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## **Traditional Problems: Gay Marriage and the Backlash against Indian Sovereignty**

Marcia A. Yablon-Zug

*University of South Carolina School of Law, zug@law.sc.edu*

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# Traditional Problems: How Tribal Same-Sex Marriage Bans Threaten Tribal Sovereignty

Marcia Zug

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## TRADITIONAL PROBLEMS: HOW TRIBAL SAME-SEX MARRIAGE BANS THREATEN TRIBAL SOVEREIGNTY

Marcia Zug<sup>†</sup>

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*In another time he would have been honored. Instead he was murdered.*<sup>1</sup>

### I. INTRODUCTION

The above statement is from the PBS documentary *Two Spirits*, a film examining the life and tragic death of Fred Martinez, a sixteen-year-old Navajo Indian, born physically male, who identified as female.<sup>2</sup> The documentary explores the circumstances that led to

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<sup>†</sup> Associate Professor of Law, University of South Carolina, School of Law.

1. *TWO SPIRITS* (PBS 2011), <http://www.pbs.org/independentlens/films/two-spirits/>; see also ICMN Staff, *PBS Documentary Explores Navajo Belief in Four Genders*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 5, 2013), <http://indiancountrytodaymedianetwork.com/2013/11/05/pbs-documentary-explores-navajo-belief-four-genders-152094>.

2. *TWO SPIRITS*, *supra* note 1.

Martinez's death while also more broadly discussing the treatment of gay, lesbian, and transgendered Navajo people.<sup>3</sup> As the film notes, gender non-conformity was once an accepted part of Navajo culture.<sup>4</sup> Traditionally, the Navajo recognized four genders: male, female, male-born persons living as female, and female-born persons living as male, and they held these dual-gender or "two spirit" people in high regard.<sup>5</sup> The Navajo view of two-spirit people was not unique.<sup>6</sup> Historically, many American Indian tribes honored their transgendered members,<sup>7</sup> but by the nineteenth century, this tolerance began to disappear.<sup>8</sup> European colonizers and their descendants viewed homosexuality as an intolerable sin, and they

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3. *Id.*

4. *Id.*

5. Jeffrey S. Jacobi, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy*, 39 U. MICH. J.L. REFORM 823, 837 (2006) (discussing the behaviors and relationships of "men," "women," "male-bodied" individuals, and "female-bodied" individuals); *see also* BRIAN JOSEPH GILLEY, BECOMING TWO-SPIRIT: GAY IDENTITY AND SOCIAL ACCEPTANCE IN INDIAN COUNTRY 10–11 (2006) (stating that "two-spirits" were often seen as having special powers, and that many tribes believed "[t]he gender different were possessed of a special relationship with the Creator because they were seen as being able to bridge the personal and spiritual gap between men and women"); WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 3 (1998) ("accepted and sometimes honored"); Jacobi, *supra* ("Alternative gender roles have been documented in approximately 155 tribes . . ."); *id.* at 823 ("[H]istorically, many tribes accepted and even honored same sex-unions."). *But see* TWO-SPIRIT PEOPLE: NATIVE AMERICAN GENDER IDENTITY, SEXUALITY, AND SPIRITUALITY 5 (Sue-Ellen Jacobs et al. eds., 1997) (criticizing scholars and other non-Natives for an "idealizing view" of the past that "has led to a relatively recent romanticization of purported positively sanctioned pan-Indian gender or sexual categories that do not fit the reality of experiences faced by many contemporary gay, lesbian, third-gender, transgender, and otherwise two-spirit Native Americans").

6. Jacobi, *supra* note 5, at 823 ("[M]any [commentators] agree that indigenous tribes often tolerated and even celebrated ['Native American individuals whose behavior did not comport with European gender norms'].") (citations omitted).

7. *Id.*

8. *See* Trista Wilson, Comment, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. INDIAN L. REV. 161, 173 (2012) (citations omitted) ("Native Americans likely responded to the 'Euro-American condemnation of the gender different' by hiding that part of their culture . . . As this [European acculturation and assimilation] trend continued, two-spirit culture became increasingly suppressed until, in many cases, it was altogether hidden or eliminated.").

exerted increasing pressure<sup>9</sup> on tribal communities to adopt similar views regarding family and sexuality.<sup>10</sup> Eventually, this pressure led to a dramatic decline in tribal acceptance of homosexual and transgendered Indian people.<sup>11</sup>

Today, many tribes are rejecting these colonially imposed beliefs regarding gender and homosexuality.<sup>12</sup> For instance, a substantial number of tribes were at the forefront of the fight for marriage equality.<sup>13</sup> These path-clearing tribes used their unique status as separate sovereigns to recognize same-sex marriages before, and sometimes in defiance of, the surrounding states.<sup>14</sup> In a few instances, the marriage codes of these tribes even served as a model

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9. Christian missionaries and Indian agents targeted gender non-conforming Indians through the provisions of the Religious Crimes Code. *See id.* (“By the early 1880s, Christian missionaries and Indian agents were using [these laws] ‘to aggressively attack Native sexual and marriage practices,’ and to pressure tribal communities to adopt the Euro-American ideals on family and sexuality.”).

10. In fact, tribes’ acceptance of homosexuality was one of the reasons often cited as evidence of American Indians’ inferiority and was used as part of the justification for the conquest of North America. *See GILLEY, supra* note 5, at 13–14.

11. *Id.* at 13 (stating that Anglo-American aversion towards homosexuality was clearly “communicated to the Indians,” causing gender non-conforming Indians to lead “repressed or disguised lives”).

12. *See Wilson, supra* note 8, at 175 (“Two-spirit organizations across the country are engaged in an effort to promote two-spirit culture, both inside and outside Indian Country. And although some tribes have legislated against same-sex marriage, others have affirmatively legislated in its favor.”); *see also* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 110 (2015) (“Twelve tribes are known to allow same-sex marriage, either due to amendments to tribal laws, interpretation of a pre-existing marriage law, or, in one case, the explicit incorporation of state marriage law.”).

13. *See, e.g., Tweedy, supra* note 12, at 110–31 (discussing laws, ranging from explicit recognition of same-sex marriage to potential recognition of same-sex relationships performed in other places, created by various Native American tribes); *see also* Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT’L & COMP. L. 509, 530–31 (2009) (noting that, in 2008, the Coquille Indian Tribe in Oregon passed a law allowing same-sex marriage).

14. *See, e.g., Tweedy, supra* note 12, at 112 (“At the time Coquille [in Oregon] passed its law in February 2008, Massachusetts was the only state that allowed same-sex marriage.”). Similarly, the Suquamish Tribe of Washington legalized same-sex marriage well before the state of Washington, where it is located. *See Ashley Fantz, Washington Voters Pass Same-Sex Marriage*, CNN (Nov. 9, 2012), <http://www.cnn.com/2012/11/09/us/washington-passes-same-sex-marriage/index.html>; William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES (Aug. 11, 2011), <http://www.nytimes.com/2011/08/12/us/12tribe.html>.

for subsequent state legalization.<sup>15</sup> Similarly, many tribes are also rediscovering their “two-spirit” traditions.<sup>16</sup> These tribes once again recognize the value of their transgender members, and their approach to gender and sexuality is increasingly proffered as a model of tolerance that LGBT advocates believe should be adopted by both Indian and non-Indian communities.<sup>17</sup> Such changes are encouraging. Unfortunately, they are not universal. Two years after the Supreme Court’s decision in *Obergefell v. Hodges*,<sup>18</sup> in which the Court found same-sex marriage bans unconstitutional, many tribes display little interest in accepting same-sex marriage or the two-spirit tradition.<sup>19</sup>

Currently, a significant number of tribes still ban same-sex marriage.<sup>20</sup> Prior to the Supreme Court’s *Obergefell* decision, this ban

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15. See, e.g., Walter L. Williams, *The ‘Two-Spirit’ People of Indigenous North Americans*, GUARDIAN (Oct. 11, 2010), <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america>; see also Wilhelm Murg, *Momentum Mounts to Again Embrace Two-Spirits*, INDIAN COUNTRY MEDIA NETWORK (June 6, 2011), <https://indiancountrymedianetwork.com/news/momentum-mounts-to-again-embrace-two-spirits/> (discussing the re-incorporation of a gender variant identity into many tribal cultures).

