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MULTICULTURALISM AND THE FUTURE OF TRIBAL SOVEREIGNTY

by Scott C. Idleman*

One of the most important things to understand about American Indian tribes is the simple fact that tribes are governments—not non-profit organizations, not interest groups, not an ethnic minority.¹

I. INTRODUCTION

The history of American culture is rich with social and ideological movements of every sort, from the temperance and abolitionist efforts at the outset of the nineteenth century to the animal rights and anti-abortion campaigns at the close of the twentieth century.² In recent decades, one of the more influential movements in the United States has clearly been multiculturalism. The multiculturalist project, though neither monolithic nor immutable, can generally be identified by the objectives that it pursues as well as the perspectives or premises that render it, at least for adherents, so morally resonant and intellectually cogent. Broadly viewed, these objectives appear to

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¹ Professor of Law, Marquette University. Several individuals graciously fielded questions or offered comments throughout the drafting of this Article, including Duane Champagne, Elizabeth Dale, Mary Dudziak, Mark A. Graber, Elizabeth Staton Idleman, Robert J. Kotecki, Michael M. O’Hear, Malla Pollack, Ilya Somin, and David C. Williams. In addition, Mark P. Tilkens, now with Foley & Lardner, provided excellent research assistance.


be three-fold: to enhance public awareness and tolerance of the nation’s pluralistic character; to increase the representative diversity of society’s economic, political, and educational institutions; and, eventually, to dislodge the unicultural hegemony that has governed these institutions to date. Correspondingly, these goals are often informed by several beliefs or ideologies, such as cultural diversity, identity politics, the politics of recognition, and cultural particularism, which themselves reflect convergent conceptual premises regarding race, culture, and identity.

Much of the writing on multiculturalism has involved attempts either to affirm or to repudiate its merit in toto. The purpose of this Article is more focused. In essence, it is to explain why American Indian tribes or tribal members should be singularly hesitant to align themselves or their interests too closely with the multiculturalism movement, regardless of its potential merit for other groups or for society at large. The key to this thesis is the distinctive legal and political status of Indians. Unlike other minorities or so-called outgroups, Indian tribes—particularly those which are federally-recognized and comprised of enrolled members—are politically separate, semi-sovereign entities. Accordingly, unlike these other groups, what many Indian tribes fundamentally seek—and what they uniquely stand to jeopardize—is the fortification and recognition of their political separateness and, ultimately, their legal and territorial sovereignty.

3. See, e.g., George A. Martinez, Latinos, Assimilation and the Law: A Philosophical Perspective, 20 Chicano-Latino L. Rev. 1, 14 (1999) (“Today’s political discourse often involves the ‘demand for recognition,’ the demand to have one’s culture and cultural identity appreciated and respected. Minority groups and the ‘politics of multiculturalism’ often generate this demand.”) (footnote omitted); Johan D. Van der Vyver, Book Review, 17 Conn. J. Int’l L. 323, 325 (2002) (“Multiculturalism recognizes in broad outline the fact of cultural diversity within a political community (pluralism) as a salient fact that ought to be accommodated in the political structures and legal arrangements of the state.”).


5. See Jonathan Drimmer, Hate Property: A Substantive Limitation for America’s Cultural Property Laws, 65 Tenn. L. Rev. 691, 726 (1998) (recognizing that multiculturalism can be defined as seeking the pluralistic coexistence of equally-valued cultural systems).

6. See Ayelet Shachar, Two Critiques of Multiculturalism, 23 Cardozo L. Rev. 253, 253 (2001) (“The literature on multiculturalism has become a burgeoning industry... The bulk of this literature involves weighing the arguments for and against public policies that would allow special provisions for protecting distinct cultures and ways of life.”).
At first blush, this thesis may seem at the very least counterintuitive, if not somewhat outlandish. After all, Indians clearly possess characteristics that place them within the ambit of multiculturalist concern: tribal membership has a (non-white) racial or ethnic component; within certain segments of society, there is latent or overt stereotyping of Indians along racial or ethnic lines; Indian tribes since the colonial era have suffered economic, social, religious, and political oppression, at times even genocide; and Indian tribal cultures, like many minority cultures, are frequently at odds structurally, religiously, and linguistically with traditional Western perspectives, often leading to significant misunderstanding by dominant Western institutions. These, moreover, are only the superficial similarities. Closer examination appears to reveal even deeper, more salient points of conceptual or philosophical commonality, such as a particularist (as opposed to universalist) view of culture and a separationist (as opposed to assimilationist) view of cultural preservation. In short, the case for Indian inclusion within the multiculturalism movement, or what can be called the inclusionist position, would seem to be virtually unassailable.

Nevertheless, this Article will contend that neither these superficial similarities nor these conceptual commonalities are truly as meaningful or convergent as they first appear, and that they may not favor, much less compel, the inclusionist position after all. With regard to the outward characteristics such as racial identity and historic oppression, the inclusionist position is problematic insofar as it suggests or presupposes that these are the defining indicia of Indian tribalism vis-à-vis the dominant society—that, as with certain other minority groups, there is nothing more, or at least nothing more important. In fact, unique to Indian peoples is an identifiable and self-identifying political or governmental dimension, rooted in history and ratified by law, which

7. It may also seem heretical if, as often appears to be the case, multiculturalism has assumed the status of orthodoxy. But see id. at 256 (noting a "second wave" of literature critiquing multiculturalism). To be sure, this author could find only one other scholar, University of California, Los Angeles Professor Duane Champagne, who has directly confronted the issue addressed in this Article. See Duane Champagne, Does the Focus in Multiculturalism Emphasize Differences and Foster Racial/Ethnic Stereotypes?, in Controversial Issues in Multiculturalism (Diane De Anda ed., 1997); Duane Champagne, Does Multiculturalism Include American Indians? Native Resistance to a New Form of Incorporation, Address Before the European Association of American Studies (Mar. 1996) [hereinafter Native Resistance], quoted in part in Alan R. Velie, Indian Identity in the Nineties, 23 Okla. City U. L. Rev. 189, 204 (1998). There have, however, been concerns raised about the compatibility of multiculturalism with the interests of women. See, e.g., Susan Moller Okin, Is Multiculturalism Bad for Women? (Joshua Cohen et al. eds., 1999) (presenting various perspectives); Walter Berns, Women: An Uncertain Fit for the Multicultural Movement?, 19 Harv. J.L. & Pub. Pol'y 733 (1996) (noting that women are not a cohesive group that fits easily into a multicultural model).
categorically distinguishes them from any other minority interest on the American landscape.

Likewise, with regard to the conceptual commonalities such as particularism and separationism, the inclusionist position is mistaken to the extent that these perspectives, when more carefully defined, are not understood or interpreted the same way by Indians and multiculturalists. While the particularism of the multiculturalists, for instance, generally rests on the view that race and culture are socially constructed and historically contingent, the particularism of Indian cultures frequently reflects a cosmologically-based view that the various races and cultures are intrinsically, objectively, and meaningfully different, and quite often that one’s own tribe has in some manner been divinely chosen and endowed with a special character, destiny, or purpose. Similarly, while the separationism advocated by certain multiculturalists typically rests on theories of individual and group autonomy or equality, the separationism of Indian tribes is, by contrast, deeply rooted in historically traceable and legally enforceable claims of geopolitical sovereignty.

Finally, this Article will contend that inclusion itself, even if it could be theoretically supported, may actually prove injurious to the interests of tribal Indians in the long term. In particular, tribal affiliation with the multiculturalism movement may incrementally erode the very political and legal distinctiveness upon which the self-identity and separate existence of tribes arguably depend. While this distinctiveness does not alone preclude participation or inclusion in the multiculturalism movement and may even be a unique contribution to it, the unavoidable reality is that multiculturalism does not and cannot promise the retention of tribal sovereignty in the long term. To the contrary, it may actually undermine this sovereignty as it advances its own objectives. By focusing so heavily on issues of race and equality, and by largely pursuing goals such as integration and proportional representation, the multiculturalist agenda can only serve to dilute or erode the Indian legal claim to political separateness, especially given the historical fact that Indian law and federal Indian policy, for better or worse, have often tracked progressive cultural movements and understandings. Moreover, should multiculturalist concerns fall out of public favor, as they already have to some extent, being tethered to the multiculturalism movement may lead to a comparable decline in the acceptance, if not the defensibility, of the continued special status of Indian tribes and tribal Indians.

This Article proceeds as follows. Part II describes in more detail the phenomenon of multiculturalism, and in particular its premises, conceptualization, and manifestations. Part III delineates the distinctive legal and political status of tribes and their members. Combining these foundational elements, Part IV then canvasses the ways in which, and extent to which,
multiculturalism and Indian tribalism are either convergent or divergent. Part IV also assesses these points of convergence or divergence by formulating three models of multicultural-tribal relations (association, avoidance, and appropriation) and by comparatively gauging the benefits and costs to tribal Indians that each model would likely produce. Based on this assessment, this Article concludes that multiculturalism and Indian tribalism are in significant ways not compatible. And, if there is to be any association at all, it must be selectively and strategically undertaken by tribes and their members based on the long-term furtherance of sovereignty rather than the short-term attainment of economic gain, political influence, or social status.8

II. THE ESSENTIAL CONTOURS OF MULTICULTURALISM

Multiculturalism, as intimated, does not readily lend itself to definition. This is only slightly surprising, for it is not so much a singular or comprehensive philosophy as it is a sociopolitical phenomenon resulting from

8. To some, this position may seem regressive and fundamentally insensitive to decades of reform, while to others, it may appear as yet another instance of a non-Indian commentator expostulating about what is good and what is bad for tribal Indians—yet another manifestation of other- rather than self-determination. Accordingly, it may be helpful to offer at the outset two qualifications that should lessen these concerns. First, nothing in this Article is intended to suggest that tribal members should either refrain from full participation or be denied full equality in the nation's political, economic, social, or educational processes and institutions. It merely asks whether affiliation with the multiculturalism movement is an appropriate and necessary undertaking, especially in light of the potential adverse consequences that such affiliation might engender. Second, far from dictating to tribal Indians what they should or should not do, this Article is intended simply to provide an alternative perspective on multiculturalism—which is, after all, largely a non-Indian construct—so that tribal Indians themselves may decide more circumspectly which course of action is most desirable. Implicit in this approach, of course, is the view that some decision should be made, and clearly this Article offers its own viewpoint. But the final assessment of short-term and long-term costs and benefits, and thus the content and contours of that decision, belong rightly and quite plainly with the tribes and tribal members themselves. There are, moreover, at least two problems with attempts to speak on behalf of Indian tribal interests. The first is one of legitimate authority, whether or not the speaker is a tribal member. See G. William Rice, There and Back Again—An Indian Hobbit's Holiday "Indians Teaching Indian Law," 26 N.M. L. Rev. 169, 170 n.5 (1996). The second is one of overgeneralization, if only because tribes, which number in the hundreds, obviously do not hold identical or monolithic views. See Philip P. Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 Cal. L. Rev. 1137, 1230 n.435 (1990); Catherine A. O’Neill, Variable Justice: Environmental Standards, Contaminated Fish, and “Acceptable” Risk to Native Peoples, 19 Stan. Envtl. L.J. 3, 11 n.17 (2000).
the opportune convergence of several interests and ideologies. In turn, any attempt to define it must by necessity be descriptive, tentative, and illustrative, rather than normative, conclusive, and exhaustive. The task of this first Part, accordingly, is to delineate the contours of the multiculturalism movement—descriptively, not definitively—by focusing on those goals or modes of action, as well as those underlying conceptions or premises, that most often correspond to efforts which are largely self-identified as multiculturalist in nature. This delineation proceeds in two stages. Section A provides an intellectual or conceptual overview of contemporary multiculturalism, while Section B catalogs several of its actual manifestations within the legal, political, and social arenas.

A. Conceptual Premises

The multiculturalism movement represents in many respects another stage in the evolution of how civil equality, and thus the civil rights movement, has been and ought to be conceptualized. In particular, its premises evince a conceptual shift or departure from the traditional understanding of the nature and meaning of discrimination and of the relationship of discrimination to the structures and dynamics of society. Initially, and for many years, civil rights efforts generally focused on objectively manifest forms of discrimination against minorities, particularly black Americans. These included legal enactments that were textually or intentionally biased, and institutional arrangements that vestigially, but clearly, reflected past deliberate discrimination. Illustrative of such discrimination was the segregated state of public education, initially by law and subsequently by the lingering effects of this legally supported status quo.


With time, as these manifestly discriminatory phenomena became scarcer but as racial disparities persisted or even increased, the focus turned to the notion of institutionally imbedded or structural racism—the idea that seemingly neutral policies or practices, and even entire institutions or systems, might be designed in ways that naturally and effectively (though perhaps unintentionally) disadvantage certain groups. According to this view, racial bias is not simply a phenomenon that correlates exclusively or even predominantly with concretely malicious acts or their consequences, which, under a traditional model, one then might present to the legal or political system for redress. Rather, it can inhere in the very social structures, from language to legal processes, that constitute the cultural and juridical baselines according to which principles such as equality and fairness are discerned and measured.

12. See John Powell, Does Racism in Motion Have To Stay in Motion? Nonprofits as a Force Against Structural Racism, 9 Race & Power (Summer 2002) (explaining that "[p]ersistent racial disparities are not dependent upon racial animus or ill will" but instead are ""structural’ . . . [i.e.,] built into all of our structures" and that "vastly different outcomes for people of color and whites in housing, education, wealth, and treatment under the criminal justice system are all examples of structural racism at work" insofar as "they are rooted in laws and policies that disadvantage people of color and overadvantage whites"), available at http://www.tsne.org/section/320.html (last visited Apr. 14, 2004); Dorothy E. Roberts, Why Culture Matters to Law: The Difference Politics Makes, in Cultural Pluralism, Identity Politics, and the Law 85, 89 (Austin Sarat & Thomas R. Kearns eds., 1999) [hereinafter Cultural Pluralism] ("[T]he law promotes the dominant culture in much more subtle ways. Those in power need not resort to obvious cultural bias because the law’s language of neutrality is already weighted in favor of the status quo."); Rodolfo Stavenhagen, Structural Racism and Trends in the Global Economy, in Int’l Council on Hum. Rts. Pol’y, Consultation on Racism and Hum. Rts. 8, 9 (Dec. 3–4, 1999) ("[I]nstitutional or structural racism . . . refers to the dynamics of economic and social institutions through which racialised groups become systematically marginalised or excluded from the benefits of development, regardless of the prejudices, beliefs or intentions of particular individuals who happen to direct or manage such institutions."), available at http://www.ichrp.org/ac/excerpts/52.pdf (last visited Apr. 2, 2004).

13. See, e.g., Timothy A. Canova, Global Finance and the International Monetary Fund’s Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latino/o Communities, 33 U.C. Davis L. Rev. 1547, 1549 (2000) (contending that “the global monetary system, and the IMF in particular, systematically subordinates entire nations of color” and that “[t]he same social relations, mechanisms, and patterns of thought that keep down people of color throughout the world also serve to keep down millions of people of all colors here in the United States”); Lodis Rhodes, The “Underclass” and Structural Racism (“Problems in the inner city have roots in structural racism and economic inequality. . . . Relationships between citizens and their communities, the governed, and the governors are all conducted in systems rooted in structural racism. This system determines life in the inner city . . . .”), at http://www.utexas.edu/lbj/rhodesprp/01_02/divide/under.htm (last visited Feb. 25, 2004). For a recent example of this perspective applied to issues of institutional gender equity, see Overview: The Status of Women Faculty at MIT (Mar. 2002), available at http://web.mit.edu/faculty/reports/overview.html (last visited Feb. 25, 2004).
This conceptual shift obviously has implications for how bias or discrimination ought to be addressed. Section B, accordingly, will focus on how these implications have been realized or manifested to date. For present purposes, it is important to examine more thoroughly the shift itself. Of particular significance is that this conceptual evolution has not transpired in a theoretical or intellectual vacuum. Instead, largely correlating with the shift in emphasis from surficial discrimination to structural bias have been certain changes in the ways in which race, identity, and various cultural institutions are themselves understood or interpreted. What follows is a summary of some of the chief intellectual developments that have accompanied or contributed to this shift, eventually culminating in socio-ideological phenomena such as multiculturalism.14

Like all intellectual or philosophical movements, the roots of multiculturalism (or at least its conceptual elements) can likely be traced back hundreds if not thousands of years.15 At the risk of oversimplification, but in the interest of economy, the present genealogy will be confined to the most immediate and relevant developments. In particular, beginning in the latter half of the twentieth century, and especially the last quarter, there emerged a growing consensus within certain intellectual communities that traditional Western narratives occupied an unjustifiably monopolistic or exclusive position in many American institutions, especially those of a social, political, legal, and educational nature.16 The issue was not exclusivity per se, but rather unjustifiable exclusivity (often termed hegemony) in light of extant alternative narratives that to many observers appeared to possess comparable historical, intellectual, or aesthetic qualities.17


17. As noted by one author:

Multiculturalists address their work to those who have historically been excluded from the historical narrative, while traditionalists seek a unified coherent narrative that supports and explains American cultural ideology. However, traditionalists fail to recognize that insistence on a unified retelling of American history is ultimately hegemonic because the only history that gets retold clearly and heroically is that of the winners, while those of the losers gets forgotten.
Complementing if not facilitating this emerging perspective was an increasing sense, particularly in the precincts of higher education, that the principal determinant of a narrative’s relative status was not its intrinsic or objective value as such—a concept which itself was coming under fire—but, rather, the comparative social, economic, or political status of its proponents. The prevailing modes of governance, aesthetics, historiography, morality, and even language could not, in other words, be objectively or universally deemed excellent, proper, or correct. Instead, their dominance appeared to be largely if not entirely contingent upon the shared, often ethnocentric perspectives or preferences of those in a position to accord them their elevated status. 18

Furthermore, the content and parameters of any given favored narrative appeared (far from coincidentally, from some perspectives) to preserve or enhance the status and hence the power of its proponents. Not only, then, was the favored narrative unduly elevated to its position of predominance, this elevation and the maintenance of this predominance were arguably the means by which the powerful remained in power. 19 Concomitantly, not only were competing alternative narratives unjustifiably devalued and thereby marginalized, this devaluation and the maintenance of this marginalization were arguably the means by which the powerless remained out of power. 20 So, for example, it has been contended in regard to the univocality of academic law that:

[T]he conventional methodology of traditional legal scholarship maintains status quo values, and ... it explicitly and implicitly marginalizes, silences, and renders invisible the socialized Other (e.g., blacks). In so doing, the Law’s meaning and its discourse presume the irrelevance of people of color generally and reinforce


19. See, e.g., Roberts, supra note 12, at 90 (“[T]he transparent cultural standard hidden in the law got there as a result of social inequities, and it often works to privilege not only white people’s way of life but also their position of power.”).

