

A Historical Braid of Inequality: An Indigenous Perspective of *Brown v. Board of Education*

Donald E. Laverdure*

*With education, you are the white man's equal; without it, you are his victim.*¹

*What appears to be progress toward racial justice is, in fact, a cyclical process.*²

I. INTRODUCTION

In 1954 and 1955, the United States Supreme Court issued three landmark rulings, collectively known as *Brown v. Board of Education*,³ which declared segregation of public schools by race to be unconstitutional.⁴ In *Brown*, the United States Supreme Court legally guaranteed the right of African-Americans to equal protection, a right guaranteed to every individual in the United States,⁵ seemingly putting an end to a 350-year history of exclusion, separation, and subordination. Even though *Brown* specifically required only desegregation of public schools, the Court, in a series of per curiam orders, quickly expanded its holding to desegregate buses,⁶ municipal golf courses,⁷ and public beaches.⁸ The adoption of an equality principle and the

* Assistant Professor of Law, Michigan State University-DCL College of Law. LL.M. Candidate, University of Wisconsin; J.D., 1999, University of Wisconsin; B.S. in Civil Engineering, 1995, University of Arizona. Enrolled Citizen and Chief Justice of the Crow Nation. I want to thank Ron Griffin and Washburn Law School for inviting me to the *Brown* symposium. I also want to give a special thank you to my wife, Kristen Burge, for her invaluable support and constant encouragement with this article.

1. EDITH TARBESCU, *THE CROW* 40 (2000) (quoting Chief Plenty Coups, the last traditional chief of the Apsaalooke Nation).

2. DERRICK BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 27 (2000).

3. The first decision was *Brown v. Board of Education*, 347 U.S. 483 (1954) (prohibiting states from segregating schools based on race); the companion case regarding federal segregation was *Bolling v. Sharpe*, 347 U.S. 497 (1954) (prohibiting the Federal Government, through the District of Columbia, from segregating schools based on race); and the third ruling was *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) [hereinafter *Brown II*] (remanding the case to the federal district courts to formulate an appropriate remedy "with all deliberate speed").

4. *Brown*, 347 U.S. at 495. The decision in *Brown* was the culmination of a long and sustained litigation strategy by the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP). See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (rejecting the claim of the University of Texas that a hastily established law school for black law students met the requirements of equal protection); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (upholding challenges to segregated graduate programs); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that Missouri did not provide equal protection by paying tuition for black students at out-of-state schools while denying them admission to the local state school).

5. The express language of the Fourteenth Amendment states in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

6. *Gayle v. Browder*, 352 U.S. 903 (1956).

7. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

8. *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955).

inclusionary effort of *Brown* soon became a significant symbol in the civil rights movement⁹ and evolved into an American icon.¹⁰

Unfortunately, the victory of *Brown* was short-lived.¹¹ Ultimately, the failure to provide, let alone achieve, equal educational opportunity for minority students after *Brown* became just one of many examples of historical inequality suffered by African-Americans.¹² American history contains many more instances, indeed entire time periods, of inequality that I contend constitute a much larger “braid of inequality”¹³ suffered by both African-Americans and indigenous peoples.¹⁴ Because political and legal equality for African-Americans and indigenous peoples has been, by historical fact, elusive in America, a political partnership is desirable and long overdue.¹⁵

Arguably, a partnership may not be possible due to past and recent conflicts between African-Americans and indigenous peoples.¹⁶

9. After years of activism and protests by African-Americans and others, a series of civil rights laws were enacted by Congress, culminating with the 1964 Civil Rights Act, 1965 Voting Rights Act, and the 1968 Civil Rights Act (also known as the Fair Housing Act).

10. Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 3, 3-28 (Jack M. Balkin ed., 2002).

11. See discussion *infra* Part II.C.

12. Other individuals and groups in the United States have suffered and continue to suffer varying measures of discrimination and inequality, including Asian-Americans, Latinos, women, and poor whites, but that discussion is beyond the scope of this article. A recent casebook is a good example of an examination of their combined issues. See generally JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000).

13. The braid analogy is an imperfect description because the inequality experienced by these two peoples is sometimes parallel, often overlaps, has inconsistencies, and at times is completely unrelated. The legal, political, and sociological complexities surrounding African-Americans and indigenous peoples is one possible explanation for separate casebooks and law school courses. See, e.g., BELL, *supra* note 2; DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (4th ed. 1998).

14. I use the term “indigenous peoples” to describe “Indians,” “American Indians,” and/or “Native Americans,” as individuals. The term “indigenous peoples” also describes “tribal governments” and “Indian Nations” as governments. The focus of this article primarily relates to “indigenous peoples” as governments and their quest for equality. For a good debate about the important distinction between indigenous peoples’ treatment as individuals versus governments, see David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 *UCLA L. REV.* 759 (1991), but compare Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples,”* 39 *UCLA L. REV.* 169, 184 (1991) (stating that strict scrutiny of Indian legislation in Professor Williams’ article lacks the appropriate social and historical context).

15. See, e.g., LANI GUINER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002); ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* (1999); see also Cheryl Harris, *Mining in Hard Ground*, 116 *HARV. L. REV.* 2487 (2003) (agreeing with the authors in *Miner's Canary* that reconfiguration of the present understandings of race to create a prism to frame and create political action, beginning at a local level, to achieve social justice is necessary).

16. Despite parallel inequality experiences, there are current problems. In fact, Professor David Wilkins says, “A specter is haunting Indian country—the specter of First Nation-African American relations.” David Wilkins, *Red, Black, and Bruised* (Nov. 4, 2003), at <http://www.alternet.org/story.html?StoryID=17111>; see also Richard Delgado, *Linking Arms: Recent Books on Interracial Coalitions as an Avenue of Social Reform*, 88 *CORNELL L. REV.* 855 (2003) (arguing that interracial coalitions have too many procedural problems and the road to social justice is more likely to occur individually); William Glaberson, *Who Is a Seminole, and Who Gets to Decide?*, *N.Y. TIMES*, Jan. 29, 2001, at A1 (detailing the black Seminoles legal battle over tribal citizenship); Brent Staples, *When Racial Discrimination Is Not Just Black and White*, *N.Y. TIMES*, Sept. 12, 2003, at A30, available at <http://www.nytimes.com/2003/09/12/opinion/>

Nevertheless, I contend that a red-black interest convergence¹⁷ is not only logical but achievable for two main reasons. First and most important, African-Americans and indigenous peoples share a common goal—equality. An examination of select landmark decisions in American history reveals that lasting equality cannot be achieved alone—rather, some kind of coalition is necessary to achieve and sustain equality. Second, an open and honest dialogue about resolving conflicts is presently occurring among those seeking political and legal equality for African-Americans and indigenous peoples.¹⁸

In analyzing a red-black interest convergence, I begin with an analogy of the two most famous United States Supreme Court cases that guaranteed, but failed to provide, equality for African-Americans and indigenous peoples, respectively. Thus, in Section II, I evaluate *Brown*, focusing on its importance for educational and life opportunities, and its broken promise. In Section III, I analyze *Worcester v. Georgia*,¹⁹ a much earlier case in American history,²⁰ for its significance to governmental equality, and its eventual demise, resulting in a slow erosion of indigenous peoples' authority over their historic homelands.²¹ In Section IV, I briefly evaluate select landmark legal,

12FRI3.html (challenging Congress to help black Indians that are excluded by the Five Civilized Tribes).

17. According to Professor Bell, white interests must converge with African-American interests in order to obtain racial justice. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Professor Bell's theory is illustrated in a series of allegories. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

18. See, e.g., 57th Annual Session of the National Congress of American Indians, Many Nations, One Family: Exploring the Legacy and Future of Black / Indian Relations (Nov. 12-17, 2000), at <http://www.weyanoke.org/hc-blackindianrelations.html>; Press Release, Office of Public Affairs, Dartmouth College, Complex History of Black and Native American Relations to be Focus of Dartmouth College Conference April 20-22, at <http://www.dartmouth.edu/~news/releases/2000/mar00/relations.html> (Mar. 28, 2000). Another author argues for an open discussion of the underlying racism in Indian law decisions in order for "an Indian law *Brown v. Board of Education*" to be possible. Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 86 (2002). Actually, I argue that *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), represents Indian Law's *Brown v. Board of Education*—at least in theory. Indeed, the aftermath of *Brown* and *Worcester* are analogous—inequality despite major legal victories. Like Professor Leeds, I argue that Indigenous Nations do not currently have equality vis-à-vis the federal and state governments.

19. 31 U.S. (6 Pet.) 515 (1832) (holding that the laws of Georgia can have no force in Cherokee territory without the assent of the Cherokees themselves and Congress).

