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MEYERS v. BOARD OF EDUCATION: THE BROWN v. BOARD OF INDIAN COUNTRY

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*The U.S. Supreme Court announced the constitutional promise of an equal, unified education for African American students by deciding *Brown v. Board of Education* in 1954, but it would take another forty years before a federal court even addressed the basic question of whether American Indians share a similar right to equal educational opportunities. *Meyers v. Board of Education*, decided in 1994, is the seminal case addressing the civil rights of American Indians in public education. It is “the *Brown v. Board of Indian Country*.”*

*This article examines the legal and historical relationship between American Indians and the federal government to provide an understanding of why it took forty years for the promise of *Brown* to be formally recognized by a federal court and delivered to American Indians. A brief lesson in Indian law will introduce the unique treatment that Tribes have received in the courts. The sui generis nature of federal Indian law may provide some insight into why American Indians were still fighting for the rights recognized in *Brown* into the end of the twentieth century, long after the decision in *Brown* had become axiomatic for other racial groups.*

*While Indian rights are hinted at in the landmark civil rights decisions, few decisions have actually involved American Indians. This article discusses how the reluctance of courts to address Indian civil rights slowed construction on the road to *Brown* through Indian country.*

*Finally, the article discusses the decision in *Meyers* and how the Court and parties brought the promise of *Brown* to the American Indians of Navajo Mountain in Utah. The article demonstrates how and why the case of American Indian school desegregation gave birth \*1156 to the unique legal arguments in the *Meyers* decision. The legal arguments and conclusions are dissected for a full understanding of the leading case on the educational rights of American Indians and its impact on both federal Indian law and education jurisprudence.*

In 1974, twenty years after the Supreme Court's decision in *Brown v. Board of Education*,<sup>1</sup> the Navajo People's Legal Services and the Native American Rights Fund filed suit against the San Juan County, Utah School District (the District), to bring public schools to a part of the Navajo Reservation where none had previously existed. The case resulted in a settlement agreement,<sup>2</sup> without any legal opinion as to the rights of the plaintiffs. In 1994, the plaintiffs reopened the suit, requesting further relief in the form of an order requiring the District to build another high school on the Navajo Indian Reservation, this time in the remote community of Navajo Mountain.<sup>3</sup>

The Navajo Mountain area of the Navajo reservation is located in extreme southern Utah, within the boundaries of San Juan County. It is bordered by Lake Powell on the north, by 10,388-foot Navajo Mountain on the west, by the impassable Paiute mesa on the east and by Arizona on the south. It is one of the most remote and inaccessible areas of the Navajo reservation and perhaps of the United States.<sup>4</sup>

In 1974, the District sought an amicable settlement resulting in the construction of three new schools on the Navajo Reservation. This time the District argued that it had no legal duty to educate the residents of Navajo Mountain.<sup>5</sup> In 1994, forty years after the promise of *Brown v. Board of Education*,<sup>6</sup> no federal court had ruled on the simple question of whether American Indians<sup>7</sup> have a right to an equal educational opportunity from the states in which they live. The court's decision in \*1157 Meyers v. Board of Education is the leading case on the civil rights of American Indians in education.<sup>8</sup> Lead counsel for the Meyers plaintiffs, upon seeing the court's opinion for the first time, called the decision "the *Brown v. Board of Indian Country*."<sup>9</sup> *Meyers* is the first federal case to declare that American Indians, because of their state citizenship, have a right to an educational opportunity equal to all other persons.

In order to understand why this would be a legal question at the end of the twentieth century, one must first review the long history of the relationship between the United States and American Indians. This article is divided into four parts to present the framework for understanding the place the *Meyers* decision holds in the panoply of civil rights case law. First, it looks to the legal, if fallacious, underpinnings of the relationship between American Indians and the federal government. It is, in fact, only against this legal and historical backdrop that one can understand the importance of *Meyers*. Second, it looks to the history of Indian education to appreciate why the District would make a seemingly illogical legal argument in light of this country's history of desegregation. It is here that the voices of Indians who have suffered a mixed relationship with the education system of the United States will be heard. Third, this article dissects the legal arguments and the court's conclusions in the *Meyers* case to develop its understanding for those who have not studied both civil rights law and federal Indian law.

The continued existence of Indians as tribes and as peoples are the open wound in the psyche of America. The very land on which the federal government was established was taken from peoples who have not disappeared, as the pioneers and founding fathers dreamed they would. The myth of the vanishing American Indian refused to become reality. The result is that the relationship between the United States and American Indians has always been *sui generis*. The application of the concept of desegregation in public education is no exception. Indians have an anomalous relationship with both the federal government and the Anglo education system.

In some ways, the experience of African Americans and the experience of Native Americans have been polar opposites. In policy, the government wanted to maintain a "separate but equal" relationship with African Americans after the Civil War--emphasis, of course, on separate.<sup>10</sup> At the same time, the government attempted to turn Indians into white people in brown skins.<sup>11</sup> One disastrous governmental policy opened Indian \*1158 reservation lands to non-Indian settlement and, in checkerboard fashion, gave Indians "40 acres and a mule" next to similarly situated white farmers.<sup>12</sup> The theory was that the Indians would see the white farmers plant, farm, and prosper and that the Indians would do the same.<sup>13</sup> Education, in one form or another, has long been a part of the war between America and Indians.

On June 17, 1744, the commissioners from Maryland and Virginia negotiated a treaty with the Indians of the Six Nations in Lancaster, Pennsylvania. The Indians were invited to send boys to William and Mary College. The next day they declined the offer as follows:

We know that you highly esteem the kind of learning taught in those colleges, and that the maintenance of our young men, while with you, would be very expensive to you. We are convinced that you mean to do us good by your proposal; and we thank you heartily. But you who are wise must know that different nations have different conceptions of things and you will therefore not take it amiss, if our ideas of this kind of education happen not to be the same as yours. We have had some experience of it. Several of our young people were formerly brought up at the colleges of the northern provinces; they were instructed in all of your Sciences; but when they came back to us they were bad runners, ignorant of every means of living in the woods; unable

to build a cabin, take a deer, or kill an enemy; spoke our language imperfectly; were therefore neither fit for hunters, warriors, nor counselors; they were totally good for nothing.

We are, however, not the less obliged by your kind offer, though we decline accepting it; and, to show our grateful sense of it, if the gentlemen of Virginia will send us a dozen of their sons, we will take care of their education, instruct them in all we know, and make men of them.<sup>14</sup>

**\*1159 I. THE ACTUAL STATE OF THINGS IN THE FEDERAL-TRIBAL-STATE RELATIONSHIP, OR INDIAN LAW 101<sup>15</sup>**

Indian tribes have lands.<sup>16</sup> There is no other land-based racial minority group in the United States. Indian tribes, or nations, have governments with powers over their lands and their members. The federal Constitution recognizes the governments of Indian tribes,<sup>17</sup> but the Constitution did not create the Indian tribal governments. The powers of Indian tribes are derived from their inherent sovereignty, not powers created by or delegated from the United States.<sup>18</sup> Indian tribes have treaties with the United States that are equal to treaties with foreign nations.<sup>19</sup> These characteristics separate Indians from any other racial or ethnic minority group in the United States and define their relationships with the federal government.

