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Student Note

THE MINER'S CANARY: TRIBAL CONTROL OF AMERICAN INDIAN EDUCATION AND THE FIRST AMENDMENT

I. Introduction

Since the arrival of Columbus 500 years ago, Native Americans have endured massacres and intolerance, racism and rapacity, altruism and benign neglect. Federal policy originally favored the repression of Indian religious practices because religion was an indivisible part of the native cultures that the American government sought to stamp out through forced assimilation.[1] One legacy of America's mistreatment of its indigenous peoples has been an educational policy that has run roughshod over Native American Free Exercise rights.[2]

Today, American Indian tribes widely seek increased control over the education of their children.[3] This position has received broad congressional and presidential support since the Nixon Administration[4] when the Special Senate Subcommittee on Indian Education recommended that the United States set as a national goal the achievement of "maximum Indian participation in the development of exemplary educational programs" for the following: "(a) Federal Indian Schools; (b) public schools with Indian populations; and (c) model schools to meet both social and educational goals . . . ."[5] More than twenty years later, Native Americans are still fighting to attain these goals. Federal statistics that rank American Indians as our least educated, most addicted, shortest-lived citizens[6] suggest tre-

1. VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 232 (1983 ed.) [hereinafter DELORIA & LYTLE]; *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 242-43 (1982) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

2. Likening Native Americans to the canaries once carried by miners to detect poison gas, Felix S. Cohen characterized the Indians as a litmus test for the political health of America as a whole on the issue of civil rights. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953) [hereinafter *Erosion of Indian Rights*].

3. M. S. Mason, *Rebuilding the Indian Nations*, CHRISTIAN SCI. MONITOR, Aug. 21, 1990, at 14-15 [hereinafter Mason]; *see also* REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, vol. 1, Executive Summary 60 (1991) [hereinafter NYS JUDICIAL COMMISSION].

4. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 363, 91st Cong., 2d Sess. 6 (1970).

5. SPECIAL SUBCOMM. ON INDIAN EDUCATION, COMM. ON LABOR AND PUBLIC WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY — A NATIONAL CHALLENGE, S. REP. NO. 501, 91st Cong., 1st Sess. 106 (1969) [hereinafter A NATIONAL CHALLENGE].

6. Robert H. White, *Indians' New Harvest*, N.Y. TIMES, Nov. 22, 1990, at A27.

mendous room for improvement in Indian education. Because of the strong correlation between educational levels and general standards of living,[7] and the potential for education to preserve Indian culture, improvements in Indian education would have far ranging benefits to the living conditions of Indians in general.

Moreover, all three branches of the federal government have recognized the crucial role that increased control by Indian communities must play in the advancement of Indian education.[8] Although any group of citizens[9] could ostensibly make similar demands for improved government services, due to the unique historical relationship between the United States and its indigenous peoples, the Supreme Court has recognized that "a moral obligation of a high order rests on this country to provide for decent shelter, clothing, *education*, and industrial advancement of the Indian."[10] This moral obligation to Native Americans stemming from their unique history has set Indian education rights apart from those of other groups and has resulted in the explicit legal obligation to provide special educational services to Native Americans.[11]

This Note discusses some of the legal and practical considerations arising as Indian communities attempt to transform the rhetoric of "Indian control" into the reality of quality education. Part II of this Note traces the history of United States Indian education policy and the special status of Native Americans. Part III examines the paramount tribal interest in Indian children and the attendant First Amendment issues which lie at the heart of the Native American movement for self-determination in Indian education. Part IV lists potential strategies for the promotion of Indian educational control.

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7. Janet Naylor, *Four Fight for Favor in Fourth*, WASHINGTON TIMES, Feb. 24, 1992, at B1.

8. *See infra* notes 75-129 and accompanying text.

9. Native Americans first gained United States citizenship in 1924, Means v. Wilson, 522 F.2d 833, 839 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

10. Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 355 (1945), *reh'g denied*, 324 U.S. 890 (1945) (*emphasis added*) (although treaty with Shoshone created no legal obligation, government has high moral obligation to provide for health, education and advancement of Indians).

11. Prince v. Bd. of Educ., 88 N.M. 548, 556 (1975) (federal government and states have duty to provide for education and other services needed by Indians). Furthermore, the special guardianship of the federal government over Native Americans mandates that monies appropriated by Congress under the obligations of treaties with the Indians are treaty and trust monies which the Indians can lay claim to as a matter of right. A contract, for example, between the Commissioner of Indian Affairs and the Bureau of Catholic Indian Missions for the payment of such appropriations for the support of Indian Catholic schools, made at the request of the Indians, does not violate the Establishment Clause. Quick Bear v. Leupp, 210 U.S. 50 (1908).

This Note concludes that the key to Native American education success lies with the encouragement of parental involvement, and the establishment of state-tribal compacts and tribal education departments and codes. Moreover, this Note concludes that, despite some Free Exercise Clause decisions that unreasonably hold Indian First Amendment rights to a lower standard of protection than other religions, the First Amendment should not prevent increased Indian parental and tribal control of their children's education.

II. Background

A. An Historical Overview of U.S. Indian Education Policy

Education has been a critical weapon in the forced assimilation of American Indians since the founding of the colonies. Although the Constitution recognized the status of Indian tribes as sovereign governments,[12] Congress has often used its plenary powers over the Indians[13] to further their subjugation.[14] Historically flawed assumptions that only non-Indian educational systems were useful to Indian children and that tribes had nothing worthwhile to contribute to their children's education curtailed tribal and parental involvement in Indian education.[15] Early missionaries who assumed that America would be a "Christian" nation (specifically of their denomination) suffered immense hardships to proselytize the Indians.[16] The inclusion of education provisions in U.S.-Indian treaties from 1794 to 1889[17] illustrates the role of education in the "civilizing" of the Indians. Part of the consideration for these treaty promises of education was the cession by various tribes of almost one billion acres of land to the United States.[18] With the recognition of education as the responsi-

12. U.S. CONST. art. I., § 8, cl. 3.

13. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

14. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 139-141.

15. Melody L. McCoy, The Role of Tribal Governments in Education Policy: A Concept Paper 2-3 (unpublished manuscript prepared for the National Indian Policy Center, Oct. 15, 1991) (available from Native American Rights Fund). The author of this Note wishes especially to thank Ms. McCoy for her advice and support.

16. Andrew Guilford, *America's Frontier Missionaries*, CHRISTIAN SCI. MONITOR, Mar. 16, 1990, at 12.

17. *See, e.g.*, Treaty with the Oneida, Tuscarora, and Stockbridge Indians, Dec. 2, 1794, 7 Stat. 47, 48 (federal government undertook to "instruct some young men of the three nations in the arts of the miller and the sawer"); Treaty with the Sioux Indians in Dakota, Mar. 2, 1889, 25 Stat. 888, 894 (education provision of 1868 treaty effective for 20 years). For a discussion of why treaty-making with the Indian nations was abolished in favor of legislation, *see* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 105-107.

