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Same-Sex Marriage, Indian Tribes, and the Constitution

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This Article explores the impact of a same-sex marriage amendment on the place of Indian tribes in the Federal Constitution. A same-sex marriage amendment, depending on the text, might serve to incorporate Indian tribes into the Federal Union as the third sovereign. The Constitution has not been amended to incorporate Indian tribes into the Federal Union, rendering their place in Our Federalism uncertain and unpredictable. A same-sex marriage amendment that applies to limit or expand tribal authority to recognize or authorize same-sex marriage could constitute an implicit recognition of Indian tribes as the third sovereign in the American system of federalism. Even an amendment that excludes mention of Indian tribes may have something to say about Indian tribes as the third sovereign.

INTRODUCTION

In a 19th century Michigan Supreme Court case immortalized by Robert Traver's *Laughing Whitefish*,¹ the court upheld the inheritance rights of the child of a polygamous marriage between two Chippewa Indians in the Upper Peninsula of Michigan.² The court wrote that "we had no more right to control [tribal] domestic usages than those of Turkey or India."³ Taking judicial notice "that among these Indians polygamous marriages have always been recognized as valid,"⁴ the court

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1. ROBERT TRAVER, *LAUGHING WHITEFISH* (1965). Mr. Traver was the pen name of John D. Voelker, the former Michigan Supreme Court justice who wrote *Anatomy of a Murder*. Frederick M. Baker, Jr. & Rich Vander Veen III, *John D. Voelker: Michigan's Literary Justice*, 79 MICH. B.J. 530 (2000); *Books Received*, 18 STAN. L. REV. 779, 780 (1966). For a description and partial explanation of Anishinaabe (Ottawa, Chippewa, and Potawatomi) practices of polygamy, see JAMES A. CLIFTON, *THE POKAGONS, 1683-1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY* 61 (1984); RUTH LANDES, *OJIBWA SOCIOLOGY* 53-86 (1937).

2. *Kobogum v. Jackson Iron Co.*, 43 N.W. 602 (Mich. 1889).

3. *Id.* at 605.

4. *Id.*

identified a conundrum: "We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usages are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes."⁵

Times have changed. Most, if not all, Indian tribes no longer recognize polygamous marriages⁶ and Indian people tend to utilize the divorce laws as much as non-Indian people.⁷ The Upper Peninsula is no longer on the fringes of the American frontier.⁸ Moreover, the laws of states often do apply to Indians and sometimes even Indian tribes.⁹ It remains settled black-letter law, however, that Indian tribes retain plenary and exclusive inherent authority over "domestic relations among tribal members."¹⁰

The fact that tribes control their own domestic relations well into the "modern era"¹¹ of federal-state-tribal relations is a function of the *sui generis* character of federal Indian law.¹² Tribal authority has survived major changes after Congress instructed the President to cease treaty-making with Indian tribes in 1871,¹³ after Congress declared all Indians to be citizens in 1924,¹⁴ and after Congress experimented with extending state civil jurisdiction into large parts of Indian Country in 1953.¹⁵ Retained tribal authority may also be a function of the place of family law in "Our Federalism"¹⁶ that designates domestic relations all but off-

5. *Id.*

6. *E.g.*, BAY MILLS INDIAN COMMUNITY TRIBAL CODE § 1401 (2004), available at <http://www.narf.org/nill/Codes/baymillscodes/chapter14marriage.htm>.

7. *E.g.*, Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982); Eberhard v. Eberhard, 24 Indian L. Rep. 6059 (Cheyenne River Sioux Tribal Court of Appeals 1997).

8. Compare RICHARD M. DORSON, BLOODSTOPPERS & BEARWALKERS: FOLK TRADITIONS OF THE UPPER PENINSULA (1952) (describing Upper Peninsula traditions from frontier times), with JIM HARRISON, TRUE NORTH (2004) (fictionalizing the end of frontier times in the Upper Peninsula).

9. *E.g.*, Wagon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005) (upholding a state tax against a non-Indian retailer who passed the cost down to an Indian tribe); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that a state may tax land located within an Indian reservation and owned by an Indian where the land had been alienated in the Allotment Era).

10. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[2][c], at 215 (Neil Jessup Newton, ed. 2005) (citing Fisher v. Dist. Ct., 424 U.S. 382 (1976); United States v. Quiver, 241 U.S. 602 (1916)).

11. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987) [hereinafter WILKINSON, AMERICAN INDIANS].

12. See Morton v. Mancari, 417 U.S. 535, 554 (1974).

13. COHEN, *supra* note 10, § 1.03[9], at 74-75.

14. *Id.* § 1.04, at 83-84.

15. *Id.* § 1.06, at 96-97.

16. Younger v. Harris, 401 U.S. 37, 44 (1971); Texas v. Florida, 306 U.S. 398, 428 (1939) (Frankfurter, J., dissenting).

limits to federal authority.¹⁷ This last, vigorous bastion of retained tribal governmental authority may become the staging grounds for an American constitutional rift.

The exclusion of state laws from Indian Country¹⁸ in the arena of marriage has not generated much dispute in comparison with the litigation over, for example, Indian child adoption and custody.¹⁹ But that relative stillness may be in jeopardy. A few tribal legislatures and tribal courts have confronted the contentious subject of same-sex marriage. The Cherokee Nation's highest court has dismissed on procedural grounds a challenge to the marriage of a lesbian couple under tribal law.²⁰ The Cherokee and Navajo legislatures have acted to prohibit same-sex marriages in their respective jurisdictions.²¹ While the issue of same-sex marriages is far from the forefront of tribal governmental issues compared to issues such as tribal economic development²² and tribal criminal jurisdiction,²³ there remains the distinct possibility that one or more of the 560-plus federally recognized Indian tribes²⁴ will take action to recognize same-sex marriage in their jurisdictions.

Numerous states have taken action to ban same-sex marriage, but not all.²⁵ And, in some jurisdictions, federal and state courts have determined that any such legislation would violate the Equal Protection Clause and other federal or state constitutional provisions.²⁶ As a result,

17. See *Williams v. North Carolina*, 325 U.S. 226, 273 (1945); Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 240-50 (2005).

18. "Indian Country" is a term of art defined at 18 U.S.C. § 1151.

19. See COHEN, *supra* note 10, §§ 11.01-11.08, at 819-56.

20. See *In re the Marriage License of McKinley*, No. JAT-04-15 (Judicial Appeals Tribunal of the Cherokee Nation 2005), available at <http://www.cherokeecourts.org/> (registration required); *In re the Marriage License of McKinley*, No. JAT-05-11 (Judicial Appeals Tribunal of the Cherokee Nation 2005), available at <http://www.cherokeecourts.org/> (registration required); *Cherokee Court Rejects Same-Sex Marriage Challenge*, INDIANZ.COM, Jan. 5, 2006, available at <http://indianz.com/News/2006/011890.asp>.

21. See Wyatt Buchanan, *Bay Area Celebration, Setbacks for Gay Indigenous People; They'll Mark Parade Grand Marshal, Loss on Marriage Front*, S.F. CHRON., June 25, 2005, at B1, available at 2005 WLNR 10025760.

22. See generally Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597 (2004).

23. See generally *Morris v. Tanner*, No. 03-35922, 2005 WL 3525598 (9th Cir. Dec. 22, 2005), cert. denied 2006 WL 927031 (Oct. 10, 2006); Will Trachman, *Tribal Criminal Jurisdiction after U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847 (2005).

24. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71194 (Nov. 25, 2005).

25. See Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 614 n.45 (2005).

26. E.g., *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005),

some opponents of same-sex marriage have proposed an amendment to the United States Constitution banning same-sex marriage.²⁷ On the other hand, the American people may one day ratify an amendment that precludes governmental restriction on same-sex marriage. While it appears far from certain that such amendments would pass, this Article explores such an amendment's broader statement about the place of Indian tribes in the United States Constitution.

If the Constitution can be divided into two general categories of provisions, structural and individual rights provisions,²⁸ a same-sex marriage amendment could have either a dramatic, or not-so-dramatic, impact on Indian tribes. A same-sex marriage amendment, operating as a structural amendment and depending on the text, might serve to incorporate Indian tribes into the Federal Union as the third sovereign, a topic often discussed by federal Indian law scholars.²⁹ While Indian tribes as sovereign entities predated the Constitution and did not participate in the discussions over the founding document,³⁰ the territory of the American state has engulfed and the federal government has asserted exclusive authority over the tribes.³¹ Despite this fact, the Constitution has not been amended to incorporate Indian tribes into the Federal Union, ren-

overruled by *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

27. See Krotoszynski & Spitko, *supra* note 25, at 638; Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 2 (2005), available at <http://heinonline.org/HOL/Page?handle=hein.journals/stjcrcl1&id=5&collection=journals>; Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 ST. THOMAS L.J. 137, 139 (2004).

28. See Kirsten Matoy Carlson, *Do Constitutional Provisions Matter? Canada's Recognition of Aboriginal and Treaty Rights* 17 (2006) (unpublished manuscript, on file with the University of Michigan Department of Political Science) (citing Cass Sunstein, *Constitutions and Democracies: An Epilogue*, in CONSTITUTIONALISM AND DEMOCRACY 327 (Jon Elster & Rune Slagstad, eds. 1988)). Cf. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1114-20 (2005) (describing the election law "rights-structure debate").

29. See Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 160 (2002); Frank Pommersheim, *Constitutional Shadows: The Missing Narrative in Indian Law*, 80 N.D. L. REV. 743 (2004) [hereinafter Pommersheim, *Constitutional Shadows*]; Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28 (2006), available at <http://www.harvardlawreview.org/forum/issues/119/dec05/skibine.shtml> (last visited April 13, 2006); Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

30. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107-08 (2005).

31. See *United States v. Lara*, 541 U.S. 193, 200 (2004); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 60 (1996); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1218-19 (9th Cir. 2001), cert. denied, 535 U.S. 927 (2002).

dering their place in Our Federalism uncertain and unpredictable.³² A same-sex marriage amendment that results in limiting or expanding tribal authority to recognize or authorize same-sex marriage could constitute an implicit recognition of Indian tribes as the third sovereign in the American system of federalism. Even an amendment that excludes mention of Indian tribes may have something to say about Indian tribes as the third sovereign.

