# AFRICAN AMERICANS AND ABORIGINAL PEOPLES: SIMILARITIES AND DIFFERENCES IN HISTORICAL EXPERIENCES

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## INTRODUCTION

In August of 2003, Harvard University hosted a major conference, organized by the Civil Rights Project, titled *Segregation and Integration in America's Present and Future.* The conference was appropriately subtitled the *Color Lines Conference,* in reference to W.E.B. Du Bois's classic 1903 study *The Souls of Black Folk.*[1] This sprawling conference brought together some of the more significant actors in the Civil Rights arena—including Gary Orfield, Julian Bond, Antonia Hernandez, Glenn Loury, William Julius Wilson, and Gerald Torres—to reflect on the dynamics of residential segregation, racial identity, institutional barriers to racial integration, inequalities in higher education, and, of course, lessons learned and not learned from the powerful ruling in *Brown v. Board of Education.*[2]

While the attendees at the conference generally comprised a racially and ethnically diverse group, a mere handful were of Native American origin. Moreover, of the fifty-one panels presented, only one focused upon indigenous issues.[3] The few Native-American attendees were disappointed by the paucity of attention paid to indigenous issues and rights, particularly because native communities have endured and continue to endure profound civil, social, religious, legal, and economic problems at the individual, tribal, and national levels. This lack of indigenous representation and depth of coverage of issues affecting tribal peoples could, understandably, be attributed to two broad factors. First, Native Americans are a relatively small but incredibly diverse population comprised of approximately 2.4 million self-identified native people that are divided into 562 separate federally-recognized political entities.[4] Second, and of even greater import,

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1 W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1996).

2 347 U.S. 483 (1954).

3 Three of the members of this single panel dealing with indigenous civil rights concerns comprised the majority of Native-American attendees.

4 DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 34 (2002) (citing early data from the 2000 U.S. census). In addition, over 100 groups are

is that these diverse small nations occupy a distinctive political, cultural, legal, and territorial position within the United States,[5] which is disparate enough from that of other minority groups to make extensive coverage at such a conference unlikely.

This second factor, the unique status of indigenous peoples as separate political bodies, with *sui generis* cultural, legal, and proprietary rights as the original nations in the Americas, differentiates First Nations from other ethnic minorities. The hundreds of diplomatic accords negotiated between tribal nations and European states, the United States, and several of the thirteen original colonies confirm this separate status.[6] The Framers of the Constitution further cemented the unique position of tribal nations, delegating to Congress the power to control commercial relations with tribes[7]—a power deemed essential for U.S. financial and political stability during those critical years of American history.

Before addressing the profound differences between indigenous people and other resident racial or ethnic groups, this Article examines some parallels between African-American and indigenous life experiences under the American political and legal systems. The article will then shift its focus to the more significant differences between the African-American experience and that of First Nations.

## I
## AN ASSESSMENT OF SIMILARITIES

The most fundamental similarity between the African-American and Native-American experiences was the lack of humanity that the white establishment presumed each group to possess.[8] Church officials, lawmakers, and legal minds intensely debated the relative humanity of each group. The fundamental philosophical and religious question was whether African Americans and Indians were human beings, entitled to human rights protections like Euro-Americans, or in-

actively pursuing federal recognition, over fifty tribes have state recognition, and several groups have been terminated by congressional enactment. *See id.* at 20–23.

5 *See generally id.* at 41–62 (discussing tribes' unique status as sovereign nations, as opposed to minority groups, and the features that accompany this status).

6 *See generally* VINE DELORIA, JR. & RAYMOND J. DEMALLIE, 2 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979, at 745–49, 1018–19, 1084–86 (1999) (containing a brilliant cross-section of the diplomatic accords negotiated and providing a detailed narrative accompanying these important documents).

7 *See* U.S. CONST. art. I, § 8, cl. 3 (stating that the Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and the Indian Tribes").