18. This cession of land secured treaty obligations that, along with the historically brutal treatment of Native Americans by whites, has led to the official recognition that

bility of public institutions, beginning in the 1880s, government boarding schools largely replaced sectarian schools.[19] By the turn of the twentieth century, the Bureau of Indian Affairs ("BIA") had developed an extensive network of off-reservation boarding schools[20] designed to inculcate Indian children with the values of Western civilization and to eliminate any traces of the children's native heritage.[21] Until the 1930s, the BIA took an essentially paternalistic approach to Indian education — viewing schools and particularly boarding schools as mechanisms for "civilizing" and "Christianizing."[22] There are many expressions during this period to the effect that the BIA based its educational policy on the assumed inferiority of Indians in terms of religion, morals, and home life.[23] In 1889 the Commissioner of Indian Affairs demonstrated this attitude with a statement of official policy that the American Indian was "to become the Indian American."[24] Many Indian children in this era were kidnapped from their camps or villages and taken to federal boarding schools where their hair was cut, their clothing was burned and often students had their mouths washed out with lye for speaking their native languages.[25]

The late 1920s and early 1930s marked a dramatic departure from many of the assimilationist policies of the previous era. In what the Senate would later describe as "probably the most significant investigation ever conducted in the field of Indian affairs,"[26] the Meriam Report of 1928[27] recognized the abject state of Indian education under the federal boarding school system. The Meriam Report was devastating in its criticism of two major areas that constituted the most serious deficiencies in Indian administration: "the exclusion of

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America has an obligation to provide its indigenous peoples with effective education. A NATIONAL CHALLENGE 181, *supra* note 5.

19. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 140.

20. Sally J. McBeth, *The Primer and the Hoe*, NAT. HIST., Aug. 1984, at 4, 6.

21. Referring to the federal policy that "the Indian must conform to the white man's ways, peaceably if they will, forcibly if they must," in 1889, the Commissioner of Indian Affairs declared that the government's primary duty was "to prepare the rising generations of Indians for the new order of things thus forced upon them." Red Lake Band v. United States, 17 Cl. Ct. 362, 452 (1989). Thus, education became an invaluable tool in the government's attempt to destroy "tribal relations." *Id.* at 452.

22. *Id.*

23. *Id.*

24. COMM'R INDIAN AFFAIRS ANNOTATED REP., H.R. EXEC. DOC. NO. 1, 52d Cong., 2d Sess. 6 (1890).

25. McBeth, *supra* note 20, at 4-11.

26. A NATIONAL CHALLENGE, *supra* note 5, at 153.

27. Institute for Government Research, *The Problem of Indian Administration* (L. Meriam ed. 1928) [hereinafter MERIAM REPORT].

Indians from the management of their own affairs, and the poor quality of services (especially health and education) rendered by public officials not responsible to the Indian people they serve."[28] Criticisms included overcrowded dormitories, deficient diets, inadequate medical facilities, and a daily schedule of work and study that was overly demanding.[29] The curriculum was called unrealistic and classroom instruction techniques were found ineffective.[30]

In the wake of the federal government's acknowledgement of its dismal record in Indian education,[31] Washington transferred much of the control in this area to the states.[32] By the early 1970s, of the roughly 250,000 Indian, Eskimo, and Aleut children attending the nation's public, federal and private schools, some seventy percent were in public schools, twenty-five percent in federal schools and five percent in religious or other schools.[33] In exchange for being the primary provider of education for Indians, the states demanded federal subsidies for the tax-exempt Indian lands that they would serve.[34]

Like the treaties and land acts of the 1890s, however, these laws failed to provide for tribal control.[35] State schools lacked any obligation to offer education beyond the basic non-Indian curriculum until the Elementary and Secondary Education Act of 1965.[36] Although this Act failed to look to tribal governments for control of educational programs, it did encourage Indian parental involvement in schools.[37]

The effects of the federal policy that existed until 1970 of terminat-

28. *Red Lake Band*, 17 Cl. Ct. at 452. Criticism of the unresponsiveness of the Bureau of Indian Affairs to Native Americans continues today. Recently, a survey of government executives ranked the BIA as the least respected of 90 federal agencies—with the Indian Health Service close behind. Nancy Gibbs, *This Land is Their Land*, TIME, Jan. 1991, at 18.

29. *Red Lake Band*, 17 Cl. Ct. at 453.

30. *Id.*

31. *Id.* at 452.

32. *Id.*

33. Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 491 (1973). Today, in the wake of the closings of many federal Indian boarding schools, more than 80% of Indian students attend state public schools. McCoy, *supra* note 15, at 4.

34. This was accomplished through the Johnson O'Malley Act, ch. 147, § 1, 48 Stat. 596 (1934)(current version at 25 U.S.C. §§ 452-57 (1991)). Further funding was provided by the Impact Aid Laws, Pub. L. ch. 1142, § 1, 64 Stat. 1100 (1950)(current version at 20 U.S.C. §§ 236-46 (1991)).

35. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 683.

36. The Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 102 Stat. 140 (current version at 20 U.S.C. §§ 2701-2713) took a crucial step in recognizing and funding "special supplementary programs for the education and culturally related needs of Indian students." *Id.* §§ 2701(a)(2)-2701(b).

37. *Id.* § 2701(b).

ing recognition of Indian tribes[38] illustrate the importance of tribal authority in the preservation of Indian culture. After World War II, both the executive and legislative branches sought to "terminate" the special relationship between Indians and the federal government[39] in order to force the integration of Native Americans into mainstream society.[40] "Termination" contemplated the division of tribal assets among members of the tribe and the implementation of a plan to encourage Indians to relocate from the reservations to urban areas.[41] Today, as a result of these policies, almost half of the Indian population resides in urban centers rather than rural reservations.[42]

In the first official repudiation of the termination philosophy, President Richard Nixon, in a message to Congress on July 8, 1970, announced:

> Because termination is morally and legally unacceptable, because it produces bad results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate, and repeal the termination policy. . . .[43]

In the 1970s, tribes attained more direct control over federal Indian educational programs and funding. The Indian Self-Determination and Education Assistance Act of 1975 ("1975 Act"),[44] for example, resulted in some relinquishment of federal control to tribes in the area

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38. Some of the consequences of federal termination policy were:
a. fundamental changes in land ownership,
b. the end of the trust relationship,
c. the imposition of state judicial and legislative authority,
d. the repeal of the exemption of Indians from state taxing power,
e. the end of special federal programs to tribes,
f. the discontinuation of special federal programs to individual Indians, and
g. the end of tribal sovereignty.

DELORIA & LYTLE, *supra* note 1, at 20.

39. In 1953, Congress expressed its desire to end the status of Indians as "wards of the United States, and to grant them all the rights and prerogatives pertaining to all American citizens." H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953).

40. DELORIA & LYTLE, *supra* note 1, at 17.

41. Rosenfelt, *supra* note 33, at 500.

42. *See* Sheppard v. Sheppard, 655 P.2d 895, 914 (1982).

43. DELORIA & LYTLE, *supra* note 1, at 20. Despite this official repeal, Native Americans continue to worry about the loss of their special status and trust relationship with the federal government. *See* Rosebud Sioux Tribe Education Code, Res. No. 91-272, Ord. No. 91-04, § 102(d) (1991) (assertion that exercise of self-determination in running schools on reservation land not an abrogation of other rights and powers) [hereinafter ROSEBUD CODE].

44. Pub. L. No. 93-638, 88 Stat. 2203 (current version at 25 U.S.C. §§ 450-450(n) (1991)).

of education. The 1975 Act directs the Secretary of the Interior, upon the request of any Indian tribe, to contract with such tribe "to plan, conduct and administer" educational programs within the Secretary's control such as BIA-run schools.[45] Furthermore, the legislative history of the 1975 Act reflects congressional concern with fostering Indian self-government[46] and declares its intent "to promote maximum Indian participation in the government and education of the Indian people."[47]

Since the end of the termination era in the 1970s, Congress has fostered Native American cultural preservation and increased tribal control in Indian education.[48] This attention to Indian culture was due mainly to the resurgence of tribalism among increasingly vocal Indian people that paralleled the civil rights movement and growing multi-cultural sentiment in America at large. The Indian Elementary and Secondary School Assistance Act of 1972[49] reflected this atmosphere by making tribes eligible to compete for certain discretionary education projects and programs such as demonstration elementary and secondary projects[50] and special education programs.[51] This Act dealt with funding state schools in planning and developing "programs specifically designed to meet the special educational or culturally related academic needs, or both, of Indian children."[52] Funding was conditioned upon program development in consultation with Indian parents and approval by an Indian parent committee; still, the Act failed to provide for tribal control.[53]

Similarly, the 1978 amendments to the Impact Aid Laws[54] failed to address the issue of tribal control of Impact Aid funding and programs. Although the amendments are based expressly on the govern-

45. *Id.* § 450(f).