As to individual rights, a same-sex marriage amendment that excludes Indian tribes would raise important questions about whether the Constitution's individual rights declarations and protections apply to the exercise of tribal governmental authority. As the law stands, the Bill of Rights and other individual rights protections do not limit the exercise of tribal governmental authority.³³ For example, the Twenty-Sixth Amendment, which sets the age for federal elections at eighteen rather than twenty-one, does not apply to Indian tribes.³⁴ But the same federal circuit implied that, without making the specific holding, Indian tribes might not be allowed to set the voting age at twenty-one in contravention of the Twenty-Sixth Amendment.³⁵ If an amendment passed prohibiting all same-sex marriages but excluding mention of Indian tribes, would that amendment limit tribal recognition and authorization of such marriages? If an amendment passed prohibiting restrictions on same-sex marriage and again omitting mention of Indian tribes, would that amendment limit tribal authority? These issues raise larger questions about the Constitution's application to Indian tribes and to the third sovereign's place in Our Federalism.

Part I describes the state of law relating to Indian tribes' incorporation into the federal Constitution. Indian tribes predate the Constitution. The Founders did not conceive Indian tribes as being part of the Federal Union because they were located outside the territorial bounds of the original thirteen states. As a result, the tribes were not included in the

32. See *Lara*, 541 U.S. at 219 (Thomas, J., concurring) ("schizophrenic"); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434-35 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]; Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996) [hereinafter Getches, *Conquering*]; Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 403 (1991/1992).

33. See *Talton v. Mayes*, 163 U.S. 376 (1896); *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 278-79 (Southern Illinois University Press, 3rd ed. 2002).

34. See *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975).

35. See *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). *Contra Wounded Head*, 507 F.2d at 1081.

provisions of the Constitution except as outside governmental entities. But while history shows that Indian tribes are now surrounded by the states, the Constitution lags behind in recognizing the legal implications of that fact. As a result, the Supreme Court and the lower federal courts are slow to recognize the validity of exercises of tribal governmental authority. Moreover, because Indian tribes predate the Constitution and because the Founders excluded Indian tribes, the restrictions on governmental activity included in the Constitution do not, as a general matter, apply to tribal governments. Therefore, Indian tribes are left as outsiders in the constitutional scheme of protecting individual rights while preserving tribal self-determination. In sum, these constitutional conditions tend to convince the Supreme Court to restrict the authority of tribal governments to that of private associations, where their laws apply in very limited circumstances.³⁶

Part II opens with a general description of the debate about same-sex marriage in the United States and in Indian Country. In the Defense of Marriage Act (DOMA),³⁷ Congress included Indian tribes in the Act's application,³⁸ which was neither the first nor the last time Congress enacted legislation that recognized Indian tribes as a third sovereign.³⁹ In part as a result of this enactment, some Indian tribes have begun to confront the possibility of either recognizing or banning same-sex marriage. The cultural context of this debate is far removed from the cultural context of the same-sex marriage debate outside of Indian Country.⁴⁰ Part II also mentions the possibility that the American people may enact an amendment to the Constitution banning same-sex marriage. Such a ban, like the DOMA, might include Indian tribes in its provisions, but the draft proposals tend not to include Indian tribes.

Part III analyzes the less likely scenario in which the American people enact a constitutional amendment on same-sex marriage, either banning or protecting same-sex marriage, and include Indian tribes in the text. This Article argues that such an amendment would serve as a formal, yet implicit, incorporation of Indian tribes into Our Federalism, alongside states, as powerful and recognized sovereigns with separate and unique authorities and rights. The Supreme Court has identified

36. *E.g.*, *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). See COHEN, *supra* note 10, § 7.02, at 599-607. *But see* *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Rehnquist, J.).

37. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)).

38. *Id.*

39. *E.g.*, *Indian Child Welfare Act*, 25 U.S.C. §§ 1901-1903 (2001); *Indian Gaming Regulatory Act*, 25 U.S.C. §§ 2701-2721 (2001).

40. See Part II, *infra*.

many limitations on the exercise of tribal governmental authority, which are expressed by the Court as “implicit divestitures.”⁴¹ Although the Court alone has identified these divestitures, one could argue that the policymaking branches of the federal government have acquiesced to them.⁴² After an amendment recognizing or identifying Indian tribes as a third sovereign, continued “discovery” of implicit divestitures by the Court would be less legitimate. However, an amendment that mentions Indian tribes, but does not express their specific place in Our Federalism might not affect the outcomes in federal court litigation between states and Indian tribes that now tend to favor states.⁴³

Part IV analyzes the more likely scenario in which the American people enact a constitutional amendment banning same-sex marriage in the United States without mentioning Indian tribes. This Article argues that such an amendment would not serve to restrict a tribal government’s exercise of its inherent authority to either restrict or authorize same-sex marriage. Indian tribes already retain undisturbed inherent authority to decide matters of domestic and family law within Indian Country.⁴⁴ Accordingly, tribal governments would be free, even after a constitutional amendment, to enact legislation on same-sex marriage in contravention of that amendment. As a result, some Indian tribes could become islands of nonconforming law in an area where the American

41. See *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (defining “implicit divestiture” as “that part of sovereignty which the Indian implicitly lost by virtue of their dependent status”); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053-67 (2005); Bethany R. Berger, “Power over this Unfortunate Race”: *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 2046-49 (2004); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 371 (1994) available at <http://heinonline.org/HOL/PDF?handle=hein.journals/aind19&id=359&print=section§ion=18&ext=.pdf>; Philip P. Frickey, *A Common Law for Our Age of Colonialism: A Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 43-48 (1999); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 437 n.243 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1160-64 (1990) [hereinafter Frickey, *Congressional Intent*]; Getches, *Conquering*, *supra* note 32, at 1595-1617; Robert Laurence, *The Dominant Society’s Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 800-05 (1996); Laurie Reynolds, “Jurisdiction” in *Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 377-80 (1997); Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 270-80 (2000); Dean Suagee, *The Supreme Court’s “Whack-A-Mole” Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 97-124 (2002).

42. See Frickey, *(Native) American Exceptionalism*, *supra* note 32, at 459-60.

43. See Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW. 38, 39-42 (March/April 2006) [hereinafter Fletcher, *Reviving*].

44. See *United States v. Quiver*, 241 U.S. 602 (1916).

people appear to have spoken with finality. Federal courts confronted with the question of whether tribes could become islands of nonconforming law would be hard-pressed to either affirm tribal sovereignty or disclaim foundational federal Indian law. Either way, the result may yet be the formal and surprising incorporation as a matter of federal constitutional common law of Indian tribes into Our Federalism.

Federal Indian law is already at a constitutional crossroads in other areas: Whether Congress has authority to overturn Supreme Court decisions relating to implicit divestiture and whether Congress can authorize Indian tribes to assert criminal or even civil jurisdiction over nonmembers.⁴⁵ A same-sex marriage amendment, tribal nonconformance, and the federal or state response to tribal nonconformity could generate yet another constitutional crisis in federal Indian law.

I. INDIAN TRIBES AND THE CONSTITUTION

A. *Indian Tribes as an Anomaly in the Constitutional Structure*

Indians are mentioned in the Declaration of Independence.⁴⁶ The colonists considered the Indians to be brutal savages, threatening the safety and business interests of the signers of the Declaration, a force that the king did not repel with sufficient success.⁴⁷ After the Revolution, the drafters of the Articles of Confederation still treated Indian tribes as a powerful force, but chose to treat them as legal entities akin to foreign nations.⁴⁸ The Articles granted the federal government exclusive authority to deal with Indian nations.⁴⁹ Under the Articles' provision on Indian tribes, state legislatures had undefined authority to subvert federal actions in the field.⁵⁰ Before and after the Revolution, the country's leaders assumed Indian tribes would always remain outside of the territorial bounds of the United States.⁵¹ Any tribes surrounded by American territories and states would have to be assimilated,

45. See *United States v. Lara*, 541 U.S. 193 (2004); Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003).

46. See THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) ("the merciless Indian Savages. . .").

47. See Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041, 1046-47 (1998); John R. Wunder, "Merciless Indian Savages" and the Declaration of Independence: Native Americans Translate the *Ecunnaunuxulgee* Document, 25 AM. INDIAN L. REV. 65, 65-66 (2000-2001).

48. See Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1083-84 (2004) [hereinafter Prakash, *Against*].

49. See ARTICLES OF CONFEDERATION OF 1777 art. IX.

50. See Robert N. Clinton, *There Is No Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 130-31 (2002) [hereinafter Clinton, *There Is No*].

51. See Prakash, *Against*, *supra* note 48, at 1082-83.

a policy perpetuated in various forms until the latter half of the 20th century.⁵²

Indians and Indian tribes appear twice in the original text of the Constitution and once again in the Fourteenth Amendment. The most critical mention is listed in Congress's enumerated powers under Article I, Section 8, Clause 3, often referred to as the "Indian Commerce Clause."⁵³ It seems clear that the Founders intended to retain exclusive federal authority to deal with the Indian nations, but the Clause does not expressly state this.⁵⁴ This language differs in significant ways from the language in the Articles.⁵⁵ Regardless, the Supreme Court has long acknowledged that the Indian Commerce Clause bestows exclusive and plenary power to deal with Indian tribes,⁵⁶ including the power to legislate over Indian tribes.⁵⁷ But the Founders' apparent intent has been undermined by a modern parallel debate over the meaning of the Interstate Commerce Clause started in large part by former Chief Justice Rehnquist.⁵⁸ Some Indian law scholars agree with the originalist skepticism of the extent of federal authority under the Indian Commerce Clause⁵⁹ and further question the moral legitimacy of such broad federal authority.⁶⁰

Manifest Destiny meant that American people in the East would push Indian tribes to the West.⁶¹ At the same time, the federal govern-

52. See COHEN, *supra* note 10, § 1.04, at 75-84.

53. But see AMAR, *supra* note 30, at 108 (referring to the clause as a "with-and-among" clause).

54. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996) [hereinafter Frickey, *Domesticating*].