20. See, e.g., Reginald Leamon Robinson, Race, Myth and Narrative in the Social Construction of the Black Self, 40 How. L.J. 1, 8–9 (1996) (“[T]he Critical Race Theory Movement ... developed an understanding that legal discourse and methodology are not neutral and objective. Rather, [they] are stories, i.e., narratives. [Where] the Law’s meaning is a purposeful story, and its methodology [] a narrative that silently underwrites already existing dominant norms and values ... ”) (footnotes omitted); Power, Privilege and Law: A Civil Rights Reader (Leslie Bender & Daan Braveman eds., 1995).
the subordination of blacks specifically. Conventional methodology in traditional legal scholarship institutionalizes legal hegemony, a concept that cannot be removed from the institutional practices which rationalize employment discrimination, race hatred, gender marginalization, and class oppression.21

At the same time, a number of commentators contended that notions like race and even gender and sexual orientation are to a significant extent cultural constructs, and that certain institutions of society, such as legal rules and norms, can effectively "reify[] racial identities"22 as well as notions of gender,23 sexual orientation,24 and disability.25 According to one author, in fact, American legal history teaches that socio-legal norms and narratives weave the strands of culture, economics, politics, and society into a recurrent pattern of racial violence: symbolic, spatial and textual. In the high-profile criminal trials under scrutiny here, this pattern of violence is marked by traditional figurations of racial identity, racialized narrative, and race-conscious representation. Rooted in antebellum and postbellum visions of racial status and community, the figures of black and white identity, dominant and subordinate narrative, and color-conscious representation pervade the law, lawyering, and ethics of criminal justice.26


21. Robinson, supra note 20, at 12–13. In addition,


23. See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987) (arguing that inequality precedes, rather than reflects, gender differences); David B. Cruz, Disestablishing Sex and Gender, 90 Cal. L. Rev. 997 (2002) (examining how different conceptions of disestablishment would have different effects on such issues at governmental recognition of sex changes, sex-segregated education, and the mixed-sex requirement for civil marriages).

24. See, e.g., Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. Rev. 1467, 1473 n.16 (2000) (citing numerous sources for the proposition that homosexual identity is not always easy to describe).

Rather than understanding sexual identities as a set of discrete and independent social types, queer theorists emphasize their mutual implication: for example, the word "homosexuality" first appears in English in 1897, but the term "heterosexuality" is back-formed, first used some years later. Heterosexuality comes into existence as a way of understanding the nature of individuals after the homosexual has been
"[i]t is now fairly widely accepted that race is a social construction." Thus, from this perspective, "[r]ace is neither a skin color, nor a natural or biological division of humankind. The concept of race is historically located, culturally and socially specific, and therefore continually under construction in our own time." In turn, "[o]nce race was understood as a social construction, scholars identified different meanings and concepts attached to the term race itself. Further scholarly work identified whiteness as a racial construction, protected as a dominant norm by its ability to appear neutral and natural to white people."

Whether or not the substance of this or any of the foregoing perspectives is demonstrably true or correct is not particularly necessary for purposes of the Article. What is critical is that these perspectives comprise some of multiculturalism's more conceptually central and commonly recognizable components. More importantly, these perspectives, while not exhausting the fullness of multiculturalism, are sufficient in and of themselves to illustrate just how far-reaching and powerful the postmodernist, multiculturalist critique is or can be. Not only do these various strands of thought, when taken together, call into question the effects of society's institutions, norms, and premises, they also call into question the functional legitimacy of these institutions, norms, and premises. More than that, they undermine the very notion that such institutions,

diagnosed; homosexuality requires heterosexuality as its opposite, despite its self-professed essentialism. Queer theorists point out that the homo/hetero dichotomy, like many others in western intellectual history that it arguably draws on and reinforces, is not only mutually implicated, but also hierarchical (heterosexuality is superior, normal, and inevitable) and masquerades as natural or descriptive.


25. Heyes, *supra* note 24 ("The trope of social constructionism [argues] . . . that disability is not a natural or objective flaw of certain individuals, but rather a set of challenges faced by those whose needs the dominant culture fails to accommodate.") (citations omitted).


27. Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 Cornell L. Rev. 1309, 1320 (2000) (footnote omitted). For a somewhat different conceptualization, see Sylvia R. Lazos Vargas, *Critical Race Theory and Autobiography: Can a Popular "Hybrid" Genre Reach Across the Racial Divide?*, 18 *Law & Ineq.* 419, 427 (2000) (book review) ("When race theorists assert that race is 'socially constructed' they mean that race is an objective phenomenon (say having Black skin) that has no positive or negative meaning until humans, and their social mores, history and laws, provide that social meaning (as is encapsulated by White supremacist ideology.").

28. Mahoney, *supra* note 27, at 1320 (footnote omitted); *see also* Roberts, *supra* note 12, at 89.
norms, and premises can ever be truly legitimate in an intrinsic or abstract sense, apart from their concrete relation to presently or historically oppressed groups. Disquieting as this perspective may be, however, it is hardly surprising. Given the relativism that materializes without the certain prospect of objectivity, the disbelief in neutrality that surfaces when normative society is reduced to a superstructure of power relationships, and the subjective individualism that arises when one's self or one's identity is conceived as fundamentally an exogenous social construct, it is only natural that one might simply discard the apparent pretense of discerning neutral and objectively fair processes or criteria and, instead, gauge fairness exclusively in terms of the demonstrable redistribution or restructuring of political power, social status, material wealth, and moral authority.

B. Concrete Manifestations

To varying degrees, the multiculturalism movement does appear to reflect or incorporate several of the premises and implications of this critique, presumably indicating its likely resonance among those who possess or embrace marginalized perspectives. This incorporation, even if inadvertent, gives rise to several consequences. Most prominently, because the legal and political processes themselves can no longer be deemed neutral or reliable—imbedded as they are with the self-preserving safeguards of those already in power—the focus of civil rights achievements has turned almost exclusively to actual results, whether in terms of equality of income or wealth, or percentage representation in political office, corporate governance, or higher education. Related efforts to locate neutral means by which equality may be achieved (such as prohibitions on intentional discrimination) have largely been overshadowed by efforts to locate explicitly non-neutral means (such as minority-preferential selection systems) that will simply produce the desired results. If there is, after all, no such thing as a neutral process, so that any process will inevitably reflect the interests of those crafting it, then the solution is necessarily to craft processes that reflect and will advance minority interests outright.

In recent years this strategy has manifested itself in a broad variety of contexts ranging from academic assessment to capital punishment to voting. For

29. Cf. Gene R. Shreve, Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m), 67 Ind. L.J. 85, 91 n.33 (1991) (observing that "[i]t is . . . only natural that groups long victimized by injustice and only recently permitted a voice in legal discourse would be more critical of the legal order").

example, the failure of certain minority groups to achieve equal performance on standardized tests such as the Scholastic Aptitude Test (SAT) has led some to advocate abandonment of these tests altogether,31 even though they appear to provide a fairly objective tool for educational admissions and were, in part, originally advanced precisely to minimize non-merit-based favoritism.32 Likewise, minority overrepresentation on death row, in comparison to relevant populations,33 has prompted calls simply to eradicate capital punishment in toto rather than continue efforts to make it procedurally fair,34 even though many of the reform efforts to date have specifically been designed to minimize biased or arbitrary decisionmaking.35 Finally, when suboptimal but seemingly neutral

31. See, e.g., Diana Jean Schemo, Head of U. of California Seeks To End SAT Use in Admissions, N.Y. Times, Feb. 17, 2001, at A1 (noting that the head of the University of California criticized the use of SATs to rank students for admission, and recommended that the University abandon its use). Similar proposals have been directed at professional-level tests, such as the MCAT, the LSAT, and the bar examination. See Phillip Gonzalez & Betsy Stoll, The Color of Medicine: Strategies for Increasing Diversity in the U.S. Physician Workforce (Community Catalyst, Boston, Mass.), Apr. 2002, at 9 (suggesting that while the MCAT has "some predictive value," it should be only one of many admissions criteria, and "should not be used by itself for any purpose"), available at http://www.kaisernetwork.org/health_cast/uploaded_files/The_Color_of_Medicine.pdf (last visited Apr. 2, 2004); Daria Roithmayr, Direct Measures: An Alternative Form of Affirmative Action, 7 Mich. J. Race & L. 1, 10 (2001) ("Given the test's disproportionate impact, its limited predictive value and questionable history, law schools should minimize, if not eliminate altogether, the LSAT's role in the admissions process."); Society of American Law Teachers Statement on the Bar Exam, 52 J. Legal Educ. 446, 451 (2002) ("Even if the bar examination were a valid screening device, one would have to ask whether its disproportionate impact on people of color could be justified."). For an unapologetically radical critique of the legal profession's current configuration, see George B. Shepherd, No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools, 53 J. Legal Educ. 103 (2003).


33. See Erwin Chemerinsky, Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act, 35 Santa Clara L. Rev. 519, 522-24 (1995) (reviewing various findings to this effect and concluding that "[t]he overall result is that the most fundamental decisions that a society can make—who shall live and who shall die—are racially biased"). For a more nuanced assessment of the data, see John C. McAdams, Racial Disparity and the Death Penalty, 61 Law & Contemp. Probs. 153 (1998).

34. See, e.g., Michael B. Blankenship & Kristie R. Blevins, Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases, 31 U. Mem. L. Rev. 823, 858 (2001) (contending that total eradication of the death penalty "is probably the best option because it is likely impossible to eliminate all racial biases that currently exist within the capital sentencing process").

voting methods in the 2000 presidential election, notably punch-card ballots, appeared to create racially disproportionate voting errors and invalidations (characterized by some as discrimination or disenfranchisement),\textsuperscript{36} the short-term solution proposed by several advocates was to conduct either a second vote using an entirely different method or a manual recount using standards that differed from those in place at the time of the original election,\textsuperscript{37} even though "[t]he reason we have machine counts is to guard against the risk of human error and bias,"\textsuperscript{38} and the reason we employ uniform election standards and single elections is to minimize unequal or discriminatory treatment.

This outcome-determinative strategy is perhaps most visible in the areas of employment and education. Within the employment realm, for example, the focus on prohibiting manifest discrimination has been superseded by efforts to implement explicit preferences on the basis of race or other criteria of diversity. According to one account:

As civil rights evolved so did the concept of affirmative action. Originally, the term was utilized to express aggressive nondiscrimination or a strong commitment to equality of opportunity for all regardless of race or ethnicity . . . . As cynicism and dissatisfaction grew despite the attainment of legal equality, affirmative action took on a new meaning. Affirmative action would represent any measures "beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination . . . ." This approach promotes special or "procedural safeguards adopted after Furman [v. Georgia, 408 U.S. 238 (1972)], . . . were designed to reduce arbitrariness and caprice in capital sentencing decisions" though noting that, despite these safeguards, "racial discrimination in the administration of capital punishment continues").


\textsuperscript{37} For an overview and jurisprudential analysis of this litigation, particularly the tension among classical, modern, and postmodern conceptions of law, see Joel Edan Friedlander, The Rule of Law at Century's End, 5 Tex. Rev. L. & Pol. 317 (2001).

\textsuperscript{38} Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": The Outcome in Bush v. Gore Defended, 68 U. Chi. L. Rev. 613, 625 (2001).
preferential consideration of defined or targeted groups that have been the victims of discrimination. The goal of this type of affirmative action represents a significant shift from equality of opportunity to equality of outcome.\textsuperscript{39}

In the field of education, likewise, this strategy's influence has been unmistakable. Among other developments have been curricular changes that effectively dislodge traditional subjects or revise their traditional understanding;\textsuperscript{40} speech codes that restrict offensive or ostensibly intolerant expression;\textsuperscript{41} a variety of diversity-preferential admissions and scholarship efforts, particularly at the university level;\textsuperscript{42} and, in the end, the production of "equitable academic excellence (outcomes) for all students."\textsuperscript{43}


One of the goals of multicultural education is to acknowledge the experiences and perspectives of oppressed groups that are commonly excluded from mainstream academia (eg. [sic] racial, ethnic, class, gender, etc.). To accomplish this, the traditional Western canon used in shaping the curriculum must be reformulated and transformed to teach "a more truthful, complex and diverse version of the West" in schools.

Given the premise that concepts such as history or language, previously understood as relatively neutral or objective, are in fact constructs laden with the values and perceptions of those in power, it is not surprising that there should be attempts to alter the content and processes of education, from pre-school to the graduate and professional levels. See, e.g., Paul Kengor, Evaluating World History Texts in Wisconsin Public High Schools (Wis. Pol'y Research Inst. June 2002) (finding that several high school textbooks present distorted renditions of history, especially so as to distort or diminish traditional Western values and institutions), available at http://www.wpri.org/Reports/Volume15/Vol15no4.pdf.


43. Minn. Indep. Sch. Forum, supra note 9 (quoting Sandra Dickerson, The Blind Men (Women) and the Elephant: A Case for a Comprehensive Multicultural Education Program at
In each of these contexts, the operative premise or implication is that fairness or legitimacy is dictated not by the antecedent neutrality, consensual nature, or intrinsic truth-potential of the process or institution itself, but rather by the actual results or environment that the process or institution yields. As a consequence, any result or environmental element may rightfully be eliminated when inequality of status or outcome is perceived. This approach also correlates strongly with the aforementioned perspective that inequality most likely stems from the possession and exertion of power against the less powerful, and that it does not result from "natural" or random inequality simply manifesting itself through an otherwise neutral system. Under this perspective, in other words, no system is neutral or objectively equitable; inequalities or perceived offenses are not mere incidental effects of an otherwise valid or fair system, but rather the logical consequence of inherently inequitable arrangements or structurally biased institutions. There are, in short, no system errors, only erroneous systems.

The adoption of this premise further correlates with another feature distinctive of the multiculturalism movement, namely, the expansiveness of its reach. Not only does the movement encompass traditional characteristics or categories such as race and ethnicity, including innumerable variations on each, it also encompasses several quite different characteristics or categories such as (nonheterosexual) sexual orientation, (unconventional) religious beliefs or belief systems, and (nonmainstream) lifestyles or family arrangements. The

the Cambridge Rindge and Latin School, in Freedom's Plow: Teaching in the Multicultural Classroom 65, 70 (Theresa Perry & James W. Fraser eds. 1993)).

44. Consider in this regard the following definition of racial harassment from the Oberlin College Student Handbook: "Racial harassment . . . is behavior which calls attention to racial identity of persons in a manner that prevents or impairs their full enjoyment of education or occupational benefits or opportunities. What is often at issue is not discrimination per se, but unconscious intimidation, coercion or abuse of power." 2002-2003 Oberlin College Student Handbook § V.F.1, at 214, available at http://www.oberlin.edu/stlife/handbook/02-03/OC_St_Handbook_2002_03.pdf. What is noteworthy is the emphasis on the subjective psychological effects of one's behavior, rather than its objective content or one's conscious motivation or intent.


46. See Richard T. Ford, Race as Culture? Why Not?, 47 UCLA L. Rev. 1803, 1804 (2000) ("Cultural identity politics . . . informs at least some of the modern gay pride movement, the push for recognition of the children of interracial couples as a distinct racial
logic of this expansiveness, given the perspectives thus far examined, is fairly simple to explain. If there are no uniquely objective or intrinsic qualities to race or ethnicity (if it is a social construct), and if the issue is instead one of institutionalized oppression (if it is a function of power possessed and exerted), then the chief criterion for civil rights inclusion is essentially whether one has been oppressed or at least perceives oppression. Thus, being of homosexual orientation in many respects becomes as significant—and paradoxically as insignificant—as having darker skin pigmentation or being of Hispanic ancestry. Their equivalence stems from a common experience of construction and subjugation by systemically biased social norms, processes, and institutions. To be sure, multiculturalism is notable in this regard not merely for its inclusiveness, but more fundamentally for its reluctance or inability to openly distinguish among its constituents regarding the relative merits of their claims.

Manifestations of contemporary multiculturalism are often characterized as well by many of the classic indicia of ideological, even extremist, thinking. These include, among other things, a belief that one’s objectives are both correct and compelling, that these objectives (because they are correct and compelling) warrant compliance by legal or institutional coercion, and that these coercive measures may justifiably be enforced against most if not all of society’s constituents. First, the proponents of multiculturalism seem generally to hold that the goals of their movement are not simply beneficial or useful, but rather that they are compelling or overriding—precisely the types of goals that could satisfy strict scrutiny under the Equal Protection or Free Speech Clause. So, for example, in the recent University of Michigan admissions cases, the proponents of race-preferences argued that obtaining the educational benefits of diversity is by itself a compelling interest, while in litigation against so-called hate speech codes, the codes’ defenders have typically argued that the government’s interest in protecting the victims from bigoted speech is likewise overriding.47

For one example, see Romero, supra note 18, at 1602 (alluding collectively to “African American, Asian American, Native American, Feminist, Queer, and other OutCrit subjectivities”).

47. See George & Wilcox, supra note 2, ch. 2.


Second and related, multiculturalist initiatives are seldom presented to their target entities or individuals as voluntary undertakings, one’s fulfillment of which would arise largely from the fora of conscience and reason. Rather, the proponents of such initiatives usually endeavor to transform their platform into institutionally or governmentally enforced mandates, compliance with which then becomes a matter of legal or economic coercion. Examples of this second phenomenon are not difficult to compile. Among the more common (some of which have already been noted) are diversity-based preferences, prohibitory speech codes, various curricular requirements, and mandatory diversity or sensitivity training.

Finally, just as multiculturalism has difficulty drawing internal limits on the range of its constituents, it has similar difficulty discerning external limits on the reach of its application. This expansiveness, too, is both predictable and explicable. Not only does it follow from the view that one’s platform is correct and compelling, it also follows, perhaps more so, from the rather global view that the structures and systems of society are pervasively and genetically laden with the biases, preferences, and self-serving arrangements of


52. See, e.g., Report of the Committee To Advance Our Common Purposes Curriculum Task Force (May 2000) (recommending that “[e]ach [Rutgers University] college that grants an undergraduate degree should require that students participate in educational experiences that address multicultural understanding and intercultural interaction”) (emphasis added), available at http://diversityweb.rutgers.edu/taskforcereport.pdf.

the privileged and powerful. Thus, from a conceptual perspective, issues as seemingly parochial or mundane as the location of a waste facility or the words that describe a crayon's color are no less suitable an object of multicultural criticism and reform than matters of obvious importance, such as the voting process in a national presidential election or the executive profile of a transnational corporation. Being variant expressions of the same underlying forces, all are potential media of systemic, structural discrimination or inequity, though of course their practical or strategic significance may vary enormously.

There are no doubt additional aspects or manifestations of multiculturalism that could be identified and addressed, but the foregoing paragraphs clearly provide a reasonable and general rendition of the phenomenon. More importantly, they will enable readers to assess, in Part IV, the extent to which the multiculturalism movement coincides or conflicts with Indian tribalism. Before undertaking such an assessment, it is necessary to provide in Part III an equally broad rendition of the nature and parameters of Indian tribal sovereignty.