The underpinnings of the federal government's dealing with Indian tribes and the continuing angst over its relationship with its native peoples was established in three early Supreme Court decisions known as "The Marshall Trilogy"--all authored by Chief Justice John Marshall. In 1823, the Court, in *Johnson v. M'Intosh*,<sup>20</sup> struggled with the status of a transfer of Indian lands to a non-Indian. At issue was the underlying assumption that the "discovering nations" of Europe each had the power to claim ownership, by right of discovery, and could prevent the Indian tribes from transferring tribal lands to any sovereign other than the one claiming discovery.<sup>21</sup>

In truly beautiful, almost poetic, language the Court answered the question:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, \*1160 in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.<sup>22</sup>

While it seems Marshall found the question and its answer rather absurd, the Chief Justice was a practical man and concluded that the courts of the conqueror could not find otherwise.<sup>23</sup> In other words, he was saying that "this might all be blue smoke and mirrors, but all of our land ownership depends on the premise being a correct one, therefore, it is a correct one." To paraphrase the immortal words *cogito ergo sum*<sup>24</sup> --"I think it must be, therefore, it is."

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In 1831, the Court was again called upon to define the relationship between Indian tribes, the states, and the federal government.<sup>25</sup> The State of Georgia had passed laws that purported to extend into the lands of the Cherokee Nation. The Cherokees filed a motion directly in the Supreme Court under the constitutional provision allowing for original jurisdiction in a suit by a foreign nation against a state.<sup>26</sup> Chief Justice Marshall noted that the Court first had to establish jurisdiction before ruling on the issues.<sup>27</sup> The Court needed to decide whether the Cherokee Nation was a foreign nation in the constitutional sense. Counsel for the Cherokee Nation argued that individual Cherokee were not citizens of the United States and, therefore, foreigners.<sup>28</sup> Counsel went on to argue that, collectively, the Cherokee were a nation of people who were foreign to the United States, therefore, they must be a foreign nation.<sup>29</sup> In attempting to discern whether an Indian tribe was a foreign nation entitled to bring this action, the Court looked to the Commerce Clause for evidence of how the Framers intended Indians to be treated under the Constitution. The Commerce Clause provides Congress with the power “to regulate commerce with foreign nations and among the several states, and with the Indian tribes.”<sup>30</sup> The Court stated:

The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.<sup>31</sup>

Chief Justice Marshall stated, and counsel for the Indian tribes argued, that it is obvious that Indian tribes are not states of the union. Marshall also noted that Indian tribes were listed separately from foreign nations in the Commerce Clause because they were distinguished from foreign nations at the Constitutional Convention.<sup>32</sup> Ultimately, Justice Marshall stated that Indian tribes

may, more correctly, perhaps, be denominated domestic dependant nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.<sup>33</sup>

These few words, although speculative, became the definition of the Indian-federal government relationship for 150 years. In federal law, tribes became “domestic dependant nations” and “wards of the government.”<sup>34</sup>

At least one scholar opines that Chief Justice Marshall wanted a better case to establish the independence of Indian tribes.<sup>35</sup> It is believed that he supported the publication of the other opinions in *Cherokee Nation* because he wanted Justice Thompson's dissent known. A year later, in *Worcester v. Georgia*,<sup>36</sup> Marshall seized the opportunity to more completely delineate the rights and status of Indian tribes. Samuel Worcester, a citizen of the State of Vermont, was convicted, pursuant to Georgia law, for preaching the gospel without a Georgia state license to the Cherokee within Cherokee territory. Marshall stressed the importance of the issues:

The legislative power of a state, the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.<sup>37</sup>

He then began his inquiry with a history lesson:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and

governing themselves by their own laws. It is difficult to comprehend \*1162 the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.<sup>38</sup>

As in earlier opinions, Marshall demonstrated that he was a practical jurist. Marshall found it difficult to understand how colonists from Europe could sail along the American coast, stop periodically, plant a flag, and proceed to make grand claims of ownership over lands already occupied by others:

[b]ut power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.<sup>39</sup>

The great powers of Europe all laid claim to some part of America. Where each had laid claim, they agreed that the other could not interfere. The nations sometimes disputed the extent of a given claim, but never disagreed as to the rights created by the claim in the first place.

The Indian nations had always been considered distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. This was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term “nation,” so generally applied to them, means “a people distinct from others.” The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. \*1163 The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.<sup>40</sup>

The Court emphasized the limited power of the states to interfere with the activities of Indian tribes within tribal lands. It also defined the underpinnings of the powers of the federal government with respect to Indian affairs. These powers were later defined as plenary where Indians are concerned.<sup>41</sup>

[The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.<sup>42</sup>

These brief reflections on the backdrop of federal Indian law may, perhaps, shed light on the argument made by the District in *Meyers* that they did not have a legal duty to provide education to the Navajo students of Navajo Mountain.

## II. A BRIEF HISTORY OF ANGLO EDUCATION OF AMERICAN INDIANS<sup>43</sup>

In the dedication of her book on the history of Indian education, *To Live Heroically*, Deloris J. Huff writes:

To the generations of Indian children--who endured history classes extolling the heroism of Christopher Columbus (who enslaved and slaughtered the Arawak to extinction)--who have learned from history books that label Indians as savages and pagans (and perpetuate a modern cultural genocide to rationalize the historical physical genocide)--who endured the ignominy of having to wear turkey feathered headdresses in class in celebration of Thanksgiving Day (and the historical amnesia of the genocide perpetuated by the puritans and pilgrims on the Wampannoags, the Massachusetts, the Narragansetts, the Schaghticokes, and many other eastern tribes that lived in New England thousands of years before the Puritans landed on Plymouth Rock)--who in their confusion and bewilderment watch western movies and root for the cowboys.

In spite of it all, each generation of Indians has survived and endured the pain. We adult Indians know how painful it is to be a non-person in our own country. All pain comes to an end. Sooner or later, you either die from pain or develop antibodies to withstand \*1164 the virus of cultural invasion. My generation wants the pain to end, so that your generation can bring sanity into the twenty first century.

If life is really a crap shoot, my bet is on you.<sup>44</sup>

Education among American Indians did not begin with the arrival of Columbus or the Puritans. However, many treaties with Indian tribes called for the provision of schools.<sup>45</sup> For example, the treaty with the Navajo Nation discussed in *Meyers* states: In order to insure [sic] the civilization of the Indians entering into this treaty, the necessity of education is admitted ...; and the United States agrees that, for every thirty children [between the ages of six and sixteen] who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less that ten years.<sup>46</sup>

It is noteworthy that education is provided "to ensure the civilization of the Indians," a theme that dominated the federal government's programs for the education of Indians for another century.

In the earliest stages of the federal-tribal relationship, mission schools were supported by the federal government for the civilization of the Indians.<sup>47</sup> The experience of many Indians in the mission schools is reflected in Francis La Flesche's autobiographical account of life in a mission school in Nebraska in the 1860s, *The Middle Five: Indian Schoolboys of the Omaha Tribe*, where punishment was often harsh.

"Hold out your hand!" he said, addressing the shrinking boy.

Joe timidly held out his left hand, keeping his eyes all the while on the uplifted board, which came down with force, but not on the little hand that had been withdrawn to escape the blow. Gray-beard sprang at the boy, caught his hand, and attempted to strike it; but the boy pulled away and the board fell with a vicious thud on the wrist of the man, who now turned white with rage.