55. See Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 656-57 (2003).

56. See *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Tribes and Bands of Yakima Indian Nation*, 439 U.S. 463, 501(1979); *United States v. Hellard*, 322 U.S. 363, 367 (1944); *Smith v. Turner*, 48 U.S. 283, 418 (1849) (Wayne, J.); *Worcester v. Georgia*, 31 U.S. 515, 573 (1832) (McLean, J., concurring); *Cherokee Nation v. Georgia*, 30 U.S. 1, 36 (1831) (Baldwin, J., concurring).

57. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding Congressional abrogation of Indian treaty without tribal consent).

58. See *Florida v. Seminole Tribe of Fla.*, 517 U.S. 44 (1996); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1061-62 (2001); Erwin Chemerinsky, Keynote Address, 41 WILLAMETTE L. REV. 827, 827-28 (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 320-21 (2001) [hereinafter Getches, *Beyond*]; J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690 (2004).

59. See Getches, *Beyond*, *supra* note 58, at 301.

60. E.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986).

61. See John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J. L. & POL'Y 347 366-67 (1999); Robert J. Miller, *The Doctrine*

ment pursued a policy of “measured separatism” in its treaty-making policy toward the tribes.⁶² Indian Country, once defined as all land outside the territory of the United States,⁶³ became subsumed over time into American states and territories.⁶⁴ Despite numerous opportunities to deal with the constitutional problem that Indian tribes posed, especially during the Reconstruction era,⁶⁵ the American people never amended the Constitution to reflect the existence of Indian tribes within their borders or express the tribes’ situation within the constitutional scheme of federalism.⁶⁶ Indian tribes were no longer foreign nations or states.⁶⁷ Indian Country was not an American territory, a term of art contemplated by the Constitution.⁶⁸ Indian Country was not like the District of Columbia,⁶⁹ nor was Indian Country like Puerto Rico.⁷⁰ Indian tribes, Indian Country, and federal Indian law were and are *sui generis* – “extraconstitutional.”⁷¹

The Constitution contains two references to Indians as individuals, both of which are now considered atavistic and meaningless in the modern era. Article I, Section 2, Paragraph 3 provides that “Indians not taxed” cannot be included in counting the American population for purposes of representation in Congress and the Electoral College.⁷² The Fourteenth Amendment includes identical language.⁷³ Here, it appears the Founders assumed that some individual Indians could reside in areas

of Discovery in American Indian Law, 42 IDAHO L. REV. 1, 112 (2006) [hereinafter Miller, *Doctrine*].

62. See WILKINSON, AMERICAN INDIANS, *supra* note 11, at 4.

63. See Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County*, 23 AM. INDIAN L. REV. 55, 70-71 (1998).

64. See 18 U.S.C. § 1151 (1949); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 440 (1998).

65. See EFFECT OF THE FOURTEENTH AMENDMENT ON INDIAN TRIBES, S. Rep. No. 41-268 (1870).

66. See Pommersheim, *Constitutional Shadows*, *supra* note 29, at 756-57.

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

68. See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 129 (1960) (Black, J., dissenting); *United States v. Kagama*, 118 U.S. 375, 380 (1886).

69. See *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923).

70. See *De Lima v. Bidwell*, 182 U.S. 1 (1901); DAVID F. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 59-65 (1990) (discussing the so-called “Insular Cases”).

71. *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring). See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25 (2002); Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 776 (1993).

72. U.S. CONST. art. I, § 2.

73. U.S. CONST. AMEND. XIV.

within the American borders, but not become citizens or be subject to taxation by federal or state governments.⁷⁴ Since 1924, all Indians born within the United States are American citizens, regardless of whether they choose to be citizens.⁷⁵ As American citizens, they are subject to federal taxation in general, although they may retain numerous state and local tax immunities.⁷⁶ The 1924 Act appears to have eliminated all significance to the “Indians not taxed” language.⁷⁷

In a constitutional sense, Indian tribes are an anomaly.⁷⁸ The text does not appear to recognize tribal sovereignty except in an implicit fashion, although the evidence of that recognition is as close to conclusive as possible.⁷⁹ But while Indian tribes retain sovereign authority, their members maintain three types of citizenship simultaneously: tribal, American, and state citizenship.⁸⁰ Thus, while American Indian citizens have the benefit of federal and state constitutional rights protections, such as those included in the Bill of Rights, they also have the benefit of any rights protected under their tribal Constitution.⁸¹

This stands in marked contrast, even irony, to the fact that constitutional rights protections do not limit the exercise of tribal governmental authority.⁸² For example, the Supreme Court has held that where one Cherokee Indian murders another Cherokee Indian within the jurisdiction of the Cherokee nation, this is not an offense against the United States, but rather only an offense against the local laws of the Cherokee nation.⁸³ A vast number of Indian tribes, as history shows, were foreign nations⁸⁴ (except to the most skeptical Founders or significant contem-

74. See *Elk v. Wilkins*, 112 U.S. 94 (1884); AMAR, *supra* note 30, at 439 n. *; see also *id.* (citing Civil Rights Act of 1866, 14 Stat. 27).

75. See generally Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L. J. 107 (1999).

76. See Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 225 n.161 (1984) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)).

77. See Porter, *supra* note 75, at 123-28.

78. See *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) (describing Indian tribes as “extraconstitutional sovereign[s]”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 27-28 (Johnson, J., dissenting) (“anomaly”); Frickey, *Domesticating*, *supra* note 54, at 34 (“anomaly”); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 807-08 (2006) (“extraconstitutional”).

79. See generally Clinton, *There Is No*, *supra* note 50.

80. See Tebben, *supra* note 29, at 346-47.

81. See Angela R. Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. (forthcoming 2007).

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

83. *Id.*

84. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 50-74 (1831) (Thompson, J., dissenting) (arguing that the Cherokee Nation was a foreign state as late as 1831); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 514 (1969).

poraries⁸⁵) during the time of the Founding⁸⁶ and even during the time of the enactment of the Fourteenth Amendment.⁸⁷ Tribes predate the Constitution with a sovereignty that existed “from time immemorial.”⁸⁸ Tribal leaders did not negotiate or execute any of the provisions of the Constitution, and, as a result of the peculiar Lockean notion of the consent of the governed, legal authorities agree that the Constitution does not apply to Indian tribes.⁸⁹ Specific examples of this exemption include the fact that Indian tribes were free to disregard Anglo-American concepts of “due process” and “equal protection”⁹⁰ until Congress interjected a version of the Bill of Rights into Indian Country in 1968.⁹¹ Indian people are not constitutionally guaranteed a jury trial under the Seventh Amendment in tribal courts.⁹² Indian people are not constitutionally guaranteed a right to counsel under the Fifth and Sixth Amendments in tribal courts.⁹³ As a practical matter, Indian tribes generally

85. See *Cherokee Nation* at 31-50 (Baldwin, J., concurring) (arguing that the Cherokee Nation retained no sovereignty in 1831); Burke, *supra* note 84, at 515 (discussing Justice Baldwin’s opinion in *Cherokee Nation*).

86. See Prakash, *Against*, *supra* note 48, at 1107 (“As far as the intentions of the Constitution’s Founders (both the Framers and the Ratifiers), there is no evidence that any of them sought to have the Constitution protect Indian tribes.”).

87. See Clinton, *There Is No*, *supra* note 50, at 145-46 (citing *Elk v. Wilkins*, 112 U.S. 94 (1884)).

88. *McClahanan v. State Tax Commission of Ariz.*, 411 U.S. 164, 172 (1973) (“It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.”); see *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 230 (1985); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 359 (1941); *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 356 (1926); *Oregon v. Hitchcock*, 202 U.S. 60, 62 (1906); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 906 (2000); Daniel Kelly, Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975).

89. See Clinton, *There Is No*, *supra* note 50, at 162; Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990); Richard Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts Over Nonmember Indians: An Examination of the Basic Framework on Inherent Tribal Sovereignty Before and After Duro v. Reina*, 38 FED. BAR NEWS & J. 70, 74 (1991); Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 461 (1997); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 15 (1991) (footnote omitted); David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 478-79 (1994).

90. See *Martinez v. S. Ute Tribe of S. Ute Reservation*, 249 F.2d 915, 919 (10th Cir. 1957).

91. See 25 U.S.C. § 1302(8) (2006).

92. See Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal ↔ Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 42 n.103 (2004) [hereinafter Clinton, *Comity*]; Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 85 n.96 (1990) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 n.14 (1978)).

93. See Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 361 n.124 (2004).

provide these guarantees in accordance with tribal constitutional, statutory, or common law,⁹⁴ but they cannot be required to do so by the American Constitution. In addition, the Establishment Clause does not serve to prohibit the theocratic governments of the desert southwest tribes and Pueblos,⁹⁵ a result that is both a question of governmental structure and individual rights. In short, measured separatism provided Indian tribes a place in Our Federalism to make their own laws and be governed by them.⁹⁶

B. *The Supreme Court's Resulting Distrust of Tribal Governments*

For the Supreme Court, the exercise of sovereign authority by a governmental entity in the United States should derive from either the federal government or the states.⁹⁷ The federal government and the states entered into the compact known as the Constitution and, as such, are the only obvious legitimate outlets of governmental authority.⁹⁸ As the Constitution states and as the Founders intended, in general, the federal government controls foreign and interstate questions,⁹⁹ while states handle their own internal and local affairs.¹⁰⁰ It would seem that since Indian tribes are now located within the borders of the states, state law would control their destiny.

But federal Indian law, derived in large part from the Indian Commerce Clause,¹⁰¹ treaties with Indian tribes,¹⁰² and a "preconstitutional"

94. *E.g.*, CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS ART. X, § 1 (1988), available at <http://thorpe.ou.edu/constitution/GTBcons3.html>; *Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians*, No. 04-007 (Turtle Mountain Appellate Court 2005), available at <http://www.turtle-mountain.cc.nd.us/cases.htm>; Clinton, *Comity*, *supra* note 92, at 42 n.103.

95. See Robert Laurence, *Federal Court Review of Tribal Activity under the Indian Civil Rights Act*, 68 N.D. L. REV. 657, 665 (1992); Valencia-Weber, *supra* note 92, at 361-62.