III. THE DISTINCTIVE LEGAL STATUS OF INDIAN TRIBES

The objective at this juncture is to delineate the unique status of tribes and their members within the legal and constitutional framework of the United States. As the following two sections will demonstrate, this status turns out to be irreducibly political and sovereign in nature. In particular, it will be shown as a matter of federal law that recognized tribes, especially those exercising the full breadth of their inherent powers, are not simply voluntary associations or joint property owners as such, nor are they merely self-segregating minority groups who are defined, or who define themselves, predominantly by ethnicity or race. Instead, they are fundamentally governmental bodies which possess substantial jurisdiction over both their territory and their members.

A. Not Merely Associational or Proprietary

From the early colonial era onward, the European and then American


governing authorities, with various but limited exceptions, dealt with Indian tribes in a distinctly bilateral fashion, recognizing at least formally the tribes' original and extra-continental claims of both territorial integrity and sovereign authority. Until 1871, in fact, relations between tribes and the United States were frequently memorialized through the ratification of treaties or treaty-like arrangements, a medium of relations ordinarily and traditionally reserved for

56. See William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 Wash. L. Rev. 1, 2 (1987) ("In colonial days, the British Crown and several of its colonies dealt with the Indian tribes as wholly independent foreign nations.").

57. The Supreme Court has stated:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others."

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). See also Timpanogos Tribe v. Conway, 286 F.3d 1195, 1202 (10th Cir. 2002) ("By the time of the Revolutionary War, '[i]t was accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial.'") (quoting County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 233–34 (1985)); David E. Wilkins & K. Tsianina Lomawaima, Uneven Ground: American Indian Sovereignty and Federal Law 7 (2001) ("When the United States was first established, tribes were politically and militarily powerful and recognized as sovereigns through the treaty-making process, among others."); Sandra B. Zellmer, Sustaining Geographies of Hope: Cultural Resources on Public Lands, 73 U. Colo. L. Rev. 413, 437 (2002) ("Many treaties explicitly recognize tribal governments as sovereign nations entitled to certain political rights, including the right to self-government. Treaties also reflect the special place that the land holds for the tribes, with provisions for exclusive possession of tribal lands and non-exclusive use of off-reservation lands . . . .") (footnote omitted). Likewise, "the historical record adequately reflects that Indigenous peoples acknowledged and recognized the sovereignty of the colonizing peoples." Robert B. Porter, The Meaning of Indigenous Nation Sovereignty, 34 Ariz. St. L.J. 75, 79–80 (2002).

58. Nancy Carol Carter states:

The legal recognition of tribal sovereignty in United States law is partially founded on the history of treaty-making. Upon declaring its independence, the United States followed the tradition of the British and other colonial powers in North America by entering into treaties with Indian tribes. Indian treaties were negotiated and ratified in the same manner as international treaties with foreign nations.

deals among sovereign states or entities. Today, this course of dealings continues to be characterized by both parties as a “government-to-government” relationship, set within a context defined by a federal policy of tribal self-governance and tribal self-determination.


Although Congress began governing Indians by legislation, it is important to note that the end of the treaty era did not end all consensual relations between the government and Indian tribes, especially with regard to land cessions. The executive negotiated agreements regarding land cessions, which were then sent to both houses of Congress for ratification.


59. See Zicherman v. Kor. Air Lines Co., 516 U.S. 217, 226 (1996) (explaining that “a treaty ratified by the United States is . . . an agreement among sovereign powers”). In addition,

[un]der principles of international law, the word [treaty] ordinarily refers to an international agreement concluded between sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word “treaty” has a far more restrictive meaning. Article II, § 2, cl. 2, of that instrument provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”

Weinberger v. Rossi, 456 U.S. 25, 29–30 (1982) (citation omitted) (footnote omitted); see also Porter, supra note 57, at 80:

[F]rom the beginning and for many, many years thereafter, both the Indigenous and colonizing peoples thought of themselves, and one another, as peoples possessing and maintaining what is called “sovereignty.” . . . While it might have been verbalized that one viewed the other as not possessing the attributes associated with being sovereign, actions betrayed such words. The treaties that were entered into reflected both the acknowledgment of each peoples’ sovereignty, as well as its limits.


61. See, e.g., Exec. Order No. 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000) (“The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and
That Indian tribes and their members enjoy a special legal or political status is not merely a fact to be inferred from this course of dealings, however, for it is embodied in the organic law of the nation—the U.S. Constitution. Most prominently, the Commerce Clause of Article I indicates that Indian tribes are in some material sense comparable to foreign nations and the states, though synonymous with neither, while the Fourteenth Amendment explicitly recognizes (and excludes from apportionment) "Indians not taxed" and implicitly references (and excludes) tribal Indians when securing citizenship to "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof . . . ." In short, it is beyond question that "America's indigenous nations occupy a distinctive political/legal status within the United States as separate sovereigns," one "which no other group, racial or otherwise, can claim."

62. It is also embodied, to some extent, in various state constitutions. See, e.g., State v. Shook, 67 P.3d 863, 866 (Mont. 2002) (noting that Article X, § 1(2) of "our own Constitution makes a distinction regarding Indians"), cert. denied, 124 S. Ct. 67 (2003).

63. See U.S. Const. art. I, § 8, cl. 3 (granting to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); Wilkins & Lomawaima, supra note 57, at 5 ("The drafters of the Constitution, in express wording in the commerce clause, recognized Indian nations as something distinct from the United States.").

64. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-20 (1831) (explaining that the Cherokee Nation is not a "foreign State" within the meaning of U.S. Const. art. III, § 2, and that the tribes "may, more correctly, perhaps, be denominated domestic dependent nations").

65. See U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."); id. art. I, § 2.

66. Id. amend. XIV, § 1 (emphasis added); see Williams, supra note 58, at 832 (explaining that the legislative history indicates that the requirement that citizens be "subject to the jurisdiction" of the United States was designed primarily to exclude tribal Indians").

67. Wilkins & Lomawaima, supra note 57, at 8; see also United States v. Long, 324 F.3d 475, 479 (7th Cir. 2003) ("The Supreme Court has long recognized that Indian tribes occupy a unique place in the American system of government. . . . Indian tribes are . . . viewed as quasi-independent or domestic dependent nations within the United States."); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996) ("Federal courts have long acknowledged that Indian nations possess a unique status in our constitutional order. . . . Indian tribes are distinct political entities retaining inherent powers to manage internal tribal matters."); cert. denied, 519 U.S. 1041 (1996).

This distinctive status has in turn produced an entirely discrete body of law, commonly known as federal Indian law, which occupies its own title in the United States Code, is executed by its own array of administrative agencies (most notably the Bureau of Indian Affairs), and is interpreted and adjudicated within its own jurisprudential framework, including special canons of construction and customized rules of federal preemption. As one district court has explained:

[regardless of whether there are factual similarities between the treatment accorded Indian Tribes and African American slaves and their descendants . . . , there is nothing in the relationship between the United States and any other persons, including African American slaves and their descendants, that is legally comparable to the unique relationship between the United States and Indian Tribes. Courts have recognized fiduciary responsibilities running from the United States to Indian Tribes because of specific treaty obligations and a network of statutes that by their own terms impose specific duties on the government.

Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995). See also Wilkins & Lomawaima, supra note 57, at 40 (“No other racial/ethnic group in America signed treaties with the federal government; hence American Indians have a unique political status in this country that distinguishes them from other ‘minority’ groups.”); Robert Laurence, Symmetry and Asymmetry in Federal Indian Law, 42 Ariz. L. Rev. 861, 894 (2000) (“American Indians are the only ethnic group recognized by American law as having their own governments . . . .”); Frank Pommersheim, Tribal Court Jurisprudence: A Snapshot from the Field, 21 Vt. L. Rev. 7, 8 (1996) (“Indian tribes are the only minority within the United States with their own government . . . .”).

69. This designation, including the perspectives that inform it and manner in which it is rendered, has not gone uncriticized. See, e.g., Robert B. Porter, A Proposal to the Hanodaganyas To Decolonize Federal Indian Control Law, 31 U. Mich. J.L. Reform 899 (1998) (calling it “federal Indian control law”); Robert A. Williams, Jr., “The People of the States Where They Are Found Are Often Their Deadliest Enemies”: The Indian Side of the Story of Indian Rights and Federalism, 38 Ariz. L. Rev. 981 (1996) (calling it “the White Man’s Indian Law”). In all events, federal Indian law ought not to be confused with tribal law or custom. As one author has noted, “there is a sharp distinction between United States federal law as applied to Native Americans and the tribal law that emanates from hundreds of sovereign Indian tribes.” Carter, supra note 58, at 8.

70. Title 25 of the United States Code, labeled “Indians,” encompasses most of the federal statutes governing Indian affairs, several of which, in turn, are enforced through Title 25 of the Code of Federal Regulations.

71. Other Indian-related agencies include the Indian Health Services in the Department of Health and Human Services, the Office of Tribal Justice in the Department of Justice, and the Office of Native American Programs in the Department of Housing and Urban Development.

Because of the historical relationship between the United States and American Indians, a substantial amount of legislation has developed which is unique to Indians and Indian tribes. Such legislation generally distinguishes Native Americans from other Americans for purposes of application of particular rules, because the United States government has determined that American Indians have unique historical standing which places them outside certain legislative schemes applicable to other United States citizens.

According to this court, in fact, it is rather clear from this unique legal constellation that "Indian legislation dissimulates, rather than assimilates"—an observation that will obviously have implications for the later analysis of whether the objectives and premises of multiculturalism coincide or conflict with the status and interests of tribal Indians.

For present purposes, the most significant consequence of this legal-historical backdrop is the dual reality that Indian tribe, rather than being merely an ethnic classification, is predominantly a geopolitical designation, while...


The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

Accordingly, "[t]ribal rights are based in the doctrine of inherent sovereignty, affirmed in hundreds of ratified treaties and agreements, acknowledged in the commerce clause of the U.S. Constitution, and recognized in ample federal legislation and case law." Wilkins & Lomawaima, supra note 57, at 8–9.


76. See 25 U.S.C. § 1301(1) (2004) (defining "Indian tribe" as "any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government"); see also United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); Miami Nation of Indians of Ind., Inc. v. Babbitt, 112 F.
Indian, rather than being exclusively a term of minority group membership, is principally a term of political affiliation. Thus, under current law, an Indian

Recognized tribes are acknowledged as self-governing entities standing in a government-to-government relationship with the United States. Each tribal-federal relationship is unique, being defined by a specific history and the treaties, agreements, legislation, and executive actions applicable to the tribe. The status of recognized tribes under United States law derives from this political association, not from a racial distinction based on the Indian blood of tribal members.

77. See LaPier v. McCormick, 986 F.2d 303, 304–06 (9th Cir. 1992) (explaining that, for purposes of federal criminal jurisdiction, even tribal membership is not sufficient if the tribe itself is not federally recognized); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974) (explaining that a member of a tribe which is no longer federally recognized "anthropologically . . . remains an Indian," but that "his unique status vis-à-vis the Federal Government no longer exists"); State v. Daniels, 16 P.3d 650, 652–55 (Wash. Ct. App. 2001) (holding that a criminal defendant, racially an Indian but not tribally enrolled, was not an "Indian" for jurisdictional purposes). Thus, "Indian" in the United States Code is overwhelmingly defined in terms of tribal membership or jurisdictional geography, and not simply in terms of ethnicity. See, e.g., 25 U.S.C. §§ 450b(d) ("a person who is a member of an Indian tribe"), 1301(4) ("any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies"), 1452(b) ("any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs"), 1603(c) ("any person who is a member of an Indian tribe"; though noting alternative definitions), 1801(a)(1) ("a person who is a member of an Indian tribe"), 1903(3) ("any person who is a member of an Indian tribe"), 2201(2) ("any person who is a member of any Indian tribe or is eligible to become a member of any Indian tribe, or any person who has been found to meet the definition of 'Indian' under a provision of Federal law if the Secretary determines" that it is consistent with the purposes of the statute), 1303(9) ("a member of an Indian tribe"), 3703(8) ("an individual who is a member of an Indian tribe"), 4103(9) ("any person who is a member of an Indian tribe") (2004). But,
tribe strictly speaking is a federally-recognized political entity possessing a variety of inherent and delegated powers, especially those relating to self-government, and often occupying a jurisdictionally distinct area of land that to some degree functions extraterritorially to the one or more states in which it is situated. As the en banc Tenth Circuit has recognized: "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." What this means in terms of descriptive legal categories is that Indian tribes are manifestly governmental and meaningfully sovereign, rather then merely associational or propriety, in nature. They are, in the Supreme Court's words, "a good deal more than 'private voluntary organizations.'"

of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.

Id. § 479.

78. See Wheeler, 435 U.S. at 323 ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); United States v. E.K., 471 F. Supp. 924, 927 (D. Or. 1979) ("Generally speaking, an Indian tribe possesses all the powers of a sovereign state, including the powers of internal governance over relationships between tribal members.").

79. See Miami Nation, 112 F. Supp. 2d at 745 (explaining that a federally recognized tribe possesses "inherent sovereign authority independent of the United States and independent of the state in which it is located"); Mulkins v. Snow, 133 N.E. 123, 124 (N.Y. 1921) (describing an Indian reservation as "quasi extraterritorial"); Helgemo v. Bd. of Bar Exam'rs, No. 01-2611-BA, 644 N.W.2d 912, 916 (Wis. 2002) ("Although Indian tribal courts may be located within the geographic or geopolitical boundaries of a state, they are not state courts; they are courts of separate sovereign nations."); Williams, supra note 58, at 762 ("From the beginning of Indian/non-Indian relations in this country, tribal jurisdictions have existed as islands where the law of the United States and of the various states does not fully apply."). In reality,

[t]he term "tribe" has a dual meaning—it refers both to the ethnologically defined group (a contested definition even among anthropologists) and the legally recognized political entity. . . . [B]y invoking the ethnological term, the law suggests that "tribe" has a natural, prelegal meaning apart from that decreed by federal statutes or treaties.


80. NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted).

81. Wheeler, 435 U.S. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)). At the same time, precisely because of their governmental status, "[t]ribes may not
Precisely because of their sovereign status, recognized tribes ordinarily possess the power "to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions";\textsuperscript{82} "to determine tribe membership; to regulate domestic relations among tribe members; and to prescribe rules for the inheritance of property";\textsuperscript{83} "to control the use of [their] natural resources";\textsuperscript{84} to litigate as \textit{parens patriae} on behalf of their members;\textsuperscript{85} to invoke sovereign immunity against lawsuits to which they have not consented or which Congress by abrogation has not authorized;\textsuperscript{86} and to exercise all other "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."\textsuperscript{87} Moreover, because tribes in large part

\textit{Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 123 S. Ct. 1887, 1894 (2003).}

\textsuperscript{82} \textit{Wheeler, 435 U.S. at 322. Also,}

While tribal sovereignty has limitations under American law, tribes function as governmental entities with political and legal jurisdiction over their lands and, in most instances, the persons who inhabit those lands. Tribes retain the authority within their jurisdictional bounds to enact and enforce laws, to promulgate administrative rules and regulations, and to adjudicate through courts or traditional means. In the exercise of these powers of self-government, tribes create primary law.

\textsuperscript{83} \textit{Wheeler, 435 U.S. at 322 n.18 (citations omitted).}


\textsuperscript{85} \textit{See Ala. & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1327 (E.D. Tex. 1993) (finding that tribes have the right to \textit{parens patriae}, though only if they represent all members); Cami Fraser, Note, Protecting Native Americans: The Tribe as \textit{Parens Patriae}, 5 Mich. J. Race & L. 665 (2000) (arguing that tribes have \textit{parens patriae} standing even where they only represent some members).}


\textsuperscript{87} \textit{Wheeler, 435 U.S. at 323.}

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And . . . they cannot try nonmembers in tribal courts.
exercise inherent power, independent of the federal and state governments, their actions are not directly subject to constitutional limitations and their criminal prosecutions, even if duplicated by state or federal prosecutions, generally will not bear upon the constitutional prohibition on double jeopardy.

Importantly, this sovereign and governmental understanding of tribes pervades federal Indian law—from recognition to termination—and essentially defines the tribal-federal relationship. So, for example, under the current

_Id. at 326 (citations omitted).

88. _See Santa Clara Pueblo_, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations of federal or state authority.") (citing Talton v. Mayes, 163 U.S. 376, 384 (1896); _Poodry_, 85 F.3d at 880–81 ("Because tribal powers of self-government are 'retained' and predate the federal Constitution, those constitutional limitations . . . do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction."); Chapoose v. Hodel, 831 F.2d 931, 934 (10th Cir. 1987) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes.") (quoting Felix S. Cohen, Handbook of Federal Indian Law 664–65 (rev. ed. 1982)); Robert D. Cooter & Wolfgang Fikentscher, _Indian Common Law: The Role of Custom in American Indian Tribal Courts_, 46 Am. J. Comp. L. 287, 307–08 (1998) ("The U.S. Constitution regulates federal and state behavior towards tribes, but the tribes, being sovereign, are not bound by it. Consequently, . . . tribal members cannot sue tribal governments for violating the U.S. Bill of Rights."). Due partly to this fact, Congress in 1968 passed the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301–1341 (2004), which applies statutory versions of several constitutional guarantees to the actions of tribal governments. _See id. § 1302; Poodry_, 85 F.3d at 881–84 (discussing the content and legislative history of the ICRA). Regarding the construction of these guarantees, see Mark D. Rosen, _Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act_, 69 Fordham L. Rev. 479 (2000).

89. _See Wheeler_, 435 U.S. at 322–32; United States v. Long, 324 F.3d 475, 478 (7th Cir. 2003) ("Prosecutions by Indian tribes and the federal government are prosecutions by separate sovereigns for purposes of the Double Jeopardy Clause."). This general rule will presumably not apply, however, where a tribe's criminal jurisdiction is congressionally delegated rather than inherent.

[If a tribe's power to prosecute derives from inherent sovereignty, then a subsequent federal prosecution is permissible . . . . If, on the other hand, tribal jurisdiction derives from a congressional grant of power, the dual sovereignty doctrine is not applicable and a subsequent federal prosecution may implicate the Double Jeopardy Clause.

United States v. Male Juvenile, 280 F.3d 1008, 1021 (9th Cir. 2002) (citation omitted).