8 This lack of humanity is easily identifiable in the African-American experience, as their ancestors were first imported as slaves.

ferior beings, undeserving of comparable rights because of their alleged animal-like nature.[9]

For several centuries, whites used the perceived religious deficiencies of African Americans, principally their alleged heathenism, to justify enslavement and inferior treatment.[10] Numerous examples evidence the prevailing ethos of inferiority that Europeans or Euro-Americans held towards indigenous peoples from the fifteenth century, the time of Christopher Columbus, through the late nineteenth century. Robert A. Williams, Jr., in his study *The American Indian in Western Legal Thought: The Discourses of Conquest*, shows that the legal doctrines of *discovery* and *conquest* have been used to deny the basic human rights of Native peoples in the United States from historical times to the present:

> Violent suppression of Indian religious practices and traditional forms of government, separation of Indian children from their homes, wholesale spoliation of treaty-guaranteed resources, forced assimilative programs, and involuntary sterilization of Indian women represent but a few of the practical extensions of a racist discourse of conquest that at its core regards tribal peoples as normatively deficient and culturally, politically, and morally inferior.[11]

Likewise, while the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution accorded African Americans a measure of legal recognition of their humanity and constitutional personhood,[12] it was not until a federal court decision in 1879 that the law began to constitutionally recognize Indians as "persons."[13]

A second similarity between the African-American and indigenous experiences is the paradoxical treatment that each group has received from federal authorities. African Americans faced the inherent contradiction embedded in the U.S. Constitution, which banned the slave trade after 1808,[14] yet respected the legality of slavery until

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9 Whites considered African Americans to be "draft" animals because they labored and Indians to be "wild" animals because they occupied large areas of land. *See* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 8 (1988).

10 *See* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812, at 91–96 (1968).

11 ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–26 (1990) (citations omitted).

12 *See* U.S. CONST. amends. XIII, XIV, XV.

13 *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700 (C.C.D. Neb. 1879) (No. 14,891) (declaring that "an Indian is a 'person' within the meaning of the laws of the United States, and, has, therefore the right to sue out a writ of habeas corpus in a federal court").

14 While Article I, § 9 of the Constitution forbade Congress from limiting the slave trade before 1808, Congress passed legislation in 1807 that banned such trade, and President Jefferson signed the act into law that same year to take effect in 1808. *See* ROBERT A. DIVINE ET AL., AMERICA: PAST AND PRESENT 226 (1984).

the Civil War and the ratification of the Thirteenth Amendment in 1865.[15] Similarly, tribal nations have been deemed independent nations due to their treaty-based relationship with the United States and preexisting status as de facto and de jure sovereign polities,[16] yet Congress (sanctioned by the federal courts) has asserted a virtually absolute power over tribal nations, their lands, and resources since *United States v. Kagama*.[17]

These first two similarities confirm that the original status of Africans, African Americans, and First Nations under U.S. law was an extraconstitutional consideration. Whites considered African Americans, as slaves, to be legally inferior beings and thus denied them basic constitutional rights and privileges.[18] Likewise, the United States viewed the politically "foreign" tribal nations as extra-constitutional entities, even though they were domestically situated, because they were not parties to the Constitution's construction.[19] Therefore, this document was largely inapplicable to tribal nations and their affairs inside Indian land.

John Noonan raises a discussion that forms the basis for a third similarity between the African-American and indigenous experiences: the place of "persons" in the law.[20] Noonan's thesis is that the American legal tradition has often given "masks" to participants in its process, concealing those persons' true character.[21] These masks are "legal construct[s]" that function to "suppress[ ] the humanity of a participant in the process."[22] Noonan focuses largely on African Americans and the institution of slavery: American law shielded—or "masked"—African Americans' humanity behind various descriptions normally reserved for real, personal, or other types of property.[23]

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15 *See* U.S. CONST. amend. XIII.

16 *See, e.g.*, Gloria Velencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 422 (2003).

17 118 U.S. 375, 384–85 (1886) (

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because *it alone can enforce its laws on all the tribes.*

(emphasis added)).

18 *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405–08 (1856).

19 *See* WILKINS, *supra* note 4, at 44–46.

20 *See* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 3–28 (1976).

21 *Id.* at 18–19.

22 *Id.* at 20.

23 *See, e.g., id.* at 39 ("From the beginning of the colony, 'slave' and 'Negro' were terms of art indicating a special legal status.").

