. In short, this grant program, like other school-specific programs, furthers the overall project of empowering tribes to cultivate nuanced education strategies.⁸⁴

Tribal Education Department (“TED”) Grants, by contrast, offer funding directly to tribes for the development and operation of their own educational agencies.⁸⁵ TEDs can only be created by tribes, by way of tribal codes, and represent the delegated authority of the sovereign to its own leaders for the betterment of education.⁸⁶ As a feature of the TED Grant, state DOEs become collaborative partners with tribes for the purposes of ensuring uniformity in rigor of curricula in their schools, programming, and other important concerns. For this purpose, TEDs can take many forms, including formal government departments, tribal education committees, education offices, and resource centers. Indeed, their malleability allows for effective development and administration of special programs, tracking student data, setting academic standards and curricula, and creating tribe-tailored policy. As of 2013, over 200 diversely constructed TEDs operate within thirty-two states; the technical assistance and support services

⁷⁹ Pub. L. 100-297, Title V, Act of April 28, 1988, 102 Stat. 130, 385, as amended Tribally Controlled School Grants, 25 U.S.C., Chap. 27.

⁸⁰ *Id.*

⁸¹ See McCoy, *supra* note 40, at 17.

⁸² Allotment Formula, 25 U.S.C. § 2007 (2002).

⁸³ See *e.g.*, Early Child and Family Development Grants, 25 U.S.C. § 2019; Tribal Grant Support Costs (Administrative Cost Grants), 25 U.S.C. § 2008.

⁸⁴ See *generally* MACKETY, ET. AL., AMERICAN INDIAN EDUCATION: THE ROLE OF TRIBAL EDUCATION DEPARTMENTS 5 (2009). See *e.g.*, 25 U.S.C. § 2007, 25 U.S.C. § 2019, 25 U.S.C. § 2008.

⁸⁵ Tribal Departments or Divisions of Education, U.S.C. § 2020. Pub. L. No. 95-561, Act of Nov. 1, 1978, 92 Stat. 2143, as added by No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. (Note that while only tribes can establish TEDS, the TED concept originated on the federal stage with the Elementary and Secondary Education Act of 1965 with funding mechanisms reaffirmed in the ISDEAA).

⁸⁶ See *generally* Mackety, *supra* note 84, at 5.

these units provide to schools themselves, but also to the larger project of community cohesion, are truly laudable.⁸⁷ For example, the Hoopa Valley Tribe TED of California operates a learning center dedicated to helping at-risk students by pairing students with mentors, and developing student-learning plans in specific academic areas as well as in life skills.⁸⁸ According to the Tribal Education Departments National Assembly (“TEDNA”), “this program alone has improved student academic performance by two letter grades in core academic areas.”⁸⁹ The Jemez Pueblo Tribes of New Mexico—having newly implemented a comprehensive tribal education plan in light of a TED grant—boasts an eighty-nine percent graduation rate for the tribe’s K-12 charter school, higher than the forty-nine percent statewide average for Indigenous students.⁹⁰ Indeed, TEDs make a huge difference in student outcomes—and serves as a testament to opportunity that comes from tribal sovereignty in education.

The differences in funding structures between TEDs are just as diverse. Until 2013, not one of these grants had been federally administered⁹¹—perhaps harkening to the sub-textual inequality that existed in the first iteration of the ISDEAA contracting mechanism. Slowly, federal funding has since been introduced in support of TEDs through State Tribal Education Partnership grants (“STEP”).⁹² In addition, other sources like “tribal grants, contracts, self-governance compacts, federal program funding, right to work fee[s]...and foundations and endowments,”⁹³ make TEDs possible. With increasing numbers of tribes availing themselves of these grants, the landscape is shifting towards new frontiers in educational sovereignty, and commensurately, new heights in student outcomes.⁹⁴

B. *New Millennium; New (and Problematic) Federal Efforts to Standardize*

The No Child Left Behind Act of 2001 (“NCLB”) ushered in a new century of federal education initiatives which negatively impacted tribal schools.⁹⁵ NCLB was premised on remedying persistent disparities in education achievement, school-by-school, by making schools

⁸⁷ See *Native Education Collaborative*, CC NETWORK, available at https://compcenternetwork.org/sites/default/files/TSC_tribal_ed_one-pager_508a.pdf (last visited Oct. 23, 2022).

⁸⁸ See Matthew Campbell, *U.S. Department of Education Proposed Priorities, Requirements, Definitions, and Selection Criteria—STEP Program*, TEDNA (last visited Oct. 23, 2022), available at <https://tedna.org/wp-content/uploads/2014/12/00052437.pdf>.

⁸⁹ See *Id.*

⁸⁸ *Id.*

⁹¹ See generally Mackety, *supra* note 84, at 6.

⁹² See OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, STATE TRIBAL EDUCATION PARTNERSHIP (STEP) (last visited Oct. 17, 2022), <https://oese.ed.gov/state-tribal-education-partnership-step/>. (Importantly, funding from this program, in its incepting year, only went to around five TEDs. With that said, it demonstrates a newfound attention and prioritization on the part of the government to help fund these important programs; see also Campbell, *supra* note 88).

⁹³ See generally Mackety, *supra* note 84, at 6.

⁹⁴ See Pub. L. No. 95-561, Title XI, Part B, Act of Nov. 1, 1978, 92 Stat. 2143, 2316, as amended by Bureau of Indian Affairs Programs, 25 U.S.C., Chap. 22 (25 U.S.C. §2000 et seq.).

⁹⁵ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

accountable for results.⁹⁶ Targeting especially low-income communities, the federal government provided the standards to equalize education; the school responsively implements these standards and provides reports under a high-stakes accountability paradigm.⁹⁷ Of course, based on our current positioning, we can say that this premise was seemingly effective in the way intended, especially when it came to indigenous education.

On one hand, NCLB retained provisions for TED funding and, on its face, Title VII authorized “activities that promote the incorporation of culturally responsive reaching and learning.”⁹⁸ The reality was far less reassuring. Culturally-reflective instruction actually fell by the wayside as a direct result of the corresponding teach-to-test mentality.⁹⁹ For example, consider that annual standardized testing was conducted entirely in English, a language that only seventy-two percent of Indigenous students spoke at home as of 2001.¹⁰⁰ For those that did speak at home, “English” might have been influenced by one of over 175 spoken native languages. Understandably, sixty percent of Indigenous students in BIE schools were labeled as “limited English proficient,”¹⁰¹ under NCLB metrics, and, commensurately, the push to externally “reform” (read: assimilate) schools was exacerbated. The NCLB did away with bilingual education funding in favor of English language acquisition to meet testing requirements; obligations were imposed for implementing a “scientifically-based reading program” at the expense of cultural education.¹⁰² In considering NCLB in the grander line of policies favoring Indigenous self-determination, the policy is no doubt a failure. To add insult to

⁹⁶ U.S. DEP’T OF EDUC., EXECUTIVE SUMMARY (2001) *available at* <https://www2.ed.gov/nclb/overview/intro/execsumm.html> (last visited Oct. 23, 2022).

⁹⁷ *See generally* U.S. DEP’T OF EDUC., *ADEQUATE YEARLY PROGRESS* (2002-2007) <https://www2.ed.gov/nclb/accountability/ayp/edpicks.jhtml> (last visited Oct 23, 2022). (If a school does not meet benchmarks after two years in “school improvement status,” it is moved to corrective action which involves decreasing school management authority. Schools who fail after one year in corrective action status are reclassified as restructuring and subject to replacement of all staff and takeover by an outside party).

⁹⁸ *See McCoy, supra* note 40, at 30; *see also* Teresa L. McCarty, *American Indian, Alaska Native, and Native Hawaiian Education in the Era of Standardization and NCLB — An Introduction*, 47 J. OF INDIAN AM. EDUC. 1 (2008).

⁹⁹ *See generally* David Beaulieu et. al., *Preliminary Report on No Child Left Behind in Indian Country*, 16 (2005).

¹⁰⁰ *See* Michael Krauss, *The Condition Native North American Languages: The Need for Realistic Assessment and Action*, 132 INT’L J. SOCIO. LANGUAGE, 9-21 (1998); *see also* CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: *available at* <https://www2.census.gov/library/publications/2005/compendia/statab/125ed/tables/pop.pdf> (last visited Oct. 23, 2022).

¹⁰¹ *See* Teresa L. McCarty et. al., *The Impact of High-Stakes Accountability Policies on American Learners: Evidence from Research*, 5-6 (2008).

¹⁰² *See Id.* Eric Cohen & Ann Allen, *Toward an Ideal Democracy: The Impact of Standardization Policies on the American Indian/Alaska Native Community and Language Revitalization Efforts*, 27 Sage J. 743, 744 (2012) (Discussing the impact of standardization policies in NCLB).

injury, studies conducted post-NCLB showed little improvement for tribally controlled BIE schools in the way of the achievement gap from 2005 to 2011.¹⁰³

NCLB represented a federal move directly antagonistic to the guiding directives divined from previous legislation, that it is the *tribe* who has expertise over Indian education, and it is the *tribe* who should run the system. NCLB's impact was lasting, and, even in its replacement in 2015 with the more state focused Every Student Succeeds Act ("ESSA"), has reverberations that are still felt today. Broad sweeping standardization policies represented mechanisms for social control that "stifled diversity through uniformity,"¹⁰⁴ failing to recognize the diverse learning styles that help Indigenous students learn best, and the social or economic context in which each student lives. As a result, schools failed; the "mismatch between what students have learned in their home cultures and what is required of them at school" led to the disheartening statistics one hears today regarding tribally controlled education.¹⁰⁵ For example, in 2018 just fifty-three percent of students in tribal schools graduated compared to the national average of eighty percent.¹⁰⁶ Further, the backlog repair bill for the sixty-eight highest risk BIE schools on reservations now totals over \$1.2 billion.¹⁰⁷ Indeed, the NCLB represented a step in the wrong direction, itself a form of assimilationism that was not only out of touch with student needs, but an active impediment to the infrastructure of self-determination which yielded consequences both within and without the classroom.

Today, BIE schools are bouncing back from the era of standardization. They provide up to ten percent of the Native American and Alaska Native population access to education and with federal money, are innovating culturally responsive literacy education, preserving Indigenous language, history, and learning techniques across schools.¹⁰⁸ As a result, forty percent of BIE schools recorded learning rates significantly above the national average.¹⁰⁹ From cultivating tribal pride, to improving communities, to allowing tribes a direct line to government, to giving voice to a vulnerable population, there *is* something positive going on here in this tribal-specific governance paradigm, even if a cursory study of statistics say otherwise.¹¹⁰

¹⁰³ See Sandra J. Fox, *The Need for Indian Education Reform*, in HONORING OUR ELDERS: CULTURALLY APPROPRIATE APPROACHES FOR TEACHING INDIGENOUS STUDENTS 15, 19 (Jon Reyhner, et al. eds., 2015). See Cohen, *supra* note 102, at 743-744.

¹⁰⁴ See Cohen, *supra* note 102, at 744, 756.

¹⁰⁵ Alden Woods & Agnel Philip, *The Bureau of Indian Education Hasn't Told the Public How Its Schools are Performing. So We Did It Instead*, PROPUBLICA, <https://www.propublica.org/article/the-bureau-of-indian-information-hasnt-told-the-public-how-its-schools-are-Performing> (last visited Oct. 23, 2022).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See generally Donna Deyhle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self Determination*, TEACH AMERICA, <https://www.teachforamerica.org/one-day/magazine/why-are-native-students-being-left-behind> (last visited Oct. 10, 2022).

The question becomes, why aren't we talking about this positive trend? Researchers have suggested that the issue lies in a "standard narrative and deficit perspective that says [I]ndigenous people . . . [are] inherently inferior or have more problems than other communities, instead of focusing on the structural problems in many communities."¹¹¹ In other words, there is an ingrained Eurocentric bias that reduces the issues affecting Indigenous societies reduced to a stereotyped and value-laden "Indian problem."¹¹² When we compare blanketly Indigenous statistics with white statistics, we discount an endemic inequality of resources, a history of genocide and assimilation, and target Indigenous communities as being in need of "change" *writ large*. In other words, we *still* propagate an assimilatory model.

But, since the 1990s, researchers focusing on educational methodologies and policies have begun to favor more of a "cultural difference" model of study. This model addresses power relations and views Indigenous tribes as unique microcosms with their own challenges, assessing successes and failures more individually.¹¹³ Test scores, for instance, do not give an accurate representation of student success given the economic and social challenges facing Native families.¹¹⁴ Through this lens, we must understand the federal-tribal relationship, and, in it, understand the brilliance of an administrative model where the federal government is the partner of communities—one that can be an example serving as a catalyst for radical change in how education governance is conceived in other contexts.¹¹⁵

III. CASE STUDIES IN DECOLONIZING COMMUNITY EDUCATION TODAY: TRIBAL-FEDERAL PARTNERSHIP AS MODEL FOR COMMUNITY-FEDERAL PARTNERSHIP

The legislative reforms we discuss above gave impetus to a political climate in which Native American and Alaska Native nations worked to end the monopoly of settler-colonialism in Indian education. These sought to create an educational system that was both a pillar of Indigenous self-determination, as well as a means for restoring national identity and pride in ancestral traditions and languages. What resulted was also an opportunity for the federal government to realize its new vision of Indian policy promising measurable reform in terms of improving the socio-economic conditions of Indigenous nations. As such, the work of

¹¹¹ See generally *Id.*

¹¹² See FERGUS M. BORDEWICH, *KILLING THE WHITE MAN'S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY*, 282 (1997). Unexamined assumptions of policymakers and researchers may include attitudes dismissive towards the patterns of Native cultural and political life, with the effect that socio-economic problems become conflated with indigeneity. This latter had been one of the premises of mainstream Indian education during the assimilation era. As was claimed at the Carlisle Industrial Indian School: "When one Indian boy or girl leaves this school with an education, the 'Indian problem' will forever be solved for him and his children".