90. _See Goldberg-Ambrose, supra_ note 79, at 1125 (explaining that, "[f]or many purposes, the tribe has been the basic unit of federal Indian law" and that, "[a]ccording to the Indian Reorganization Act of 1934, . . . the 'tribe' is the unit that possesses governmental powers over a reservation").
requirements for federal recognition, a petitioning tribe must demonstrate not merely that it "has been identified as an American Indian entity on a substantially continuous basis since 1900,"\textsuperscript{91} but that it "has existed as a community"\textsuperscript{92} and "has maintained political influence or authority over its members as an autonomous entity from historical times until the present."\textsuperscript{93} In turn, such recognition not only functions as "a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes,"\textsuperscript{94} but also, and more fundamentally, "entitle[s] [tribes] to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes."\textsuperscript{95}

For many of the same reasons, the meaning or status of Indian is likewise political in nature.\textsuperscript{96} From a legal standpoint, an Indian strictly

\textsuperscript{91} 25 C.F.R. § 83.7(a) (2004).
\textsuperscript{92}  Id. § 83.7(b).
\textsuperscript{93}  Id. § 83.7(c) (emphasis added). An official list of federally recognized tribes can be found at 62 Fed. Reg. 55,270 (Oct. 23, 1997), while an unofficial list of non-federally recognized tribes can be found at http://www.kstrom.net/isk/maps/tribesnonrec.html (last visited Apr. 14, 2004). It should be noted that prior to the regulations in 25 C.F.R. pt. 83, "the federal government had previously recognized groups of Indians as tribes in a variety of ways for a variety of purposes" and that "[e]ven after the promulgation of Part 83, 'tribes cannot be neatly divided into "recognized" and "nonrecognized" tribes for all purposes; rather, a tribe may 'exist' for some purposes but not for others.'" Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) (citing Cohen, supra note 88, at 3–7).
\textsuperscript{94} 25 C.F.R. § 83.2 (2004).
\textsuperscript{95}  Id. (emphasis added).

Federal acknowledgment establishes an intergovernmental relationship between the United States and the acknowledged tribe. An acknowledged tribe becomes a domestic dependent nation with inherent sovereign authority independent of the United States and independent of the state in which it is located. An acknowledged tribe may exercise jurisdiction over its territory and establish tribal courts than can assert criminal misdemeanor jurisdiction over non-Indians, and gains considerable other discretionary authority under federal law.


\textsuperscript{96} Correspondingly, discrimination or bias on the basis of Indian, particularly tribal, status might more properly be seen as xenophobia or national origin discrimination rather than
speaking is not simply an ethnic Native American, but ordinarily refers to an enrolled member of a federally recognized tribe who is thereby vested with all the legal and political rights and obligations commonly associated with citizenship, subject to tribe-specific variations in tribal law. These frequently include: the right to vote in tribal elections, the ability to run for tribal office, racial or ethnic discrimination. 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, 158 (1999).

97. Enrollment is not the only means to establish membership in a tribal political entity, but it is the most observed method. See United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996) ("While tribal enrollment is one means of establishing status as an 'Indian' under 18 U.S.C. § 1152, it is not the sole means of proving such status."); Margo S. Brownell, Note, Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 305 (Fall 2000/Winter 2001) ("Most tribes define tribal membership requirements in a tribal constitution and implement the definition through a tribal roll."). Moreover, while it is true that tribes themselves typically require a demonstration of tribal ancestry, usually framed as a minimum blood quantum such as one-quarter or one-eighth, see infra note 139, there is no general federal law mandating such a requirement.

98. See, e.g., Blackfeet Tribe of the Blackfeet Indian Reservation of Mont. Const. art. VIII, § 1 ("Any member of the Blackfeet Tribe, eighteen (18) years of age or over, shall be eligible to vote at any election . . . ."), at http://www.tribalresourcecenter.org/ccfolder/blackfeetconstandbylaws.htm (last visited Apr. 6, 2004); Cheyenne River Sioux Tribe Const. art. V, § 1 ("All enrolled members of the Cheyenne River Sioux Tribe, 18 years of age or over, who have maintained legal residence on the reservation for a period of ninety (90) days immediately prior to any election shall have the right to vote."); at http://www.tribalresourcecenter.org/ccfolder/cheyenne_siouconst.htm (last visited Apr. 6, 2004); Grand Traverse Band of Ottawa & Chippewa Indians Const. art. VII, § 3(a) ("Any member duly enrolled in the Grand Traverse Band who is at least eighteen (18) years old, has been a resident for a period of at least six (6) months . . . . and is registered to vote on the date of any given tribal election shall be eligible to vote in that tribal election.") at http://www.tribalresourcecenter.org/ccfolder/grand_traverse_const.htm (last visited Apr. 6, 2004); Turtle Mountain Band of Chippewa Indians of N.D. Const. art. V, § 2(a) ("Any enrolled member of the tribe, eighteen (18) years of age or over shall be entitled to vote in any election provided he has resided in Rolette County a period of thirty (30) days immediately prior to a given election."); at http://www.tribalresourcecenter.org/ccfolder/turtle_mountainconstandbylaws.htm (last visited Apr. 6, 2004); Yavapai-Apache Nation Const. art. VIII, § 8 ("All tribal members who are eighteen (18) years of age or older on the date of any tribal election shall be eligible to vote in the election.") at http://www.tribalresourcecenter.org/ccfolder/yavapai_apache_const.html (last visited Apr. 6, 2004).

99. See, e.g., Cheyenne River Sioux Tribe Const. art. V, § 3 ("Any member of the tribe may become a candidate for any office upon the signed petition of at least ten (10) legal voters from the district where he is declared to be a legal resident."); at http://www.tribalresourcecenter.org/ccfolder/cheyenne_siouconst.htm (last visited Apr. 6, 2004); Grand Traverse Band of Ottawa & Chippewa Indians Const. art. VII, § 4(a) (requiring tribal membership for tribal chair or tribal council candidates), at http://www.tribalresourcecenter.org/ccfolder/grand_traverse_const.htm (last visited Apr. 6, 2004); Minn. Chippewa Tribe Const. art. IV, §
the right to utilize the tribal court system, the rights to assemble and to petition the tribal government, and the right to partake in various tribal resources. Concomitantly, tribal members must abide by whatever conditions are attached to tribal membership and may be subject to the criminal laws and

2 (revised) ("A candidate for Chairman, Secretary-Treasurer and Committeeman must be an enrolled member of the Tribe and reside on the reservation of his enrollment."), at http://www.tribalresourcecenter.org/ccfolder/chippewa_constandbylaws.htm (last visited Apr. 6, 2004); Red Cliff Band of Lake Superior Chippewa Indians Const. art. IV, § 2 ("Any qualified member of the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin may announce his or her candidacy or be nominated for the [Tribal] Council."), at http://www.tribalresourcecenter.org/ccfolder/red_cliff_constandbylaws.html (last visited Apr. 6, 2004).

100. See, e.g., Cherokee Nation of Okla. Const. art. II, § 1 ("The judicial process of the Cherokee Nation shall be open to every member of the Cherokee Nation."). available at http://www.tribalresourcecenter.org/ccfolder/cherokee_const.htm (last visited Apr. 6, 2004).

101. See, e.g., Chickasaw Nation Const. art. IV, § 5 ("The citizens shall have the right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with powers of government; for redress of grievances or other purposes, by address, or remonstrance."). available at http://www.tribalresourcecenter.org/ccfolder/chickasaw_const.htm (last visited Apr. 6, 2004); Kickapoo Traditional Tribe of Tex. Const. art. IX (providing for participatory governance), available at http://www.tribalresourcecenter.org/ccfolder/kickapoo_const.htm (last visited Apr. 6, 2004). For additional references, see Elmer R. Rusco, Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions, 14 Am. Indian L. Rev. 269, 275-76 (1990).

102. See, e.g., Confederated Tribes of the Coos, Umpqua & Siuslaw Indians Const. art. IV, § 1 (recognizing "[t]he right to equal opportunity to participate in the [tribe's] economic resources and activities . . . ."), available at http://www.tribalresourcecenter.org/ccfolder/coos_umpqua_siuslaw_const.htm (last visited Apr. 6, 2004); Confederated Tribes of Warm Springs Reservation of Or. Const. art. VII, § 1 ("All members of the Confederated Tribes shall be accorded equal opportunities to participate in the economic resources and activities of the Reservation."). available at http://www.tribalresourcecenter.org/ccfolder/warm_springs_constandbylaws.htm (last visited Apr. 6, 2004); Coquille Indian Tribe Const. art. VIII, § 1 ("All members of the Coquille Indian Tribe shall be accorded the opportunity to participate in the economic resources and activities of the Tribe."). available at http://www.tribalresourcecenter.org/ccfolder/coquille_const.htm (last visited Apr. 6, 2004); Ely Shoshone Tribe Const. art. VIII, § 1 ("All members of the Ely Shoshone Tribe shall have equal rights, equal protection . . . and equal opportunity to participate in the economic resources, tribal assets and activities of the tribe."). available at http://www.tribalresourcecenter.org/ccfolder/ely_shoshone_const.htm (last visited Apr. 6, 2004); Grand Traverse Band of Ottawa & Chippewa Indians Const. art. X, § 2 ("Members . . . shall have the right to fish, hunt and gather food from plants, subject to reasonable restrictions . . . ; provided that this Section does not include the right to commercially develop tribal resources, such right being reserved to the Band . . . ."). available at http://www.tribalresourcecenter.org/ccfolder/grand_traverse_const.htm (last visited Apr. 6, 2004).

103. See Duro v. Reina, 495 U.S. 676, 686 (1990) (recognizing "[t]he power of a tribe to prescribe and enforce rules of conduct for its own members"); superseded on other grounds
the jurisdiction of their tribe,\textsuperscript{104} if not also those of other federally recognized tribes.\textsuperscript{105}

B. Not Merely Racial or Ethnic

The most striking application of these principles, especially with regard to multiculturalism, is arguably found in the jurisprudence of equal protection.\textsuperscript{106} Arising from the Fifth and Fourteenth Amendments,\textsuperscript{107} the equal protection guarantee largely prohibits racial and ethnic classifications by the government, subjecting them when challenged to rigorous judicial review, or what is often called strict scrutiny. Accordingly, a government’s differential treatment of citizens by race or ethnicity, in order to satisfy the guarantee of equal protection, must be narrowly tailored or necessary to achieve a compelling governmental interest.\textsuperscript{108}

Were “Indian” nothing more than a racial or ancestral category, the government’s selective use of that category would thus be subject to, and would thus have to satisfy, this heightened level of constitutional review.\textsuperscript{109} The

\begin{footnotesize}

105. See 25 U.S.C. § 1301(2) (2004) (recognizing “the inherent power of Indian tribes . . . to exercise jurisdiction over all Indians”) (emphasis added), abrogating Duro, 495 U.S. at 688 (holding that tribal criminal jurisdiction extends only to tribal members). The validity of this congressional recognition of inherent tribal power, contra Duro, was recently upheld in United States v. Lara, 124 S. Ct. 1628 (2004).


108. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

109. See Williams, supra note 58, at 764 (If Title 25 used the word “‘African-American’ everywhere that it used the word ‘Indian,’ the Court would [] waste little time in striking down the whole volume . . . . [T]he special status of the Indians would have to come to an end, unless there was some extraordinary state interest.”); Kimberly A. Costello, Note, Rice v. Cayetano: Trouble in Paradise for Native Americans Claiming Special Relationship Status,
judiciary has held quite clearly, however, that the differential treatment of Indian tribes and their members is ordinarily not a form of racial or ethnic classification subject to strict scrutiny,\(^\text{110}\) at least when employed by the federal government,\(^\text{111}\) and therefore need only be tied rationally to the fulfillment of

\[ \text{79 N.C. L. Rev. 812, 817 (2001) ("The classification of the special relationship [between the federal government and Indian tribes] as legal and political is crucial; were the relationship based on a racial distinction, the differential treatment would have to withstand the heightened standard of strict scrutiny.")}. \]


\[ \text{[B]ecause federal regulation of Indian tribes is "rooted in the unique status of Indians as 'a separate people' with their own political institutions," the Supreme Court has long distinguished Indian classifications from suspect racial classifications, holding that "the unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."} \]

\[ \text{Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (quoting United States v. Antelope, 430 U.S. 641, 646 (1977), and Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500–01 (1979) (quoting Mancari, 417 U.S. at 551–52)). The notion that the differential treatment of Indians does not amount to ordinary racial discrimination is not an invention of the Mancari Court. As explained in politically incorrect terms:} \]

\[ \text{The Indian law is not to be confused with the rules of racial segregation and discrimination . . . as against Negroes and Mongolians in several American states and which have occasionally included Indians; for . . . the Indians' legal position is due more to their independence of, than to their economic or political inferiority to, the ruling race.} \]

\[ \text{See, e.g., William G. Rice, Jr., The Position of the American Indian in the Law of the United States, 16 J. Comp. Legis. & Int'l L. 78, 78 (1934).} \]


\[ \text{[a local government] does not enjoy the same special relationship with and power to regulate Indian tribes that the federal government has . . . Absent . . . a showing [that their actions are rationally tied to the fulfillment of the federal government's obligation to Indians], local [governments] are simply not free to discriminate between Indians and non-Indians based solely on their status.} \]

Congress’ unique obligation toward the Indians” and “rationally designed to further Indian self-government . . .” According to the Supreme Court, such a classification “is not even a ‘racial’ preference” but rather a “political” classification that falls within “the Federal Government’s broad authority to

Mancari held only that when Congress acts to fulfill its unique trust responsibilities toward Indian tribes, such legislation is not based on a suspect classification. Indeed, in its more recent case of Rice v. Cayetano, 528 U.S. 495 (2000), the Supreme Court expressly stated that the Mancari “opinion was careful to note . . . that the case was confined to the authority of the BIA, an agency described as ‘sui generis.’”

Malamed, 335 F.3d at 868 n.5 (citation omitted) (quoting Rice, 528 U.S. at 520).


113. Mancari, 417 U.S. at 553. For criticism, see Granite Valley Ltd. P’ship v. Jackpot Junction Bingo & Casino, 559 N.W.2d 135, 171 (Minn. Ct. App. 1997) (Randall, J., concurring) (contending that Mancari “attempts to sidestep the bitter truth that Indian sovereignty is a race-based classification”).

114. In Mancari, the Court noted that the challenged preference “is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.” Mancari, 417 U.S. at 553 n.24. Accord Antelope, 430 U.S. at 646 (“[F]ederal regulation of Indian affairs . . . is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions . . . [and] therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group . . . .”) (quoting Mancari, 417 U.S. at 553); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1214–16 (5th Cir. 1991) (upholding a peyote exemption for members of the Native American Church because the church “is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification” and because the exemption “is rationally related to the legitimate governmental objective of preserving Native American culture”); Squaxin Island Tribe v. Washington, 781 F.2d 715, 722 (9th Cir. 1986) (“No compelling state interest need be shown since preferential treatment for tribal members is not a racial classification, but a political one.”); State v. McBride, 955 P.2d 133, 138 (Kan. Ct. App. 1998) ("Federal law promoting tribal self-government and Native American welfare is not . . . premised on racial distinctiveness; rather, such laws are based upon the political relationship existing between tribal and federal governments which predates the United States Constitution.").
multiculturalism and tribal sovereignty

legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits."\(^{115}\)

But there is a catch. To qualify for this designation, the classifying regulation cannot be entirely detached from the political or sovereign status of tribes but instead must "relate[] to Indian land, tribal status, self-government or culture . . . because 'such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions."\(^ {116}\) It is only when Indians are treated differently apart from their tribal status, or when "Indian" or "Native American" is used for classification without regard to tribal membership, that governmental classifications appear fundamentally racial or ethnic in character and thereby become vulnerable to the rigors of strict scrutiny.\(^{117}\)


\(^{116}\) Williams v. Babbitt, 115 F.3d 657, 664 (9th Cir. 1997) (quoting Antelope, 430 U.S. at 646). Thus, "[t]he legislative classifications the Court has upheld have often been directed not towards 'Indians' as such but towards members of federally recognized tribes and, at least in some instances, have actually excluded some persons who would have been deemed Indians by race." Meyers, 905 F. Supp. at 1570 (citing Mancari, 417 U.S. at 553 n.24). Compare Krueth v. Indep. Sch. Dist. No. 38, Red Lake, Minn., 496 N.W.2d 829, 837 (Minn. Ct. App. 1993) (explaining that a "classification must be limited to members of federally recognized tribes, not just people of some American Indian ancestry, otherwise strict scrutiny would apply"), with Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1168 (9th Cir. 1982) ("If the preference in fact furthers Congress' special obligation, then a fortiori it is a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian.").

\(^{117}\) See, e.g., Morrison v. Garraghty, 239 F.3d 648 (4th Cir. 2001) (analyzing as a racial classification a prison requirement that "[i]nmates requesting Native American faith items" demonstrate Native American "heritage," either by tribal membership, by BIA card possession, or by proof of "blood relati[onship]" to a Native American); Williams, 115 F.3d at 663-66 (addressing "grave" constitutional questions raised by a statutory preference if interpreted to apply broadly and exclusively to Native Alaskans with no discernible relation to "Indian land, tribal status, self-government or culture"); In re Santos Y., 112 Cal. Rptr. 2d 692, 727-31 (Cal. Ct. App. 2001) (invalidating an application of the Indian Child Welfare
That this interpretation of equal protection is significant and culturally counterintuitive, if not radical, may best be demonstrated by examining the content of actual federal Indian legislation. Paradigmatic in this respect is the 1978 Indian Child Welfare Act (ICWA), which governs the placement of children who are members, or whose parents are members, of federally recognized tribes. Normally, under prevailing principles of American family law as informed by the constitutional guarantee of equal protection, the racial attributes of a child and of prospective adoptive parents (to the extent they are relevant at all) may at most be considered as one of many factors, and certainly

A distinction must be drawn between governmental requirements affecting the American Indian as a political classification and those affecting the American Indian as a racial classification. . . .[L]aws or practices in the former category are "closely related to furthering the federally recognized interests of political sovereignty and tribal self-government and the classifications consequently depend on tribal membership or proximity to reservations." Those in the latter category, however, are directed to a "racial" group consisting of "Indians," and are to be judged no differently than other classifications based on race.


118. See, e.g., Costello, supra note 109, at 817 & n.19 (listing several "federal laws and programs specifically designed to benefit members of Indian tribes").