20. The Lakota scholar Vine Deloria notes the importance of a historical understanding of the indigenous experience in America:

It is impossible to understand American Indians in their contemporary setting without first gaining some knowledge of their history as it has been formed and shaped by the Indian experience with Western civilization. Many of the customs and traditions of the past [persevere] in the minds and lives of Indians today and have been jealously preserved over several centuries of contact with non-Indians as the last remaining values that distinguish Indians from the people around them.

VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1-2 (1983).

21. See discussion *infra* Part III.C. In addition to governmental inequality, individual Indians have also suffered significant discrimination when seeking inclusion or integration into mainstream society. For a comprehensive examination, see Jeanette Wolfley, *Jim Crow, Indian Style: The Disfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 192-94 (1991); see also

political, and policy decisions in American history to illustrate the much larger “braid of inequality” suffered by African-Americans and indigenous peoples in different time periods, but ultimately to reflect parallel experiences of removal, exclusion, and historical inequality. In Section V, I conclude by proposing a much broader perspective for seeking solutions—an individual and universal ethic of responsibility, which is committed to equality for all individuals.

II. *BROWN*, EDUCATIONAL OPPORTUNITY, AND ITS BROKEN PROMISE

A. *The Hope of Brown*

In *Brown v. Board of Education*,²² the United States Supreme Court declared segregation of public schools by race to be unconstitutional. In 1955, the Court’s second *Brown* decision (*Brown II*), regarding remedies for the plaintiffs—black children—mandated desegregation to proceed “with all deliberate speed.”²³ Despite *Brown*’s strong indictment that “separate is inherently unequal,”²⁴ the *Brown II* Court did not order immediate desegregation, thereby signaling an implicit approval of southern resistance to integration. In 1957, in a dramatic historical moment, President Eisenhower sent federal troops to ensure the safe and lawful integration of nine black students at Central High School in Little Rock, Arkansas.²⁵ By 1964, only two percent of African-American students attended desegregated schools in the South.²⁶

Against this desegregation backdrop, in 1968, the Court modified “with all deliberate speed” from *Brown II* to require that school boards implement realistic plans that “work now.”²⁷ For example, in *Green v. County School Board*,²⁸ the Court ordered school boards to convert schools to a unitary system of education “in which racial dis-

Steve Russell, *Seeking Justice: Critical Perspectives of Native People: A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 GEO. PUB. POL’Y REV. 129 (1999). Mr. Russell’s main point is to include individual Indians in the civil rights discourse. I agree with his conclusion but only as it relates to Indians who voluntarily abandon their tribal relations and assimilate into mainstream society.

22. 347 U.S. 483 (1954).

23. *Brown II*, 349 U.S. 294, 301 (1955) (emphasis added). In 1955, the Supreme Court in *Brown II* remanded the cases to the federal district courts to formulate “such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.” *Id.* The Supreme Court stated that during “this period of transition, the courts will retain jurisdiction of these cases.” *Id.*

24. *Brown*, 347 U.S. at 495.

25. See, e.g., United States Department of State, March Toward Equality: Significant Moments in the Civil Rights Movement, at <http://usinfo.state.gov/products/pubs/civilrts/march.htm> (last visited Dec. 22, 2003).

26. See John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1733 (2000).

27. *Green v. County Sch. Bd.*, 391 U.S. 430, 438-39 (1968) (emphasis added).

28. 391 U.S. 430 (1968).

crimination would be eliminated root and branch.”²⁹ The *Green* Court also provided an expansive directive for lower federal courts to examine the entirety of school functions, including the teachers, administrators, busing, extracurricular activities, and the overall facilities, to determine if a particular school and its board operated a discriminatory educational system.³⁰

In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*,³¹ the United States Supreme Court affirmed a lower federal court’s extension of *Green* concerning the available school desegregation remedies.³² In *Swann*, the Court upheld the use of student racial percentages, grouping of noncontiguous areas, and cross-district school busing to desegregate the area’s school systems.³³ In its last case upholding extensive desegregation remedies, the Court held that schools in the city of Denver, Colorado, had implemented a “systematic program of segregation affecting a substantial portion of the . . . school system.”³⁴ The Court upheld a lower court’s decision to desegregate the city’s entire school system, even though some school districts were not segregated.³⁵ At least through 1973, the purpose of *Brown*—equal educational opportunity through school desegregation—was largely affirmed by the Court.

B. *Equal Educational Opportunity*

The vitality of *Brown* has never been more important. The educational process, beginning at a very early age, is central in our society because schools provide a foundation for many Americans’ life options.³⁶ The Court in *Brown* recognized the correlation between educational opportunity and a child’s prospects for life success:

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. *In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.*³⁷

Because the quality and depth of instruction are not uniform and often vary with a school system’s resources, the Court in *Brown* held

29. *Id.* at 437-38.

30. *See id.* at 435.

31. 402 U.S. 1 (1971).

32. *Id.* at 19-20.

33. *Id.* at 25.

34. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201 (1973).

35. *Id.* at 213-14.

36. In theory, our educational system creates an informed body politic that makes collective and thoughtful decisions through our democratic institutions.

37. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

that separate schools for African-American children were “inherently unequal.”³⁸ In doing so, the Court sought to provide all children equal access to schools with resources, regardless of skin color, and simultaneously create equal educational and life opportunities for every child in America.³⁹

The *Brown* Court’s conclusion—that success in life depends to a certain extent on educational preparedness and equal educational opportunity—has been extended to higher education as well.⁴⁰ In the summer of 2003, the current United States Supreme Court affirmed the spirit of *Brown* by upholding the right of equal educational access for minority students to this country’s elite higher education institutions.⁴¹ In narrowly upholding the University of Michigan Law School’s affirmative action program, the Court emphasized the importance of racial and ethnic groups’ participation in America’s institutions to achieve “the dream of one Nation”:⁴²

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. . . . The United States . . . affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective . . . [n]owhere is the importance of such openness more acute than in the context of higher education.”⁴³

38. *Id.* at 495.

39. Today, more than ever, “[w]e live in an industrial, technological world in which a knowledge of science is often the key to employment.” VINE DELORIA, JR., *American Indian Metaphysics: A Prelude to Understanding Indian Education*, in POWER AND PLACE: INDIAN EDUCATION IN AMERICA 1, 4 (2001). In America’s current economy, educational attainment directly correlates with income level. See Median Annual Income, by Level of Education, 1990-2000, at <http://www.infoplease.com/ipa/A0883617.html> (last visited Dec. 10, 2003).

40. See, e.g., Grace Hechinger, *Clark Kerr, Leading Public Educator and Former Head of California’s Universities*, *Dies at 92*, N.Y. TIMES, Dec. 2, 2003, at B7, available at www.nytimes.com (“[In] 1911, [it was] a time when fewer than 5 percent of American 18-year-olds went to college.”). Today, more than fifty percent of American citizens attend some college and approximately twenty-five percent obtain a Bachelor’s degree. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CENSUS 2000 BRIEF, EDUCATIONAL ATTAINMENT: 2000 5 tbl.2 (Aug. 2003). However, there are significant disparities by race. For whites alone, fifty-five percent attend college and twenty-seven percent obtain a bachelor’s degree. In contrast, for African-Americans forty-two percent attend college and fourteen percent obtain a bachelor’s degree. For indigenous peoples, forty-two percent attend college and eleven percent obtain a bachelor’s degree. Consequently, *Brown* continues to be important because an individual’s opportunities to achieve success in life depend to a significant extent on access to schools with resources that can prepare the student to qualify for and complete technical or professional training or higher education.

41. See, e.g., *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (*United States Reports* pagination not available at time of publication); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (*United States Reports* pagination not available at time of publication). In the recent landmark case, *Grutter*, the Court ruled that the University of Michigan Law School admissions program did not violate the Defendants’ rights to equal protection. *Grutter*, 123 S. Ct. at 2325.

42. *Grutter*, 123 S. Ct. at 2340-41.

43. *Id.* at 2340 (internal citations omitted).

An equal opportunity for educational preparedness at all levels is at the heart of *Brown* and “the dream of one Nation.” In several post-*Brown* cases, the United States Supreme Court upheld extensive remedial measures to desegregate several school systems and, in turn, provide equal educational opportunities and potential life success for every child in America, regardless of skin color. Even though the spirit of *Brown* was recently extended to higher education, its underlying foundation—equal educational opportunity at the elementary and secondary levels—unraveled just two decades after the decision.