16. Wilson, *supra* note 8, at 176 (“During the 1990s, the LGBT Native American community began emphasizing their unique place within the gay community by focusing on the rich history of two-spirit culture and the value tribes traditionally placed on those individuals.”).

17. See, e.g., Jacobi, *supra* note 5, at 848 (encouraging tribes to use their “sovereignty to make independent decisions on this matter [of same-sex marriage]” and warning that they “should be wary of disregarding their traditions, which are integral to tribal identity”); Wilson, *supra* note 8, at 163 (urging tribes to break with “prejudicial state precedent” and endorsing “tribal government recognition of same-sex marriage, with the goals of returning to traditional tribal values, promoting inclusivity within the tribal community”).

18. 135 S. Ct. 2584 (2015).

19. See Tweedy, *supra* note 12, at 131–32 (discussing twelve tribes that, as of 2012, had Defense of Marriage Acts); see also Jacobi, *supra* note 5, at 846 (“[M]any Native American tribes have disregarded the traditional respect given two-spirits, and adopted European American and Christian views on homosexuality and gender difference.”).

20. See *infra* note 23 (discussing tribal bans). In addition, it should be noted that the discrimination against LGBT tribal members is not limited to marriage. See, e.g., Eben Blake, *Native American LGBT Discrimination: Obama Administration Pushing Housing Protections for Gays on Tribal Land*, INT’L BUS. TIMES (May 28, 2015), <http://www.ibtimes.com/native-american-lgbt-discrimination-obama-administration-pushing-housing-protections-1942835> (describing potential discrimination in tribal housing projects); see also ICMN Staff, *Study: Transgender Native Americans Experience Discrimination at Worst Rates*, INDIAN COUNTRY MEDIA

elicited little national notice.<sup>21</sup> However, once the Court declared state marriage bans unconstitutional, tribal bans became the glaring exception to nationwide marriage equality.<sup>22</sup> Tribes with same-sex marriage bans are now under increasing pressure to adopt the Supreme Court's view of marriage equality and repeal their marriage bans.<sup>23</sup> In most cases, these requests have been ignored.<sup>24</sup>

Tribal marriage bans prevent thousands of native men and women from marrying their chosen partners. Moreover, the impact

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NETWORK (Oct. 12, 2012), <https://indiancountrymedianetwork.com/news/study-transgender-native-americans-experience-discrimination-at-worst-rates/> (noting that the bias experienced by transgender people "extends into virtually all aspects of their lives").

21. See Elizabeth Dias, *A Gay Marriage Loophole for Native Americans*, TIME (Nov. 1, 2013), <http://nation.time.com/2013/11/01/a-gay-marriage-loophole-for-native-americans/> (discussing a tribe that granted a same-sex couple a marriage license, but also noting that "[t]he wedding has brought attention to a subset of the marriage equality movement that often flies under the radar").

22. See Ann E. Tweedy, *Tribes, Same-Sex Marriage, and Obergefell v. Hodges*, FED. LAW., Oct.–Nov. 2015, at 6, 6 ("Now that the U.S. Supreme Court has confirmed that the Constitution protects the right of same-sex couples to marry . . . Indian tribes are suddenly the only governmental entities in the United States that have the option not to allow same-sex couples to marry within their jurisdictions."); Steven J. Alagna, Note, *Why Obergefell Should Not Impact American Indian Tribal Marriage Laws*, 93 WASH. U. L. REV. 1577 (2016) (considering how Native American tribes will be impacted by the Supreme Court's ruling).

23. See, e.g., Felicia Fonseca, *U.S. Same-Sex Marriage Challenged by Native American Sovereignty*, THE STAR (Nov. 27, 2015), <https://www.thestar.com/news/world/2015/11/27/us-same-sex-marriage-challenged-by-native-american-sovereignty.html>; Marcia Zug, *Why Same-Sex Marriage Bans Risk Native American Sovereignty*, THE ATLANTIC (Oct. 15, 2016), <http://www.theatlantic.com/politics/archive/2016/10/tribal-same-sex-marriage-bans/503345/> ("Couples that live on American Indian reservations are beyond the reach of constitutional protections because of the unique legal status of Native American tribes . . . Tribal governments are therefore allowed to continue to ban same-sex marriage despite the Court's ruling."); Hayley Fowler, *Gay Marriage Discouraged Within American Indian Tribes*, DAILYTARHEEL.COM (Aug. 18, 2015), <http://www.dailytarheel.com/article/2015/08/native-american-gay-marriage> (discussing the Eastern Band of Cherokee Indians' marriage ban); Matthew Tharrett, *Native American Tribes Passing Same-Sex Marriage Bans Ahead of Supreme Court Mandate*, NEWNOWNEXT (Apr. 8, 2015), <http://www.newnownext.com/native-american-tribes-passing-same-sex-marriage-bans-ahead-of-supreme-court-mandate/04/2015/>.

24. But see Hayley Miller, *Cherokee Nation Will Now Recognize Same-Sex Marriage*, HUFFINGTON POST (Dec. 9, 2016), [http://www.huffingtonpost.com/entry/cherokee-nation-will-now-recognize-same-sex-marriage\\_us\\_584b061fe4b04c8e2bafca0e](http://www.huffingtonpost.com/entry/cherokee-nation-will-now-recognize-same-sex-marriage_us_584b061fe4b04c8e2bafca0e) (discussing the reversal of the Cherokee nation's same-sex marriage ban).

of these bans may extend far beyond individual couples. Historically, when tribal and Anglo-American values conflict, the result is an increased perception by non-Indians that tribes are backwards, inferior, and unjust, and this effect is particularly pronounced in instances where tribal law or custom reflect a position specifically and forcefully rejected by American law.<sup>25</sup> Consequently, there is a real danger that the continuation of tribal same-sex marriage bans post-*Obergefell* will negatively affect how tribes and tribal justice are perceived. This perception could then become the catalyst for reversing many of the recent gains in tribal court jurisdiction.<sup>26</sup>

This article examines the potential impact of tribal same-sex marriage bans in light of America's long history of distrusting and dismantling Indian traditions that conflict with contemporary American beliefs regarding fairness and morality. As this article demonstrates, the appeal to tradition has not fared well in same-sex marriage debates, and this is likely to hold true in the Indian law context as well. In *Obergefell*, the Supreme Court specifically rejected arguments based on tradition and held that regardless of tradition, laws limiting marriage to one man and one woman no longer reflect contemporary understandings of equality and cannot continue.<sup>27</sup> Tribes argue they are not bound by *Obergefell* and have the right to continue to promote their traditional concept of marriage.<sup>28</sup> They

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25. See, e.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. REV. 219, 274 (1986) ("Tribes must exercise their 'rights' to self-determination so as not to conflict with the interests of the dominant sovereign. In effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic, universalized worldview.").

26. See *infra* Part IV.

27. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era . . . . [W]hen [opposition to same-sex marriage] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.").