96. WILKINSON, AMERICAN INDIANS, *supra* note 11; *Williams v. Lee*, 358 U.S. 217, 222 (1959).

97. See *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976) (federal authority over state authority); *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466, 477 (1939) (federal authority); *Luther v. Borden*, 48 U.S. 1, 34 (1849) (state authority).

98. See *Worcester v. Georgia*, 31 U.S. 515, 570-71 (1832), *superseded by statute*, 43 U.S.C.S. § 666, 66 Stat. 549, *as recognized in Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

99. See AMAR, *supra* note 30, at 107-08; Saikrishna Prakash, *The Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1166 (2003). *E.g.*, *Gonzales v. Raich*, 125 S. Ct. 2195, 2206-07 (2005) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)); Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 701-06 (1996).

100. See, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000).

101. See *United States v. Lara*, 541 U.S. 193, 200 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

102. See, 541 U.S. at 200; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902).

federal authority to deal with Indian tribes,¹⁰³ compels the opposite result. States have, as a general matter, no authority over reservation Indians.¹⁰⁴ The federal government continues a long-standing "trust relationship" with Indian tribes and Indian people, forming part of its special political relationship with both Indian tribes and individual Indians.¹⁰⁵ Indian treaties, unless abrogated by an express Act of Congress, remain in full force, even though the (indirect, third-party) beneficiaries often are American citizens who happen to be Indian people.¹⁰⁶ Finally, inherent tribal governmental authority remains intact unless divested by express action of Congress or some other divestiture.¹⁰⁷ For example, Indian tribes retain immunity from suit even by a state in federal, state, and tribal courts.¹⁰⁸ This is a significant sovereignty.

But tribes are not states and they have no Tenth or Eleventh Amendment to guard them from federal or state intrusion in their affairs. From the very earliest pronouncement of the foundational principles of federal Indian law, the Marshall Trilogy,¹⁰⁹ and the even earlier congressional pronouncements of federal Indian law and policy, the

103. *Lara*, 541 U.S. at 201 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936); *Worcester*, 31 U.S. at 557; other citations omitted).

104. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); *Williams v. Lee*, 358 U.S. 217, 221-222 (1959); *Worcester*, 31 U.S. at 517 (1831); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1179-81 (1995); Mike McBride, III, *Oklahoma's Civil-Adjudicatory Jurisdiction over Indian Activities in Indian Country: A Critical Commentary on Lewis v. Sac & Fox Tribe Housing Authority*, 19 OKLA. CITY U. L. REV. 81, 120-21 (1994); G. William Rice, *Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship*, 72 N.D. L. REV. 267, 269 (1996).

105. See generally Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1108-1109 (2005); Rodina Cave, Comment, *Simplifying the Indian Trust Responsibility*, 32 ARIZ. ST. L.J. 1399 (2000); Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 802-06 (2001); Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635 (1982); 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, 74 (2002); Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247 (2003).

106. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Washington State Commercial Passenger Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

107. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 174 n.24 (1982) (quoting Earl Mettler, *A Unified Theory of Tribal Sovereignty*, 30 HASTINGS L.J. 89, 97 (1978)); *United States v. Wheeler*, 435 U.S. 13, 323 (1978).

108. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-56 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

109. See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. (forthcoming 2006), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=924547.

Nonintercourse Acts,¹¹⁰ tribal authority has been subject to both explicit and implicit divestiture without consent.¹¹¹ Nothing in the Constitution prohibits Congress or the Supreme Court from winnowing down tribal governmental powers, or even relegating individual Indians to a status (some might say) below that of non-Indian American citizens, such as in the area of criminal jurisdiction.¹¹² To this day, Congress retains incredible authority to regulate Indian tribes, as long as their enactments meet the rational basis test.¹¹³ And Congress has done so, both to the advantage and disadvantage of Indian tribes and individual Indians.¹¹⁴ But Congress alone cannot amend the Constitution.

In the end, the Supreme Court decides what the Constitution means.¹¹⁵ Although the Court granted almost unlimited deference to Congress when it made positive law in the field,¹¹⁶ where Congress has been silent or vague, the Court has taken the lead as both constitutional interpreter and, according to many legal authorities, national federal Indian policymaker.¹¹⁷ The Rehnquist Court's pronouncements on federal Indian law have been both bold and "ruthlessly pragmatic."¹¹⁸ While Congress appears to have acquiesced to all but a few decisions, the Court maintained a sort of "judicial plenary power."¹¹⁹ The Court's decisions in cases where tribal authority conflicted with state or local

110. See *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478, 1484 (2005) ("In 1790, Congress passed the first Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act. Periodically renewed and remaining substantially in force today, the Act bars sales of tribal land without the acquiescence of the Federal Government." (citations omitted)).

111. See *Wheeler*, 435 U.S. at 325-26 (listing examples of divestitures of tribal inherent authority).

112. See *United States v. Antelope*, 430 U.S. 641 (1977).

113. See *United States v. Sioux Nation*, 448 U.S. 371, 415 (1980); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977); Pommersheim, *Is There*, *supra* note 45, at 271 n.4; Comment, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235 (1982).

114. Compare *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding Congress's abrogation of Indian treaties in favor of the General Allotment Act), with *United States v. Lara*, 541 U.S. 193 (2004) (upholding Congressional reaffirmation of tribal inherent authority to prosecute nonmember Indians).

115. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

116. See *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 718-19 (1943); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 311 (1911).

117. See Frickey, *(Native) American Exceptionalism*, *supra* note 32, at 454; Getches, *Beyond*, *supra* note 58, at 357; David E. Wilkins, *The Reinvigoration of the Doctrine of 'Implied Repeals': A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1, 4 (1989).

118. Frickey, *(Native) American Exceptionalism*, *supra* note 32, at 460.

119. See *Clinton, Comity*, *supra* note 92, at 62; *Clinton, There Is No*, *supra* note 50, at 259; Pommersheim, *Constitutional Shadows*, *supra* note 29, at 751; Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 304 (2003-2004); Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1991); Gloria Valencia-Weber, *The*

authority;¹²⁰ where tribal authority conflicted with nonmembers' individual rights;¹²¹ and where individual Indians sought any relief whatsoever,¹²² have overwhelmingly favored non-Indian interests.¹²³ These results turn the foundation of federal Indian law on its head, but given the political ideology of the Rehnquist Court, these results are unsurprising.¹²⁴ Whether a decision could be found to be a result of an originalist Court,¹²⁵ a strict constructionist Court,¹²⁶ an activist Court,¹²⁷ or a tentative and minimalist Court,¹²⁸ the fact that the Constitution does not incorporate Indian tribes implies that the Roberts Court also will be reluctant to value tribal governmental interests over state or federal interests or nonmember interests.¹²⁹ Moreover, the members of the Court know they are not constrained by constitutional provisions in deciding their Indian cases as they believe matters ought to be.¹³⁰

Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets, 5 U. PA. J. CONST. L. 405, 412 (2003).

120. E.g., *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478 (2005); *Nevada v. Hicks*, 533 U.S. 353 (2001).

121. E.g., *Duro v. Reina*, 495 U.S. 676 (1990); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe* 435 U.S. 191 (1978).

122. E.g., *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

123. See Getches, *Beyond*, *supra* note 58, at 279-81.

124. See John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 ARIZ. ST. L. REV. 787, 902-03 (1999) ("In effectively promoting the compulsory propagation of 'the State's own rules and traditions' within the boundaries of an Indian reservation, the Kennedy/Rehnquist opinion in *Coeur d'Alene Tribe* illustrates the Rehnquist Court's signatory tendency to adjudicate disputes implicating both state and tribal interests in disregard of fundamental tenets of federal Indian law, in order to 'enrich' the States at the expense of the Tribes."). See generally Getches, *Beyond*, *supra* note 58; Getches, *Conquering*, *supra* note 32; Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1995).

125. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

126. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 100-01 (1985) ("Terms such as 'strict construction,' an 'activist court,' or 'judicial restraint' cease to have meaning when used by opponents of equality who were never committed to abstract principles, but only to preserving segregation at any cost.").

127. See Lawrence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 170-71 (1984) (accusing the Burger Court of judicial activism).

128. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

129. See Bruce Bothelo, Mayor of Juneau, Alaska and former Alaska Attorney General, Address before the Federal Bar Association's Indian Law Conference, Albuquerque, NM (April 6, 2006) (asserting that Chief Justice Roberts will not be sympathetic to tribal interests). Cf. generally Cass R. Sunstein, *John Roberts, Minimalist: He's Conservative, but He's No Fundamentalist*, WALL ST. J., Sept. 5, 2005, available at <http://www.opinionjournal.com/editorial/feature.html?id=110007208>.

130. See Getches, *Conquering*, *supra* note 32, at 1575 ("[O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all

II. THE SAME-SEX MARRIAGE DEBATE AND INDIAN COUNTRY

Same-sex marriage became a national policy issue after the Court decided *Lawrence v. Texas*,¹³¹ striking down anti-sodomy laws that applied to gay and lesbian persons and no others because these laws violated their right to privacy as protected by the Due Process Clause of the Fourteenth Amendment.¹³² In overruling *Bowers v. Hardwick*, the Court seemed to be recognizing that if sex between members of the same sex could not be criminalized, then it made sense to many that discriminatory bans on same-sex marriage should be struck down as well.¹³³ In 2003, the Massachusetts Supreme Judicial Court decided *Goodrich v. Department of Public Health*,¹³⁴ finding on the basis of both federal and state constitutional law that the state law ban on same-sex marriage was unconstitutional.¹³⁵ In the following year, a large swath of states enacted via public referendum amendments to their state constitutions that banned same-sex marriage.¹³⁶ Nebraska's ban, more severe than many others,¹³⁷ was struck down by the federal district court.¹³⁸ The Eighth Circuit reversed on July 14, 2006, holding the ban

legislation, and the congressional 'expectations' that it reflects, down to the present day.") (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., (Apr. 4, 1990) (*Duro v. Reina*, No. 88-6546), in *Papers of Justice Thurgood Marshall* (reproduced from the Collections of the Manuscript Division, Library of Congress)). Cf. Frickey, (*Native*) *American Exceptionalism*, *supra* note 32, at 467 ("Justice Kennedy's line of reasoning exemplifies the root problem in federal Indian law. The place of federal Indian law in American public law can be understood by imagining layers of law, with American constitutionalism built on top of American colonialism. Above the colonial line, America has what amounts to a civil religion of constitutionalism. Justice Kennedy is one of many believers who have in the Constitution a 'faith [that] is the substance of things hoped for, the evidence of things not seen.' This constitutional faith may be crushed when the eye drifts below the colonial line, which is presumably one reason why most eyes never venture that far. I say 'may be' rather than 'is' because a true believer like Justice Kennedy might respond to the problem not by a loss of faith, but by a call to missionary work. For in both *Duro* and his separate opinion in *Lara*, Justice Kennedy has sought to bring our civil religion to Indian country.") (quoting Hebrews 11:1 (King James)).