¹¹³ See Deyhle, *supra* note 110.

¹¹⁴ *Id.*

¹¹⁵ See generally *Id.*

decolonizing Indian education began within a new federal tribal relationship centered on partnership and respect for cultural differences. Indian education would therein become a collaboration: Indigenous peoples and the federal government demanding justice from both ends could lead to tribes regaining their educational sovereignty over their children.

Across the United States, tribal leadership and Indigenous educators took initiative in creating a new educational paradigm that, in enhancing self-determination, engaged in dialogue with community priorities. Differences in governance structures, as among political, cultural, and most importantly, historical differences existing between Indigenous nations, however, would yield an Indian education project that is uneven, being limited and defined by the levels of community control that each apportions. The most prevalent type of administrative framework, and the one under which fall the largest proportion of Indigenous students, is state government control, with the school district as the basic unit enjoying varying levels of autonomy. However, there are serious problems that follow from state political control of education, especially in the context of vulnerable and historically disenfranchised populations. In the Indian education context, hostility to state mistreatment has led to the emergence of the independent school district. Independent school districts self-fund, and answers to neither federal nor state education agencies—save for whatever minimal requirements might be in place for a given jurisdiction. However, there is another operative model, which is tribal control under the auspices of the BIE: this is the format contemplated by the legislative reforms set forth in the preceding section.

We argue that Indian education is best served by the implementation of this last approach. We advance this as a governance structure that should be utilized by communities across the United States to improve the learning experiences of their children, restore a sense of civic engagement, and become the organizational and administrative basis for an antiracist pedagogy. On the assumption that principles of self-determination can help inform the development of an American educational system corresponding with the empowerment of communities, we maintain that state control over education ossifies bad practices and contributes to the exasperating levels of inequality felt in American society today.

To give substance to our claims, we will examine the recent history and local circumstances of the Akwesasne Mohawk in upstate New York and their battle for a decolonized system of education reflecting tribal imperatives in language, culture, and sovereignty. We will present historic and contemporary policies of the New York state government in relation to the Indigenous peoples within its jurisdiction as evidence of how state control of education fails marginalized populations. Furthermore, we will provide an illustration of how the independent school format, while a laudable representation of positive reform in Indian education, has not reached such dimensions and institutional hale as to recommend it as the model that should be emulated by other communities on a large scale.

By comparison, this article will then offer the educational system of the Mississippi Band of Choctaw Indians, which follows the governance structure favored by our argument, as a demonstration of the possibilities for social and economic justice that community control can help make possible. Owing in large part to an educational sovereignty that is both modern and reflective of a living culture, this nation has managed to overcome succeeding legacies of oppression and exploitation with astonishing results; however, this is not to say that Indian education for the Mississippi Choctaw is a flawless institution and that such progress has been registered as to make the tribe a state or national leader in student performance. In fact, statistics would place its schools on the lower ends of school achievement in Mississippi, which may lead one to believe that tribal control over education offers no lessons for the non-Indigenous world. Apart from the problem of using methodologies reflecting Eurocentric bias, there is a historical overlay that such statistics do not tell: where episodic genocide and state-sanctioned racism almost consigned the Mississippi Choctaw to political, as much as biological oblivion. Nor do such markers explain how community control of education has been an integral part of the tribe's exemplary plan to realize self-determination, and how this has been a battering ram against the weight of historical oppression. And it is progress here which tell of massive improvement in the socio-economic status of individual tribal members. These results are a crucial basis for education administration policy, representing decolonization in action and the coordinated dismantling of systems of Euro-American domination that is possible when the federal government have the ability to help critically impoverished communities. Mississippi Choctaw Education has embodied the governance framework that can be utilized by local communities across the United States as these also attempt to decolonize, overcome legacies of racism, and change philosophies of administration education that continue to fail young people across the United States.

Lastly, this section will advert to emerging principles of education governance drawn from Indigenous human rights law and from these, posit a new approach to American education that is community-empowering and which, particularly in the context of districts made up of historically disadvantaged citizens, could help reverse the poor outcomes that reinforce socio-economic disparities along lines of race and class.

A. The Akwesasne Mohawk and the Failure of State Control of Education

The relationship between the Akwesasne Mohawk and the state of New York demonstrates the inequalities that follow from unilateral state-control of education policy. As a constituent nation of Haudenosaunee Confederacy, the Akwesasne Mohawk were participants of an elaborate democratic system which knew of extensive legally cognizable political and

economic rights.¹¹⁶ Yet with the colonial critique that these were “primitive” peoples, this nation would soon fall under the surveillance, regulation, and indoctrination of Christian missionaries. As elsewhere in North America, education would become an important mechanism of social control for French imperialism. The oldest standing structure in northern New York is the St. Regis Mission, which in 1775 was opened by Jesuit Roman Catholics who sought to provide the light of the gospel to the Mohawk.¹¹⁷ Such pretenses continued after the establishment of the United States, which assumed from the British Crown, a mandate to civilize Indigenous peoples within its rapidly expanding borders. The changes in Federal Indian policy of the 1970s were met by a strategic and communal response from members of the Akwesasne Mohawk nation who wanted to ensure that cultural sovereignty would become the lodestar of a new model of Indian education that they envisaged. A generation of Akwesasne Mohawk educators, committed to reversing the legacy of the boarding school, set to work. Ann Barnes, a survivor of the St. Thomas Indian School—who earned a bachelor’s degree from St. Lawrence University in Canton, New York onsite at the Akwesasne—would go on to teach Mohawk language and culture in local schools.¹¹⁸ She was one of four Indigenous women, all graduates of the St. Lawrence University program, “who sparked a cultural revitalization of the Mohawk language,” undermining boarding school curriculums and disciplines through their own classroom environments.¹¹⁹ Her daughter, Marjorie Kaniehtonkie Barnes Skidders, having earned masters degrees in education from SUNY Potsdam and St. Lawrence University, would similarly contribute to Mohawk cultural learning in the administrations of the Akwesasne Mohawk Board of Education, the Akwesasne Freedom School, and the Franklin County Boards of Cooperative Educational Services programs.¹²⁰ Because of the efforts of these women, and through and with the support of these institutions, hundreds of Akwesasne Mohawk residents have been able to

¹¹⁶ See ROGER RIENDEAU, *A BRIEF HISTORY OF CANADA*, 27-28 (2d ed. 2007).

The Haudenosaunee had systems of legally cognizable economic and trading rights vesting in the *kanata* (village) that as early as the Cartier expedition were being disregarded by Europeans. (“Viewing the French as powerful and valuable trading partners, [Chief of the Stadacona village] Donnacona objected to their intention to proceed inland to a larger Iroquois village at Hochelega).

¹¹⁷ *Id.* at 27. The Stadaconans apparently had the customary right to a monopoly over upriver traffic, and Donnacona recognized the advantages of assuming the broker's role in the trade of furs from the interior Native groups for precious European metal goods. Ignoring Donnacona's wishes and thus foreshadowing future European reaction to Native land and trading rights, Cartier arrived at Hochelega on October 2 [1535].” Misinterpreting language from an exchange with two Indians, Cartier believed “Canada” to be the specific name of the territory of Donnacona.

¹¹⁸ Under the terms of the program offered by St. Lawrence University, Barnes could complete her degree on-site from Akwesasne. See Deborah Dudley, *A Laurentian Story: Reclaiming Mohawk Language and Culture Through Education*, in *ST. LAWRENCE UNIVERSITY MAGAZINE*, FALL 2021, 25-31, at 26. For discussion of the St. Thomas Indian School, which began as an initiative of clergy affiliated Presbyterian Church and later was taken over by the State of New York, which oversaw an educational context replete with racial and cultural discrimination see generally KEITH R. BURICH, *THE THOMAS INDIAN SCHOOL AND THE “IRREDEEMABLE” CHILDREN OF NEW YORK* (2016).

¹¹⁹ To speak a word of Mohawk at a boarding school was grounds for punishment. See Dudley, *supra* note 118, at 26.

¹²⁰ *Id.*

reclaim their language through a new paradigm of Indian education which accedes to the community powers over its own educational future and priorities.¹²¹

Such work has taken place in the context of different theories of education governance, which themselves can be related to cleavages present in the Akwesasne Mohawk nation during the beginning of the self-determination era. These formed around competing interpretations of the meaning of Indigenous sovereignty. Catalyzing events of 1979 would see this internal dispute transform into a “standoff” between tribal members and the state.¹²² Armed detachments of the New York State Police were ordered to seal off the part of the reservation where one of the factions in protest was encamped.¹²³ Parents staring at rifles trained on them by sharpshooters, with the support of the traditional tribal government, decided that New York state should not be entrusted with controlling the education of their children.¹²⁴ Beverly Cook, whose child was nearing the age of matriculation into primary school, says this regarding their motivations: “I couldn’t imagine sending my daughter to public school. It just didn’t work for me, and the other parents were likeminded, it was important for us to know our kids were going to know they were... and why their parents were behind a barricade.”¹²⁵

And so, it was intimidation and the tactics of a modern “cowboy diplomacy” evinced by New York that ultimately led these parents to form their own Indigenous center of learning, where an educational program outside the sphere of influence of Albany could be developed. The result was the Akwesasne Freedom School; independently-run, and taking money from neither the state of New York nor the federal government.¹²⁶ Its creation, revealing a considered effort to maintain a separate governance structure from surrounding schools, runs counter to the discourse of Native rights characterizing the reform of Federal Indian Law beginning in the 1970s. State governments, exemplified here by New York, were at cross-purposes with the federal government when it came to the recognition of tribal sovereignties. In doing so, they were following the historical antecedence of federal-state conflict over issues of aboriginal title

¹²¹ *Id.* at 30.

¹²² See THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, HONORING NATIONS: 2005

HONOREE AKWESASNE FREEDOM SCHOOL, FRIENDS OF THE AKWESASNE FREEDOM SCHOOL, AKWESASNE MOHAWK NATION, John F. Kennedy School of Government, Harvard University, available at https://hwpi.harvard.edu/files/hpaied/files/akwesasne_freedom_school.pdf?m=1639578983.

¹²³ See Nora Flaherty, *Akwesasne Freedom School’s Mission: Cultural Survival*, NCP, available at <https://www.northcountrypublicradio.org/news/story/18193/20110812/akwesasne-freedom-school-s-mission-cultural-survival><https://www.northcountrypublicradio.org/news/story/18193/20110812/akwesasne-freedom-school-s-mission-cultural-survival> (last visited October 22, 2022).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Its budget derives from contributions made by the tribal government as well as from private donations. See *Akwesasne Freedom School Receives \$1 Million from SRMT*, INDIAN TIME, <https://www.indiantime.net/story/2022/01/13/news/akwesasne-freedom-school-receives-1-million-fromsrmt/38758.html> (January 13, 2022) (announcing the award of a \$1 million grant from the St. Regis Mohawk Tribal government to the school).

and treaty rights. Such controversies would metastasize in the 1990s, and eventually reach the reactionary Supreme Court of Chief Justice Rehnquist, whose states-rights (and anti-Indian) jurisprudence of “federalism” resulted in majority opinions unfavorable to the Oneida Nation.¹²⁷ In choosing to shape a separate educational future for their children, these parents would be part of a wider story of resistance by the Indigenous nations of New York against state practices of settler colonialism in the 20th Century which had very deep roots in colonial education policy.¹²⁸

Native New Yorkers remembered the complicity of the state government in the tragedy of the St. Thomas Indian School, in which Indigenous children and their families and social networks experienced lasting traumas resulting from psychological, physical, and emotional harm.¹²⁹ And so the Native nations of the state have, irrespective of such dissension as took place at Akwesasne in 1979, been resolute in insisting upon their rights to self-government and autonomy vis-a-vis state and local regulatory bodies.¹³⁰ With the Akwesasne Freedom School, this would yield an effort to decolonize Indian education absenting the government of New York, with its ongoing uncooperativeness and poor record on tribal sovereignty. Nonetheless, the New York state school system plays a proportionally greater role than the Akwesasne Freedom School in the Mohawk Akwesasne’s attempt to construct a culturally sanctioned model of Indian education.

Children from the St. Regis Mohawk Reservation fall under the geographical aegis of the Salmon River Central School District, which encompasses localities with majority non-Indigenous populations as well.¹³¹ Indigenous children comprise sixty-six percent of the student body, the highest percentage for any public school district in the state.¹³² The 1,017 enrolled Native students are afforded Indigenous language and cultural education programs as well as specific forms of learning assistance pursuant to Title VI grants from the federal government.¹³³ Grades Three through Eight show below-average proficiencies in reading and mathematics compared to other in-state school districts according to the latest data aggregated by the New

¹²⁷ See, e.g., *County of Sherill v. Oneida Nation*, 544 U.S. 997 (2005). On the pejorative attitude of Rehnquist towards Indigenous Americans that inhered in his legal thought, see generally, ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

¹²⁸ For a definitive study of the history of the school, which includes discussion of the complex and, because antithetical, unproductive, state-tribal relationship see generally LOUELLYN WHITE, *FREE TO BE MOHAWK: INDIGENOUS EDUCATION AT THE AKWESASNE FREEDOM SCHOOL* (2006).

