

Tulsa Law Review

Volume 40
Number 1 *Tribal Sovereignty and United States v. Lara* Volume 40 | Number 1
v. Lara

Fall 2004

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Recommended Citation

Kevin K. Washburn, *Lara, Lawrence, Supreme Court Litigation, and Lessons from Social Movements*, 40 Tulsa L. Rev. 25 (2013).

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LARA, LAWRENCE, SUPREME COURT LITIGATION, AND LESSONS FROM SOCIAL MOVEMENTS

Kevin K. Washburn*

*United States v. Lara*¹ was hailed as a victory for Indian tribes because it upheld tribal criminal jurisdiction over non-member Indians. *Lawrence v. Texas*² was hailed as a victory for the gay rights movement because it upheld the due process right of gays to be protected from criminal prosecutions for consensual sexual acts done in private within their own homes. Despite dramatically different contexts, the two cases share a common thread: both are cases in which interested groups achieved important successes by marshalling broad support for their arguments at the briefing stage which helped pave the way for Supreme Court victory.³ In each case, advocates received support from unlikely sources.⁴ This modest link provides an opportunity to examine some aspects of the strategies employed in the Supreme Court litigation in the *Lara* and *Lawrence* cases and to evaluate how and whether Indian tribes can adapt successful legal strategies of the gay rights movement or other social movements.⁵

In a series of recent articles William Eskridge has documented the development of constitutional legal strategies during the past century by the gay rights movement, as well as the civil rights movement and the women's rights movement, and has evaluated their successes.⁶ Although these movements differ

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1. 124 S. Ct. 1628 (2004).

2. 539 U.S. 558 (2003).

3. Three briefs were filed in the *Lara* case in support of the tribal position; the briefs were the result of a coordinated effort between amici consisting of eight states, eighteen tribes, and the National Congress of American Indians. See *infra* nn. 24, 33-34. Sixteen briefs were filed in the *Lawrence* case in support of the gay individuals; the amici filing these briefs were even more numerous, and included many powerful organizations. See 539 U.S. at 561-62 (listed in footnote).

4. For example, states are not always likely to align their interests with tribes, as some did in *Lara*. The amici in the *Lawrence* case include several somewhat surprising organizations.

5. The notion is not as creative as one might think. While drafting this essay, I received in the mail a copy of a reprint from a colleague who has suggested the converse, i.e., that the gay rights movement may well have something to learn from Indian law. See Robert Laurence, *What Could American Indian Law Possibly Have to Do with the Issue of Gay-Marriage Recognition?: Definitional Jurisprudence, Equal Protection and Full Faith and Credit*, 24 N. Ill. U. L. Rev. 563 (2004).

6. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2062 (2002) [hereinafter Eskridge, *IBSMs*]. See

in several fundamental respects from the tribal sovereignty movement, tribes and these identity-based social movements have faced the same challenge: how to convince the Supreme Court to accept their respective views of their status within the United States and the Constitution. With the notion that the work of these movements might be able to inform Indian legal strategists, this essay will search Professor Eskridge's work for simple insights that might be useful in the field of Indian law and for the tribal sovereignty movement. It will first briefly discuss *Lara* and *Lawrence* and the link between the two cases. It will then summarize some insights from Professor Eskridge and comment on their relevance to Indian tribes.

I. LARA AND UNIFIED INDIAN SUPREME COURT STRATEGY

Lara was nominally a criminal case involving the issue of whether an Indian defendant could be prosecuted by the federal government following a tribal prosecution by a tribe not his own.⁷ Since he was not a member of the tribe that prosecuted the original offense, the defendant argued that the tribal prosecution had been authorized by federal law.⁸ And if it had been so authorized, the defendant argued, the initial tribal prosecution was equivalent to a federal prosecution and the subsequent federal prosecution was therefore invalid under the Constitution's Double Jeopardy Clause.⁹ The case raised serious issues of congressional authority, inherent tribal power, and the intersection of two important American legal constructs. The case posed the following question: When Congress acts to restore the power of Indian tribes to prosecute non-member Indians, is that action a delegation of federal authority that would create, in essence, a federal prosecution by Indian tribes acting pursuant to the law? Or, on the other hand, is the congressional action simply a recognition of preexisting and inherent tribal authority that would not constitute federal jeopardy?¹⁰

The United States argued that Congress has restored to the tribes a sovereign power that predates the Constitution and laws of the United States and that this tribal sovereign power derives from a source independent of those laws.¹¹ This argument was perhaps most elegantly summarized in a government brief in a similar case in the Seventh Circuit that preceded *Lara*:

Tribal sovereignty is a river flowing from a natural source, channeled within the overriding sovereignty of the United States, enlarged or obstructed by the will of

also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419 (2001) [hereinafter Eskridge, *Channeling*]; William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. Rev. 1183 (2000) (comparing the relative utility of due process and equal protection arguments by subordinated groups).

7. *Lara*, 124 S. Ct. at 1628.

8. *Id.* at 1632. See also 25 U.S.C. § 1301(2) (2000) (recognizing the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians").

9. *Lara*, 124 S. Ct. at 1631. Since this piece is being published as part of a symposium on *Lara*, the author does not feel obliged to recount at length the facts or the legal background of the case.

10. *Id.* at 1632.

11. Petr. Br. at 11, *Lara*, 124 S. Ct. 1628.

Congress. When Congress removes an obstruction, tribal sovereignty flows free of it.¹²

Because *Lara* was a federal criminal case, no tribe was a party to the case. However, the issues at stake went to the heart of tribal sovereignty, causing tribal governments to worry about the outcome and leading them to participate in the case as amici.¹³

Like Indian tribes, opponents of tribal sovereignty were interested in the case as well. Anti-tribal interest groups filed numerous amicus briefs in the case, generally asking the Court to decide that tribal sovereignty was not broad enough to support criminal jurisdiction over an Indian who was not a member of the tribe.¹⁴ With the exception of a brief filed by the National Association of Criminal Defense Lawyers (“NACDL”), most of the defendant’s amici directed their arguments toward discrediting tribal justice systems rather than supporting the defendant *Lara*.¹⁵ Because these briefs tended to present positions well outside of the mainstream of federal Indian law jurisprudence, these briefs were not particularly threatening to tribal sovereignty.¹⁶

However, one amicus brief caused significant worry. The states of Idaho, Alabama, Louisiana, Nebraska, South Dakota, and Utah (“Idaho brief”) filed a brief that nominally supported the position of the United States that *Lara* had no valid double jeopardy claim in this case, but nevertheless took a position that was hostile to Indian tribes.¹⁷ Idaho and these other states asserted that the authority of Congress to restore an inherent tribal power was a “grave” issue.¹⁸ They “profoundly disagree[d]”¹⁹ with the position that Congress has the power to restore a tribe’s inherent authority²⁰ and argued that this power must be found unconstitutional.²¹

12. Petr. Br. at 7, *U.S. v. Long*, 324 F.3d 475 (7th Cir. 2003).

13. See e.g. Michael Moreland, *The Native Voice, For All Our Relations, “We Never Give Up”*: An Interview with John E. Echohawk, <http://www.native-voice.com/fullstory.cfm?ID=666> (accessed Oct. 22, 2004) (discussing the importance of *Lara* to tribes).