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Catching a firm grip on the hand of the boy, Gray-beard dealt blow after blow on the visibly swelling hand. The man seemed to lose all self-control, gritting his teeth and breathing heavily, while the child writhed with pain, turned blue, and lost his breath.<sup>48</sup>

**\*1165** Eventually, the federal government decided to open its own schools through the Bureau of Indian Affairs (BIA). While there are some Indians who support the retention of these schools, many others have not had positive educational experiences. I was happy living with my grandparents in a world of our own, but it was a happiness that could not last. “Shh, *wasicun anigni kte*--be quiet or the white man will take you away.” How often had I heard these words when I had been up to some mischief, but I never thought that this threat could become true, just as I never thought the monsters *ciciye* and *siyoko* would come and get me.

But one day the monster came--a white man from the Bureau of Indian Affairs. I guess he had my name on a list. He told my family, “This kid has to go to school. If your kids don't come by themselves the Indian police will pick them up and give them a rough ride.” I hid behind Grandma. My father was like a big god to me and Grandpa had been a warrior at the Custer fight, but they could not protect me now.

In those days the Indian schools were like jails and run along military lines, with roll calls four times a day. We had to stand at attention, or march in step. The B.I.A. thought that the best way to teach us was to stop us from being Indians. We were forbidden to talk our language or to sing our songs. If we disobeyed we had to stand in the corner or flat against the wall, our noses and knees touching the plaster. Some teachers hit us on the hands with a ruler. A few of these rulers were covered with brass studs. They didn't have much luck redoing me, though. They could make me dress up like a white man, but they couldn't change what was inside the shirt and pants.

My first teacher was a man and he was facing a lot of fearful kids. I noticed that all the children had the same expression on their faces--no expression at all. They looked frozen, deadpan, wooden. I knew that I, too, looked that way .... The schools leave a scar. We enter them confused and bewildered and we leave the same way. When we enter the school we at least know that we are Indians. We come out half red and half white, not knowing what we are.<sup>49</sup>

One of the primary architects of the federal education program was Army Captain Richard Henry Pratt.<sup>50</sup> Most well-known for founding the Carlisle Indian School,<sup>51</sup> his educational philosophy for American Indians **\*1166** was based on late nineteenth-century assumptions about the education of emigrant children.<sup>52</sup>

1) Indian children, like emigrant children, were infinitely plastic and educable in character so long as they were effectively disabused of their “old world” superstitions in favor of “new world” culture and knowledge; 2) Indian children, like emigrant children, would benefit from a compulsory formal education in a suitable classroom or shop setting that would, in the case of the Indian children, transform them from savages to citizens; and 3) Indian children, unlike emigrant children, must be separated from their parents, families and peer groups if they were to be effectively educated in the white way of life.<sup>53</sup> Indian children faced a different form of segregation--a segregation from themselves.

In the 1930s, the government made a major shift to integrate Indian children into the public school systems. The 1934 passage of the Johnson-O'Malley Act provided the Secretary of the Interior with the authority to contract with “any State university, college or school, or with any appropriate State or private corporation, agency, or institution, for the education ... of Indians in such State or Territory.”<sup>54</sup>

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In the 1950s, during a time known to Indian people as the termination period, the federal government decided that it was time to get out of the Indian business, break up Indian reservations, terminate tribal governments, and eventually end the Indians' special relationship with the federal government.<sup>55</sup> One part of this overall scheme was to turn Indian education over to the states and provide financial support to the states for the education of American Indians,<sup>56</sup> including granting funds in lieu of taxes for children on Indian reservations not subject to local ad valorem property taxes.<sup>57</sup> There are many other federal programs to assist states with Indian education, including the Educational Agencies Financial Aid Act (Impact Aid Act),<sup>58</sup> the School Facilities Construction Act,<sup>59</sup> Title I of the Elementary and Secondary Education Act of 1965,<sup>60</sup> and the Indian Education Act,<sup>61</sup> to name a few.<sup>62</sup> The modern educational \*1167 policy is to provide assistance to Indian tribes to take over schools formerly run by the BIA.

### III. THE ROAD NOT TAKEN: FINDING THE AMERICAN INDIAN VOICE IN DESEGREGATION LAW

Though there are whispers of the presence of American Indians in the civil rights classics, there are few cases in the pantheon of leading civil rights cases that involve American Indians. When the Supreme Court declared racially restrictive covenants in housing deeds to be unconstitutional under the Fourteenth Amendment in *Shelley v. Kraemer*<sup>63</sup> there was a companion case filed against the District of Columbia under the Fifth Amendment.<sup>64</sup> In *Hurd v. Hodge*,<sup>65</sup> the Supreme Court noted that the complainant maintained throughout the litigation that he was not Negro, but rather a Mohawk Indian.<sup>66</sup> The Court could have held that discrimination because he was an Indian offended the Constitution, but instead opined that discrimination is in the eyes of the beholder. If the seller of the property believed him to be Negro and therefore denied him the right to purchase the home--it violated his constitutional right.<sup>67</sup> In *Loving v. Virginia*, the 1967 case finding antimiscegenation laws unconstitutional, the Court noted that, under the statute, American Indians, like African Americans, could not intermarry with whites unless they were one-sixteenth or less Indian blood.<sup>68</sup> The Court noted that this provision was put into the law because someone of that quantum of Indian blood might be a descendant of John Rolfe and Pocahontas.<sup>69</sup>

Previously, the only federal case involving desegregation and directing affecting Indians was *Mendez v. Westminster School District*,<sup>70</sup> a case that many believe to be the precursor to *Brown*. Four school districts in Orange County, California, established and operated separate schools for Hispanic children. The plaintiffs, all of Mexican descent, argued that California law did not call for the segregation of people of Mexican ancestry and therefore their separation from the schools in question was a violation of state law.<sup>71</sup> The federal district court held that these practices \*1168 violated not just California law, but also "the supreme law of the land."<sup>72</sup>

"The equal protection of the laws" pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.<sup>73</sup>

And, finally, the court noted that the methods of segregation of children of Mexican heritage "foster antagonisms in the children and suggests inferiority among them where none exists."<sup>74</sup> This was a giant step forward in California, where racially segregated schools were allowed by law. While Indians were not before the court in *Mendez*, the laws it struck down did affect them.

The governing body of the school district shall have power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Chinese,

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Japanese or Mongolian parentage. When such separate schools are established, Indian children or children of Chinese, Japanese, or Mongolian parentage must not be admitted into any other school.<sup>75</sup>

The road taken by the Supreme Court in getting to *Brown* did not pass through Indian country. Each education case that the Court accepted for review was built upon the case before it. In the 1930s, the State of Missouri had separate colleges for white and black students.<sup>76</sup> State law provided that where the black school did not offer an educational program that was offered at the white school, the state would pay the tuition and fees for the black student to go to a school that would admit him in one of the neighboring states.<sup>77</sup> In 1938, in *Missouri ex rel. Gaines v. Canada*, the Court declared that the Missouri practice violated the constitutional right to equal opportunity holding that the right to an equal education must be met by the state in which the person lives.<sup>78</sup>

The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of \*1169 the privileges which the laws give to the separated groups within the State .... The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it.<sup>79</sup>

A decade later, in *Sipuel v. Board of Regents*,<sup>80</sup> the *Gaines* opinion was reinforced in a two page per curiam opinion striking down a similar practice in Oklahoma. Oklahoma reacted by enacting statutes providing for the admission of black students to white schools where comparable programs were not offered at the black schools, but “upon a segregated basis.”<sup>81</sup> G.W. McLaurin, a black student admitted to the graduate school at the University of Oklahoma was required to sit outside the classroom during lectures in an anteroom labeled “Reserved For Colored,” at a similarly designated desk in the library, and was not allowed to use the regular reading room.<sup>82</sup> He was allowed to eat in the same cafeteria, but at a different time from the other students.<sup>83</sup> While his case was pending, the school altered its practices and allowed him to sit in the classroom in a “row specified for colored students ...,” and at special tables on the main floor of the library and in the cafeteria.<sup>84</sup> The Court found that, under these circumstances, McLaurin was not being granted the same educational opportunities as white students. These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession.<sup>85</sup>

This same transcendental concern, the importance of the exchange of different views, was later used to justify finding a compelling state interest in attaining diversity in the classroom.