¹²⁹ See, e.g., Dan Herbeck, *Lessons of Pain: The Terrible Legacy of the Thomas Indian School Remains All Too Fresh in the Seneca Nation Consciousness*, THE BUFFALO NEWS, Oct. 1, 2006, updated July 29, 2021.

¹³⁰ *Id.* (“The school is one reason why the Senecas take such strong, often confrontational stances against the state and local governments when it comes to issues like casino development, gasoline taxes [sic] and tobacco taxes”).

¹³¹ See Salmon River Central School District, *About US*, <https://www.srk12.org/about-us/>. (last visited December 9, 2022)

¹³² See *Id.* at Title VI, <https://www.srk12.org/academics/title-vii/>.

¹³³ *Id.*

York State Education Department.¹³⁴ Such research does not exemplify the methods of Indigenous sciences, and reflects markers that may or may not comport with Native educational priorities, including those that relate to language and cultural studies. Accordingly, it cannot be held as an index of achievement in contemporary Indian Education. Educational statistics should not be isolated from sociological factors and historical context that can explain reasons for underperformance of tribal youth. Substance abuse, poverty, family disintegration, and high rates of joblessness—the hallmarks of colonial underdevelopment—should be background assessments of Indigenous learning.¹³⁵ The experience of the boarding school *must* also be accounted for.

Nonetheless, schools within the district have suffered from inequalities in terms of how the state bureaucracy apportions needed resources for education. This means that relative to other public-school districts in New York, those serving large Indigenous student populations are under-resourced, lacking in community accountability, and, in the final analysis, delivering an unequal education. Because of a discriminatory legal framework that empowers the state at the expense of tribes, schools that are located on the grounds of an Indian reservation are considered to be under state ownership: this means that they are dependent upon legislative fiat to repair buildings and to maintain such minimum public health standards that support healthy learning environments.¹³⁶ And the evidence is clear that the state government is failing in discharging its obligations to these districts, and to Native American students particularly.

The superintendents of these schools paint an image of dilapidated buildings, cracked and unpaneled windows, doors that fail to lock, and roofs that admit the elements.¹³⁷ These have demonstrable effects on student psychological and physical well-being, as well as the learning

¹³⁴ Such data is of limited value given the Covid pandemic, with only 40% of students contributing to assessments. See *Salmon River CSD- New York State Report Card [2020-21]*, NEW YORK STATE EDUCATION DEPARTMENT, available at https://data.nysed.gov/essa.php?instid=800000051790&year=2021&createreport=1&OverallStatus=1§ion_1003=1&EMStatus=1&EMchronic=1&HSStatus=1&HSgradrate=1&HSchronic=1&38ELA=1&38MATH=1&48SCI=1®ents=1&cohort=1&nysaa=1&naep=1&expnd=1&staffqual=4&gradrate=1&feddata=1; In preceding years, the district has generally fallen below the state mean in terms of various educational markers. See *Salmon River Central School District, Miseducation Project*, PROPUBLICA, <https://projects.propublica.org/miseducation/district/3625500> (compiled in 2016); see also *Salmon River Central School District, New York School Test Scores, Franklin County*, NEW YORK TIMES, <https://www.nytimes.com/interactive/projects/new-york-schools-test-scores/counties/franklin/districts/salmon-river-central-school-district>.

¹³⁵ See *2014 Native Youth Report*, EXECUTIVE OFFICE OF THE PRESIDENT (DECEMBER 2014) at 13, https://obamawhitehouse.archives.gov/sites/default/files/docs/20141129nativeyouthreport_final.pdf

¹³⁶ See Keith Benman, *Superintendents with Schools on Native American Land Call Out NY State*, WWNYS TV, (Nov. 5, 2021), <https://www.wnnyt.com/2021/11/05/superintendents-with-schools-native-american-land-call-out-ny-state/>.

¹³⁷ See Michael DePietro, *Superintendents: Native American Schools Crumbling While NYS Fails to Act*, NIAGARA FRONTIER PUBLICATIONS, (July 30, 2021) <https://www.wnypapers.com/news/article/featured/2021/07/30/147523/superintendents-native-american-schoolscrumbling-while-nys-fails-to-act>.

process.¹³⁸ The funding disparities are extreme: where one New York state school district had spent \$54 million to cover up-keep and repairs, over the same period a majority-Indigenous district had only been able to use \$180,000 for the same purposes.¹³⁹ A superintendent who oversees one of the critically underfunded districts explains the political exigencies this way: “It feels like every time we need something, it’s a fight, it’s a battle. And I’m not alone. All of the superintendents who are in school districts who serve Native populations are waiting for funds, whether that’s money for the operating budgets, or for capital project work.”¹⁴⁰ In the summer of 2021, the Onondaga Nation Council convened a meeting with members of the administration from three school districts to demand change from New York state legislators.¹⁴¹ One statistic introduced at the gathering was that for every \$5 the state of New York typically spent on updating a school’s facilities, \$1 would be spent on a school serving Indigenous students.¹⁴² In November 2021, a conference was held in Akwesasne, during which the principal of the St. Regis Mohawk School revealed that the HVAC system of the school was so inadequate that it prohibited the holding of indoor classes during the summer session.¹⁴³

The situation here fits into a familiar pattern of institutionalized inequality that has typified governmental control of education—an inequality made abundantly apparent under the homogenizing policies of the NCLB, but even afterwards, as we alluded to above and will develop further in the next section, the still centralizing state control policies of the ESSA. That said, the Akwesasne Freedom School closely relates to what we argue school administration in the United States should look like: increasingly community oriented, focused, and regulated.

But there are issues with the school and the model that it represents, which argue against its universality. For one, the school is unrepresentative of how the educational needs of most Mohawk students are met in upstate New York.¹⁴⁴ It only runs to the eighth grade, after which students generally transition to public school.¹⁴⁵ This limits the reach of its educational mandate. Parents have expressed apprehension about its curricular emphasis on cultural transmission and instruction in the Mohawk language.¹⁴⁶ Indeed, there is a record of student achievement coming from the school that could dispel concerns that it is not preparing students for the rigors of secondary public education.¹⁴⁷ And behind the school lies an important tribal governmental initiative in higher education aimed at increasing the number of Mohawk students who would go

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *Superintendents Advocate for Native Schools*, ONONDAGA NATION, (Sept. 1, 2021) <https://www.onondaganation.org/news/2021/superintendents-advocate-for-native-schools/>.

¹⁴² *Id.*

¹⁴³ See Benman, *supra* note 136.

¹⁴⁴ Only around 1-2% of the total number of children at Akwesasne attend the school. See Flaherty *supra* note 123.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *Honoring Nations supra* note 122.

on to graduate college with degrees in the sciences.¹⁴⁸ Regardless, the concerns of such parents should be regarded as valid, and here it becomes apparent that tribal control over education helps provide the political context where could be negotiated a compromise where broader parental and community interests would be served. Another benefit from tribal control, and federal support, would be reflected in terms of access to resources. The lack of state and federal funding means that independent schools are beholden to revenue streams from private sources; this places such schools at a relative disadvantage in terms of access to resources. This results in limitations on school expansion in terms of student enrollment, program development, and enlargement and modernization of facilities. There is also the possibility of budget shortfalls that may impact the quality of education. Because of these concerns, this article proposes that education governance is best formatted when it is community controlled and can rely upon funding support from a collaborative federal government. This is why we now turn to the Mississippi Choctaw.

B. *The Mississippi Choctaw and Federal-Tribal Partnership in Education Governance*

The Mississippi Choctaw have an ancient history. They are among the descendants of the great mound builders of the American Southeast.¹⁴⁹ Stories preserved in their culture acknowledge the mound of Nainah Wayah as the birthplace of the nation.¹⁵⁰ It has been suggested that the etymology of Choctaw derives from the Indigenous term for the Pearl River, *Haccha*. To the Chickasaw they were the *Pansh Falaia*, the "long hairs," and to the French, the "flat heads," in reference to their practice of artificial cranial deformation.¹⁵¹ Whereas other Indigenous nations in the region had more hierarchical government structures and tolerated social inequality based on class and other factors, the Choctaw were politically closer to the democracies comprising the Indigenous nations of the Northeast.¹⁵² Their geographic reach spanned much of what is today the states of Mississippi and Arkansas. A religious connection to the land, in tandem with economic and political significance, yielded a close connection between tribe and geography—the land represented social identity and cohesion.¹⁵³ For white colonists, the territory was simply a valuable resource, a place where settlements could arise and

¹⁴⁸ See Gale Courey Toensing, *St. Regis Mohawk Chief Elected Clarkson University Trustee*, INDIAN COUNTRY TODAY, (May 24, 2009), updated Sept 12, 2018, <https://indiancountrytoday.com/archive/st-regis-mohawk-chief-elected-clarkson-university-trustee>; for a talk by Ransom on the Akwesasne Freedom School, which he has been associated with, see Harvard Project on American Indian Development, *Honoring Nations: James Ransom & Elvera Sargent: The Akwesasne Freedom School* (2005), available at Indigenous Governance Database, UNIV. OF ARIZ., NATIVE NATIONS INSTITUTE, <https://nnigovernance.arizona.edu/honoring-nations-james-ransom-and-elvera-sargent-akwesasne-freedom-school>.

¹⁴⁹ See generally, GREGORY SMITHERS, *NATIVE SOUTHERNERS: INDIGENOUS HISTORY FROM ORIGINS TO REMOVAL* (2019).

¹⁵⁰ See LINDA LOWERY, *NATIVE PEOPLES OF THE SOUTHEAST (NORTH AMERICAN INDIAN NATIONS)* 38 (2016).

¹⁵¹ See CARL WALDMAN, *WORD DANCE: THE LANGUAGE OF NATIVE AMERICAN CULTURE* 44 (1994).

¹⁵² See CARL WALDMAN, *ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES* 64 (Revised Edition) (1999).

¹⁵³ Brandon Layton, *From Indian Country to Slave Country*, JOURNAL OF SOUTHERN HISTORY 32, 27-58 Vol LXXXII no. 1 (2016).

Euromerican land tenure could be practiced, with the rich soils yielding abundant possibilities for agricultural enterprise and animal husbandry.

The threat of national—as much cultural as spiritual—dislocation was wielded even at the time of Jefferson, who, in a letter, said to William H. Harrison in 1803: “Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others, and a furtherance of our final consolidation.”¹⁵⁴ This last clause reveals the expansionism that Indigenous dispossession would help accomplish; it was an expedient to create the land base for, in Jeffersonian language, the “empire of liberty,” an arc of Enlightenment democracy and civilization that would spread across the Western Hemisphere.¹⁵⁵ Thus, “removal” from an early date of U.S. history was theorized as a means to increase the power of the American state and its racialized political economy in a way that tolerating Indigenous sovereignty would not. When implemented during the Jackson Administration, “removal,” while given a humanitarian gloss in some circles, was in form the same punitive military tactic as the third president had considered. It would prove to be a study in human cruelty as much as a barometer of the American high ideals of government. A forced movement of men, women, and children under military guard, it was an expression of imperialist violence from which was gained significant holdings for the Southern states and “consolidation” of Manifest Destiny in the region.

Choctaw “removal” was a tragedy that was also an act of betrayal, because unlike other tribes of the South, such as the Cherokee, the Choctaw were allies of the United States government. Choctaw warriors fought under American generals in the Revolutionary War, the War of 1812, and the Creek War of 1813-14.¹⁵⁶ The opinion among many Georgians who supported Indian Removal had been that “the Cherokee had sided with the British in the Revolutionary War, and lost, and thus deserved the same fate as the Tories.”¹⁵⁷ There could be no such pretext for the Choctaw of Mississippi. Yet, considerations of national honor would not temper what began essentially as a local initiative, which saw state and individual colonial interests merge in a common plan of Indigenous dispossession. Private acts of theft and lynching by individual settlers received quiet sanction from the organs of local and state power.¹⁵⁸ There was broad public support of attempts by the Mississippi legislature to eviscerate Choctaw tribal sovereignty, with only a single newspaper pronouncing a sustained voice of protest.¹⁵⁹ And so, there effectively was a “removal” project already undergone by the Southern states at the time of

¹⁵⁴ See JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* 395 (1988).

¹⁵⁵ For the political significance of this term for Jefferson and his expansionist policy that included the Louisiana Purchase, see ANTHONY BOGUES, *EMPIRE OF LIBERTY: POWER, DESIRE, & FREEDOM*, 13-16 (2010).

¹⁵⁶ Waldman, *supra* note 152, at 65.

¹⁵⁷ GORDON SAWYER, *NORTHEAST GEORGIA: A HISTORY* 32 (2001).

¹⁵⁸ See Christina Snyder, *Many Removals: Re-evaluating the Arc of Indigenous Dispossession*, 41 *JOURNAL OF THE EARLY REPUBLIC* 63, 623-50 (Winter 2021).