14. Four amicus briefs were filed in support of the defendant Billy Jo Lara. The amici were the National Association of Criminal Defense Lawyers, Br. of Amicus Curiae Natl. Assn. of Crim. Def. Law., *Lara*, 124 S. Ct. 1628; the Citizens Equal Rights Foundation, Br. of Amicus Curiae Citizens Equal Rights Found., *Lara*, 124 S. Ct. 1628 [hereinafter *CERF Br.*]; Lewis County, Idaho, Mille Lacs County, Minnesota, and Thurston County, Nebraska, Br. of Amici Curiae Lewis County, Idaho, Mille Lacs County, Minn., & Thurston County, Neb., *Lara*, 124 S. Ct. 1628 [hereinafter *Counties Br.*]; and Thomas Lee Morris, Elizabeth S. Morris, and Roland J. Morris, Br. of Amicus Curiae Thomas Lee Morris, Elizabeth E. Morris, & Roland J. Morris, *Lara*, 124 S. Ct. 1628 [hereinafter *Morris Br.*].

15. See e.g. *CERF Br.*, *supra* n. 14, at 11 (emphasizing that tribal courts do not provide full constitutional protections).

16. See e.g. *Counties Br.*, *supra* n. 14, at 1 (challenging tribal jurisdiction by asserting that until recently, “[n]o one maintained that the original reservations still existed”); *CERF Br.*, *supra* n. 14, at 1 (also using the term “original reservations,” as well as implying that tribal courts abridge the rights of U.S. citizens); *Morris Br.*, *supra* n. 14, at 20 n. 10 (comparing blood quantum standards for enrollment in an Indian tribe to the Nazis’ treatment of persons with Jewish blood).

17. Br. of Amicus Curiae States of Idaho, Ala., La., Neb., S.D., and Utah, *Lara*, 124 S. Ct. 1628 [hereinafter *Idaho Br.*].

18. *Id.* at 3.

19. *Id.*

20. *Id.* at 3-4. The brief argued that the states’ chief interest was raising “criminal process-related concerns” on behalf of their citizens to prevent these citizens from being subjected to treatment that

It should be no surprise why this brief might be particularly worrisome to tribes. A very large body of the Court's jurisprudence has been developed in cases in which states and tribes are opponents. Given the strong support for states' rights in the jurisprudence of one faction of the Supreme Court, a significant concern by states might motivate some members of the Court to rule in favor of the states and against the tribes.²² In tribe-versus-state cases, tribes have often found themselves on the losing end. Indeed, in cases involving tribes-versus-*anyone* in recent years, tribal victories have been the exception. The tribal win-loss record is so bad that Professor David Getches recently noted that convicted criminal defendants have had a better chance than Indian tribes of prevailing in the Supreme Court in recent terms.²³ Under these circumstances, a case in which states and criminal defense lawyers line up together against tribes might present a particularly serious cause for concern.

Yet this risk was dramatically addressed by the filing of a brief by several other states in support of tribal sovereign authority to prosecute non-member Indians. This brief in support of tribal sovereignty, which was filed by eight states led by the State of Washington, offered unqualified support for the position of the United States in favor of Congress's power to restore inherent tribal sovereignty.²⁴ Washington's brief on behalf of itself and Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon effectively nullified any presumption that might have arisen from the Idaho brief that there was unified state opposition to tribal criminal jurisdiction over non-member Indians.

The Washington brief provided an important policy viewpoint in the briefing by discussing the important partnership that those states have developed with Indian tribes to provide effective law enforcement²⁵ and by agreeing that the restoration of inherent tribal power over non-member Indians was a valid exercise of Congress's power in Indian affairs.²⁶ These states, many of which are larger and more influential than those that joined the Idaho brief, also addressed important public safety issues. For example, they noted that it is very common for non-member Indians to reside on reservations. They also highlighted the jurisdictional

might violate criminal procedural protections found in the Bill of Rights (which do not apply to tribes). Given the vigorosity with which some of these same states opposed incorporation of the Bill of Rights through the Fourteenth Amendment, their position is more than a little ironic. *Id.* at 1; see e.g. *Duncan v. La.*, 391 U.S. 145 (1968) (holding that a defendant facing a possible sentence of two years plus fine was entitled under the Sixth and Fourteenth Amendments to a jury trial); see also *Turner v. Dept. of Empl. Sec.*, 423 U.S. 44 (1975) (holding that the Fourteenth Amendment required a more individualized means to achieve legitimate state ends in the case of a Utah statute presuming the incapacitation of pregnant women).

21. *Idaho Br.*, *supra* n. 17, at 2-4.

22. See generally John P. Lavelle, *Sanctioning a Tyranny: The Diminishment of Ex parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d'Alene Tribe*, 31 *Ariz. St. L.J.* 787 (1999).

23. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 *Minn. L. Rev.* 267, 281 (2001).

24. Br. of Amici Curiae States of Wash, Ariz., Cal., Colo., Mich., Mont., N.M., and Or., *Lara*, 124 S. Ct. 1628 [hereinafter *Washington Br.*].

25. *Id.* at 1.

26. *Id.* at 1-2.

gap that might therefore arise in the absence of tribal authority to prosecute non-member Indians.²⁷ According to the Washington brief, state interests in good government and effective law enforcement favored the position of the United States and Indian tribes.²⁸

Aside from the substantive value of the arguments, the filing of the Washington brief made clear that large and sophisticated Western states supported the tribal position and that *Lara* was not simply a tribe-versus-state case, dramatically changing the complexion and posture of the case before the Court. A states' rights court might nevertheless have adopted a states' rights position. But, in light of the fact that more states supported the tribal position than opposed it, such a position by the Supreme Court might ultimately have been a stronger statement of federal paternalism than federalism. Strong state support for the tribal position thus placed the states' rights faction of the Court in an awkward position and undermined its ability to persuade moderate justices.

Given the importance of this brief, it is worth examining the briefing strategy that gave rise to its filing. The Washington brief was the capstone of a Supreme Court strategy that had been several years in the making. Through the 1990s, Indian tribes worried about the Supreme Court as it became clear that the Supreme Court was no longer the chief protector of important principles of tribal sovereignty, and was becoming a forum where it was difficult for tribes to prevail.²⁹ Though tribes knew intuitively that the Court was becoming a hostile environment, the research of Professor Getches painted an alarming picture of the tribal success rate before the Supreme Court. It no doubt served to confirm their suspicions.³⁰ A plan of action began to form.

In 2001, the National Congress of American Indians ("NCAI") and the Native American Rights Fund ("NARF") joined together to form a tribal Supreme Court Project ("Project").³¹ The Project worked to coordinate briefing in cases before the Supreme Court. In *Lara*, Project lawyers pursued a three-pronged strategy.³²

27. *Id.* at 2-7.

28. *Id.* at 6-8.

29. Compare e.g. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985); with e.g. *Nev. v. Hicks*, 533 U.S. 353 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Seminole Tribe of Fl. v. Fl.*, 517 U.S. 44 (1996). See also Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 *Am. Indian L. Rev.* 274, 274-75 (2004) ("The Supreme Court in the late Seventies and through, I would say, the mid-to late Eighties, was particularly supportive of Indian tribes and Indian people . . .").

30. Getches, *supra* n. 23, at 281. Getches notes that three general trends in the Court in recent years are that "[v]irtually without exception, state interests prevail; attempts to protect specific rights of racial minorities fail; and mainstream values are protected." *Id.* at 268. He also lists some of the setbacks tribes have experienced in the Rehnquist Court. *Id.* at 282-83.

31. See Moreland, *supra* n. 13; see also Native Am. Rights Fund, *Tribal Supreme Court Project*, <http://doc.narf.org/sc/index.html> (accessed Oct. 23, 2004).