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. \*1170 Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates.<sup>86</sup>

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In response to the Supreme Court's decisions, the State of Texas made plans to open a separate law school for black students, but instead opened a law school at "The Texas State University For Negroes."<sup>87</sup> The Court found that the new law school was inherently unequal.

In terms of the number of faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.<sup>88</sup>

The Court also found that the students at the black school would study law in an environment from which eighty-five percent of the state's racial groups would be excluded--that excluded population being the one from which most of the state's lawyers, jurors, judges, and potential clients would be drawn.<sup>89</sup> All of these deficiencies led the Court to find that the new law school was, therefore, unequal to the University of Texas.<sup>90</sup>

While each of these cases moved the law forward, they still accepted the race-based separation of students if the state offered nonwhite students an educational program substantially equal to the program offered to whites. The next education case the Supreme Court heard was *Brown*.

#### IV. THE WAY TO NAVAJO MOUNTAIN

Although Navajo Mountain is technically within Utah, the only vehicular access to the Navajo Mountain area is from the Arizona side, by a graded dirt road. It is a 200-mile trip from District headquarters in Monticello, Utah, to Navajo Mountain. As the proverbial crow flies, Navajo Mountain is only about 45 miles from the District's nearest high school, at Monument Valley, and only about 60 miles from the District's nearest elementary school, at Mexican Hat, but because of the topography and lack of roads, one has to drive more than 120 miles from Navajo Mountain to reach the nearest District facilities.<sup>91</sup>

##### \*1171 A. Procedural History

In 1973, private plaintiffs represented by the Navajo People's Legal Services and the Native American Rights Fund brought an action entitled *Sinajini v. Board of Education* to bring elementary and secondary schools to the Utah portion of the Navajo Indian Reservation.<sup>92</sup>

In 1994, the population of the Navajo Mountain community, which straddles Arizona and Utah, had grown to include approximately sixty-six high school age students on the Utah side of the state line.<sup>93</sup> The plaintiffs, through Indian parent groups, asked the District to construct a high school for their community. The high school age students were attending boarding schools run by the federal government in Arizona, ninety miles from Navajo Mountain.<sup>94</sup> When the District did not respond in a positive and timely manner, the plaintiffs reopened the old *Sinajini* case and sought further relief under that decree. The District moved for dismissal of the claim for relief at Navajo Mountain on the grounds that the original settlement was silent as to a high school at Navajo Mountain. The motion was granted. With that portion of their claims dismissed, the plaintiffs filed the *Meyers* case.<sup>95</sup> The new suit alleged that the District had historically built small remote schools for small populations of

white miners in the county and that the failure to provide a high school at Navajo Mountain was racial discrimination.<sup>96</sup> The District responded that it had no legal duty to provide a high school at Navajo Mountain.

The question before the court was a simple one: Who had the legal duty to provide elementary and secondary educational services to American Indian children who lived within the external boundaries of an Indian reservation? The facts were also simple.<sup>97</sup> Approximately 125 Navajo and Paiute children live in the Navajo Mountain community, sixty-six of them on the Utah side of the border. The San Juan County School District is, geographically, the largest school district in America. The county runs from the Arizona State line in the south, to just below Moab in the north, to the Colorado State border on the east, and to the Colorado River and Lake Powell on the west. The southern third of the county is the Navajo Indian Reservation. In the 2003-2004 school year, fifty-one percent of the school district enrollment was American Indian. \*1172 The students attending schools in the northern part of the county are predominantly non-Indian. The students attending schools in the southern portion of the county are overwhelmingly American Indian. The schools in Blanding have roughly fifty-fifty Indian/Non-Indian enrollment. This case was never about desegregation. The case was purely about the provision of services.<sup>98</sup> While the District argued, in 1974, that all of its schools were open to any student in the District, the majority of its schools were so far removed from the Navajo communities they purported to serve that Indian students would have been commuting to school longer than they would have been in the classroom.<sup>99</sup> It would have been educationally unsound to bus children those distances.

The 1974 Settlement (the Settlement) called for the construction of two new high schools on the Navajo Reservation.<sup>100</sup> The schools would be located in the communities they were to serve.<sup>101</sup> The Settlement said that the District would not be required to build an elementary school in the Navajo Mountain Community if the BIA built an elementary school there.<sup>102</sup> The Settlement was silent as to the presence of a high school in the Navajo Mountain Community.<sup>103</sup>

### ***B. The Meyers Decision***

The plaintiffs argued that the District had a legal duty to educate their children and to build a school within their community.<sup>104</sup> The Navajo Nation also argued that the County and the State had the exclusive duty to provide a school at Navajo Mountain.<sup>105</sup> The United States, also intervenors, agreed that the duty to educate American Indian children lay with the state and school districts within which they resided.<sup>106</sup> The District argued that the exclusive duty lay with the federal government and, with respect to the Navajo students, with the Navajo Nation.<sup>107</sup> Utah argued that there was a shared duty among all of the entities.<sup>108</sup>

\*1173 The court opened its opinion with a punt: "For the reasons stated below, the court concludes that each of the governmental entities involved in this case has an obligation to see that the plaintiffs receive appropriate educational opportunities."<sup>109</sup> The court's attempt to engage in a Solomon-like splitting of the baby sent the case into eighteen months of further litigation and negotiation before it settled.<sup>110</sup>

The District set forth, in a motion for summary judgment, various sophisticated, though ultimately fallacious, federal Indian law arguments.<sup>111</sup>

***1. The court does not have to decide the issue because the federal government is offering a free public education at Navajo Mountain.***<sup>112</sup>

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Several state courts had previously held that the existence of BIA schools does not justify the exclusion of Indian children from public schools.<sup>113</sup> California, in 1874, provided that students could be segregated on the basis of race if separate schools were built for the nonwhite students.<sup>114</sup> With respect to Indian students, the statute provided that the state school could refuse to admit Indians if there was a separate school established for them by the district or if one had been established by the federal government.<sup>115</sup> In *Piper v. Big Pine School District*, the California Supreme Court ruled that the federal school was not the equivalent of a separate school established by the state government.<sup>116</sup> The court found that the plaintiff could not be denied admission to the state-authorized school because of the presence of the federal school.<sup>117</sup> However, the court implied that the plaintiff could have been denied admission to the white school had the district constructed a separate school for Indians.<sup>118</sup> Likewise, in *Grant v. Michaels*,<sup>119</sup> the Supreme Court of Montana held that the presence of a federal boarding school did “not relieve the state of its duty to furnish public school facilities to” Indian children living on Indian reservations.<sup>120</sup> In *Prince v. Board of Central Consolidated Independent School District*,<sup>121</sup> a challenge was made to the practice of allowing Indians to vote in school board elections and to the district's placement \*1174 of school buildings on land leased from the Navajo Nation. The New Mexico Supreme Court held that if the district did not build schools on the reservation it would still be obligated to provide Indian children with a school. The court also noted that to build a school off-reservation, where the distances to school made it impossible for the Indian students to attend, would deny the Indian students “a free school just as effectively as if no school existed.”<sup>122</sup>