¹⁵⁹ See Tim Allen Garrison, *Inevitability and the Southern Opposition to Removal*, 107-25, 115 in *THE NATIVE SOUTH: NEW HISTORIES AND ENDURING LEGACIES* (eds. Tim Allen Garrison & Greg O'Brien) (2017).

national debate over what to do with the Indigenous peoples of the Southeast.¹⁶⁰ Pressure from Southern representatives in Washington ultimately persuaded the federal government to adopt as its own the policy of the Southern states, and this despite the view that the Southeastern tribes were unlike those elsewhere in becoming "civilized" and attaining [] self-sufficiency.¹⁶¹

It was at this time that the federal government began to pursue land concessions through its familiar strategic pattern of devising succeeding treaties, each surrendering additional acreage and still more favorable terms.¹⁶² An unrepresentative sample of the Choctaw, who did not speak for the majority, were bribed into accepting the terms of the Treaty of Dancing Rabbit, which surrendered all tribal lands in Mississippi.¹⁶³ Tactics of intimidation were used by American representatives and their functionaries in the treaty formation process, which was standard practice.¹⁶⁴ Article 14 of the treaty promised to those tribal members who remained in Mississippi rights to individual allotments.¹⁶⁵ Indian agents threatened that military force would be used to compel holdouts to leave the state.¹⁶⁶ The federal government would ultimately fail to keep its promise of allotments under the treaty.¹⁶⁷

The first tribe to be "removed" by the federal government, the Choctaw, experienced the "Trail of Tears," really a series of forced marches beginning in 1831 and lasting for three years, that was marked by privation of all kinds—food, clothing, horses, blankets, attacks by bandits that went unanswered by the military escorts, and the onslaught of disease that would claim one in four members of the tribe.¹⁶⁸ When a cholera outbreak began to result in a high rate of fatality during one of the journeys, efforts were made by the accompanying soldiers to conceal the severity of the situation.¹⁶⁹ The deaths of Choctaw on that trip were nearly all attributable to the illness.¹⁷⁰ The idea of moving to Indian Territory had a religious connotation, soon to be borne out in the details of the tragedy that it came to represent: in Choctaw tradition, the afterworld is

¹⁶⁰ See GINA CAISON, RED STATES: INDIGENEITY, SETTLER COLONIALISM, AND SOUTHERN STUDIES 118 (2018).

¹⁶¹ See CHARLES C ROYCE, THE CHEROKEE NATION OF INDIANS, 74-75 (1975).

¹⁶² See, e.g., LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2007) (discussing the centrality of the law in the colonial project of Manifest Destiny)

¹⁶³ Waldman, *supra* note 152.

¹⁶⁴ Compare with the situation facing the Cherokee, for as Chief John Ross could relate of the situation leading up to the signing of one such treaty: "At one of the meetings of the nation, the reverend Mr. [John F.] Schermerhorn, who has performed a conspicuous part in these transactions, distinctly apprised the Cherokees that if they remained on this side of the Mississippi, their difficulties would increase, 'that the screws would be turned upon them till they would be ground into powder.'" Letter from John Ross to a Gentleman of Philadelphia, *The Papers of Chief John Ross*, Vol I 1807-1839 493-494 (Ed. Gary E. Moulton 1986).

¹⁶⁵ KATHERINE M. OSBURN, CHOCTAW RESURGENCE IN MISSISSIPPI: RACE, CLASS, AND NATION BUILDING IN THE JIM CROW SOUTH, 1830-1997, 202 (2014).

¹⁶⁶ *Id.* at 36.

¹⁶⁷ See Katherine M. Osburn, *The 'Identified Full-Bloods' in Mississippi: Race and Choctaw Identity, 1898-1918*, 56:3 AMERICAN SOCIETY FOR ETHNOHISTORY 423-447, 424 (Summer 2009).

¹⁶⁸ Waldman, *supra* note 152, at 66.

¹⁶⁹ See Paul Kelton, *Pandemic Injustice: Irish Immigrant, Enslaved African American, and Choctaw Experiences*, JOURNAL OF SOUTHERN HISTORY Volume LXXXVIII No. 1 (February 2022).

¹⁷⁰ *Id.* at 147.

described as a location that can be reached when traveling in a western or southwestern direction from the borders of the homeland under escort of enemies.¹⁷¹ Indeed, Indian Territory, now present-day Oklahoma, was no biblical promised land, and the realities of life there were such that many Choctaw would soon face death from starvation, disease, and encounters with marauding tribes of the American west.¹⁷²

The language of the colonizer affects how the history of this time is defined, understood, and located within the larger history of the South as well as the United States. In the words of James Taylor Carson, “[T]o call their expulsion a removal is to sanitize it, to banalize it, for what the citizens of Georgia, Alabama, and Mississippi in fact undertook was nothing less than the complete dismemberment, the ethnic cleansing, of the society and the place they inhabited.”¹⁷³ A decolonized vocabulary, which can refer to the experience of these peoples in reference to concepts such as genocide that today are units of analysis and also areas of criminal legislation within the discourse of the international human rights system, is needed. However, the genocidal nature of what was then and now called “removal” was evident to many who lived in the era, including some who participated in it from the American side. Private John G Burnett of the 2nd Brigade, Mounted Infantry, who took part in one of the military operations making up the Trail of Tears—a mission against the Cherokee—recalls an episode that for us evokes the image of Mai Lai or Abu Ghraib and does not disguise the reality of what happened:

I was sent as an interpreter into the Smoky Mountain Country in May, 1838, and witnessed the execution of the most brutal order in the History of American Warfare. ... I saw the helpless Cherokees arrested and dragged from their homes, and driven at bayonet point into the stockades ... And in the chill of a drizzling rain on an October morning I saw them loaded like cattle or sheep into six hundred and forty-five wagons and started toward the west. Many of these helpless people did not have blankets and many ... The trail of the exiles was a trail of death. They had to sleep in the wagons and on the ground without fire. And I have known as many as twenty-two of them to die in one night of pneumonia due to ill-treatment, cold, and exposure.¹⁷⁴

It is in this historical moment, during the Trail of Tears, that the Choctaw were splintered into Oklahoma and Mississippi nations. The Mississippi remnant, numbering some 6,000 was comprehensively deprived of political rights to sovereignty from state and federal governments. Their existence depended upon values of communal resiliency, although these were constantly

¹⁷¹ See Jane Dinwoodie, *Evading Indian Removal in the American South*, JOURNAL OF AMERICAN HISTORY 25, 17-41 (June 2021).

¹⁷² *Id.* at 66.

¹⁷³ *Id.* at 632 (quoting James Taylor Carson, “*The Obituary of Nations*”: *Ethnic Cleansing, Memory, and the Origins of the Old South*, SOUTHERN CULTURES 14 6-31, 10 (WINTER 2008)).

¹⁷⁴ THOMAS BRYAN UNDERWOOD, *CHEROKEE LEGENDS AND THE TRAIL OF TEARS*, 22 (1956).

assailed by an outside world which was constructed on white supremacy. This resulted in conditions of such poverty as to almost result in the extirpation of the Choctaw presence from Mississippi after centuries of cultural, spiritual, and physical presence. The post-removal reality was a period of mob violence and systematic racial discrimination that was characterized also by an absence of governmental aid in any form:

The treaty rights of these Indians were largely ignored by the Jackson Administration and its successors, who found it politically expedient to leave them at the mercy of white Mississippians. Some Choctaws were 'scourged, manacled, fettered, and otherwise personally abused' by whites. Between the 1830s and 1918, when they were finally rediscovered by the federal government, the remnant of the Choctaws in Mississippi lived an existence worse than that of the average black in the state.¹⁷⁵

The Choctaw nonetheless were able to endure such conditions, and in so doing displayed such commitment to national liberation as had manifested earlier. One of the ways the Choctaw attempted to preserve cultural identity was through appropriation of a Euro-American model of education. Of course, education has served the purposes of European colonialism since its earliest representations in the Western Hemisphere.¹⁷⁶ And the United States was no exception: it subordinated education to its Manifest Destiny ideology and enduring system of racial exploitation, such that “for many Indigenous students, schooling has been intentionally damaging.”¹⁷⁷ Education became part of the structure of oppression as the United States developed into a racial and economic caste system predicated on Indigenous dislocation.¹⁷⁸ It would also become an institution of cultural and ontological genocide. In the words of Commissioner of Indian Affairs Thomas Morgan, the government in its role as educator should “seek the disintegration of the tribes, not their segregation.”¹⁷⁹ Nonetheless, the Choctaw had found ways to take European concepts and structures and adopt them to their own purposes. This was not new to the Choctaw as they had given Christian beliefs and practices Indigenous

¹⁷⁵ See Ronald N. Satz, *Rhetoric Versus Reality: The Indian Policy of Andrew Jackson*, CHEROKEE REMOVAL: BEFORE AND AFTER, 29 (William L. Anderson ed., 1991).

¹⁷⁶ See MARINELLA LENTIS, COLONIZED THROUGH ART: AMERICAN INDIAN SCHOOLS AND ART EDUCATION, 1889-1915 31-32 (2017) (“The education of the Indigenous population of America was one of the main goals of the colonizers since their arrival on the continent; missionaries of different denominations were responsible for the founding and operation of numerous schools where the colonists’ language, religion (Christianity), and mode of living (agriculture) were the core areas of instruction.”).

¹⁷⁷ Samantha A. Marshall, *To Sustain Tribal Nations: Striving for Indigenous Sovereignty in Mathematics Education* 31 J. OF EDUC. FOUNDATIONS 9, 12 (2018).

¹⁷⁸ See Nikki Luke & Nik Heynen, *Abolishing the Frontier: (De)colonizing “Public” Education*, 22 SOC. & CULTURAL GEOGRAPHY 403, 405 (2021) (asserting that higher education has played a role in legitimizing and establishing the racial stratification of the United States).

¹⁷⁹ Bethany R. Berger, *Savage Inequalities*, 94 WASH. L. REV. 583, 608 (2019).

meanings and molded these beliefs into expressions also of a post-contact, but distinguishably Choctaw culture.¹⁸⁰

The interest of the Choctaw in Euro-American modalities of education reveals a clever strategy for resisting settler-colonialism that involves acquiring knowledge from Western society so as not to assimilate but rather to maintain their identity in a process of social, political, and economic development, and moreover to consolidate rights of self-government as imbued in Christian peoples. Many Southeastern tribes demonstrated an interest in providing for their children a Euro-American education, although on their own terms and not in such a way as sovereignty would be forfeited. This had been the case with the Cherokees, who sought Western education for their children on the basis of economic and political development, all the while dismissive of any claims of moral or civilizational superiority that may have attended such pedagogies.¹⁸¹ Such distinctions were not lost on those who engaged in proselytization among the Southeastern tribes. One missionary active in the area of Lafayette, Georgia, said, "I became cognizant of many acts among the Indians, that rebuked in the most pointed manner the boasted civilization—the professed Christianity of the white people, who settled amongst them."¹⁸² What was being demonstrated was assimilationism in reverse, which in effect was to take Western concepts and beliefs and give them an Indigenous gloss, or else adapt them to existing Indigenous values and systems of knowledge production.

By the terms of the 1820 Treaty of Doak's Stand, the United States government was to construct schools for Choctaw children upon unceded lands.¹⁸³ Coincidentally, the first boarding school to open under federal control was the Choctaw Academy, founded in 1825 in Blue Spring, Kentucky, with a mission to educate Choctaw and later other Native children.¹⁸⁴ The Choctaw who had wanted to see the school established did so because they desired tribal members who would have the skills that could provide for the survival and perpetuation of the nation in a modern context.¹⁸⁵ The Choctaw Academy was a place where an Indigenous

¹⁸⁰ See Michelene E. Pesantubbee, *Beyond Domesticity: Choctaw Women Negotiating the Tension Between Choctaw Culture and Protestantism*, 67 J. OF THE AM. ACAD. OF RELIGION 387, 388 (1999) ("Contrary to appearances, however, Choctaw women perpetuated Choctaw culture up to the present time, and, ironically, did so within the alien structure of Protestant churches.").

¹⁸¹ See MARION L. STARKEY, *THE CHEROKEE NATION* 29-30 (2nd ed. 1972) ("the early Cherokees had shown little response to such missionaries as occasionally strayed their way; their experience with white man's practice had made them skeptical of his preaching. In 1801, however, they had given the Moravian Brethren a trial on the express stipulation that in return for the privilege of expounding their religion they open a school for Cherokee children; their chiefs had held the Moravians very strictly to this bargain, once threatening to expel them when they procrastinated about setting up the school.")

¹⁸² JAMES ALFRED SARTAIN, *HISTORY OF WALKER COUNTY, GEORGIA* 52 (Vol. 1 1932).

¹⁸³ See Katherine M. Osburn, *Tribal 'Remnants' or State Citizens: Mississippi Choctaws in the Post-Removal South*, 17 AM. NINETEENTH CENTURY HIST. 199, 201 (2016).

¹⁸⁴ See Christina Snyder, *The Rise and Fall and Rise of Civilizations: Indian Intellectual Culture during the Removal Era*, 104 J. OF AM. HIST. 386, 386 (2017).

