AN AMERICAN TRIFEDERALISM
BASED UPON THE
CONSTITUTIONAL STATUS OF TRIBAL NATIONS

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I. INTRODUCTION: NATIONS WITHIN A NATION

At one end of the hall, in a constitutional law course on the structure of American government, we analyze federalism, the give and take of state and national sovereignty. At the other end of the hall, in another course on federal Indian law, we analyze the history and reality of the inherent sovereignty of tribal nations. In this academic sense, a traditional study of federalism occurs in a course on constitutional law, but a student interested in learning more about tribal sovereignty, and the give and take of state/tribal/national interaction, must be sent “down the hall” to a course on federal Indian law. This artificial dichotomy, separating tribes and their governments from the constitutional architecture of the United States, diminishes the history, reality, and importance of tribes as domestic sovereign nations.

For more than two hundred years, the term “federalism” has been used to contemplate the dynamic, flexible, ever-changing, and difficult-to-define relationship between two constitutionally recognized divisions of American government,¹ a relationship defined through an ongoing evolutionary process of Supreme Court opinions, constitutional language, and actual practice. The longstanding legal debate within federalism has been primarily over the appropriate distribution of sovereign authority to wield decision-making power between the national government and the States, rather than the identities of the players in the dynamics of federalism. The central argument of this Comment is that governmental decision-making authority in the United States involves not only the national and state governments, but also the tribal nations. An important player has been effectively neglected, if not completely omitted, in traditional constitutional federalism debate. Therefore, the most appropriate

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designation for the constitutional division of sovereign authority in American government is not "federalism" but "trifederalism," based upon constitutional language, treaties, Supreme Court precedent, and actual practice. ² Although basic constitutional law textbooks do not (yet) acknowledge trifederalism, it does exist, both in principle and in practice.

There is great divergence of opinion, particularly among scholars who defend the sovereign authority of tribal nations, about the legal relationship of these nations to the United States government and to the States. In much of the literature, emphasis is placed upon the conceptualization of tribes as independent international sovereigns outside the structure of American government, with some scholars calling for a renewal of treaty making between tribes and the United States. Historically, tribes stood as totally independent international sovereigns, each equal in status to the United States government, and the structural relationship of tribal nations to the United States has been based largely upon treaties. These facts have served as premises for the conclusion by many that tribal nations must lack constitutional status as sovereigns within the governmental structure of the United States.

² The term "trifederalism," referring to the interaction of the national, state, and tribal governments as three types of constitutionally recognized limited sovereigns, was defined by this author. See Carol Tebben, Trifederalism: The Constitutional Recognition of National, State, and Tribal Sovereignty, Address Before the Wisconsin Political Science Association Conference (Nov. 6, 1998).

³ See, e.g., VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES 254 (1974) ("With the tribes having international status, the [S]tates would have no more power to interfere with tribal governments or reservation affairs than they would have to interfere with the operations of the Canadian or Mexican government."); JOHN WUNDER, RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 8 (1994) (quoting John Clinebell & Jim Thomson, Sovereignty and Self-Determination: The Rights of Native Americans Under International Law, 27 BUFF. L. REV. 669 (1978) ("Native Americans have been sovereign nations for centuries and continue to be under international law."); Kirke Kickingbird et al., Indian Sovereignty, in NATIVE AMERICAN SOVEREIGNTY 13 (John Wunder ed., 1999) ("It is possible that a return to the treaty relationship or at least some variation of it, along with an accompanying recognition of sovereignty, is the only way to prevent non-Indian governments from interfering in the affairs of Indian nations."); Anne McCulloch, The Politics of Indian Gaming: Tribe/State Relations and American Federalism, 24 PUBLIUS 99, 102-03 (1994) (identifying three positions on tribal sovereignty: tribes as international sovereigns, tribes with no sovereignty, and a middle position with tribes as sovereign but domestic nations under federal protection); Glen T. Morris, International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples, in NATIVE AMERICAN SOVEREIGNTY 323 (John Wunder ed., 1999): [With respect to tribes as international sovereigns,] not only would the extension of the right to self-determination to indigenous nations, even if it meant secession, promote the expansion of rights in the world, it would also promote predictable international mechanisms of resolving disputes between indigenous nations and the [S]tates around them, leading to an overall expansion of global freedom, peace, and stability. See also S. James Anaya, The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective, 1989 HARV. INDIAN L. SYMP. 191 (1990).
The conceptual framework suggested in this Comment is not intended necessarily as a direct confrontation with the conceptualization of tribes as independent international sovereigns. Gerald Alfred, in the context of the Kahnawake Mohawk, has explained:

But while the majority of Canadians wish to see native societies integrated within the social and political framework they have created, Mohawks reject the idea of buying into what are essentially foreign institutions. They have recognized the political realities and the necessities of cooperating with Canadian authorities to create institutions and arrangements which will afford the community control over its internal organization, expanded jurisdictional powers, and more flexible external relationships. Canadians perceive these as ultimate objectives; Mohawks assuredly do not.

Having a clear sense of their goals does not cause the Mohawks of Kahnawake to develop tunnel vision with respect to interim measures. Without prejudice to the nationalistic goals, Kahnawake is aggressive in pursuing pragmatic arrangements to ensure that in the meantime the community achieves a level of security and prosperity.\(^4\) The conceptualization of a constitutionally sanctioned, three-sovereign government that includes tribes within the structure of American government may represent a stepping stone to a higher and independent tribal nation status. A pragmatic arrangement in the meantime may be a constitutional trifederalism. Ongoing interaction occurs among the three sovereigns as though tribes are included within the structure of American government, yet without the benefit of an unambiguous judicial reference to the structure (or make-up, or constitution) of American government itself. As a result of this interaction, which lacks clarity about the constitutional sovereignty of tribes, sovereign tribal rights are given extreme marginalization and often are ignored.\(^5\) Without abandoning the defense of the sovereign status of tribes as nations, this comment comprehends the larger reality that tribes, with their inherent sovereignty, have become incorporated into the overall structure of government within the United States as domestic rather than “independent international” sovereigns.\(^6\) Since tribes are treated matter-of-fact by the States and

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\(^5\) This is not to imply that the lack of judicial acknowledgment of the constitutional status of tribal nations is the major force in the marginalization of tribal self-government, but rather that it is a contributing factor to the marginalization that has been spawned by ethnocentrism, racism, and abandonment of democratic principles.

\(^6\) As Richard Monette states, “[w]hat we must conclude is that, while tribes were once international sovereigns, today their spheres of sovereignty overlap with the United States of America.” Richard Monette, Sovereignty and Survival, 86 A.B.A. J. 64, 65 (2000). Robert Clinton also emphasizes that, “[h]owever nonconsensual inclusion of Indian tribes within the union originally was, that process constitutes an accomplished historical and political fact.” Robert Clinton, Tribal Courts and the Federal Union, 26 Willamette L. Rev. 841, 889 (1990). See also
national government as sovereigns within American government, it is imperative to strengthen that sovereignty by clarifying the constitutional status of tribes as nations within a nation.\footnote{Duro v. Reina, 495 U.S. 676 (1990) (rejecting the argument that tribes are international sovereigns).}

Is the inclusion of tribal nations, particularly constitutional inclusion within the structure of American government, merely an assimilation threatening the sustained strength of sovereign tribal authority? One perspective would be to view inclusion as "a wholly new direction for federal Indian law."\footnote{The concept of tribes as nations within the United States was addressed, for example, in Vine Deloria, Jr. & Clifford Lytle, The Nations Within: The Past and Future of American Indian Sovereignty (1984).} The most effective protection of tribal separateness and empowerment may be found in the acknowledgment, particularly the unclouded judicial acknowledgment, of tribal nations as constitutionally recognized sovereigns. A core underlying assumption of the three-sovereign framework is that constitutional inclusion, and a renewed judicial recognition of the constitutional status of tribal governments, have the potential to give greater protection to unique tribal cultures from continued dominance and interference. This discussion offers the counterintuitive proposition that constitutional inclusion may promote a more meaningful separateness.

II. OBSCURE BEGINNINGS

Since its inception, the Constitution of the United States has recognized three sovereigns within the structure of American government. The Constitution contemplates a sovereign national government which the document was written to create, at a time when it was crucial to the people that the reserved sovereign powers of the preexistent state governments be protected. Tribal nations represent the third type of government recognized in the Constitution, although practical inclusion of these constitutionally recognized sovereigns within the structure of American government has come gradually

\footnote{As Monette states, "[v]ery few scholars unabashedly argue that tribes should strive for a structured relationship on our domestic plane," and "[w]ith tribes no longer on the international plane, treating tribes as states for purposes of applying the logic of our federalism provides a wholly new direction for federal Indian law." Richard 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, 631 nn.8-9, 633 (1994); see also W. Dale Mason, Tribes and States: A New Era in Intergovernmental Affairs, 28 Publius 111, 130 (1998) ("In the current era of self-determination, tribal governments have begun to take their place in the system of American federalism. The basis for this is the U.S. Constitution and the political determination by the federal government that tribes do have a place in that system.").}
over time. Together, these three limited sovereigns participate in a tripartite system of government known as trifederalism.

Largely out of concern that the central government created by the Articles of Confederation would not survive, the Constitution was written to establish a more powerful, albeit limited, national government. This government was to possess extensive powers, including both explicitly delegated powers enumerated in the document and implicitly delegated powers later defined by the Supreme Court as implied powers. The people were unwilling to yield the total power of the preexistent state governments to the newly-created national government, so any power not delegated to the federal government was reserved to the States. The States retain some decision-making authority as limited sovereigns, while at the same time they are often heavily regulated by the federal government. During the formative years of the United States, the Supreme Court expended much time and effort in defining the limits of state sovereignty especially as it related to national governmental power.