28. For example, Otto Tso, a Navajo legislator and medicine man, stated, "We have to look at our culture, our society, where we come from, [and] talk to our elders." Julie Turkewitz, *Among the Navajos, a Renewed Debate About Gay Marriage*, N.Y. TIMES (Feb. 21, 2015), <http://www.nytimes.com/2015/02/22/us/among-the>



are correct. However, due to their potential to influence national perceptions regarding tribal justice, tribes should be wary of making such arguments. In recent years, tribes have slowly been permitted to increase their authority over crimes perpetrated by non-Indians on tribal lands. Unfortunately, negative perceptions of tribal fairness could quickly eliminate these important gains.

American courts and legislatures have frequently used the difference, or at least the supposed difference, between Indian and non-Indian values to justify limiting tribal sovereignty.<sup>29</sup> Consequently, although tribes have the right to ban same-sex marriages, there is a real danger that these bans will reinforce the long-standing and deeply-entrenched belief that tribal laws and customs are unjust and that tribal jurisdiction should be limited. Thus, the dangerous irony of tribal marriage bans is that these laws may ultimately wind up threatening the very sovereignty tribes rely upon to defend them.

Part II of this article discusses the semi-sovereign status of tribes and explains how this status enables tribes to ban same-sex marriage post-*Obergefell*.<sup>30</sup> Part III examines the connection between Indian sovereignty and conflicts between Indian and non-Indian customs.<sup>31</sup>

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-navajos-a-renewed-debate-about-gay-marriage.html. Other Navajo members echoed these sentiments. Supporters of the Navajo marriage ban, such as Katherine Benally, argued that the ban “would strengthen our traditional values.” 2005 Diné Coalition for Cultural Preservation, *A History of the Dine Marriage Act and the Efforts to Stop It from Becoming Law*, NATIVE OUT (Apr. 22, 2005), <http://nativeout.com/twospirit-rc/tribal-marriage-equality/dine-marriage-act-of-2005/>. Navajo member Harriet Becenti noted, “Men and women have been created in a sacred manner. We need to honor this.” *Id.* Orlanda Smith-Hodge stated, “Many tell us our teachings come from our home. Our elders have taught us much, and unfortunately it appears we are leaving our traditional values. [The ban] is moving in the spirit of preserving cultural teachings.” *Id.*

Similar arguments were also made by Todd Hembree, the lawyer for the Cherokee Nation who drafted the amendment banning same-sex marriage. Hembree defended the ban, stating, “‘Cherokees have a strong traditional sense of marriage,’ and ‘[t]hroughout [Cherokee] history, there’s never been a tribal recognition of same-sex marriage.’” Jacobi, *supra* note 5, at 828–29. The Cherokee Nation has now reversed its position on same-sex marriage. Interestingly, this reversal is also justified by reference to Cherokee culture and tradition.

29. See generally Matthew Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93 (2007).

30. *Infra* Part II.

31. *Infra* Part III.

Using the well-known decisions of *Santa Clara Pueblo v. Martinez*<sup>32</sup> and the Cherokee Freedmen cases,<sup>33</sup> this Part demonstrates that assertions of tribal sovereignty in contested-values cases can create the perception that Indian sovereignty perpetuates unjust and problematic values.<sup>34</sup> Part IV examines the recent *Dollar General*<sup>35</sup> decision and argues that cases like *Dollar General*, which were brought to limit tribal sovereignty, and cases like *Santa Clara* and the Cherokee Freedmen cases, which attempt to affirm that sovereignty, are actually two sides of the same coin.<sup>36</sup> The latter are typically described as “wins” for tribal sovereignty, but they have actually been instrumental in undermining it.<sup>37</sup> As *Dollar General* demonstrates, fear of tribal custom and tradition remain an effective means of attacking tribal jurisdiction.<sup>38</sup> Finally, Part V explores the recent gains in tribal criminal jurisdiction.<sup>39</sup> This article concludes by suggesting that the assertion of tribal sovereignty in the same-sex marriage context risks increasing the perception that tribes are unjust and potentially reversing the recent increases in tribal criminal jurisdiction over non-Indians.<sup>40</sup>

## II. SAME-SEX MARRIAGE IN INDIAN COUNTRY

In *Obergefell v. Hodges*, the Supreme Court declared same-sex marriage bans unconstitutional pursuant to both the Due Process

32. 436 U.S. 49 (1978).

33. *Nero v. Cherokee Nation*, 892 F.2d 1457, 1460–61 (10th Cir. 1989); *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, 2011 WL 8843901 (Cherokee Sup. Ct. Aug. 22, 2011); *Allen v. Cherokee Nation Tribal Council*, JAT-04-09 (Cherokee App. Trib. Mar. 7, 2006), *rev'g Riggs v. Ummerteskee*, JAT-97-03-K (Cherokee App. Trib. Aug. 15, 2001).

34. *Infra* Part III.

35. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

36. *Infra* Part IV.

37. *See, e.g.*, Letter from Larry Echo Hawk, Assistant Sec’y for Indian Affairs, U.S. Dep’t of the Interior, to S. Joe Crittenden, Acting Principal Chief, The Cherokee Nation (Sept. 9, 2011), <http://www.nativetimes.com/index.php/news/tribal/6005-letter-from-echo-hawk-regarding-choke-kee-freedmen-upcoming-election> (expressing that the federal government may not honor recent tribal decisions because said actions do not line up with previous treaties between the Cherokee Nation and the U.S. government).

38. *Cf.* Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 816–18 (2012) (discussing misperceptions about tribal law arising from the significant scrutiny to which tribal law has been subjected).

39. *Infra* Part V.

40. *Infra* Part V.

and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution.<sup>41</sup> As a result of this decision, state marriage bans immediately became unenforceable.<sup>42</sup> Nevertheless, despite the *Obergefell* decision, tribal marriage bans remain in effect.<sup>43</sup>

Tribes approach same-sex marriage in a variety of different ways. A number of tribes were at the forefront of the same-sex marriage movement,<sup>44</sup> but others, including the Navajo, the largest federally recognized tribe, continue to ban such unions.<sup>45</sup> The Navajo alone have a population of more than 300,000 members,<sup>46</sup> and there are at least another 350,000 members of smaller tribes who are also

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41. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

42. *Id.* at 2607–08 (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States. It follows that that the Court must also hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”)

43. See Zug, *supra* note 23 (discussing tribes that continue to allow same-sex marriage bans, even after *Obergefell*).

44. For example, the Iipay Nation of Santa Ysabel, located near San Diego, California, enacted its marriage resolution before same-sex marriage became legal in California. Tweedy, *supra* note 12, at 125 (noting that the Tribe’s “resolution was passed before the Supreme Court’s decision in *Hollingsworth v. Perry*, in which the Supreme Court indirectly legalized same-sex marriage in California”); Jean Walcher, *California Native American Tribe Announces Support of Same Sex Marriage: Santa Ysabel Tribe First in California to Make Proclamation*, BUS. WIRE (June 24, 2013), <http://www.businesswire.com/news/home/20130624005344/en/California-Native-American-Tribe-Announces-Support-Sex>. Similarly, Oregon’s Collville Tribe and Oklahoma’s Cheyenne and Arapaho tribes each recognized same-sex marriages before their respective states did so. Andrew Potts, *8th US Native American Tribe Allows Same-Sex Couples to Wed*, GAY STAR NEWS (Nov. 16, 2013), [www.gaystarnews.com/article/8th-us-native-american-tribe-allows-same-sex-couples-wed161113/#gs.Pu=\\_B7g](http://www.gaystarnews.com/article/8th-us-native-american-tribe-allows-same-sex-couples-wed161113/#gs.Pu=_B7g). Other tribes supportive of same-sex marriage before *Obergefell* include the Coquille, Suquamish, Pokagon, Tlingit and Haida, Puyallup, Mashantucket Pequot, Colville, Little Traverse, Cheyenne, Arapaho, Leech Lake Band of Ojibwe, Eastern Shoshone, Northern Arapaho, Iipay Nation of Santa Ysabel, and Keweenaw Bay Indian Community. Tweedy, *supra* note 12, at 110–11.