¹⁸⁵ See Ella Wells Drake, *Choctaw Academy: Richard M. Johnson and the Business of Indian Education*, 91 THE REG. OF THE KY. HIST. SOC'Y 260, 260 (1993).

intellectualism, in conversation with, but not defined and subsumed by Western sources of knowledge, rose as a dynamic form of resistance to pedagogical white supremacy that challenged with counter-narratives the prevailing views of mainstream sociology.¹⁸⁶

Because of this, the cultural encounter was not static, and could not be reduced, contrary to the ideology of white supremacy, to the formulaic teach-pupil of guardian/ward ontology that was codified in the law of the Supreme Court.¹⁸⁷ Nor was it univocal: discourse and intellectual production were coming from tribes that offered interpretations of colonial actions challenging orthodoxies of race and religion and which represented uniquely Indigenous critiques. The Choctaw Academy was a tissue of contradictions, a place operating under federal administration and which evinced assimilationist designs, and yet was a site of uniquely Indigenous learning, where students took up their own educational goals and could claim intellectual sovereignty that undermined rhetorical colonialism.¹⁸⁸ And so, the school became a place where Euro-American goals in education were subverted through a process of cultural exchange in which is negotiated as a distinctly Indigenous consciousness.

The Choctaw Academy closed in 1848, but Choctaw efforts to in education construct an anti-colonial education system of cultural and economic development emerged again in Twentieth-Century Mississippi, where federal action would again make this possible.¹⁸⁹ Paradoxically, it was the Democratic Party, although staunch segregationists, that would lobby Congress to show attention and extend its powers of trust protection to the state's long-suffering Indigenous population. In 1917, Mississippi representatives in Washington persuaded Congress to form a study on the Choctaw.¹⁹⁰ Whatever their motivation, their efforts would secure for the tribe federal programs designed to elevate their political and socio-economic station. But it would not be until the 1970s, and the new era of Federal Indian Law, that the Mississippi Choctaw would rise from extreme poverty. And rise they would.

The Honoring Nations program, a joint venture of Harvard University and the University of Arizona, declared that the Choctaw Tribe "is widely viewed as the standard of excellence against which other Native nations measure their success."¹⁹¹ The achievements of the Mississippi Choctaw have indeed been remarkable, and can be credited to effective stewardship that has drawn upon, and also helped redefine, the federal-tribal trust relationship. They have

¹⁸⁶ See Snyder, *supra* note 184, at 390.

¹⁸⁷ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹⁸⁸ See generally CHRISTINA SNYDER, *GREAT CROSSINGS: INDIANS, SETTLERS, AND SLAVES IN THE AGE OF JACKSON* (2017) (Using the Choctaw Academy as a microcosm of the political, racial, and social complexities of Jacksonian America).

¹⁸⁹ See *id.* at 391. (By 1848, some six hundred Indigenous male students from a variety of national backgrounds had been educated at the school).

¹⁹⁰ See Katherine M. B. Osburn, *Mississippi Choctaw and Racial Politics*, 14 *SOUTHERN CULTURES* 32, 52 (2008).

¹⁹¹ MIMI JORGENSEN & JONATHAN TAYLOR, *CONSTITUTIONS & FUNDAMENTAL GOVERNMENT REFORM: LESSONS IN EXCELLENCE IN THE GOVERNANCE OF AMERICAN INDIAN NATIONS*, 11 (2010).

benefitted from political leadership that have located Native sovereignty in a 20th and 21st century context of economic innovation.¹⁹² This has meant that the project of Choctaw nation-building has been in conversation with the technological and scientific discourses that undergird various sectors of the state and national commerce. The result has been enormous capital development and investment from corporations looking for stable and productive business environments, and this has accrued to the benefit of the tribe collectively and individually. The conditions of the 1960s resembled those of the 1860s: only ninety percent of all houses lacked indoor plumbing, and one-third were without electricity.¹⁹³ Yet, by the start of the new millennium, the Choctaw had become the second largest employer in the state of Mississippi.¹⁹⁴

Likewise, Choctaw sovereignty in education would emerge and flourish from this new dynamic of federal-tribal cooperation. Today, the Mississippi Choctaw oversee the largest tribally-controlled school district in the nation¹⁹⁵, with eight schools under its direct management.¹⁹⁶ In 1975, only twenty-five percent of the population above the age of sixteen had an education level above the third-grade level, and under seven percent had gone to College. By 1999, some seventeen percent had achieved a high school diploma, 10.8% had earned the GED, and thirteen percent had managed to obtain some form of college experience.¹⁹⁷ Choctaw schools have continued to improve since the dawn of the new millennium and have received attention from federal authorities impressed with what the tribe has accomplished in education.¹⁹⁸

To be sure, some schools within the district have been recognized as low-performing by the BIE, which has triggered additional apportionments of funding.¹⁹⁹ Yet, this state of affairs should not be attributed to tribal control of education, but rather acknowledged as a space where the strengths of the federal-tribal partnership can be demonstrated: indeed, where there are perceived weaknesses, the federal government is available to provide funding. And it is the tribe that will determine how the money can be spent and where improvements can be made. This has

¹⁹² See generally PHILLIP MARTIN, CHIEF: THE AUTOBIOGRAPHY OF CHIEF MARTIN: LONGTIME TRIBAL LEADER, MISSISSIPPI BAND OF CHOCTAW INDIANS (2009).

¹⁹³Debbie Elliott, *Mississippi Choctaws Find Economic Success*, NPR ONLINE (JULY 7, 2004), <http://www.npr.org/2004/07/17/3465024/mississippi-choctaws-find-economic-success>.

¹⁹⁴ *Id.*

¹⁹⁵ See MISSISSIPPI BAND OF CHOCTAW, EDUCATION, <HTTPS://WWW.CHOCTAW.ORG/GOVERNMENT/EDUCATION/INDEX.HTML> (last visited Dec. 9, 2022).

¹⁹⁶ See CHOCTAW TRIBAL SCHOOLS, <https://www.choctawtribalschools.com/> (last visited Nov. 16, 2022).

¹⁹⁷ Charles Wood, *The Mississippi Band of Choctaw Indians: A Case Study in Economic Development*, 16 ECON. DEV. REV. 93, 102 (1999).

¹⁹⁸ See Slade Rand, *A Culture of Learning*, in MISSISSIPPI MIRACLE: PART II OF MISSISSIPPI'S INDIANS 1, 34 (Bill Rose ed., 2016) (“When U.S. Secretary Sally Jewell looked around Indian Country for a school system that other tribes should emulate, she chose Mississippi’s Choctaw Tribal Schools.”).

¹⁹⁹ See SY 2019-2020 *Comprehensive Support and Improvement (CSI) Schools*, BUREAU OF INDIAN EDUCATION (last visited Nov. 16, 2022) available at https://www.bie.edu/sites/default/files/documents/SY-2019-2020_Comprehensive_Support_Intervention_Schools_Lowest_Five_Percent.pdf (identifying Choctaw Central High School as among the bottom five percent of schools according to state assessment scores and as such extending supplemental funding in the amount of \$150,000).

been the pattern as well during the Coronavirus pandemic, where funds offered by the federal government have been reapportioned by the tribe to enhance the technological capabilities of schools in order to facilitate social distancing and make sure the learning environment is safe.²⁰⁰

Tribal control over these schools helped make possible the restoration of cultural sovereignty that has helped shape and maintain the Mississippi Choctaw identity which has been the agent of broad economic success. Cultivating the Indigenous identity, which can impact and actualize self-determination, is an essential goal of Indigenous education.²⁰¹ And it is through an empowering model of education that the Mississippi Choctaw nation is able to preserve for itself a continuing presence in the contemporary world. As one Choctaw parent says, “If we stopped sending our kids to these schools, our culture would cease to exist.”²⁰²

C. Decolonizing Education Governance: From the Coloniality of Power to the Language of International Human Rights

Indian and non-Indian education systems in the United States share in the assumptions and the methodologies and are source inequalities that characterize what could be deemed its social constitution. Those norms and values that, while not codified into law, are reproduced in all aspects of government and politics, including the field of education policy. The American school system exemplifies the logic and lack of racial justice in terms of wealth, and serves as the basis for socialization into the cultural predicates of the white settler colonial nation. On the margins are those communities which, alienated from decision-making power, experience abysmal outcomes in nearly all markers of academic and broader economic success. Poor education stories sustain cycles of poverty, crime, and substance addiction that emplace the subordination of minorities within existing social hierarchies. The pattern here has analogs with the Indian boarding school experience and what it was able to exact upon in terms of colonial immiseration generations of Indigenous families and nations. It is through the local direction of education that rhetoric and cultures of empowerment, sourced in the communities themselves, can begin a process of building learning environments that can nourish the embodied, historically situated, and diverse American child. The work of decolonizing education is inherently a political act, involving as it does the reapportioning of political power and the redefining of the political subject. Colonialism is the negation of sovereignties and rights. It is the erasure of voice and authority in the exploited.

²⁰⁰ See Native News Online Staff, *Mississippi Choctaw Tribe Taps CARES Funding for Wi-Fi Access in all Tribal Schools*, NATIVE NEWS ONLINE (July 16, 2020), <https://nativenewsonline.net/education/mississippi-choctaws-taps-cares-funding-for-wifi-access-in-all-tribal-schools>.

²⁰¹ Preston Sanchez & Rebecca Blum Martinez, *A Watershed Moment in the Education of American Indians: A Judicial Strategy to Mandate the State of New Mexico to Meet the Unique Cultural and Linguistic Needs of American Indians in New Mexico Public Schools*, 27 J. OF GENDER, SOC. POL’Y & THE L. 183, 219 (2019) (“[I]n addition to the three Rs and proficiency in the core subjects, Indian educational success also means preparedness for tribal leadership roles and governmental and community duties”).

²⁰² See Rand, *supra* note 198, at 35.

Education governance, which follows a top-down structure, enacts Euro-American domination in politics as well as knowledge. Under the colonial and patriarchal structures of Western epistemologies, truth becomes the province of a hegemon that is self-constructed and exclusionary, and which alone holds institutional power.²⁰³ Such top-down hierarchism reproduces colonial relationships both substantively (privileged/non-privileged demographics) and structurally (subject/object).²⁰⁴ Education governance becomes a representation of what Anibal Quijano called the “coloniality of power.”²⁰⁵ According to Quijano, colonialism was about impressing unequal power relations across all forms of political, social, cultural, and racial life in the exploited regions of the Americas. Where applied to education governance, we see that such a critique can deconstruct how “No Child Left Behind” reinforced patriarchal control of education and exacerbated inequalities in terms of race of class; and how it can also explain the current problems typified by the ESSA system of broad latitude for state governments. Comparing European with Indigenous philosophies, Native theologian George (Tink) Tinker writes, “An American Indian worldview, to the contrary, generates a social whole that eschews up-down hierarchies in favor of lateral social constructs that are much more egalitarian and predicated on harmony and balance.”²⁰⁶ Education administration would do well to abjure Western governance structures in favor of more horizontal models that emphasize autonomy of action.

As it now exists, in forms more and less realized, the Indian education model which insists upon tribal control is the system that should be the exemplar for the federal government and the communities across the United States as they negotiate a new paradigm of anti-racism and social justice. It should become the basis for a new federal-community relationship that is rooted in shared goals of success in education, socio-economic advancement for historically disenfranchised population and the extension of democratic and political franchise. The federal-tribal trust relationship as developed by the Mississippi Choctaw, in providing for community control of education, allows for a practice of decolonization which through political change (i.e., transferring powers of decision-making) can lead to improvements in education for historically marginalized segments of the American population.

What Indigenous nations and the federal government have accomplished in transforming Indian Education can be expressed in terms of international human rights law. The emerging

²⁰³ For an Indigenous feminist critique of European claims to scientific objectivity which dismiss outside narratives, see Dian Million, *Felt Theory: An Indigenous Approach to Affect and History*, 24 WIZACO SA REVIEW 53, 53-76 (2009).

²⁰⁴ On the emphasis of hierarchy to Western thought, see Tink Tinker, *Why I do not Believe in a Creator*, in BUFFALO SHOUT, SALMON CRY 167, 69-171 (Steve Heinrichs ed., 2013).

²⁰⁵ For ramified analysis and definition of this concept, which relates to the multifariousness of European colonial domination of the Western Hemisphere, including its Indigenous peoples and epistemologies, see generally Anibal Quijano & Michael Ennis, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533 (2000).

²⁰⁶ See Tinker, *supra* note 204, at 177.

corpus of international law on Indigenous peoples has articulated a new system of education governance that, answering the legacy of colonialism, uses the language of human rights to locate an empowered Indigenous nation and individual within a context of historical subordination. The substance is preeminently anti-colonial: its rights are pronounced not abstractly, but rather in the bitter experience of a history of state practice which has meant generations of programmatic human rights abuses. It can be in this way be compared to the Human Rights Charter, which was issued in reaction to the events of the Second World War. And so, it is a catalog of rights that is also a condemnation of injustices that while not be named and footnoted, are to be inferred. The prologue of the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP) insists that families and communities have rights to the education of Indigenous children, subject only to the rights of the child.²⁰⁷ Article fourteen of the UNDRIP sets forth an articulated right of education that considers internal and state practices.²⁰⁸ It first specifies that Indigenous peoples have rights to “establish” and have “control” over their own educational systems, adding that this perforce includes the authority to shape curriculums to match language and cultural needs.²⁰⁹ Next, it speaks of not collective rights but individual rights, stipulating that the Indigenous individual is to be provided a right to access all forms of available state education free of discrimination. Lastly, it imposes an obligation on states “to take effective measures” to ensure that the Indigenous individual has access to a culturally appropriate education (including language instruction) regardless of domicile, with the conditionality that only “when possible.”²¹⁰ These are rights that while sui generis, are to be referenced to others. In this, the Rights of the Child, provides a baseline to ensures that self-determination is shaped by and in dialogue with human rights requirements.²¹¹ The UN bureaucracy has made efforts to implement and further define the content of UNDRIP, for example, the designation of 2019 as the International Year of Indigenous Languages.²¹² The Permanent Forum has called on states to provide funding for Indigenous controlled educational programs beginning with the primary school level.²¹³

The international human rights system created a framework that recalls the current iteration of the trust-relationship as it exists in the Indian Education context. Significantly, the UNDIRP in calling for respect for Indigenous rights does not demand state abnegation; in fact, the UNDRIP commits to explaining the affirmative responsibilities of the state to the Indigenous

²⁰⁷ See G.A. Res. 61/295, U.N. Doc. A/RES/61/295, *United Nations Declaration on the Rights of Indigenous Peoples* (Sept. 13, 2007) [hereinafter UNDRIP].