Once "the law" had labeled African Americans as "property," they could then be bartered, sold, or even killed without the legal system having to confront the reality that African Americans were human beings entitled to human rights and civil liberties.[24]

Federal law and policy concerning Native Americans also uses "masks," which deny the basic humanity of Native peoples. Unlike the "masks" the legal system cast upon African Americans, many of the masks cast upon Native populations continue to haunt indigenous people. The Supreme Court has, at various times, characterized tribal nations as "dependent" peoples and as "wards of the nation."[25] The Court has also described tribal nations as discovered and conquered peoples, connoting that their proprietary and sovereign rights were explicitly and categorically reduced vis-á-vis the discovering conquerors.[26] Another "mask" suggests that the United States has plenary authority over tribes and their resources, thus justifying Congressional allotment of tribal lands—without first securing tribal consent—in direct violation of treaty provisions.[27] A contemporary legal "mask" facing Native Americans is the notion that tribal nations, having been geographically incorporated into the body politic of the United States, have thereby implicitly lost certain inherent powers of sovereignty, including the right to exercise criminal jurisdiction over non-Indians who commit crimes within their borders.[28]

A fourth parallel in the experiences of African Americans and Native Americans centers on sporadic and intermittent efforts to force assimilation of African Americans and Native Americans into the body politic.[29] The sporadic and intermittent nature of such efforts is evidenced by the fact that the overall goal of American society until *Brown* was generally to deny African Americans entrance to the social contract.[30] Similarly, indigenous peoples at times faced concentrated,

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24 *See id.* at 29–64.

25 United States v. Kagama, 118 U.S. 375, 383–84 (1886); *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2, 17 (1831) (analogizing the relationship between Native Americans and the United States to "that of a ward to his guardian" because "[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father").

26 *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 588 (1823) (denying a tribe the right to hold legal title to occupied land because "[c]onquest gives a title which the Courts of the conqueror cannot deny"); *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279–81 (1955) (holding that a Native American group was not entitled to compensation under the Takings Clause for taking of timber from occupied land).

27 *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

28 *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) ("Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.").

29 *See* WILKINS, *supra* note 4, at 192–93.

30 *See, e.g.*, Joyotpaul Chaudhuri, *American Indian Policy: An Overview, in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 30–31 (Vine Deloria, Jr. ed., 1985) (discussing the conflict between the methodological individualism of the Bill of Rights and various tribes' differing philosophy of the self).

coercive, and unrelenting pressure to assimilate into American society, albeit on an inferior level. Despite wide variation in this important sphere, certain thrusts have sought to assimilate the members of both groups:

> Since our Government was organized two questions, or rather two classes of questions, have transcended all others in importance and difficulty, viz, the relations of the Government and the white people to the negroes and to the Indians. The negro question has doubtless absorbed more of public attention, aroused more intense feeling, and cost our people more blood and treasure than any other question, if not all others combined. That question, it is to be hoped, is settled forever in the only way in which its settlement was possible—by the full admission of the negro to all the rights and privileges of citizenship. Next in importance comes the Indian question, and there can be no doubt that our Indian wars have cost us more than all the foreign wars in which our Government has been engaged. It is time that some solution of this whole Indian problem, decisive, satisfactory, just, and final, should be found. In my judgment, it can be reached only by a process similar to that pursued with the negroes.[31]

Additionally, in the late nineteenth and early twentieth centuries, the federal government conducted for a brief period an industrial boarding school to provide education for the children of freed slaves, a social experiment that aimed simultaneously to "enlighten" and "elevate" the status of black and Indian children.[32] The school's founder, Samuel Chapman Armstrong, believed that Indian and African American children "must be understood as races that occupied various rungs on a Social Darwinist 'scale of civilization.'"[33]

Despite the profound political and legal differences discussed below, another similarity in the historical experience of Native Americans and African Americans centers on the denial of voting rights. The two groups have faced, *inter alia*, a bevy of ideological, institutional, financial, and legal constraints that have either denied or diluted their voting power.[34] While the Fifteenth Amendment, in

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31 REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, H. EXEC. DOC. NO. 44-1, at 388 (1876).

32 Laura L. Lovett, *"African and Cherokee by Choice": Race and Resistance Under Legalized Segregation*, *in* CONFOUNDING THE COLOR LINE: THE INDIAN-BLACK EXPERIENCE IN NORTH AMERICA 204 (James F. Brooks ed., 2002).

33 *Id.* at 203.