Tribal nations, which predate both the national and state governments, were given constitutional recognition ab initio in the Commerce Clause, which states that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Constitution made no attempt to extinguish the sovereignty of tribal nations, but instead recognized that Congress was to deal with the tribes on issues of commerce. Native tribes were recognized as governmental bodies in the Commerce Clause. Even the exclusion of "Indians not taxed" from state population rolls for purposes of representation in the House of Representatives impliedly recognized tribal nations as independent of the States and the Union, although this recognition was less direct than that contained in the Commerce Clause. In this sense, exclusion from population count and citizenship was an indication of the recognition of the separate and sovereign status of tribal nations. Although the coaptation of the tribal governments, the States, and the national government was not apparent or understood at the Founding, the governmental relationship that was established has evolved over time. Currently, each of the three divisions of American government—national, state, and tribal—possesses limited sovereign authority.

Our Constitution was established solidly upon the foundation of self-government, a principle that has application at the national, state, and tribal levels. One critical example of this principle is found in the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

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9 U.S. CONST. art. I, § 8, cl. 3.
10 U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.
States, are reserved to the States respectively, or to the people.11 These words giving recognition to the reserved power of the States also provide explicit support for the reserved power of Native governments. The amendment goes deeper than stating that the power which is not delegated to the United States government is reserved to the States by including the phrase "or to the people." The commanding words "to the people," inclusive of the Native peoples of tribal America as United States citizens, give constitutional cover to self-government in Indian country and to the sovereignty placed in these governments by the people. The Tenth Amendment augments other constitutional language by providing an explicit basis for the constitutional recognition of the sovereign tribal right of self-government. All decision-making power has not been concentrated in the national government of the United States. The plain language of this amendment protects those Americans who have chosen extra-constitutionally to vest some sovereign power in the States and, in addition, protects those Americans who have extra-constitutionally chosen to vest some sovereign power in the tribal governments. There exists a reservation of power not delegated to the government of the United States that the people of Native America have bestowed upon tribal governments, just as there exists a reservation of power not delegated to the government of the United States that the people of the States have bestowed upon state governments.

Tribes are often described in Indian law scholarship as 'pre-constitutional' and 'extra-constitutional,'12 designations that can give rise to the implication that tribal sovereign authority must lack constitutional status. Under a framework of trifederalism, the characterization of tribes as pre-constitutional is considered to be an accurate one. The designation of tribes as extra-constitutional is accurate only to some extent, however, because tribes do possess constitutional status as sovereign domestic nations within the government of the United States. The right of popular sovereignty itself is recognized in the structure of American government as pre-constitutional and extra-constitutional. Under this principle, the people placed some power in the States through state constitutions, and to their loosely organized federation under the Articles of Confederation. The people then conferred some governing authority upon the newly created national government under the Constitution, reserving some power

11 U.S. CONST. amend. X.
12 See, e.g., McCulloch, supra note 3, at 111 ("Unlike [S]tates, Indian tribes are not part of the constitutional construction of the United States."); see also DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 320 n.10 (1997) ("Tribes, I argue, have an extra-constitutional status because of their preexisting, original sovereignty; because they were existing sovereigns, they were not parties to the U.S. Constitution or state constitutions.").
to the States and to the people themselves. Both the tribes and the States are pre-constitutional in the sense that both kinds of governments existed as sovereigns before the creation of the United States Constitution. Moreover, both the tribes and the States have some reserved extra-constitutional sovereign authority that has not been delegated to the national government, even though the delegation process itself was not the same for each kind of government. Both States and tribes are recognized as sovereign governments in the document; both have constitutional status.

In addition to possessing reserved sovereign authority, there is a critical sense in which the tribes are extra-constitutional, or more specifically, extra-Bill of Rights. The protections in the Bill of Rights apply directly only against the national government, and most of these protections apply indirectly to the States through the Due Process Clause of the Fourteenth Amendment by the process of selective incorporation. Neither the Bill of Rights nor the Fourteenth Amendment limits the sovereignty of domestic tribal nations. In addition to the contexts in which tribal nations may be accurately described as extra-constitutional, there are other contexts in which tribal nations and their people do have constitutional status. The Commerce Clause and the Tenth Amendment represent two examples, and there are more.

The national government has a long history of honoring or recognizing tribal sovereign authority with the creation of treaties, which are by definition and common understanding, agreements between two sovereigns. These agreements made between the national government and tribal governments bolster the constitutional status of the tribes because, along with laws of Congress and the Constitution itself, they are the supreme law of the land. The Department of Justice has observed the link between treaties and the constitutional status of tribal sovereignty with its declaration that "[o]ur Constitution recognizes Indian sovereignty by classing Indian treaties among

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13 The States that joined the Union after ratification of the Constitution are considered constructively pre-constitutional under the equal footing doctrine. See Shively v. Bowlby, 152 U.S. 1 (1894).
15 See Talton v. Mayes, 163 U.S. 376 (1896) (declaring that tribes are not a unit of the federal government).
16 U.S. CONST. amend. XIV.
17 As a reaction to this fact, Congress imposed the Indian Civil Rights Act of 1968, applying constitution-like limitations against tribal governments, and claiming the source of legitimacy for this legislation to be the Constitution. 25 U.S.C. § 1301 (1990).
18 With the ratification of the Constitution in 1788, our new national government was bound to honor existing obligations entered into by the government under the Articles of Confederation. U.S. CONST. art. VI, cl. 1.
19 U.S. CONST. art. VI, cl. 2.
the ‘supreme law of the land.’ In some cases the promises made in prior treaties were superseded by federal law or ignored completely, yet a number of treaties with tribes are still in effect today. The United States government continues to recognize the validity of past sovereign-to-sovereign treaties. The relationship of the United States government to the sovereign tribes has changed over time, and “the measure of sovereignty upon entering treaty negotiations may be vastly different than that which emerges, especially if a federal type of relationship is contemplated and intended by both parties.” The treaty process itself has played a vital role in defining tribes as an integral and sovereign element within the overall structure of American government, and in defining the state/national/tribal constitutional relationship.

It is no coincidence that the term “reservation” referring to the power reserved in the Tenth Amendment and the term “reservation” used to denote tribal lands are identical. Both symbolize a concept of rights predating the Constitution. The Supreme Court has over the years identified many rights in addition to land occupancy, which were “reserved” to tribal nations. The Court affirmed that many rights, in addition to the occupancy of land, were reserved to tribes after treaties with the United States government, when it declared:

In other words the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted . . . And the right[s were] intended to be continuing against the United States and its grantees as well as against the States and its grantees.

In their innovative analysis of the treaty-making process between the United States and tribal nations, an analysis that has significance for the theory of a constitutional trifederal structure, Barsh and Henderson have proposed that the doctrine of “treaty federalism”

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20 U.S. Dep’t of Justice, Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes (1999), available at http://www.usdoj.gov/otj/sovtrb.htm (last visited Jan. 9, 2003). The policy statement also declares that the trust responsibility “includes the protection of the sovereignty of each tribal government.” Id.


22 See ANGIE DEBO, AND STILL THE WATERS RUN (1940) (exposing blatant corruption in the denial of treaty rights in Oklahoma).

23 Monette, supra note 8, at 631.

24 U.S. CONST. amend. X.


explains the "consensual distribution of powers between the tribes and the United States." According to this doctrine, they argue that:

Even if the Constitution itself did not guarantee certain inalienable political rights to all citizens, tribes would be entitled to political self-determination by virtue of their agreements with the United States. They are political compacts irrevocably annexing tribes to the federal system in a status parallel to, but not identical with, that of the States. "Treaty federalism" asserts that the connection between the government of the United States and the tribes "is discernible only in the hundreds of treaties which link them and give authority to federal supremacy." It is not argued here that treaties should be regarded as the only component, because many tribes have no treaties with the United States, and treaties are supported by explicit constitutional language in creating a state/national/tribal constitutional relationship. Rather, treaties are one critical component in the recognition that tribal nations have been brought within the constitutional structure of American government, and as one critical component in the recognition of tripartite federalism. Barsh and Henderson add credence to the proposition that tribes were indeed annexed to our federal system of government.

Legal scholar Richard Monette, in a perceptive contribution to our understanding of the state/national/tribal relationship under the Constitution, asserts that tribes have a federal relationship with the national government, based upon treaties, constitutional provisions, and Supreme Court precedent. Monette builds upon the treaty federalism perspective of Barsh and Henderson by stating:

To reiterate, the States granted to the Union through the Commerce Clause their inherent power to deal with tribes on the international plane. The treaty process provided the mechanism for effectuating such commercial dealings. In *Worcester*, the resulting treaty served to bring the tribe within the sovereign sphere of the federal Union. Therefore, although the Commerce Clause is a critical link in establishing the Union/state/tribe relationship, it is but one link. The other equally necessary link is the Treaty Clause. Although the interstate Commerce Clause is a source of Union power over the States by express delegation, the "Indian Commerce Clause" alone is not a source of Union power over

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28 Id.
29 Id. at 279-280.
31 Monette calls the relationship between the tribes and the national government "our other federalism," and points out that the word *federal* comes from the Latin word *foedus*, which means "treaty" and is a cognate of the word *fides*, meaning "faith." Monette, *supra* note 8, at 627, 631. David Walker, in his book on state and national federalism, defines the word *foedus* as "'covenant' not 'treaty.'" Walker, *supra* note 1, at 60.
tribes. Such Union power requires the Treaty Clause and a treaty upon which to hang an inter-sovereign relationship. Such treaties will then be construed as the Constitution itself—as a grant of rights from the local source of sovereignty to the Union with a reservation of those rights not granted, guided by principles of republican democracy and in the spirit of Our Federalism.