120. See 25 U.S.C. § 1903(4) (2004) (defining an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"); id. § 1903(8) (defining "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(e) of Title 43").
cannot comprise the determinative factor, in a child custody proceeding. Under the ICWA, by contrast, the Indian status of a child can function as the principal consideration in a placement decision, particularly if so dictated by tribal resolution or by "the prevailing social and cultural standards of the

121. See, e.g., J.H.H. v. O'Hara, 878 F.2d 240, 245 (8th Cir. 1989) (explaining that, under Palmore v. Sidoti, 466 U.S. 429 (1984), "race may not be the sole factor in determining the best interests of the child"), cert. denied, 493 U.S. 1072 (1990); McLaughlin v. Pernsley, 693 F. Supp. 318, 323–24 (E.D. Pa. 1988) ("[W]hen a governmental entity . . . determines foster care placements [solely] on the basis of race, any such decision made by racial classification is inherently suspect and must be subjected to the most exacting judicial scrutiny."); aff'd, 876 F.2d 308 (3d Cir. 1989); In re Adoption/Guardianship No. 2633 in Circ. Ct. of Wash. County, 646 A.2d 1036, 1048 (Md. Ct. Spec. App. 1994) ("While race may be considered legitimately as one of the factors in making the ultimate placement decision, courts that have addressed the issue agree that race may not be used in an automatic fashion to prescribe the appropriate adoptive placement.") (citations omitted), cert. denied, 516 U.S. 809 (1995); In re Carpenter, No. 217634, 1999 WL 3409752, at *3 (Mich. Ct. App. Dec. 3, 1999) (per curiam) ("Race may not be the sole factor in determining the best interests of the child."); Brown v. Brown, 621 N.W.2d 70, 83 (Neb. 2000) (holding that "a child's racial identity is one factor among several that may be considered in making custody determinations"); In re Moorehead, 600 N.E.2d 778, 786 (Ohio Ct. App. 1991) ("The difficulties inherent in interracial adoption justify consideration of race as a relevant factor in adoption, but do not justify race as being the determinative factor."); In re Davis, 465 A.2d 614, 624 (Pa. 1983) (explaining that "race cannot be unduly emphasized either by the placement agency or hearing court"); see also Cassondra L. Wiedenhoeft, Should Race Be Considered in the Adoption of a Child?, 11 J. Contemp. Legal Issues 600, 600-01 (2000) (noting that "[s]everal federal court decisions . . . [in the late 1960s and early 1970s] held that prohibiting transracial adoptions was unconstitutional as a violation of the equal protection clause"). But cf. Renner, supra note 115, at 165–66 (contending that "placing a child in a similar racial or cultural environment is a common procedure in adoptions" and that "there is good reason to expect that the [Supreme] Court would treat such racial preferences as a non-objectionable, 'benign' discrimination"). By federal statute, moreover, it is generally unlawful to deny an adoption or foster care placement "on the basis of the race, color, or national origin of the individual, or of the child, involved," 42 U.S.C. § 1996b(1)(A)-(B) (2004), but the law expressly provides that it "shall not be construed to affect the application of the Indian Child Welfare Act . . . ." Id. § 1996b(3).

122. See 25 U.S.C. § 1915(a) (2004) (providing that, absent good cause to the contrary, preference shall be given in adoptive placements to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families"); id. § 1915(b) (providing that, absent good cause to the contrary, preference shall be given in foster care or preadoptive placements to "a member of the Indian child's extended family" or to various tribally operated or approved Indian institutions); Christine M. Metteer, A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy, 38 Brandeis L.J. 47, 57 (1999–2000) (noting that "the race-matching preferences of the ICWA . . . compel state courts to recognize the Indian child's extended family, a concept foreign to most adoption proceedings").

123. See 25 U.S.C. § 1915(c) (2004) ("[I]f the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall
Indian community," and it can clearly be the determinative factor regarding whether the matter is heard in the first instance by a tribal rather than a state court.

Despite this glaring anomaly, but congruent with the aforementioned equal protection analysis, courts have generally refused to strictly scrutinize either the ICWA's substantive directives or its jurisdictional provisions, precisely "because the [statute's] classification of Indians is a classification of a sovereign political entity, not a suspect racial classification." Importantly, though, a child's Indian ancestry is relevant only when it is linked to membership in a federally recognized tribe, a limitation that has also been uniformly sustained under the guarantee of equal protection. Pursuant to this

follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child.

124. *Id.* § 1915(d).

125. See *id.* § 1911(a) (providing for exclusive tribal court jurisdiction "over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law"); *id.* § 1911(b) (providing that, "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child . . . the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe"); Renner, *supra* note 115, at 156–61 (summarizing the ICWA's jurisdictional provisions).

126. See, e.g., *In re Armell*, 550 N.E.2d 1060, 1067 (Ill. App. Ct. 1990) ("[T]he ICWA does not involve a suspect class. Federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of quasi-sovereign tribal entities.") (citation omitted), appeal denied, 555 N.E.2d 374 (Ill. 1990), cert. denied, 498 U.S. 940 (1990); *State ex rel. Children's Servs. Div. v. Graves*, 848 P.2d 133, 134 (Or. Ct. App. 1993) ("The different treatment of Indians and non-Indians resulting from ICWA does not violate the equal protection guarantee implicit in the Fifth Amendment, because the classification of Indians is a classification of a sovereign political entity, not a suspect racial classification."). *review denied*, 854 P.2d 940 (Or. 1993).


130. See, e.g., *T.I.S.*, 586 N.E.2d at 692–93 (holding that the ICWA's witholding of benefits from members of tribes not federally recognized does not violate equal protection); *In re A.J.*, 733 A.2d 36, 37–38 (Vt. 1999) (holding the same as *T.I.S.*). Conversely, when the ICWA is applied on the sole basis of ethnicity, without any linkage to tribal or other uniquely Indian concerns, it will presumably be subjected to strict scrutiny and, in turn, may be deemed unlawful. See, e.g., *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 727–31 (Cal. Ct. App. 2001) (holding that such an application is invalid).
statute, in fact, tribes themselves uniquely possess legal prerogatives in the placement of Indian children,\textsuperscript{131} including a jurisdictional priority,\textsuperscript{132} a right to notice of pending state court proceedings,\textsuperscript{133} and "a right to intervene at any point" in such proceedings.\textsuperscript{134} Collectively these prerogatives reflect the fact that the ICWA is intended not simply "to protect the best interests of Indian children"\textsuperscript{135}—which is otherwise the singular focus of family law\textsuperscript{136}—but also "to promote the stability and security of Indian tribes and families"\textsuperscript{137} insofar as "no resource . . . is more vital to the continued existence and integrity of Indian tribes than their children . . . ."\textsuperscript{138}

131. Christine Metteer states:

In most [non-ICWA] proceedings, the child's best interests form the basis for placement decisions, and those interests might include both a chance to maintain cultural identity and a permanent, stable home. This standard practice of "child-centered decision-making" does not take into account other, external interests. Under the ICWA, however, child placement decisions also take into account the tribes' interest in their own continued existence, and, in fact, the tribes' interests may even become paramount.

See Metteer, \textit{supra} note 122, at 57 (footnotes omitted) (quoting Margaret Howard, Transracial Adoption: Analysis of the Best Interests Standard, 59 Notre Dame L. Rev. 503, 547 (1984)).


133. \textit{See} id. § 1912(a).

134. \textit{Id.} § 1911(c).

135. \textit{Id.} § 1902.

136. \textit{See, e.g., In re D.D.H.}, 538 N.W.2d 881, 883 (Iowa Ct. App. 1995) ("It is settled law that the determinative factor in deciding between two or more qualified and suitable persons is the best interest of the child."); \textit{In re Aldridge}, 841 S.W.2d 793, 802 (Mo. Ct. App. 1992) ("In all legal proceedings involving custody of a child, the prime consideration and ultimately determinative factor is the welfare and best interest of the child."); Kjellgren v. Kjellgren, 730 N.Y.S.2d 734, 735 (N.Y. App. Div. 2001) (explaining that "[i]n adjudicating custody and visitation rights, the most important factor to be considered is the best interests of the child"); Bah v. Bah, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1983) ("[T]he child's best interest is the paramount consideration. It is the polestar, the \textit{alpha and omega}").) (emphasis in original); Cloutier v. Queen, 545 S.E.2d 574, 579 (Va. Ct. App. 2001) ("In determining child custody issues, . . . the trial court's paramount concern and the determinative factor must remain the 'best interests of the child,' regardless of what the parents desire.") (internal quote omitted).


The Indian Child Welfare Act is particularly illustrative because, in addition to confirming the specific status of Indian classifications under the guarantee of equal protection, it underscores more generally the unique conceptualization and posture of tribes as compared to conventional legal doctrine and as a matter of federal law and policy. Precisely because they are political rather than racial or ethnic in their essential character, tribes and tribal members may be singled out and treated differently by the ICWA without having to confront strict scrutiny under the equal protection guarantee. And, being predominantly sovereign rather than associational or proprietary in nature, tribes under the ICWA are accorded various interests in child placement which are *sui generis* under domestic family law and which necessarily presuppose that they possess governmental (especially *parens patriae*) authority. The extent to which this unique legal status meaningfully sets tribes apart from other minorities, and thus the extent to which Indian tribalism may ultimately be inconsistent with the assumptions or objectives of multiculturalism, shall be the focus of Part IV, to which the Article now turns.

IV. THE MULTICULTURAL-TRIBAL RELATIONSHIP

Examining the interplay between the premises or purposes of multiculturalism and the intermediate- to long-term interests of tribes and their members, and then delineating their most appropriate relationship, is by no means an easy task. It implicates a daunting array of legal, historical, political, economic, and cultural variables that are difficult to fully compile, much less thoroughly assess. It is nonetheless a necessary task, lest the eventual relationship between multiculturalism and Indian tribalism—wherever it may fall on the associational continuum—be inadvertently or thoughtlessly determined by forces and circumstances largely extrinsic to the tribes themselves and, hence, dangerously oblivious to their unique status and to the consequences of this eventual relationship with regard to that status.

This Part will attempt to undertake such an analysis. It will do so in two Sections. Section A will divide the present relationship into broad categories of convergence and divergence, which in turn will canvass a variety of conceptual and practical dimensions, roughly corresponding to those addressed in the two sections, respectively, of Part II. Then, in Section B, the Article will bring these various points of convergence and divergence into sharper focus by presenting and assessing three normative models that could guide the future relationship between multiculturalism and Indian tribalism.
A. Present Empirical Realities

1. Convergences

At first blush, the historical travail and present circumstances of many tribal Indians would appear to make them an ideal constituent of the multiculturalism movement, whether as participant or as beneficiary. Several factors create this impression. First and foremost, tribal Indians comprise, both conventionally and generally speaking, a non-white racial or ethnic minority. As a consequence, they are arguably situated within the presumptive domain of multiculturalist concerns. This characterization obtains even though their collective status is very much political and governmental, as Part III makes clear. For their membership criteria, and hence their membership rolls, are overwhelmingly if not always premised in part on demonstrable ancestry.139

It is not simply the racial dimension of Indians, however, that catches the multiculturalist’s eye; it is also their undeniable history of mistreatment at the hands of Western civilization. Even a cursory reading of this history indicates that they possess one of the most visibly compelling claims for

139. “Virtually all tribal membership qualifications themselves contain two requirements: a political affiliation and a tribal blood quantum.” Williams, supra note 58, at 803 (citing Blackfeet Const. art. II, amend. III §§ 1 (a)–(c); Cheyenne River Sioux Const. art. II, § 1; Colorado River Indian Const. art. II, § 1; Hopi Const. art. II, §§ 1–2; Maricopa Ak-Chin Articles of Ass’n art. III, §§ 1 (a)–(d); 1 American Indian Policy Review Comm’n, 95th Cong., 1st Sess., Final Report 108–09 (Comm. Print 1977)). See also Crow Tribal Const. art. III, § 1(a) (“one-quarter (1/4) Crow Indian blood or more”), available at http://www.tribalresourcecenter.org/ccfolder/crow_const.htm (last visited Apr. 6, 2004); Nez Perce Tribe Const. art. IV, § 1(B) (rev. 1999) (“at least one-fourth (1/4) degree Nez Perce Indian ancestry”), available at http://www.tribalresourcecenter.org/ccfolder/nez_perce_constandbylaws.htm (last visited Apr. 6, 2004); Colville Confederated Tribal Law & Order Code § 8-1-80 (“one-fourth degree of the blood”), available at http://www.tribalresourcecenter.org/ccfolder/colville_lawandorder_CHPT8-1.html (last visited Apr. 6, 2004); Grand Traverse Band Code §§ 301, 304 (“one-fourth (1/4) Indian blood” for adoption into the tribe) (quoting Grand Traverse Band of Ottawa & Chippewa Indians Const. art. II, § 1(b)(3)(a)), available at http://www.tribalresourcecenter.org/ccfolder/travcode7enroll.htm (last visited Apr. 6, 2004); Skokomish Tribal Code § 1.01.010(a)(3) (“at least one-fourth (1/4) degree Skokomish blood”), available at http://www.tribalresourcecenter.org/ccfolder/skokomish_tribalcode_1.htm (last visited Apr. 6, 2004). In addition, federal courts appear to presuppose a racial or ancestral component to the definition of Indian, at least for jurisdictional purposes. See, e.g., United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996); Scrivner v. Tansy, 68 F.3d 1234, 1241 (10th Cir. 1995), cert. denied, 516 U.S. 1178 (1996); United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995). For critiques of the federal emphasis on race as a determinative element of tribal membership, see Brownell, supra note 97; John Rockwell Snowden, Wayne Tyndall & David Smith, American Indian Sovereignty and Naturalization: It’s a Race Thing, 80 Neb. L. Rev. 171 (2001).
reparative social justice, grounded in a record of domestic oppression rivaled in gravity and duration only by that of black Americans. Without doubt, the course of Indian relations both with the federal government and with the states, and more generally with the nation's citizenry and institutions, has been shaped and to some extent continues to be shaped by racial or racist beliefs and practices, and has been characterized by various forms of systematic economic, cultural, and religious oppression. Particularly at the individual

140. See Arthur N. Frakt, Affirmative Action: A Dean's Reflections, 5 Widener J. Pub. L. 1, 19–20 (1995) ("Obviously, some minorities have suffered substantially greater hardships than others. African Americans and Native Americans both have unique historical records of being subjected to discrimination, neglect and overt hostility from the majority society."); Barbara Bennett Woodhouse, "It All Depends on What You Mean By Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 Utah L. Rev. 569, 593 (observing that "few other groups of Americans have experienced the massive, systematic dislocation and oppression weathered by Native Americans and African Americans").

141. James Boggs states:

Notions about the inferiority of Native American culture and its detrimental influences on Native American persons underlie many aspects of federal Indian policy. Federal policies throughout the nineteenth and early twentieth centuries were directed toward "blotting out" the "barbarous dialects" of Native American tribes and "gradually obliterating" their distinct customs and differences. Few questioned that this effort was in the Indians' best interests.


tribal level, it would not be an overstatement to describe some of this past oppression as genocidal.\textsuperscript{143} Even today, Indians remain subject to certain forms of discrimination\textsuperscript{144} and ethnic stereotyping,\textsuperscript{145} especially of a sort that is defended on the ground that it is either benignly generic or genuinely ennobling.\textsuperscript{146}


\textsuperscript{144} See Elizabeth Cook-Lynn, \textit{Strategies}, 34 Ariz. St. L.J. 261, 261 n.3 (2002) (discussing discrimination against Indians, particularly in certain western states); Jeanette Wolflley, \textit{Jim Crow, Indian Style: The Disenfranchisement of Native Americans}, 16 Am. Indian L. Rev. 167, 195–202 (1991) (discussing recent forms of voting-related discrimination). More generally, there has been a persistence of various socioeconomic and related disparities. See, e.g., Hall, \textit{supra} note 1, at 5–6, 8–10 (discussing various economic, infrastructural, health-related, and educational problems); Rebecca L. Case, Comment, \textit{Not Separate but Not Equal: How Should the United States Address Its International Obligations To Eradicate Racial Discrimination in the Public Education System?}, 21 Penn St. Int'l L. Rev. 205, 207 (2002) (“Studies show that African American, Latino, and Native American students have higher dropout rates, higher suspension and expulsion rates, decreased access to advanced placement courses, and fewer college applicants than Caucasian students.”); \textit{Indians Have Lowest Graduation Rates in Wyo.}, Native Am. L. Dig., Jan. 2003, at 15 (noting that the Indian graduate rate in Wyoming is 47%, while the state average is 76.6%); \textit{S.D. Has Disproportionate Number of Indians in Prison}, Native Am. L. Dig., Dec. 2002, at 4 (reporting that Indians comprise 9% of South Dakota's population, but 23% of the state's prison population).


\textsuperscript{146} Most commonly this occurs in the area of athletic logos or mascots. See Kristine A. Brown, \textit{Native American Team Names and Mascots: Disparaging and Insensitive or Just Part of the Game?}, 9 Sports Law. J. 115 (2002); Kristin E. Behrendt, Comment, \textit{Cancellation of the Washington Redskins' Federal Trademark Registrations: Should Sports Team Names, Mascots and Logos Contain Native American Symbolism?}, 10 Seton Hall J. Sport L. 389 (2000); Aaron Goldstein, Note, \textit{Intentional Infliction of Emotional Distress: Another Attempt
Nor are these merely the societal vestiges of bygone governmental policies. Even certain modern doctrines and laws—in this ostensible era of self-determination—arguably perpetuate conceptions of Indians and tribal governments that range from patronizing to demeaning.147 In turn, and consistent with the postmodern ontological framework of the multiculturalism movement, some have maintained that such conceptions are little more than a form of social construction that effectively serve a subordinating function.148 For example, it has been posited that the criteria which form the basis of modern federal tribal recognition “assume an ‘ideal tribe’ . . . premised on [a] Romantic image of the Indian,” and that “certain tribes or bands that may

147. See, e.g., Derek C. Haskew, Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?, 24 Am. Indian L. Rev. 21 (2000) (arguing that federal statutes requiring consultation between tribes and federal agencies prior to state action vest tribes with uncertain benefits and create ambiguous responsibilities for federal officials); Nell Jessup Newton, Enforcing the Federal-Indian Trust Relationship After Mitchell, 31 Cath. U. L. Rev. 635, 681 (1982) (observing that the federal-Indian trust relationship has “patronizing, colonial overtones”); Irene K. Harvey, Note, Congressional Plenary Power Over Indian Affairs—A Doctrine Rooted in Prejudice, 10 Am. Indian L. Rev. 117 (1982) (arguing that the plenary power doctrine, still invoked today, rests on the alleged inferiority of Indians). Also,

otherwise deserve recognition may be denied it simply because they fail to adhere to this Romantic image..." According to this critique, 

the assumptions behind the criteria are more than merely mistaken; they represent more than the imposition of European conceptions of culture on an alien context. . . . [T]he recognition process, as part of the discourse of the Indian, may be understood as a technology of regulation, of disciplinary power that has made possible a more efficient control of American Indians.150

Even the very notion of a tribe—as a distinct, geographically situated entity—appears at least in part to be a Western construct that has acquired its content substantially through legal reification and cultural reinforcement.151

149. Dan Gunter, The Technology of Tribalism: The Lemhi Indians, Federal Recognition, and the Creation of Tribal Identity, 35 Idaho L. Rev. 85, 89 (1998); see also Goldberg-Ambrose, supra note 79, at 1127 ("The problem with these defining characteristics [as found in the recognition criteria] is that they do not always (or even often) correspond to the boundaries of political identity that traditionally have existed for Indian people.").

150. Gunter, supra note 149, at 89–90 (footnote omitted); see also Jo Carrillo, Identity as Idiom: Mashpee Reconsidered, 28 Ind. L. Rev. 511 (1995) (arguing that the federal tribal recognition laws continue to confuse tribal adaptations with tribal assimilation into the mainstream community).

The [tribal] recognition process, and the faithful participation in it by many tribes seeking recognition, may induce a dangerous complacency. The danger is that self-proximity of the subject’s identity is fixed so exclusively to the federal acknowledgment that the political freedom it allows comes to be seen as an end in itself.