34 *See* DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 78–113 (1991) (discussing constraints on the ability of African Americans to exercise their voting power); WILKINS, *supra* note 4, at 191 (discussing constraints on the ability of Native Americans to exercise their voting rights).

theory, granted African Americans the right to vote,[35] many African Americans were nonetheless denied voting privileges until the Voting Rights Act of 1965.[36] Likewise, the Indian Naturalization Act seemingly conferred the right to vote upon Native Americans,[37] yet several states, including Arizona, New Mexico, and Utah, continued to deny the franchise to Native Americans living in those states until as late as the 1960s.[38] Both African Americans and Native Americans have endured poll taxes, literacy tests, and gerrymandering, while African Americans have also had to overcome unabashed violence.[39] Furthermore, Native Americans have confronted constitutional arguments contesting their suffrage, including arguments citing Native Americans' exemption from certain state taxes,[40] as well as sovereignty arguments, claiming that Native Americans' status as members of alien nations precludes them from voting.[41]

A sixth parallel between the treatment of the two groups can be seen in the timing of their social integration. In 1954, the same year the Court decided *Brown*, Congress passed the first termination law, a measure aimed at incorporating and integrating Native Americans into American society by abruptly ending the federal government's trust relationship to the Menominee tribe of Wisconsin.[42] Ironically, the termination policy was euphemistically labeled the Indians' "Emancipation Proclamation," because it theoretically would "free" tribal nations and their encumbered citizens from the oppressive bureaucracy of federal paternalism.[43]

One final parallel will suffice. Throughout the 1960s and 1970s, the federal government extended a measure of equal rights and opportunities to African Americans by prohibiting employment discrimi-

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35 *See* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

36 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (2000)).

37 Indian Citizenship Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

38 *See* Daniel McCool, *Indian Voting, in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY, *supra* note 30, at 108–16.

39 *See* WILKINS, *supra* note 4, at 193–94. For example, several redistricting attempts in parts of Montana and South Dakota, both historically and presently, have sought to dilute the Native American vote. *Id.* at 194.

40 *See id.* at 194–95 (citing Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo County*, 15 AM. INDIAN CULTURE RES. J. 63 (1991)).

41 McCool, *supra* note 38, at 106–07; *see* Elk v. Wilkins, 112 U.S. 94, 109 (1884).

42 Menomine Indians Act of June 17, 1954, Pub. L. No. 83-399, 68 Stat. 250 (codified at 25 U.S.C. §§ 891–902), *repealed by* Menomine Restoration Act of December 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770; *see* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960, at 94–104 (1986).

43 *See* FIXICO, *supra* note 42, at 95.

nation,[44] protecting voting rights,[45] encouraging affirmative action,[46] and striking down state antimiscegenation laws.[47] Despite these important changes, many African Americans still face discrimination and resegregation in housing and employment, poverty, and unfair treatment by the criminal justice system (such as racial profiling), all of which combine to fundamentally limit their rights to life, liberty, and justice.[48]

Similarly, Native Americans have faced coerced assimilation into the American mainstream, through which they have been forced to sacrifice additional lands, natural resources, and treaty and civil rights. The citizenship that they have received in return has amounted to a second-class citizenship in many parts of the country due to persistent discrimination and ongoing legal constraints, including congressional and judicial attacks on their rights.[49] As the U.S. Commission on Civil Rights noted in a detailed report issued in 2003:

> A quiet crisis is occurring in Indian Country. Whether intentional or not, the government is failing to live up to its trust responsibility to Native peoples. The federal government undertook a legal and moral obligation to make up for what had been taken from Native Americans and to ensure their well-being. This obligation is rooted in the history of displacement of entire tribes and the confiscation of natural resources that they depended upon for their livelihood. Perennial government failure to compensate Native Americans and the residual effects of the nation's long history of mistreatment of Native peoples have increased the need for federal assistance even further. Efforts to bring Native Americans up to the standards of

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44 *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2000)) (prohibiting discrimination in public accommodations, including employment).

45 *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (2000)) (empowering the federal government to take a broad range of action to adequately ensure that no citizen is denied the right to vote on account of race); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that Virginia's poll tax violates the Fourteenth Amendment).

46 *See, e.g.*, Exec Order No. 11,375, 35 Fed. Reg. 14,303 (Oct. 13, 1967) (requiring that federal contractors take affirmative action towards hiring minorities).