46. "True self-determination of any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles." *Id.* at § 455(b)(1).

47. H.R. REP. NO. 1600, 93d Cong., 1st Sess. 1 (1974).

48. McCoy, *supra* note 15, at 5.

49. Pub. L. No. 92-203, 85 Stat. 688 (current version at 25 U.S.C. §§ 2601-2651 (1991)).

50. "The Secretary is authorized to make grants to state and local educational agencies, federally supported elementary and secondary schools for Indian children and to their tribes . . . to support pilot, and demonstration projects which are designed" to show the effectiveness of programs for improving educational opportunities for Indian children. *Id.* § 2621(b).

51. *Id.* § 2622.

52. *Id.* § 2603.

53. *Id.* § 2604(b)(2)(B).

54. Pub. L. No. 95-561,104 Stat. 2222 (current version at 20 U.S.C. § 240(b)(3) (1991)).

mental relationship between the United States and the Indian tribes,[55] tribes and Indian parents have input regarding only the funding application process.[56] Parents and tribes may also file complaints against school districts.[57] Such complaints are ultimately reviewable by the Secretary of Education.[58] Few complaints have been successful, however, because of the difficulty in obtaining the evidence necessary to prove violations of the law.[59]

Another important piece of 1970s Indian education legislation with the intent of fostering Indian self-government, the Education Amendments of 1978[60] provide that tribes can set education standards for federal and tribal schools that consider "the specific needs of the tribe's children."[61] This Act established the official policy, moreover, of the BIA "to facilitate Indian control of Indian affairs in all matters relating to education."[62] The Tribally Controlled Community College Assistance Act of 1978 further demonstrated congressional recognition of tribal sovereignty over Indian education.[63] This Act recognizes tribal governments on a par with state governments and provides funding to colleges[64] that are formally controlled by tribal governments.[65]

B. Special Status of Native Americans

The special status of Native Americans derives from the government's historic treatment of tribes as separate political entities[66] — which is why, until the late 19th century, United States relations with the Indians were almost exclusively through treaties.[67] Congress has

55. *Id.* § 240(b)(3)(F).
56. *Id.* § 240(b)(3)(B).
57. *Id.* § 240(b)(3)(C).
58. *Id.*
59. McCoy, *supra* note 15, at 6.
60. Pub. L. No. 95-561 (current version at 25 U.S.C. §§ 2001-2019 (1991)).
61. *Id.* § 2001(d).
62. *Id.* § 2010(a).
63. Pub. L. No. 95-471, 92 Stat. 1325 (current version at 25 U.S.C. §§ 1801-1836 (1988)).
64. *Id.* § 1803. Because of cultural differences and language barriers, dropout rates of Indians at traditional institutions of higher education have been high. However, the retention rate at the tribally controlled community colleges is 89.28%; the dropout rate is 10.72%. The 22 tribally controlled colleges are located in 10 midwestern and western states. Twenty of the colleges are located on reservations. The colleges are sponsored by 36 Indian tribes. During the 1988-1989 academic term, the colleges enrolled 16,787 Indian students and 4,208 non-Indian students, for a total of 20,995 students. S. REP. NO. 371, 101st Cong., 2d Sess. (1990), 1990 U.S.C.C.A.N. 1825-26.
65. 25 U.S.C. § 1805 (1988).
66. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 654.
67. *See id.* at 107.

plenary power to legislate regarding Native Americans.[68] Indian tribes, however, retain all powers of self-government and aboriginal rights that Congress has not explicitly taken from them.[69] As quasi-sovereign nations, Indian tribal governments are subject to the U.S. Constitution only to the extent that it expressly binds them or is made applicable to the tribes by treaties or Acts of Congress.[70]

Recognizing that the Bill of Rights, therefore, did not apply to tribal governments,[71] Congress enacted the Indian Bill of Rights as part of the Civil Rights Act of 1968.[72] The Indian Bill of Rights statutorily applied language from the Constitution almost verbatim — but with a few distinctions. Congress pruned the First Amendment here of its Establishment Clause,[73] for example, in order to refrain from undermining Indian cultural autonomy.[74]

The judicial interpretation of the Indian Bill of Rights has consistently supported tribal autonomy even in the face of claimed violations of important individual rights.[75] Except for writs of habeas corpus, the fashioning of remedies and the imposing of sanctions for violations of the Indian Bill of Rights are solely within the discretion of tribal governments.[76]

Moreover, in addition to the legislative intent not to impinge on the cultural autonomy of Indian tribes, legislation affecting Native Americans further suggests that the meaning of the Indian Bill of Rights should remain distinct from the meaning of its constitutional counter-

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68. U.S. CONST. art. I., § 8, cl. 3.

69. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832). For a more detailed discussion of the constitutional status of tribal governments, see Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969) [hereinafter *Constitutional Status of Tribal Governments*].

70. Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 135 (10th Cir. 1959).

71. This Note does not mean to suggest that the Constitution applies differently to Indians as an entire category than to Americans in general. Only reservation Indians, not detribalized urban Indians, are beyond the jurisdiction of constitutional authority. *See* David C. Williams, Note, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 790 n.116 (1991).

72. Pub. L. No. 90-284, 82 Stat. 77.

73. The First Amendment of the Indian Bill of Rights reads as follows:

> No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the free exercise of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances.

Id.

74. *Constitutional Status of Tribal Governments*, *supra* note 69, at 1355.

75. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 243.

76. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

part.[77] The federal government's trust responsibility[78] for the Indians has led to canons of construction that treaties and statutes should be read, where possible, to protect the survival of Indian culture.[79] Although the courts have occasionally violated[80] this interpretive rule, the trend in Congress toward supporting Indian self-determination and Free Exercise rights should eventually render such cases irrelevant.[81]

C. Special Nature of Indian Religion

One factor that distinguishes American Indian religions from Western religions is the former's lack of dogma and doctrine.[82] Unlike most faiths, Native American religions (like the Amish culture) are not limited to specific spheres of the lives of adherents. American Indians tend to be near-pantheists, "their every act having religious significance in their basic desire to live in harmony with the uni-

77. *Constitutional Status of Tribal Governments*, *supra* note 69, at 1355.

78. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall characterized Indian tribes as "domestic dependent nations," in a state of "pupilage," whose relation to the federal government "resembles that of a ward to his guardian." *Id.* at 17. The Court later adopted the wardship theory of Marshall's dictum in *Cherokee Nation* as an alternative source of congressional power over the Indians apart from the commerce power in Article I of the Constitution. *See, e.g.*, United States v. Nice, 241 U.S. 591, 597 (1916) (applying wardship relationship as source of congressional authority to regulate liquor sales); *see also* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972) (in allocation of precious water in Nevada, the United States, acting through the Secretary of Interior, charged itself with moral obligations of the highest responsibility and trust). Although the federal government holds most Indian lands in trust, the Indian nations in upstate New York generally hold "Indian title" to their lands. NYS JUDICIAL COMMISSION, *supra* note 3, at 62.

79. Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (doubtful statutory expressions are to be resolved in favor of the Indians).

80. Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439 (1988) (5-4 decision)(American Indian Religious Freedom Act did not prevent the Forest Service from building a marginally useful access road across an Indian sacred site); Employment Div. v. Smith, 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990) (holding 5-3 that, regardless of American Indian Religious Freedom Act, generally applicable law prohibiting peyote use is enforceable no matter how burdensome enforcement is on individual religious beliefs).

81. *Lyng* and *Smith* will likely become irrelevant in light of pending legislation to strengthen the American Indian Religious Freedom Act, H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1978, *reprinted in* 1978 U.S.C.C.A.N. 1262 [herinafter AIRFA]. *See* 135 CONG. REC. S6219-02 (1991). For a more detailed discussion of AIRFA's implementation and official statement of policy of preserving Native American culture, *see* FEDERAL AGENCIES TASK FORCE, U.S. DEPT. OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (1979).

82. Joshua D. Rievman, Comment, *Judicial Scrutiny of Native American Free Exercise Rights: Lyng and the Decline of the Yoder Doctrine*, 17 B.C. ENVTL. AFFAIRS L. REV. 169, 172 (1989).

verse."[83] The pervasiveness of Indian religion in Indian life makes tribal religious life and tribal social structure inseparable. In bringing claims under the Free Exercise Clause, therefore, Indian plaintiffs often assert that the loss of spiritual life will result in the destruction of the tribe's social fabric.[84]

III. Tribal Interest in Indian Children

At the heart of tribal assertions of control over education lies the tribe's assertion of its paramount interest in Indian children.[85] Moreover, because of the unique status of American Indians,[86] a tribe's interest in its children has, in many respects, received more federal deference than the interests of other parents in their respective children.[87] Such sovereignty issues are further complicated by the wide dispersion of Native Americans both geographically across urban and rural areas[88] and biologically through intermarriage.[89]

Although most of America's indigenous population lives in the Western states in rural areas,[90] there are substantial pockets of Indians all across the United States. In New York City alone, for example, the 1990 census counted approximately 30,000 Native Americans.[91] Furthermore, a number of reservations lie in urban centers. The Puyallup and Okema Reservations, for example, are respectively in the middle of Tacoma and Toppenish, Washington; the Gila River and Papago reservations are in the Tucson, Arizona metro-area.

Rural reservations, in their isolation from other educational authorities and ethnic or racial groups,[92] pose the least sovereignty diffi-

83. New Rider v. Bd. of Educ., 480 F.2d 693, 700 (10th Cir. 1973) (Lewis, C.J., concurring), *cert. denied*, 414 U.S. 1097 (1973), *reh'g denied*, 415 U.S. 939 (1974).

84. *See, e.g.*, Lyng v. Northwest Cemetery Protective Assoc., 485 U.S. 439 (1988); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983), *cert. denied*, 464 U.S. 1056 (1984).

85. McCoy, *supra* note 15, at 2.

86. *See supra* notes 67-82 and accompanying text.

87. *See infra* notes 95-99 and accompanying text.

88. *See* Rosenfelt, *supra* note 33, at 491 n.4.

89. *See* Gary Sandefur & Robert McKinnell, *American Indian Intermarriage*, 15 SOC. SCI. RES. 347, 348 (1986).

90. Rosenfelt, *supra* note 33, at 491 n.4. *See also* NYS JUDICIAL COMMISSION, *supra* note 3, at 61.

91. The 1990 census counted exactly 27,531 American Indians, Eskimos, and Aleuts in New York City. Edward B. Fiske, *New York Growth is Linked to Immigration*, N.Y. TIMES, Feb. 22, 1991, at B1. However, the census bureau admitted undercounting American Indians by five percent — thereby putting the actual figure closer to 29,000. Elaine S. Povich, *Commerce Chief Says Politics Didn't Play Role in Letting Census Stand*, CHI. TRIB., July 16, 1991, at C4.

92. Although most reservations are largely populated by Indians, in some instances,

culties regarding increased tribal control. In contrast to their rural counterparts, urban reservations, and pockets of urban Indians[93] residing outside of Indian country,[94] raise the most difficult sovereignty dilemmas due to conflicting interest groups and governmental authorities. Nevertheless, the strong federal recognition of tribal sovereignty over Indian children suggests that in a contest between tribal and other governmental or even non-Indian parental interests (as in intermarriage), courts and legislatures will continue the trend of tipping the scales in favor of tribal control.

A distinction, moreover, lies between tribal and parental involvement. Tribal control means control by tribal governments. Such control can be used to influence federal and state entities in the formulation of educational policies. Parents, on the other hand, even when organized in committees, simply lack the political clout of their tribal governments to affect these policy decisions in any meaningful way.

A. Federal Recognition

1. The Indian Child Welfare Act of 1978

In the wake of the self-determination policies of the 1970s, the federal government has consistently recognized the paramount interests of tribal governments in Indian children. Although it is not specifically an education law, the Indian Child Welfare Act of 1978 ("ICWA") constitutes a significant statement by Congress regarding children and Indian tribes.[95] The Act expressly states that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[96] Declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability. . . of Indian tribes and families,"[97] the ICWA

many non-Indians reside on tribal reservations. *See* Greywater v. Joshua, 846 F.2d 486, 493 (8th Cir. 1988) (non-Indians are a majority on Devils Lake Sioux reservation).

93. Today, almost half of the Indian population resides in cities rather than rural reservation-communities. *See* Sheppard v. Sheppard, 655 P.2d 895, 914 (1982).

94. If non-Indian owned land is allotted among Indian owned reservation land, then the totality of the area is deemed "Indian Country" despite the presence of non-tribal holdings. *See* 18 U.S.C. § 1151 (1988) (ownership of land by non-Indians). Such holdings will then generally fall under federal jurisdiction. United States v. Mazurie, 419 U.S. 544 (1975); Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962). If allotment to non-Indians is extensive, then the Court may perceive a congressional intent to diminish the scope of the reservation. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

95. Pub. L. No. 95-608, 92 Stat. 3069 (current version at 25 U.S.C. §§ 1901-1963).

96. *Id.* § 1901(3).

97. *Id.* § 1902.

grants tribes the right to intervene at any point in a state court proceeding for the foster care placement of or termination of parental rights to an Indian child.[98] The Act further grants Indian tribes exclusive jurisdiction over custody proceedings regarding Indian children.[99]

Although the ICWA represents a recognition of tribal interests in Native American children that bolsters arguments for increased tribal control of Indian education, the Act has received criticism for sacrificing the best interests of Indian children in favor of tribal interests.[100] Furthermore, the ICWA arguably failed to consider that many children subject to its provisions are of multi-racial backgrounds with little Indian heritage.[101] Although many American Indians are urbanized and have few ties to a tribe other than membership, the Act allows a tribal court that knows little about that environment to decide the future of such children.[102]

Despite such criticisms, courts have resolved to strongly enforce the ICWA. In 1991, the New York Judicial Commission on Minorities ("Commission") noted past lapses in the enforcement of the Act's requirement that, among other things, the appropriate Indian nation be notified when an Indian child is before a state court in an involuntary proceeding.[103] Consequently, the Commission recommended judicial seminars on the ICWA and a system of "monitoring custody proceedings involving Indian children . . . to ensure that there is full compliance with the requirements of the Act."[104]

2. *The Indian Education Act of 1988*

The Indian Education Act of 1988[105] further exemplifies congressional recognition of the primacy of tribes regarding their children's education. Congress declared that "a major national goal of the United States is to provide the resources, processes, and structures that will enable tribes and local communities to effect the quantity and quality of educational services and opportunities that will permit Indian children to compete and excel in the life areas of their