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² G.A. Res. 71/178, para. 13, A/RES/71/178, *Rights of indigenous peoples* (Dec. 19, 2016). See also G.A. Res. 74/135, para. 24, U.N. Doc. A/RES/74/135, *Rights of indigenous peoples* (Dec. 18, 2019) (By vote of the General Assembly, the period 2022-2032 has been proclaimed the International Decade of Indigenous Languages).

²¹³ U.N. Permanent F. on Indigenous Issues, Rep. on the Eighteenth Session, para. 109, E/2019/43-E/C.19/2019/10, *Permanent Forum on Indigenous Issues* (2019).

peoples within its borders. Emphasis is given to correcting past injustices, but only through the outline of a new political project that locates the governments and yokes Indigenous peoples arising from settler colonialism to a new model of Indigenous self-determination. These are all descriptions of the federal tribal trust relationship as well. This article posits that it holds the key to success in the education governance paradigm as well, for communities across the United States.

IV. SETTING THE STAGE: AT-RISK POPULATIONS CONTINUE TO STRUGGLE EVEN UNDER THE ESSA

Today, school governance across America represents a consistent tussle between federal, state, district, and local control. Certainly, the federal role in education has given way to state discretion since moving from the NCLB towards the ESSA in 2015.²¹⁴ The excessive federal standardization of learning under NCLB, after all, did great damage to vulnerable communities across the nation—not just in the Indigenous context.²¹⁵ The ESSA had (and has) two principal objectives in mind: to push states, as the primary decision-makers, to align their own programs towards the goal of creating educational equity and opportunity, and to extend the federal government’s focus, by way of the states, on providing resources specifically to vulnerable populations.²¹⁶ As others have propounded, however, the ESSA’s bold objectives may not necessarily be realized today.

Professor Derek Black of the University of South Carolina, in his 2017 assail of the ESSA, noted that a chief problem with the act is that there are few new accountability measures for newly empowered state governments: there are *no* real equity provisions, no demands for specific student achievement, and no enforcement mechanism to ensure that states equitably treats the diverse educational needs across districts.²¹⁷ The NCLB had these measures in place in the form of testing metrics, but now one is simply urged to *trust* the states, endowed with great flexibility and discretion, in its use of federal and state funds in the project of education.²¹⁸ The thinking, indeed, is that “control over substantive standards setting *and* the consequences for

²¹⁴ Derek Black, *Abandoning the Federal Role in Education*, 105 CAL. L. REV. 1309, 1311-12 (2017).

²¹⁵ See generally Sean Reardon et al., *Left Behind? The Effect of No Child Left Behind on Academic Achievement Gaps*, STAN. INST. OF EDUC. SCI. (2013).

²¹⁶ Michelle D. Young et al., *The Every Student Succeeds Act: Strengthening the Focus on Educational Leadership*, 53 EDUC. ADMIN. Q. 705, 706 (2017).

²¹⁷ Gary Orfield, *A Great Federal Retreat: The 2015 Every Student Succeeds Act*, 3 EDUC. L. & POL’Y REV. 273, 284 (2016) (“The result was a legislative process in which all consideration came down not to a great debate in the House and Senate, but instead a ‘take it or leave it’ proposition that was enacted within days.”); see also Black, *supra* note 214, at 1312.

²¹⁸ Black, *supra* note 214, at 1313 (emphasis added) (Of course, states must still provide reports and plans to the federal government, but, for reasons we will discuss, this doesn’t mean very much in the way of ensuring equity or accountability).

states that fail to achieve their own self-defined achievement goals” will allow for more nuanced approaches to the diverse educational needs of the states’ communities.²¹⁹

This, of course, is cause for concern. The ESSA’s new paradigm is toothless when it comes to ensuring *any* changes are made by states; they *might* creatively innovate and experiment with assessments or flounder in doing nothing.²²⁰ And, sadly, the facts favor the latter. Consider, for instance, that thirty-one states have reduced education funding since 2008,²²¹ or that—given state ability to control measurements and information in their “comprehensive reports”—we receive less information than before about schools in desperate need of salvaging.²²² This should be unsurprising; as to the notion of *trusting* the states, Professor Black poignantly reminds us, “as a matter of history [from de-segregation to disproportionate school funding], state educational power poses a threat to equality and, by extension, to adequacy.”²²³ Black argues that those who are hurt by state control without accountability are underprivileged students and underperforming schools.²²⁴

Now, at first glance, one might point to two distinct ESSA innovations that counsel in favor of the notion that the Act does indeed address the needs of our most vulnerable schooling

²¹⁹ Michelle Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1873 (2021) (emphasis added).

²²⁰ *Id.* at 1872-1873 (“In comparison to NCLB, ESSA affords states far greater latitude in annual test results’ deployment. Under ESSA states are now free to dilute yearly testing results’ weight when it comes to annual school, district, and teacher performance. That is, ESSA largely *relieves* states and districts from the federal consequences that flow from inadequate yearly student academic progress. In its place, ESSA imposes potential federal sanctions and requires states to intervene in only a discrete, small subset of schools: those in the bottom five percent of a state and those high schools with graduation rates below sixty-seven percent. Nesting standards-setting and accountability mechanisms in federal authority under NCLB was among NCLB’s hallmarks. ESSA, in contrast, affords states greater autonomy, both in terms of control over substantive standards setting *and* the consequences for states that fail to achieve their own self-defined achievement goals.”); Anna J. Egalite et. al., *Will Decentralization Affect Education Inequity? The Every Student Succeeds Act*, 53 Educ. Admin. Q. 757, 766-772 (2017).

²²¹ Black, *supra* note 214, at 1314; Kenneth Wong, *Commentary: Towards Systemic Reform in Urban School Districts*, in THINKING AND ACTING SYSTEMICALLY: IMPROVING SCHOOL DISTRICTS UNDER PRESSURE 221, 221 (Alan J. Daly & Kara s. Finnigan eds., 2016).

²²² Carolyn Phenicie, *Turning Four This Month, the Every Student Succeeds Act is Hailed as a Victory for State Control of Education Policy. And, Critics say, That’s Part of the Problem*, THE 74 (Dec. 9, 2019), available at <https://www.the74million.org/article/turning-four-this-month-the-every-student-succeeds-act-is-hailed-as-a-victory-for-state-control-of-education-policy-and-critics-say-thats-part-of-the-problem/> (“What we’re seeing in practice is there are lots of places where we aren’t identifying, [and] we don’t have enough information about the interventions or the outcomes that we’re getting, even when those schools are identified,” said Wallin, who helped develop ESSA accountability and school improvement rules at the Education Department during the Obama administration).

²²³ Black, *supra* note 214, at 1342.

²²⁴ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 § 1005; *see also* discussion *supra* Section III.A. for an example of this as it relates to the Akwesasne Mohawk.

communities.²²⁵ The first is a funding argument; the ESSA “emphasizes funding for the lowest performing schools and is more focused on how well subgroups of students, such as low-income or Hispanic youth, perform.”²²⁶ In 2020, \$16.2 billion in ESSA Title I funding was set to close the achievement gap for the lowest performing five percent of at-risk schools.²²⁷ The second argument lies in *how* that funding is applied. Low-performing schools and student populations are set to be identified by Local Educational Agencies (LEAs) through “needs assessments.”²²⁸ LEAs, being visible, on-the-ground reporters, are in the unique position to work with important stakeholders in schools—students, social workers, teachers, community-members—to suggest goals and provide insights to the states concerning different community issues.²²⁹ Their “needs assessments” are evidence-based, focusing on a myriad of factors affecting a given school and offer full information to the state for its funding decision-making, endeavoring to allocate resources in ways that are “well-informed, evolve over-time, and respond to localized needs and problems.”²³⁰ Yet, as we have seen in the case of Indigenous education history, *theory* differs from *practice*.

Undoubtedly, the LEA is an important, creative, and functional concept.²³¹ However, the LEA’s capacity as a catalyst for systemic change is greatly limited under the current contours of the ESSA. The state is at liberty to interpret, implement, announce, or disregard any LEA in a markedly unchecked way.²³² The “vast flexibility and discretion”²³³ that the ESSA affords states in determining how best to address the needs of its schools opens the floodgates for political influence to cloud funding decisions, cultivate a culture of favoritism, and enable state departments of education to disclose only those parts of the needs assessments that favor their decisions.²³⁴ Consequently, LEAs and school leadership have little power in the governance and

²²⁵ *The Every Student Succeeds Act Creates Opportunities to Improve Health and Education at Low-Performing Schools*, PEW 1, 5 (Aug, 29, 2017) available at https://www.pewtrusts.org/-/media/assets/2017/08/hip_the_every_student_succeeds_act_creates_opportunities_to_improve_health_and_education_at_low_performing_schools.pdf (last visited Nov. 18 2022)

²²⁶ *Id.*

²²⁷ *Id.* at 6.

²²⁸ *Id.*

²²⁹ *Id.* at 5. (Such issues might include gaps in teacher quality unique to schools, curricula, house instability, students’ food issues and more).

²³⁰ Derek Black, *Abandoning the Federal Role in Education*, 105 CAL. L. REV. 1309, 1312 (2017).

²³¹ See, e.g., *Tribal Consultation*, CA DEP’T OF EDUC., <https://www.cde.ca.gov/sp/ai/tc/>. (last visited Nov. 18 2022) (In the Indigenous contexts, LEAs do great work in coordinating with tribal leadership, developing consultative relationships, and facilitating exchanges between public schools and tribes as they relate to the education of indigenous students).

²³² Black, *supra* note 230, at 1312

²³³ *Id.*

²³⁴ Jeff Bryant, *Investigations Unearth Systemic Corruption in K-12 School Leadership- and Students and Teachers Lose Out*, THE PROGRESSIVE MAGAZINE, (NOV. 5 2019) <https://progressive.org/public-schools-advocate/investigations-corruption-school-leadership-byrant-191105/> (last visited Nov. 18 2022); Benjamin Superfine, *New Direction in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L. J. 653, 693 (2010) (noting that most education reform has been politically motivated rather than evidence based);

funding paradigm beyond their reporting role—and as a result, funding disparities perpetually persist.²³⁵ As an added wrinkle, the state is at the mercy of the federal government to fund programs, including those deemed necessary by LEA. “Should the federal government choose to eliminate funding, it is unlikely that states will be in a position to fund activities included in their state plan.”²³⁶ Commensurately, if the state fails to identify school-needs despite the express findings of an LEA, or federal or state funding fails to go to the aid of a problem, there is no recourse and key issues may fall to the wayside.²³⁷

Systemic inequality in school resource allocation is rampant. The government is out-of-touch with the needs of students. The current pandemic has exacerbated and shone new light on these latent issues in the current educational paradigm.²³⁸ Indisputably, school closures and online learning have interrupted normal education cycles; many students—disproportionately students of color—have been left behind. As of 2021, fifty-eight percent of white students attending schools were enrolled in fulltime in-person instruction, but only thirty-six percent of Black students and thirty-five percent of Latinx students in schools were similarly positioned.²³⁹ Even more harrowing, nearly a third of teachers in schools with Black majority populations report that their students lacked the technology necessary to take part in virtual instruction through the pandemic.²⁴⁰ States were aware of these gross resource-related issues, of the fact that inner-city public schools generally have huge infrastructural issues, and that these students disproportionately suffer from health issues, homelessness issues, and food issues.²⁴¹ Yet, little is *actually* done to rectify the situation.

At the present moment, even the return to in-person schooling is fraught with contention. Employing “language of feasibility,” state policies ask for quicker and faster returns that might

FairTest, *Failing Our Children Calls for NCLB Alternative*, FAIRTEST, (Nov. 2 2007) <http://www.fairtest.org/failing-ourchildren-calls-nclb-alternative> [<https://perma.cc/FSA8-G4ZQ>] (last visited Nov. 18 2022) (finding “educational quality and equity have been damaged because of the law’s incorrect assumptions and arbitrary requirements”).

²³⁵ *Education in a Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> (last visited Nov. 18 2022). (In 2018, for example, students of color, especially those from Black, Hispanic/Latinx, and Native American families, typically attended schools in districts that received nearly thirteen percent less in state and local funding per student than schools in districts serving the fewest students of color.); *see also infra* Section III.A. for an example of funding disparities and their impact in the context of the Mohawk.

²³⁶ Michelle D. Young, *The Every Student Succeeds Act: Strengthening the Focus on Educational Leadership*, 53 EDUC. ADMIN. Q. 705, 721 (2017).