131. 539 U.S. 558 (2003).

132. *See id.* at 578-79 (O'Connor, J., concurring). Justice O'Connor would have struck down the statute on the basis that it violated the Equal Protection Clause and also would not have overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). *Id.* at 579 (O'Connor, J., concurring).

133. *See id.* at 578 ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

134. 798 N.E.2d 941 (Mass. 2003).

135. *See id.* at 959-61.

136. *See* Amy Miller, *Marriage Equality v. The Defense of Marriage Acts*, Address at Helen Hamilton Day, University of North Dakota School of Law (March 31, 2006) (videotape on file with author).

137. *See id.*

138. *See* *Citizens for Equal Prot., Inc., v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

to be constitutional.¹³⁹

After *Goodrich* in 2004, two Cherokee women walked into the Cherokee tribal court and applied for a marriage license.¹⁴⁰ The Cherokee Nation Judicial Appeals Tribunal dismissed two challenges to their application on the grounds that the challengers lacked standing because they had not suffered an injury.¹⁴¹ Meanwhile, the Navajo Nation's legislature enacted the Dine Marriage Act, which banned same-sex marriage.¹⁴²

In 1996, Congress enacted the Defense of Marriage Act (DOMA),¹⁴³ creating an exception to the full faith and credit doctrine allowing state courts to refuse to recognize a same-sex marriage legal in another state or jurisdiction.¹⁴⁴ The statute incorporated Indian tribes into the mix as a third sovereign, authorizing tribal courts to have the same ability as state courts to refuse to recognize a same-sex marriage from an outside jurisdiction.¹⁴⁵ DOMA allows, however, that if a tribe authorizes or recognizes same-sex marriage, states and other tribes have no obligation to recognize that decision.¹⁴⁶ Under current law, tribes may become an island of same-sex marriage, although, given the debates in Cherokee and Navajo country, it might never happen.

DOMA is a powerful statute, but it may suffer from the same constitutional infirmities as many state laws banning or restricting same-sex marriage. Legal commentators suggest that DOMA is unconstitutional under several constitutional provisions.¹⁴⁷ Members of Congress and President Bush contend that the clear solution is to adopt a constitutional

139. See *id.*, rev'd, 455 F. 3d. 859 (D. Neb. 2006), rehearing denied *en banc*, 2006 U.S. App. LEXIS 22372 (D. Neb. 2006).

140. See S. E. Ruckman, *Third Challenge Filed to Tribal Same-Sex Marriage: A Cherokee Nation Court Administrator Says She Would Be Violating Tribal Law if She Filed a Lesbian Couple's Marriage Certificate*, TULSA WORLD, March 4, 2006, available at 2006 WLNR 3684250.

141. See *JAT Dismisses Same-Sex Marriage Injunction*, CHEROKEE PHOENIX AND INDIAN ADVOCATE, Feb. 1, 2006, at 3, available at 2006 WLNR 6759034.

142. See *Gay Marriage Ban Polarizes Views; Council Rejects Shirley Veto of Gay Marriage Ban, Opposing Sides Remain Firm in Pro and Con Positions*, NAVAJO TIMES, June 9, 2005, at A10, available at 2005 WLNR 11935955.

143. See Pub. L. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)).

144. See 28 U.S.C. § 1738C (1996). The text of this provision is as follows:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

145. *Id.*

146. See *id.*

147. E.g., James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christianity*, 4 MICH. J. GENDER & L. 335 (1997); Kristian D. Whitten, *Section Three of the*

amendment that would ban same-sex marriage once and for all.¹⁴⁸ It does not appear at this writing that such an amendment will pass any time soon, but such an amendment remains a possibility.

The various proposals focus more on the exact character of the ban rather than the jurisdictional questions. In national politics, where Indian tribes are not represented at all and Indian people are an under-represented and statistically insignificant minority, forgetting the third sovereign is endemic.¹⁴⁹ Regardless, in the case of a same-sex marriage amendment, either including or excluding Indian tribes raises significant constitutional questions and implications, as the following section shows.

III. IMPLICIT INCORPORATION OF INDIAN TRIBES INTO THE CONSTITUTION THROUGH A SAME-SEX MARRIAGE AMENDMENT

A constitutional amendment prohibiting or authorizing same-sex marriage in the United States and its territories – and including Indian Country – could have the concomitant impact of creating implicit recognition of modern Indian tribes in the Constitution and Our Federalism. A marriage amendment either prohibiting Indian tribes from authorizing or recognizing same-sex marriage or restricting Indian tribes from banning same-sex marriage, listing Indian tribes among the federal government and the states, would be implicit recognition and slight modification of no fewer than four Indian law doctrines and the possible creation of a fifth: (1) Indian tribes are sovereigns, with inherent authority over domestic relations;¹⁵⁰ (2) Indian tribes (somehow) are part of Our Federalism, even if they are not states or other entities;¹⁵¹ (3) state

Defense of Marriage Act: Is Marriage Reserved to the States?, 26 HASTINGS CONST. L.Q. 419 (1999).

148. See Krotoszynski & Spitko, *supra* note 25, at 602-03.

149. E.g., *Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071 (9th Cir. 2001) (holding that Age Discrimination in Employment Act's silence as to Indian tribes meant that it did not apply to the tribes); *State of Wash., Dept. of Ecology v. United States Envtl. Prot. Agency*, 752 F.2d 1465, 1469 (9th Cir. 1985) (noting that the Resource Conservation and Recovery Act of 1976 was silent as to Indian tribes).

150. See *United States v. Quiver*, 241 U.S. 602, 605-06 (1916); COHEN, *supra* note 10, § 4.01[2][c], at 215.

151. See Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country."). See generally Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Skibine, *Imperfect Notion*, *supra* note 41.

laws do not apply in Indian Country, in general;¹⁵² (4) Indian tribes are not subject to the Constitution's limits or mandates;¹⁵³ and (5) the remainder of the Constitution's limitations on federal and state governmental power do not, by negative inference, apply to Indian tribes.

First, a marriage amendment including Indian tribes would be recognition that they are the third sovereign. The Indian Commerce Clause lists Indian tribes along with states and foreign nations.¹⁵⁴ The Supreme Court, however, has never recognized Indian tribes to be equivalent to foreign nations, let alone states (although the Court once came close¹⁵⁵). Nevertheless, the Founders wrote that clause with the understanding that Indian tribes would remain outside the borders of the United States, with no serious discussion or expectation that the tribes would survive being surrounded by the states.¹⁵⁶ A constitutional amendment restating, in a way, the constitutional place of Indian tribes in the 21st century would be modern constitutional recognition of the place that Indian tribes hold in practice. And in the domestic and family law context, Indian tribes' authority would not be subject to questioning.

Second, a marriage amendment mentioning Indian tribes would constitute an implicit incorporation of Indian tribes into Our Federalism. Indian tribes now have a place in Our Federalism, but that place exists at the sufferance of Congress, and, to a greater extent, the Supreme Court.¹⁵⁷ For example, Congress, in the Indian Gaming Regulatory Act,¹⁵⁸ placed Indian tribes in the governmental scheme along with the states and the federal government.¹⁵⁹ But Congress's policy toward Indian tribes can change, as it often has, to a policy of assimilation of Indian people or even termination of Indian tribal government structures.¹⁶⁰ In addition, the Court, with its apparent eye toward judicial supremacy, may one day terminate tribal sovereignty in its entirety.

152. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 376 (1976); *Williams v. Lee*, 358 U.S. 217, 219-22 (1959); *Worcester v. Georgia*, 31 U.S. at 517 (1832); COHEN, *supra* note 10, §§ 6.01[1]-[2], at 499-506.

153. See *Talton v. Mayes*, 163 U.S. 376 (1896); *Native American Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

154. U.S. CONST. art I, § 8, cl. 3.

155. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831) (recognizing Indians as "domestic dependent nations" but not as foreign nations).

156. See WILKINSON, *AMERICAN INDIANS*, *supra* note 11, at 103.

157. See *United States v. Lara*, 294 F.3d 1004, 1007-09 (8th Cir. 2002) (Hansen, J., dissenting) (arguing that Congress may delegate new powers to tribes as a matter of federal common law but it may do so only under constitutional constraints), *rev'd*, 324 F.3d 635 (8th Cir. 2003), *rev'd*, 541 U.S. 193 (2004).

158. Pub. L. No. 100-497, 102 Stat. 2467 (1988).

159. See 25 U.S.C. § 2710 (2001) (creating a complex schema where Indian tribes, states, and federal government authorize certain forms of Indian gaming through a compacting process).

160. See generally COHEN, *supra* note 10, § 1.04, at 75-84.

Both of these results appear to be unrealistic, for both practical and political reasons,¹⁶¹ but they are not impossible. A marriage amendment including Indian tribes brings tribes into the formal constitutional structure. It would be untheorized and haphazard, but it would be undeniable.