32. Memo. from Tex Hall, Pres., Natl. Cong. of Am. Indians & John Echohawk, Exec. Dir., Native Am. Rights Fund, to Tribal Leadership, *Tribal Supreme Court Project: U.S. v. Lara Raises Significant Issues for Tribal Sovereignty 2* (Aug. 14, 2003) [hereinafter *Memorandum*] (available at <http://www.tribalresourcecenter.org/legal/sovereignty/laramemo.pdf>).

First, rather than submitting numerous independent and uncoordinated briefs, Project lawyers asked tribes to adopt a joint collaborative strategy in briefing this case; in the end, eighteen tribes coordinated with Project lawyers from NARF and filed a single brief.³³ The tribal brief focused on the factual context of the case and explained the practical importance of tribal jurisdiction over non-member Indians. Second, Project lawyers retained experienced Supreme Court counsel to file a brief that focused on key legal principles.³⁴ This brief, filed on behalf of NCAI, the largest tribal advocacy group in the United States, addressed the source of tribal sovereignty and the role of Congress in defining it. Finally, Project lawyers asked tribes to urge their respective states' attorneys general to coordinate in filing a states' brief supporting the tribe's position, a strategy that resulted in the Washington brief.³⁵

As a result of this strategy, a total of three strong and well-coordinated amicus briefs were filed in support of the tribal position and the United States. From a strategic point of view, the Washington brief was a signal achievement. The end result, of course, was that the United States and the tribes were successful in *Lara*, with the Supreme Court holding that Congress has the power to recognize inherent tribal criminal authority over non-member Indians.³⁶

In Supreme Court litigation strategy, *Lara* offers several lessons. First, it shows the power of a coordinated approach to litigation in the Supreme Court. Tribes have never effectively cooperated to insure that briefs were carefully constructed to cover specific important areas of law and policy. While this may have happened informally on occasion, sovereign tribes have maintained fierce independence of one another. In contrast, state attorneys general have cooperated for decades,³⁷ with the result that states have stood together in Supreme Court litigation far better than tribes have. *Lara* shows that tribes do well when they are disciplined, coordinated, thorough, and sophisticated in presenting cases before the Supreme Court.

Second, tribes have long had the problem of not being able to effectively coordinate which cases go up for Supreme Court review. Since "hard cases make bad law,"³⁸ tribes have often been at a handicap; many of the legal issues that reach the Court are set within factual circumstances that do not present the issues in a favorable light. It often seems to be the cases with the worst facts that make it

33. Br. of Amici Curiae on Behalf of Eighteen Am. Indian Tribes, *Lara*, 124 S. Ct. 1628 [hereinafter *Tribal Br.*].

34. Br. of Amicus Curiae Natl. Cong. of Am. Indians, *Lara*, 124 S. Ct. 1628. Veteran Supreme Court litigator Carter G. Phillips was Counsel of Record.

35. *Memorandum*, *supra* n. 32.

36. 124 S. Ct. at 1639.

37. Under the auspices of the National Association of Attorneys General ("NAAG"), the states have long had their own Supreme Court Project. Under this program, six attorneys from various attorneys general's offices spend one year in the NAAG's office in Washington, D.C., on detail from their home office. They spend the year attending Supreme Court arguments, learning about Supreme Court practice, coordinating helpful amicus briefs from state governments nationwide, and meeting attorneys from state attorneys general's offices who come to Washington to argue cases.

38. *Cf. N. Securities Co. v. U.S.*, 193 U.S. 197, 400-01 (1904) (Holmes, J., White, C.J., & Peckham, J., dissenting) ("Great cases like hard cases make bad law.").

to the Supreme Court.³⁹ *Lara* was the exception. Billy Jo Lara, a Turtle Mountain Chippewa Band member, had voluntarily moved to the Spirit Lake Reservation and chosen to live within that community.⁴⁰ He married a Spirit Lake tribal member and fathered two children there.⁴¹ He also took advantage of a multitude of government services for Indians on the reservation.⁴² Because of repeated violations of tribal laws, including domestic abuse laws, the tribe conducted proceedings to exclude him from the reservation.⁴³ In the course of an arrest for trespassing on the reservation in violation of the exclusion order, Lara struck a Bureau of Indian Affairs (“BIA”) officer.⁴⁴ He was prosecuted and convicted in tribal court.⁴⁵

For institutional reasons, it is highly unusual for the Department of Justice to decline prosecution of a suspect who has assaulted a federal law enforcement officer. Thus, for striking the BIA officer, Lara was also prosecuted and convicted by federal authorities in federal court.⁴⁶ Because the federal prosecution was the vehicle for the case to travel to the Supreme Court, it was the Solicitor General’s office that made the decision as to whether to seek certiorari. That office is both wise and savvy in choosing cases to take to the Supreme Court and it chose well here. The case exemplified why it makes sense, from a practical standpoint, to allow tribal jurisdiction over other Indians living in their midst, which was well-highlighted in one of the amicus briefs.⁴⁷ Thus, perhaps one lesson from *Lara* is that tribes must use the same kind of care that the Solicitor General uses in choosing which cases to attempt to take to the Court.

The Project’s success in *Lara* is a quantum leap forward in the presentation of Indian law cases in the Supreme Court. It dramatically demonstrates the importance of the Project to tribal governments in helping to shepherd Indian law in a more positive direction. With this victory, tribes learned how much more effective they can be when they adopt a unified and coherent briefing strategy. Even in a legal forum that is nominally outside the political context, their political power can be brought to bear. To a tremendous degree, tribes are beginning to flex their muscles not only as independent sovereign governments but also as important players within the state political scene.⁴⁸ As tribes have become more

39. Perhaps the worst in recent years was *C & L Enter. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (holding that an arbitration clause constituted a waiver of sovereign immunity).

40. *Lara*, 124 S. Ct. at 1631.

41. *Id.* See also *Tribal Br.*, *supra* n. 33, at 4.

42. *Tribal Br.*, *supra* n. 33, at 4-5.

43. *Lara*, 124 S. Ct. at 1631. See also *Tribal Br.*, *supra* n. 33, at 5.

44. *Lara*, 124 S. Ct. at 1631. See also *Tribal Br.*, *supra* n. 33, at 6.

45. *Lara*, 124 S. Ct. at 1631. See also *Tribal Br.*, *supra* n. 33, at 6-7. The tribes also note that Lara does not challenge the tribal court conviction. *Id.* at 7.

46. *Lara*, 124 S. Ct. at 1631. See also *Tribal Br.*, *supra* n. 33, at 7.

47. *Tribal Br.*, *supra* n. 33, at 4-12. Consider how the complexion of the case might have differed if Lara had been an urban Indian with no ties to the tribe, who was merely driving on a state highway through the reservation on a family vacation at the time of the altercation.

48. John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 Kan. J. L. & Pub. Policy 533, 533 (2001).

prominent players in state government, state interests vis-à-vis tribes are no longer as monolithic as they have been in the past. By convincing some states to join the tribal sovereignty cause, tribes transformed some of their traditional opponents into powerful allies that helped to neutralize the opposition of those states that chose to remain tribal foes.

This success begs Indian legal strategists to begin to think about other ways to advance tribal litigation before the Supreme Court. To that end, tribes would do well to consider the strategies of similarly situated groups, such as the strategies that led to the victory for the gay rights movement in *Lawrence v. Texas*.