151. As noted,

judicial doctrines of tribal sovereignty, together with federal laws mandating Indian political organization at the tribal rather than the village, kinship, or clan level, have channeled Indian political identity and organizational activity into existing tribal entities. Yet the territorial boundaries of these entities are often the product of federal contrivance rather than a reflection of traditional conceptual identity or political organization. And in their structure and operation, many reproduce non-Indian political values rather than indigenous methods of social organization and control.

Goldberg-Ambrose, supra note 79, at 1139; id. at 1145 ("Contemporary Indian tribes are an amalgam of traditional identifications and organization, federal pressures, and Indian improvisation."); Susan Staiger Gooding, Place, Race, and Names: Layered Identities in United States v. Oregon, Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor, 28 Law & Soc’y Rev. 1181, 1225 (1994) ("[L]egal and nonlegal naming practices... begin to suggest the subtlety with which social and cultural rights must be addressed. The history of
This is most evident, once again, in the criteria for federal recognition, but by no means is it limited to that domain. Professor Goldberg, drawing in part on the work of Stephen Cornell, explains that “[c]ontact with non-Indians had two major consequences for the evolution of Indian groups.” The first consequence was political and self-conceptual integration or centralization that effectively caused “smaller divisions within a particular cultural group [to be] swept aside for non-Indian purposes.” The second consequence “was the creation of political entities that melded Indian groups with quite distinct identities and self-concepts, or separated groups which thought of themselves as one people.” In addition, “[w]ith the passage of the Indian Reorganization Act in 1934 (IRA), Congress engineered further adjustments in the meaning of ‘tribe’ and reinforced the salience of the tribe as political unit.” Even where tribes themselves appear to have adopted a contemporary extrinsic understanding of their nature and status, arguably this has occurred out of necessity, not genuine choice. For, unless their configuration resembled this understanding, their sovereignty, even their partial sovereignty, might not have been (or today might not be) recognized.

The Colville Confederated Tribes is a rich resource for understanding both the pragmatics of cultural diversity and the evolution and contradictions of rights discourse.

154. Id. (citing Cornell, supra note 152, at 76).
155. Id. at 1132. “Not only were disparate groups melded together, but groups united in self-concept were divided onto separate reservations and treated as distinct political entities for purposes of treaties and recognition of sovereign powers.” Id. As Professor Goldberg more recently notes, the exogenous forces of Western culture have shaped not only political configuration of Indians into “tribes,” but also Indians as a whole into a “race”:

[A]t the time of earliest European contact, the aboriginal inhabitants of North America understood themselves solely in terms of their particular social, cultural, and language groups, corresponding only very roughly to modern-day “tribes.” Indeed, they “had no conception of themselves as a single ‘race,’ group, or people.” The idea of indigenous North Americans as a single “race” was a European invention.

156. Goldberg-Ambrose, supra note 79, at 1133. “Formal political unity, with apparent Indian ‘consent,’ was superimposed on whatever cultural and political diversity existed on the reservation, whether it was the combination of distinct peoples or the superseding of surviving traditions of subtribal autonomy.” Id.
Likewise it has been argued that the nature of tribal sovereignty, rather than existing objectively, actually "subsists in a field of contingencies" and that the Supreme Court's variable "use of language . . . situate[s] tribes in relation to the federal government, either in positions of normative equipoise . . . or in positions of subordination . . . ." More specifically, the Court "institutionalizes tribal sovereignty within the matrix of American democratic structure through language that alternately affirms tribal political existence into perpetuity and consigns such political existence to the whims of a superior power." This, in turn, "suggests that . . . the ultimate determination of the nature or scope of tribal power and rights operates in relation to broader national institutional imperatives[,]" the identification of which "often sheds light on the Court's conceptualization of tribal sovereignty that, in presentational form, is revealed through language that employs transpositional and/or subjugated discourse."

As with other historically oppressed groups, moreover, the identity of Indian tribalism is in part a function of resistance to the various forces of subjugation. In particular, Indian identity, or what might be called Indian pride, is frequently, if not necessarily, tied to each tribe's history of conflict and survival vis-à-vis the colonization efforts of European nations and the westward manifest destiny of the United States. In turn, there would appear to be substantial congruence between Indian self-identification and postmodern multiculturalist thinking, the latter of which not only emphasizes the themes of oppression and resistance, but also encourages the realization or actualization of self-understanding particularly as against one's oppressor. This is true even to

the European "conceptualization of 'state' created a problem with respect to the integrity and sovereignty of Native peoples whose organizational system(s) were not like the European structures upon which the model was constituted"). "Native groups have not passively submitted to these forces; but the story of their distinctive conflicts over, and responses to, American law demonstrate how groups can appropriate powerful outside pressures to sustain an evolving sense of their identity and community." Goldberg-Ambrose, supra note 79, at 1124.


159. Id. at 150.

160. Id. Accordingly, "[t]he verticalized positions of Indians as subordinate entities in relation to superior Euro-American entities ensures that the narrative, and hence, legal discourse, proceeds to its rightful conclusion, where Euro-American political, legal, and economic hegemony over Indians is maintained." Id. at 165.

161. Id. at 150–51.

162. Id. at 151.
the extent that Indian identity, being thus tethered to Western subjugation, is consequently, though partially, a secondary product of social construction. In particular, multiculturalist thinking can at least create or enhance awareness of this reality—a reality which, in all events, multiculturalism itself did not create.

The conceptual construction and subjugation of Indian tribalism by Western legal and societal institutions reflect not merely the exertion of unequal power, but more generally a preexisting, persistent, and critical disjunction between these two cultural traditions. There is, in one author’s words, a “clash of cultures with radically different epistemologies . . . .” Perhaps the most illustrative realm of cultural dissonance is that of religion, especially the treatment of Indian religious freedom claims by non-Indian courts applying conventional constitutional doctrine. According to one scholar, “[t]he[se] courts do not understand the nature of Indian religious beliefs because most judges are confined intellectually by Judeo-Christian notions of what constitutes a religion,” and “[t]his bias is reflected in the judicially constructed legal doctrines for determining the constitutional validity of religious claims . . . .” In turn, “because these doctrines are framed in Western concepts of religiosity, they are prejudicial to the non-Western religions of Native Americans.”

163. See John A. Powell, Whites Will Be Whites: The Failure to Interrogate Racial Privilege, 34 U.S.F. L. Rev. 419, 431-33 (2000) (discussing the phenomenon of marginalized groups “mak[ing] what seems like a radical move from the dominant discourse” but which is, “in actuality, a strategy firmly embedded in and derivative of the dominant discourse” and that, “[t]o the extent that they remain only oppositional, or try to assimilate as an end, they also remain dependent on the dominant discourse that they seek to challenge”). Likewise, the ethnicity-based classification of “Native American” is itself a construction “imposed on American Indians from U.S. Society, . . . an outsider’s view, and an inaccurate one.” Velie, supra note 7, at 204 (quoting Native Resistance, supra note 7).

164. Moreover, as one commentator points out, “[i]f [Indians] do not begin the process of redefining who [they] are, others will do it for [them].” Perry Horse, Sovereignty in Spiritual Perspective, 13 St. Thomas L. Rev. 117, 119 (2000).


166. Rhodes, supra note 142, at 17.

167. Id. at 16–17. See also Brian E. Brown, Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land (1999) (“In its refusal to accord constitutional protection to tribal belief and practice, the Supreme Court prevented religion from . . . liberating land as a sacred reality . . . .”); Weaver, supra note 165, at 179–88 (supporting the proposition that different concepts of religion have impacted Native American religion negatively); Lori G. Beaman, Aboriginal Spirituality and the Legal Construction of Freedom of Religion, 44 J. Church & St. 135 (2002) (supporting the same); Dussias, supra note 142, at 805–19 (discussing various definitional and conceptual problems); Bryan J. Rose, Comment, A Judicial Dilemma: Indian Religion, Indian Land, and the Religion Clauses, 7
While religious freedom claims and their judicial treatment may best demonstrate the cosmological or epistemological differences between Indian and Western perspectives, by no means are they unique in this regard. To the contrary, these differences, and the dissonances they engender, pervade and affect the entire Indian-Western relationship. Notions of family and parenting,\(^{168}\) understandings of law and justice,\(^{169}\) perspectives on human relationships to the environment,\(^{170}\) views towards land and property ownership,\(^{171}\) and even conceptions of time\(^{172}\) in many instances vary greatly.

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The continuing inability of our society to comprehend and appreciate the religions of Native Americans is reflected in first amendment [sic] case law, both in the results of the cases, which frequently deny Indian religious rights, and in the flavor of the opinions, which rarely transcend Judeo-christian [sic] notions of religion to grasp the spirituality of American Indian religions.

Rhodes, supra note 142, at 35.


170. See Douglas W. Ackerman, *Kennewick Man: The Meaning of “Cultural Affiliation” and “Major Scientific Benefit” in the Native American Graves Protection and Repatriation Act*, 33 Tulsa L.J. 359, 375 (1997) (“Whereas Anglo-American traditions see humans as clearly below God and above other animals, Native American traditions do not make sharp distinctions among these three groups; further, humans are free to interact with gods and other animals.”) (footnote omitted).

171. See *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 473 (1988) (Brennan, J., dissenting) (noting “the longstanding conflict between two disparate cultures—dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred”); Ackerman, supra note 170, at 377.
between the Indian and Western worlds. Indeed, so stark and "irreconcilable [are the] cultural differences between Native Americans and Anglo-Americans [that they] are thought to be the reason for Native American and Anglo-American military conflict, for if Anglo-Americans could not make Native Americans conform to Anglo-American ideas—e.g., private property, rational empiricism, monotheism—they, instead, conquered them."  

This Indian-Western disjunction is not merely an empirical feature or phenomenon; it also exists and has consequences at a thematic and philosophical level as well. For example, American culture has until recent years included a strong ideal of assimilation or homogenization, often described using the metaphor of a melting pot. Yet, this ideal has clearly not been easy to achieve in relation to many Indian groups—and, to some extent, other groups—who are beholden and committed to a radically different worldview, especially one that stresses their own geopolitical autonomy. The multiculturalism movement, by contrast, insofar as it rejects this ideal, seems able to promise to tribal Indians a vision of cultural acceptance and co-existence which for so many generations they have been denied. Within the realm of law, for example, the multiculturalist ethos has led some to advocate that "legal discourse . . .

(discussing the concept of private ownership); Mark A. Godsey, Educational Inequalities, the Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews, 12 Harv. BlackLetter L.J. 59, 69 (1995) ("Most of [America's] property law concepts, such as 'first in time-first in right,' true ownership, inheritance, adverse possession, and future interests, are uniquely European in origin. Most Native American tribes, however, believe that land is something to be shared and worshipped instead of owned.") (footnote omitted). According to one author, moreover, "[c]urrent cases . . . indicate that many jurists still do not understand the differences between Western and Indian property values." Angela R. Riley, Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act, 34 Colum. Hum. Rts. L. Rev. 49, 54 n.26 (2002) (citing Castro Romero v. Becken, 256 F.3d 349 (5th Cir. 2001)).

172. See Ackerman, supra note 170, at 374 ("Anglo-Americans conceive of time linearly, starting with a beginning and proceeding toward an end, whereas Native Americans have a cyclical, or spatial, conception of time.") (footnote omitted); see generally The American Indian and the Problem of History (Calvin Martin ed. 1987) (exploring various American Indian conceptions of time).

173. See generally Allison M. Dussias, Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights, 55 Md. L. Rev. 84, 97-102 (1996) (illuminating many of these differences as well as others).

174. Ackerman, supra note 170, at 381 (citing Pearce, supra note 145, at 73).

175. See, e.g., Minn. Indep. Sch. Forum, supra note 9 ("[T]he 'melting pot' metaphor no longer reflects, if it ever did, the cultural make-up of the nation. Our diverse and pluralistic society is more accurately described as a 'salad bowl' . . . . Multicultural education takes the 'salad bowl' concept as a starting point.").
incorporate[] the emerging and evolving narrative traditions of Indigenous Peoples" in order "to awaken the mind to reconceptualize the place of Native Americans within American society and to ignite the imaginative possibilities of more inclusive, respectful, and peacefully co-existing communities."176

At the same time, certain segments of multiculturalism support the notion of group separationism, which is obviously a notion that many proponents of tribal sovereignty or self-determination would find agreeable, at least in the abstract.177 For the very reason that individual identities and the communities they comprise are seen as constructs, and in keeping with notions of autonomy and self-realization, multiculturalism seems to invite, if not demand, the formation and recognition of separate, affinity-based communities, as long as these communities subscribe to minimal liberal ideals such as tolerance, civil equality, and participatory governance.178 In turn, to the extent that Indian groups are seen as constituents of the multicultural vision, such separationist efforts could very well benefit from these and similar arguments and perspectives. Among other things, this would include the particularism that is often implicitly, if not explicitly, part of the multiculturalist framework.179

176. Duthu, supra note 158, at 143.
177. In fact, multicultural separationism appears to be increasingly countenanced. According to a recent poll conducted by the NAACP and Hamilton College, American young people are no longer interested in racial integration. Although intensely supportive of racial equality, they remain content to see America’s racial communities separated and disconnected. Fifty percent of those polled believe that it’s “OK if the races are basically separate as long as everyone has equal opportunities.” Editorial, Struggling with Who We Are, Deseret News, Aug. 28, 1999, at A10, available at 1999 WL 26547033.
178. See Ford, supra note 46, at 1807 (“What joins multiculturalism and identity politics . . . is the commitment to defend certain practices and expressions because they are subjectively important to an individual’s or a group’s sense of self.”). Professor Ford distinguishes these movements from what he calls antisubordination politics, noting that an embrace of both perspectives would be logically problematic. For purposes of this Article, multiculturalism is conceptualized as encompassing both identity politics and antisubordination politics, without the attendant claim that this dual embrace is either universal or logical.
179. Cultural particularism generally denies the existence of objective or universal standards by which cultures can be normatively assessed, and it often further rejects the possibility or desirability of a common culture. See Carrington, supra note 4, at 1111; Joshua Parens, Multiculturalism and the Problem of Particularism, 88 Am. Pol. Sci. Rev. 169, 169 (1994) (“In lieu of the cultural universalism of the melting pot, multiculturalists prefer a more particularistic view of culture.”). According to Professor Parens,
For, just as many particularists reject the notions of universal cultural norms that, by virtue of their alleged status, may be coercively enforced against deviant societies or practices, tribal Indians largely reject the notion that Western civilization is intrinsically or objectively superior, and that the conquest of the last several centuries was morally justifiable on that basis.

Finally, it is beyond question that the multiculturalism movement has yielded tangible benefits for tribal Indians, just as it has yielded such benefits more generally for Native Americans and certain other racial or ethnic groups. Opportunities and participation in higher education, employment in virtually all trades and professions, involvement and representation in regional and

Multiculturalists can be divided into three types: egalitarian antiessentialists, their fellow travelers, and separatist essentialists. Egalitarian antiessentialists believe that cultures do not have essences. Because cultures are constructed by their adherents, they may be deconstructed. By means of deconstruction, rather than universal principles of action, one can achieve a truly inclusive society. Fellow travelers of the egalitarian antiessentialists acknowledge that difference may in the long run be capable of deconstruction, but they deny that every community in the United States has achieved sufficient cultural identity to have its identity deconstructed. Separatist essentialists view each culture as possessing an essence. They object to the Western claim to have access to have universal principles of action. They hint, however, that their own culture may be better, if not more universal, than Western culture.

Id. at 170 (citations omitted).


181. Faith Smith, President of the Native American Educational Services College, gives one example:

Achieving equitable access to law and professional schools for Native people is a long process, but one which is being addressed, albeit slowly, through affirmative action. In twenty years, the situation has improved dramatically. We entered the twentieth century with no Native attorneys. Those who have earned law degrees did so in the past two decades. While equitable access is now a dream we can imagine, we are not at the point where we can relax our vigilance about making sure that Native people have equal preparation and access to resources and a learning environment in which they are valued. Affirmative action continues to be the vehicle through which these issues can be addressed.

national politics, and ambient societal awareness of Indian cultural and tribal life have all generally been enhanced or improved by the decades-long struggle for racial equality and by the ongoing efforts of those in the civil rights, multiculturalist, and various other progressive communities. Correspondingly, Indians have arguably made unique contributions to each of these communities and their movements, including lessons on resistance, coexistence, cultural preservation, and community cohesion.

182. See, e.g., Porter, supra note 96, at 146–54 (noting that the last ten years have seen Indians beginning to vote in American elections in increasingly high numbers); Russ Lehman, The Emerging Role of Native Americans in the American Electoral Process (Jan. 2003), available at http://www.first-americans.net/ELECTORP.PDF (last visited Apr. 7, 2004); David Wilkins, An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty, 9 Kan. J.L. & Pub. Pol'y 732 (2000) (discussing a substantial increase in Indian voter registration as well as the successful election of Indian candidates to local school boards and state government); Wolfley, supra note 144, at 192–93 (“[I]t appears that a steady number of Indians express support for tribal sovereignty, but an increasing number believe that in order to protect these sovereign rights they must participate in the American political process, whether as voters, giving endorsements, engaging in volunteer campaign work for non-Indian office seekers . . . .”). For current examples, see Randi Hicks Rowe, Indian Votes Key Factor in Races, Native Am. L. Dig., Dec. 2002, at 1; Northwest Tribes Make Record Political Contributions, Native Am. L. Dig., Feb. 2003, at 6.

183. See Ferdinand M. De Leon, A Party Unto Themselves: Native Americans Offset Hoopla Over Columbus with Their Own Celebrations, Seattle Times, Apr. 5, 1992, at K1 (quoting Robert Eaglestaff, Principal of the Seattle Public School’s American Indian Heritage School and Program, as stating that “the mainstream society’s awareness of American Indian issues is increasing”); cf. Ted Gup, U.S. Museums Are Locked in a Battle for Truth, Balt. Sun, Feb. 25, 1996, at 6C (“In recent years, increasing sensitivities to race, gender and political diversity have helped move more stolid institutions beyond narrow Eurocentricism, leading to repatriation of Native American artifacts and reburial of human remains and a long-overdue broadening of the public’s appreciation for multiculturalism.”), available at 1996 WL 5242325. Several institutions have emerged to foster this awareness, such as the Education Project (http://www.first-americans.net), the National Museum of the American Indian (http://www.nmai.si.edu), and, at a more local level, the Massachusetts Center for Native American Awareness (http://www.mcnaa.org).