45. See Alagna, *supra* note 22, at 1586 (“At least eleven tribal sovereigns have legislative bans on same-sex marriage, including . . . the Navajo Nation.” (citations omitted)).

46. Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJO TIMES (July 7, 2011), <http://navajotimes.com/news/2011/0711/070711census.php>.

affected by tribal marriage bans.<sup>47</sup> Consequently, even after *Obergefell*, there are hundreds of thousands of Americans still subject to same-sex marriage bans.

Tribal bans remain in effect post-*Obergefell* for two reasons. The first is that the provisions in the Bill of Rights bind states and the federal government, but they do not bind tribes.<sup>48</sup> As the Supreme Court explained in *Talton v. Mayes*,<sup>49</sup> Indian tribes

were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided.<sup>50</sup>

The second reason *Obergefell* is not binding on tribes is because the Indian Civil Rights Act (ICRA), a federal statute that made many constitutional provisions applicable to tribes, allows tribes to interpret ICRA's provisions according to their own customs and traditions.<sup>51</sup> Therefore, although the equal protection and due process rights encapsulated in the Fifth and Fourteenth Amendments of the Constitution are applicable to tribes through ICRA, tribal courts are not required to interpret ICRA rights in the same way the federal courts have interpreted the corresponding constitutional rights.<sup>52</sup>

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47. James King, *Two Largest Native American Tribes in U.S. Ban Gay Marriage*, VOCATIV (Apr. 7, 2015), <http://www.vocativ.com/culture/lgbt/two-largest-native-american-tribes-in-u-s-ban-gay-marriage/>. Tribes with such bans include: "Navajo Nation, Blue Lake Rancheria, Chickasaw Nation, Confederated Tribes of the Coos, Lower Umqua, and Siuslaw Indians, Grand Traverse Band of Chippewa Indians, Nez Perce Tribe, the Oneida Indian Nation, the Sac & Fox Tribe of the Mississippi in Iowa, and the Muscogee (Creek) Nation." Tweedy, *supra* note 12, at 131–32.

48. *See id.* at 147 ("[T]ribes, being distinct from both states and the federal government, are not generally subject to the constitutional obligations in the Bill of Rights.").

49. 163 U.S. 376 (1896).

50. *Id.* at 384.

51. *See* Tweedy, *supra* note 22, at \*7 ("[A]lthough tribes are required to abide by a federal statute that contains equal protection and due process rights, namely the ICRA, tribes are empowered to interpret those rights according to their own cultures and traditions and need not follow the federal courts' interpretations of what those rights mean.").

52. As Professor Ann Tweedy has explained, "ICRA reflects a compromise between protecting tribes' rights to self-determination and protecting the rights of

The goal of ICRA is to ensure that American Indians receive basic constitutional rights and are protected “from arbitrary and unjust actions of tribal governments.”<sup>53</sup> However, it is not a constitutional clone. In *Santa Clara Pueblo v. Martinez*, the Supreme Court held that the desire to provide American Indians with constitutional protections must be balanced against the well-established federal “policy of furthering Indian self-government.”<sup>54</sup> The Court confirmed that ICRA’s provisions protect tribal members, but it also held that it is up to the tribal governments to determine how these provisions will be interpreted and enforced.<sup>55</sup>

*Santa Clara* concerned the Pueblo’s membership rules, which permitted male tribal members to pass their tribal membership onto their children regardless of the mother’s eligibility but denied a reciprocal right to the Pueblo’s female members.<sup>56</sup> These sex-based membership laws appeared to be a clear case of gender discrimination, and, thus, tribal member Julia Martinez challenged the rules under the equal protection provision of ICRA.<sup>57</sup> In considering the case, the Court weighed Martinez’s individual right to be free of discrimination against the Pueblo’s interest in

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individual tribal citizens and others who are subject to tribal jurisdiction. If tribes were required to interpret ICRA rights in the same manner federal courts interpret constitutional rights, this would have an assimilating effect on tribes.” *Id.*

53. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60–61 (1978) (citing S. REP. NO. 841, at 5–6 (1967)) (“We note at the outset that a central purpose of the ICRA and in particular of Title I was to . . . ‘protect individual Indians from arbitrary and unjust actions of tribal governments.’”).

54. *Santa Clara*, 436 U.S. at 62 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

55. Although this article discusses ways in which ICRA allows tribes to offer what many view as lesser protections, it should be noted that there are also examples where tribes have interpreted ICRA provisions to offer greater protections than the corresponding constitutional provision. *See, e.g.*, Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 810 n.70 (1997) (“Some tribes have gone further than ICRA’s mandates and ensure the right to counsel for indigent defendants in criminal cases.”). One such example is the Navajo tribe. 1 NAVAJO CODE § 7 (1995) (stating that “nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation”).

56. *See Santa Clara*, 436 U.S. at 49.

57. *Id.* at 51.

controlling its membership.<sup>58</sup> Describing the importance of this control, the district court stated it was

no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States.<sup>59</sup>

The Supreme Court cited *Worcester v. Georgia*<sup>60</sup> and similar cases<sup>61</sup> in order to demonstrate that tribes have the right to manage their internal decisions and that this right includes membership choices.<sup>62</sup> The Court agreed that ICRA secured broad constitutional protections for tribal members, but it also clarified that constitutional protections under ICRA are not necessarily the same as the constitutional protections that apply to non-tribal members.<sup>63</sup> According to the Court, the equal protection challenges pursuant to ICRA should be evaluated against the background of tribal sovereignty, and it specifically noted that ICRA does not require the imposition of an Anglo-American standard of equal protection if to do so would violate traditional values or harm the “cultural identity” of Indian tribes.<sup>64</sup> The *Santa Clara* decision, therefore, confirmed

58. *Id.* at 49–50. “This case requires us to decide whether a federal court may pass on the validity of an Indian tribe’s ordinance denying membership to the children of certain female tribal members.” *Id.* at 51–52.

59. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 15 (D. N.M. 1975), *rev’d*, 540 F.2d 1039 (10th Cir. 1976), *rev’d*, 436 U.S. 49.

60. *Santa Clara*, 436 U.S. at 55 (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)).

61. *Santa Clara*, 436 U.S. at 55–56. These cases recognize and affirm tribal sovereignty. They include: *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975); *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Quiver*, 241 U.S. 602 (1916); *Jones v. Meehan*, 175 U.S. 1 (1899); *Roff v. Burney*, 168 U.S. 218 (1897); and *United States v. Kagama*, 118 U.S. 375 (1886).

62. *Santa Clara*, 436 U.S. at 55–56.

63. *Id.* at 60–62 (“Section 1302 [of the ICRA], rather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments . . . selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.”).

64. *Id.* at 72. Quoting the district court in its description of the case, the *Santa Clara* Court stated,

[T]he equal protection guarantee of the Indian Civil Rights Act should

that tribal courts, rather than federal courts, should be the primary arbiters of ICRA disputes and that Indian tribunals are free to consider tribal customs and traditions in their decisions.<sup>65</sup>

After *Santa Clara*, it was clear that tribes are not bound by the federal definition of gender equality and, instead, are free to use tradition and custom to determine what is fair treatment toward their male and female members.<sup>66</sup> *Santa Clara* additionally means that tribes are also not bound by the *Obergefell* Court's interpretation of gender and sex equality. Instead, tribes can evaluate the right to same-sex marriage based on their own tribal customs and traditions, and they are free to conclude that these traditions and values support the continuation of tribal same-sex marriage bans.