II. LAWRENCE, LIBERTY AND LIBERTARIANS

Like *Lara*, *Lawrence* was a remarkable success achieved through careful planning and an appeal to an unlikely ally at the briefing stage. *Lawrence* involved the prosecution by Texas officials of two gay men for engaging in consensual sexual relations with one another in the privacy of one's apartment.⁴⁹ The case reached the Supreme Court when the men brought equal protection and substantive due process challenges to the Texas statute criminalizing certain sexual conduct between members of the same sex.⁵⁰

Lawrence seems to have been the case that gay rights legal strategists had been awaiting, ready to pounce.⁵¹ Like *Lara*, it offered attractive facts and it opened the door to a fruitful legal strategy. In his work evaluating the progress of social movements, Professor William Eskridge had written that the Supreme Court's libertarian decisions had been among the most important cases for women, people of color, and gays.⁵² *Lawrence* seemed to be the perfect case to marry libertarianism with the gay rights agenda. To put this theory into action, Professor Eskridge left the ivory tower and became an advocate and legal strategist in the Supreme Court briefing on *Lawrence*. On behalf of the CATO Institute, a public policy foundation "dedicated to advancing the principles of individual liberty,"⁵³ Eskridge filed a brief arguing that the Texas law at issue in the case "invade[d] fundamental liberties, including personal security, the sanctity of the home, and interpersonal relations."⁵⁴

If Eskridge was the matchmaker in the marriage of convenience between libertarianism and the gay rights movement, Justice Kennedy officiated at the wedding ceremony. With Justice Kennedy authoring the majority opinion, a total of six justices sided with the defendant against Texas and found the statute unconstitutional. Four justices joined Justice Kennedy's opinion and held that the statute violated the substantive due process protections of the Fourteenth

49. 539 U.S. at 562-63.

50. *Id.* at 562-64.

51. William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 Minn. L. Rev. 1021, 1021 (2004).

52. Eskridge, *IBSMs*, *supra* n. 6, at 2386.

53. Br. of Amicus Curiae CATO Inst. at 1, *Lawrence*, 539 U.S. 558 [hereinafter *CATO Br.*].

54. *Id.* at 2.

Amendment.⁵⁵ One other member of the Court, Justice O'Connor, opined that the statute violated equal protection and thus she concurred in the result reached by the Kennedy-led majority.⁵⁶

To reach its conclusion, the Court explicitly overruled *Bowers v. Hardwick*,⁵⁷ a fairly recent case⁵⁸ that had been a serious obstacle to the gay rights movement. In overruling *Bowers*, *Lawrence* represented the equivalent of a bases-loaded home run, a dramatic transformation of the constitutional legal regime faced by the gay rights movement.

The case also constituted a strong validation of the gay rights movement's (and Professor Eskridge's) legal strategy. In writing for the Court, Justice Kennedy began with a paragraph that could have been adapted directly from the CATO brief:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.⁵⁹

In helping the gay rights movement achieve this victory, the CATO brief was important in several respects. First, it provided substantive arguments that split libertarian conservatives away from religious or even states' rights conservatives, and appealed to still somewhat nascent constitutional norms related to privacy. It also sent the more subtle message that support for gay rights was not limited to a radical fringe group, or even to liberal groups, but was widespread, a factor that Eskridge believes was key to the decision.⁶⁰

III. LEGAL STRATEGIES EMPLOYED BY THE GREAT IDENTITY-BASED SOCIAL MOVEMENTS OF THE TWENTIETH CENTURY

In a series of recent articles, Professor Eskridge has moved to bridge the gap between social movement theory and constitutional law scholarship.⁶¹ In producing legal histories of the civil rights movement, the women's rights movement, and the gay rights movement, which Eskridge terms "identity-based social movements," or "IBSMs," Eskridge found numerous parallels between each of these movements. The similarities allowed him to develop a common

55. *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring).

56. *Id.* at 579-80.

57. 478 U.S. 186 (1986).

58. Justice Scalia was dismayed by the "Court's surprising readiness to reconsider a decision rendered a mere 17 years ago in *Bowers v. Hardwick*." *Lawrence*, 539 U.S. at 586-87 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

59. *Id.* at 562 (majority).

60. See e.g. Eskridge, *supra* n. 51, at 1046 ("Drawing from amicus briefs filed by the Cato Institute and by several eminent historians of sexuality, *Lawrence* concluded that *Hardwick* reflected a poor job of historical analysis."). See also Eskridge, *IBSMs*, *supra* n. 6, at 2201 (hypothesizing that amicus briefs provide "political and cultural signals to the Supreme Court that a civil rights complaint or defense has merit from the perspective of a variety of allied groups or institutions").

61. Eskridge, *IBSMs*, *supra* n. 6; Eskridge, *Channeling*, *supra* n. 6; Eskridge, *supra* n. 51.

conceptual framework for the constitutional progress of the three movements.⁶² Eskridge's primary interest with regard to these three movements is "how movement lawyers translated the problems and aspirations of women and minorities into constitutional discourse, and how their arguments fared."⁶³ While setting forth that framework and critiquing it are far beyond the scope of this modest essay, some of Eskridge's insights may be relevant to Indian legal strategists.

For the Indian legal strategist, perhaps the most important question is one that goes to the heart of the success of these movements: How did these three identity-based social movements achieve such success in shaping constitutional norms during the last century? According to Professor Eskridge, these movements used various strategies to move the Supreme Court to adopt a more favorable constitutional jurisprudence and ultimately to produce a "regime shift" in constitutional law.⁶⁴

Eskridge discussed three key strategies in particular. One strategy that Eskridge characterizes as "naïve" assumed that judges would neutrally apply the law and, thus, entailed bringing cases in which even a skeptical but open-minded judge would feel logically compelled to recognize minority rights within the existing constitutional framework.⁶⁵ Eskridge cites numerous criminal procedure cases from the 1920s through the 1960s in which lawyers for black defendants presented the Court with factually egregious cases that implicated the constitutional purposes of preserving the rule of law in the face of an alternative that appeared to be an intolerable state of nature.⁶⁶ Faced with outrageous facts, judges from a variety of perspectives could agree with minority claims.⁶⁷

In addition to the naïve strategy, each of the movements also used a more sophisticated strategy that assumed that judges' decisions were influenced by their own political preferences; this strategy sought to appeal to or mold those preferences.⁶⁸ In the 1930s, for example, civil rights lawyers were able to argue that the deprivation of political rights was anathema to a pluralistic democracy and more akin to totalitarianism or communism, making their arguments more compelling even to the justices on the Court who might otherwise be least sympathetic to minority rights.⁶⁹ The effective use of libertarianism in *Lawrence* is a dramatic demonstration of the power of this sophisticated strategy.⁷⁰

Finally, each of the movements also used "cynical" strategies that presumed that justices are partisan and that litigation is nothing more than politics in

62. Eskridge, *IBSMs*, *supra* n. 6, at 2062.

63. *Id.* at 2065.

64. Eskridge, *supra* n. 51, at 1027-32.

65. *Id.* at 1027-28.

66. *Id.*

67. *Id.* at 1028.