184. See Wilkins & Lomawaima, supra note 57, at 7 (“Civil rights activism of the 1960s and growing political and legal action by Indian people and tribes resulted in tremendous political, social, and educational gains.”). “Not until the 1960s, when the Kennedy and Johnson Administrations emphasized the welfare and economic interests of minorities, did the American government again pay some attention to indigenous concerns.” Raidza Torres, The Rights of Indigenous Populations: The Emerging International Norm, 16 Yale J. Int’l L. 127, 148 (1991). “This change resulted partly from increased cultural awareness of Native American traditions and partly from President Johnson’s Great Society programs, which enabled Native Americans to obtain more federal funds and to use them at their discretion.” Id. at 148 n.115.
2. Divergences

It would appear, based on the foregoing, that the points of convergence between multiculturalism and Indian tribalism are rather substantial. The purpose at this juncture is to examine alternative perspectives on this relationship. In particular, this section will demonstrate that several of these points of convergence are not necessarily as strong as they may initially seem; that there exist points of divergence that are equally numerous and in some instances more profound or consequential; and, as a result, that any effort to include American Indians within the rubric of multiculturalism should be approached, at least initially, with extraordinary caution.

Consider, first of all, the most obvious issues of convergence, such as minority racial or ethnic status, historical oppression, and contemporary discrimination and stereotyping. It is beyond question that by and large these characteristics are shared by both Indians and, for example, black or African Americans, and it is also true from a public policy perspective that these are not insignificant issues. Arguably, however, that is where the similarity ends. Indeed, at least two substantial points of difference can be identified.

First, there is the role that these issues play in forming the identity of Indians and the recognizable corporealization of each group. For many black Americans, that role is arguably significant or even determinative; for many American Indians, by contrast, it is not. Perhaps the best way to illustrate this point is to imagine, hypothetically albeit somewhat illogically, a world in which these issues do not exist. Were black Americans, for instance, not saddled with the institutions of slavery, discrimination, and stereotyping, in theory they might not constitute a sociologically significant group at all, at least no more so than, say, contemporary Irish or Greek Americans. Were American Indians not encumbered, however, by the institutions of termination, discrimination, and stereotyping, among others, they would presumably still constitute legally and politically identifiable entities, whether or not denominated tribes, with each possessing a relatively full complement of sovereign and territorial attributes. In short, while both "African-Americans [and Native Americans] trace their roots to distinct tribes and share a history of oppression and family separation," unlike African Americans, Native Americans retained their own legally recognized kinship and tribal structures, incorporated into tribal and federal laws."
Second, there is each group's conceptual or cosmological understanding of these issues as they pertain to the past, the present, and especially the future. For black Americans, the widely shared ideal of equality generally entails rendering these issues either irrelevant or nonexistent. There is, in Dr. Martin Luther King's celebrated words, an abiding hope that Americans might "one day live in a nation where [people] will not be judged by the color of their skin but by the content of their character." For American Indians, however, the general ideal of tribal sovereign independence requires neither the irrelevance nor the nonexistence of these issues. Indeed, the separationism that this ideal both presupposes and produces seems to promise that these issues might to some extent endure indefinitely.

It is this very point of difference, in fact, that most clearly distinguishes the separationist and particularist dimensions of multiculturalism from those of Indian tribalism. While Indians would likely agree to some extent with the phenomenon of socially constructed understandings of race or ethnicity, particularly given the various images of American Indians with which tribes must contend, they would likely disagree that there exist no overarching, objective standards (presumably their own) by which it may be determined that the various races and cultures are at some level intrinsically and meaningfully (and not merely experientially) different. They would likely also explain that this disjunction between multicultural and Indian perspectives is neither coincidental nor contingent. Rather, it almost certainly reflects each tribe's fundamental cosmology, which typically recognizes the tribe's relationship to one or more gods or spirits and articulates the tribe's own special character,

country either as individual slaves or as immigrants" and that "[t]hey did not bring with them a government or legal apparatus capable of asserting or enjoying sovereignty and property claims on behalf of the group"; Alex M. Johnson, Jr., Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again, 81 Cal. L. Rev. 1401, 1415 (1993) (arguing that "the presence of an African-American culture, language, and religion signifies the existence of a separate community," but recognizing that, unlike American Indians, "African-Americans . . . have no geographic lands to call their own, nor any claim that their unique culture existed prior to and independently of majoritarian culture").


188. See Angela P. Harris, Equality Trouble: Sameness and Difference in Twentieth-Century Race Law, 88 Cal. L. Rev. 1923, 1927 (2000) ("Indian nations . . . have consistently fought not for 'equality' within the American nation, but for some version of 'sovereignty' or self-determination—the right to resist extinction or assimilation by the United States.").

189. In this sense, tribal worldviews are closest to the multiculturalist subtype of separatist essentialism. See supra note 179.
Lastly, it is doubtful that they would agree that the cosmological significance of their tribe is simply a contingent social construct, and they may not even share (and need not share) the Western liberal ideal of religious tolerance, especially in its more relativistic form.

More generally, such worldviews arguably contemplate not the unity of cultures and ethnicities, but rather their demarcation and to some extent the ongoing tension between them. While Indians, like other minority groups, obviously do not desire racial discrimination or subordination, unlike other minority groups they do not particularly seek the erasure of relevant distinctions between their worlds and the worlds of non-Indians, whether those distinctions are cast as racial, ethnic, cultural, religious, or philosophical. There is,

190. See, e.g., Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 8 (1983) ("Tribal names generally reflect the basic idea that these particular people have been chosen from among the various peoples of the universe—including mammals, birds, and reptiles, as well as other humans,—to hold a special relationship with the higher powers."). Somewhat illustrative is the Confederated Tribes of Siletz Indians Constitution, which states that its purposes are, inter alia, to:

(1) Continue forever, with the help of God, our unique identity as Indians and as the Confederated Tribes of Siletz Indians of Oregon, and to protect that identity from forces that threaten to diminish it; (2) Protect our inherent rights as Indians and as a sovereign Indian tribe; [and] (3) Promote our cultural and religious beliefs and to pass them on in our own way to our children, grandchildren and grandchildren's children forever....

Confederated Tribes of Siletz Indians of Or. Const. pmbl., available at http://www.tribalresourcecenter.org/ccfolder/siletz_const.htm (last visited Apr. 6, 2004). Also:

[E]stablish[ing] our tribal government in order to: 1. Perpetuate our unique identity as Indians and as members of the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, and to promote and protect that Identity; 2. Secure the rights and powers inherent to us as Indian people and as an Indian tribe; [and] 3. Preserve and promote our cultural, religious and historical beliefs.


191. One means of illustrating these differences is to compare the mission statements of major civil rights organizations with those of major tribal Indian organizations. Compare, e.g., Nat'l Cong. of Am. Indians, Welcome to NCAI ("NCAI's mission is to inform the public and the federal government on tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments."), available at http://www.ncai.org/index.asp (last visited July 1, 2003), with Nat'l Ass'n for the Advancement of Colored People, Const. for College Chapters art. II (Feb. 2000) ("The purpose . . . [of] the [NAACP] shall be to improve the political, educational, social and economic status of minority groups; to eliminate racial
furthermore, the inherently demarcating nature of geopolitical sovereignty, which is central to tribal life and identity. To be sure, the possession and exercise of tribal sovereignty quite clearly proclaim that tribal members comprise a separate people, politically, culturally, and historically distinct from the neighboring non-Indian communities and, to a large extent, from every other tribe.

Needless to say, this formulation of separationism differs starkly from the theories of autonomy or equality that are generally employed to defend the types of non-Indian separationism sometimes advanced under the multiculturalist banner. This difference is more than stark. It is also highly significant. For the approach to separationism held by certain multiculturalist (especially civil rights) proponents not only rests on notions of autonomy or equality. By definition, it extends no further than the logical perimeter of these notions, and there is no particular incentive for these proponents to reshape it according to the unique characteristics and substantial demands of tribal sovereignty.

In addition, the attempt to bring tribal interests within the multiculturalist platform may be not simply inefficacious, but also quite harmful. This is true in at least two respects. First, multiculturalism will necessarily respect tribal beliefs and practices only to a point, and those which it finds categorically objectionable, it will attempt to eradicate. Despite its particularist dimensions, in fact, multiculturalism is functionally similar to any other comprehensive or quasi-comprehensive worldview. As one commentator has observed:

Multiculturalism correctly exposes the false claims of universality in dominant institutions, which in fact represent the culture of dead prejudice; to keep the public aware of the adverse effects of racial discrimination; and to take all lawful action to secure its elimination . . . .”), available at http://www.naacp.org/work/youth_college/CC.pdf. Likewise, commentators have noticed the fundamental differences between, for example, the goals of the civil rights protests and those of the Wounded Knee occupation, see Deloria & Lytle, supra note 190, at 12–13, or between the justifications for the civil rights “sit-ins” and those for the Indian “fish-ins.” See id. at 235.

192. See, e.g., Hall, supra note 1, at 2 (explaining that “[t]ribes’ survival depends on maintaining our unique relationship to this nation as independent, self governing peoples”).

193. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (“Although no longer ‘possessed of the full attributes of sovereignty,’ they remain a ‘separate people, with the power of regulating their internal and social relations.’”) (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

194. See James G. Dwyer, Religious Schools v. Children’s Rights 103 (1998) (“Most arguments for minority cultural rights among political theorists today take one of two forms—an autonomy-based, freedom-of-association rationale or an equality-based rationale.”).
White European males; however, it simply replaces that dead White European male culture with an equally particularistic elite liberal cosmopolitan culture that it then declares to be universal. Multiculturalism is highly selective in the attributes of diverse cultures that it selects for inclusion, and its evaluative criteria are highly particular.195

Nowhere has this been more evident to date than in the realm of gender. Far from embracing the different, seemingly traditional roles accorded to women within certain tribal cultures, some feminist critics have simply added these cultural aspects to the list of beliefs and practices that should, by legal or extra-legal pressure, be marginalized or eliminated.196 Likewise, despite the legal and rhetorical emphasis on tribal self-determination and self-government in recent decades, few progressives have objected to the imposition of various Western legal notions and limitations upon tribal legal or governmental systems.197

Second, the multiculturalist incorporation of tribal interests may be harmful to the extent that it renders the public, including the nation's legislators and judges, unable to discern the critical and distinguishing attributes of tribes, especially those relating to sovereignty. By conceptualizing Indians as yet another racial or ethnic minority, and then by approaching their grievances using the standard grammar of discrimination, inequality, and structural racism, multiculturalism creates or perpetuates among non-Indians the view that tribal Indians are, in fact, simply one among many racial or ethnic groups battling against past and present bias. At the same time, the sovereign nature of tribes and the unique geopolitical history of tribal-federal relations become

increasingly abstract, if not irrelevant, and treaty-based rights and obligations become seemingly unjustifiable forms of racial favoritism. In short, "[t]he failure . . . to appreciate the difference between Indigenous people as a race and Indians as citizens of separate sovereign nations . . . confuse[s] the message sent to American society about Indigenous political status and thereby compromise[s] the existence of Indigenous sovereignty." Yet, it is precisely "the existence of [tribes'] governing power . . . that has enabled them to evade the potential conflict between special rights for Indians (e.g., tax exemptions, freedom from state laws, health and education benefits) and the prevailing American legal values favoring racial equality," such that "the continued force of elements of American law valuable to Indian people (such as retention of special rights to ancestral lands) depends in part on the perpetuation of Indian sovereign authority." Finally, the public association of tribes with multiculturalism not only creates a risk that they will be conceptually reduced to self-segregating racial coalitions; it also links their future to the future of multiculturalism itself. In other words, the public perception and tolerance of tribes and their separate existence may rise and fall

198. See Carter, supra note 58, at 7 (explaining that "a lack of public understanding [about the legal status and governmental powers of tribes] means that headline Indian law news often confounds and sometimes outrages non-Indians, especially when the political status of tribes is not understood and outcomes appear to reflect unfair racial preferences") (footnote omitted); Porter, supra note 96, at 154–58. See also John Craig, Great Divide: Tribal Members, Non-Indians Struggle To Find Common Ground on Reservations, Spokesman Rev., Dec. 26, 2000, at A1 ("Some non-Indian property owners on reservations resent rules that disenfranchise anyone who doesn't have at least 25 percent Indian blood. They also complain about job preferences for tribal members and other privileges on the basis of race."). This may be especially true in light of the enhanced economic, legal, and political position of many, though certainly not all, tribes. See Barbara Ann Atwood, Identity and Assimilation: Changing Definitions of Tribal Power Over Children, 83 Minn. L. Rev. 927, 939 (1999) (noting that "[tribes'] growing power today has highlighted the anomaly of recognizing unique rights for tribal members in a larger society formally committed to equality").

199. Porter, supra note 96, at 156. "Sending confusing messages to American society relating to questions of Indians and race threatens Indigenous sovereignty because Americans as a general matter are so ignorant about the subject." Id. at 158. Part of the problem, as well, involves the use of the term member rather than citizen to describe one's relationship to a tribe; the former fails to denote sovereignty of a group and is also the term used to describe one's relationship to a racial or ethnic minority or to an organization. See Robert Fairbanks, Native Peoples Must Exert Political Will To Stop Assimilation, Ojibwe News, Dec. 1, 1995, at 4 (noting that "most of the Ojibwe people who live in northern Minnesota are 'members,' not citizens, of the Minnesota Chippewa Tribe").

with the public perception and tolerance of multiculturalism, the latter of which to some extent already seems to have fallen out of favor.\textsuperscript{201}

B. Future Normative Possibilities

Given this exposition of convergences and divergences, it is now possible to assess more judiciously the alternative future stances vis-à-vis the multiculturalism movement that tribes or their members may adopt. Indeed, while this exposition sheds significant light on this actual (and complex) relationship, it does not necessarily dictate the proper trajectory of that relationship in a normative or prescriptive sense. The purpose of this Section is to assist tribes in charting such a trajectory. It will do so by proposing three normative models of the multicultural-tribal relationship—association, avoidance, and appropriation—and by critically assessing their respective advantages and disadvantages for tribes.\textsuperscript{202} Based on this assessment, and on the substance of Parts II through IV.A, the Article will contend that the third model, appropriation, most adequately addresses the concerns at hand and most closely embodies the degree of moderation and circumspection that these concerns demand.

1. Association

One option for tribes is to adopt a model of association, which would entail their conscious and public affiliation with the multiculturalism movement. Although such affiliation may be either active or passive, or in varying degrees both, the basic idea is that tribes generally would offer no resistance to their inclusion, much less their participation, in the positions, literature, or activities of the movement. To some extent, an associational approach has already been employed by some Indian groups. For example, the Native American Journalists Association in concert with analogous groups


\textsuperscript{202} These models obviously do not exhaust the options for tribes. Rather, they are archetypes in relation to which particular tribal circumstances, perspectives, and objectives can be evaluated.
representing other ethnicities has attempted to diversify the nation’s newsrooms.203

The principal justifications for adopting this approach—indeed, the principal reasons that one joins forces with any movement or organization—would presumably include a natural affiliation with the existing constituents of the movement, a belief in the premises or perspectives that support the movement, and a desire to obtain the benefits that the movement seems to offer, including the attainment of its objectives. Accordingly, a logical method for assessing the propriety of this approach is to examine the extent to which each of these justifications is satisfied. As the following paragraphs will show, the empirical relationship between multiculturalism and Indian tribalism is, on all three counts, sufficiently conflicted and multidirectional that full-fledged association cannot easily be supported.

The first two considerations—whether there is a natural affiliation with the movement and whether there is a belief in its underlying premises—were effectively covered in Section A, and that coverage revealed that they do not predominantly point in a single direction. Tribal Indians do to some degree have a natural affiliation with multiculturalism and do subscribe to some of its premises, but by the same token they materially differ from every other multiculturalist constituent. Furthermore, they clearly do not accept (and in fact likely reject) some of its more philosophically radical yet central premises. Given the conflicted nature of these first two considerations, therefore, the propriety of an associational approach may very well hinge on the third consideration, namely, the extent to which tribes would incur benefits or burdens by an affiliation with multiculturalism, whether from the achievement of multiculturalism’s objectives or otherwise.

As it turns out, association could produce several benefits, some of which, arguably, have already been realized. Among other things, these can include: an increased societal awareness that tribes exist at all (a fact not necessarily known by all Americans), much less that they are culturally, economically, and politically robust; a decrease in discrimination in employment and in the provision of public and private services; the addition of Indian perspectives to social institutions, such as the media and the educational system; an increased visibility of positive role models for Indian youth; the ability to form coalitions with like-minded groups to achieve otherwise unattainable objectives; and, of course, the enrichment of tribal culture by the

voluntary exposure to the experiences and cultures of their multicultural partners.

At the same time, an associational approach clearly creates a number of potential costs or risks. As noted earlier, for example, multiculturalist association may lead to the perception that Indian or tribal classifications are merely racial or ethnic in character, especially from the viewpoint of those citizens (i.e., most citizens) who lack sufficient legal, historical, or experiential understanding to avoid drawing that inference. (Among those citizens who already believe that tribal classifications are nothing but racial or ethnic, moreover, an associational approach would simply, in their view, support their position.) This perception, in turn, can generate a variety of adverse consequences. On the social front, it can lead to claims of reverse discrimination or race-based welfare, while on the legal front, which is often not far behind the social front, it can lead to a decreased likelihood that additional Indian-based legislation would be enacted and an increased likelihood that existing legislation will be amended, narrowly construed, or in some cases even invalidated.

Linking one’s interests to the multiculturalism movement may also mean inadvertent alignment or association with a variety of positions, commonly or generally held by other members of that movement, that conflict with the positions or interests of tribes. Many multiculturalists, for example, appear also to consider themselves environmentalists (as, presumably, do a number of Indians). Yet modern environmentalism, as expressed through regulatory laws and through concepts such as environmental racism or environmental justice, can in many instances be adverse to Indian political or economic interests relating to the development or management of Indian lands. This can also be the case with other progressive movements, such as those relating to: women’s rights, which may conflict with tribal cultural norms; artifacts preservation, which may conflict with tribal repatriation efforts; and animal rights, which may conflict with both traditional Indian

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205. See supra note 196 and accompanying text.

206. See Weaver, supra note 165, at 160–74 (discussing such controversies); Dussias, supra note 173 (canvassing historical and current conflicts); Yamamoto & Lyman, supra note 204, at 339 n.173 (noting environmentalist opposition to the repatriation of Indian sacred objects and cultural patrimony).
harvesting rights\textsuperscript{208} and Indian religious practices.\textsuperscript{209}

Even more problematic than these potential incompatibilities is that the ultimate fate of tribal sovereignty under an associational approach would to some extent be tied, for better or worse, to the fate of multiculturalism. At least two concerns—abandonment and exploitation—arise in this regard. First, as discussed, multiculturalism may in the future enjoy much less public favor than it does presently, and the concern is that an abandonment of society’s multiculturalist commitment may, if the associational road is taken, lead to a corresponding abandonment of its commitment to tribal sovereignty and separatism. Second, there should also be a concern that certain multiculturalists, particularly those advocating ethnicity-conscious measures such as slavery reparations, racial separationism, or bilingual education, will attempt to exploit the superficially similar characteristics of Indian tribes as a basis for realizing their agenda.\textsuperscript{210} Not only would these attempts further fuel the perception that Indian tribes are simply racial minority factions, if successful they would effectively erase the fundamental justifications of difference between tribes and


\textsuperscript{210.} For efforts to bolster the black claims for reparations by referencing the relationships between the federal and tribal governments, see Anthony E. Cook, \textit{King and the Beloved Community: A Communitarian Defense of Black Reparations}, 68 Geo. Wash. L. Rev. 959, 972 (2000) (arguing that “[a] Black Reparations discourse . . . could lead to greater solidarity with other historically oppressed groups like Native Americans, Hispanics, Asians, women, and the poor of all races who have constructed their own narratives of oppression” and that, “[i]ndeed, some [of these groups] have already demanded and received some form of reparations”); Irma Jacqueline Ozer, \textit{Reparations for African Americans}, 41 How. L.J. 479, 480 (1998) (arguing that via the Indian Claims Commission and in other ways “Native Americans have been compensated and continue to seek reparations”) (citation omitted). For comparable efforts to defend race-matching in non-Indian adoptions by looking to the Indian Child Welfare Act, see Metteer, \textit{supra} note 122, at 66–67 (noting this with particular regard to black advocates of race-matching).
non-tribal entities, thus compromising the conceptual and rhetorical basis for tribal sovereignty. And if that basis or understanding becomes sufficiently eroded by virtue of these and other extrinsic forces, it is unlikely that tribal sovereignty will survive in any meaningful, enforceable sense.