In *Meyers* the argument was more absurd because the BIA school was an elementary school and the plaintiffs were secondary school age students. It would be an anomalous finding that the presence of a federal elementary school relieved the District of its duty to provide high school services. Instead, the court noted that the provision of a high school education by the BIA in another state “does not necessarily provide him or her with an equivalent education.”<sup>123</sup>

**2. The court does not have authority to rule on the matter because dealing with Indians is a political question.**<sup>124</sup>

The District also argued that the relationship between the federal government and Indians is a government-to-government relationship and, therefore, the case presented a nonjusticiable political question. Defendants cited *National Indian Youth Council v. Bruce*<sup>125</sup> for the proposition that “Congress [has] exclusive authority to ‘control and manage the affairs of the Indian people.’”<sup>126</sup> The court distinguished *Bruce* on its facts, noting that the case was brought to force a federal agency to close a boarding school and move the program to another location. The plaintiffs in *Bruce* asked the court to direct a federal agency, “a coordinate branch of the federal government”<sup>127</sup> to take a specific action within its discretionary authority.<sup>128</sup> In *Meyers*, plaintiffs argued that they were being denied “educational opportunities equal to those provided other children in the District” based on race, by a state-operated school district, the very kind of case that the courts had been handling since *Brown v. Board of Education*.<sup>129</sup> “Courts have both the power and the responsibility \*1175 to address alleged violations of constitutional rights, such as the right to equal protection claimed in this case.”<sup>130</sup>

**3. Indians living on an Indian reservation are not “children of the state” under the Utah Constitution.**<sup>131</sup>

The Utah Constitution requires the legislature to provide for “the establishment and maintenance of the state's education systems including ... a public education system, which shall be open to all children of the state.”<sup>132</sup> The District claimed that the framers of the state constitution did not intend to include Indians living on reservations as children of the state.<sup>133</sup> The District also argued that the constitutional provision should be interpreted in light of past practices. Until recently, the state did not provide

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any educational services to on-reservation Indian students. The court found that past practices under the state's constitution are not conclusive of its interpretation.<sup>134</sup>

Whatever may have been the status of Native Americans in 1895, when the Utah Constitution was adopted, it is now clear that Native Americans residing on a reservation within the territorial confines of a state are citizens of that state and entitled to all the rights and privileges of other citizens.<sup>135</sup>

It would indeed be a curious decision that found that a past practice of discrimination validated a current practice of discrimination.<sup>136</sup>

**\*1176 4. *The District does not have the same powers on Indian lands that it does on state lands and therefore should not have to provide educational services to on-reservation Indians.***<sup>137</sup>

The District argued that it would be inappropriate to find that it had a duty to provide on-reservation schools because it did not have the power to condemn property for school construction, compel student attendance, or appropriate water for school use.<sup>138</sup> The court found that

[w]hile these limitations on the District's powers may affect the scope of the District's duty and may require the cooperation of the Navajo Nation and the United States in providing educational services to Navajo children living on the reservation, they do not excuse altogether the District's constitutional obligation to provide a system of public schools open to all the children of the District, including the children of Navajo Mountain.<sup>139</sup>

The court in *Prince* had noted the cooperation of the Navajo Nation in providing land, water, and compulsory school attendance for on-reservation schools in New Mexico.<sup>140</sup> The San Juan County School District itself had three elementary schools and two high schools on the Navajo reservation that had been constructed pursuant to the Settlement. The District was well aware of the willingness of the Navajo Nation to cooperate in providing education for its children.

**5. *Any duty the District may have has been preempted by the comprehensive scheme the United States has implemented to educate Navajos.***<sup>141</sup>

The District first pointed to the treaty with the Navajo Nation which promised that, for every thirty students the Navajo Nation compels to come to school, the United States will provide a schoolhouse and a teacher. The court did find that the United States had a continuing duty under the treaty to provide education to the Navajo Nation's students.<sup>142</sup> The District and the court also cited numerous other funding statutes wherein Congress made broad statements about the obligation of the United States to provide education to American Indians. The court's **\*1177** conclusion was that "the United States clearly has an obligation for educating the plaintiffs in this case."<sup>143</sup>

The District argued this created a federal scheme of Indian education statutes that "make reasonable the inference that Congress left no room for the States to supplement"<sup>144</sup> the federal regulation of Indian education. The court, however, correctly noted that the "comprehensive scheme" of federal laws involving Indian education focuses heavily on federal programs to assist state and local school systems to provide education to Indians, including the Federally Impacted Aid Act,<sup>145</sup> making federal impact funds available to local educational agencies for educating residents of Indian lands; the School Facilities Construction Act,<sup>146</sup>

making federal funds available to local educational agencies for the construction of schools to “provide free public education for children who reside on Indian lands”; Title I of the Elementary and Secondary Education Act of 1965,<sup>147</sup> providing financial assistance to local educational agencies for the education of Indian children; the Johnson-O'Malley Act of 1934,<sup>148</sup> authorizing the Secretary of the Interior to contract with and provide assistance to state education agencies and school districts for Indian education; and the Indian Education Act,<sup>149</sup> also providing financial assistance to local educational agencies for the education of Indian children.<sup>150</sup>

The court found that, in the modern era, the federal government shifted its educational programs for Indians to supporting state responsibility for the provision of those services noting that “[t]he statute authorizing federal impact funds for local educational agencies expressly provides that it is not meant ‘to relieve any State of any duty with respect to \*1178 any citizens of that State,’ ... and, of course, on-reservation Indians are citizens of the state within which they reside.”<sup>151</sup>

***6. Strict scrutiny should not apply in this case because Indians are a political group, not a racial group.***<sup>152</sup>

The defendants argued that the court should not apply a strict scrutiny standard of review to its policies and actions. While the plaintiffs claimed that the District's actions were racially discriminatory, the District argued that Indians are a political group instead of a racial group.<sup>153</sup>

The court found that the political status doctrine is a one-way street, allowing the federal government to fulfill its obligations to Indians through special statutes, but does not allow discrimination against them.

When it comes to governmental action affecting Indians, the line between permissible political classifications is not always easy to draw. However, the test seems to be whether “the special treatment [afforded Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians”; if so, the legislative judgment “will not be disturbed.” The District, of course, does not enjoy the same special relationship with and power to regulate Indian tribes that the federal government has. The District has not shown how its allegedly disparate treatment of the plaintiffs is “tied rationally to the fulfillment of Congress' unique obligation toward the Indians.” The District does not have to withhold its services for the federal government to fulfill any obligation it may have to educate the plaintiffs. Absent such a showing, local school boards are simply not free to discriminate between Indians and non-Indians based solely on their status.<sup>154</sup>

***\*1179 C. Defining the District's Duty or Dividing Up the Duty Pie***<sup>155</sup>

The court may have been attempting to push the parties to a settlement and avoid protracted litigation by repeating its opening attempt to spread the duty across all of the parties before the court.