68. *Id.*

69. Eskridge, *supra* n. 51, at 1028-29.

70. Eskridge notes that none of the justices in the majority would think of himself as an advocate of any "homosexual agenda." *Id.* at 1024. In contrast, one or more of the justices might well be willing to call himself an advocate for certain libertarian values expressed within the opinion.

another forum.⁷¹ The “punch line for this strategy is to fight for your allies to be appointed to the Court and to oppose appointment of known enemies.”⁷² As an example of the success of this strategy, Eskridge notes that all four twentieth-century judges nominated for the Supreme Court but defeated in a Senate vote were opposed by the NAACP and allied groups.⁷³

Eskridge writes that each of the social movements employed the strategies in different ways. For example, the women’s rights movement ignored the naïve strategy of presenting case after egregious case and directly sought the landmark ruling.⁷⁴ He seems to believe that this strategy had its pitfalls; since *Roe v. Wade*⁷⁵ was the result of a sudden legal avulsion rather than the gradual case-by-case development of a constitutional regime, *Roe* has been much more difficult to digest than, say, *Brown v. Board of Education*,⁷⁶ which followed dozens of cases demonstrating the harms of official racism. As a result, *Roe* is not nearly as widely accepted.⁷⁷

One of the key findings of Eskridge’s work is that legal strategies alone cannot produce victories in the Supreme Court. Indeed, he attributes the success of the gay rights movement in *Lawrence v. Texas* to the fact that the Supreme Court’s previous decision on the same subject, *Bowers v. Hardwick*, “stood in direct tension with the new equilibrium in public opinion”⁷⁸ which was far more tolerant of homosexuality. While public opinion rarely figures as an explicit or prominent touchstone in opinions of the Supreme Court,⁷⁹ Eskridge argues that the strategies identified above have worked hand-in-hand with each movement’s public education campaign. In moving public opinion toward toleration and acceptance of the social movements, the movements have placed the Court in the position of either ruling in favor of the social movement or risk losing the “the aura of neutrality that is essential for its legitimacy.”⁸⁰

IV. INDIAN TRIBES AND IDENTITY-BASED SOCIAL MOVEMENTS: SIMILARITIES AND DIFFERENCES

Are tribes sufficiently comparable to the IBSMs to be able to profit from their experiences? Tribes share some common attributes of Eskridge’s social movements, but they also exhibit key differences that make direct comparisons difficult. One difference is that tribes simply began at a different place than the

71. *Id.* at 1029.

72. *Id.* at 1029.

73. *Id.* at 1029-30.

74. Eskridge, *IBSMs*, *supra* n. 6, at 2361-62.

75. 410 U.S. 113 (1973).

76. 347 U.S. 483 (1954).

77. Eskridge, *supra* n. 51, at 1069-71.

78. *Id.* at 1036.

79. *But see e.g. Atkins v. Va.*, 536 U.S. 304, 307 (2002) (noting that “the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal,” and stating that “[t]he consensus reflected in those deliberations informs” the decision in this case).

80. Eskridge, *supra* n. 51, at 1041.

social movements; tribes had formal legal recognition long before women, African-Americans, or gays. Even before this country's founding, tribal sovereignty had long been recognized. Indeed, Indian tribes began their American experience from a position of relative power and prestige, at least with regard to the constitutional structure, having forced the weak federal government to negotiate treaties or face potentially ruinous (and, at a minimum, very expensive) wars.⁸¹ As a result, in contrast to these other movements, the tribal sovereignty movement has long worked to preserve seemingly ever-shrinking tribal sovereign powers.⁸² Indeed, one might say that the tribal sovereignty movement is not so much an affirmative movement as a defensive one.

Tribes also seek a fundamentally different result than the IBSMs. The civil rights movement, the women's movement, and the gay rights movement seek full and equal participation in American governance and society. They can cast their arguments as pleas to participate more fully in an already pluralistic and democratic government.⁸³ In this way, their arguments appeal to fundamental democratic ideals and flatter those who already exercise such rights. In contrast, tribes do not necessarily seek greater participation in the American democratic ideal through participation in federal and state governments. Tribes seek primarily to preserve their right to a separate legal and governmental structure within the geographic boundaries of the United States. In rejecting the American governance and societal structure, and preferring their own, tribal arguments in favor of separatism may be less appealing and, indeed, more threatening, especially to those who have a near religious faith in the American democratic system.

A couple of other distinctions are critical. The legal texts and instruments used to achieve litigation successes and to force constitutional regime change for the members of the civil rights, women's, and gay rights movements are inherently oriented toward individuals and individual rights.⁸⁴ These movements relied heavily on First Amendment, Due Process, and Equal Protection strategies.⁸⁵ Moreover, in both the civil rights and women's movement cases, Professor Eskridge finds a common substantive theory: "[i]t is a theory about rationality in public policy and about respecting the individuals in all groups actively participating in the nation's pluralist politics."⁸⁶ He notes that the "norms that gained traction in the twentieth century were based on *democracy* and *pluralism*."⁸⁷

81. See generally Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113 (2002).

82. *Oliphant v. Suquamish Indian Tribe*, 436 U.S. 191 (1978).

83. Cf. Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 *S. Ct. Rev.* 357, 439 (2004) (casting *Lawrence* as an effort by Kennedy and O'Connor to provide "equal citizenship" to gays and lesbians).

84. See e.g. *Lawrence*, 539 U.S. at 562.

85. Eskridge, *IBSMs*, *supra* n. 6, at 2072, 2193.

86. *Id.* at 2382.

87. *Id.* at 2375 (emphasis in original).

A strong preference for a norm of individualism is reflected throughout liberal political philosophy and American law.⁸⁸ In contrast, tribal legal strategists are focused on protecting communitarian values and the “group rights” of Indian tribes.⁸⁹ Even when those tribes themselves adopt individualistic legal regimes, protecting the integrity of those regimes requires advocating for the rights of tribes to define their own governmental systems in the way that each tribe deems best. That is the essence of self-governance and it conflicts to some degree with the norm of individualism that pervades American law.

In other respects, the narrative of the tribal sovereignty movement fits cleanly into Professor Eskridge’s framework for social movements. One can easily describe a tribal experience with important similarities to the stages of development of the social movements.⁹⁰ After centuries of conflict that began with European contact, the power of Indian tribes began to shrink in the early years of the new American republic. Tribes sought protection of their treaty rights in the courts. The response by the Supreme Court was perhaps as Eskridge’s study might have predicted, even though it occurred far earlier than the cases he examined: the Court was sympathetic but ultimately was unwilling to buck popular opinion in a meaningful way.⁹¹

In his study, Eskridge used the early 1900s as his baseline start date for studying each of the new social movements.⁹² If one uses the same baseline start date for tribes, other similarities emerge. Tribes were at their weakest in many respects by the early 1900s. At the start of that century, tribes were fighting to justify their existence and recognition as tribes at a time when the government explicitly sought to undermine tribal governmental structures and communitarian norms by converting individual Indians into farmers and individual landowners.⁹³ One of the achievements of that era was establishment of the right to American citizenship for individual Indians.⁹⁴ Indeed, African-Americans established the right to be citizens and to vote long before American Indians. Despite the Fourteenth Amendment, which was not thought to apply to Indian tribes,⁹⁵ citizenship rights were not legally recognized for all Indians until 1924.⁹⁶

88. See generally Carole Goldberg, *American Indians and “Preferential” Treatment*, 49 *UCLA L. Rev.* 943 (2002).

89. *Id.*

90. Professor Eskridge describes African Americans as “the social group most violently oppressed, most dramatically resistant, and most tragically unsuccessful.” Eskridge, *IBSMs*, *supra* n. 6, at 2072. With all due respect to African-Americans and their admittedly tragic history, Eskridge’s descriptives could apply with equal force to American Indians and tribes. The history of harm and discrimination to Indians is compelling and familiar. See generally Felix S. Cohen, *Handbook of Federal Indian Law* (Rennard Strickland et al. eds., Michie 1982). For more dramatic accounts, see e.g. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (Holt, Rinehart, & Winston 1970); Vine Deloria, Jr., *Custer Died For Your Sins: An Indian Manifesto* (2d ed., U. Okla. Press 1988).