For Monette, this constitutionally sanctioned treaty process creates a state/national/tribal relationship, because the States, or the people of the States, granted power in the Constitution to the national government to regulate commerce with the tribes and the power to effect treaties. In addition, Monette points out that through the Supremacy Clause, which declares treaties to be the supreme law of the land, treaties have become incorporated into state law and policy, and have cemented the state/national/tribal relationship.\(^3\)

In forming treaties with the national government, the people of tribal nations became participants in a sovereign-to-sovereign federal, or federated, or federative, relationship with the national government as a "protector." This kind of analysis whitewashes history, especially the reality of armed cavalry, exploitation, and broken promises that has belied a protecting role. Yet the tribal/state/federal relationship does exist, and buried in the confusion of the relationship are sound and enduring principles of agreement. Anticipating that this conceptualization does not work well for tribes without treaties, Monette endorses the idea of an equal footing doctrine for tribes, which would construct a legal equality of treaty situation where one does not technically exist.\(^3\) This principle would mirror the equal footing doctrine as applied to the States, which has created a state legal equality, not accurate in a technical sense, that all States created the national government.\(^3\)

Frank Pommersheim lends support to the constitutional inclusion perspective with an articulate call for a national/tribal relationship of "constitutional 'faith,'" based upon "important foundational understandings relative to the constitutional status of tribal sovereignty and principles of treaty federalism."\(^3\) He advocates the continued and expanded vibrancy of tribal courts not only to counterbalance congressional intrusion into matters tribal, but also to counterbalance a

\(^3\) Monette, supra note 8, at 640. Also, the Treaty Clause states, "The President shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of those present concur." U.S. CONST. art. II, § 2, cl. 2.

\(^3\) Monette, supra, note 8, at 647; see also U.S. CONST. art. VI, cl. 2.

\(^3\) Monette, supra note 8, at 661.

\(^3\) Shively v. Bowlby, 152 U.S. 1 (1894), discussed in Monette, supra note 8, at 659.

In summary, he observes that all of this needs to be pursued and explored within a yet to be adequately identified constitutional framework—a constitutional framework that nevertheless can be discerned within principles of treaty federalism. All of these concerns are currently unhinged from any meaningful constitutional idiom or discourse and threaten to permanently extend the plenary power doctrine into the judicial realm. The sum of these developments reveals a journey—though seldom recognized—of great constitutional and historical import that needs the increased understanding and engagement of all of us within the legal community. Without this consciousness and commitment, there is only likely to be more aimless wandering in an (extra) constitutional wilderness.

Pommersheim’s concept of “constitutional faith” blends well with the Barsh, Henderson, and Monette efforts to analyze the tribal/state/national relationship, a relationship whose paradigm shift has been a continual one. The trifederalism perspective presented in this comment may assist in adequately identifying the constitutional framework of American government.

A crucial constitutional principle underlying both reserved state and reserved tribal sovereignty is the concept of multiple sovereigns in American government. The liberty of Americans was purposely protected in the Constitution by preventing the concentration of power. In The Federalist No. 51, Madison explicitly recognized the division of power among multiple sovereigns (along with separation of powers into three branches) as an example of such protection when he stated:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Madison felt so strongly that individual liberty would be protected by maintaining power in the States as a counterbalance to national power, that he was willing to support a constitution without a national bill of rights. Having participated in state politics, and in the creation of the Virginia Statute for Religious Liberty, Madison strongly supported the idea of protecting liberties at the state level, while at the same time defending a meaningful national power. The principle...
of multiple sovereigns as a benefit to liberty runs deep in American constitutional jurisprudence.

The Tenth Amendment reflects the concept of protecting liberty by the division of power among multiple sovereigns. This amendment was written at a time when Native peoples were not recognized as United States citizens and Native cultures were given little respect, yet these words were also written at a time when sovereign tribes were gradually being enveloped within the United States. A theory of constitutional trifederalism acknowledges that the same critical protection of liberty through the principle of multiple sovereigns, which is so important to retaining state power, extends to the Americans who are tribal citizens. The concentration of power in the government of the United States is no less a threat to the liberty of people today than it was in James Madison’s day, and tribal citizens are United States citizens. Conceptions of the structure of American government that exclude the reserved sovereign authority of domestic tribal nations in effect dismiss the inalienable rights of tribal Americans, characterizing these rights as a tangent to liberty.

It may be argued that the Framers intended only to create a two-part federalism when creating the Constitution. Yet, even if they were not fully aware of all the implications of the language used, in reality the seeds of a tripartite system were sown from the beginning. A historical analogy can be drawn from the Supreme Court’s interpretation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In *The Slaughterhouse Cases*, the Court declared that white butchers were not protected from the state establishment of a monopoly because these Fourteenth Amendment clauses were created to protect newly emancipated slaves. Over time the Court interpreted the plain language of the clauses to include the protection of other groups, including Americans of Anglo descent. Although perhaps the Framers of the Fourteenth Amendment were not

advocated strong central power, expressed his support for a viable state sovereignty and his belief that state power would continue to thrive in our system, in spite of the expansion of national decision-making authority. See Carol Tebben, *Is Federalism a Political Question? An Application of the Marshallian Framework to Garcia*, 20 PUBLIUS 113 (1990).


U.S. CONST. amend. XIV, § 1.

The Slaughter House Cases, 83 U.S. 36 (1873).
specifically thinking about protecting Anglo-Americans when the clauses were written, the plain language was inclusive. And although perhaps the Framers of the Constitution and the Tenth Amendment were not specifically thinking about tribal sovereignty when the words were written, the plain and inclusive language identifies tribes as tribes and people as people.

Historically, there has been in this country a general parochial disregard for the importance, complexity, diversity, and effectiveness of tribal cultures and tribal governments. In spite of decades, even centuries, of misunderstanding and harsh attempts at forced acculturation, the resilience of tribal nations, or in some cases tribal bands, is remarkable. In the words of Professor Monette, the tribes have been treated as a "federalism football" in American law in clashes of authority between the States and the national government.45 There seem to be significant parallels between the gradual evolution of federal/state relations (federalism) and the evolution of federal/state/tribal relations (trifederalism), as the Court continues to address issues of sovereign tribal authority. Gradually over time constitutional provisions, treaties, and constitutional principles have coalesced to create a trifederal structure of American government. The reserved power of the States as a traditional component of federalism and the reserved power of the tribal nations as a traditional component of federal Indian law have become constitutionally compatible.

III. THE ERRATIC JUDICIAL RECOGNITION OF TRIBAL SOVEREIGNTY

The Supreme Court of the United States has recognized sovereign tribal authority on many occasions, lending support to the argument that tribal nation sovereignty itself is an enduring principle of American jurisprudence. In one case, for example, addressing the appropriate jurisdiction of tribal courts, the Court declared, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."46 The Court unfortunately does not always follow its own precedent. Judicial protection of Native sovereignty has been erratic even though the Court has recognized that tribes have sovereignty as a matter of federal law, and even though the Court has recognized that tribal nations have constitutional status.

When the Cherokee Nation challenged the authority of the State of Georgia to have criminal jurisdiction over tribal affairs, the Court in Cherokee Nation v. Georgia declared that a tribe was a "domestic, de-

45 Monette, supra note 6.
The Court held that the Cherokee Nation was not a foreign government, a ruling that meaningfully echoed the Commerce Clause language that Congress could regulate commerce "with foreign Nations . . . and with the Indian Tribes." The Supreme Court determined it had no jurisdiction over the issue, and since the Court did not intervene, the Cherokee in effect lost their challenge to state power in that case. Tribes were not considered by the Court to be foreign nations, but rather "domestic nations," and as domestic nations tribes retained a non-foreign sovereignty. Tribal governments with their attendant tribal sovereignty were, in a legal sense, domestic sovereigns within the United States. One ultimate effect of this decision was to bring tribes within the framework of American jurisprudence as sovereigns.

One year later in *Worcester v. Georgia* the Supreme Court stated that tribal nations were "independent, political communities, retaining their original natural rights," and attempted to protect tribal sovereignty. When the Court declared that the Cherokee Nation did not fall under the sovereign authority of state government, Chief Justice Marshall was careful to explain that the relationship of the United States and the tribes involved the protection of tribes as nations.

The *Worcester* case involved a tug-of-war between the power of the United States government to create treaties with tribal nations and the power of a State to interfere with such a treaty and regulate Indian country. Was the status of tribal nations within the United States an issue of relevance in *Worcester*? Marshall made the issue not only relevant but one of constitutional relevance when he explained:

> The very term "nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties.

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48 Id.
49 U.S. CONST. art. I, § 8, cl. 3. The sentiment that tribes are not the equivalent of foreign governments was expressed by the Court in *Duro v. Reina*, 495 U.S. 676 (1990).
51 See id. at 555, quoted in ROBERT CLINTON ET AL., AMERICAN INDIAN LAW 23 (3d ed. 1991) ("This relation was that of a nation, claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."). Marshall also clarified that "[p]rotection does not imply destruction of the protected," and stated that "[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." Id. at 552, 561.
52 Worcester, 31 U.S. at 559; CLINTON, supra note 51, at 24.
Marshall clarifies that the Constitution has adopted and sanctioned treaties, and that the Constitution admits the rank of nation for Native tribes. Here the Supreme Court asserts explicitly that the Constitution acknowledges tribes as nations.

The Court in *Worcester* declared Georgia’s law to be a violation of treaties, federal law, and the Constitution of the United States. To put the language of *Cherokee Nation* and *Worcester* together, tribes are domestic independent (or sovereign), political communities (or nations), retaining their original natural rights, with dependence upon the national government for protection. The Court’s attempt to protect tribal sovereign authority became a pyrrhic judicial victory for the tribe in *Worcester* when President Andrew Jackson’s refusal to enforce the decision of the Court and implementation of the congressional Removal Act caused thousands of Native people to die when forced from tribal homelands. The precedent of Supreme Court recognition of sovereign tribal authority and constitutional status for tribal nations had been established, and since the time of the decision in *Worcester*, the Court has been awkwardly and inconsistently refereeing judicial contests between national, state and tribal nation sovereignty, without calling it trifederalism. The Court has not, however, paid attention to Marshall’s declaration that tribes have constitutional status as nations.