98. *Id.* § 1911(c).
99. *Id.* § 1911(a).
100. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 64 (1989) (Stevens, J. dissenting).
101. Null, Note, *In Re Junious M: The California Application of the Indian Child Welfare Act,* 8 J. JUV. L. 74, 84 (1984).
102. *See In Re* Junious M. v. Diana L., 193 Cal. Rptr. 40-42 (1983).
103. NYS JUDICIAL COMMISSION, *supra* note 3, at 62.
104. *Id.* at 64.
105. 25 U.S.C. § 2501, *et seq.*

choice."[106] The Act strengthens the role of tribal governments by authorizing funding for tribal education departments.[107] Such funding, however, is subject to the availability of appropriations;[108] and, to date, no money has ever been appropriated for such departments.[109]

3. The Native American Languages Act of 1990

The latest congressional recognition of tribal sovereignty over Indian education is the Native American Languages Act of 1990 ("Languages Act").[110] Here, Congress declared the responsibility of the United States to act with Native Americans[111] to ensure the survival of the unique cultures and languages of the Indians.[112] This Act established as the policy of the United States the "preservation, protection and promotion of the rights of Native Americans to speak, practice, and develop Native American languages and to foster the use and practice of these languages."[113]

The legislative history of the Native American Languages Act suggests the official cognizance of the value of increased Native American involvement in Indian education.[114] In sponsoring the Languages Act, Senator Inouye cited findings from a hearing on "Culturally Relevant Early Education Programs" before the Senate Select Committee on Indian Affairs on November 24, 1987.[115] These findings strongly indicated that where children are taught in their own languages by teachers of the same cultural background who teach in methods appropriate to that culture, "the results are that the children are brighter, higher-achieving, and have higher self-esteem than their native counterparts schooled in other environments."[116] President Bush noted the benefits of culturally relevant Indian education with this

106. *Id.* § 2502(c).
107. *Id.* § 2022b.
108. *Id.* § 2022b(a).
109. McCoy, *supra* note 15, at 9.
110. Native American Languages Act, 25 U.S.C. § 2901 (1990) [hereinafter Languages Act].
111. Here, as in most modern legislation affecting American Indians, the term "Native Americans" includes Indians, Native Hawaiians and Native American Pacific Islanders. 25 U.S.C. § 2902 (1). This Note, however, focuses on the historic plight of Indians and Alaska natives.
112. 25 U.S.C. § 2901 (1990).
113. S. REP. No. 250, 101st Cong., 2d Sess. (1990); *see also* 25 U.S.C. § 2903. In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee found that the enactment of S. 1781 would not effect any changes in existing law. S. REP. No. 250, 101st Cong., 2d Sess. 10 (1990).
114. S. REP. No. 250, 101st Cong., 2d Sess. (1990).
115. *Id.*
116. *Id.*

declaration: "In approving this legislation, I recognize and acknowledge the tribal colleges for the contribution they have made and continue to make in improving the quality of life for many American Indian people. . . . [T]he tribal colleges are excellent examples of the Administration's policy of self-determination for Indian tribes."[117]

In furtherance of the government's objective to preserve, protect, and promote "the rights and freedom of Native Americans to use, practice, and develop Native American Languages," the Languages Act establishes the following relevant policies: (1) to encourage state and local education programs to work with Native American parents, educators, Indian Tribes, and other Native American governing bodies in the implementation of programs to put this Act into effect; (2) to support the awarding of academic credit for proficiency in a Native American language on a par with comparable credit for any foreign language; and (3) to "allow exceptions to teacher certification requirements for federal programs" and other government funded programs for "instruction in Native American languages" when such teacher certification would hinder the employment of qualified teachers — and to encourage state and territorial governments to make similar exceptions.[118]

In light of the benefits to Indian children from culturally relevant education, it is especially important that exceptions be made for teachers who are qualified to instruct in native languages but lack federal or state teacher certification. Tribal elders may often perform such instruction — which is desirable since many native cultures hold their elders in high esteem.

Furthermore, a clear statement of federal policy is necessary to prevent the extinction of native languages, to perpetuate native culture, and to foster the enrichment of Indian children.[119] As Senator Inouye declared: "If native cultures are to survive and if Native Americans are to become full and productive members of society, . . . then the United States must do all it can to protect and encourage cultural practices."[120] This recognition was at the core of the 1990 Native American Languages Act.[121]

Implementation of the Languages Act, however, faces a number of difficulties. First, the creation of Native American language programs

117. Pub. L. 101-477, 1990 U.S.C.C.A.N. 1849-1 (Statement by President George Bush upon signing S. 2167, 102d Cong., 2d Sess. (1990)).

118. 25 U.S.C. § 2903 (1990).

119. S. REP. No. 250, 101st Cong., 2d Sess. 3 (1990).

120. *Id.*

121. *Id.*

is a very complex process. Even though many tribes have developed their written languages to a point where curriculum materials and textbooks are available for immediate use, for many other tribes such materials are not available. Therefore, it would take considerable time to develop such instructional material. In addition, for many of the BIA-run schools, more than one tribal language is represented. For example, the Sherman School in Riverside, California recently had more than seventy different tribes represented in its student body.[122]

Aside from the difficulties of implementing native languages programs, such programs would be expensive to administer. The Office of Management and Budget has estimated the cost of such a program at approximately twenty million dollars.[123] Limited funding arguably should be directed toward providing Indian students with the basic skills needed to compete with their counterparts in public schools. The undisputed importance of culturally relevant Indian education in reducing drop-out rates (which are as high as eighty-five percent in some schools)[124] and in increasing educational achievement, however, suggest that this twenty million dollars would be well spent. Moreover, such spending would constitute only a small percentage of the present budget as a whole for Indian education.[125]

Another criticism of the Languages Act is that legislation of this kind might cause Native American tongues to supplant English as the main language for Indian students. An argument can be made that, after Indian students receive their education, they must be able to compete outside their reservation if economic development is to occur in Indian country. The priority of economic development and the focus on educating Indian children to compete on the terms of American society at large, however, were the foundation of the now repudiated assimilation policy of the past. As Congress and the President have recognized, Indian children do best in schools which are sensitive to their own cultures.[126]

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122. S. REP. No. 250, 101st Cong., 2d Sess. 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1840.

123. *Id.* at 22.

124. *Salt River Announces Impact Aid Pact*, COALITION FOR INDIAN EDUC. NEWSL. (Coalition for Indian Educ., Washington D.C.), Sept. 1991, at 2.

125. For one source of federal assistance alone, Impact Aid, Congress has appropriated $885 million for fiscal year 1992 and $935 million for 1993. *See* 20 U.S.C. § 236(b) (1992).

126. S. REP. No. 250 at 4.

4. Supreme Court Decisions

The U.S. Supreme Court has never squarely dealt with the issue of Native American control of Indian education. The closest that the Court has come to this topic was in dictum in *Merrion v. Jicarilla Apache Tribe*, which recognized the inherent sovereignty of tribes in the area of education in Indian territory.[127] *Merrion*, which involved a suit by oil companies to enjoin the enforcement of a tribal severence tax, further declared that inherent tribal sovereignty includes the right to "enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life."[128] The only other Supreme Court decision related to Indian control in education, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*,[129] involved a dispute over the ability of the state to impose a tax on the gross receipts of contractors engaged in the construction of reservation schools. *Ramah* declared in dictum, as *Merrion* had before it, that federal policy expressly encourages "tribal self-sufficiency in the area of education."[130]

B. First Amendment Issues

Native American control of Indian education raises a number of First Amendment[131] concerns. Some specific questions that arise involve the following issues: the rights of Indian parents to raise their children according to their religious, cultural and moral values; whether government funding of sectarian schools serving Indian students, the favoring of Indian culture and language and the preferential hiring of Indian teachers violate the Establishment Clause;[132] and the parallels between free speech values and the merits of enhanced parental participation in Indian education. The special status of Native Americans[133] and the particular characteristics of American Indian religions[134] impact substantially on the answers to these

127. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982) (quoting S. REP. No. 698, 45th Cong., 3d Sess. 1-2 (1879)) (tribe has inherent power to impose a severance tax on mining activities as part of its power to govern and to pay for the costs of self-government).