47 *See* Loving v. Virginia, 388 U.S. 1, 12 (1965) (holding Virginia's ban on interracial marriage unconstitutional).

48 *See* Norman Redlich, *"Out Damned Spot; Out I Say:" The Persistence of Race in American Law*, 25 VT. L. REV. 475, 516–21 (2001). *See generally* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989) (analyzing the continued challenges African Americans face in the United States).

49 *See generally* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 (1984) (surveying efforts to assimilate Native Americans and the resulting economic and social suffering); PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM (1991) (describing courts' legal treatment of Native Americans as inherently contradictory because the federal government's plenary power over Native Americans counteracts principles of equal treatment).

> other Americans have failed in part because of a lack of sustained funding. The failure manifests itself in massive and escalating unmet needs in areas documented in this report and numerous others. The disparities in services show evidence of discrimination and denial of equal protection of the laws.[50]

Although the legal system has supposedly integrated Native Americans into the broader characterization of Americans, Native Americans nonetheless remain a marginalized community.

## II
## DIFFERENCES BETWEEN NATIVE-AMERICAN AND AFRICAN-AMERICAN EXPERIENCES

The similarities presented above provide potent parallels in the historical experiences of African Americans and Native Americans, but history, law, politics, and culture suggest even greater substantive differences between these two groups. The first and most obvious difference is that Native Americans are the indigenous inhabitants of the United States. Of what significance is this obvious observation? The preexistence and the nationhood that tribal nations, qua nations, possessed underlies the distinctive sovereign-to-sovereign relationships that Native Americans still share with state and federal governments.[51] Unlike African individuals who involuntarily arrived as slaves, Native Americans were present in America, inhabiting bounded homelands with economic, cultural, and governing infrastructures, for millennia. Thus, Native Americans continue to perceive themselves not only as pre-constitutional polities, but as continuing extraconstitutional nations who deal with state and federal governments on a government-to-government basis.

Second, the distinct sovereign status of tribal nations necessitated the practice of negotiating treaties, political compacts, accords, and alliances, first with one another, then with the various competing European states, and later with the United States.[52] This diplomatic process (in which no other resident racial or ethnic group participated)[53] and the resulting treaties, agreements, and negotiated settlements confirmed a fundamental and diplomatic political relationship be-

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50 U.S. COMM'N ON CIV. RIGHTS: A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 110 (2003).

51 *See generally* WILKINS, *supra* note 4 (analyzing the internal dynamics of Native American governments and their politics, and examining relationship of Native Americans to the states and the federal government).

52 *See, e.g.*, DELORIA & DEMALLIE, *supra* note 6 (compiling Native American treaties, agreements, and conventions from 1775–1979).

53 Hawaiian natives are included in the grouping "indigenous people" because they signed accords with both foreign powers and the United States. *See* WILKINS, *supra* note 4, at 11–12.

tween Native Americans and the federal government, even if the diplomatic partners were not always of equal power.[54] Approximately 370 of these important contractual arrangements form the baseline parameters of the political relationship between Native-American tribes and the United States.[55] While these agreements remain legally valid, their enforcement by the federal courts and Congress has been problematic since the Indian Removal era of the 1830s. Many of these treaties involved substantial land cessions by tribal nations, containing articles that created the present-day set of Indian reservations.[56]

Because tribal nations are treaty-recognized sovereigns, indigenous rights are not based on, or generally subject to, U.S. Constitutional law.[57] As preexisting sovereigns, the Constitution does not protect tribal nations either because First Nations do not derive their inherent governmental powers from the federal or state governments.[58]

A third feature differentiating Native Americans from African Americans and other groups is the relevance and meaning of the trust doctrine.[59] While the federal government and tribal nations have rarely agreed upon the exact contours of the trust principle, President Clinton provided a fairly clear description of the federal perspective of this doctrine in a 1998 executive order: "The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection."[60] The President sought to assure Native-American nations that the federal government recognized their sovereign governmental status, which the federal government, as a separate *though connected sovereign, is legally and morally bound to respect.*[61] The hundreds of treaties and agreements guaranteeing Native-American tribes all the rights and resources not specifically ceded

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54 *See id.* at 245–52.