C. *The Aftermath—De Facto Unequal Education*

In 1974, the United States Supreme Court dealt a significant blow to integration efforts when it upheld the exclusion of predominantly white suburbs in Detroit from desegregation compliance.⁴⁴ Then from 1991-1995, the Court reversed course from its earlier desegregation cases and essentially deferred to local school board decisions, despite the existence of school (re)segregation.⁴⁵ In the past decade, federal judges have followed suit by relinquishing control of school desegregation cases to local school boards⁴⁶ because the resegregation of schools and the resulting educational inequality has transformed from de jure segregation, which is remediable by the courts, to de facto segregation, created by phenomena such as “white flight,” which has been determined to be outside of the scope of equitable judicial power.⁴⁷

Consequently, the opportunity of many minority students to achieve life success is often an illusion because they do not attend schools with resources. For example, 70% of African-American and

44. *Milliken v. Bradley*, 419 U.S. 815 (1974).

45. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70 (1995) (concluding that orders designed to attract nonminority students from outside the school district into the school district were beyond the scope of intradistrict violation identified by the lower court, that order requiring across-the-board salary increases for teachers and staff to achieve desegregation was beyond the scope of the court’s remedial authority, and that the national statistical norms of students in the district was not the appropriate test to determine whether the previously segregated district had achieved partially unitary status); *Freeman v. Pitts*, 503 U.S. 467 (1992) (upholding the district court’s authority to relinquish supervision and control over the school district in incremental stages before full compliance has been achieved in every area of school operations); *Bd. of Okla. City v. Dowell*, 498 U.S. 237 (1991) (holding that the school district was not required to show grievous wrong, created by new and unforeseen conditions, in order to have desegregation decree dissolved, that desegregation decrees were not intended to operate in perpetuity, and that in dissolving desegregation decrees, courts should consider whether the school district has complied in good faith with the decree and whether vestiges of past discrimination have been eliminated to the extent practicable).

46. Wendy Parker, *The Decline of Judicial Decision Making: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1628 (2003). On September 27, 2003, another federal district court ruled that court supervision was no longer necessary with respect to desegregation of the Kansas City School District. *Desegregation Case Ends*, N.Y. TIMES, Sept. 28, 2003, at 32, available at www.nytimes.com/2003/09/28/education/28SCHO.html.

47. *See, e.g., Anne Randall, Reclaiming Brown’s Vision: A New Constitutional Framework for Mandating School Integration*, 10 GEO. J. ON POVERTY L. & POL’Y 363, 370-72 (2003).

75% of Latino students attend predominantly minority schools, located in communities with a 40% poverty rate.⁴⁸ Because of this limited tax base, these impoverished school districts need additional funds from outside sources including federally funded programs like special education. The dire need for federal funds may be one explanation as to why African-American children are almost three times more likely than white children to be designated “mentally retarded.”⁴⁹ Clearly, the high designation of African-American students as “mentally retarded” substantially decreases the chances of a timely graduation and reduces the likelihood of future technical or professional training and higher education.⁵⁰

Similarly, indigenous students’ attendance in impoverished school districts limits their opportunities for life success.⁵¹ For instance, 80% of the below-standard⁵² public schools in Montana are on or near Indian reservations.⁵³ The lack of resources severely impedes the educational preparedness of indigenous students in public schools on Indian reservations: 81% of fourth-graders are not proficient in science; 83% are not proficient in reading; and 86% are not proficient in math.⁵⁴ By the twelfth grade, approximately 90% of these same students are not proficient in math and science.⁵⁵ These statistics amply illustrate the inadequate educational preparedness of many minority students in elementary and secondary schools.

48. See, e.g., Linda Perlstein, *Montgomery Schools at Diversity Landmark*, WASH. POST, Oct. 14, 2003, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A214412-2003Oct13>; see also Michael A. Fletcher, Brown +50: *The Fight Goes On*, WASH. POST, June 23, 2003, at C1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A21442-2003Jun22>.

49. Rosa A. Smith, *Black Boys: African-American Children Are Reportedly Almost Three Times More Likely Than White Children To Be Designated “Mentally Retarded,”* at http://www.greaterdiversity.com/education-resources/ed_articles2002/Black_Boys.html (last visited Dec. 10, 2003). Some educators disagree and hypothesize that the disproportionately high designation might derive from poor preparation and cultural differences.

50. *Id.*

51. For example, in 1999, per capita income on the Crow Indian Reservation was \$4243 and the poverty rate was 41.7%. See, e.g., The Crow Indian Tribe Socio-Economic and Cultural Resources Assessment and Conditions Report, at <http://www.mt.blm.gov/mcfo/cbm/eis/Crow-TribeNarrativeReport/socio.pdf> (Apr. 15, 2002); Frontier Life: Homestead History, at http://www.pbs.org/wnet/frontierhouse/frontierlife/essay7_4.html (last visited Dec. 21, 2003).

52. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.). Through various reporting requirements, the Act seeks identification of “below-standard” public schools, i.e., those plagued by high poverty and students with low standardized test scores, in order to eventually enforce accountability. For a brief overview of the Act’s provisions, see U.S. Department of Education, No Child Left Behind, <http://www.ed.gov/nclb/landing.jhtml> (last visited Dec. 12, 2003); Jay Mathews, *Politicians Failing to Address Education Issues*, WASH. POST, Oct. 21, 2003, available at <http://www.washingtonpost.com/ac/wp-dyn/A58624-2003Oct21.html> (discussing problems with the Act).

53. *50 Schools Qualify for U.S. Help*, BILLINGS GAZETTE, Apr. 26, 2002, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2002/04/26/build/local/66-school-program.inc>.

54. See, e.g., John Fitzgerald, *Native Americans Study No Child Left Behind Act*, BILLINGS GAZETTE, Sept. 24, 2003, available at <http://www.billingsgazette.com/index.php?id=&display=rednews/2003/09/24/build/local/50-act.inc>.

55. *Id.*

Recent higher education studies demonstrate that an opportunity to complete technical or professional training and higher education is substantially lower without adequate educational preparedness. According to a recent education study, “70 percent of all students in public high schools graduate,” but only 32% of all high school students are “qualified to attend four-year colleges.”⁵⁶ In particular, 51% of African-American students, 54% of Latino students, and 54% of indigenous students graduate from high school.⁵⁷ In urban areas, “fewer than 30 percent of African-American boys graduate from high school with their peers.”⁵⁸ Additionally, the percentages of college readiness rates for African-American, Latino, and indigenous students are 20%, 16%, and 14%, respectively.⁵⁹ To compound the problem, the already extremely low number of college-ready indigenous students⁶⁰ have incredibly high dropout rates in mainstream higher education institutions—78% at Arizona State University, for example.⁶¹

In short, equal educational opportunity for all—the fifty-year-old promise of *Brown*—is not a reality for many minority students. Early educational deficiencies create a vicious cycle—lack of educational preparedness, low high school graduation and college-readiness rates, low retention rates in higher education institutions, and a consequential decrease of opportunity to achieve success in life. A lack of opportunity gives rise to enormous societal costs with disastrous consequences for these individuals—a higher probability of poverty, drug use, and criminal activity.⁶²

Perhaps the broken promise of *Brown* should not be surprising in light of the overall unequal treatment of African-Americans in American history.⁶³ Professor Derrick Bell has pointedly remarked, “The struggle by black people to obtain freedom, justice, and dignity is as old as this nation.”⁶⁴ For indigenous peoples, who have also exper-

56. JAY P. GREENE & GREG FORSTER, PUBLIC HIGH SCHOOL GRADUATION AND COLLEGE READINESS RATES IN THE UNITED STATES, (Manhattan Inst. for Policy Research, Education Working Paper, no. 3), at http://www.manhattan-institute.org/html/ewp_03.htm#01 (Sept. 2003).

57. *Id.* at 9.

58. Smith, *supra* note 49.

59. GREENE & FORSTER, *supra* note 56, at 9.

60. In 2003, only one percent of the approximately 1.5 million students taking the Scholastic Aptitude Test (SAT) were indigenous students. *Native Students Show Gains on College Test*, at <http://www.indianz.com/news/archives/001022.asp> (last visited Aug. 27, 2003).

61. Bill Hart, *State Universities' Goal: Better Graduation Rates*, ARIZ. REPUBLIC, Mar. 3, 2003, available at <http://www.arizonarepublic.com/arizona/articles/0303grad03.html>.

62. For instance, “a black boy born in 1991 stands a 29% chance of being imprisoned at some point in his life, compared with a 16% chance for a Hispanic boy and a 4% chance for a white boy.” Smith, *supra* note 49.

63. For example, Congress established the Freedmen’s Bureau in 1865 to implement some basic needs of the former slaves after the Civil War, including the infamously promised “forty acres and a mule.” The first Reconstruction era resulted in a broken promise. See, e.g., BELL, *supra* note 2, at 58-59.

64. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992).

perienced numerous broken promises,⁶⁵ the disappointing aftermath of *Brown* is a contemporary but parallel example of the inequality, and eventual tragedy, experienced by the Cherokees before and after their United States Supreme Court victory in *Worcester v. Georgia*.⁶⁶

III. WORCESTER, GOVERNMENTAL EQUALITY, AND THE EROSION OF TRIBAL SOVEREIGNTY

After the American Revolution and ratification of the United States Constitution,⁶⁷ the federal government sought to avoid a massive Indian war with the Iroquois Confederacy and western Indigenous Nations.⁶⁸ Like European countries, the federal government initiated and negotiated treaties with Indigenous Nations, creating a bilateral government-to-government relationship.⁶⁹ The early treaties demonstrate the substantial political power of Indigenous Nations in early America, where they controlled vast areas of territory and trade relations, especially before the War of 1812.⁷⁰

The first treaty between an Indigenous Nation and the colonists—the 1788 Treaty of Fort Pitt with the Delaware Nation—is especially illuminating regarding the political power of indigenous peoples.⁷¹ The United States Supreme Court characterized the treaty between the Continental Congress and the Delaware Nation as encompassing “[t]he language of equality.”⁷² In the face of this tribal-federal equality, it should be somewhat surprising that the controversy at the time, much like today, derived from *unlawful state action* in-

65. The repetitive nature of the federal government’s broken promises to Indigenous Nations caused Justice Hugo L. Black to say, “Great nations, like great men, should keep their word.” Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

66. 31 U.S. (6 Pet.) 515 (1832).

67. In ratifying the United States Constitution, the states delegated their authority to deal with indigenous peoples to the Federal Government. “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

68. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 416-19 (1942). “The English, the French, and the Spaniards, were equally competitors for their friendship and their aid.” *Worcester*, 31 U.S. at 546.

69. See, e.g., Treaty of Hopewell with the Cherokee Nation, Nov. 28, 1785, 7 Stat. 18; Treaty of Fort Pitt with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13. Between 1788 and 1871, approximately 371 treaties were ratified between Indigenous Nations and the Federal Government. 2 INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., 1904).

70. Prior to 1812, indigenous peoples maintained great political power over vast regions of what is now the United States. See, e.g., VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES AND CONSTITUTIONAL TRIBULATIONS 3-20 (1999); FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE (1984); RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815 (1991).

71. Treaty of Fort Pitt with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13.

72. *Worcester*, 31 U.S. at 549 (emphasis added). The Treaty of Fort Pitt contains the following provisions: mutual “peace and friendship” sought; “each [Nation] shall assist the other” against common enemies; colonists requested “free passage for the American troops through the Delaware nation”; an express “guaranty to the . . . Delaware, and their heirs, all their territorial rights”; and a telling invitation to form a state where the “Delaware nation shall be the heads, and have representation in congress.” *Id.* at 549-50.

fringing upon the territorial rights of Indigenous Nations over their historic homelands—in other words, governmental *inequality*.⁷³

A. Worcester v. Georgia⁷⁴

In *Worcester*, the plaintiff, Sam Worcester, was a missionary authorized under federal law to preach the gospel to Cherokees, but he was “condemned to hard labour for four years in the penitentiary of Georgia” because he and three other missionaries violated the laws of Georgia, including: (i) “residing within the limits of the Cherokee Nation without a license” from the Governor; and (ii) refusing to take “the oath to support and defend the constitution and laws of the state of Georgia.”⁷⁵ In addition, the State of Georgia seized Cherokee territory, parceled “it out among neighboring counties,” extended its laws over Cherokee territory, abolished Cherokee institutions and laws, and placed state guards to protect Georgia’s newly discovered gold mine, which was until that point located within Cherokee territory.⁷⁶

Justice Marshall listed the significant claims at issue, stating that the case “in every point of view in which it can be placed, is of the deepest interest”:⁷⁷

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.⁷⁸

After detailing the history of indigenous-federal relations,⁷⁹ the Court acknowledged the separate national existence of Indigenous Nations:

73. My primary focus is the erosion of Indigenous Nations’ authority, with the simultaneous extension of state jurisdiction, in Indian territory. See Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1 (1999). However, major unresolved tribal-federal issues continue, including the Federal Government’s ongoing exercise of extra-constitutional plenary power in indigenous affairs, briefly discussed in Part IV.C, but a detailed analysis of those problems is outside of the scope of this article. For a comprehensive study on the problematic use of federal power in indigenous affairs, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *ARIZ. ST. L.J.* 113 (2002); Nell Jessup Newton, *Federal Power over Indians: Its Source, Scope, and Limitations*, 132 *U. PA. L. REV.* 195 (1984); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 *U. MICH. J.L. REFORM* 899 (1998).

74. 31 U.S. (6 Pet.) 515 (1832). *Worcester* was actually the second of the two Cherokee decisions by the United States Supreme Court. In the first case, in 1831, the Court held that it did not have jurisdiction because the Cherokee Nation was not a foreign nation within the meaning of Article III, Section 2 of the United States Constitution (the grant of judicial power). *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet.) (1831). The controversy returned to the Court the following year after a group of missionaries refused to follow Georgia law, which was superimposed over Cherokee territory. *Worcester*, 31 U.S. at 536-37.

75. *Worcester*, 31 U.S. at 536-37.

76. *Id.* at 542.

77. *Id.* at 536.

78. *Id.*

79. “Columbus did not discover a new world; he established contact between two worlds, both already old.” FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM,*

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. . . . 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.⁸⁰

The Court declared that “Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial.”⁸¹ Based on its historical review and understanding of federal-indigenous relations, the Court held

[t]he 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.⁸²

Finally, Chief Justice Marshall held that the entire “system of legislation lately adopted by the legislature of Georgia in relation to the Cherokee nation . . . [was] repugnant to the constitution, laws, and treaties of the United States.”⁸³

B. Governmental Equality

In *Worcester*, the United States Supreme Court enunciated an enduring legal principle of governmental equality for Indigenous Nations vis-à-vis the federal and state governments.⁸⁴ The *Worcester* decision was extremely important because it upheld the Cherokee Nation’s exclusive right to its territory against unlawful legislation of Georgia. The Cherokees also thought that the decision had settled

AND THE CANT OF CONQUEST 39 (1975) (quoting J.H. PARRY, *THE SPANISH SEABORN EMPIRE* 65 (1966)).

80. *Worcester*, 31 U.S. at 559-60.

81. *Id.* at 559. “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.” *Id.* at 542-43. The Court also added,

[t]his soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.

Id. at 544-45.

82. *Id.* at 561. The Court also stated, “Far from advancing a claim to their lands, or asserting any right of dominion over them, congress resolved ‘that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies.’” *Id.* at 549.

83. *Id.* at 561.

84. *Id.* During the 1970s and 1980s, *Worcester* was the fourth most cited of the pre-Civil War United States Supreme Court cases. GETCHES ET AL., *supra* note 13, at 125.

any question regarding possible removal from their historic homeland, which was located partially in Georgia, to the proposed Indian territory in what is now Oklahoma.⁸⁵ The core of the *Worcester* decision has been upheld in several United States Supreme Court decisions over the past century.

For instance, in 1883, the Court affirmed *Worcester's* vision of treaty-based indigenous sovereignty when it upheld exclusive tribal criminal jurisdiction over a crime committed by an Indian against another Indian in Indian territory.⁸⁶ Similarly, in *Talton v. Mayes*,⁸⁷ the Court held that the Fifth Amendment's grand jury requirements did not apply to the Cherokee Nation's prosecution of its own citizen for the murder of another Cherokee citizen in its own territory.⁸⁸ The underlying holding of *Talton*—that Indigenous Nations are not subject to the Bill of Rights because their powers pre-existed the United States Constitution and, therefore, did not derive from the federal or state governments or their citizenry—is still good law today.⁸⁹

In 1905, the Court again affirmed the central holding of *Worcester*—treaty-based indigenous sovereignty—in *United States v. Winans*.⁹⁰ The Court in *Winans* enjoined several non-Indian landowners from obstructing the off-reservation fishing rights of indigenous peoples at usual and accustomed places on the Columbia River, in an area expressly reserved by the Yakima Nation in its 1859 treaty with the Federal Government.⁹¹ In its most important language since *Worcester*, the Court pronounced that “the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those

85. In 1830, Congress authorized President Andrew Jackson to “convey land west of the Mississippi to Indian tribes that *chose* to ‘exchange the lands where they now reside, and remove there.’” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999) (quoting 4 Stat. 411, 412 (1830)) (emphasis added). For a comprehensive analysis of the political controversy surrounding the Cherokee Nation, Georgia, and the Federal Government, see Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969); Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111 (1994).

86. *Ex parte Crow Dog*, 109 U.S. 556 (1883).

87. 163 U.S. 376 (1896).

88. *Id.* at 384. The Cherokee Nation's grand jury consisted of five jurors; therefore, it was argued to not be a “grand jury within the contemplation of the Fifth Amendment to the Constitution.” *Id.* at 379.