Based on the federal statutes governing Indian education, the court concludes that Congress intended the education of on-reservation Indians to be a cooperative effort among the federal government, states and local school boards, the Indian tribes and Indian parents. The fact that one entity may have a duty to educate on-reservation Indians does not excuse any other entity from fulfilling its own obligations.<sup>156</sup>

The United States, of course, was the only party before the court that was providing schools for the students at Navajo Mountain-- a school for students in grades kindergarten through eighth that also provided boarding services for those requiring it. The high school age residents of Navajo Mountain were educated by the BIA in boarding schools. The federal government's duty to provide education is limited to its specific treaties with individual tribes. No court has delineated the specific parameters of that duty. The United States meets its duty in a multiplicity of ways. Historically, federal money was given to religious organizations

to “civilize” the Indians. Then the federal government began opening its own schools through the BIA. Finally, the federal government recognized that the states have the primary duty to provide education through their public schools, but it provides millions of dollars through a variety of programs to states to assist their efforts. Half of the District's annual budget in *Meyers* consisted of federal funds. Counsel for the United States suggested at the hearing on the motions for summary judgment that one of the ways the federal government might meet its treaty obligation to the Navajos would be to enforce civil rights laws on their behalf.<sup>157</sup> Any duty that may be ascribed to the United States, be it through specific treaties or the general trust responsibility, is not a constitutional duty. No court has ruled that there is a right to have federal schools proximate to the communities where Indian children live; one court has \*1180 ruled that there is no such right.<sup>158</sup> It is the state constitutions that provide for free public education, and the Fourteenth Amendment that requires education to be offered equally to all. The Utah Supreme Court held that “[t]here shall be provided, for each child in the state, a school suitable to its development and training, and as reasonably convenient for attendance as is practicable, which school such child shall have a right to attend.”<sup>159</sup> The Fourteenth Amendment requires equal treatment for the students of Navajo Mountain.

The court concludes that all of the entities involved in this case--the District, the State, the United States and the Navajo Nation--each has a duty to educate the children of Navajo Mountain. The duty of one does not relieve any other of its own obligation. The precise scope of that duty may depend on facts that have yet to be developed.”<sup>160</sup>

#### V. THANK YOU MR. SWENSON

After the new high school was built at Navajo Mountain, the attorneys for the plaintiffs visited the school to see it in operation and to speak to the students and parents about the educational program. At the end of a small community meeting, a Navajo woman rose from her seat and spoke these words:

Mr. Baca. Mr. Swenson. We cannot let you leave without saying thank you for what you have done for our community. Before you came here my daughter had to go ninety miles away to the boarding school. At the end of the day when she went back to the dorm she was alone. She did not have her father there to help her with her homework. She did not have her mother there to teach her to be Navajo. But now because you have fought for the Navajos in this community our children come home from school every night. Because you fought for the Navajos our children can get their education and they do not have to lose their culture. Thank you Mr. Baca. Thank you Mr. Swenson.

While the court had not delineated the duty of any party to the case, it was clear from the opinion that the big winners were the Navajo and Paiute students of Navajo Mountain--and their attorney.

An eagle feather to you Eric!

#### Footnotes

- a1 *Deputy Director of the Office of Tribal Justice, United States Department of Justice.*  
*A career attorney in the Civil Rights Division, Lawrence R. Baca (Pawnee) was lead counsel for the United States in the Meyers case. His words and analysis here on the issues of civil rights law, federal Indian law, and the history of Indian education are his own and may not be attributed to the Department of Justice.*

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- 1 347 U.S. 483 (1954) (*Brown I*).
- 2 *See Sinajini v. Bd. of Educ.*, No. 74-346, 1975 U.S. Dist. LEXIS 15526 (D. Utah Oct. 31, 1975).
- 3 The 1974 Settlement Agreement had not provided for a high school in this area. *See id.* The complete procedural history of the litigation is discussed *infra*.
- 4 *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544 (D. Utah 1995).
- 5 *See id.* at 1553 (“The defendants moved for summary judgment, claiming that they had no duty to provide any educational services to Native American students residing at Navajo Mountain ....” (citation omitted)).
- 6 347 U.S. 483 (1954) (*Brown I*).
- 7 Throughout this article I use the terms Indian, American Indian, Native American, and Native interchangeably. It will be obvious that I am using them in reference to the indigenous peoples to the part of the North American continent that is now the United States. I find them all useful, but inadequate. We are not really “Native Americans” because it was not America that we are native to--someone else called it America, we just called it home. We generally refer to ourselves by our tribal names. Those names often translate to “the people,” “the first people,” “the true people,” “the only people,” or “the people of ....” Dine--The People; Tohono O’odam--the People of the Desert; Gayogohono--People of the Great Swamps; Wabanaki, People of the Dawn; Kitchi-Gumee Anishinabeg--the People of Great Lakes; Havasupai--People of the Blue-Green Water. But, while Indian is a misnomer, it is in the federal Constitution three times and Title 25 of the United States Code is “Indians.” Indian and Indian tribes serve the purpose of being the “legal name” of “the People.”
- 8 905 F. Supp. 1544 (D. Utah 1995). This case was also the first case ever filed by the United States to enforce educational civil rights statutes on behalf of American Indians.
- 9 Interview with Eric P. Swenson, attorney for individual plaintiffs in *Meyers*, at private dinner (Apr. 10, 1995).
- 10 S. LYMAN TYLER, U.S. DEPT OF THE INTERIOR, A HISTORY OF INDIAN POLICY 76-84 (1973).
- 11 While we may occasionally be called “red Indians” to distinguish us from people from the continent of India, I would never use the pejorative “redskin” as a reference to a race of people.
- 12 TYLER, *supra* note 10, at 95-96.
- 13 *Id.* at 96 (“To the Indian the Allotment Act was revolutionary for he had traditionally tended to think of land use in terms of community rather than individual use practices. As conceived, the law would have allowed individual Indian allottees to become citizens of the United States, and also, by the terms of the 14th [A]mendment, citizens of a particular State. A patent in fee would have been given to the individual Indian allottee after the allotment had been held in trust by the Government for 25 years. As a citizen with a patent in fee the Indian would have been able to sell or do whatever else he wished with his land. He would have held a negotiable title. The actual allotment act of land to individual Indians proceeded slowly at first, but eventually this breaking up of tribal land holdings became a much speedier process. By experience it was learned that while the tribes held their lands in common there was little opportunity for covetous individuals to acquire Indian lands, but that after allotment to individual Indians the way was opened for exploitation of the individual owners as each acquired a negotiable title.”).
- After allotment surplus Indian lands were purchased from the tribes by the Secretary of the Interior and sold off at public auction. Indian land holdings went from 155,632,312 acres in 1881 to 77,865,373 in 1900. The funds from the sales were to be held in trust by the federal government for the tribe. *Id.* at 97.
- 14 BENJAMIN FRANKLIN, TWO TRACTS 28-29 (3d ed. 1974).
- 15 The subject of federal Indian Law is far too complex to receive more than a cursory explanation here of the establishment of the federal-tribal-state dynamic. For example, Title 25 of the United States Code referring to “Indians” makes Indians the only race of people in America with their own U.S. Code Title. The discussion here of the leading cases is solely for the purpose of giving

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the reader, who may be unfamiliar with federal Indian law, a basis on which to understand the District's defenses in *Meyers*. For a thorough review of federal Indian law, see generally FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland ed., 1982).

16 Not all, of course, but many.

17 The Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

18 See generally *Worcester v. Georgia*, 31 U.S. 515 (1832).

19 *Id.*

20 21 U.S. 543 (1823).

21 *Id.* at 571-72.

22 *Id.* at 591-92.

23 *Id.* at 604.

24 “I think, therefore, I am.”

25 *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

26 U.S. CONST. art. III, § 2.

27 *Cherokee Nation*, 30 U.S. at 8.