In more recent cases, the Court has continued to acknowledge the sovereignty of tribal nations by stating, for example, “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” When addressing a conflict between state and tribal authority on the issue of gaming, the Court reasoned, “[t]he inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government.” The Court in a variety of cases has indicated for us what some of these “traditional notions” are, and Judge Diana Murphy has identified several of these, including the power to:

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[Marshall further explained that] the words 'treaty' or 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

53 See WEBSTER'S II NEW COLLEGE DICTIONARY 15 (1995) (defining "admit" as "to permit to exercise certain rights, functions, or privileges . . . [t]o acknowledge . . . [t]o concede as true or valid"); BETTY KIRKPATRICK, THE CASSELL CONCISE ENGLISH DICTIONARY 17 (1992) (defining "admit" as "to accept as valid . . . to acknowledge").

54 With many tribal nation/United States treaties still in effect, the Constitution continues to sanction treaties, and still acknowledges tribes as nations.

55 Act of May 28, 1830, ch. 148. 4 Stat. 411 (1830).


(1) Make substantive laws to regulate internal affairs,\(^{58}\)
(2) Create tribal court systems,\(^{59}\)
(3) Set tribal membership requirements,\(^{60}\)
(4) Set criminal penalties for tribal members,\(^{61}\)
(5) Impose sales tax upon transactions occurring on the reservation,\(^{62}\)
(6) Tax oil and gas extraction on the reservation,\(^{63}\)
(7) Tax non-Indian leasehold interests on the reservation,\(^{64}\)
(8) Resolve internal disputes in a tribal forum.\(^{65}\)

In addition to these, the Court has held that a tribal government must waive sovereign immunity before being subject to suit by a State,\(^{66}\) that a tribe and the national government are two distinct sovereigns who can each prosecute the same case without violating double jeopardy,\(^{67}\) and that neither the protections of the federal Bill of Rights, nor the Fourteenth Amendment, limit tribal governments.\(^{68}\) This discussion of the attributes of sovereignty is not meant to be exhaustive, but rather is offered by way of example. It is not within the scope of this Comment to identify the character and extent of tribal sovereignty, but rather to clarify the constitutional, judicial and legislative acknowledgment of its existence.

Cases involving issues of tribal sovereignty are now commonplace in the caseload of the Supreme Court, addressing questions such as tribal self-determination,\(^{69}\) tribal court versus state court jurisdiction over Indian children,\(^{70}\) tribal court versus federal court jurisdiction,\(^{71}\) and tribal-state disputes over gaming.\(^{72}\) Although this discussion em-

\(^{59}\) Talton v. Mayes, 163 U.S. 376 (1896).
\(^{60}\) Roff v. Burney, 168 U.S. 218 (1897).
\(^{65}\) Williams v. Lee, 358 U.S. 217 (1959). All of the sources in notes 58-65 are discussed in Diana Murphy, Developing Cooperative Relationships Between Tribal and Federal Courts, Address Before the 23rd Annual Federal Bar Association Indian Law Conference (Apr. 2-3, 1998). This list represents a paraphrasing of her article.
phasizes a few of the notable cases in which the Court has been willing to respect the domestic sovereignty of tribal America, there have been many cases in which the Court has ignored or diminished that sovereignty. Why is tribal sovereignty at times given judicial protection and at other times ignored? Why are tribal governments at times considered within the structure of American government and at other times excluded?

The Supreme Court asserted in *Worcester* that tribes have constitutional acknowledgment as nations, yet it has ignored rather than honored that precedent and the language of the Constitution. Philip Frickey maintains that the Court has been "divesting" sovereign tribal authority, particularly jurisdiction over nonmembers of the tribe and over tribal land, by the creation of federal common law in Indian affairs. Apart from congressional regulation of Native affairs, the Court has made its own judicial policy destructive of tribal self-government. Frickey declares that "it is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty." Professor Frickey's elucidation of the hostile judicial environment for tribal authority may seem to clash with a call for the Court to continue to honor the fact that tribal nations have constitutional acknowledgment according to precedent. However, his analysis and the work done by other scholars, renders the longstanding need for judicial constancy even more compelling. Fidelity to constitutional language and to precedent clarifying the constitutional status of tribal nations would lessen the Court's inconsistency in federal Indian law cases and rein judicial attempts to further erode tribal sovereignty.

Native tribes are acknowledged by the Constitution as nations, and the Supreme Court has recognized the constitutional status of tribal nations when interpreting the powers of the national government and the reserved powers of the States. It is reasonable to propose that tribes merit a continued judicial recognition of their constitutional status as tribal nations.

IV. IF THE TRIBES, WHY NOT LOCAL GOVERNMENTS?

If tribal nations are constitutionally recognized as limited sovereigns within a trifederal structure of American government, why are local governments not included? Local governments hold a vital

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73 For a detailed analysis of several federal Indian law cases, especially those that have been detrimental to tribal sovereignty, see *Wilkins*, *supra* note 12.
75 *Id.* at 7.
place in the structure of American government as democracy in action at a level close to the people. For purposes of the Constitution, however, the Supreme Court has clarified the status of local governments to involve the creation and extension of state power. A common kind of example would be *Miranda v. Arizona*, in which a local police officer failed to inform the defendant of his right to remain silent and right to an attorney. The Court held the local Phoenix police officer's "failure to inform" to be state action for purposes of Fourteenth Amendment application.\(^6\) The officer, as a member of local government, was acting on behalf of the State of Arizona.

More to the point, in *Reynolds v. Sims*,\(^7\) the State of Alabama argued that the relationship of county governments to the State was analogous to the relationship of the States to the national government. Alabama wanted to predicate state senate representation on the basis of one senator from each county, without any consideration of the difference in county populations, because it claimed that this method was similar to the constitutional provision allowing each State to have two United States senators regardless of size. The Court disagreed, holding that state senatorial districts must be roughly equal in population size, even though population is not a relevant factor for representation in the United States Senate. In explaining its reasoning for treating local governments differently than the States, the Court observed that:

Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together "to form a more perfect Union." But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government . . . . Political subdivisions of States—counties, cities, or whatever—never were or never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.\(^8\)

The Court reasoned that while States were sovereign entities predating the national government created by the Constitution, county governments, which were created by state law, were at no time sovereign. Local governments receive constitutional recognition and status only indirectly through the constitutional recognition of the State. The States have not been required by the national government to recognize or honor the sovereignty of local governments, as they have been required to recognize and honor the sovereignty of tribal nations.

\(^7\) 377 U.S. 533 (1964).
\(^8\) *Id.* at 574-75.
The statement by the Supreme Court in *Reynolds* is also relevant to this discussion in another way. Not only does it point out how local and county governments are *not like* States because they are created by the States, but it also alludes to how tribes and States *are alike* in the sense that both predate the government of the United States, and both have surrendered some, but not all, power to the national government. Local governments do not independently participate in a constitutional tripartite federalism composed of the national, state, and tribal governments, except, for purposes of the Constitution, as extensions of the state governments.

Tribal governments are sovereigns, with sovereignty similar in many respects to the sovereignty of the United States government and the States. Attempts to identify tribal nations as governments similar to local, municipal, or county governments are inaccurate and a death knell to sovereignty.

V. **PLENARY POWER OF CONGRESS OVER INDIAN COUNTRY?**

A major barrier to joining the discussions of national, state and tribal sovereignty into one has been the dubious doctrine of "congressional plenary power over Indian affairs." Congress has ostensibly seized control of American Indian affairs under its Commerce Clause power. For example, early legislation known as "Trade Acts" curtailed liberty in Indian country, including limitations on movement and free speech.

The Supreme Court has paid great deference to congressional control over tribal governments, upholding a long line of statutory attempts at de-Indianization, or forced acculturation. In addition to the early Trade Acts, congressional policy on removal from tribal homelands, the mandated break up of tribal lands into individual allotments, renegation of treaty rights, and forced termination of federal-tribal relations all fell allegedly under the power of Congress to regulate commerce with tribal America. These actions were the products of an explicit and concerted effort to assimilate Native peoples into the American mainstream by the destruction of Native cultures and Native governments. This forced acculturation model has not been obliterated, yet congressional policies toward Indian country have at times attempted to support tribal autonomy, and in spite

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71 Act of May 28, 1830, ch. 148, 4 Stat. 411 (1830).
of the record of heavy congressional legislation, tribal nations still retain some sovereign authority recognized by Congress.

There has been a great deal of judicial lip service paid to an idea of congressional plenary power over tribal affairs. The Court's common deference to congressional authority over Native peoples lacks constitutional foundation, since the words of the Commerce Clause do not plainly authorize it. The Commerce Clause does bestow explicit authority upon Congress to regulate "commerce ... with the Indian Tribes." Congress seems to have taken this authority and with judicial approval expanded it to include other tribal issues in addition to commerce. The constitutional basis for congressional plenary power over tribal governments outside the realm of commerce is vulnerable to challenge.

Legal scholar Frank Pommersheim discussed the Lone Wolf case, in which the Supreme Court declared that Congress could abrogate a federal/tribal treaty based on its power to regulate Indian affairs, as a primary example of the plenary power doctrine. Pommersheim observed that

[t]he plenary power doctrine—without any constitutional mooring—ratified the absorption of Indian tribes physically and politically into the national republic and assigned complete authority over this third sovereign to the United States Congress. All this was accomplished by extraordinary evasiveness. In other words, the "need" for ongoing federal hegemony trumped any concern or necessity for constitutional integrity. The brutal effect[s] of Lone Wolf [were] both to strip tribes of their constitutional status and to make their sovereignty subject to the unconstrained (and extra-constitutional) authority of the federal government.