### III. TRIBAL SOVEREIGNTY, TRADITION, AND UNFAIRNESS

*Santa Clara* was considered a win for the tribe and tribal sovereignty.<sup>67</sup> However, it was not considered a win for Indian

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not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore should be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . .

. . . To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.

*Id.* at 54 (citing *Santa Clara*, 402 F. Supp. at 18–19).

65. *See id.* at 65 ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."); *see also id.* at 71 ("By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."). According to the *Santa Clara* Court, Congress limited the enforcement of ICRA claims to tribal court in order to "avoid[] unnecessary intrusions on tribal governments." *Id.* at 67. Consequently, there is no appeal from these tribal court decisions to federal court. The only explicit federal remedy under ICRA is habeas corpus.

66. *See id.* at 71.

67. *See* Francine R. Skenandore, Comment, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347, 347 (2002) ("For practitioners, scholars, and students of federal Indian law, *Santa Clara Pueblo v. Martinez* is the most frequently cited case for upholding tribal

women.<sup>68</sup> In fact, even in the Court's decision, it is clear that the justices viewed this case as a conflict between women's rights and tribal rights.<sup>69</sup> As the Court noted, recognizing Martinez's claim for injunctive relief would protect her individual rights, but it "would be at odds with the congressional goal of protecting tribal self-government."<sup>70</sup> Consequently, the implication of the *Santa Clara* decision was not that the Pueblo's ordinance was fair, but that unfair laws are the price one pays for protecting tribal sovereignty and preserving Indian culture and heritage.<sup>71</sup>

A. *Interpreting Santa Clara Pueblo v. Martinez*

A few scholars have suggested that the Pueblo's claim of a patrilineal membership tradition was overstated and the case did not truly present a conflict between cultural traditions.<sup>72</sup> Nevertheless, most commentators accepted the tribe's description of its patrilineal traditions and, like the Court, viewed the case as a disagreement

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sovereignty.”).

68. *See id.* The author explains that “[m]ainstream feminists claim that the Court overlooked the equal protection claim and upheld tribal sovereignty at the expense of female equality,” while “Indian feminists view tribal sovereignty from the perspective that it is crucial to the cultural survival of Indian women.” *Id.*

69. *See Santa Clara*, 436 U.S. at 62 (“Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal ‘policy of furthering Indian self-government.’” (citation omitted)).

70. *Id.* at 64.

71. *See id.* at 72 (“[W]e are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.”).

72. For example, Judith Resnik has questioned whether this membership rule could really have come from the enduring culture of the Santa Clara people when it is

linked to the Pueblo's decision to organize under the guidance of the Department of the Interior, is linked to the Pueblo as a recipient of federal funds, and is linked to the Pueblo as situated in a United States culture that has made patrilineal and patriarchal rules so familiar that, to some, they seem uncontroversial.

Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 725 (1989); *see also* CATHARINE A. MACKINNON, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 68–69 (1987) (suggesting that the male supremacist ideology of tribes like the Santa Clara Pueblo may have been adopted from white culture).



between two different cultures with very different values.<sup>73</sup> Professor Gloria Valencia-Webber's description of the case is illustrative. She described *Santa Clara* as a "conflict between American Indians and the mainstream non-Indian world about what values should guide when law is made for a society."<sup>74</sup> According to Valencia-Webber, the case revealed the "chasm between two cultural frameworks."<sup>75</sup> Consequently, the conflict in *Santa Clara* is not over whether Indian and non-Indian values were in conflict but, instead, whether the preservation of the tribe's sovereign right to continue its patrilineal tradition was worth sacrificing the American value of gender equality.

Rina Swentzell, a member of the Santa Clara Pueblo and an expert on Santa Clara culture, believed tribal sovereignty was worth this sacrifice.<sup>76</sup> In a moving essay on the *Santa Clara* case, Swentzell explained that despite the fact she believed the decision was bad for her individually, she ultimately supported it because she considered it good for the tribe.<sup>77</sup> She stated,

I thought long and hard about the *Martinez* case. I wanted my children to be members of Santa Clara, although I had married a non-Indian who I met in college. If the case favored the Martinez family, who I assumed had been encouraged by non-Native people to initiate the lawsuit, I

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73. See, e.g., Gloria Valencia-Weber, *Racial Inequality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 335 (2004) ("Indian law cases such as *Santa Clara Pueblo v. Martinez* clearly expose the tension between constitutional individual rights conceived in an abstract sense and the tribe's right as a cultural and political community with distinct consensual values."); see also *supra* note 68 and accompanying text (showing the difference in opinion between "mainstream" and "Indian" feminists).

74. Gloria Valencia-Weber, *Three Stories in One: The Story of Santa Clara Pueblo v. Martinez*, in INDIAN LAW STORIES 451 (Carole Goldberg et al. eds., 2011).

75. *Id.*; see also Skenandore, *supra* note 67, at 368 ("*Santa Clara* is a very difficult case to reconcile from both a sovereignty perspective and an equal rights perspective. Ultimately, the two positions cannot be reconciled."); Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 508–09 (1994) (describing the debate between those who privilege individual rights over tribal sovereignty and vice versa).

76. See Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97, 97 (2004) ("I wanted the courts to rule in favor of the tribe—to rule for tribal sovereignty . . . I also knew that it did not make sense; that it was not just or fair.")

77. *Id.* at 98–99.

felt that Santa Clara would loose [sic] any remnants of itself as a vital, self-determining community. I was relieved to hear the decision. Santa Clara was to retain the on-going conversation about who is a recognized member of the community. But, more importantly, the Western world was acknowledging the way of life which traditionally honored nurturing and feminine qualities.<sup>78</sup>

Swentzell supported the decision because she believed it was good for the Tribe, but many other commentators were unwilling to accept the idea that the preservation of tribal sovereignty and tribal traditions could justify discrimination against American Indian women.<sup>79</sup> For instance, in her excoriating critique of the *Santa Clara* decision, Professor Catharine MacKinnon wrote, “[C]ultural survival is as contingent on equality between women and men as it is upon equality between people.”<sup>80</sup> She therefore questions whether a culture based on gender inequality is one capable of long-term survival.<sup>81</sup>

As MacKinnon’s quote demonstrates, the *Santa Clara* decision affirmed the doctrine of tribal sovereignty, but it did so by reinforcing the perception that tribal sovereignty permits the perpetuation of backwards and inferior values. Moreover, although *Santa Clara* was not the first case to portray a conflict between Indian sovereignty and American values, it was the first to do so after the passage of ICRA, which many supporters had hoped would eliminate these types of cultural conflicts.<sup>82</sup> It did not. As the *Santa Clara*

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78. *Id.*

79. *See, e.g.,* Carla Christofferson, *Tribal Courts’ Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 185 (1991) (“The *Santa Clara* decision showed great respect for the sovereignty of Native American tribes. Yet in awarding such unrestricted sovereignty, the Court has left Native American women powerless within their communities. . . . In light of the current plight of Native American women, an expansion of the ICRA is warranted. Congress has a duty to provide an enforcement mechanism for the rights enumerated in the ICRA.”). *See generally* Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392 (2010) (discussing ways different Native American tribes respond to gender discrimination cases).

80. MACKINNON, *supra* note 72, at 68.

81. *Id.* at 65.