Third, inclusion of Indian tribes in a marriage amendment would represent an understanding that state law has no force in Indian Country. Inclusion of Indian tribes in the amendment would be necessary only because state laws cannot reach Indian Country. This principle, which Justice Marshall referred to as a "platonic notion," derives from the very early case of *Worcester v. Georgia*.¹⁶² *Worcester* was less an Indian law case than a states' rights case¹⁶³ and Chief Justice Marshall carved out an exception to state authority to legislate over Indian tribes and Indian people in Indian Country.¹⁶⁴ The Rehnquist Court backtracked and turned the *Worcester* presumption upside down when it asserted in dicta that state laws do apply as a presumptive matter in Indian Country.¹⁶⁵ But the reality of Indian Country is that state and local governments, in general, do not want jurisdiction over Indian Country because they wish to avoid the issue.¹⁶⁶ Moreover, in many areas, non-Indian governments and non-Indian people rely on tribes for jobs, police protection, environmental protection, and other governmental and economic services.¹⁶⁷ Thus, the *Worcester* rule, disfavored by the current Court, retains de facto legitimacy in Indian Country. A marriage amendment

161. See Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 2 (2005), available at <http://www.harvardlawreview.org/forum/issues/119/dec05/singer.pdf>:

The Court cannot seem to live with Indian nations; those nations do not fit easily into the constitutional structure and their place in the federal system seems obscure and anomalous. Yet the Supreme Court cannot live without them either; much as the Court would like to limit tribal sovereignty, it is neither equipped nor inclined to erase tribal sovereignty entirely. Indian nations are not only mentioned in the Constitution, but are also the subject of an entire Title of the United States Code.

162. *County of Yakima v. Confederated Tribes and Bands of Yakima*, 502 U.S. 251, 257 (1992); *Worcester v. Georgia*, 31 U.S. 515, 515 (1832).

163. See Hon. Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005).

164. See *Worcester*, 31 U.S. at 557, 561.

165. *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001).

166. E.g., Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 159 (1999) (describing how state and local law enforcement rely on tribal courts). See Fletcher, *Reviving*, *supra* note 43, at 41-42.

167. E.g., Margaret Graham Tebo, *Betting on Their Future*, A.B.A. J., May 2006, at 32, 36 ("For the state, it's a sweet deal. It doesn't have to make any concessions or put up any money to get a large new tax base. At Quil Ceda, for example, all the utility work for roads, sewers, water lines, electricity, etc., was paid for by the tribes. The Tulalips even contributed money for work on a new interchange from the interstate, which also benefits nearby communities. The tribes also hire, train and pay for their own police force.").

would cement that understanding and create a larger barrier to the Court's tendency to puncture the "platonic notion."¹⁶⁸

Fourth, a marriage amendment limiting tribal government activities to recognize or prohibit same-sex marriage establishes the federal and state government understanding that the Constitution includes some provisions that apply to Indian tribes. Part of the incorporation of Indian tribes into the Constitution and the federal system is the side-effect (for tribes) of being subject to some mandates of that document. Indian tribes did not participate as sovereigns at the table during the Founding or any of the Constitution's amendments. They would probably also be excluded (without bad faith) from the negotiations and later ratification of a marriage amendment.

A marriage amendment attempting to alter the inherent authority of Indian tribes to recognize or restrict same-sex marriage would cut into the undisturbed authority of Indians to make their own laws and be governed by them. It is conceivable and realistic to assume that tribes may resist application of this amendment to them. Moreover, some Indian tribes may take the view that the United States cannot incorporate tribes into the Constitution without consent from each of the over 560 tribes.¹⁶⁹ This Article will not seek to answer these questions as they are outside the scope of discussion. The Article does assume, however, that the amendment would be successful in binding Indian tribes to its mandate. Indian tribes have acquiesced to federal authority for so long that to reject an amendment at this point could be fruitless.¹⁷⁰

Fifth, inclusion of Indian tribes in a marriage amendment – and in no other place in the Constitution except the Commerce Clause – would mean by negative implication that the remaining provisions of the document do not apply to Indian tribes. For instance, the Bill of Rights does not limit tribal governmental authority and a marriage amendment would not alter that result.¹⁷¹ The rest of the Constitution excludes Indian tribes, for example, from sending representatives to Congress and

168. See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973); Laurence, *Symmetry*, *supra* note 89, at 890.

169. Thanks to Kirsten Carlson for reminding the author of this possibility.

170. See generally Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 148 (1997) (arguing that Indian tribes signing treaties ceding land in exchange for federal protection acquiesced to federal authority). Cf. generally Deloria & Newton, *supra* note 89, at 74 ("To round out what looks like a parade of horrors, the Court could also choose a case challenging the amendments as an opportunity to limit congressional power to members of federally recognized Indian tribes. If Congress were to acquiesce to a limitation of its power to enrolled Indians, its acquiescence would unweave the complex fabric of federal jurisdiction and control in Indian country.").

171. See *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); *Native American Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959).

the Electoral College.¹⁷² If an amendment were passed, tribes would remain outside the structure of the federal-state relationship, but would be part of the overall structure. Even under the overall structure, however, tribes would have very limited duties and responsibilities compared to states and the federal government. Incorporation of Indian tribes into the Constitution through a marriage amendment would serve to bind Indian tribes (if at all) to that provision and that provision only.

These modifications would go a long way toward answering questions posed by some Justices. Two fundamental questions remain open in the Roberts Court. First, Justice Thomas appears to be a leader in questioning whether tribes should retain sovereignty at all, in large part because tribes are neither full sovereigns nor have a place in the United States Constitution. He has made two statements in relation to this question: "The tribes, [in] contrast [to States and the federal government], are not part of this constitutional order, and their sovereignty is not guaranteed by it[;]"¹⁷³ and "[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."¹⁷⁴ Second, a corollary and resulting question is whether Indian tribes can exercise – or whether Congress can authorize Indian tribes to exercise – jurisdiction over nonmembers outside of the bounds of the individual rights protections contained in the Constitution. Justice Kennedy appears to be a leader in raising this question. He wrote, "[t]o hold that Congress can subject [a nonmember American citizen], within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step."¹⁷⁵

A marriage amendment incorporating Indian tribes into its provisions raises significant questions and, in all likelihood, may signify recognition of the American people that Indian tribes are a part of Our Federalism. At the founding of the Republic, Indian tribes were the unknown, outsider presence beyond the borders of the fledgling United States. As Manifest Destiny made its way west and swallowed all of the remains of Indian Country,¹⁷⁶ federal policy changed toward assimila-

172. See Clinton, *There Is No*, *supra* note 29, at 258.

173. *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

174. *Id.* at 218 (Thomas, J., concurring).

175. *Id.* at 212 (Kennedy, J., concurring); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 114-19 (2002) (restating Justice Kennedy's approach; discussing *Duro v. Reina*, 495 U.S. 676 (1990)); Frickey, *(Native) American Exceptionalism*, *supra* note 32, at 465-66 (criticizing Justice Kennedy's approach).

176. See generally Miller, *Doctrine*, *supra* note 61, at 117-18 (explaining how the Doctrine of Discovery was applied by European-Americans to legally infringe on the real property and sovereign rights of American Indians).

tion and, in some cases, extermination.¹⁷⁷ Indian tribes survived, and in 1934, Congress repudiated the efforts to stamp out Indian sovereignty by enacting the Indian Reorganization Act.¹⁷⁸ Still, as Justice Thomas stated, tribal sovereignty could be argued to exist at the sufferance of Congress (although one thing American history shows is that Indian tribes do not disappear even when “terminated”¹⁷⁹). A marriage amendment including Indian tribes would recognize in the Constitution what the federal government has recognized since 1934 – that Indian tribes are sovereign entities and are part of Our Federalism. Of course, the amendment alone would not define the rights and responsibilities of Indian tribes, states, and the federal government in relation to each. If the amendment does nothing more than constitutionally codify the current state of affairs, such a result would still be a benefit to Indian tribes. While the extent of tribal authority will remain a question for the Court to ponder over and over again, no longer could anyone argue with authority that Indian tribes existed at the sufferance of another sovereign.¹⁸⁰

The formal (if implicit) incorporation of Indian tribes into the Constitution may answer Justice Kennedy’s concern as well. Indian tribes would be part of the Constitution, albeit in an undefined manner. Justice Kennedy’s theory that no non-member consented to the jurisdiction of Indian tribes, even in the Lockean sense of the consent of the governed,¹⁸¹ would no longer have persuasive value the moment that the American people ratify a constitutional amendment that presumes the presence of Indian tribes in the constitutional system of Our Federalism. There would be no Tenth Amendment-type provision precluding the Supreme Court or Congress from limiting the authority of Indian tribes, but neither would there be the blank check of judicial supremacy in Indian law.

177. See COHEN, *supra* note 10, § 1.04, at 75-84.

178. Wheeler-Howard Act, ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§461-79 (1934)).

179. See, e.g., CHARLES F. WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 71-75, 82, 182-89 (2005) (describing recovery of Menominee tribe after being terminated by Congress).

180. One initial question that will confound constitutional law experts after an amendment including Indian tribes would be how to decide which Indian tribes would be included. There are over 560 federally-recognized Indian tribes, but these tribes are recognized either by the Secretary of Interior in an administrative process or through Acts of Congress. See generally Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 491-492 (book review). Could any employee of the Department of Interior have authority to decide monumental constitutional questions? Could Congress, for that matter? Can the American people incorporate Indian tribes into the Constitution without asking for consent? Alas, these hard questions remain outside the scope of this Article.

181. See *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

In sum, amending the Constitution to prevent Indian tribes from recognizing or prohibiting same-sex marriage creates an unusual solution to an unusual problem. The practical existence of Indian tribes as a third sovereign could be linked to a constitutional provision that recognizes that existence. Many of the arguments made by opponents of tribal governmental authority point to the fact that the Constitution does nothing to either protect or authorize tribal authority. A marriage amendment in this vein eliminates this line of argument. But, in reality, it is not certain or even probable that a marriage amendment would include Indian tribes. The final part of this Article discusses the impact of a same-sex marriage amendment that is silent as to Indian tribes.

IV. IMPLICIT RECOGNITION OF INDIAN TRIBES IN THE CONSTITUTION THROUGH SILENCE

A same-sex marriage amendment that does not mention Indian tribes poses a very serious question for tribal advocates and leaders and, depending on how tribes react, to the Supreme Court. Indian tribes would have a few options. First, tribes could conform to the amendment, as many tribes would anyway. Second, tribes could rely upon the *Worcester* rule and flaunt the amendment by authorizing same-sex marriage. It is the second possibility that creates the interesting and even dangerous question for tribes. Part IV.A. and Part IV.B. analyze two theories under which the amendment could be construed to apply to Indian tribes – either under federal authority or state authority. Part IV.C. investigates the ramifications of this dispute on Our Federalism and proposes one possible outcome that would represent the implicit incorporation of Indian tribes as a constitutional entity.