Citing the lack of an adequate constitutional reference for congressional plenary power over tribal sovereignty, Professor Pommersheim does make a significant point. Constitutional integrity is lacking in our present-day assessment of the place of tribal governments within the framework of American government. The words of the Constitution do not justify a congressional plenary authority over tribal nations. In addition, an ongoing judicial acknowledgment that

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84 U.S. CONST. art. I, § 8, cl. 3.
85 See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the area of Indian affairs."). This extensive interpretation of congressional power over Indian affairs was echoed in Attorney General Janet Reno's 1999 Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes that asserts that, although tribes are sovereign domestic nations, congressional control over Indian affairs is complete. U.S. Dep't of Justice, supra note 20.
87 Pommersheim, supra note 36.
88 Id. at 320 (internal citations omitted).
89 Id. at 320 n.29.
three constitutionally recognized limited sovereigns participate in a tangible trifederalism would be the epitome of constitutional integrity. This kind of acknowledgment of the constitutional status of tribal nations, well grounded in constitutional language, Marshall precedent, and the constitutionally sanctioned treaty process, would provide Congress and the judicial system with some guidance in protecting, and some limitation in diminishing, sovereign tribal authority.

Although the Supreme Court at times has recognized that Congress has a plenary power to regulate Indian affairs, at the same time it has also often recognized the existence of tribal sovereign authority. In deciding that tribal nations had the authority to establish their own membership criteria, the Court recognized that “proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.”

For the Court there seems to be no contradiction in the contemporaneous existence of both the doctrine of “congressional plenary authority over Indian affairs” and the doctrine of “tribal sovereignty.” In the Court’s view, these doctrines are not mutually exclusive, any more than “congressional plenary power over commerce” and “state sovereignty” are mutually exclusive doctrines. The troubling aspect of this comparison between States and tribes, however, is that States are commonly recognized as having some sovereign power outside the realm of commerce that Congress does not have constitutional authority to regulate. The Supreme Court has been reluctant to recognize, or more accurately reluctant to continue to recognize, that tribes have some sovereign power outside the realm of commerce that Congress does not have constitutional authority to regulate. The Supreme Court has never declared that tribal nations possess no sovereign right to self-government, and Congress itself has recognized and continues to recognize the existence of sovereign tribal authority.

VI. THE TRAIL TO UNITED STATES CITIZENSHIP

A corollary to the issue of congressional plenary power over tribal self-government is the question of the source of United States citizenship for people who belong to a tribe. Does Congress retain the power to revoke United States citizenship for the peoples of Native America? The evolution of United States citizenship status for individuals who are also tribal citizens is a critical element in understanding the constitutional status of tribal nations within the structure of

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American government. The trail to American citizenship has been painful, complicated, and even brutal, marked by government deception, broken promises, removal from homelands, and the slaughter of loved ones. It is understandable that from the perspective of tribal members, citizenship in a newly-formed alien democracy was probably not a preferred destination.

When the Constitution was created, indigenous peoples were excluded from the concept of "We the People of the United States." A primary reason for the exclusion of tribal members from the population of the United States, a reason with significant relevance to this discussion, was that tribal nations were separate sovereigns, each with its own distinct cultural and political heritage. In Article I of the Constitution, this exclusion was made explicit with the provision that "Indians not taxed," or tribal members, were not to be included in the population count for the purpose of determining representation in the House of Representatives. The exclusion of tribal members was also attributable to the attitudes of those actively creating the new nation. People of Native ancestry were referred to as "savages" and were considered to be inferior by the Eurocentric colonists who understood little of tribal ways. Even those who tended to be more generous in their acceptance of Native customs, some with unselfish motivation, usually did so as a temporary expedient to entice assimilation for purposes such as religious conversion or establishing trade.

The contrast in goals has been great between people of African ancestry who have sought assimilation into the mainstream of American life and people of indigenous ancestry who have sought to maintain the inherent right of self-government rather than assimilation. Yet, the history of the exclusion of people of African descent from citizenship under the Constitution has relevance to the exclusion of tribal members. For African Americans, explicit inclusion as United States citizens came first through congressional legislation and later through constitutional amendment.

In 1857, Dred Scott appealed to the Supreme Court for a declaration of his freedom from slavery and a recognition of his status as a United States citizen. The Court rejected Scott's arguments, declar-
ing that slaves were "property" and that Negroes (slave or free) were not citizens of the United States. The decision displayed constitutional contortionism because the Constitution did not exclude people of African descent from citizenship, and many free blacks had participated in the ratification of the Constitution. The Court's declaration, however, made exclusion from citizenship under the Constitution a reality. Less than a decade later, after the country experienced a bitter, divisive, and deadly civil war, Congress gave its response to the narrow and exclusive interpretation of citizenship announced in the Dred Scott case.

In the Civil Rights Act of 1866, Congress declared that all persons born in the United States, and subject to its jurisdiction, were citizens of the United States. Like the Constitution, the Act explicitly excluded Indians who were not taxed, or in other words, people who were affiliated with tribal nations. At the time the law was written, the United States was still making treaties with tribal nations as independent sovereigns. In addition, most members of Congress exhibited a parochial disdain and disregard for matters tribal. Members of Congress freely used descriptive words such as "wild" and "uncivilized" in references to the people of indigenous nations, while the United States military continued to apply and threaten brutality to gain control of Native peoples and their land.

In 1866, Congress proposed the Fourteenth Amendment, which was ratified by the States in 1868. With the declaration that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States," the first clause of the first section of the Fourteenth Amendment was a reaction to the Court's decision in Dred Scott, just as the Civil Rights Act of 1866 had been. This amendment contained no explicit exclusion for "Indians not taxed," but by its actions Congress clearly expressed its assumption that loyalty to a tribe disqualified a person for United States citizenship. After ratification of the Fourteenth Amendment, Congress authoritatively and unilaterally continued to bestow citizenship upon tribal members without reference to the amendment, just as it had done before the amendment was adopted. In many cases, Congress would bestow citizenship upon the members of an entire tribe at one time. A Native person was granted citizenship by Congress for a va-

98 Id. at 577 (Curtis, J., dissenting).
99 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).
101 U.S. CONST. amend. XIV, § 1, cl. 1.
102 See Stockbridge-Munsee Band of Mohicans, March 1871, 16 Stat. 406 (allowing members of Stockbridge and Munsee Tribes to become citizens); Act of Feb. 6, 1871, 16 Stat. 361 (allowing Winnebagos residing in Minnesota to become citizens through an application process);
riety of reasons including such explicitly recognized justifications as acceptance of the break-up of tribal lands and adopting habits of "civilized life;" service in the military, especially for being wounded in battle; and even conversion to Christianity. All of these actions signified that, from the congressional perspective tribal members were not considered American citizens under the Fourteenth Amendment.

In general, members of Congress assumed that loyalty to tribe and loyalty to the United States were mutually exclusive. During the 1800's, the granting of citizenship status was often predicated upon a unilateral congressional assumption that tribal affiliation had been relinquished. At times this trade-off between United States citizenship and relinquishment of tribal loyalty was stipulated by treaty, although little evidence has been presented to indicate that relinquishment was actually the understanding and intention of tribal leaders. Treaties were written in English, which the people of tribal nations often did not speak or read. Tribes were pressured, even forced, into agreement with treaty terms thrust upon tribal leaders.

It is clear that the parties to a tribal nation/United States treaty did not possess equal bargaining power, especially in terms of size and military strength.

Only three years after the Fourteenth Amendment was adopted, with its implied exclusion of Native individuals because of tribal loyalty, Congress forbade the making of any new treaties with tribal nations. These conflicting actions of Congress demonstrated the confusion about the relationship of the tribes and tribal peoples to the United States. On one hand, tribes were treated as if they were foreign countries through the exclusion of tribal members from citizenship under the Fourteenth Amendment; yet on the other, tribes were no longer treated as nations for treaty making purposes. The underlying objective of members of Congress, reflected clearly in congressional legislation and rhetoric of the time, was the assimilation of people of indigenous ancestry into the mainstream of American life.

But if assimilation was the goal at that time, why not bring it about by granting citizenship to every Native person at once? The congressional strategy instead seemed to be, "first become like us,

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Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887); Porter, supra note 94, at 123.

Porter, supra note 94, at 108-09.


Id. at 94.

See BROWN, supra note 91; Porter, supra note 94.

Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (1871).

See Porter, supra note 94, at 120-25.
then you may become a citizen.” Thus, a companion goal of assimilation was the destruction of tribal nations.

The congressional assumption that tribal members were excluded from citizenship under the Fourteenth Amendment was supported by the Supreme Court in the case of *Elk v. Wilkins*. John Elk, an individual who had been born a member of the Cherokee Nation, appealed to the Supreme Court for a declaration that he was a citizen of the United States so that he could vote. The laws of Nebraska stated that a man who had reached the age of twenty-one could vote if he were a citizen of the United States and a resident of Nebraska. Denied the right to vote because he was Cherokee, Mr. Elk argued that his birth within the boundaries of the United States and his disassociation from tribal life to become completely subject to the jurisdiction of the United States qualified him for citizenship under the Fourteenth Amendment. Although John Elk’s desire for United States citizenship at the expense of tribal loyalty may not be representative of the majority of tribal members, his case does clarify the Supreme Court’s interpretation of the Fourteenth Amendment. The Court reasoned that tribal membership and United States citizenship were mutually exclusive. They even went further to say that because he was a tribal member at the time of his birth, he could only become a citizen of the United States as an adult by naturalization at the hands of Congress. The Court compared him to the child of a foreign ambassador, who although technically within the boundaries of the United States, is considered to be only a citizen of his parents’ country. Since Mr. Elk, by this decision of the Supreme Court, was not a citizen of the United States under the Fourteenth Amendment, his right to vote in Nebraska could be denied according to state law. The Fifteenth Amendment, which prohibited States from denying the right to vote based upon race, did not protect him because he was not considered to be a United States citizen.