²³⁷ *Id.*

²³⁸ *National Ctr. for Educ. Statistics Monthly School Survey Dashboard*, U.S. DEP’T OF EDUC., <https://ies.ed.gov/schoolsurvey/> (last visited Nov. 18, 2022).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

cause a “wave of preventable death determined in large part by race and class.”²⁴² Importantly, “for people of color and low-income families, feasibility is a specter of safety, used by the state to shrug off accountability.”²⁴³ Even in the era of state-control, government is poorly positioned to address – or worse, willfully ignorant of – the disparate needs of different, diverse vulnerable schooling communities.

This realization extends beyond the pandemic, as well. Filed in March 2021, the case *Integrate NYC v. the State of New York* rests on claims by students and advocates calling out the “caste system” in education perpetuated by government oversight.²⁴⁴ Plaintiffs contend that New York City public schools are segregated, that testing is unfair and perpetuates inequality, and that the resulting system “is one of a caste: an artificial, graded ‘ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of,’ in the United States, race.”²⁴⁵ Among the many issues regarding systemic inequality in schooling under the City and State conservatorship, one major and important matter being disputed is the Eurocentric curriculum:

Students of color are taught a curriculum in which civilization is equated with whiteness, and coursework is dominated by white authors and Eurocentric portrayals of history. Teachers who seek instead to deliver a racially equitable education receive little to no support or guidance from the City and State; must design their own curriculum or even expend their own resources to purchase culturally responsive learning materials; and are evaluated narrowly by their students’ performance on culturally destructive standardized Tests.²⁴⁶

This has been done, “notwithstanding expert consensus and [both the State’s and City’s] own pronouncements²⁴⁷—made without any corresponding system of accountability – regarding the

²⁴² Valerie Strauss, *The Racist Effects of School Reopening During the Pandemic- by a Teacher*, THE WASHINGTON POST, (July 23, 2020), <https://www.washingtonpost.com/education/2020/07/23/racist-effects-school-reopening-during-pandemic-by-teacher/>.

²⁴³ *Id.*

²⁴⁴ Complaint, 7 (N.Y. App. Div. filed March 9, 2021).; *see also* Hyeyoon (Alyssa) Choi, *What to Know About Suit Challenging Alleged ‘Racist’ Education System in NYC*, ABC NEWS, (Sept. 9, 2021), <https://abcnews.go.com/US/suit-challenging-alleged-racist-education-system-nyc/story?id=79410312>.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 9.

²⁴⁷ *Id.* at 103 (The State’s “Culturally Responsive-Sustaining Education Framework recommends that ‘Education Department Policymakers’ align existing state standards to [culturally responsive-sustaining education] guidelines” and “create high-quality resources that allow teachers . . . to plan and implement culturally responsive sustaining practices in their respective communities.” The framework calls upon leaders to “adopt curriculum that includes culturally authentic learning experiences” and “highlights [the] contributions” of diverse communities. But the State has adopted no accountability system to accompany its Framework, and, unsurprisingly, its prescriptions have gone unimplemented”).

pedagogical need for a culturally responsive curriculum.”²⁴⁸ In other words, the State and City are saying they are working towards righting wrongs, but the reality is far different. Recalling the indigenous education context, one plainly sees the echoes of assimilative practice, the perpetuation of otherness implicit in the system, and the blatant call for a more culturally-responsive curriculum.²⁴⁹ What is missing, however, is a public-school governance paradigm—as has been forged over time in the indigenous education context—that commensurately supports the project of self-determination and empowerment necessary to further community cohesion.

V. LEARNING FROM THE INDIGENOUS MODEL: GOVERNMENTS SHOULD FOLLOW THE SCHOOL’S LEAD AND NOT THE OTHER WAY AROUND

We argue here that issues like the above directly result from an administrative model that vests *control* of the education project with the government—either federally, as seen with NCLB, or with the states under the ESSA—that is out-of-touch with the needs of the students and schools under their jurisdiction.²⁵⁰ Those measures within the ESSA, from LEAs to specific grants allocated for low-performing public schools, are toothless when they can be easily ignored. We join in the voices of others who emphasize that, unfortunately, the great result of

²⁴⁸ *Id.* at 104. I was taken by the plaintiffs’ description of the “failure of the State and City to prepare teachers to engage in culturally responsive instruction are manifested clearly in the context of teaching about slavery.” Consider the following:

In 2018, a white teacher at a predominantly Black high school in the Bronx instructed Black students to lay on the floor during a lesson about slavery, placing her foot on a student’s back and saying: “See how it feels to be a slave?” At one of the City’s specialized high schools, a teacher asked Black students to write the pros and cons of slavery on the board. In another history class at that high school, a teacher failed to comment when a student described slavery as “a necessary evil.” At an academically screened high school, a student who is Black described the pain she experienced as her teacher, while introducing a video of enslaved Africans shackled together and packed into a slave ship, blithely described it as a “really great depiction” of the triangular trade. The student was troubled by her teacher’s failure to acknowledge the racial trauma of slavery, but as the only Black student in her class, felt unable to speak out. Of course, this directly contravenes policy, but nevertheless it takes place; it is a testament to how out of touch states can be with the schools in their jurisdiction.

²⁴⁹ *Id.* at 104.

²⁵⁰ For examples of grants and procedure, see Egalite et. al., *Will Decentralization Affect Education Inequity? The Every Student Succeeds Act*, 53 EDUCATION ADMINISTRATION QUARTERLY 757, 765 (2017). (“Further bolstering support for low-performing students under ESSA, Title IV, Part A of ESSA authorizes \$1.65 billion for Student Support and Academic Enrichment Grants, which can be directed toward dropout prevention efforts. Funds can be used to provide well-rounded educational programming, such as music and the arts, as well as college and career readiness initiatives or they can be directed toward drug and violence prevention or mental health programs, depending on local priorities. Finally, schools in which more than 40% of the population are low-income students may be designated as a “school wide” Title I program. These schools will have greater flexibility over spending and will be permitted to commingle federal funds with state and local resources in order to develop comprehensive plans for ensuring all students meet state standards.”); *K-12 Education Federal Funding*, IMAGINE LEARNING, <https://www.edgenuity.com/resources/funding/> (last visited Dec. 9, 2022).

the current paradigm is the systemic disadvantaging of vulnerable student populations and failure to meet their educational resource needs. As it stands, and as the case of *Integrate NYC v. the State of New York* brings to light, education—for so many American children—is a continued tool of segregation, of disenfranchisement and, in a way, perpetual *coloniality*.²⁵¹ If a grander vision of education involves cultivating a culture of community through learning, of creating opportunities and safe havens for students, the current paradigm—run by a far-distant constituency (the government) who could not understand the lived experiences of these at-risk populations—fails entirely.

The history of Indigenous education *is* a story of the Euro-American government coopting “the school” as a tool for cultural absorption rather than empowerment; stories of a school system built on the notion that their tribal history—one spanning back thousands of years—was not just fanciful, but antithetical to the mission of “the school” to eradicate this history, the memory of it, and youth connections to it. And while the lived histories of underprivileged populations outside of indigenous communities differ in background, the urgent need to use the project of education to empower both groups and allow their communities to grow reigns harmonious.

The current Indigenous education model, forged on principles of sovereignty, self-determination,²⁵² and community-orientation, built to sustain and grow diverse tribal communities, should be a model for education across schools. In other words, *districts, schools, and the communities associated with them—uniquely poised to understand the needs of their students—should be the decision-makers concerning education, not the government, whether state or federal, which is very clearly out-of-touch.*

Our proposal is one of *direct partnership*, where schools can solicit funds directly from the government and funds are sent directly to schools based on clearer expressions of need rather than problematic metrics, where an individual school’s student demography and community context are considered on case-by-case bases rather than through problematic funding measures that shroud inequity.²⁵³

²⁵¹ Complaint, 89 (N.Y. App. Div. filed March 9, 2021). (In the context of New York City public schools, plaintiffs in the case explain: “[public schools] teach us American history from a perspective that disempowers students of color. Notwithstanding the State’s admonition that curriculum should be empowering, students across the City report that their classes’ treatment of Black history is . . . ‘always depressing,’ because there was never any discussion of Black accomplishments”).

²⁵² Again, we note that the use of this terminology is not meant to diminish the status of self-determination as a legal concept under international law specifically applied to Indigenous Americans in order to protect their rights to self-government.

²⁵³ See e.g., *Transforming School Funding for Equity, Transparency, and Flexibility: An Introduction to Student-Based Budgeting*, EDUCATION RESOURCE STRATEGIES, (Sept. 2018), <https://files.eric.ed.gov/fulltext/ED603206.pdf>. (The question of transparent funding and suggestions for shifting the process to be more school and student focus has been tackled from other perspectives).

Think back, for instance, to the Akwesasne Mohawk and their story of building a new model of Indian education amidst hindering governmental interference. We are impressed by the strength of the communal response to what was a generation subject to governmental neglect or programmatic genocide—and for some, it is clear that the state of New York is an impediment to not only their own rights to self-government, education of their children, and community health—be they articulated in international or domestic law— but that they also contravene the federal-trust relationship and new era of Federal Indian Law premised on respect for self-determination. Instead, Indian education is being frustrated by a tribal-state relationship that perpetuates racial and socioeconomic injustice in education.

The Akwesasne Freedom School story is an example of community control of education that has reinvigorated a response. It represents a resounding accomplishment of Indigenous educators and families who have embodied a commitment to build a learning environment that can teach to the specific cultural needs of their children. Through nongovernmental action, they have strengthened cultural sovereignty and reestablished links to the worldview of their ancestors through the teaching of Indigenous language. The school offers an example of Indian education which centered the agency of the Indigenous communal subject. And it has accomplished all this in direct response to—and in spite of—ongoing discrimination from the State of New York.

Certainly, the Akwesasne Freedom School closely relates to what we argue school administration in the United States should look like, and, indeed, the policy for this comparison is also ever-present. Native Americans are outliers in the state public school system, but so too are other historically marginalized groups. For Indigenous peoples, this can be referred to the practices and legal history that reaches from the time of Non-Intercourse Acts to the *Oneida Nation*²⁵⁴ cases of the 1990s; for minority communities, the theme of racist white populism in state politics can be traced to the origins of an American Republic that tolerated and admitted into union “slave states,” and paradigmatically to Jim Crow and the legislation of racism that was the patrimony of Southern segregationist. What we see in the New York state education system today is performative racism.²⁵⁵ Discrimination here holds back a generation of children belonging to underprivileged groups, Indigenous and non-Indigenous. Locating educational prerogatives and funding needs in a federal-community relationship offers a framework to address existing inequalities, and propose a way forward that, in reimagining new nodes of

²⁵⁴ 544 U.S. 997 (2005); see also *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005).

²⁵⁵ The accusation of racism against the State of New York for its educational policies is one that tribal members have made. See Olivia Proia, *Superintendents: Inequities in Funding Repairs in Native Schools Versus Public Schools*, WKBW, (July 22, 2021), available at <https://www.wkbw.com/news/eye-on-education/superintendentsinequities-in-funding-repairs-in-native-schools-versus-public-schools> (“‘That’s not right. I know that’s a form of racism on their part [New York State] to say it’s complicated. It is not. A building is a building,’ Neil Patterson, a member of the Sand Turtle Clan of the Tuscarora Nation, said”).

educational sovereignty, is empowering to communities and their children and will deliver improvements in such statistics as *they* define as important.

With this in mind, and having established a firm comparative grounding in policy for our argument, we must now turn to a seemingly larger question: what is there to be done? We propose two ways that current schema can shift – without complete overhaul—to provide the more empowering form of education students like those in *Integrate NYC*²⁵⁶ need. Yet even before we do so, we note that this larger guiding principle of partnership has already manifested naturally in the context of the current ESSA paradigm in two different, important contexts. This shows that reform can be approached organically from the existing structure.

The DOE’s recent Elementary and Secondary School Emergency Relief Fund (“ESSERF”) landscape affords our first glimpse of a world where high-level, co-determinative community participation in funding allocation is prized and applied. The lynchpin ‘return to normalcy’ funding plan bypasses the state and affords districts and schools with great discretion in how to use millions in funds for a safe return to schools.²⁵⁷ Recipients must utilize funds in demonstrated, “meaningful” consultation with community stakeholders; students, tribes, civil rights organizations, teachers, and school leaders now have a say in the amount and use of *their* school’s funding.²⁵⁸ ESSRF money, in one sense, cultivates a space to empower vulnerable populations *directly in a way that allows them to help better their* failing schools; to trust in their own expertise rather than leave the practice of dispensing all-important resources to the distant school district and state which, all too often, have competing, inequitable priorities.

To satisfy ESSRF community input requirements, school districts got inventive. Boston Public Schools began roundtable discussions on how to use new funding; Boulder Valley, Colorado started online forums for parental outreach and suggestions on potential uses of new resources.²⁵⁹ All involved districts learned something from their “meaningful stakeholder consultation,” most notably Chicago Public Schools.²⁶⁰ Always caught in a web of multiple, oft

²⁵⁶ Complaint (N.Y. App. Div. filed March 9, 2021).