91. See e.g. *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831) (essentially finding a right without a remedy).

92. Eskridge, *IBSMs*, *supra* n. 6, at 2069.

93. See generally Cohen, *supra* n. 90, at 128-29.

94. 8 U.S.C. § 1401(b) (2000) (commonly referred to as the *Citizenship Act of 1924*).

95. U.S. Const. amend. XIV.

96. 8 U.S.C. § 1401(b).

At several times throughout the century, tribes used an approach not unlike Eskridge's "*politics of recognition*"⁹⁷ to preserve the legitimacy of their legal status and to insure fair treatment and, eventually, remedies for past discrimination. Like the other movements that Eskridge describes, Indian sovereignty has also given rise to counter-movements.⁹⁸ For tribes the counter-movements continue to be active; counter-movement members filed amicus briefs in the *Lara* case.⁹⁹

In many ways, the tribes occupy a position perhaps most similar to that of the gay rights movement. For example, in sheer numbers, neither Indians nor gays account for any more than a tiny fraction of the voting population.¹⁰⁰ Thus, creating or protecting their rights solely through their own participation in the democratic process is not likely to be an effective option. Moreover, there is little or no direct constitutional text protecting their rights.¹⁰¹ Given that at some level of generality Indian tribes and social movements face the same fundamental challenge (to wit: convincing the Supreme Court to adopt the constitutional regime that will support their existence), it is useful to consider some of the very practical insights that Eskridge draws from his careful look at the identity-based social movements. Indian legal strategists may find Eskridge's findings as to the successes of the social movements useful in informing their own litigation strategy in the Supreme Court.

V. LESSONS ADAPTED FROM THE EXPERIENCE OF THE SOCIAL MOVEMENTS

Indian tribes have already adapted some of the same legal and political strategies used by the social movements. Tribal use of the "naïve" strategy of bringing case after egregious case¹⁰² has occasionally succeeded in educating the Supreme Court and producing victories by a sympathetic court willing to create doctrine to recognize legal rights.¹⁰³ Moreover, very recently, tribes utilized the "cynical" strategy by helping defeat the nomination of William G. Myers III to the Court of Appeals for the Ninth Circuit for taking views opposing Indian tribes as

97. Eskridge, *IBSMs*, *supra* n. 6, at 2065 (discussing the politics of recognition) (emphasis in original).

98. *See generally id.* (discussing countermovements). For the gay rights movement, for example, the counter-movement is characterized by those who claim to protect "traditional family values." *Id.* at 2161.

99. *See supra* nn. 14-21 and accompanying text (discussing anti-tribe briefs filed in the *Lara* case).

100. Karen MacPherson, *American Indians Flex Political Muscle*, *Pittsburgh Post-Gazette* A10 (Feb. 1, 2004) (available at <http://www.post-gazette.com/pg/04032/268085.stm>) (noting that there are an estimated 1.5 million Indian voters, compared to the 100 million registered voters nationwide; but also noting that Indian voters have increased clout in states with high concentrations of American Indians). Gay voters are somewhat more difficult to quantify. However, the consensus appears to be that about four million voters identify as gay. *See e.g.* David Paul Kuhn, *GOP Grapples with Gay Unions*, <http://www.cbsnews.com/stories/2004/05/17/politics/main618003.shtml> (May 17, 2004).

101. Women and African-Americans have much more explicit support in the Constitution. *See* U.S. Const. amend. XIV; U.S. Const. amend. XIX.

102. *See supra* nn. 66-68 and accompanying text (discussing the "naïve" strategy).

103. One example of such doctrine is the trust responsibility. *See e.g. U.S. v. Mitchell*, 463 U.S. 206 (1983) (holding that statutes regarding timber management gave rise to an implicit fiduciary duty such that Indians were entitled to money damages for the government's mismanagement of timber resources).

an Interior Department official.¹⁰⁴ Thus, whether they have intentionally copied the social movements or not, tribes have used several of the same strategies that the social movements have used.

The following are some insights that can be drawn from Eskridge's work on social movements, adapted to fit the context of Indian law:

Tribes must mobilize broad public support and diminish public opposition if they wish to prevail in the Supreme Court. A theme manifested throughout Eskridge's work is that, even though the Court is not a democratic institution, public opinion is relevant to the Court. To him, it is precisely the Court's need to remain within the mainstream, at least as far as American cultural values are concerned, that often motivates (and thus *moderates*) the Court. While the Court may occasionally take positions that are not supported by an actual political majority, it nevertheless may not wander too far. If the Court ventures too far beyond the mainstream, it risks losing the "the aura of neutrality that is essential for its legitimacy."¹⁰⁵ Moreover, Eskridge asserts, the Court cannot "disrupt a nationwide normative equilibrium on important political issues."¹⁰⁶

Viewed in this way, political considerations become a two-edged sword. On the one hand, the Court may occasionally be forced to moderate its views to move back toward the range of normal public opinion, just as Eskridge asserts that it did in overruling *Bowers* and deciding *Lawrence*.¹⁰⁷ On the other hand, however, public opinion may occasionally be a limiting factor in the Court's effort to venture forth and do justice. In other words, the Court's desire to stay within the political mainstream may ultimately limit the Court's ability to do (unpopular) justice.

To state these conclusions in a way that is relevant to Indian tribes, consider the following: if an overwhelming majority of Americans think that Indian tribes are an anachronism, the Court may find it more difficult to preserve tribal authority. Thus, if tribes wish to preserve the Court's ability to rule in favor of Indian tribes, they should focus on educating the broader American public about the existence and the importance of Indian tribal governments. The concept of Indian sovereignty must be made known to a wider audience than just educated Indians and the handful of law students who have the insight to take an elective Indian law course in law school. The recent effort in some states to include Indian law questions on state bar exams is evidence of strategic thinking in motivating law students to educate themselves about Indian sovereignty.¹⁰⁸ However, if

104. See e.g. Natl. Cong. of Am. Indians, *Resolution #ABQ-03-061* (Nov. 21, 2003) (available at <http://www.ncai.org/data/docs/resolution/annual2003/03-061.pdf>) (opposing the nomination of William G. Myers III to the Ninth Circuit Court of Appeals). Much of the credit in the media for Myers's defeat went to environmental groups. One might legitimately question whether tribes could have engineered Myers's defeat if they had been acting without the support of another broad-based and powerful advocacy group.

105. Eskridge, *supra* n. 51, at 1041.

106. *Id.* at 1081.

107. See *supra* nn. 78-80 and accompanying text.

108. See e.g. *New Mexico Includes American Indian Law on Bar Exams*, <http://www.lawschool100.com/indianlaw.htm> (Apr. 1, 2002). See also Natl. Cong. of Am. Indians, *Res. # MOH-04-001* (June 23,

Eskridge's theory is accurate, it is only a very modest step. To reach the broad audience that would be necessary to truly make a difference, all Americans must begin to learn about tribal governments in elementary school, in middle school, and in high school, when students are learning the other basic norms of American government. Just as the civil rights movement worked to "change public norms away from understanding racial variation (nonwhite) as malignant, toward understanding racial variation as completely benign,"¹⁰⁹ the tribal sovereignty movement must change public norms to agree with the notion that allowing Indian tribes to maintain their separate sovereign status makes America a richer place. In other words, Americans must be educated in such a way that they are willing to disregard the nearly overwhelming norm of assimilation characterized by the American "melting pot," at least for Indian tribes. For some immigrant groups, assimilation may be fine, and even encouraged, but for Indians, it means a certain kind of death.¹¹⁰

At this point, the relevance of Eskridge's work for Indian tribes becomes ironic. It suggests that activism in American politics and civic education may be a necessary step for tribes to preserve their tribal separateness. In sum, tribes must engage the American political system to maintain their separation from it. Because participation in democratic processes of American government is an inherently assimilative activity, tribes may win the battle but lose the war. Nevertheless, it may be the only way to fight within a democratic forum.