89. See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that Navajo Nation courts derive their authority from citizens of the Navajo Nation and consequently a subsequent federal prosecution is not barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution); *Native Am. Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (concluding that the First Amendment to the United States Constitution did not apply to the Navajo Nation). In 1968, Congress unilaterally imposed the Indian Civil Rights Act, an analog to the Bill of Rights with a few notable exceptions, to provide procedural safeguards for individuals subject to Indigenous Nations' authority. See 25 U.S.C. §§ 1301-1303 (1994) (as amended); Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

90. 198 U.S. 371 (1905).

91. *Id.* at 377.

not granted.”⁹² This line of reasoning from *Worcester* and *Winans*—treaty-based indigenous rights and sovereignty—was reaffirmed in part by the Court in 1999.⁹³

C. *The Erosion of Tribal Sovereignty*

Although there have been notable decisions upholding *Worcester*, the equality principle has been selectively applied, repeatedly ignored, and unilaterally modified by the Court.⁹⁴ For example, in the *Worcester* case itself, the State of Georgia refused to appear before the Court, and after the decision, President Andrew Jackson has been quoted as saying, “John Marshall has made his decision, now let him enforce it.”⁹⁵ The *Worcester* decision became the rallying cry of the National Republican Party in the election of 1832, accusing “Jackson of tearing up the Constitution by failing to execute the *Worcester* decree.”⁹⁶ Thus, “[f]or most of the Justices, the election of 1832 was not simply a contest of parties [between the Cherokees and the State of Georgia] but a battle for the Court and the Constitution.”⁹⁷ For the Cherokees, it was a battle for their political liberty, governmental equality, and the right to remain in their homeland.

After Jackson was overwhelmingly reelected in 1832, the “Cherokees and the missionaries had become an embarrassment” to those in favor of the Union.⁹⁸ The truth was revealed—the favorable decision in *Worcester* for the Cherokees was not really about rights of indigenous peoples. As demonstrated by the efforts to help the Cherokees before and after *Worcester* and the 1832 presidential election, removal of the Cherokees from Georgia and their right to political liberty in their homeland only mattered to some whites if it helped the Union. Enforcement of *Worcester* became highly unlikely after

92. *Id.* at 381.

93. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that the Chippewas’ usufructuary rights to hunt, fish, and gather on ceded land guaranteed under their 1837 treaty was not abrogated by an 1850 executive order, a subsequent 1855 treaty, or Minnesota’s admission into the Union on an equal footing with the original thirteen states).

94. *See infra* note 107. The clash between the Cherokees and Georgia was inevitable because the Federal Government promised Georgia in 1802 that it would rid the Cherokees within her state boundaries in exchange for Georgia dropping its charter claims to western territory. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding Congress’ power to unilaterally abrogate federal-tribal treaties despite an express treaty provision to the contrary); Burke, *supra* note 85, at 524.

95. Burke, *supra* note 85, at 525. “While most admit that they [historians] cannot prove what Jackson said, none seems to doubt that he thought it and acted on it. The impression left by these discussions is that Jackson ignored his constitutional duty to enforce the Court decree.” *Id.* But “no direct confrontation with the President could have occurred in the *Worcester* case without a second writ of error.” *Id.* at 531.

96. *Id.* at 527-28. The missionaries’ imprisonment was frequently cited in debates and party presses. *Id.* at 525-31.

97. *Id.* at 531.

98. *Id.* at 530. After the election, the missionaries ended their struggle in return for a pardon from Georgia’s governor. *Id.*

President Jackson's reelection. Therefore, "[t]he need to defend the Constitution and the Union meant that the Cherokee cause had to be dropped and the Jackson administration supported."⁹⁹ In the face of their inevitable removal, the Cherokees "must have wondered how a cause [Cherokee political liberty] so connected with politics, law, and morality in 1832 could be of so little interest to politicians and lawyers in 1833."¹⁰⁰

Perhaps beginning with *Worcester* and the Cherokee removal, the sovereignty of Indigenous Nations was quickly becoming "the past in a nation of the future."¹⁰¹ Over the next 170 years, the indigenous population decreased at an astonishing rate.¹⁰² Although politically and legally separate, Indigenous Nations became inherently unequal to other governments even in their own territory.¹⁰³ Eventually, major aspects of their governmental authority became subordinated, first to the Federal Government¹⁰⁴ and then to state and local governments.¹⁰⁵ Most recently, in the last thirty years, the United States Su-

99. *Id.* at 531. The real winner, besides Georgia, in the Cherokee cause may have been the Court because its authority with respect to state court cases was validated. *Id.* at 531 n.168. Congress passed the 1833 Force Act, which permitted any United States Supreme Court Justice or district judge to issue a writ of habeas corpus to a state court—an important procedural mechanism to truly enforce the *Worcester* decision in the state courts in Georgia. *Id.* The Cherokees' attorney recommended the Force Act against President Jackson's opposition. *Id.*

100. *Id.* at 530.

101. Strickland & Strickland, *supra* note 85, at 118. See generally RAMOND W. STEDMAN, SHADOWS OF THE INDIAN (1982). Actually, the legal theories justifying subordination of indigenous peoples derived from a much earlier time period, probably medieval times during the Crusades. For a detailed examination, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

102. One scholar describes indigenous peoples' massive population decrease as a silent but gradual holocaust in the United States. Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 3 n.1. Professor Clinton estimated the population decrease of indigenous peoples in the 300 years since contact to be ninety-five percent, even with assuming a conservative population estimate. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79 (1993).

103. In fact, the Federal Government exercised its extra-constitutional power to break up the tribal land mass and force indigenous peoples to assimilate and act like farmers. See, e.g., The General Allotment Act, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348, 349, 354, 381 (1994)). See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995). From 1887 to 1934, the tribal land base decreased from 138 million acres to 48 million acres (20 million of which were arid or desert). *Id.* at 13 n.59.

104. In one case that did not cite *Worcester*, in 1846, Chief Justice Taney held that a white person who had been formally naturalized by the Cherokee Nation as a Cherokee citizen could not be an "Indian" for federal criminal jurisdiction purposes. *United States v. Rogers*, 45 U.S. (4 How.) 567, 572-73 (1846). The federal limitation of the Cherokees' ability to determine their own citizenship speaks volumes to the conflict of interest by the Federal Government—by limiting Cherokee citizenship, their treaty obligations are much less. See also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding Congress' power to unilaterally abrogate federal-tribal treaties despite an express treaty provision to the contrary); *United States v. Kagama*, 118 U.S. 375 (1886) (affirming Congress' authority to legislate and then prosecute major crimes committed between Indians in Indian territory).

105. Diminishment is a legal term of art used by federal courts to describe when an area of Indian territory has become so assimilated into mainstream society that it, by the area's character, becomes subject to state and county authority in place of tribal and federal jurisdiction. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998); *Hagen v. Utah*, 510 U.S. 399, 411 (1994). For county authority upheld in historic Indian territory, see *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding the "open" portion of Indian territory to be subject to county zoning authority and the "closed" part to be under

preme Court has implemented flawed federalism principles to implicitly divest Indigenous Nations of their sovereign authority over their own territory.¹⁰⁶

With regard to the *Worcester* decision itself, the Court either has not cited it as precedent, ignored it, or cited it for a proposition contrary to its holding.¹⁰⁷ For example, in *McClanahan v. Arizona State Tax Commission*,¹⁰⁸ the Court appeared to uphold *Worcester* by extending its rationale to state taxation. “Although *Worcester* on its facts dealt with a State’s efforts to extend its criminal jurisdiction to reservation lands, the rationale of the case plainly extended to state taxation within the reservation as well.”¹⁰⁹ However, the Court ultimately caused irreparable damage by modifying *Worcester* for the first time in order to accommodate state interests:

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.¹¹⁰

The *McClanahan* Court not only modified *Worcester* but severely undercut its central premise of treaty-based reserved rights. The Court relegated the historic sovereignty of Indigenous Nations to a mere backdrop. “The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit,

tribal authority); *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (upholding county’s authority to assess and collect its property tax on reacquired parcels of the tribe).

106. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that the Three Affiliated Tribes lacked civil adjudicatory jurisdiction over a car accident between non-Indians on a state highway within the historic boundaries of the Tribes’ territory); *Montana v. United States*, 450 U.S. 544 (1981) (holding that the Crow Nation lacked civil regulatory jurisdiction over non-Indians hunting and fishing on fee lands within the historic boundaries of Crow territory); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that tribes lacked inherent criminal jurisdiction over non-Indians for crimes committed in Indian territory); see also Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000).