In his dissent, Justice Harlan argued that the Fourteenth Amendment did confer citizenship upon a person born to a tribe within the United States who later renounced tribal loyalty. Even though Justice Harlan disagreed with the Court about the application of the Fourteenth Amendment to John Elk, he did agree with the Court’s reasoning that a person could not at the same time be loyal to both the United States and his tribal nation. For Justice Harlan as well as the majority of the Court, the Fourteenth Amendment did not confer

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110 112 U.S. at 109.

111 The court compared Mr. Elk to the child of a foreign ambassador, who although technically born within the boundaries of the United States, is considered to be only a citizen of his parents’ country. *Id.* at 102.

112 U.S. CONST. amend. XV, § 1.
American citizenship upon a person at the time of birth if that person was born as a member of a tribe.\textsuperscript{115}

The Court in \textit{Elk v. Wilkins} seemed to equate birth in Indian country with birth in a nation that was foreign to the United States. Though it commented in the case that tribes were not foreign, in the decision a tribe was defined as an “alien” nation, and tribal members were considered to be like “other foreigners” and “other foreign people.”\textsuperscript{114} More than fifty years before, the Supreme Court had specifically declared that tribes were not “foreign” in the \textit{Cherokee Nation} case. There the Court had stated that tribes were not foreign nations, “not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States.”\textsuperscript{115} The Court in the \textit{Cherokee Nation} case had declared tribes to be \textit{domestic} nations, clearing the trail for a dual loyalty concept. In \textit{Elk v. Wilkins}, however, there was no indication of the possibility of dual loyalty to both tribal nation and the United States. Birth within a tribe made the Fourteenth Amendment inapplicable, and was grounds for the denial of American citizenship even when an individual rescinded tribal loyalty.\textsuperscript{116}

Tribal affiliation and United States citizenship would not be officially recognized as compatible for at least forty years after \textit{Elk v. Wilkins}.

A significant number of men from indigenous nations had been willing to fight (and die) in World War I, receiving recognition for unselfish service with the offer of American citizenship.\textsuperscript{117} When Congress chose to pass the Citizenship Act of 1924, unilaterally conferring citizenship upon all people of Indian country,\textsuperscript{118} approximately two-thirds of the members of tribal nations already had been granted citizenship status.\textsuperscript{119} The bestowal of citizenship in this legislation was unilateral in the sense that Congress did not ask individuals affected by the law whether they desired United States citizenship.

Tuscarora Chief Clinton Rickard, who had been active in attempting to block passage of the Citizenship Act of 1924, declared after its passage: “The Citizenship Act did pass in 1924 despite our strong opposition. By its provisions all Indians were automatically made United States citizens whether they wanted to be or not. This was a violation of our sovereignty. Our citizenship was in our own nations.”\textsuperscript{120} There are negative aspects to American citizenship for tribal members. One

\textsuperscript{115} \textit{Elk}, 112 U.S. at 110-11 (Harlan, J., dissenting).
\textsuperscript{114} Id. at 100-01.
\textsuperscript{115} \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1, 19 (1831).
\textsuperscript{116} \textit{Elk}, 112 U.S. at 102.
\textsuperscript{117} \textit{See} Daniel McCool, \textit{Indian Voting}, in \textit{AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY} 105 (Vine Deloria, Jr., ed., 1985); \textit{see also} Porter, \textit{supra} note 94, at 127-33.
\textsuperscript{118} Citizenship to Indians Act of 1924, ch. 233, 43 Stat. 253 (1924).
\textsuperscript{119} McCool, \textit{supra} note 117, at 105.
\textsuperscript{120} Porter, \textit{supra} note 94, at 128.
of the most significant concerns for those who cherish the perpetuation of tribal culture and self-government is that acculturation to mainstream American values poses the threat of a corresponding loss of tribal identity and autonomy. Author Robert Porter considers the imposition of citizenship upon indigenous peoples without request or approval to be a "genocidal act," causing a disintegration of tribal nations.121 What better way to destroy another culture, or a great number of other cultures, than to invite the people of these cultures to become part of your own? In the case of Native peoples, though, United States citizenship was not contingent upon the relinquishment of tribal membership, so tribal nations have continued to exist after the granting of citizenship status.

The lack of grammatical rigor in the Citizenship Act of 1924 left open the question of whether tribal members were being naturalized by Congress, or alternatively if all people born as members of tribal nations would now be born as citizens of the United States. Congress gave some clarification to the previous act with passage of the Nationality Act of 1940 by declaring in part, "[t]he following shall be nationals and citizens of the United States at birth: . . . (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe."122 Still, other ambiguities remained. Was Congress the source of citizenship status because it determined the citizenship of tribal members by passing legislation? Or had the Fourteenth Amendment, by declaring that all persons born in the United States are citizens at birth, become the basis of this status? If Congress remained the source, did Congress retain the power to withdraw American citizenship from indigenous peoples at any time? These questions remain unanswered by the courts today.

If Congress did retain the power to revoke indigenous citizenship, then there exists a two-tiered citizenship in the United States—one tier for people with tribal affiliation protected only by a law of Congress, and a second tier for all other people protected by the Constitution. There are at least four factors that point to the Fourteenth Amendment as the source of citizenship for Native American Indians. First, Indians are not excluded from the Fourteenth Amendment. Second, it has become accepted by Congress, the President, and the Supreme Court that a person who so chooses can be loyal to both a tribal nation and the United States. Third, relinquishment of tribal citizenship was not required in congressional recognition of the American citizenship of tribal members by Congress in the Citizenship Act of 1924.123 Fourth, a two-tiered system of citizenship status

121 Id. at 165.
would be antithetical to the constitutional principle of equal treatment under the law. The language of the Fourteenth Amendment stating that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States" does seem to apply forcefully to protect the United States citizenship of Native American people. Thus, the Citizenship Act of 1924 seems to have triggered application of the Fourteenth Amendment Citizenship Clause to the people of tribal nations, a protection not subject to congressional control.

When the Fourteenth Amendment declared that those born in the United States were citizens of the United States, it also added, "and of the State wherein they reside." Are people who are affiliated with a tribe, many of whom live on reserved tribal land or land held in trust for a tribe, also citizens of the State in which the tribe is located? In some cases, States have been slow to accept this idea, using a variety of justifications for withholding state citizenship status. The constitutional declaration that "Indians not taxed" were to be excluded for purposes of population count to determine state representation in the House of Representatives served as one justification. After indigenous people became recognized as citizens of the United States, however, tribal members living on tribal land began to be included for purposes of population count, thereby increasing a State's political power in Congress. One federal judge asserted in 1927 that Indians, based upon United States citizenship and residency in the State, were state citizens.

The status of tribes as separate domestic sovereigns, not usually falling under the jurisdiction of state governments, provided States with another argument to justify the exclusion of tribal members from state citizenship. In 1975, Bruce Babbitt, as Arizona Attorney General, clarified the relationship of tribal members to the State by observing, "[w]hat I think is safely established now is the principle that Indians can retain their sovereignty and their separateness politically from state governments, and at the same time, participate with full rights." The status of United States citizen has not automatically included the right to vote, and many States have denied the franchise to tribal members who desired to exercise this right, including Arizona, Idaho, Maine, Mississippi, New Mexico, North Dakota, South Dakota,

124 U.S. CONST. amend. V; U.S. CONST. amend. XIV.
125 U.S. CONST. amend. XI.
126 U.S. CONST. amend. XIV, § 2.
128 McCool, supra note 117, at 114.
Utah, and Washington. In one example, four years after the congressional recognition of United States citizenship for tribal Americans, the Arizona Supreme Court decided that United States citizenship did not include the right to vote in that State. This decision seemed to ignore the Fifteenth Amendment, ratified in 1870, which prohibits the States and the federal government from denying the right to vote on account of race for a person who is otherwise qualified to vote.

The right of the people of Native America to vote in state and federal elections has generally become honored in all States, and political science researchers have begun to study the impact of voting by tribal members in these elections. Not a great deal of research has been completed, and data is difficult to gather since voting is done by secret ballot, yet the studies demonstrate that such political participation is on the increase and tribal members under certain conditions can have a significant influence, especially upon the outcome of state and local elections.

The historical proposition that tribal citizens were not also United States citizens under the Fourteenth Amendment contributed to the overall confusion about whether tribes were part of the United States as domestic sovereigns. This proposition also led to confusion over whether tribal sovereign rights were a constitutional issue. A basic premise of trifederalism is that the people of tribal America are simultaneously subject to three limited sovereigns, with the freedom to participate in elections as citizens of the tribe, the State, and the United States. The perspective that people could be loyal to three sovereigns within the United States has gained gradual acceptance by Congress and the Court, clearing the way for tribal citizenship to be constitutionally compatible with United States and state citizenship.

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129 Id. at 106-116.
130 Porter v. Hall, 271 P. 411 (Ariz. 1928). This decision was reminiscent of the 1875 Minor v. Happersett decision, in which the Supreme Court declared that although women were citizens of the United States, this status did not give women the right to vote. Any State that chose to do so had the constitutional authority to deny women the right to vote until passage of the Nineteenth Amendment in 1920. See Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).
131 U.S. CONST. amend. XV.
132 See Jeff J. Cornthassel & Richard C. Witmer II, American Indian Tribal Government Support of Office-Seekers from the 1994 Election, 34 SOC. SCI. J. 511 (1997); McCool, supra note 117. This scholarship may also have implications for the substantiation of a constitutional trifederal framework; however, there is no evidence that the authors have intended such a purpose.
133 If an election is a relatively close one and if the tribe votes as a bloc, then voting power is correspondingly increased. McCool, supra note 117, at 129.
134 A discussion of tribal youth council members acting as pages in the New Mexico State Legislature observed, "[a]ssisting their District Senator, Arthur Rodarte, members were able to see and experience their state government at work firsthand." Jicarilla Apache Tribal Youth Council Conducts Government Project, UNITY NEWS (United National Indian Tribal Youth, Inc.), Summer 2000, at 7.
The idea of triple citizenship has been expressed by a number of people in Indian country, particularly those who actively participate in tribal, state, and national elections. According to law professor Robert Porter, "While there are no official statistics on the number of Indians who reject their American citizenship, it is likely that only a few would identify themselves solely as citizens of their own Indigenous nation." This assumption is supported by research conducted with tribal court judges and tribal court personnel in Wisconsin, in which an overwhelming number of those interviewed identified themselves as citizens of their tribe, the State of Wisconsin, and the United States.