55 *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY app. B (1994) (containing a detailed list of the ratified U.S.-Indian treaties).

56 EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1896–97, INDIAN LAND CESSIONS IN THE UNITED STATES, Part 2 (Charles C. Royce, comp. 1899) (compiling Native American land cessions from 1784–1894); *see* PRUCHA, *supra* note 55, at 103–04 (describing the "massive" land transfers from Native Americans to the federal government through treaty cessions).

57 *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

58 *Cf. id.* at 384–85 (denying application of the Fifth Amendment's due process clause to the Cherokee Nation's grand jury proceedings).

59 *See generally* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 64–97 (2001) (describing the nature and various conceptions of the trust doctrine).

60 Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

61 *See id.*

away were contractual rights that the trust doctrine also protected. This doctrine constitutes the United States's legal and moral pledge to respect those reserved rights.[62]

More important, however, was the President's use of the phrase "under its [the United States's] protection."[63] This was a declaration that the United States has a protectorate obligation to support Native Americans legally, culturally, economically, and politically. The phrase "trustee-beneficiary relationship" best describes this obligation—not "guardian-ward relationship," which for many years was the stereotypical view of the relationship between Native Americans and the United States.[64] As Vine Deloria notes:

> [T]he "trust responsibility" of the federal government toward Indian tribes is mandated by the fact that Indians are extraconstitutional. No constitutional protections exist for Indians in either a tribal or an individual sense, and hence the need for special rules and regulations, special administrative discretionary authority, and special exemptions. This special body of law replaces the constitutional protections granted to other members of American society.[65]

A fourth concept, congressional plenary power, emphatically and profoundly distinguishes tribal nations from African Americans—probably more so than any other concept discussed in this Article.[66] In its broadest common-sense use, "plenary" means entire, unqualified, and absolute.[67]

The term, however, has developed several specific meanings with regard to federal Indian policy.[68] First, plenary means *exclusive*:[69] the Commerce Clause vests in Congress the *sole* authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[70] The Framers believed that the power to engage in diplomacy and trade with tribal nations should rest with the legislative branch, not with the states, which had retained the right to deal with tribes in their proximity under the Articles of Confederation.[71] Second, and related to the first definition, plenary also means

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62 *See* WILKINS & LOMAWAIMA, *supra* note 59, at 67.

63 Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).

64 *See* Felix S. Cohen, *Indian Wardship: The Twilight of a Myth*, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 328–34 (1960) (distinguishing the terms "trusteeship" and "guardianship" based on the powers that are concomitant with the latter).

65 Vine Deloria, Jr., *The Distinctive Status of Indian Rights*, *in* THE PLAINS INDIANS OF THE TWENTIETH CENTURY 237, 241 (Peter Iverson ed., 1985).

66 *See* WILKINS & LOMAWAIMA, *supra* note 59, at 99 (describing the contradictory nature of plenary power doctrine's relationship to tribal sovereignty).

67 THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1486 (2d ed. 1987).

68 *See* WILKINS & LOMAWAIMA, *supra* note 59, at 99.

69 *Id.*

70 U.S. CONST. art. I, § 8, cl. 3.

71 *See* WILKINS & LOMAWAIMA, *supra* note 59, at 198–99.

*preemptive*.[72] That is, Congress may enact legislation effectively precluding state governments from acting in Indian-related matters.[73] Finally, and most controversially (because this meaning lacks an explicit or implicit constitutional basis), plenary has come to mean *unlimited or virtually absolute power*.[74] This judicially constructed definition, first announced by the Supreme Court in *United States v. Kagama*, means that Congress has virtually boundless governmental authority and jurisdiction over tribal nations, their lands, and resources.[75]

In some important respects, the legal landscape that African Americans faced prior to the *Brown* decision embodied characteristics of plenary power. The Thirteenth, Fourteenth, and Fifteenth Amendments, however, provided some slight measure of protection for African Americans, whereas no such constitutional amendments have ever protected the rights of Native Americans.[76] Furthermore, despite the treaties—or perhaps because of the treaties—the federal government may invoke its self-proclaimed plenary power to quash, dramatically diminish, or reaffirm Native-American rights.[77] In 2004, for instance, the Supreme Court noted that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'"[78] Federal plenary power, when defined as unlimited and virtually absolute, is arguably constitutionally problematic, given that the United States is a democratic state that purports to adhere to the notion that absolute power cannot logically exist in a nation that follows the rule of law. Although the fact that Native Americans have had status as U.S. citizens since 1924[79] should also work to prohibit the exercise of federal plenary power over Indians, it has not.[80]

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72 *Id.* at 104–06.