107. For no citation, see for example, *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870) (holding that federal tobacco taxes applied to Cherokee tobacco sales in Cherokee territory, despite a bilateral treaty that does not permit such taxes inside Cherokee territory and the non-existence of a revenue district applicable to Cherokee territory); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) (holding that a non-Indian that married into the Cherokee Nation was not an Indian citizen for federal jurisdiction purposes, despite the Cherokee Nation’s position to the contrary). For citing *Worcester* for a different proposition than its holding, see *United States v. Kagama*, 118 U.S. 375, 384 (1886):

In the case of *Worcester v. Georgia*, [31 U.S. (6 Pet.) 515 (1832)], it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes

And for ignoring *Worcester*, see *Lone Wolf*, 187 U.S. at 564-65 (citing *Worcester* to mean Indian right of occupancy is sacred as fee simple).

108. 411 U.S. 164 (1973).

109. *Id.* at 169. The Court stated, “[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *Id.* at 168 (internal quotes omitted).

110. *Id.* at 172 (internal citations omitted).

but because it provides a backdrop against which the applicable treaties and federal statutes must be read.”¹¹¹ The detrimental impact of the *McClanahan* decision continues, resulting in overall governmental inequality for indigenous peoples.

For instance, in a series of subsequent cases, the Court applied *McClanahan*'s tribal sovereignty backdrop rationale to create triple, and sometimes quadruple, taxation in Indian territory.¹¹² Needless to say, triple or quadruple taxation is a barrier to tribal territorial governance and clearly discourages much needed economic development in tribal communities, including the attraction of new businesses to locate, conduct, and expand their operations in Indian territory.¹¹³ Indigenous Nations are not and cannot be equal sovereigns when an essential governmental function, like taxation, is of limited practical application.

In a final blow to the sovereignty of indigenous peoples, in *Nevada v. Hicks*,¹¹⁴ the Court effectively overruled *Worcester* and its governmental equality principle:

State sovereignty does not end at a reservation's border. Though tribes are often referred to as “sovereign” entities, it was “long ago” that “the Court departed from Chief Justice Marshall's view that ‘the laws of [a State] can have no force’ within reservation boundaries.” “Ordinarily,” it is now clear, “an Indian reservation is considered part of the territory of the State.”¹¹⁵

The erosion of *Worcester* is complete with the recent *Hicks* decision.¹¹⁶ However, what is even more disconcerting is that the broken promises of *Brown* and *Worcester* are only two examples of a histori-

111. *Id.*

112. *See, e.g.*, *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (holding that county had authority to assess and collect property tax on reacquired parcels of the tribe); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (upholding tribe's power to impose severance tax on non-Indian business in Indian territory); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that state and tribe can tax cigarette sales to non-Indians and nonmember Indians made within Indian country); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (affirming the ability of tribes and states to tax cigarette sales to non-Indians made within Indian territory). A century earlier, the Court upheld federal taxation of Indian products made and sold in Indian territory, even though indigenous peoples did not become United States citizens until 1924. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870).

113. For an insightful critique of the *Moe* decision, the first cigarette tax case upholding state tax authority in Indian territory, see Russel Lawrence Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977).

114. 533 U.S. 353 (2001).

115. *Id.* at 361-62 (internal citations omitted).

116. In the most recent United States Supreme Court case, county authority over tribal citizens was approved de facto because the tribe could not bring a cause of action. *Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887, 1894 (2003) (*United States Reports* pagination unavailable at time of publication) (holding that the tribe was not a person within the meaning of 42 U.S.C. § 1983, a federal civil rights statute; therefore, the tribe could not bring a claim against the county for its unilateral search and seizure, performed with bolt cutters to destroy locks to tribal facilities, of tribal employees' records in Indian territory for alleged welfare fraud).

cal “braid of inequality” experienced by both African-Americans and indigenous peoples.

IV. HISTORICAL BRAID OF INEQUALITY

A. Removal

1. Indigenous Peoples

Despite the equality victory in *Worcester*, many Indigenous Nations in the East were removed from their homelands.¹¹⁷ For example, even before the federal Indian removal bill was passed in 1830, the State of New York had acquired the western half of the state from indigenous peoples through a series of 200 illegal treaties.¹¹⁸ New York illegally obtained indigenous lands by two methods: (i) interfering with peace treaty negotiations between indigenous peoples and the Federal Government; and (ii) passing state laws that prohibited any purchase or occupancy of Indian land in New York by any person without legislative consent.¹¹⁹ The Federal Government never approved these state-tribal land deals.

In another Indian removal case in 1850, President Zachary Taylor attempted to permanently remove a band of Chippewa Indians from Wisconsin to Minnesota by unilaterally changing the location of their annuity payments and food rations.¹²⁰ After the Chippewas received notice from government agents and then traveled to Minnesota, the annuity payments arrived forty-five days late.¹²¹ While waiting for the treaty-promised annuity payments, 150 Indians died from dysentery and measles, and 230 more died on the return trip to Wisconsin.¹²²

The removal of the New York Indians and the Mille Lacs Band of Chippewa are only two examples of several Indian removal cases. In perhaps the most infamous Indian removal, the “Trail of Tears,” terrible injustices preceded their trail of death. Those injustices are aptly

117. Although Indian removal had been suggested earlier, “it was not until after the close of the War of 1812 that the first exchange treaty was concluded.” COHEN, *supra* note 68, at 53. In theory, but definitely not practice, the removal of indigenous peoples from the east coast was negotiated. The first land exchange was agreed to by the Federal Government and the Cherokee Nation in 1817. Treaty with the Cherokee, July 8, 1817, 7 Stat. 156. Eventually, Congress authorized the President to “convey land west of the Mississippi to Indian tribes that chose to ‘exchange the lands where they now reside, and remove there.’” *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999) (quoting 4 Stat. 411, 412 (1830)).

118. COHEN, *supra* note 68, at 416-19. The one-sided state-tribal treaties violated the 1790 Trade & Intercourse Act and, ironically, constitute the source of Indigenous Nations’ successful land claims today. See, e.g., *Oneida County v. Oneida Indian Nation*, 470 U.S. 226 (1985).

119. COHEN, *supra* note 68, at 416-19.

120. *Mille Lacs*, 526 U.S. at 180-81. Pursuant to an 1850 executive order, President Taylor intended to remove the Mille Lacs Band of Chippewas from their aboriginal homelands in Wisconsin, previously agreed upon by treaty, to Minnesota. *Id.*

121. *Id.* at 180.

122. *Id.*

described by the Cherokee leader, Major Ridge, to President Andrew Jackson:

They have got our lands and now they are preparing to fleece us of . . . money. . . . We found our plantations taken either in whole or in part by Georgians—suits instituted against us for back rents for our farms. These suits are commenced in the inferior courts [where Cherokees could not testify under Georgia law], with the evident design that, when we are ready to remove, to arrest our people, and on these vile claims to induce us to compromise for our own release to travel with our families. Thus our funds will be filched from our people, and we shall be compelled to leave our country as beggars and in want. Even the Georgia laws, which deny us our oaths, are thrown aside and notwithstanding the cries of our people, and protestation of our innocence and peace, the lowest classes of the white people are flogging the Cherokees with cowhide, hickories, and clubs. We are not safe in our houses—our people are assailed by day and night by the rabble. Even the justice of peace and constables are concerned in this business. This barbarous treatment [in our own homeland] is not confined to men, but the women are stripped also and whipped without law or mercy. . . . [W]e shall carry off nothing but the scars of the lash on our backs.¹²³

Eventually, “sixteen thousand Cherokees were driven at gunpoint from their homeland in Georgia over the ‘Trail of Tears’ and more than four thousand of their number died enroute.”¹²⁴ In the Cherokees’ hour of need, the equality principle of *Worcester* and their treaty-based political liberty were nowhere to be found.¹²⁵

2. African-Americans

Africans also experienced removal, although it was not qualitatively or quantitatively the same as that experienced by indigenous peoples in the nineteenth century. Nevertheless, the following brief and oversimplified summary of the origin and growth of slavery in America illustrates a parallel removal experience to that of indigenous peoples.¹²⁶ Shortly after Columbus established contact, numerous Africans were removed from their homelands, then transported to, and sold as slaves in, various areas of the Americas:¹²⁷

123. Strickland & Strickland, *supra* note 85, at 121-22.

124. *Id.* at 111.

125. One author argues that the Cherokee removal and its effects “paved the way for a new birth of freedom for all Americans.” Gerard Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. (2003) (forthcoming 2004) (manuscript on file with the author). Professor Magliocca argues that the Cherokee removal provided an example for the Reconstruction Framers to draft the Fourteenth Amendment, which served as the paradigm for equality under the Fourteenth Amendment. *Id.*

126. For some compelling accounts of slavery, see *THE CLASSIC SLAVE NARRATIVES* (Henry Louis Gates, Jr. ed., 1987).

127. For a comprehensive analysis of the slave trade, see W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA, 1638-1870* (Dover Publ'ns 1999) (1896).