²⁵⁷ *U.S. Education Department Releases State Plan Template for the American Rescue Plan Elementary and Secondary School Emergency Relief Fund*, U.S. DEPARTMENT OF EDUCATION, (April 21, 2021), <https://www.ed.gov/news/press-releases/us-education-department-releases-state-plan-template-american-rescueplan-elementary-and-secondary-school-emergency-relief-fund> (noting that, as of August 2021, nearly \$81 billion has been allocated to the states for the purposes of “safely reopen[ing] schools, sustain[ing] their safe operations, and support[ing] students,” with another \$41 billion on the way).

²⁵⁸ *American Rescue Plan Elementary and Secondary School Emergency Relief Fund State Plan Requirements*, U.S. DEPARTMENT OF EDUCATION (May 6, 2021), <https://oese.ed.gov/files/2021/05/ARP-ESSER-Plan-Office-Hours-5.6.21.pdf>.

²⁵⁹ Alvin Makori et al., *Analysis: How 100 Large Urban Districts are Wrapping Family & Community Input into Plans for Spending Federal Emergency School Relief Funds*, THE 74, (August 2, 2021), <https://www.the74million.org/article/analysis-how-100-large-urban-districts-are-wrapping-family-community-input-into-plans-for-spending-federal-emergency-school-relief-funds/>.

²⁶⁰ *Id.*

competing, issues regarding its facilities, educational quality, and staff inventory, the district, after consulting with its student and family communities, decided it best to allocate 160 million dollars to the school heads themselves to deal with their own school's problems and priorities rather than be micro-managed by the district.²⁶¹ The allocation of these funds features a decentralized funding strategy that affords opportunities for schools to develop “systemic approaches for collecting community input” throughout the spending process.²⁶² Furthermore, Chicago joined twenty-one percent of all school districts in communicating plans to invest in long-term community engagement strategies that involve family and student input in the proper allocation of funds to address school-specific and student-specific issues.²⁶³

A second model based in the principles of school, district, and community self-determination has grown in California out of the LEA concept. In 2013, California passed the Local Control Funding Formula (“LCFF”), which decentralizes funding from the state to districts, redistributing important resources-based student populations and categorized student needs.²⁶⁴ As was the case with the ESSRF, the law requires a level of community engagement in district decision-making. Districts must involve parents, pupils, stakeholders, and other school community members in developing its “Local Control Accountability Plan,” which defines goals, objectives, needs, and programming plans to deal with its different student populations.²⁶⁵ Importantly, “the law dramatically changes the public inclusion provision of educational decision-making in California and moves local governance beyond representative democracy, in the form of school board elections, to include participatory engagement in goal setting and budgeting.”²⁶⁶ California has been a trailblazer in creating such a democratic and community-oriented initiative, and more states need to follow its lead.

The ESSRF and California's LCFF represent rare upshots within the larger ESSA paradigm, but they are rooted in an important idea that communities are resilient, they change *from within*, and the government occupies a solemn role as partner and supporter, rather than controller or conservator, of their growth. In thinking about structural reform on a national-scale, Indigenous education provides a sustainable model which should influence an already natural impulse to bettering our public education system.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Moving Forward Together*, CHICAGO PUBLIC SCHOOLS, <https://www.cps.edu/strategic-initiatives/moving-forward-together> (last visited Dec. 9, 2022). (This could manifest in many different ways. The Detroit Public School District, for instance, will be using new funds to hire outreach coordinators and host home visits. These, in turn, can empower individual advocacy for different funding opportunities and a new perspective on higher-level resource allocation to meet student needs).

²⁶⁴ Julie A. Marsh & Michelle Hall, *Challenges and Choices: A Multidistrict Analysis of Statewide Mandated Democratic Engagement*, 55 AMERICAN EDUCATIONAL RESEARCH JOURNAL 243-44 (2018) (such examples of categories include English language learner, low income, and foster youth).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 244.

Tribal education looks to government for resources rather than direct administration and flexibility in leadership rather than hardline education policies issued from far-off offices. This is borne out of the realization that federal policies *will always be out of touch* with community needs, easily discounting systemic disadvantages to Indigenous people—the fact of their diverse differences from tribe-to-tribe— that only those *within* these communities truly appreciate. Indeed, the Mississippi Choctaw are a prime example of this; they have been able to make use of a collaboration with the federal government that allows them access to resources from which they can construct their vision of self-government.²⁶⁷ The tribe has surmounted the paradox that is implied in Federal Indian Law between Native sovereignty and the trust relationship.²⁶⁸ Indigenous peoples had claimed that the implementation of both were essential to a future of mutuality of interest.²⁶⁹ Perhaps better than all other Native nations, this group was (and is) able to find balance and use constructively this dyad; in the process they decolonized the trust relationship, enlisting the federal government as an institutional partner in building up the infrastructure of economic and political power.²⁷⁰ Self-determination was revealed to be a concrete, attainable goal, where progress was measurable and could be made with, and not despite, federal involvement. Such contributions in the form of grants had helped make the “Choctaw Miracle” happen.²⁷¹ It is a story that attests to the power of even the most historically marginalized community to become through constructive partnership with the federal government exemplary of socio-economic advance.²⁷² And other tribes can be said to have done the same.

And it is a model that should be learned from and applied elsewhere. Vulnerable student populations across the country would benefit from taking heed of the Mississippi Choctaw

²⁶⁷ For example, the tribe was able to recently take advantage of federal grant to construct a career training center within reservation borders. See Sara DiNatale, *Choctaw Tribe Receives \$5.8 million Grant to Fund New Job Training Center*, *MISSISSIPPI TODAY*, (Sept. 14, 2022), available at

<https://mississippitoday.org/2022/09/14/choctaw-tribe-receives-5-8-million-grant-to-fund-new-job-training-center/>
²⁶⁸ See DAVID HURST THOMAS ET AL., *THE NATIVE AMERICANS: AN ILLUSTRATED HISTORY*, 449 (1993). (Treaty provisions have long been interpreted as establishing a trust relationship between the government and tribes, a relationship that casts tribes and individuals as wards in relation to a government guardian. Among the responsibilities assigned to the guardian and exchanged for concessions of land were those of education and protection from hostile Americans. But, in an apparent contradiction, treaties and legal interpretations also establish tribes as ‘domestic dependent nations,’ sovereign entities in their own right”).

²⁶⁹ See *Id.* at 450 (“During the 1980s, Indian people continued a long-standing attack on the either-or approach Americans traditionally took when confronted by these apparent contradictions. First of all, they argued, the nature of the tribal-federal relationship could not be defined by only one of the parties. If the United States really wished to solve its ‘Indian problem,’ then both Indians and non-Indians would have to be involved in equal measure in developing).

²⁷⁰ See Katherine Osburn, *CHOCTAW RESURGENCE IN MISSISSIPPI: RACE, CLASS, AND NATION BUILDING IN THE JIM CROW SOUTH*, 105 (2014).

²⁷¹ *Id.*

²⁷² See Fergus M. Bordewich, *KILLING THE WHITE MAN’S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY* 342 (1997). (“The Choctaw experience has made clear that even the least well-endowed tribes, with able and determined tribal leadership, a pragmatic willingness to cooperate with non-Indians, federal support, and the ability to raise capital, can at least in theory remake themselves into viable communities able to compete in the modern American economy”).

example, or generally the policies that are hallmark of Federal Indian Law. These groups are diverse in nature, defined by race or ethnicity or by sex or gender and include other such groups as foster youth; English language learners; youth who are lesbian, bisexual, gay, transgender, or questioning; disconnected youth; families that are homeless or in transition; and youth at risk for sexual exploitation.²⁷³ They live in the inner city and rural settings, and have different learning and social needs.²⁷⁴ The structure of our system ought to amplify and support this diversity through self-empowerment in schooling—deferring to those who know these communities best.

We offer two very cursory suggestions for how the existing paradigm might be shifted, borrowing off an education system that has learned both principles early-on given their assorted histories. The details of these proposals are best left to policy experts, but they are suggested here as a gesture of potential ideas moving forward.

The first is simple: increasingly favor grant-based funding to specific schools based on need—as is the case under the EAA in the indigenous context—that target school-specific problems and helps address community-specific concerns. This would *replace* the varying state school finance formulas that disregard the nuanced needs of different communities, and supplement, with a view to promoting equality and economic empowerment, general funding from taxes that themselves could also be equitably redesigned and distributed.²⁷⁵ Grants like the ESSRF that go straight to the districts or, in the indigenous context, the ISEGP that goes straight to the schools, are excellent examples of local empowerment mechanisms that place student-needs as primary consideration points for funding. The policy should be to allow schools to let the state and federal government know what they need, whether in terms of technology, staffing, infrastructure, or anything else. As is the case with TEDs in the tribal context, empower existing LEAs on the district-level with similar power to ensure uniformity in rigor of curricula, develop and administer special programs, track student data, set academic standards and curricula, and create policy, and allocate funds to schools for which they better understand.

Secondly, borrowing from the Indigenous model necessitates re-looking at state departments of education themselves. Under the ESSA, these agencies consolidated responsibility and stewardship that has naturally resulted in inequitable treatment of schools under their jurisdiction—their guiding principles ought to be scrutinized. In 1978, the EAA proffered a mission statement for the BIE to cultivate an active “government to government” relationship as pertaining to building up the tribal schooling project.²⁷⁶ The BIE could cultivate

²⁷³ *Serving Vulnerable and At-Risk Populations*, NATIONAL CENTER FOR HEALTHY SAFE CHILDREN, <https://healthysafechildren.org/topics/serving-vulnerable-and-risk-populations> (last visited Dec. 9, 2022).

²⁷⁴ *Id.*

²⁷⁵ For larger discussion on the problems with generic formulas, see Linda Darling-Hammond, *America’s School Funding Struggle: How We’re Robbing Our Future By Under-Investing In Our Children*, FORBES, (August 5, 2019),

<https://www.forbes.com/sites/lindadarlinghammond/2019/08/05/americas-school-funding-struggle-how-were-robbing-our-future-by-under-investing-in-our-children/?sh=a808aea5eafa>.

²⁷⁶ See *infra* Section IIA for discussion of EAA.

standards for education, but the schools reserved the right to revise “inappropriate” or “ill-conceived” standards as they relate to the specific needs of their communities;²⁷⁷ the BIE was to “facilitate Indian control of Indian affairs in all matters relating to education.”²⁷⁸ So, too, should this be the case for public schools. State departments of education ought to follow, as their guiding principle, the notion that they are a part of a consultative government to government (or, rather, government-to-school) relationship built on fortifying communities. Substantively, they provide foundations for basic curricular requirements; procedurally, they communicate with districts concerning reporting. Their role in funding, however, ought to be relegated to a supportive role to schools, communities, and districts—the new sovereignties.

Yes, these solutions are imperfect. Centrally, however, they should serve as a call for the education project to refocus on important principles of self-determination. They beg the government to acknowledge the diversity of the student communities in schools across the nation, and ask for a novel, textured governance approach through decentralization and school-specific governance. The story of Indigenous education, and the model of administration that it has produced, helps push this principle— one that is increasingly and urgently demanded by students across the nation. Importantly, only a dynamic bureaucracy that can work *as partner* rather than *conservator*, one that acknowledges the expertise of schools and communities in the management of the education of *their* children, can help facilitate an equitable public school educational schema. In so doing, the government acknowledges that these vulnerable populations are resilient, capable of self-strengthening and growing cohesively if only afforded resources.

VI. CONCLUSION

Indian identity is even stronger today than it was 100 years ago,²⁷⁹ and while the government has a role in assuring this continues, it is the tribes who are responsible for nation-building, economic strengthening, and building up schools.²⁸⁰ Today, the government is urged consistently to follow the lead of tribes in this important undertaking.²⁸¹ In this way, Indian education has gone from a tool of assimilation to one of empowerment. A government-to-government partnership model promising shared responsibility for educating children, increasing

²⁷⁷ Compare 25 U.S.C. § 2011(a) and 25 C.F.R. § 32.5.

²⁷⁸ *Id.*

²⁷⁹ Deyhle & Swisher, *supra* note 4, at 116.

²⁸⁰ Seelau, *supra* note 7, at 63.

²⁸¹ *Executive Order on the White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Native Americans and Strengthening Tribal Colleges and Universities*, WHITE HOUSE, (Oct. 11, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/11/executive-order-on-the-white-house-initiative-on-advancing-educational-equity-excellence-and-economic-opportunity-for-native-americans-and-strengthening-tribal-colleges-and-universities/>

community control are the tools for nation-building.²⁸² Schools, in the grand project of education, ought to be treated as sovereigns universally. Principles of self-determination are universal, and schools—rather than state or federal departments of education—are in the best position to understand how to effectuate change that *really* impacts their students in a positive way. A history of trial and error, of mistreatment and mishandling – and, in recent decades, of trying to do the right thing—has made Indigenous education a resource to inspire a changed perspective in the public-school paradigm.

Today, vulnerable populations are side-stepped within cloudy state funding schemas even after being saved from draconian federal standardization practices under the NCLB. They ought to be provided the resources to cultivate an approach to education that is unique to the demands of their community and that empower them amidst their varying, diverse contexts.

Of course, this solution—while stressing an important aspect of the larger issue of ‘educational disenfranchisement’—fails to address the underlying systemic issue of persistent segregation in schooling. This must be approached differently, but in an equally nuanced way. Here, we have endeavored to bridge a link between two important governance paradigms in the hopes of arguing for a less assimilative, problematized structure. For those that tackle the large issues that pervade our social discourse today, we humbly submit this reformative look as a tool in a growing toolbox for social change.

²⁸² Seelau, *supra* note 7, at 271.