82. *See, e.g.,* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1705 (2012); David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty—Current Issues*, 75 ALB. L. REV. 133, 144 (2011–2012) (noting that “ICRA was prompted by complaints about civil rights violations by Indian tribes”); Hayley Weedn, *Stay Out of the Cookie Jar: Revisiting Martinez to Explain Why the U.S. Should Keep Its Hands Out of Tribal*

decision demonstrated, ICRA could not force tribes to discard controversial customs and traditions. This decision was a blow to the Act's supporters, but a bigger blow was still to come.<sup>83</sup> *Santa Clara* paved the way for the Cherokee Freedmen cases, a set of cases that seemed to confirm *Santa Clara's* critics' worst fears regarding Indian sovereignty and injustice.<sup>84</sup>

### B. *The Cherokee Freedmen*

The Cherokee Freedmen are the descendants of former Cherokee slaves.<sup>85</sup> In 1866, a treaty between the Cherokee Nation and the United States freed these men and women and granted them the rights and privileges of Cherokee citizenship.<sup>86</sup> Despite this treaty promise, the Freedmen were routinely and systematically excluded from participation in tribal affairs, and, over time, this exclusion became increasingly pronounced.<sup>87</sup> By the late 1970s, the Freedmen had been entirely disenfranchised and denied their citizenship rights.<sup>88</sup>

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*Constitutionalism and Internal Self-Governance*, 20 WILLAMETTE J. INT'L L. & DISP. RESOL. 18, 38 (2012) (“[ICRA] was initially prompted due to ‘[c]omplaints received by the [Senate S]ubcommittee [on Constitutional Rights] alleging that Indians were being deprived of their rights by Federal, State, and tribal governments.’ Congress was thus persuaded that the gap in application of some of the most fundamental of U.S. constitutional values between tribal members and tribal governments left Natives particularly vulnerable to abuses.”).

83. See Skenandore, *supra* note 67, at 368 (noting that in response to the decision, “equal rights supporters propose to amend the ICRA as a means of protecting the equal rights of Julia Martinez and other women within their tribes”); see also Christofferson, *supra* note 79, at 170 (arguing “that an expansion of the ICRA is necessary to protect Native American women from discriminatory actions by their tribes”).

84. See Circe Sturm, *Race, Sovereignty, and Civil Rights: Understanding the Cherokee Freedmen Controversy*, 29 CULTURAL ANTHROPOLOGY 575 (2014), <https://culanth.org/articles/751-race-sovereignty-and-civil-rights-understanding> (discussing the Cherokee Freedmen).

85. S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 387 (2007); see also Lolita Buckner Inniss, *Cherokee Freedmen and the Color of Belonging*, 5 COLUM. J. RACE & L. 100, 114–17 (2015), [http://engagedscholarship.csuohio.edu/fac\\_articles/844](http://engagedscholarship.csuohio.edu/fac_articles/844).

86. Ray, *supra* note 85, at 390.

87. See Sturm, *supra* note 84, at 576 (“Whether or not they have Cherokee ancestry, Cherokee Freedmen have encountered intense opposition whenever they have sought the full rights and benefits given other tribal citizens.”).

88. The story of the disenfranchisement of the Freeman can be summarized as follows:

The disenfranchisement of the Freedmen occurred when the Cherokee tribal council changed the Tribe's membership criteria.<sup>89</sup> Under the new membership rules, all tribal members were required to provide a Certificate of Indian Blood Card (CDIB) based on the degree of blood listed on the Dawes Rolls (the 1906 list of tribal members created by the federal government) for their ancestor.<sup>90</sup> The catch, however, was that the Dawes Rolls did not list a degree of blood for Freedmen tribal members.<sup>91</sup> Consequently, this new rule

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[T]he Cherokee Nation reorganized its government between 1970 and 1976 . . . . During that period, the Freedmen were quietly disenfranchised and denied their right to citizenship. . . . These changes occurred without the knowledge or input of the Cherokee Freedmen. When the Reverend Roger Nero and his companions went to vote in the Cherokee elections in 1983, they found that the definition of a Cherokee citizen had been changed to exclude them, which came as a surprise since Nero had voted in the last tribal election in 1979.

CIRCE DAWN STURM, *BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA* 179–80 (2002).

89. See Ray, *supra* note 85, at 411–12 (“The introduction of this requirement—possession of a federally-issued [Certificate of Indian Blood Card]—into the formal criteria for Cherokee Nation citizenship in 1977–78 marked the first time since the Treaty of 1866 that the Nation had officially predicated citizenship on biology. . . . The Dawes Rolls were effectively attenuated to ‘Indian blood’-based categories only, and in subsequent elections, Freedmen’s descendants were turned back from the polls.”).

90. *Id.*; see also Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 GEO. PUB. POL’Y REV. 129, 132 (1999); Evelyn Nieves, *Putting to a Vote the Question ‘Who Is Cherokee?’*, N.Y. TIMES (Mar. 1, 2007), <http://www.nytimes.com/2007/03/03/us/03cherokee.html>.

91. Carla D. Pratt described the Dawes Rolls as follows:

The freedmen roll listed the names of the tribes’ freed slaves regardless of whether they were of Indian ancestry. It also did not record which freedmen had Native American blood. Rather, it merely listed their names and the tribal affiliation of their former slavemaster. Thus, the tribes and the federal government recognized people with Indian and European ancestry as Indian and those of Indian and African ancestry as Negro. Accordingly, the Dawes Commission was able to complete the work of tribal antiblack miscegenation laws: by failing to document the freedmen’s Indian ancestry on the rolls, the Dawes Commission created the impression that all freedmen lacked Indian blood. Hence, the Dawes Rolls create the legal fiction that Indian identity is Africanless. The perception of the freedmen as non-Indian is still held today by some members of the tribe who mistakenly think that all freedmen were “just slaves.”

Carla D. Pratt, *Loving Indian Style: Maintaining Racial Caste and Tribal Sovereignty*

effectively removed most Freedmen and their descendants from tribal membership.<sup>92</sup>

In 1984, a group of Freedmen sued the Cherokee tribe, alleging that the new membership criteria constituted unconstitutional race discrimination.<sup>93</sup> The district court dismissed the Freedmen's claims, and the Tenth Circuit affirmed the decision.<sup>94</sup> Specifically, the appellate court based its decision on *Santa Clara*, stating, "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."<sup>95</sup> Thus, the court concluded that applying ICRA's equal protection provision to a tribe's designation of its tribal members would in effect eviscerate the tribe's sovereign power to define itself and would constitute an unacceptable interference "with a tribe's ability to maintain itself as a culturally and politically distinct entity."<sup>96</sup>

The fight regarding the Freedmen continued for many years, but in 2002, the Cherokee government sought to amend its constitution to fully complete the disenfranchisement of the Freedmen.<sup>97</sup> This move was again challenged by a group of Freedmen, and initially, they won.<sup>98</sup> In March 2006, the Cherokee Supreme Court held the amendment impermissible and declared that the Freedmen were entitled to citizenship under the 1975

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*Through Sexual Assimilation*, 2007 WIS. L. REV. 409, 456–57 (2007) (citations omitted).

92. Although the Dawes Rolls did not list blood quantum for the freedmen, many actually had Indian ancestors. For various racial reasons, mixed-race Cherokees were frequently placed on the freedmen rolls rather than the Indian rolls. See Alex Kellogg, *Cherokee Nation Faces Scrutiny for Expelling Blacks*, NPR (Sept. 19, 2011), <http://www.npr.org/2011/09/19/140594124/u-s-government-opposes-cherokee-nations-decision> (noting that "blacks—even those who were part Indian—were simply labeled as black on the Dawes Rolls").

93. See *Nero v. Cherokee Nation*, 892 F.2d 1457, 1458–59 (10th Cir. 1989).

94. See *id.* at 1460–61 (confirming that *Santa Clara* provides the tribes with immunity from suit for violations of ICRA).

95. *Id.* at 1463 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)).

96. *Santa Clara*, 436 U.S. at 72.