By 1600, there were more than half a million slaves in the Western Hemisphere. In Colonial America, the first Negroes landed at Jamestown in August, 1619. Within 40 years, Negroes had become a group apart, separated from the rest of the population by custom and law. Treated as servants for life, forbidden to intermarry with whites, deprived of their African traditions and dispersed among Southern plantations, American Negroes lost tribal, regional and family ties. Through massive importation, their numbers increased rapidly. By 1776, some 500,000 Negroes were held in slavery and indentured servitude in the United States. Nearly one of every six persons in the country was a slave.¹²⁸

The removal of Africans and indigenous peoples from their respective homelands was absolutely devastating in every respect—individually, collectively, culturally, and spiritually. Unfortunately, removal was only part of a continuum of inequality experienced by both African-Americans and indigenous peoples.

B. Exclusion

Even though indigenous resources and African labor helped the original thirteen colonies gain independence from England, neither African-Americans nor indigenous peoples were represented at the Constitutional Convention. “The rise of liberty and equality in this country was accompanied by the rise of slavery. . . . To a very large degree it may be said that Americans bought their independence with slave labor.”¹²⁹ In addition to slave labor, the colonists needed the land, resources, and help, or at least the neutrality of, indigenous peoples in order to successfully win the American Revolution. Interestingly, however, exclusion was and continues to be an area of divergence between indigenous peoples and African-Americans.

1. Indigenous Peoples

With regard to indigenous peoples, exclusion from mainstream America was deliberately negotiated and agreed upon by both parties to the federal-tribal treaties.¹³⁰ If the agreed-upon treaties and the holding and spirit of *Worcester* had been followed, Indigenous Nations

128. THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS 95 (1968).

129. Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, 59 J. AM. HIST. 5, 5-6 (1972).

130. See, e.g., Treaty of Fort Pitt with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13, art. 6 (stating that “the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it hath been bounded by former treaties”).

The United States agrees that the following district of country [boundary description omitted] shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, . . . the United States now solemnly agrees that no persons . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article

Treaty of Fort Laramie with the Sioux Nation, Apr. 29, 1868, 15 Stat. 635, art. 2.

would exclusively govern their original homelands without federal and state intervention in their governmental affairs. Instead, the American polity absorbed indigenous peoples and their lands in an ad hoc manner without the consent of indigenous peoples.¹³¹ At a minimum, if Indigenous Nations desire to be part of the United States, which is not at all clear that they do, they should have direct representation in Congress.¹³² From the time of the early treaties to today, the goal of many Indigenous Nations remains the same—“separate but equal” governments.

2. African-Americans

In contrast, exclusion was not something agreed to by African-Americans.¹³³ In the Constitution itself, African-Americans were barred from voting and were legally treated as three-fifths of a person for their slave owner’s voting purposes.¹³⁴ In *Dred Scott v. Sandford*,¹³⁵ the Court held that the formerly freed slave, Dred Scott, was “not a citizen of Missouri, in the sense in which the word is used in the Constitution,” and therefore the lower federal court did not have jurisdiction to decide his case.¹³⁶ In 1896, the Court upheld the doctrine

131. The lack of indigenous consent transpired into taxation of Indians without representation. See *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (construing section 2 of the Fourteenth Amendment, “Indians Not Taxed,” to mean Indians were not citizens even under the Fourteenth Amendment); 7 Op. Att’y Gen. 746 (1856) (interpreting the “Indians Not Taxed” Clause of the United States Constitution to mean that Indians were not citizens of the federal and state governments). Perhaps foreshadowing *Brown* and civil rights, indigenous peoples served bravely in World War I, returned home, and yet were not United States citizens. For an insightful critique of this problem, see Cuthbert W. Pound, *Nationals Without a Nation: The New York State Tribal Indians*, 22 COLUM. L. REV. 97 (1922). Congress responded by passing the Indian Citizenship Act, 8 U.S.C. § 1401(a)(2) (1924). For an argument against Indian citizenship that seeks to preserve the exclusion of indigenous peoples from the American polity, see Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

132. In the early treaty period, some Indigenous Nations contemplated statehood. See, e.g., Treaty of New Echota with the Cherokee Nation, Dec. 29, 1835, art. 7; The Treaty at Fort Pitt with the Delaware Nation, Sept. 17, 1788, art. 6. For an especially instructive example and political theory on treaty federalism, see RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980). See also Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994). For a detailed history of the original understanding of possible Indian statehood, see Clinton, *supra* note 73, at 125-28.

133. For an article critical of the Marshall Court and slavery, see Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532 (1969).

134. U.S. CONST. art. I, § 2, cl. 3.

135. 60 U.S. (19 How.) 393 (1856).

136. After the Civil War, three important constitutional amendments were ratified. In 1865, the Thirteenth Amendment was ratified to abolish slavery and involuntary servitude. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In 1868, the Fourteenth Amendment was ratified to enforce legal equality for African-Americans. *Id.* In 1870, the Fifteenth Amendment was ratified to protect African-Americans’ right to vote. 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 any State on account of race, color, or previous condition of servitude.”). One author argues that *Worcester* and *Dred Scott* both represent

of “separate but equal” in approving Louisiana’s law requiring separate coaches for white and black passengers.¹³⁷ Even more recently, African-Americans were excluded from marrying whites by sixteen states.¹³⁸ Throughout their exclusion for much of American history, African-Americans, like all citizens, desired equality and opportunity in mainstream America.

C. Historical Inequality

Despite their divergent exclusion experiences, American history reveals parallel subordination experiences for African-Americans and indigenous peoples with an interesting twist: their respective legal rights emerged in a diametrical manner. Africans were treated as slaves or legal property, then as “separate but equal” through legal segregation, and eventually considered formally equal upon passage of federal civil rights laws. In contrast, indigenous peoples pre-existed all nations in America and agreed to federal-tribal treaties, then after a massive decrease in population, were legally characterized as “domestic dependent nations”¹³⁹ and remain transparent sovereign governments to many Americans today.¹⁴⁰

Notwithstanding their different experiences to date, the respective quests for equality by African-Americans and indigenous peoples have yielded limited and often short-lived advancements. In short, equality has not been and will not likely be achieved by African-Americans or indigenous peoples alone. It is time to reach beyond our historical experiences and begin working together.¹⁴¹ By way of

preemptive opinions, cases decided during a constitutional crisis which are “last gasps of a dying constitutional order” meant to delegitimize opponents and set forth an enduring doctrine that directly contradicts traditional judicial norms. Gerard Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 489 (2002). According to Magliocca’s thesis, *Elk v. Wilkins*, 112 U.S. 94 (1884), is the preemptive opinion most analogous to *Dred Scott* because the result was to exclude indigenous peoples from American citizenship even when they abandoned their tribal relations and sought to integrate into mainstream America. *Worcester*, on the other hand, represents the treaty parties’ original intent.

137. *Plessy*, 163 U.S. at 541-42. The law was enforced against a man “of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood; [and] . . . the mixture of colored blood was not discernible in him.” *Id.* at 538. In upholding separate but equal, the Court distinguished between “laws interfering with the political equality of the negro” and social inequality—forecasting the aftermath of *Brown*. *Id.* at 545.

138. *Loving v. Virginia*, 388 U.S. 1 (1967) (prohibiting states from banning interracial marriage between whites and blacks). An interesting exception to the Virginia statute existed with respect to indigenous persons of less than one-sixteenth American Indian blood. *Id.* at 5 n.4. The intent was “to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas.” *Id.*

139. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (declaring, in dicta, indigenous peoples to be “domestic dependent nations” whose relationship to the Federal Government “resembles that of a ward to its guardian”).

140. See, e.g., Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818 (1968).

141. For a good and recent example of looking beyond one’s field of scholarship to assess the larger vision of the United States Supreme Court, see David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268 (2001).

short excerpts from works of noted scholars in the respective fields, the “historical braid of inequality” experienced by African-Americans and indigenous peoples reveals the necessity of a red-black interest convergence.

1. Indigenous Nations

From the early treaties representing Indigenous Nations’ political power, to the dramatic political shift before and after *Worcester*, resulting in Cherokee removal, indigenous peoples began their strange journey into Federal Indian law. Professor O’Brien provides an overview of the significant variances in Federal Indian policy after *Worcester* and Cherokee removal:

Despite [the *Worcester*] decision by the Supreme Court affirming tribal rights of self-determination, the United States implemented a series of policies over the next century and a half to divest Indian nations of their sovereignty, land, and culture. In 1871, Congress ended the making of treaties with Indian nations The 1871 act was followed by [federal] laws establishing Indian [boarding] schools, tribal police forces, and court systems, all of which emulated Anglo-American traditions and sought to assimilate the Indian quickly. In 1887, Congress passed the Dawes Act, the most assimilationist measure of all. Heralded by Theodore Roosevelt as a “mighty pulverizing engine to break up the tribal mass,” the Dawes Act subdivided the [Indian] reservations . . . [and] the federal government purchas[ed] the remaining [“surplus”] lands of the tribe. By 1934, as a result of this policy, two-thirds of the tribal lands had passed into white ownership.