28 *Id.* at 16.

29 *Id.*

30 U.S. CONST. art. I, § 8, cl. 3.

31 *Cherokee Nation*, 30 U.S. at 16.

32 *Id.* at 17-20.

33 *Id.* at 17.

34 See, e.g., *id.*; Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian People*, 21 U. ARK. LITTLE ROCK L. REV. 941, 942 (1999).

35 See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN L. REV. 500 (1969).

36 31 U.S. 515 (1832).

37 *Id.* at 536. The use of the term “once numerous and powerful” is an indication of the Chief Justice's real belief about the military, as opposed to political status of the tribe.

38 *Id.* at 543-44.

39 *Id.* at 543.

40 *Id.* at 559-61.

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- 41 Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning.”).
- 42 *Worcester*, 31 U.S. at 559.
- 43 A thorough review of the history of Indian education is beyond the scope of this paper. The cursory review here serves to place *Meyers* and the role of public education for Indians in context.
- 44 DELORES J. HUFF, TO LIVE HEROICALLY, INSTITUTIONAL RACISM AND AMERICAN INDIAN EDUCATION vi (1997).
- 45 *See id.* at 2-3.
- 46 Treaty with the Navajo Indians, June 1, 1868, U.S.-Navajo Nation, art. VI, 15 Stat. 667, 669.
- 47 *See TYLER*, *supra* note 10, at 46, 88-90.
- 48 Francis LaFlesche, *The Middle Five: Indian Schoolboys of the Omaha Tribe*, in *GROWING UP NATIVE AMERICAN* 122 (Patricia Riley ed., 1993).
- 49 JOHN (FIRE) LAME DEER & RICHARD ERDOES, LAME DEER: SEEKER OF VISIONS 32-35 (1972).
- 50 Cross, *supra* note 34, at 941, 944.
- 51 The Carlisle Indian School is most well known as the school attended by Jim Thorpe, Gold Medalist in the Pentathlon and Decathlon in the 1912 Olympic Games and Athlete of the Half Century in 1950. *See Thorpe, Jim* on Encyclopedia.com, at <http://www.encyclopedia.com/html/T/Thorpe-JI.asp>.
- 52 Pratt is the educator who stated that you need to “kill the Indian so as to save the man within.” *See Cross, supra* note 34, at 944.
- 53 *Id.* at 944-45.
- 54 25 U.S.C. § 452 (2000).
- 55 *See H.R. Con. Res. 108*, 83rd Cong. (1953).
- 56 *Id.*
- 57 The statute known colloquially as Federal Impact Aid was originally passed during the Korean War to assist school districts who were impacted by the presence of military children whose parents lived on military bases (nontaxable federal land). Tribal lands that are held in trust are also, because of their federal trust status, nontaxable. Educational Agencies-Areas Affected by Federal Activities-Financial Aid, Pub. L. No. 81-874 (1950).
- 58 20 U.S.C. §§ 236, 241 (repealed 1994).
- 59 20 U.S.C. §§ 631-647 (repealed 1994).
- 60 20 U.S.C.A. §§ 2701-2976 (repealed 1994).
- 61 25 U.S.C. §§ 2601-2651 (repealed 1994).
- 62 *See COHEN, supra* note 15, at 678.
- 63 334 U.S. 1 (1948).
- 64 *Hurd v. Hodge*, 334 U.S. 24 (1948).
- 65 *Id.*

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- 66 *Id.* at 27 n.2.
- 67 While this is legally sound, and a narrow ruling on the facts before the court, it would have been better to note that discrimination against the complainant because he was an Indian would likewise have been a violation of the Constitution.
- 68 388 U.S. 1, 5 n.4 (1967).
- 69 *Id.*
- 70 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).
- 71 *See id.* at 547-48. The districts in question segregated students of Mexican ancestry under the ruse of having separate schools for all persons of Latin descent because they needed special programs in their own language because they did not speak English. No tests of language ability were administered, and many of the children whose families had been in California since before statehood spoke no Spanish at all. *See id.* at 545-46.
- 72 *Id.* at 549.
- 73 *Id.*
- 74 *Id.*
- 75 Piper v. Big Pine Sch. Dist., 226 P. 926, 928 (Cal. 1924) (quoting Cal. Pol. Code § 1662 (1921)).
- 76 *See Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938) (considering the constitutionality of Missouri's education law).
- 77 *Id.*
- 78 *Id.* at 352.
- 79 *Id.* at 349. Obviously, at this point the Court is still approving of the separate but equal doctrine as the accepted law of the land.
- 80 332 U.S. 631 (1948).
- 81 McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 639 (1950) (quoting OKLA. STAT. ANN. tit. 70, §§ 455, 456, 457 (West 1950)).
- 82 *Id.* at 640.
- 83 *Id.*
- 84 *Id.*
- 85 *Id.* at 641.
- 86 *Id.*
- 87 Sweatt v. Painter, 339 U.S. 629, 633 (1950).
- 88 *Id.* at 633-34.
- 89 *Id.* at 634.
- 90 *Id.*
- 91 Meyers v. Bd. of Educ., 905 F. Supp. 1544, 1552 (D. Utah 1995).

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- 92 The United States was not a participant in the original *Sinajini* litigation.
- 93 *Meyers*, 905 F. Supp. at 1552 n.4.
- 94 *Id.* at 1552-54.
- 95 *Id.* at 1551. The claims for relief in the *Sinajini* enforcement action also included claims that the District was not properly operating bilingual education programs for Native American students and that the educational programs offered at the reservation schools were not equivalent to the programs being offered at off-reservation schools. The majority of the off-reservation schools had enrollments that were predominantly white and the enrolled students at reservation schools were ninety-nine-percent Indian. *See Sinajini*, 964 F. Supp. at 320-23.
- 96 The United States intervened in both the *Meyers* and *Sinajini* litigation. *Meyers*, 905 F. Supp. at 1553, 1575; *Sinajini*, 964 F. Supp. at 320.
- 97 *Meyers*, 905 F. Supp. at 1552 n.4.
- 98 *See Sinajini*, 964 F. Supp. at 320-21 (citing the Agreement of Settlement in *Sinajini*). This companion case, litigated separately because of the District's desire to litigate the legal duty question independently from the 1974 Consent Agreement, requires the District to equalize the provision of educational services throughout the school district.
- 99 High school age students in the Monument Valley-Oljato community, for example, would have had a seventy-mile one-way bus ride to the high school in Blanding. And that presumes that they live at the trading post--most would have come to the bus stops along the road from ten to twenty miles away. *See Sinajini v. Bd. of Educ.*, No. 74-346, 1975 U.S. Dist. LEXIS 15526, at \*11 (D. Utah Oct. 31, 1975).
- 100 *Id.* at \*13.
- 101 *Id.*
- 102 *Id.* at \*21-22.
- 103 *Id.* at \*13-18.
- 104 *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1554 (D. Utah 1995).
- 105 Both the plaintiffs and the Navajo Nation were silent as to the duty of the United States. *Id.*
- 106 *Id.*
- 107 The San Juan County School District did not focus any of its arguments on the few Paiute students living within the Navajo Indian Reservation near Navajo Mountain. *Id.*
- 108 *Id.*
- 109 *Id.* at 1551.
- 110 It is important to note that the court did not find that the United States or the Navajo Nation were not meeting any duty they may have had.
- 111 *Meyers*, 905 F. Supp. at 1554-78.
- 112 *Id.* at 1554-56.
- 113 *See, e.g., Piper v. Big Pine Sch. Dist.*, 226 P. 926, 930 (Cal. 1924).