97. Jon Velie, *Should the United States Be Fighting for Jim Crow's Survival by Its Complicity in Denying Voting Rights to the Cherokee Freedmen?*, 54 FED. LAW. 43, 44 (2007).

98. See *Allen v. Cherokee Nation Tribal Council*, No. JAT-04-09, at 3 (Cherokee Nation Jud. App. Trib. Mar. 7, 2006), <https://turtletalk.files.wordpress.com/2010/12/allen-v-cherokee-nation.pdf>.

constitution.<sup>99</sup> Many Cherokee members were unhappy with this decision, and a constitutional referendum was called to address the issue.<sup>100</sup> An overwhelming majority of voters then voted to amend the Cherokee constitution to limit tribal membership to persons with documented Cherokee ancestry.<sup>101</sup> In 2011, the Cherokee Nation Supreme Court upheld the referendum results.<sup>102</sup>

Like *Santa Clara*, the Cherokee Freedmen cases were viewed as a conflict between Indian and non-Indian values.<sup>103</sup> The Cherokee argued that, as a sovereign nation, it had the right to define its membership and to do so in accordance with traditional Cherokee values that emphasized the importance of ancestry and clan.<sup>104</sup> However, critics of the Nation's disenfranchisement decision saw it as an atrocious civil rights violation that defied the core American constitutional values of equality and fairness.<sup>105</sup> Consequently, although the courts in the Freedmen cases held that the principle of

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99. Ray, *supra* note 85, at 388 (citing *Allen*, No. JAT-04-09, at 19).

100. Jessica Jones, *Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State*, 22 NAT'L BLACK L.J. 1, 19 (2009).

101. *Id.*

102. See *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, at 9 (Cherokee Nation S. Ct. Aug. 22, 2011), <https://turtletalk.files.wordpress.com/2011/08/sc-11-02-15-opinion-cn-registrar-v-nash.pdf>; *In re 2011 General Election*, No. SC-2011-06, at 1 (Cherokee Nation S. Ct. July 21, 2011), [http://www.cherokeecourts.org/Portals/73/Documents/Supreme\\_Court/SC-11-06%2024-FINAL%20ORDER%207-21-11.pdf](http://www.cherokeecourts.org/Portals/73/Documents/Supreme_Court/SC-11-06%2024-FINAL%20ORDER%207-21-11.pdf). Shortly before this article was published, a federal district court held that the Cherokee Nation has the right to determine its membership, subject to the 1866 Treaty between the federal government and the Tribe, which stated that the Cherokee Freedmen are entitled to membership in the Tribe. *Cherokee Nation v. Nash*, No. 13-01313, 2017 WL 3822870 (D.D.C. Aug. 30, 2017). The Tribe has decided not to appeal the decision. Kat Chow, *Judge Rules that Cherokee Freedmen Have Right to Tribal Citizenship*, NAT'L PUB. RADIO (Aug. 31, 2017, 7:39 PM), <http://www.npr.org/sections/thetwo-way/2017/08/31/547705829/judge-rules-that-choke-ee-freedmen-have-right-to-tribal-citizenship>.

103. Rebecca Tsosie, *The Next Frontier in Federal Indian Law: Building on the Foundational Work of Carole E. Goldberg*, 63 UCLA L. REV. 1692, 1732 (2016).

104. Will Chavez, *Cherokee Judge Rules for Freedmen in Citizenship Case*, CHEROKEE PHX. (Jan. 14, 2011), <https://web.archive.org/web/20110118004854/http://www.cherokeephoenix.org/25490/Article.aspx> (quoting the Cherokee Nation Attorney General as saying that "[w]e believe that the Cherokee people can change our Constitution, and that the Cherokee citizenry clearly and lawfully enunciated their intentions to do so in the 2007 amendment").

105. See Tsosie, *supra* note 103, at 1731 (discussing how the Congressional Black Caucus called for Congress to terminate the Cherokee Nation's trust).

tribal sovereignty prevented them from interfering with and directing tribal membership decisions, others—most notably the other branches federal government—were not nearly so sanguine about the Tribe’s actions.<sup>106</sup> In fact, in this case, the federal government’s response demonstrated an outright refusal to respect tribal sovereignty.<sup>107</sup>

After the Cherokee Supreme Court issued its decision upholding the amendment expelling the Freedmen, Larry Echo Hawk, Assistant Secretary for Indian Affairs for the U.S. Department of the Interior, issued a menacing letter to the Cherokee government.<sup>108</sup> He wrote that the Bureau of Indian Affairs (BIA) “had never approved the constitutional amendment removing the Freedmen and would consider the 2011 Cherokee election unconstitutional if the Freedmen were prevented from voting.”<sup>109</sup> He thus warned the Tribe to “consider carefully the Nation’s next steps in proceeding with an election that does not comply with federal law.”<sup>110</sup>

Echo Hawk’s letter was an unapologetic threat to Cherokee tribal sovereignty and an announcement that the federal government considered the Cherokee people unable to govern themselves.<sup>111</sup> It was also not the only government threat the Tribe received.<sup>112</sup> Ten days earlier, the U.S. Department of Housing and Urban Development (HUD) froze thirty-three million dollars of housing funds, which it stated would only be restored to the Tribe once “the [Freedmen] issue is resolved.”<sup>113</sup> In addition, the

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106. See Echo Hawk, *supra* note 37.

107. See *id.*

108. *Id.*

109. Cody McBride, *Placing a Limiting Principle on Federal Monetary Influences of Tribes*, 103 CALIF. L. REV. 387, 408–09 (2015).

110. *Id.* The Echo Hawk letter further stated that “[t]he Department will not recognize any action taken by the Nation that is inconsistent with these principles and does not accord its Freedmen members full rights of citizenship.” Echo Hawk, *supra* note 37.

111. In 1997, federal intervention was needed to remove corrupt tribal leaders. At the time, Chad Smith, incumbent chief, called the intervention by federal agents “humiliating” and “embarrassing.” Sam Howe Verhovek, *Cherokee Nation Facing a Crisis Involving Its Tribal Constitution*, N.Y. TIMES (July 6, 1997), <http://www.nytimes.com/1997/07/06/us/ Cherokee-nation-facing-a-crisis-involving-its-tribal-constitution.html?src=pm>. It was a clear sign that the nation appeared unable to govern itself. *Id.*

112. McBride, *supra* note 109, at 407–09.

113. *Id.* at 408.

Cherokee Nation's membership decision had so disgusted California Congresswomen Diane Watson that even before the BIA or HUD got involved, Watson introduced a bill to cut off all federal funding for the tribe (estimated to be approximately 300 million dollars per year) and suspend its ability to conduct gaming operations until full citizenship was restored to the Freedmen.<sup>114</sup>

Cherokee leaders recognized that these threats posed a grave risk to Cherokee sovereignty.<sup>115</sup> After Watson introduced her bill, incumbent Chief Chad Smith called it "a misguided attempt to deliberately harm the Cherokee Nation in retaliation for this fundamental principle that is shared by more than 500 other Indian tribes."<sup>116</sup> The National Congress of American Indians (NCAI) also expressed its disapproval of the bill, describing it as akin to earlier governmental policies designed to destroy Indian tribes.<sup>117</sup> Similarly, Echo Hawk's letter led Acting Principle Chief Joe Crittenden to

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114. Chris Casteel, *Lawmaker Wants to Eliminate Funding for Cherokee Nations*, NEWSOK (June 22, 2007), <http://newsok.com/article/3069097>. On June 21, 2007, U.S. Representative Diane Watson (D-California), one of the twenty-five Congressional Black Caucus members who signed a letter asking the BIA to investigate the Freedmen situation, introduced H.R. 2824. This bill sought to sever the Cherokee Nation's federal recognition, strip the Cherokee Nation of its federal funding (estimated \$300 million annually), and stop the Cherokee Nation's gaming operations if the Tribe did not honor the Treaty of 1866. H.R. 2824 was co-signed by eleven Congress members and was referred to the Committee of Natural Resources and the Committee of the Judiciary. H.R. 2824, 110th Cong. (2007), <https://www.congress.gov/bill/110th-congress/house-bill/2824>.