128. *Id.*

129. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982).

130. *Id.* at 846.

131. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I.

132. *Id.*

133. *See supra* notes 67-82 and accompanying text.

134. *See supra* notes 83-85 and accompanying text.

questions.

1. Free Exercise Clause Claims

The First Amendment dictates that Congress and the states[135] shall make no law prohibiting the free exercise of religion.[136] Despite its mandatory language, however, this prohibition is not absolute. Although state and federal governments may not regulate religious beliefs, they may regulate religious practices if the government can show a compelling state interest in the subject matter and relate the objective of the regulation to a "valid secular purpose."[137]

A number of Supreme Court cases dealing with the Free Exercise Clause have supported parental assertions of control in their children's education.[138] The case most relevant here is *Wisconsin v. Yoder*[139] where the Court balanced Amish parental Free Exercise rights with the state's interest in public education, and declared that the First Amendment forbids governmental action that unjustly burdens the rights of a religious minority to direct the rearing of its children.[140] As a crucial part of its balancing test, *Yoder* held that in order for a claim to enjoy Free Exercise Clause protection from burdensome governmental control, such a claim "must be rooted in religious belief."[141] *Yoder* stressed the fact that the Amish customs at stake were an integral part of religious practices extending back over almost 300 years.[142] Similar to the Amish, Native American customs are inseparable from their time-honored religious beliefs — with the added distinction of extending back for thousands of years.

The only mention of the *Yoder* doctrine to date in the area of Indian education has been in two Tenth Circuit cases[143] and one Colo-

135. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

136. U.S. CONST. amend I.

137. For a more detailed description of Free Exercise Clause Rights, *see* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

138. Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compelled attendance in formal high school to age sixteen unreasonably interfered with interest of Amish parents in providing their children with vocational education under parental guidance); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state compelled attendance in public school from age eight to sixteen unreasonably interferes with interest of parents in directing the rearing of offspring); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting languages other than English from being taught to grade school children unreasonably interferes with power of parents to control education of their own children).

139. *Yoder*, 406 U.S. 205.

140. *Id.* at 213.

141. *Id.* at 215.

142. *Id.* at 219.

143. Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974); *New Rider*, 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 939 (1973).

rado case.[144] These cases involved claims of Indian students and their parents that school hair-length regulations violated the Free Exercise rights of Indian boys to wear their hair in traditional braids.[145] In both federal cases, the Tenth Circuit failed to even reach the *Yoder* balancing test and dismissed the Indian Free Exercise claims for failing to state a substantial constitutional claim.[146] The Colorado case held that the conclusion that a hair regulation denied an Indian student his First Amendment right to freely exercise his religion was outside the scope of unlawful acts prohibited by a state anti-discrimination statute.[147] The Colorado court further held, however, that the school board discriminated against Native Americans by requiring that only Indians need special applications to obtain exemptions from a hair length regulation.[148] In holding the determination of Free Exercise violations to be beyond the scope of the lower court, however, this Colorado case offers little to elucidate the subject of this Note.

In *Freeman v. Flake*,[149] the precursor to the two Tenth Circuit cases, the plaintiffs claimed a free speech right to assert their "individuality" through their hair style — which the court refused to recognize as a protected "form of speech."[150] The two Tenth Circuit cases, *Hatch v. Goerke*[151] and *New Rider v. Bd. of Educ.*,[152] dismissed Indian claims based upon an application of the *Freeman* doctrine that mandated that only religion-based claims regarding hair length could invoke constitutional protection.[153] In dismissing the plaintiffs' claims in *Freeman*, the court held that the desire of students "to express their individuality" by wearing their hair in violation of school dress codes without any claim of "religious discrimination" lacked any constitutional merit.[154] Despite the fact that *Hatch* and *New Rider* involved religious claims, both cases disregarded this distinction and followed *Freeman* in affirming the dismissal of First Amendment claims.[155]

Freeman stressed that the plaintiffs made no claim of "any racial or

144. School Dist. No. 11-J v. Howell, 517 P.2d 422 (Colo. Ct. App. 1973) (application for exemption from school hair regulation was discriminatory where school board required such application only from Indians).

145. *See generally Hatch*, 502 F.2d 1189; *New Rider*, 480 F.2d 693.

146. *Hatch*, 502 F.2d at 1191; *New Rider*, 480 F.2d at 695.

147. *Howell*, 517 P.2d at 423.

148. *Id.* at 423-424.

149. Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972).

150. *Id.* at 260.

151. *Hatch*, 502 F.2d 1189.

152. *New Rider*, 480 F.2d at 700.

153. *Freeman*, 448 F.2d 258.

154. *Id.* at 259.

155. *Hatch*, 502 F.2d at 1191; *New Rider*, 480 F.2d at 697.

religious discrimination."[156] *New Rider* and *Hatch*, however, placed Native American students with genuine assertions of racial and religious discrimination in the same category as the students in *Freeman* — who merely wished to make fashion statements. By holding that the plaintiffs' claim was "based on nothing more than school regulations,"[157] *Hatch* disregarded the claim of parents "to raise their children according to their own religious, cultural and moral values, and assert a deep belief of themselves and their son in maintaining his Indian appearance by wearing braids."[158]

New Rider similarly dismissed testimony on the "cultural significance"[159] of hair length in Pawnee tradition in favor of evidence that Pawnee warriors did not generally wear their hair in long braids.[160] The age of the boys (who were no warriors) suggests the absurdity of looking at the traditional dress of warriors to discount the religious sincerity of the plaintiffs' claims. Contrary to *Freeman*, where plaintiffs neglected even to raise a claim of religious discrimination, the Indian students in *New Rider*[161] and *Hatch*[162] did assert such valid discrimination claims.

Yoder held that, unless the government could show an "interest of the highest order" which could not be served in some less restrictive way, the First Amendment forbids governmental action which burdens the rights of a religious minority to direct the upbringing of its children.[163] Nevertheless, the Tenth Circuit bent over backwards to ignore evidence of the religious sincerity behind the Pawnee students' desires to wear their hair in traditional braids.[164] By forcing Native American students to cut their hair, the schools in *New Rider* and *Hatch* limited the ability of the boys' parents to raise their children according to tribal custom.[165] Regardless of the debatable disciplinary necessity of requiring boys to wear short hair in public school, it is difficult to imagine a public policy rationale for dress or hair length regulations sufficient to overcome the high tier *Yoder* standard.

Even in cases involving similar hair length regulations in prisons, where disciplinary rules have an arguably higher legitimacy than in

156. *Freeman*, 448 F.2d at 259.
157. *Hatch*, 502 F.2d at 1191.
158. *Id.* at 1192.
159. *New Rider*, 480 F.2d at 696.
160. Pawnee warriors generally wore their hair in roaches (a ridge standing up along the middle). *New Rider*, 480 F.2d at 696.
161. *Contra New Rider*, 480 F.2d at 695.
162. *Contra Hatch*, 502 F.2d at 1191.
163. *Yoder*, 406 U.S. at 215.
164. *See supra* notes 156-162 and accompanying text.
165. *Hatch*, 502 F.2d at 1191.

schools, the courts are divided on whether such regulations violate the First Amendment.[166] *Hall v. Bellmon*, and *Teterud v. Burns*, two circuit courts of appeals that have addressed this issue regarding prison regulations arrived at opposite conclusions based on subjective interpretations of whether hair length rules were reasonably related to legitimate penological interests.[167] Because such security interests as the concealing of weapons in long braids are generally of greater importance in prison regulations than in school regulations, however, such prison cases are distinguishable here.