2. Avoidance

A second relational model may be labeled *avoidance* or *disassociation*. This approach, which is essentially the opposite of the first, would entail the deliberate and possibly public disavowal of any meaningful relationship with the multiculturalism movement or its proponent organizations. Contemporary examples of avoidance in other contexts, in which one group affirmatively disassociates itself from a larger movement or coalition of groups, include intradenominational religious schisms in which a minority faction explicitly breaks with its church, and the self-separation of radical environmental or animal rights groups from their respective mainstreams. Needless to say, the reasons that a tribe might select this model largely correspond to the reasons that it might reject the model of association, namely, disagreement with multiculturalism’s premises as well as concerns about the long-term damage to the tribe’s legal status that such association might create.

As much of this Article has illustrated, at the center of these disagreements and concerns is the issue of tribal sovereignty. One commentator has bluntly explained the matter as follows:

> While sympathetic to the objectives of the Civil Rights Movement, Indian tribes are less interested in professing victimhood and framing their claims to fit the African American boilerplate of oppressed racial group seeking integration in the dominant culture than they are

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211. See John Nelson Norwood, The Schism in the Methodist Episcopal Church, 1844: A Study of Slavery and Ecclesiastical Politics 82 (1923) (describing how the Methodist Church became strongly divided over the issue of slavery); Ephraim Radner, The End of the Church: A Pneumatology of Christian Division in the West 1 (1998) (providing a theological account of divided Christianity). Although such schisms may often appear to center around one or more specific issues of conflict (e.g., abortion, homosexuality, and so forth), in reality there is typically present a more fundamental conceptual division over the nature of authority or the interpretation of sacred text.

212. Within environmentalism, for example, the group Earth First! fits a disassociational or avoidance model. See, e.g., *Why Earth First!*?, at http://www.earthfirstjournal.org/efj/primer/WhyEF!.html (last visited Apr. 4, 2004) (explaining that “Earth First! takes a decidedly different tack towards environmental issues”).
in developing a theory of legal mobilization that jibes with the political goal of self-determination.\textsuperscript{213}

Avoidance, though undeniably overbroad, would clearly allow tribes to pursue their unique objectives free from the potentially divergent interests of multiculturalism, and free from the risk that they will be incorrectly perceived as simply another aggrieved minority.

Such a perception would be incorrect precisely because tribes, having independent legal and geopolitical significance, are materially and often manifestly different from all other groups.\textsuperscript{214} Even where it appears that tribes are acting like other historically oppressed minorities—when seeking payments from the federal government, for example, seemingly akin to the reparations sought by some black Americans\textsuperscript{215}—such is often not the case. Ordinarily the tribal claim is one of intergovernmental obligation pursuant to a valid treaty, ratified by sovereigns and presumptively enforceable at law. This is quite different from the black reparations claims, which basically involve the monetary quantification of a moral injustice\textsuperscript{216} and which may or may not have any actual legal footing.\textsuperscript{217} As the Ninth Circuit has acknowledged:

[R]egardless of whether there are factual similarities between the treatment accorded Indian Tribes and African American slaves and their descendants . . . , there is nothing in the relationship between the United States and any other persons, including African American slaves and their descendants, that is legally comparable to the unique


\textsuperscript{214}See Wilkins & Lomawaima, supra note 57, at 250 ("American Indian people are not simply another 'minority,' defined as an ethnic group or an economic class, because tribes possess a nation-to-nation political relationship with the federal government.").

\textsuperscript{215}See supra note 210.

\textsuperscript{216}Morality is not irrelevant to the interpretation of Indian treaty claims. Normally, however, it does not provide a freestanding argument, but rather reflects "the idea that treaties impose upon parties the ongoing moral obligation to act in fairness and in good faith." Bradford, supra note 213, at 133 n.621.

\textsuperscript{217}To date, reparations-related claims have been met with little, if any, success. See, e.g., Wilkins v. C.I.R., 120 T.C. 109, 112 (2003) (concluding that "[t]he Internal Revenue Code simply does not provide a tax deduction, credit, or other allowance for slavery reparations"); Obadele v. United States, 52 Fed. Cl. 432, 441-44 (2002) (upholding the denial of compensation to descendants of slaves under the Civil Liberties Act, which provides redress from the internment of Japanese Americans during World War II), aff'd, No. 02-5134, 61 Fed. Appx. 705, 2003 WL 1878947 (Fed. Cir. Apr. 11, 2003) (per curiam), cert. denied, 124 S. Ct. 226 (2003).
relationship between the United States and Indian Tribes. Courts have recognized fiduciary responsibilities running from the United States to Indian Tribes because of specific treaty obligations and a network of statutes that by their own terms impose specific duties on the government. Similar strictures do not appear in the Thirteenth Amendment alone, or in combination with the other Civil War amendments and the various Civil Rights Acts which have been enacted in the meantime.\(^{218}\)

The reparations issue is particularly illustrative because, the more closely one examines the issue, the clearer it becomes how uniquely problematic it could be for Indian tribes. For example, "payment of reparations might obviate recognition of any continuing [federal governmental] responsibilities under the trust doctrine, including programs to aid tribes in the transition to self-determination."\(^{219}\) Even more significant is that the money obtained through a reparations process "cannot be directed to the satisfaction of the harms of which Indians complain: most seek to exercise the rights to self-determine and to express their unique cultures and religions upon sacred ancestral lands."\(^{220}\)

Two other considerations also appear to point strongly towards avoidance as the proper approach. First, multiculturalism is not an uncontroversial movement, and multicultural affiliation is therefore not a costless or riskless undertaking. This is not an inherently pivotal consideration until one further recognizes that the possible cost of such affiliation—what tribes would be risking—is a diminishment of their sovereignty. Second, and more importantly, it is not self-evident that Indian tribes actually need multiculturalism in order to maintain or appreciate the integrity of their culture, much less their legal standing.\(^{221}\) This, too, is not a minor point. Given the risks noted above and repeatedly throughout this Article, it becomes almost rhetorical to ask why tribes, without needing to do so, would voluntarily associate with a movement that presented these very risks.

Of course, avoidance, like association, would not be free from its own costs or risks. One obvious cost is simply the foregone series of benefits identified under the associational model, although some of these benefits (like

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218. Cato v. United States, 70 F.3d 1103, 1108 (9th Cir. 1995) (citations omitted).
220. Id.
221. See 1 Jessica L. Darraby, Art, Artifact, and Architectural Law § 6:71 (Supp. 2003) ("America has an indigenous culture that predates colonialism, and Native Americans have historically claimed their culture, or attempted to do so, well before the advent of contemporary multiculturalism.").
decreased discrimination) would likely be realized regardless of the level of affiliation. A more serious cost may be the perception, by the multiculturalist community and perhaps others, that tribes are fundamentally self-serving and exclusive—that they are more interested in furthering their economic, political, and territorial aims than they are in advancing collective goals such as equality and justice or in bettering the existence of other oppressed groups. In turn, not only would tribes forego potential political allies through avoidance, they might also create mild adversaries who could indirectly or even directly obstruct the realization of their objectives. At the very least, tribal avoidance may create the perception that tribes are unappreciative of the civil rights gains that have been achieved to date and the extent to which Indians have benefited from the efforts of multiculturalists and their predecessors.

3. Appropriation

The final normative model of tribal-multicultural relations is appropriation, which can be defined as the cautious, pragmatic, and instrumental availment of multiculturalist endeavors to the extent that they advance a tribe’s long-term interests, such as the preservation or enhancement of its legal sovereignty, intergovernmental relations, or territorial integrity. Given the shortcomings of the first two models, and for the reasons discussed in the following paragraphs, this Article will propose that an appropriative approach is in fact the most desirable option for tribes and tribal members, even though it, too, is not without its own costs or risks.

Before describing what an appropriative model might entail, it is important to explain why it is arguably the best option for tribes when determining their role in a particular multicultural endeavor. At the outset, the appropriative approach gains broad support from two interrelated propositions. The first is that the models of association and avoidance are both too extreme and too sweeping to serve as practical frameworks for tribal action. This fact is illustrated simply by examining the costs of each model. Full-fledged association would potentially entangle tribes in a variety of issues and relations that are either irrelevant or harmful to tribal sovereignty and self-governance, while full-fledged disassociation would cause tribes to forego a number of valuable opportunities and beneficial relations, some of which, if pursued, could very well advance tribal sovereign interests. The very extremism of these

alternatives suggests the impropriety of each. This is especially true in light of the fact that at issue is the decisionmaking of political entities (tribes), and political decisionmaking by its nature must always exhibit some degree of pragmatism, flexibility, and temperance, qualities that do not self-evidently describe the first two approaches.

The second proposition, which is related to the first, is that the models of association and avoidance are not sufficiently self-serving with respect to tribal interests. That is, they do not make tribal interests, and in particular tribal sovereignty and security, the centerpiece of the inquiry. This is critical precisely because the nature of sovereignty, as philosophically imbedded in the nation's Constitution and as practically demonstrated by the conduct of nation-states, is that it tends naturally towards self-interest. There is, in fact, no better exemplar of this conception than the United States and its self-determining approach to obligations pursuant to foreign treaties, various U.N. mandates, and, ironically, bilateral treaties with Indian nations, which Congress may unilaterally abrogate subject only to deferential judicial review and potential external constitutional limitations.

Having explained why appropriation appears to be the most suitable approach, it is also important, in closing, to provide some sense of how this approach might operate and, as with the other two models, to identify both its costs and its benefits. In terms of operation, an appropriative approach would proceed on a case-by-case basis, scrutinizing any given multicultural endeavor—be it a potential affiliation, a pending legislative bill, a legal challenge, or an expression of protest—in terms of its possible effects on the tribe's long-term geopolitical interests. There might very well be a presumption against participation, rebuttable where these effects are neutral to positive, especially if there are secondary short-term benefits that would flow from the endeavor. Or, a tribe might simply adopt a disinterested posture in every instance. In all events, the judgment reached would reflect a pragmatic disposition and an overwhelmingly instrumental valuation of the proposed undertaking.

The benefits of an appropriative approach are essentially two-fold. First, it is the approach most suitable for a sovereign (at least within the Western tradition), and by adopting it, tribes would be expressively and publicly fulfilling the political persona or status that by historical and legal entitlement they already possess. Second, as noted, its incremental and pragmatic character would help tribes avoid the extremism and overbreadth that necessarily attend the other two models. By the same token, an appropriative approach more readily allows tribes to make erroneous as well as correct judgments when assessing their relationship to particular multicultural undertakings. Of the three, it is arguably the third that demands the greatest degree of vigilance and
prognostic skill, although once again these are merely aspects of the discretion and diplomacy that characterize the decisionmaking of a truly autonomous sovereign. Finally, as with avoidance, appropriation will likely not be viewed kindly by other constituents of the multiculturalism movement, given its self-serving, contingent nature. True as this may be, however, the problem arguably stems not from the tribes’ misperception of their relationship to their would-be fellow multiculturalists, but rather from their would-be fellow multiculturalists’ misperception of the fundamental and quite different nature of tribes.

V. CONCLUSION

"[A] page of history," wrote Justice Holmes, "is worth a volume of logic."[^223] In no other legal-cultural domain has this maxim been more true than in the field of Indian-Western relations. Time and again, despite reversals of policy and rhetoric to the contrary, these relations have been defined by coercive efforts to assimilate tribal Indians into Western culture and society. Yet, if this maxim is in fact true, then one could surmise from this history that Indian tribes and their members, contrary to the prevailing ethos of self-determination, remain at genuine risk of assimilation—of losing their distinct political, cultural, and historical identities and, ultimately, their legally recognized sovereignty.

Against this historical backdrop, of course, the means of assimilation today would necessarily be more subtle and the process correspondingly more incremental. One would like to believe that methods such as the compulsory allotment of tribal lands, unilateral termination of tribal status, and forced removal of Indian children from their tribes are confined to the past.[^224] But assimilation need not be so overt or physical, nor must it always assume a legal guise. As multiculturalists themselves would presumably agree, assimilation can also occur conceptually and rhetorically through ideas and words and by the gradual transformation of cultural understandings.[^225]

[^225]: See, e.g., Fairbanks, supra note 199 (contending that the singular use of “Indian” in federal law to describe all native peoples “has resulted in the political homogenization of the various Native American peoples” and that “most North American native peoples, regardless of their cultural disparity or geographical dispersion, have adopted the term ‘Indian’ in
One mode of contemporary assimilation may very well be the multiculturalism movement itself, which can promise many things, but cannot ensure—and may even undermine—the continued legal distinctiveness of tribes. As this Article has shown, its convergences with Indian tribalism run only so deep, and beneath these similarities there exist multiple and often significant divergences that ultimately render multiculturalism potentially deleterious to tribal sovereignty. This is not to impugn the motives of those who support Indian inclusion within the multiculturalism movement, most of whom are presumably well-intentioned. But, so also were many of the proponents of prior assimilation and termination efforts. As one author notes, "assimilation [in the late 1800s] was the product of compassionate and well-meaning whites who sought to improve the lives of Indians... [T]he most disastrous policies for... [Indians] were not the exclusive product of frontier villains but were created, supported, and ultimately adopted by pro-Indian, friendly, Christian reformers." The termination program of the 1950s, likewise, drew support...

referring to themselves" thereby making "the federal objective of assimilation... nearly complete").

226. Another is Indian gaming, despite its obvious and often significant economic benefit for tribes. See Karin Mika, Private Dollars on the Reservation: Will Recent Native American Economic Development Amount to Cultural Assimilation?, 25 N.M. L. Rev. 23 (1995); Kathryn R.L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity, 4 Va. J. Soc. Pol'y & L. 381 (1997); see also Naomi Mezey, Note, The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming, 48 Stan. L. Rev. 711, 728-30 (1996) (noting the critique of traditionalists). However, as one scholar notes,

it is potentially misleading to claim that gaming tribes face a stark choice between economic development and assimilation. A more accurate statement would be that gaming tribes face a choice between economic development that is pursued without attention to tribal culture, and economic development that is designed to be compatible with cultural identity and to maintain tribal control over the pace and direction of cultural change.


227. Greg Overstreet, Re-Empowering the Native American: A Conservative Proposal To Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy, 14 Hamline J. Pub. L. & Pol'y 1, 14 (1993) (quoting Rennard Strickland, Friends and Enemies of the American Indian: An Essay Review on Native American Law and Public Policy, 3 Am. Indian L. Rev. 313, 314 (1975)). Conversely, the reasons for ceasing the assimilation efforts were not, in retrospect, particularly laudable either. See Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 Cal. L. Rev. 863, 923 (1993) (attributing the termination of assimilation programs to declining "private access to Native American lands";
from many quarters, including self-styled progressives.\textsuperscript{228} It is, therefore, not simply enough to be benevolent in spirit;\textsuperscript{229} one must also always be cognizant and ever-solicitous of the unique juridical status of Indian tribes, the complicated path of federal-Indian relations, and, ultimately, the historically manifest differences between tribal Indians and other minorities or subcultures within the United States.\textsuperscript{230}

In light of this historical reality as well as various contemporary concerns, this Article has proffered and critiqued three archetypal approaches to multiculturalism that tribes and their members may employ. Which path to take—association, avoidance, appropriation, or an entirely different approach—is, of course, a decision that each tribe must make, and this Article, though

\begin{quote}
"the emergence of a racist perspective that Native Americans could not reach the accomplishment levels of the white race"; and "the fading of religious and scientific transcendent ethics, the increasing secularization of society, and studies by anthropologists and ethnologists which contributed to the public's awareness of the depth, complexity, and uniqueness of the Native American cultures.") (footnote omitted).
\end{quote}

\textsuperscript{228.} See Deloria \& Lytle, \textit{supra} note 190, at 16–17 (noting both conservative and especially liberal support for termination); Kenneth R. Philp, Termination Revisited: American Indians on the Trail to Self-Determination, 1933–1953 (1999).

\textsuperscript{229.} Cf. Overstreet, \textit{supra} note 227, at 13–14 ("[T]he seemingly good intentions of the assimilation policy produced the disasters of the Allotment era because, . . . 'purity of heart does not automatically guarantee wisdom of policy [and] . . . the most benevolent purposes have produced laws with the most malevolent results.'") (quoting Strickland, \textit{supra} note 227, at 315). In the words of two scholars, one's "understanding of the status of Indian tribes and Indian people in America" must not merely be "just . . . and humane"; it must also be "accurate." Wilkins \& Lomawaima, \textit{supra} note 57, at 250.

\textsuperscript{230.} To be sure, there is nothing radical to the concept that tribal Indians enjoy a distinctly legal and political status as compared to the nation's other minority divisions. To overlook this essentiality, in fact, one must be either wholly oblivious to the history of federal-tribal relations or effectively blinded by the perceived correctness of one's agenda. In this regard, it is interesting to note that some of today's strongest proponents of conceptually racializing or ethnicizing Indian identity include both opponents of affirmative action and opponents of robust tribal sovereignty. See Carole Goldberg, \textit{American Indians and "Preferential" Treatment}, 49 UCLA L. Rev. 943, 951, 954–55 (2002).

[Senator Slade] Gorton and others who deny the legal, political, and historical status of tribes as sovereigns are committed to reducing tribal nations to polities with no sovereignty, limited or otherwise—or perhaps even to oblivion. Some proponents of contemporary termination argue that tribes should have no standing at all, as governments, and that Indian individuals should be distinguished by nothing more than a particular "ethnicity," rather than a treaty-based political relationship with the United States.

\textit{See} Wilkins \& Lomawaima, \textit{supra} note 57, at 219.
favoring appropriation, has not attempted to simplify the decision through either omission or hyperbole. Rather, it has attempted to demonstrate that some decision should be rendered, in light of the social forces at work and the grave issues at stake, and to make this decisional process more informed, more critical, and hopefully, in the retrospective view of future generations, more correct.