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- 114 See *Ward v. Flood*, 48 Cal. 36 (Cal. 1874).
- 115 *Piper*, 226 P. at 928; CAL. ED. CODE § 1662 (3) (West 1933); see also *supra* text accompanying note 75.
- 116 See *id.* at 926-31.
- 117 *Id.* at 930.
- 118 See *id.* at 926-31.
- 119 23 P.2d 266 (1933).
- 120 *Id.* at 272.
- 121 543 P.2d 1176 (N.M. 1975).
- 122 *Id.* at 1184 (quoting *Strawn v. Russell*, 219 P.2d 292 (N.M. 1950)).
- 123 *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1555 (D. Utah 1995).
- 124 *Id.* at 1556.
- 125 *Nat'l Indian Youth Council v. Bruce*, 366 F. Supp. 313 (D. Utah 1973).
- 126 *Meyers*, 905 F. Supp. at 1556 (citing *Bruce*, 366 F. Supp. at 313).
- 127 *Id.* at 1556.
- 128 *Bruce*, 366 F. Supp. at 316-17, 319-20 (“The administration of an Indian school system may be identified as a function which evokes the constitutional doctrine of the separation of powers. It is in the end a subject bearing upon the status of the Indian tribes, a subject which has been committed to the power of Congress. It was early determined that tribal Indians retained their character as a distinct political community, and state jurisdiction over this entity was preempted by Congress' exclusive authority based on its power to declare war, to implement treaties, to regulate the disposition of federal lands, and to regulate commerce with the Indian tribes.”).
- 129 347 U.S. 483 (1954); *Meyers*, 905 F. Supp. at 1556.
- 130 *Meyers*, 905 F. Supp. at 1556.
- 131 *Id.* at 1557.
- 132 *Id.* at 1557 (citing UTAH CONST. art X, § 1).
- 133 *Id.*
- 134 *Id.* at 1557-58. The Court discussed *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966) and *Brown v. Board of Education*, 347 U.S. 483, 489-93 (1954), two cases where by past practices African American citizens had, by previous practice, been denied the right to vote and to attend desegregated schools respectively. *Id.* The *Meyers* opinion also notes the difficulty of sustaining such an argument where the Utah State Board of Education was before the Court admitting that it had some duty to educate on-reservation Indian children. *Id.*
- 135 *Id.*
- 136 See *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856), for an example of such a validation of present discrimination. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary

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article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

*Id.* One is compelled to remember the words of Chief Justice Marshall returning to “the actual state of things” to “shed some light on existing pretensions.” *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

137 *See Meyers*, 905 F. Supp. at 1557-59.

138 *Id.* at 1554, 1558.

139 *Id.* at 1558.

140 *Prince v. Bd. of Educ.* 543 P.2d 1176, 1182 (N.M. 1975).

141 *Meyers*, 905 F. Supp. at 1559-62.

142 Of course, at the time of the litigation, the United States was providing a kindergarten through eighth-grade education at Navajo Mountain and boarding school education for the sixty-six high school age students at remote locations. The court did not find that the United States was not meeting its treaty duty by providing those high schools at a distance from Navajo mountain. *Id.* at 1580.

143 *Id.* at 1561-62.

[W]hether the federal government's responsibility for Indian education is based on a legal obligation arising out of its trust relationship with Indian peoples, or a moral obligation that it has voluntarily assumed, *compare, e.g.*, 25 U.S.C.A. §§ 450(a) & 2501 (concluding from its “careful review of the Federal government's historical and special legal relationship with” American Indians that the United States has “resulting responsibilities to” Indians, particularly in the area of education), *and* 25 C.F.R. § 32.3 (“the Federal Government has a direct interest, *as trustee*, in protecting Indian ... children, including their education”) (emphasis added), *with* 25 U.S.C.A. § 1901 (recognizing “the Federal responsibility to Indian people” and finding that Congress “has assumed the responsibility for the protection and preservation of Indian tribes and their resources,” none of which is “more vital ... than their children”), the United States clearly had an obligation for educating the plaintiffs in this case.

*Id.* (footnotes omitted). The court also noted that it “need not decide whether Congress could lawfully cut off all services to Indians altogether since Congress has so far not seen fit to do so. As long as federal statutes and regulations recognizing a federal obligation for Indian education are in force, the United States has such an obligation, regardless of whether any obligation could be enforced absent the statutes and regulations.” *Id.* at 1562 n.18.

144 *Id.* at 1563 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992)).

145 20 U.S.C. §§ 236-240 (repealed 1994).

146 20 U.S.C. §§ 631-647 (repealed 1994).

147 20 U.S.C. §§ 2701-2976 (omitted 1994).

148 25 U.S.C. §§ 452-458e (1994).

149 25 U.S.C. §§ 2601-2651 (repealed 1994).

150 *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1562-63 (D. Utah 1995).

151 *Id.* at 1564 (“From these federal statutes and their implementing regulations, the court concludes that Congress did not intend the federal government to be the sole provider of Indian education, nor did it intend federal law to preempt state and local obligations to provide educational services for Native Americans.”). *See* 20 U.S.C. § 240 (b)(3)(F) (repealed 1994).

152 *See Meyers*, 905 F. Supp. at 1570.

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- 153 *Id.* at 1570. The simple truth is that some Indians are both. All American Indians are members of the race of Indians. Some among the race of Indians are also members of federally recognized Tribes. The government-to-government relationship between the federal government and Indian Tribes allows the federal government to pass legislation for the benefit of Indians. The special relationship that allows legislation uniquely for or about Indians is not one that exists between the Tribes and the states. It does not allow legislation that is unfavorable to Indians. However, see *United States v. Antelope*, 430 U.S. 641, (1977), where the plaintiff argued that because he was Indian he was tried in federal court where there was a felony murder statute-- but if he were white he would have been tried in state court where the burden of proof would have required the state to demonstrate premeditation and deliberation. When an Indian walks into a restaurant or a motel and is refused service the man or woman behind the counter does not ask if the Indian is an enrolled member of a federally recognized Tribe, the person behind the counter makes a decision as to whether or not they will serve the Indian based on race.
- 154 *Id.* at 1570-71 (internal citations omitted).
- 155 *Id.* at 1568-69.
- 156 *Id.* at 1568 (internal citations omitted). The court here chose to interpret Title 10, § 102 of the Navajo Tribal Code as creating a duty in the Navajo Tribe to provide education to tribal members. *Id.* at 1568 n.31. Counsel for the Tribe had argued that the Tribe's education code and the Department of Education were not established to provide brick and mortar educational services "building and running schools" but rather to provide advice to the federal or state governments who did run schools. This author thought that the question concerning the meaning of Title 10, § 102, was a question of first impression that the federal district court should have certified to the Supreme Court of the Navajo Nation for its opinion of the Tribe's statutory law. The federal court looked to the Supreme Court of Utah's interpretation of its own constitution before making its ruling, it should have done the same for the Navajo Nation.
- 157 As argued by the author at oral argument.
- 158 See *Nat'l Indian Youth Council v. Bruce*, 366 F. Supp. 313, 326 (D. Utah 1973), *aff'd*, 485 F.2d 97 (10th Cir. 1973).
- 159 *Logan City Sch. Dist. v. Kowallis*, 77 P.2d 348, 351 (1938).
- 160 *Meyers*, 905 F. Supp. at 1578.

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