By nevertheless eschewing the *Yoder* test in favor of the low-scrutiny *Freeman* test, the Tenth Circuit and the Colorado court have applied an indefensibly lower standard to Indians regarding Free Exercise claims. This indefensibly different standard has also appeared in *Employment Div. v. Smith*,[168] a recent U.S. Supreme Court decision regarding an Oregon prohibition on peyote use — which the Court deemed not to be a violation of the free exercise rights of Indians who used peyote for religious purposes.[169] Because it involves the unique area of drug interdiction, *Smith* is easily distinguishable from cases which involve Indian control of Native American education. *Smith*, nevertheless, represents a further decrease in the protection of Native American rights which Congress is currently trying to supersede statutorily.[170]

2. *Establishment Clause Claims*

The Establishment Clause, which prohibits any law "respecting an establishment of religion,"[171] requires that government refrain from engaging in or compelling religious practices, or effecting favoritism among sects or between religion and nonreligion.[172]

The special status of Native Americans as independent political entities and the modern policy of encouraging Indian self-determination have resulted in the Establishment Clause being generally insignificant regarding laws that favor Indian religions or cultures. The ab-

166. Hall v. Bellmon, 935 F.2d 1106, 1113 (10th Cir. 1991) (hair length regulations reasonably related to legitimate penological interests outweighed Indian inmate's free exercise right); *see also* Pollack v. Marshall, 656 F. Supp. 957 (S.D. Ohio, 1987); *but see* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975); Cole v. Fulcomer, 588 F. Supp. 772 (M.D. Pa. 1984); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974).

167. 935 F.2d at 1113; 522 F.2d at 362.

168. Employment Div. v. Smith, 494 U.S. 872, 888 (1990).

169. *Id.*

170. 135 CONG. REC. S6219-02, *supra*, note 81.

171. U.S. CONST. amend. I.

172. Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J. concurring).

sence of an Establishment Clause in the Indian Bill of Rights, for example, suggests congressional recognition that such a clause would be incompatible with the government's duty to amend its brutal history of near genocide and forced assimilation of the Indians.[173] Through such legislation as the Native American Religious Freedom Act[174] and the Native American Languages Act,[175] Congress has adopted the policy of preserving what remains of Native American culture. Further legislation, therefore, favoring the appointment of Indians to state school boards and the hiring of Indian teachers,[176] or tribal decisions to limit tribal school board membership to tribal members, would not violate the Establishment Clause.

3. *The Free Speech Nexus*

Although *Yoder*[177] failed to mention the Free Speech Clause, the Court in *Employment Div. v. Smith* viewed *Yoder* as being partly a Free Speech case, and thus less significant as a pure Free Exercise case.[178] *Smith* held that regardless of AIRFA, a generally applicable prohibition on the use of peyote was enforceable no matter how burdensome such enforcement was to Indians who smoked peyote for religious purposes.[179] In so holding, moreover, the Court opined that *Yoder* was a "hybrid situation," which involved both Free Exercise and Free Speech interests.[180] *Smith* implied that an exemption to the students in *Yoder* would not have been required had only Free Exercise principles been at stake.[181] The future of exemption claims to laws which impinge on religious free exercise appears to rest, therefore, on the presence of other constitutional interests such as the freedom of speech.

An examination of the values behind the Free Speech Clause,[182] moreover, suggests parallels between free speech values and the merits

173. *Constitutional Status of Tribal Governments*, *supra* note 69, at 1355.

174. AIRFA, 135 CONG. REC. S6219-02.

175. 25 U.S.C. § 2901.

176. Where non-Indian Bureau of Indian Affairs employees challenged employment preference for qualified Indians provided by the Indian Reorganization Act, the Supreme Court held that such preference was not impliedly repealed by the Equal Employment Opportunities Act of 1972, and that the preference did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government. Morton v. Mancari, 417 U.S. 535, 547 (1974).

177. *See generally Yoder*, 406 U.S. 205.

178. *Smith*, 494 U.S. at 881.

179. *Id.*

180. *Id.* at 882.

181. *Id.*

182. U.S. CONST. amend. I.

of enhanced parental and tribal participation in Indian education. There are three core values of the Free Speech Clause: (1) the idea that in order to make informed political decisions, the people require freedom of speech and the free flow of information and ideas (the citizen-critic model);[183] (2) speech is protected as a means of discovering truth through an uninhibited, robust exchange in the marketplace of ideas, where all ideas enter on an equal basis and compete for acceptance as truth (the marketplace model);[184] and (3) freedom of speech, independent of these two utilitarian theories, promotes the personal, individual liberty interests of self-realization, self-actualization and self-identity (the self-realization/actualization model).[185]

These fundamental First Amendment values permeate judicial discussions of the functions of schools. The citizen-critic model reappears repeatedly in Supreme Court education law decisions. In its early flag salute case, the Court declared that the fact that school boards are "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[186]

The First Amendment theory of speech as a vehicle to ascertaining truth also finds expression in school law precedent. The college campus is a fertile environment for the exchange and dissemination of ideas.[187] The Supreme Court has repeatedly transplanted this marketplace model in education turf. In 1972, for example, the Court referred to "the college classroom with its surrounding environs" as peculiarly the "marketplace of ideas."[188]

Justice Brennan's emphasis on the free exchange of ideas and knowledge as an essential ingredient of an open society is closely tied to the third primary value embodied in the First Amendment. Under the self-realization model, freedom of expression is viewed as a good in itself, or at least an essential element in a good society. This view of the First Amendment also appears in *Bd. of Educ. v. Pico*,[189] where

183. *See* N.Y. Times v. Sullivan, 376 U.S. 254 (1964); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 36-39 (1948).

184. *See generally* JOHN MILTON, AREOPAGITICA (1644); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market.").

185. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting).

186. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

187. Spartacus Youth League v. Bd. of Trustees, 502 F. Supp. 789, 798 (N.D. Ill. 1980).

188. Healy v. James, 408 U.S. 169, 180 (1972).

189. Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

Justice Brennan, this time writing for the majority, relies upon past decisions focusing on "the role of the First Amendment in fostering individual self-expression."[190] Brennan links "the right to receive ideas" to "the recipient's meaningful exercise of his own rights of speech, press and political freedom."[191]

Pico affirms the special value to the individual of self-expression, thought and inquiry as ends in and of themselves — as essential goods having importance independent of other more utilitarian First Amendment values. Such judicial pronouncements of the tight parallels between schools and the First Amendment[192] indicate that, in their attempt to mold their children's education, Native Americans and the First Amendment share a powerful bond.

The marketplace of ideas is curtailed when the ideas of Native American tribes about the educational needs of their children are excluded. Intelligent decision-making based on free access to and exchange of information and ideas between providers and consumers of educational services becomes impossible without meaningful parental and tribal input in Indian education. Although the First Amendment does not actually require the government to solicit increased Indian involvement here, each essential First Amendment value (the citizen-critic ideal, the marketplace of ideas, the personal liberty/self-realization value) is advanced by parental and tribal participation in educational policy decision-making. Active government promotion of freedom of expression would realize both the basic values of the First Amendment and the vital educational mission of our schools to prepare Native American children to function in the American society that surrounds them while maintaining sensitivity to their specific cultural needs.

IV. Potential Areas for Increased Tribal Control

Effective strategies for meeting the federal objective of increased tribal control in Indian education include the encouragement of parental involvement, and the establishment of state-tribal compacts and tribal education departments and codes. In some communities, control of an entire school district may be unfeasible and undesirable. Indian control of less than a full school district may be possible, however,

190. *Pico*, 457 U.S. at 866 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

191. *Pico*, 457 U.S. at 867.

192. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Wilson v. Chancellor, 418 F. Supp. 1358 (D. Or. 1976). *See also* Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969).

through the administration of Johnson O'Malley,[193] Impact Aid contracts,[194] or other government aid programs or through parent advisory committees under Title I of the Elementary and Secondary Education Act of 1981.[195]

A. Title I

The complex pattern of government services to Indians has stymied participation of tribes and individual Indians in federal and state programs.[196] The expense of the federal assistance application process and the delays caused by the lack of interagency coordination often deter all but the largest and wealthiest tribes.[197] One possible solution to this lack of participation and coordination is the encouragement of parental and tribal involvement.

Government has the resources to promote parental and tribal access to educational decision-making under existing aid programs and school infrastructures. School officials can use the initial, mandatory annual meeting with parents under Title I of the Education Consolidation and Improvement Act of 1981,[198] for example, to explain such critical things as the following: the purposes of Title I and other programs for Indian educational assistance, and the active role of the parents in sharing in decisions about the design, implementation and evaluation of a program that will work for their children.[199] Such conferences could begin discussions with parents to structure ongoing parental involvement throughout the school year and to make available to parents all communication at the school's disposal to sustain inter-parent, parent-school, and school-parent lines of exchange. Equally important, schools can provide essential training to parents (for example, on leadership skills, conducting meetings, and analyzing budgets), which studies have repeatedly demonstrated to be critical to effective, ongoing involvement.[200]

193. *See generally* 25 U.S.C. §§ 452-457 (1992).

194. *Id.*

195. 20 U.S.C. § 3801 (1992).

196. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 676.

197. *Id.*

198. Any additional costs to the government, such as lights, heat, and staff should not be significant. In any event, Chapter II specifically sanctions the use of school facilities as community centers to meet a variety of local community needs, including education. 20 U.S.C. § 3842(2) (1982).

199. 20 U.S.C. § 3801 (1992).

200. U.S. DEP'T OF HEALTH, EDUC. & WELFARE (now U.S. DEP'T OF HEALTH & HUMAN SERVICES), TITLE I ESEA: HOW IT WORKS 24 (Pub. L. No. (OE) 77-07104, (rev. ed. 1978)).

B. Impact Aid

Impact Aid poses a good example of an Indian education program that lacks tribal control.[201] Impact Aid provides general support funding to school districts for basic education and support services to Indian students — the level of such funding varies with the number of Indian students that the state school district serves.[202] Current law requires school districts to consult with Indian parents and affected Indian tribes when developing Impact Aid programs.[203]

Indian input has largely been ineffective, however, since final decision-making authority lies with the state school districts. At the very least, tribes should have the right to give final approval to programs and funding decisions. In some instances, tribal education departments should receive Impact Aid funding directly and be responsible for developing education programs. In terms of effectively transferring control of Indian education to tribes, the geographic, cultural, and economic diversity among tribes mandates that federal legislation and agency regulations recognize the specific service needs and administrative capabilities of tribes.[204] This type of flexibility would be difficult to obtain; however, without such prerequisites, the transfer of control of Indian education to tribes might lead to the erosion of already scarce and often mismanaged resources.[205]

A landmark example of tribal control over Impact Aid is the agreement between the Mesa Public School District of Arizona and the Salt River Pima-Maricopa Tribe.[206] Under what may be the first agreement between a tribe and a public school district, the tribe will receive and administer the school district's Impact Aid funding and provide certain Impact Aid services and programs.[207] Since 1988, when the tribe, through its education department, first became involved in Impact Aid, the dropout rate for Indian students in the district has decreased from eighty-five to sixty percent.[208]

C. Rosebud Sioux Tribe Education Code of 1991

The 1991 state-tribal compact between the Rosebud Sioux Tribe and South Dakota for the joint administration of public schools on

201. 20 U.S.C. §§ 236-246 (1992).
202. *Id.*
203. 20 U.S.C. § 240(b)(3)(B).
204. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 676.
205. *See* Gibbs, *supra* note 28, at 18.
206. *Salt River Announces Impact Aid Pact*, CIE NEWSLETTER, at 2 n.70, col. 2. (Coalition for Indian Education, Washington, D.C.) September 1991.
207. *Id.*
208. *Id.*

reservation land represents another model for tribal control of Indian education.[209] One of the results of this compact was the drafting of a Rosebud Sioux Tribe Education Code.[210]

Among its findings, the Rosebud Code noted the following: drop-out rates for its schools which were almost six times the state average, limited Indian studies curricula and Lakota language instruction, the lack of an official orthography for the writing and pronouncing of the Rosebud dialect of the Lakota language, the absence of hiring criteria for teachers other than state certification requirements, and weak parental involvement.[211] Among its goals, the Rosebud Code emphasizes the preservation and protection of the tribe.[212]

The Code creates a Tribal Education Department under the authority of the Tribal Council.[213] The Code requires that the Tribal Council establish tribal curricula, actively promote and assist coordination of tribal services and programs, seek grants and funding for education improvement, and supervise Tribal Education Department appropriations.[214] The Rosebud Code further applies Tribal law as well as South Dakota state law to school boards.[215] Moreover, the Code, among other things, requires that the Tribal Education Department devise tribal curricula and report on compliance of local and other schools with such curricula.[216]

D. Other Strategies

The Languages Act represents another strategy for promoting tribal control of Indian education through the general advancement of the study of Native American languages and the waiving of certification requirements when such requirements would hinder the employment of otherwise qualified Native American languages teachers.[217] Language instruction presents an area with high potential for the assertion of tribal influence through tribal formulation of courses of study which emphasize Indian culture — similar to the use of relevant culture in any foreign language instruction. Today, there is a growing awareness in Indian communities that a bilingual-bicultural education based on Indian values and traditions presents a viable alternative to

209. Mason, *supra* note 3, at 15.
210. ROSEBUD CODE, *supra* note 43.
211. *Id.* at § 103(a)(1)-103(a)(9).
212. *Id.* at § 103(b)(1).
213. *Id.* at § 202(a).
214. *Id.* at §§ 201(4)-201(12).
215. ROSEBUD CODE, *supra* note 43, at § 301(a).
216. *Id.* § 402(e).
217. *See supra* notes 118-120 and accompanying text.

the present educational system.[218]

V. Conclusion

The historic mistreatment of America's indigenous peoples is a stain on the history of the United States which Congress has tried to rectify. The generally dismal failure of our educational system to serve the needs of Native Americans suggests much room for improvement in this area. In light of the recognition that Indian students fare remarkably better when their education is sensitive to their particular cultural needs, the key to Native American education success lies with the encouragement of parental involvement, and the establishment of state-tribal compacts and tribal education departments and codes.

Moreover, despite certain circuit court Free Exercise Clause decisions that unreasonably hold Indian First Amendment rights to a lower standard of protection than other religions, the Supreme Court has generally followed the trend of Congress and the President of fostering Indian self-determination through legislation to increase Indian parental and tribal control of their children's education. Likening Native Americans to the canaries once carried by miners to detect poison gas, Felix S. Cohen, "the Grandfather of Indian Law," characterized the Indians as a litmus test for the political health of America as a whole.[219] Cohen reasoned that "[O]ur treatment of the Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[220] In light of Cohen's apt characterization of the significance of Indian rights, our ability to preserve Native American culture has implications for the rights of all Americans.

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218. Mason, *supra* note 3, at 15; *see also* Rosenfelt, *supra* note 33, at 507.
219. *Erosion of Indian Rights*, *supra* note 2, at 390.
220. *Id.*