73 *Id.* at 104.

74 *Id.* at 106–14.

75 118 U.S. 375, 379–85 (1886).

76 *See* VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 140–50 (1999) (describing the inapplicability of these Amendments to the Native American population).

77 *See* United States v. Lara, 541 U.S. ___, 124 S. Ct. 1628, 1634 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority."); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (noting that Congress has the power to abrogate the provisions of an Indian treaty when justifying circumstances arise).

78 *Lara*, 124 S. Ct. at 1633.

79 *See* Indian Citizenship Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401 (2000)).

80 *See* Deloria, *supra* note 65, at 243 ("'[C]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection.'" (quoting United States v. Nice, 241 U.S. 591, 598 (1916))).

Congress and the Supreme Court justify this treatment of Native Americans because tribal nations constitute separate political bodies, as exemplified by the treaty relationship, the trust doctrine, and the Commerce Clause.[81] This status as separate sovereigns permits tribal courts to prosecute nonmember Indians for crimes committed on Indian lands while federal courts may also prosecute the same individual for the same offense: the Double Jeopardy Clause is inapplicable as a defense because the accused is being tried by distinct political entities.[82]

Ironically, tribes' extraconstitutional and sovereign status also provides the federal government with the pretext to claim a virtually absolute power over First Nations because the Constitution is still generally inapplicable inside Indian lands.[83] Although individual Native Americans are now citizens of both the United States and their resident states, the Bill of Rights and other constitutional amendments only partially protect tribal members from both the federal and their tribal governments.[84] For instance, while the Fifteenth Amendment guarantees all persons, including Indians, the right to vote (provided that they meet the necessary qualifications),[85] the Fourteenth Amendment's due process and equal protection rights[86] are not guaranteed to Indians within Indian territory.[87] In 1971, the Tenth Circuit recognized this lack of protection in *Groundhog v. Keeler*,[88] noting that the Indian Bill of Rights of 1968[89] embraces neither of these components of the Fourteenth Amendment.[90] Furthermore, and perhaps even more importantly, the Tenth Circuit noted that there is no limitation

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81 *See Lara*, 124 S. Ct. at 1633 (recognizing that the Indian Commerce Clause and the Treaty Clause grant Congress the power to regulate the status of tribes who would otherwise maintain their own inherent tribal power as tribal sovereigns).

82 *Id.* at 1639.

83 *See* DELORIA & WILKINS, *supra* note 76, at 97 (1999) ("[F]ederal constitutional rights exist only when Indians are living off the reservation as American citizens . . . .").

84 *See id.* at 138.

85 *See* U.S. CONST. amend. XV.

86 *Id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person . . . the equal protection of the laws.").

87 *See id.* at 148 ("[T]he Indian Citizenship Act qualifies Indians to exercise rights under the Fifteenth Amendment but does not provide them with the due-process and equal-protection rights of the Fourteenth Amendment.").

88 44 F.2d 674 (10th Cir. 1971).

89 Pub. L. No. 90-284, Title II, § 201, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301–02 (2000)).

90 *Id.* at 678, 681–82 (noting that "[t]he provisions of the Constitution of the United States have no application to Indian nations or their governments, except as they are expressly made so by the Constitution (the Commerce Clause), or . . . an Act of Congress," and that the legislative history to the Indian Bill of Rights precludes interpreting that provision to make the Due Process and Equal Protection Clauses of the Fourteenth Amendment applicable to tribal nations).

on the power of Congress to enact legislation with respect to tribal nations.[91]

## III
## SPECIFIC INSTANCES OF DISPARATE TREATMENT

The doctrines and concepts discussed above provide a critical backdrop to examine specific examples where First Nations have been treated differently than African Americans. The infamous *Dred Scott v. Sandford*[92] decision provides a powerful example. In *Dred Scott*, the Court denied Congress the power to prohibit slavery and held that African-American slaves—and even free African Americans—were not entitled to federal citizenship and thus did not have standing to sue in federal court.[93] In so holding, Chief Justice Taney manipulated the status of blacks against Indians in a way that reduced African-American rights but, in dicta, affirmed tribal sovereignty:[94]

> The situation of this [African-American] population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.[95]

This statement, however, should not be interpreted to imply that Chief Justice Taney was an advocate of Indian self-determination and tribal sovereignty. As evidenced by his earlier unanimous opinion in

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91 *Id.* at 678 ("[I]t is well settled that Congress has exclusive and plenary power to enact legislation with respect to the Indian tribes.").