A. Federal Authority over Indian Tribes

As a general matter, the individual rights provisions in the Constitution do not apply to Indian tribes, but there may be one exception and, in the coming years of the Roberts Court, there may be others. *Talton v. Mayes* and its progeny made clear that the Constitution's limitations on governments to affect the rights of citizens do not apply to Indian tribes.¹⁸² As established earlier, tribes predate the Constitution and did not consent to its strictures.¹⁸³ The lone exception, if it could be called that, is the question of the Twenty-Sixth Amendment, which set the voting age at 18. In *Cheyenne River Sioux Tribe v. Andrus*,¹⁸⁴ the question

182. See *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); *Native American Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959).

183. See *infra* notes 184-90 and accompanying text.

184. 566 F.2d 1085 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

presented was whether the Twenty-Sixth Amendment applied to a tribal election on an amendment to the tribal constitution conducted by the Secretary of Interior.¹⁸⁵ Many tribal constitutions adopted after the Indian Reorganization Act in 1934 were “boilerplate” constitutions containing similar provisions and structures.¹⁸⁶ One feature of these “model IRA constitutions” was the secretarial election, whereby the Secretary of Interior held and supervised elections on amendments to the tribal constitution.¹⁸⁷ The Secretary promulgated departmental regulations for the specific purpose of implementing these tribal constitutions.¹⁸⁸ As a result, the Eighth Circuit found in the case of the Cheyenne River Sioux elections that the election was tinged with enough federal authority so as to become a quasi-federal election subject to the Twenty-Sixth Amendment.¹⁸⁹ It is not clear at all why an election to amend a tribal constitution, regardless of which handholding agency conducts the mechanics of the election, should be subject to a federal constitutional restriction. No federal interest, other than a vague, amorphous interest in what tribes do, is implicated. One suspects that the *Cheyenne River Sioux Tribe* decision would not withstand serious scrutiny, especially after *Santa Clara Pueblo v. Martinez*.¹⁹⁰ In the latter case, the Supreme Court held that federal courts do not have jurisdiction over civil rights claims brought under the Indian Civil Rights Act.¹⁹¹ Thus, the Twenty-Sixth Amendment – only in the very narrow circumstances where the Secretary is conducting the election – applies to Indian tribes. The remainder of the Constitution, dealing with the protection of individual rights, is not applicable.

Would an amendment of general applicability apply to Indian tribes? The Supreme Court has not taken up this specific question but lower federal courts are now split on the issue of whether federal statutes of general applicability apply to Indian tribes.¹⁹² Under the Cohen formulation of tribal sovereignty,¹⁹³ approved by the Court as late as 1978,¹⁹⁴ federal statutes do not apply to Indian tribes unless they

185. See *Andrus*, 566 F.2d at 1087-88.

186. Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 92 (1993-1994).

187. See *Cheyenne River Sioux Tribe*, 566 F.2d at 1087-88.

188. See 25 C.F.R. Part 81.

189. See *Cheyenne River Sioux Tribe*, 566 F.2d at 1089.

190. 436 U.S. 49, 49 (1978).

191. *Id.* at 58-59 (citing 25 U.S.C. § 1303).

192. See Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 691, 695-96 (2004) [hereinafter Singel, *Labor Relations*].

193. See COHEN, *supra* note 10, at 122.

194. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting COHEN, *supra* note 10, at 122); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting COHEN, *supra* note 10, at

expressly include Indian tribes in their provisions. The lower federal courts have handled a few dozen of these questions and, in many of the cases, found that a statute of general applicability will apply to Indian tribes.¹⁹⁵ The courts have adopted several amorphous tests to reach this conclusion, but one area where they agree is that a statute of general applicability will not apply to Indian tribes where the statute affects a tribe's internal, domestic affairs.¹⁹⁶ This is a test created by the federal courts as a matter of federal common law. However, the result is that the hard inner core of tribal sovereignty remains the *Williams v. Lee* formulation that Indians have the right to make their own laws and be governed by them.¹⁹⁷ At the center of this core are domestic relations and family law.¹⁹⁸

Here is where the marriage amendment and federal Indian law could meet head on. After a marriage amendment purporting to ban all same-sex marriages in the United States, imagine an Indian tribe, for example, the Grand Traverse Band of Ottawa and Chippewa Indians, amending its marriage code to allow for marriages between same-sex couples.¹⁹⁹ Perhaps the Band's tribal court then presides over the marriages of several same-sex couples – tribal members, nonmember Indians, non-Indians, and maybe even foreign nationals²⁰⁰ – and attracts the attention of the U.S. Attorney's Office for the Western District of Michigan. The U.S. Attorney may then choose to bring an action seeking an injunction against the Band and its court from authorizing any other same-sex marriages and request a declaratory judgment that the marriage amendment applies to the Band.

Foundational principles of federal Indian law²⁰¹ suggest that the marriage amendment could not restrict the tribe's government authority in this area. The Eighth Circuit's conclusion that the Twenty-Sixth

122); Robert A. Williams, *The Hermeneutics of Indian Law*, 85 MICH. L. REV. 1012, 1020 (1987) (reviewing WILKINSON, *AMERICAN INDIANS*, *supra* note 11).

195. See Singel, *Labor Relations*, *supra* note 192, at 691 n.3 (citing cases by the lower courts of appeal).

196. See *id.* at 706-07 (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)).

197. See 358 U.S. 217, 222 (1959).

198. See *United States v. Quiver*, 241 U.S. 602, 602, 606 (1916); see also *Santa Clara Pueblo*, 436 U.S. at 55-56 (citing *Quiver*, 241 U.S. at 602; *Williams*, 358 U.S. at 217).

199. The Grand Traverse Band Code now defines marriage as "the legal union of one (1) man and one (1) woman as husband and wife for life or until divorced." 10 Grand Traverse Band Code § 501(e), available at <http://www.narf.org/nill/Codes/gtcode/travcode10childfamld.htm>.

200. Cf. *Eastern Band of Cherokee Indians v. Torres*, Nos. 03-143, 1529-1530-1531, 1819, 2005.NACE.0000007 (Eastern Band of Cherokee Indians Supreme Court 2005) (asserting criminal jurisdiction over non-Indian alien).

201. See Frickey, *(Native) American Exceptionalism*, *supra* note 32, at 437-43; Frickey, *Congressional Intent*, *supra* note 41, at 1210; Getches, *Beyond*, *supra* note 58, at 360; Getches, *Conquering*, *supra* note 32, at 1654; Singel, *Labor Relations*, *supra* note 192, at 697-02.

Amendment applies to Secretarial elections relied on the federal interest in the election.²⁰² The Grand Traverse Band Tribal Court, like most tribal courts, relies on federal funds to some extent, but the reliance is not mandated by federal law, unlike the elections in *Cheyenne River Sioux Tribe*. A federal court judgment that the marriage amendment does not apply to Indian Country would retain the unusual consistency of federal Indian law: the constitutional individual rights protections do not apply to Indian tribes, but Congress has authority to legislate on Indian affairs and bind the tribes.

But same-sex marriage may have more salience than other constitutional provisions. Perhaps like abortion, the fact that a tribal jurisdiction continues to authorize or prohibit same-sex marriage would generate enormous controversy from outsiders and political pressure to force these nonconforming tribes to stop. Perhaps there are some constitutional individual rights protections that are so fundamental to American society that the federal courts would somehow see fit to extend these restrictions on Indian tribes,²⁰³ despite clear federal law to the contrary. The Eighth Circuit's decision on the Twenty-Sixth Amendment avoided the main problem by coating the governmental action complained of with a federal cloak of authority, but with same-sex marriage the same federal action would not occur. A decision extending the reach of the marriage amendment to Indian Country would be unprecedented, but not outside the realm of possibility.²⁰⁴

B. State Authority over Indian Tribes

Whether state laws banning or authorizing same-sex marriage could be extended into Indian Country after a same-sex marriage amendment excluding mention of Indian tribes is a closer question than whether the amendment itself would apply to Indian tribes. Some state laws do reach into Indian Country, with the Supreme Court's support,²⁰⁵ but state laws have never been held to reach further than federal laws into the hard inner core of tribal authority over domestic relations.

202. *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088-89 (8th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

203. Cf. RONALD DWORKIN, *JUSTICE IN ROBES* 132 (2006) ("[I]n some circumstances, fidelity [to the Constitution] might be trumped by justice.").

204. Although the discussion is outside the scope of this Article, whether a same-sex marriage amendment would apply at all to Indian Country may depend on the cultural context of same-sex relationships. See Wenona T. Singel, *What's Unique About the Same-Sex Marriage Debate in Indian Country*, Address at Helen Hamilton Day, University of North Dakota School of Law (March 31, 2006).

205. E.g., *Wagon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 688-89 (2005); *Dept. of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. 61, 73-74 (1994); *Rice v. Rehner*, 463 U.S. 713, 718, 725-26 (1983).

The possibility of using state authority to enforce a same-sex marriage amendment against Indian tribes would seem fruitless where federal constitutional authority is lacking. However, the Supreme Court's federal Indian law pronouncements suggest that state laws could penetrate tribal authority where significant (if not extreme) impacts of tribal exercises of governmental authority extend beyond the Indian Country borders. The Court in *New Mexico v. Mescalero Apache Tribe*,²⁰⁶ in upholding tribal authority to regulate Indian Country hunting and fishing to the exclusion of New Mexico, relied on a rule providing for the operation of state laws in Indian Country where "the state interests at stake are sufficient to justify the assertion of state authority."²⁰⁷ These circumstances must be "exceptional."²⁰⁸ And, according to Judge Canby, "[i]t should be emphasized . . . that the occasions when states have been permitted to regulate Indians in Indian country have been rare and truly exceptional."²⁰⁹ States have been permitted to regulate (or co-regulate) tribal fishing rights,²¹⁰ collect state taxes from tribal retailers,²¹¹ and regulate on-reservation liquor sales.²¹² But in areas such as high-stakes bingo and casino operations, states have little or no say under federal Indian law.²¹³

States have no authority to regulate on-reservation domestic relations, particularly, as the *Laughing Whitefish* case demonstrates.²¹⁴ Additionally, in *United States v. Quiver*,²¹⁵ a case holding that the federal government may not prosecute reservation Indians for adultery, Justice Van Devanter foreclosed the possibility of state jurisdiction over on-reservation domestic relations.²¹⁶ Thus, it would be hard under normal circumstances to find a state interest that would justify meeting the very high standard set by the Court in the case of the *Mescalero Apache Tribe*. If on-reservation high-stakes bingo does not meet the standard, why would same-sex marriage? Same-sex marriage may not meet the standard, but there is no constitutional provision dealing with bingo, and thus that scenario is different than the circumstances proposed here. Moreover, a federal court's conception of "justice" might undo this doc-

206. 462 U.S. 324, 324 (1983).