It would be significant discrimination against Native American to maintain the doctrine that Congress retains the power to withdraw citizenship from a specific group of people based solely upon allegiance to tribal self-government. A doctrine of trifederalism stands in contrast to the proposition that Congress possesses the delegated constitutional authority to withdraw United States citizenship from Native peoples, and its corollary proposition that the United States has a two-tier system of national citizenship among its people—one tier protected by the Fourteenth Amendment and the other protected only by congressional legislation. The theory of a three-sovereign government under the Constitution encompasses the principle of constitutionally recognized citizenship for all Americans, with a category of subcitizenship for no one. Tribal citizens are deserving of full participation as state and national citizens, with the right to retain domestic sovereign tribal nation status.

The offer by the United States government of American citizenship for tribal members has brought with it the corresponding responsibility to recognize tribal nations as part of the constitutional

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135 Tricitizenship is sometimes recognized in Indian law scholarship. See, e.g., WILKINS, supra note 12, at 5:

More importantly, this discussion leads to a larger issue of why the core democratic concepts of fairness, justice, and consent of the governed have not yet been fully realized for tribal nations and their citizens despite clearly pronounced treaty rights, federal policies of Indian self-determination and tribal self-governance, positive judicial precedents, and a triple citizenship.

See also Monette, supra note 8, at 630 n.83:

As tribal citizenship seems to have evolved over time into citizenship of the Union and possibly, if problematically, of the [S]tates, one must address the improbable issues of whether tribal members can be citizens of two "independent" sovereigns, Union and tribe, or three overlapping sovereigns, Union, [S]tate, and tribe, with all the attendant rights and responsibilities.

136 Porter, supra note 94, at 140.

137 Tricitizenship was the dominant perspective expressed in interviews with tribal judges and court personnel in Wisconsin, although tribal citizenship was often expressed as the most important of the three. A minute percentage of those interviewed expressed the perspective of a single citizenship, or allegiance to the tribe alone. Carol Tebben, Trifederalism in Wisconsin (2001) (sabbatical research project, on file with author).
structure of American government. Enveloping tribal members as American citizens also involves enveloping tribal nations within the structure of American government. The constitutional protection of American citizenship for people who are also tribal citizens includes the constitutional protection of the inherent right to live as tribal nations. This inclusion of tribal citizens into the body politic as citizens of the United States represents another component of the inclusion of tribal governments into the overall structure of American government. Tricitizenship provides yet another linkage to clarify the constitutional status of sovereign domestic tribal nations, a clarification indicating nations within a nation.

By providing greater stability, prosperity, and opportunities to expand tribal authority, American citizenship also has the potential to act as an expedient to assist tribal nations in gaining a more complete self-government. Possibly the most positive aspect of federal citizenship may be an increased power to strengthen tribal autonomy, tribal separateness, and tribal independence.

VII. THE REALITY OF A TRIPARTITE STRUCTURE OF GOVERNMENT

In practice, the national, state, and tribal governments actively participate in a tripartite federalism sanctioned by constitutional language and Supreme Court precedent. Historically, Congress has at times vigorously mounted attacks on tribal cultures and tribal governments, treating them as a cultural mystery undeserving of federal or state understanding and acceptance. The more recent history of congressional legislation at times reveals respect, support, and positive action on behalf of tribal America, and homage to the right of self-government as a participant in the overall dynamics of power in the United States.

The Indian Child Welfare Act, an attempt to curb the outward flow of Native children from the tribe as a result of adoption and foster care decisions in state courts, gave statutory recognition to tribal sovereignty. Congress declared that these issues involving tribal children should be decided by tribal governments, required notice to a tribe of state cases involving tribal children, and prohibited the States, with some exceptions, from taking jurisdiction over tribal children. This law has had both positive and negative effects on the tribes because there are exceptions to tribal jurisdiction in the statute, judicial interpretation of the statutory language has at times been construed against tribal authority, and state authorities do not always follow the requirements of the act. Still, the law stands as congressional recognition of sovereign tribal authority over Native children.

Congress also acknowledged tribal sovereignty on the issue of gaming with the enactment of the Indian Gaming Regulatory Act.\textsuperscript{139} This act recognizes the right of tribes to be generally free from state regulation of gaming, and encourages States and tribes to develop tribal-state compacts to resolve disputes over gaming issues. The law seems simultaneously to honor and ignore tribal authority by prohibiting state control over tribal gaming while at the same time allowing States to dictate to tribal governments, such as by telling tribes how the money from gaming can be spent. Inconsistency notwithstanding, this law exemplifies congressional recognition of tribal sovereignty over some aspects of gaming. These laws, and others like them,\textsuperscript{140} indicate that Congress honors tribal sovereignty, a sovereignty that came into being before Congress existed.\textsuperscript{141} In a statute not generally considered to be “Indian law,” Congress curbed the practice of unfunded mandates to state, local, and tribal governments.\textsuperscript{142} This law stands as one of many examples of the pedestrian congressional acknowledgment that the sovereign tribal nations in common practice participate within the sphere of American government. They are governments having sovereign authority over people who are also United States citizens.

A conventional form of state recognition of tribal sovereignty has been the formation of voluntary tribal-state compacts, or tribal-state accords, encompassing such issues as environmental protection, criminal jurisdiction, traffic and safety, child protection, property use, and education, among others.\textsuperscript{143} Congress has strongly encouraged the development of these accords in reference to gaming; however, their use has gone far beyond this issue alone. These accords are, based upon their explicit language, agreements between two sovereigns. Some States have also given recognition to tribal sovereignty with either statutory or constitutional disclaimers of state jurisdiction over tribes. This kind of deference between the States and tribes, with encouragement from the national government, supports the

\textsuperscript{140} \textit{See}, \textit{e.g.}, Indian Self-Determination and Education Assistance Act, 21 Stat. 88 (1975) (representing a major policy shift toward support of tribal autonomy); Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (fostering the sovereign tribal right of self-regulation, but with Eurocentric requirements). In the Indian Civil Rights Act, 25 U.S.C. § 1301 (1990), Congress created civil rights legislation ostensibly to strengthen tribal self-government. The reality of this legislation, however, is that the sovereign power of tribal governments has been limited by the hands of Congress.
concept of States and tribes as sister sovereigns within a trifederal structure of government.

Federal and state courts have paid deference to the sovereignty of tribal courts not only in substantive decisions by the courts, but also in administrative actions. One growing example is the establishment of federal/state/tribal judicial councils, or forums, where jurisdictional issues can be discussed by judges representing the three sovereigns. In discussing the establishment of a council composed of federal, state, and tribal judges in the Ninth Circuit, Chief Judge Wallace commented that, "[i]t is not intuitively obvious that the federal courts have a legitimate role to play in diplomatic relations with tribal courts. The two systems are, after all, independent, serving different sovereigns." He went on to explain the importance of the work done by these advisory bodies to smooth out potential judicial conflicts over federal, state and tribal sovereignty. The State of Wisconsin has established such a council composed of federal, state, and tribal judges, calling it the Tribal Forum, or alternatively, the "federal, state, tribal judicial forum." In Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians, the Wisconsin Supreme Court brought attention to the Tribal Forum in a conflict between state and tribal sovereign authority. The plaintiff-employee had received judgment against the tribe in state court on an employment contract, and the defendant-tribe had won judgment in tribal court declaring the contract invalid. The Wisconsin Supreme Court declined to uphold the state court damage award even though the state action was the first to be filed. Explicitly acknowledging tribes as "separate sovereigns," the court remanded the case, directing the state trial court to communicate with the Bad River tribal court to work out the issue of which court had sovereign authority in this case as a matter of comity. No state protocols for allocation of judicial jurisdiction had yet been established. The court then noted the ongoing work of the newly created Tribal Forum, and invited the group of state, federal, and tribal judges to continue the development of appropriate protocols for future cases. The Teague decision encourages and exemplifies trifederalism in action.

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144 In 1999, the Federal Bar Association granted official status to tribal courts as "courts of record" for purposes of determining membership in the association. Attorneys and lay advocates who have not been admitted to practice before state or federal courts, but have been admitted to practice before tribal courts, can now request membership.


146 599 N.W.2d 911 (Wis. 2000).

147 Id. at 916.

148 Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians, 612 N.W.2d 709, 718 n.11 (Wis. 2000) ("We believe that this is a logical forum for the development of pro
A significant proportion of trifederalism interaction occurs between tribal governments and surrounding local governments, or more particularly, between tribal courts and tribal police, on one hand, and the local state courts and local city and county police, on the other. Within the trifederalism framework, and for purposes of the Constitution, local police and local courts fall under the category of "the state." This day-to-day interaction between the tribe and the State at the local level includes, for example, the cross-deputizing of officers as representatives of both the tribe and the State, local state court extension of full faith and credit to tribal court decisions, local county sheriff enforcement of tribal court decisions, and tribal court extension of full faith and credit to state court decisions. In addition, States may provide facilities for incarceration of those convicted in tribal court, and States may provide financial help for the foster care of tribal children after adjudication in tribal court.