92 60 U.S. (19 How.) 393 (1857).

93 *Id.* at 452–54.

94 *See id.* at 403–04.

95 *Id.*

writing for a unanimous Court in *United States v. Rogers*,[96] Chief Justice Taney declared that:

> The country [Cherokee lands] in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular State. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[97]

Which of these contradictory statements provides a more accurate depiction of Native-American status, land title, and tribal-federal relations? Chief Justice Taney's attitude towards Indian nations is more clearly evident in his statement in *Rogers*. The positive characterization of tribal status articulated in *Dred Scott*, while historically accurate, seems to be merely a rhetorical ploy used to diminish the human and civil rights of African Americans. Furthermore, because it appeared only in dicta, this characterization lacked any force of law.[98]

A second equally powerful contrast between Native-American and African-American status arose in 1896. In this year, the Supreme Court handed down its devastating *Plessy v. Ferguson*[99] ruling, establishing the "separate but equal" doctrine and sanctioning "Jim Crow laws."[100] On the same day and by an identical eight-to-one majority (with Justice Harlan dissenting in both cases), the Court held in *Talton v. Mayes*[101] that the Fifth Amendment did not apply to tribes, reasoning that their sovereignty existed prior to the Constitution and therefore depended upon the will of the Cherokee people and not the will of the American public.[102] Decisions like *Talton* recognized and affirmed the ongoing political sovereignty of tribal nations.

A third contrast between Native Americans and African Americans arose in 1903, the year in which W.E.B. Du Bois's novel the *Souls*

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96 45 U.S. (4 How.) 567 (1846).

97 *Id.* at 571–72.

98 *See Dred Scott*, 60 U.S. (19 How.) at 403–04.

99 163 U.S. 537 (1896).

100 *See id.* at 551–52.

101 163 U.S. 376 (1896).

102 *Id.* at 376, 384–85.

*of Black Folks*[103] was published and the Supreme Court handed down one of its most horrific Indian law decisions. In *Lone Wolf v. Hitchcock*,[104] the Court recognized that the federal government has virtually absolute plenary power over Indian lands and property, holding unanimously that Congress had the power to abrogate Indian treaty provisions designed to protect the communal land holdings of tribes.[105] The Court implied plenary power through the application of convoluted logic and in defiance of the prior treaty case law.[106] This aspect of the decision has not been overruled, and First Nations today must still cope with the strange result that they, as the original sovereigns of North America, have somehow been politically and economically subjugated by latter day sovereigns that established themselves in their midst.[107] For Du Bois, the "problem of the Twentieth Century [was] the problem of the color-line."[108] For tribal nations, as a result of *Lone Wolf* (and other related decisions and congressional policies), the problem of the fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and now twenty-first centuries was, and continues to be, not only a color line, but a problem of cultural, territorial, natural resource, and political power lines.

## CONCLUSION

Native Americans and African Americans, generally speaking, have historically endured a similar lack of rights, even though the law has treated each group quite differently. The rights of African Americans have been constitutionally entrenched via Amendments, while those of Native Americans are explicitly or implicitly connected to constitutional clauses, including the Commerce Clause and Treaty Clause. Despite significant strides each group has made, the individual rights of these citizens nevertheless remain subject to vacillating interpretation, spotty implementation, and unequal enforcement.

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103 DU BOIS, *supra* note 1.

104 187 U.S. 553 (1903).

105 *Id.* at 565–68.

106 *See* DELORIA & WILKINS, *supra* note 76, at 87–88 (describing the *Lone Wolf* opinion as one that "pitt[ed] the treaty-making power against the property clause").

107 *See* WILKINS & LOMAWAIMA, *supra* note 59, at 113.

108 DU BOIS, *supra* note 1, at 1.