207. *Id.* at 334 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

208. *Id.* at 331-32 (citing *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 168 (1977)).

209. WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 289 (4th ed. 2004).

210. *See Puyallup Tribe, Inc.*, 433 U.S. at 173-75.

211. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159, 161-62 (1980).

212. *See Rice v. Rehner*, 463 U.S. 713, 720-22 (1983).

213. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 211-12 (1987).

214. *See Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605-06 (Mich. 1889).

215. 241 U.S. 602, 602 (1916).

216. *See id.* at 603, 606.

trine of law.²¹⁷ In short, the result is not foreordained or obvious.

C. *The Potential Impact on Our Federalism and Federal Indian Law*

A marriage amendment excluding mention of Indian tribes raises recognition of Indian tribes as a constitutional player, if not full participant, in Our Federalism. As the law stands now, Indian tribes are neither constitutional players nor constitutional outlaws. Indian tribes do not enjoy the full pantheon of individual rights provided by the Constitution, such as the right to state-paid indigent defense.²¹⁸ But neither do tribes have felony jurisdiction.²¹⁹ Some tribes are operating governments that could be classified as theocracies,²²⁰ but others have a form of Athenian direct democracy (including women and non-propertied interests)²²¹ that goes beyond American representative democracy.²²² Tribes act outside the Constitution as “preconstitutional” or “extraconstitutional” sovereigns.

But tribes as yet have neither done anything that sufficiently shocks the constitutional conscience for a court to find that some or all of the individual rights protections of the Constitution must apply to the “preconstitutional” tribal sovereigns nor have they done anything sufficient to induce the American people to amend the Constitution. Tribes practiced polygamy²²³ and interracial marriage²²⁴ – no response. Tribes exercised criminal jurisdiction over non-Indians²²⁵ – no response (at

217. See DWORKIN, *supra* note 203, at 132.

218. See 25 U.S.C. § 1302(6) (2001) (granting right to counsel, but not right to government-paid counsel).

219. See 25 U.S.C. § 1302(7) (2001) (limiting tribal criminal penalties to one year).

220. See Valencia-Weber, *supra* note 118, at 361-62.

221. See *Candido v. Viejas Group of the Capitan Grande Band of Mission Indians*, No. D043342, 2004 Cal. App. Unpub. LEXIS 6582, at *4 (Cal. App., July 13, 2004); Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 319-20 (1991).

222. See Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195, 195-96 (1996); Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 729 n.69 (1994) (quoting THE FEDERALIST No. 63, at 425 (Madison) (Jacob E. Cooke, ed. 1961)). See generally Marci A. Hamilton, *Direct Democracy and the Protestant Ethic*, 13 J. CONTEMP. LEGAL ISSUES 411, 457 (2004) (discussing “historical and theological precedents that contributed to the Framers’ rejection of direct democracy at the constitutional Conventions).

223. See *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889).

224. See *Johnson v. Johnson’s Adm’r*, 30 Mo. 72, 84, 86 (Mo. 1860); *Morgan v. M’Ghee*, 24 Tenn. 13, 14 (Tenn. 1844).

225. See George E. Foster, *A Legal Episode in the Cherokee Nation*, 4 GREEN BAG 484, 489-90 (1892) (describing criminal trial of a non-Indian). See generally RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 168-74 (1975) (describing Cherokee criminal law).

least in the 19th century).²²⁶ Tribes opened gaming operations²²⁷ – no response.²²⁸ The Supreme Court has often held that Indian tribes do not have certain vestiges of their inherent sovereign authority,²²⁹ but it has never held that the Constitution's individual rights protections apply to limit or restrict the government operations of Indian tribes.

Would tribal nonconformance with the same-sex marriage amendment shock the constitutional conscience? Let us assume it does and let us assume that the Supreme Court's response²³⁰ is similar to other times when it disapproves of the actions of tribal governments – in other words, implicit divestiture. A holding that Indian tribes do not, by virtue of their dependent status, have inherent authority to recognize (or prohibit) same-sex marriages would be expected and consistent with previous decisions. But unlike other times when the Court has found an implicit divestiture, this case would be the first in which the implicit divestiture was intended to force Indian tribes to act in conformance with a specific individual rights provision of the Constitution. Other implicit divestitures (criminal and civil jurisdiction,²³¹ foreign nation status,²³² property rights²³³) were not intended to force tribes to conform to specific rights provisions in the Constitution.

Extending the logic of the result to other cases (mimicking Justice Scalia²³⁴) may result in the Court's invalidation of all tribal prosecutions

226. However, the Supreme Court divested Indian tribes of this authority in 1978, without reference to a constitutional provision mandating such a result. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 197, 202 (1978).

227. See KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* 20-24 (2006).

228. In fact, the Court held that state laws could not apply to Indian gaming. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

229. E.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (civil jurisdiction on non-Indian lands); *Duro v. Reina*, 495 U.S. 676, 688 (1990) (criminal jurisdiction over nonmember Indians); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195, 197, 202 (1978) (criminal jurisdiction over nonmembers); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 17 (1831) (foreign nation status); *Johnson v. M'Intosh*, 21 U.S. 543, 589-90 (1823) (full assortment of land ownership rights).

230. It seems more probable that the Court would be quicker to act than Congress. Congress could once again amend the Indian Civil Rights Act to include a provision on same-sex marriage, but it would serve only to beg the question.

231. E.g., *Strate*, 520 U.S. at 453; *Duro*, 495 U.S. at 688.

232. See *Cherokee Nation*, 30 U.S. at 16, 17.

233. See *Johnson*, 21 U.S. at 589-90.

234. E.g., *Locke v. Davey*, 540 U.S. 712, 734 (2004) (Scalia, J., dissenting) ("Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits on the ground that taxpayers' freedom of conscience forbids medicating the clergy at public expense? This may seem fanciful, but recall that France has proposed banning religious attire from schools, invoking interests in secularism no less benign than those the Court embraces today."). See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 150 (2005).

for failure to conform to the Fifth and Sixth Amendment right to indigent counsel.²³⁵ Perhaps the Court will then invalidate exercises of tribal government authority establishing a religion. Though it is far from certain, the Court could decide that tribal governments do not have to conform to the Constitution. The Court could also divest tribes of all authority to take actions contrary to the Constitution. By implication, the Court could conclude that the Constitution does apply to Indian tribes. Would this result differ from the conclusion that the First Amendment applies to states?²³⁶

If the Court concludes through a series of implicit divestiture decisions – starting with a tribal same-sex marriage case – that the Constitution does apply to Indian tribes, then perhaps Indian tribes will become part of Our Federalism. The logic follows: (1) Indian tribes are here to stay as sovereigns; (2) the Court recognizes tribes as sovereigns; and (3) the Court will apply (through the implicit divestiture doctrine) the Constitution's individual rights provisions to the tribes. The only step missing (and it is the most important) is the language in the Constitution incorporating Indian tribes. But similar language is missing from the Fourteenth Amendment.²³⁷ Perhaps the logical conclusion of the implicit divestiture doctrine, as the Court might have begun to explain it (in terms of individual rights), is incorporation of Indian tribes into the Federal Union. In other words, since the Constitution is a compact among sovereigns, holding Indian tribes to the letter of the Constitution amounts to recognition by the Court that tribes are part of the compact between the federal government and the states.

CONCLUSION

Long ago, the Michigan Supreme Court identified a conundrum in federal Indian law. "We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid by which Indian usages are so regarded. There is no middle ground which can be

235. But see Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 *BYU J. PUB. L.* 173, 183-84 (2000); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 *ARIZ. ST. L. J.* 403, 430-32 (2004).

236. See Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 *TUL. L. REV.* 251, 327-28 (2000). Cf. generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 *GEO. L.J.* 253, 253 (1982) (providing an early introduction of the selective incorporation theory of the Fourteenth Amendment (citing *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274-76 (1960))); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 71 *MO. L. REV.* (forthcoming 2006), available at <http://ssrn.com/abstract=723501> (last visited April 24, 2006).

237. See CURRIE, *supra* note 70, at 252.

taken, so long as our own laws are not binding on the tribes.”²³⁸ That conundrum remains, even after more than a hundred years of shifting and inconsistent federal Indian policy and Supreme Court jurisprudence.

And the conundrum could be highlighted by a constitutional amendment on same-sex marriage. In the arena of domestic relations, either American law trumps tribal law or it does not. If American law does not trump tribal law, even after an amendment, then Indian tribes remain constitutional outlaws, retaining inherent sovereignty and exercising the sovereign powers of a third sovereign alive and well within Our Federalism. If American law trumps tribal law after an amendment, then Indian tribes become part of Our Federalism by virtue of incorporation into the Constitution.

Indian tribes are part of Our Federalism one way or the other. A same-sex marriage amendment might bring incorporation of Indian tribes into the Constitution to the forefront because domestic relations, the particular subject matter of the amendment, would create an unexpected constitutional crisis. For Indian tribes seeking entry into the constitutional structure (and not all tribes do), the crisis would be more of an opportunity. But for the Court, struggling to balance its federalism jurisprudence between just two sovereigns,²³⁹ the addition of Indian tribes as a third constitutional sovereign may force it to push the reset button on federal Indian law.

238. *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889).

239. *Compare* *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (holding that federal criminalization of medicinal marijuana did not violate Commerce Clause), *with* *Gonzales v. Oregon*, 126 S. Ct. 904, 916-17 (2006) (finding that U.S. Attorney General did not have authority to prevent state from authorizing physician-assisted suicide).