This discussion points to the often unrecognized reality, from only a few of its many perspectives, that tribal governments, with their inherent right of self-government, are an integral part of governmental action within the United States. The perception of tribes as sovereign governments within the United States is a pervasive one in the systemic interaction of tribe, State, and Union.

VIII. THE CONSEQUENCES OF FAILING TO RECOGNIZE TRIFEDERALISM AS A CONSTITUTIONAL PRINCIPLE

Every tribe is potentially in peril of diminished self-government without a continued judicial acknowledgment that sovereign tribal authority has constitutional status. The example of one tribe is given here to highlight the consequences engendered by the Court's erratic and unstable federal Indian law policy in the case of Alaska v. Native Village of Venetie Tribal Government. Venetie, a village within the Arctic Circle in the northern reaches of Alaska, is home to the Neets'ài Gwich'in. When the Native village attempted to tax the State of Alaska on the building of a school on tribal land, the State ultimately challenged the tax in the United States Supreme Court.
Since the Court had previously interpreted sovereign tribal authority to include, *inter alia*, the right to tax non-Indian activities on tribal land,\(^{152}\) the case raised the fundamental issue of tribal sovereignty. The decision in *Venetie* about the tribe's right to tax the activities of the State of Alaska on tribal land turned on whether or not the village of Venetie was Indian country, a legal designation that, according to Congress, includes reservations, former allotments, and dependent Indian communities.\(^{153}\) For purposes of this Comment, the case turned upon the constitutional status of this remote Native village within the framework of American government.

In its *Venetie* decision, the Supreme Court came to the remarkable legal conclusion that the remote Native village of Venetie was not Indian country. The conclusion, based primarily upon the language of the Alaska Native Claims Settlement Act (ANCSA), is remarkable in the sense that it does not comport with common sense, history, tradition, or reality.\(^{154}\) Rather than answer the question of how the Native village of Venetie fits within the constitutional framework of American government, the Court's decision instead magnified the need for an answer to this question. Without an ongoing judicial acknowledgment of the constitutional status of tribal nations to lend consistency to federal Indian law, each challenge to tribal authority forces a tribe to assert its own sovereignty. In *Venetie*, the Neets'ai Gwich'in were at a legal disadvantage, because although the sovereignty of the tribe was negatively affected by the outcome, the issue of sovereignty was given minimal consideration by the Court. The Court failed to observe that the sovereign right of tribal self-government has extra-congressional, even extra-judicial, origin, and that the sovereign right of self-government has constitutional recognition.

Since the land owned by the Neets’aii Gwich’in in *Venetie* was not a reservation or former allotment, the Court reasoned that, in order to be classified as Indian country, the village must be designated as a “dependent Indian community.” This designation required the satisfaction of two requirements: first, that the land be “set-aside” by Congress for Indian use and secondly, that there be “federal superintendence” of the land.\(^{155}\) According to the Court, neither of these requirements was satisfied in *Venetie*.

Addressing the “set-aside” prong, the Court observed that, under ANCSA, Congress had allowed the tribe to own the land in *fee simple*.


\(^{153}\) *Venetie*, 522 U.S. at 525.


\(^{155}\) *Venetie*, 522 U.S. at 551.
with the authority to sell it to non-Indians, and therefore it could not be considered "set-aside for Indian use." Under the slight of hand of non-Indian common law principles of property, the tribe was in effect stripped of sovereign power because of the way it now technically owned the land, even though this had been tribal land since time immemorial. To hold that the land was not technically Indian country defied centuries of history, and defied the tradition of the Neets'ài Gwich'in to govern the isolated region as tribal land.

Venetie was not considered to be subject to "federal superintendence" under the second prong because the Neets'ài Gwich'in were essentially independent. It is ironic that, under the congressional requirement that a tribe be a "dependent Indian community" to be Indian country, the result is that the more independent a tribe becomes, the less it is considered to be Indian. The Court in Venetie recognized this non sequitur but declined to resolve it, stating:

The Tribe's federal superintendence argument, moreover, is severely undercut by its view of ANSCA's primary purposes, namely, to effect Native self-determination and to end paternalism in federal Indian relations . . . . The broad federal superintendence requirement for Indian country cuts against these objectives, but we are not free to ignore that requirement as codified. The Court defied common sense by holding that a tribe that has become more independent in governing its own affairs has become less Indian.

If ANSCA had been created by Congress with a full understanding that tribal nations and their sovereign right of self-government were constitutionally recognized, it is possible that it would have been more sensitive to the sovereign rights it affected. In a comparable way, if Venetie had been decided by the Court with an explicit reference to constitutionally-recognized sovereign tribal authority, it is possible that the Court would have been more sensitive to this issue. Instead, the Supreme Court, in deciding against Venetie, approvingly quoted Judge Fernandez, who concurred in the Ninth Circuit opinion below decided in favor of Venetie. Referring to ANCSA, Fernandez stated that "[i]t attempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach." Even though this statement was offered in support of Venetie's sovereign authority to tax, the Supreme Court instead used the statement to support the Court's decision to disallow

\[156\] See id. at 533.
\[157\] Id. at 534.
\[158\] Id. at 526 (quoting Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996) (Fernandez, J., concurring)).
that power. The final decision of the Supreme Court in *Venetie*—that the remote Native village was not Indian country and therefore did not have the sovereign authority to tax the activities of non-Indians on tribal land—did not comport with the reality that this was a remote Native village that owned and governed its land. Even the definition of sovereignty itself was diminished by the decision.

A unifying constitutional framework could be especially beneficial to a tribal village such as Venetie. Due primarily to the lack of treaty protection in Alaska, and without a continued judicial recognition of the constitutional status of sovereign tribal authority, Native peoples within the State must usually rely upon express congressional statutory language for protection of their sovereign authority. The considerable disparity in federal Indian law has made congressional policy and judicial interpretation unpredictable, not only in Alaska, but also for all tribes throughout the United States. It is not argued here that the continued judicial recognition of the constitutional status of tribal self-government is confined to the issue of victory or defeat in a single case. The States (unlike tribes) have a continued judicial recognition of the constitutional status of state sovereignty as a foundation upon which to defend sovereign authority, yet a State does not always win a case where state sovereignty is at stake. It is not expected that a tribe would win in every case involving sovereign tribal authority.

If the tribe had been arguing from a foundation based upon a persistent judicial recognition of the constitutional status of tribal sovereignty in *Venetie*, the Neets’ài Gwich’ín would have had a strong argument to protect the right to tax non-Indian activities on their land, and perhaps they would have been successful. If *Venetie* had been decided within a trifederalist perspective, the Court’s banal assertion of congressional plenary authority over Native affairs (sans constitutional reference) at minimum would have been tempered by the judicial recognition of sovereign tribal authority as a constitutional principle, and possibly even replaced with a staunch judicial defense of such a principle. The *Venetie* decision represents only one example among many in which the liberty of self-government for Native Americans has been threatened. Without an enduring and ex-

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159 See Tee-Hit-Ton Indians v. United States, 348 U.S. 273 (1955) (exemplifying the Court’s reliance on express congressional language).

plicit judicial mandate to respect the constitutional status of tribal sovereignty, the Court in Venetie was able to quietly and deftly avoid the issue of sovereign authority, making the decision fundamentally inconsistent with a constitutional doctrine of trifederalism.

IX. CONCLUSION AND COMMENCEMENT

The States, the federal government, and tribal nations interact within a trifederal structure of American government. Congress, the President, the Court, and the States have all in some, and indeed many ways, given recognition to tribes as sovereign entities. If tribal governments retain a limited sovereignty, and if they are domestic as opposed to foreign nations, then a trisovereign, or a trifederal structure does exist in the United States. Trifederal interaction occurs in a multitude of ways, providing a meaningful context for analyses of the nature and extent of sovereign tribal authority.

Tribes are nations within a nation not only in an historic sense, but also in a constitutional sense.161 Tribal governments are given recognition in the Constitution as sovereign nations, and sovereign tribal authority is grounded in enduring constitutional principles. The Supreme Court has declared that the Constitution acknowledges the nation status of tribes.162 With a triple citizenship as citizens of the tribe, the State, and the United States, tribal members hold an inherent constitutional right to self-determination. These indicators of the constitutional status of tribes as nations within the United States compel respect for sovereign tribal authority.

Adhering to constitutional principle, the words of the Constitution, and its own precedent of interpreting the document, the Court could again, and more clearly, effect the meaningful inclusion of tribal America within the United States. This inclusion would encompass a persistent acknowledgment by the Supreme Court of the constitutional status of tribal nations, a status that had its obscure conception upon the writing of the Constitution, subsequently supported by treaties and Supreme Court interpretation. A judicially recognized constitutional trifederalism flows naturally from the judicial recognition of the constitutional status of tribal nations.

Trifederalism, with its historic constitutional roots, has an emerging future as the skeletal framework upon which intergovernmental

Reina, 495 U.S. 676 (1990) (limiting the sovereign authority of the tribe to prosecute nonmember Indians); Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 8045 (1985) (holding that federal courts have jurisdiction to entertain challenges to the civil jurisdiction of tribal courts over nonmembers); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (declaring that tribal courts do not possess criminal jurisdiction over nonmembers).

161 DELORIA & LYLTE, supra note 7.
162 See supra text accompanying note 55.
relationships within the United States can be built, lending clarity to a dynamic that has been marked with inconsistency and injustice. The purpose of this work has been to provide sufficient arguments to engender a dialogue about trifederalism as a theoretical perspective of the constitutional structure of American government, and as a critical component of American jurisprudence. Another purpose has been to submit some persuasive evidence (though admittedly not complete) to continue to verify the existence of trifederalism in action. It is anticipated that a continuing verification will enrich, enliven and expand the clarification of the trifederalism that does exist in American government, foreclosing a “down the hall” approach to tribal nation status. The two evolving academic discussions, one about the dynamics of federalism and the other about the sovereignty of tribal nations, would effectively be joined as one.