At a time when Indian legal strategists have sometimes debated whether to pursue a congressional strategy or a Supreme Court strategy, and have at least temporarily agreed that Congress is a better forum than the Supreme Court for tribal issues, the reality is that the distinction between the two may not be as great as one might think. The strategy for achieving success in the Supreme Court may be similar to the strategy for achieving success in Congress.

The party with the most amicus briefs usually wins. This insight is a corollary to the public opinion principle enunciated above. Professor Eskridge's research, which covers a half-century of Supreme Court cases, indicates that the party with the most amicus briefs usually wins the case.¹¹¹ He hypothesizes that amicus briefs provide "political and cultural signals to the Supreme Court that a civil rights

2004) (available at <http://www.ncai.org/data/docs/resolution/midyear2004/04-001.pdf>) (noting that New Mexico began including Indian law questions in 2002, asserting NCAI's support for efforts in Washington and Idaho to include Indian law questions on their bar exams, and requesting other states to do so as well); *Bar Adds Indian Law to Exam*, Seattle Post-Intelligencer (Oct. 23, 2004) (available at http://seattlepi.nwsource.com/local/196549_barexam23.html).

109. Eskridge, *supra* n. 51, at 1029.

110. In a recent conversation, scholar Philip S. Deloria expressed the insight that traditionally we have not worried about losing the culture of immigrants because they can always look back to their home country if they want to revisit their culture. Since the tribes generally live in their own traditional lands, Indian tribal culture will be lost if it is not maintained here. There is no home country to which tribes can go to find their cultures. Author's notes from discussion with Philip S. Deloria (Sept. 11, 2004) (copy on file with author).

111. Eskridge, *IBSMs*, *supra* n. 6, at 2200. Eskridge's review of Supreme Court cases since the New Deal indicates that the side with the most amicus briefs wins in two out of three cases. He notes surprisingly that the side with the higher number of amicus briefs prevails more often than the side with the Solicitor General. *Id.*

complaint or defense has merit from the perspective of a variety of allied groups or institutions.”¹¹² Conventional wisdom regarding the Michigan affirmative action cases¹¹³ supports this analysis; the amicus brief filed by high-ranking military officers in favor of affirmative action was helpful because it signaled broad support for affirmative action as an important national policy.¹¹⁴ Likewise, a brief filed in *Lawrence* by the American Bar Association demonstrated that 81 of the 100 largest law firms in the United States had adopted policies specifically forbidding employment discrimination based on sexual orientation.¹¹⁵

In *Lara*, each party garnered the support of four amicus briefs, but the Idaho brief, which was filed nominally in support of the United States, was clearly contrary to the interest of tribes.¹¹⁶ So, other than the brief of the United States, the tribal position was a minority one, representing three amicus briefs, to the opponents’ five.¹¹⁷ The tribal position prevailed partially because of the presence of the Solicitor General and the fact that the coordinated briefing by the tribal parties was of far higher quality than the briefing for the opposition.¹¹⁸ One lesson from *Lara* is that Indian tribes must work to file merits and amicus briefs that Supreme Court justices will read. Supreme Court justices live a fairly cloistered existence. They spend most of the year in Washington. Most of them have spent little or no time on Indian reservations and have little understanding of tribal governments.¹¹⁹ Presumably, much of what they know about Indian reservations is learned from Supreme Court briefs. The briefing strategy in *Lara*, including the hiring of sophisticated and experienced Supreme Court counsel,¹²⁰ reflects that Indian legal strategists are aware of the need to speak to justices in their own language and through voices they are accustomed to hearing.

112. *Id.* at 2201.

113. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

114. See Br. of Amici Curiae Lt. Gen. Julius W. Becton, Jr., et al. at 5, *Grutter*, 539 U.S. 306 (noting, for example, that some form of affirmative action is necessary to keep the military diverse, and asserting that diversity in the military is necessary for its success).

115. Br. of Amicus Curiae Am. Bar Assn. at 10 n. 6, *Lawrence*, 123 S. Ct. 2472; see Karst, *supra* n. 83, at 439 (casting *Lawrence* as an effort by Justices Kennedy and O’Connor to provide “equal citizenship” to gays and lesbians).

116. See *Idaho Br.*, *supra* n. 17.

117. *Supra* nn. 14, 17, 24, 33-34 and accompanying text (listing the respective briefs for each side).

118. Whereas the briefs in support of the tribal position were carefully coordinated, most of the briefs for the opposition were not. Notably, CERF, the Counties, and the Morris family are all interconnected. Their filing of three separate briefs makes the opposition look more substantial than it was in reality. The Morris Brief is an effective demonstration of poor quality. The Morris’ stated interest as amici is that one of them was convicted of speeding in the tribal court of a tribe not his own, and they believed the conviction was not fair. Yet their case does not include a second federal prosecution, so it is not very similar at all to the *Lara* case, and its outcome would not be different regardless of the result in the *Lara* case.

119. However, in July of 2001, Justices Breyer and O’Connor did visit reservations and their tribal courts in Arizona and Washington, as well as meet with tribal court judges in Reno, Nevada. See Native American Rights Fund, *Case Updates: Two U.S. Supreme Court Justices Visit Tribal Courts*, 26 NARF Leg. Rev. No. 2 (Summer/Fall 2001) (available at <http://www.narf.org/pubs/nlr/nlr26-2.htm>).

120. See *supra* nn. 31-35 and accompanying text (discussing the strategy used in *Lara*).

Tribes must also reach out to allies. Tribes have realized the importance of appealing to state governments to join them in their legal arguments.¹²¹ Based on the *Lawrence* experience, tribes might agree that other groups should be cultivated as allies. Just as the gay rights movement obtained the support of the CATO Institute¹²² and successfully caused splintering in the “conservative” wing of the Supreme Court, tribes need to be strategic in appealing to the particular doctrinal tastes of each justice by appealing to groups that share like views.

In light of Justice Thomas’s concurrence in *Lara*, one theory might be to cultivate conservative law and policy groups that advocate in favor of a federal government of enumerated powers. Indeed, though the social movements benefited from dynamic constitutional interpretation as characterized by a “living constitution,” such dynamism has often hurt tribes.¹²³ When Chief Justice John Marshall created a federal common law for Indian nations that was unmoored from constitutional principles,¹²⁴ he departed dramatically from principles that many strict constructionists hold dear, especially the notion that the federal government is one of limited and defined powers.¹²⁵ Some of the Court’s early work gave rise to an entire Indian law jurisprudence that is adrift from the Constitution.¹²⁶ Thus, for tribes, originalist constitutional interpretation, which seems to be alive and well,¹²⁷ might well be the preferable approach.¹²⁸ A rigorous application of the doctrine of enumerated powers and a careful reading of the Indian Commerce Clause would, as my colleague Professor Saikrishna Prakash has recently explained, result in a diminishment of federal “plenary power” over at least some tribes.¹²⁹ “What is good for Alfonso Lopez is good for the Apache Tribe.”¹³⁰

121. *Supra* n. 35 and accompanying text.

122. *Supra* nn. 54, 59-60 and accompanying text (discussing the *CATO Br.*).