. . . The Indian Reorganization Act of 1934 halted further allotments of Indians lands By the 1950s, . . . [federal] policy involved the unilateral termination of the United States’ relationship with the tribes. . . . By 1961, Congress had terminated its relationship with 109 bands and tribes [with devastating consequences for these indigenous communities]. . . .

[Most recently,] President Nixon announced a new [federal policy] era of self-determination.¹⁴²

Against this backdrop of Federal Indian policy, the reputed Indian law scholar Felix Cohen described the elusive quest for equality by indigenous peoples in America:

142. Sharon O’Brien, *Federal Indian Policies and the International Protection of Human Rights*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 35, 43-44 (Vine Deloria, Jr. ed., 1985). The sharp changes in federal policy regarding indigenous peoples caused Solicitor of the Interior, Nathan Margold, to make the following observation about the drastic changes in policy:

[T]he groups of human beings with whom Federal Indian law is immediately concerned have undergone, in the century and a half of our national existence, changes in living habits, institutions, needs and aspirations far greater than the changes that separate from our own age the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated. Telescoped into a century and a half, one may find changes in social, political, and property relations which stretch over more than 30 centuries of European civilization.

COHEN, *supra* note 68, at xxvii-xxviii.

[T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith¹⁴³

The "fresh air" of *Worcester* has been counteracted by the "poisonous gas" permeating all aspects of indigenous peoples' political liberty, such as extra-constitutional federal regulation of their citizens¹⁴⁴ and property;¹⁴⁵ uncompensated takings of their land;¹⁴⁶ unilateral abrogation of federal-tribal treaties by the Federal Government;¹⁴⁷ and even termination of their status as political entities.¹⁴⁸

2. African-Americans

Similarly, Professor Derrick Bell summarizes American policy-making toward African-Americans in the past two centuries:

Their status as slaves from the seventeenth through much of the nineteenth centuries evolved into segregation after a brief Reconstruction period. And the post-*Brown* period in the mid-twentieth century has brought us the "eerily awful equal opportunity era": "Eerie" because some blacks seem to be making substantial moves into the mainstream; "Awful" because so many blacks have disappeared into poverty with all its afflictions.

. . . .
 . . . Serious differences between whites are often resolved through compromises that sacrifice the rights of blacks. When the disputed presidential election of 1876 threatened a renewed civil war, a compromise was effected that withdrew Northern troops from the South condemning the newly freed blacks to their former masters. And when working class whites insisted on official segregation as the price of their continued support of elite policymakers, they gained a shaky status at the expense of blacks that the Supreme Court ratified in 1896 [in *Plessy v. Ferguson*]. Of course, the classic sacrifice of blacks was that made by the Framers to secure Southern support for the Constitution. The original Constitution contained no less than several provisions intended to recognize and

143. Felix S. Cohen, *The Erosion of Indian Rights, 1950-53*, 62 YALE L.J. 348, 390 (1953).

144. See, e.g., 1885 Major Crimes Act, 18 U.S.C. § 1153 (1994); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994); see also Porter, *supra* note 131.

145. See, e.g., Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980); see also The General Allotment Act, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348, 349, 354, 381 (1994)); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that the Federal Government obtained ultimate title to Indian property by purchase or conquest and the Indians retained their use and occupancy rights to the land); cf. United States v. Shoshone Tribe, 304 U.S. 111 (1938); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

146. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992).

147. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

148. See, e.g., The Termination Act of 1953, H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

protect property in slaves. To say the least, this was serious contradiction in a document intended to insure basic liberties for all.¹⁴⁹

V. CONCLUSION

From *Worcester* to *Brown* and their respective disappointments, American history reveals a parallel but unsuccessful pursuit of equality by African-Americans and indigenous peoples—as individuals, groups, and governments. American policy-making toward African-Americans and indigenous peoples has been and continues to be deeply flawed regarding their basic rights to equality.¹⁵⁰ State and local governments have historically been, and in many ways continue to be, adverse to the rights of African-Americans and indigenous peoples. Even the United States Supreme Court, with its limited role in protecting minority rights in a system of majoritarian rule, has become “poison gas” for blacks and Indians.¹⁵¹

African-Americans and indigenous peoples have suffered despite strong legal institutions, belief in the rule of law, and this country’s proclaimed self-evident truths—“that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.”¹⁵² It may appear that we never really left *Plessy v. Ferguson*, where the Court recognized that “[l]egislation is powerless to eradicate racial instincts. . . . If one race [is considered to] be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”¹⁵³ However, I contend that although legislation may be limited, it is not completely powerless to help correct the injustices experienced by African-Americans and indigenous peoples.¹⁵⁴

For example, in direct contrast to *Plessy*, recent state legislation has been enacted to include the perspectives of African-Americans and indigenous peoples in our public education systems in order to

149. BELL, *supra* note 2, at 27.

150. See Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 924 (1986) (critiquing the philosophical framework that excluded nonpolitical minorities since ratification of the Constitution); see also CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1935) (stating that the drafters of “the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantage from, the establishment of the new system”).

151. See, e.g., Getches, *supra* note 141, at 361; Frank R. Parker, *The Damaging Consequences of the Rehnquist Court’s Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996).

152. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

153. 163 U.S. 537, 551-52 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). For an insightful critique of *Brown* along this same line of reasoning, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

154. The underlying problem in previous legislation derived from American policy-making that excluded and ignored the perspectives of African-Americans and indigenous peoples concerning their rights to equality.

teach students a more complete version of American history.¹⁵⁵ The practical effect is to help our youth understand past experiences of inequality in order to avoid these same mistakes and to develop compassion for others. The recent changes in education curricula represent a positive legislative step toward eradicating the so-called “racial instincts” noted by the Court.

By examining the parallel inequality experiences of African-Americans and indigenous peoples in American history, I suggest that a red-black interest convergence is revealed and that a political partnership is desirable. A red-black partnership probably could not by itself significantly transform American institutions, but it would serve as a powerful example of a multicultural coalition. In order to deconstruct society’s racial instincts, a red-black interest convergence would need to quickly expand to include any person desiring equality in America. In short, the overall vision of equality must recognize that self-interest and others’ interests are inextricably intertwined.

Consequently, beginning with a red-black coalition rather than the historically short bursts of cyclical and ultimately unsuccessful efforts, we need “to work steadily like a stream flowing toward our goal of [individual and societal] transformation”¹⁵⁶ to obtain equality.¹⁵⁷ The new paradigm must be universal responsibility to guarantee equality to every person, particularly to those who have suffered disproportionately in America—including, but not limited to, African-Americans and indigenous peoples.¹⁵⁸ The only lasting solution to historical injustices lies within each individual, in which compassion and mutual respect form the basis of our relations with one another.¹⁵⁹ We must reach beyond the broken promises of *Brown* and *Worcester* and redress the historical “braid of inequality” experienced by African-Americans and Indigenous Nations. It is time to guarantee their basic rights to equality and political liberty, and finally purge the “poisonous gas” of racial and political injustice suffered by African-Americans and indigenous peoples, because it is fundamental to, and reflects upon, the basic integrity of our republican democracy.

155. Recent examples include integrating the study of African-Americans and indigenous peoples into educational institutions at all levels from grade school to college. See, e.g., Ylan Q. Mui, *Black History Curriculum Developed for Statewide Use*, WASH. POST, Dec. 21, 2003, at C4; see also *Teacher Integrates Indian Studies into Schools*, BILLINGS GAZETTE, Dec. 21, 2003, at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2003/12/21/build/state/40-indian-studies.inc>. If successfully implemented, ethnic studies can be taught as part of overall American history at all educational levels.

156. HIS HOLINESS, THE DALAI LAMA, *ETHICS FOR THE NEW MILLENNIUM* 120 (1999).

157. For a comprehensive review of the unsuccessful efforts of African-Americans to obtain equality, see Kimberle’ Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331 (1988).

158. For example, African-Americans and indigenous peoples can and should actively aid each others’ interests. See, e.g., Karen Florin, *NAACP to Support Tribes’ Drive for Federal Recognition*, THE DAY (Dec. 5, 2003), at <http://www.theday.com/eng/web/newstand/>.

159. HIS HOLINESS, THE DALAI LAMA, *supra* note 156, at 125.