123. See generally Phillip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 *Tulsa L. Rev.* 5 (2002).

124. Three cases popularly known as “The Marshall Trilogy” form the bedrock of federal Indian law. *Worcester v. Ga.*, 31 U.S. 515 (1832); *Cherokee Nation*, 30 U.S. 1; *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

125. See e.g. *The Federalist No. 45* (James Madison).

126. See e.g. *U.S. v. Kagama*, 118 U.S. 375 (1886).

127. Eskridge, *IBSMs*, *supra* n. 6, at 2363-64 (noting that “originalist work has grown like weeds in a vacant lot”); see also *id.* at 2366 (“Yet originalism lives. And flourishes.”). Eskridge is a strong critic of original meaning jurisprudence. Once social normative or economic issues have changed in ways that affect an issue, he finds it virtually impossible, for a variety of reasons, to reconstruct the original meaning of a constitutional text. First, the context is unknowable and “law office history” cannot effectively reconstruct that context to understand the full texture of the meaning of the words at the time of their drafting. Eskridge, *supra* n. 51, at 1046. Second, the framers understood that their purposes would be pursued differently when social, economic or normative circumstances changed and it is a “mind game” to try to figure out which of the purposes the founders would have blessed and which they would have rejected. And, finally, the founders had certain fundamental views that are viewed today as “morally squalid.” *Id.* at 1048-50. How should an originalist consider these views in creating that broader context with which to understand original meaning?

128. *Cf. Lara*, 124 S. Ct. at 1641-48 (Thomas, J., concurring).

129. Saikrishna Prakash, *Against Tribal Fungibility*, 89 *Cornell L. Rev.* 1069, 1105-15 (2004).

130. *Id.* at 1108 (citing *Lopez v. U.S.*, 514 U.S. 549, 551-52 (1995) (holding that the Gun Free School Zones Act was beyond the Commerce Clause authority of Congress and thus determining that Mr. Lopez’s conviction under that Act was invalid)).

Viewed from this perspective, *Lara* illustrates a problem. Even though *Lara* was a victory in an immediate sense, it moves tribes further down a doctrinal dead end if the ultimate goal is a return to the constitutionally-envisaged role for Indian tribes.¹³¹ *Lara* was a vindication of the view that tribal sovereignty continues to exist at the whim of the United States. In other words, while Eskridge has explained how to achieve a regime shift, it may be that tribes need to achieve a paradigm shift,¹³² a *revolutionary*, rather than *evolutionary*, change in constitutional law.

Indians must be more visible at the Supreme Court. Eskridge believes that a cause in fact of the *Lawrence* decision was that “[e]verywhere the Justices turned, there were openly lesbian and gay attorneys, law professors, citizens—and (gasp!) even law clerks within their own building. Everywhere the Justices went in the world, people asked them how they could demonize gay people.”¹³³ In other words, though the justices of the Supreme Court are not formally accountable to an electorate, they are accountable and educable in their daily personal interactions with other human beings.

While Eskridge’s insight is heartening because it recognizes that justices are human beings and subject to the same influences as the rest of us, it demonstrates a serious problem for Indian tribes. Though gay and lesbian people have broken into the highest levels of government and society, Indians have rarely cracked the door to the most important institutions. Although hundreds of Indians have become attorneys in the last three decades, no Indian has ever been a Supreme Court Justice, and apparently no Indian has ever served as a Supreme Court clerk. Few Indians have ever served on any of the lower federal courts. The absence of any Indians encountering Supreme Court justices in their daily lives or through professional associations highlights the importance of making Indians visible at the Supreme Court in other ways, such as occasional protests at the Court, and of continuing to press for the hiring of an Indian as a clerk (at least) at the Supreme Court.¹³⁴

Since Indian tribes are loathe to bring cases to the Supreme Court in light of the Court’s recent track record,¹³⁵ Indian tribes risk becoming less visible there. Given Eskridge’s point that the civil rights movement prevailed at least in part by using a strategy of educating the Court by bringing case after egregious case,¹³⁶ Indian tribes may well be at a disadvantage if they lose visibility in the Court by

131. At least as some have suggested that it was envisaged. See e.g. Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. Rev. L. & Soc. Change 217, 256-58 (1992).

132. See Thomas Kuhn, *The Structure of Scientific Revolutions* (3d ed., U. Chicago Press 1996) (describing a “paradigm shift” as something much greater than mere incremental shifts from one regime to another and more akin to a radical reordering of the regime).

133. Eskridge, *supra* n. 51, at 1036.

134. See *supra* n. 128. Given the insight into Indian law that Justice Thomas showed in his *Lara* concurrence (and the likelihood that he will be on the bench for decades to come), an Indian would likely find an interesting and fruitful experience clerking for Justice Thomas.

135. *Supra* n. 29 (giving some examples of recent Supreme Court cases).

136. Eskridge, *IBSMs*, *supra* n. 6, at 2357.

not bringing cases. Indeed, there may be some purchase to the notion that education is key to favorable treatment in the Supreme Court, even for Indian tribes. Consider the more recent votes by Justices Stevens and O'Connor, for example, both of whom have ruled in favor of tribes more often in more recent years than they ever did in the past. This may reflect the view that they are more comfortable with tribal sovereignty now that they understand it better. Justices are like most lawyers in that they do not necessarily have wide experience with Indian law. For many of them, their first experience with Indian law may well be when they reach the Court. The notion that there are three sovereigns in the United States, rather than two (just the federal government and states), may be hard to swallow on first encounter. For those not educated about it in high school government class, it may take a little while for such a concept to take a firm place within one's worldview. One way tribes can steer this sort of education is, as in *Lara*, presenting cases to the Supreme Court in which tribal governments are behaving as responsible governments, by providing services to their constituents, in circumstances where they are the only governments that can effectively provide such services.¹³⁷

VI. CONCLUSION

Lara was an unexpected victory obtained largely through savvy lawyering. One implication of Eskridge's work, though, is that good lawyering is not enough. As Indian legal strategists consider some of the larger and smaller points made by Eskridge in his study of social movements, they will likely find that Indian tribes cannot use the substantive path well trodden by the civil rights and women's movements. The legal principles that support tribal sovereignty are radically different than those that support individual rights for African-Americans, women, and gays. While these movements relied heavily on individual rights protected by the First Amendment, due process, and equal protection,¹³⁸ tribes have relied most heavily on tribal sovereignty, a concept that is not grounded within constitutional text, but at best exists by inference from constitutional text. A key difference is that Indian tribes seek the preservation of group rights, which may well be fundamentally inconsistent with the individual rights protections sought by these other movements.¹³⁹ Because tribes face a different constitutional landscape than these social movements, they cannot simply cut and paste the arguments used by these other groups.

Though the substantive arguments of these other movements may not be particularly helpful to tribes, tribes should consider the practical lessons of the social movements in formulating positions before the Supreme Court. Tribes can

137. This approach is certainly not foolproof. In *Atkinson Trading Co. v. Shirley*, the Navajo Nation attempted to justify the need for a tax on non-Indians by showcasing, for example, the fire protection services that the tribe provided to the facilities where the tax was levied. 532 U.S. 645 (2001). Though the tribe lost the case, it may nevertheless have had an educational influence on the Court and the public.

138. Eskridge, *IBSMs*, *supra* n. 6, at 2072, 2193.

139. See Carole Goldberg, *supra* n. 88, at 983-85.

use many of the practical lessons that Eskridge highlights. They must heed the broader lesson that public opinion is also a relevant forum. They should seek support for their positions through amicus briefs from a broad range of public interest groups. And they must continue, as they did in *Lara*, to develop a more sophisticated approach to litigation in the Supreme Court.