115. McBride, *supra* note 109, at 407 ("Facing mounting federal pressure, including the loss of a substantial amount of federal funding, the Tribe caved to federal demands and agreed to temporarily reinstate the Freedmen as citizens until the federal court could reach a final decision.").

116. Casteel, *supra* note 114.

117. President Joe Garcia described the bill with reference to the disastrous Termination Era. He stated,

This is an uncalled for response to a question of treaty interpretation. When Alabama or California takes an action inconsistent with Congressional views, there is no discussion of revoking their statehood. The attempt to revoke tribal nationhood is equally inappropriate. Not since the Termination Era of the 1950s, when the official policy of the federal government was complete destruction of indigenous peoples, have we seen such a piece of legislation. NCAI was founded to oppose termination of Indian tribes.

Jerry Reynolds, *Freedmen Status at Issue in Washington*, INDIAN COUNTRY MEDIA NETWORK (June 29, 2007), <http://indiancountrytodaymedianetwork.com/2007/06/29/freedmen-status-issue-washington-91054>.



declare, “The Cherokee Nation will not be governed by the U.S. Bureau of Indian Affairs.”<sup>118</sup> These objections to the threatened government interference were valid, but it was also clear that they would be ineffective.<sup>119</sup>

The Cherokee government agreed to reinstate the Freedmen as citizens<sup>120</sup> once it became clear that its decision to justify racial discrimination as a right of sovereignty wound up threatening that very sovereignty.<sup>121</sup> As both the *Santa Clara* and the Cherokee Freedmen cases demonstrate, when tribes use sovereignty as the justification for discriminatory actions, they jeopardize the future of tribal sovereignty.

#### IV. TRIBAL TRADITIONS AND FAIRNESS

Tribes have the right to enact same-sex marriage bans, but after *Obergefell*, it is extremely likely that such bans will negatively influence non-Indian views of tribal sovereignty. The public response to both the Santa Clara Pueblo and the Cherokee Nation’s controversial decisions was extremely negative, and those cases only involved a single tribe. In contrast, same-sex marriage bans involve many tribes and hundreds of thousands of individuals. Unfair or not, non-Indian perceptions of tribal justice are critically important for Indian sovereignty, and thus, continuing tribal marriage bans has the potential to significantly harm Indian tribes.

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118. Acting Principle Chief Joe Crittenden further added, “We will hold our election and continue our long legacy of responsible self-governance.” Jorge Rivas, *U.S. Government Pressures Cherokee Nation to Accept Descendants of Slaves*, COLORLINES (Sept. 15, 2011), <http://www.colorlines.com/articles/us-government-pressures-choerokee-nation-accept-descendants-slaves>. Because the Cherokee Nation Constitution does not allow elected officials to remain in office past Inauguration Day, Smith was required to leave office on August 14, 2011. Crittenden was then sworn in as deputy chief and elevated to acting principal chief in accordance with the constitutional chain of succession.

119. McBride, *supra* note 109, at 409.

120. *Id.*

121. *Compare id.* (“Facing mounting federal pressure, including the loss of a substantial amount of federal funding, the Tribe caved to federal demands and agreed to temporarily reinstate the Freedmen as citizens until the federal court could reach a final judicial decision.”), with Echo Hawk, *supra* note 37 (“The Department will not recognize any action taken by the Nation that is inconsistent with these principles and does not accord its Freedmen members full rights of citizenship.”).

### A. Crow Dog and Tribal Justice

The United States has a long history of limiting Indian sovereignty in response to perceived conflicts between Indian and non-Indian customs and traditions.<sup>122</sup> In fact, the entire body of federal law pertaining to criminal jurisdiction over Indians was created as a solution to the perceived problem of traditional tribal justice.<sup>123</sup> The case that spurred the call for federal assumption of criminal jurisdiction over Indian country is *Ex parte Crow Dog*.<sup>124</sup> However, the sad irony of the *Crow Dog* case is that many modern Americans would now view the Indian justice meted out in *Crow Dog* as fairer and more just than the punishment mandated by nineteenth-century federal law.<sup>125</sup>

*Ex parte Crow Dog* involved the murder of one member of the Brule Sioux band of the Sioux Nation by another member.<sup>126</sup> The question for the U.S. Supreme Court was whether the laws of the United States governed this crime.<sup>127</sup> The Court held they did not.<sup>128</sup> According to the *Crow Dog* Court, it would be unfair to try an Indian plaintiff according to U.S. law because such laws are “opposed to the traditions of their history” and “the habits of their lives.”<sup>129</sup>

122. See, e.g., L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810 (1996) (describing the history of the American government in limiting Indian sovereignty).

123. E.g., Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 926 (2012) (“The ethnocentric non-Indian view was that such tribal justice systems were inadequate and western notions of criminal punishment should be imposed on tribes, and thus the MCA became law.”).

124. *Ex parte Kan-Gi-Shun-Ca (Crow Dog)*, 109 U.S. 556 (1883).

125. There are increasing arguments that the death penalty should be abolished and that it violates the Eighth Amendment’s prohibition against cruel and unusual punishment. See generally JOHN BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* (2012); DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2010); JEFFREY KIRCHMEIER, *IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY* (2015); ANDREW WELSH-HUGGINS, *NO WINNERS HERE TONIGHT: RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY’S BUSIEST DEATH PENALTY STATES* (2009).

126. *Crow Dog*, 109 U.S. at 557.

127. *Id.*

128. *Id.* at 572.

129. *Id.* at 571.

Therefore, the Court concluded that it would not “measure[] the red man’s revenge by the maxims of the white man’s morality.”<sup>130</sup>

As the Court’s explanation suggests, when *Crow Dog* was decided in 1883, there was a widespread perception that Indian and Anglo-American forms of justice were vastly different.<sup>131</sup> The *Crow Dog* Court held that this difference justified exempting Indians from federal criminal laws,<sup>132</sup> but this was a minority view. By the time *Crow Dog* was decided, most lawmakers believed that the difference between Indian and non-Indian forms of justice required the imposition of federal criminal law over Indian country.<sup>133</sup> Consequently, shortly after *Crow Dog* was decided, the Secretary of the Interior, Samuel Kirkwood, used the decision to demand legislation permitting the federal courts to punish reservation crimes.<sup>134</sup> He stated,

If offenses of this character cannot be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished. . . . If the murder is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsman.<sup>135</sup>

Kirkwood’s statement accused tribal justice of demanding indiscriminate revenge killings.<sup>136</sup> This was incorrect.<sup>137</sup> The traditional form of justice the Sioux used to deal with murder was restitution.<sup>138</sup> Nevertheless, by portraying tribal justice as random,

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130. *Id.*

131. See Raymond I. Orr, *Liberal Defaults: The Pending Perception of “Special Financial Rights” Among American Indian Nations*, 47 *TULSA L. REV.* 515, 524 (2012) (discussing how Congress passed the Major Crimes Act to apply uniformity in tribal law after *Ex parte Crow Dog*).

132. *Crow Dog*, 109 U.S. at 572.

133. See Orr, *supra* note 131, at 523 (discussing the strong public outcry after *Crow Dog*).

134. 1884 COMM’R OF INDIAN AFFAIRS ANN. REP. TO THE SECRETARY OF THE INTERIOR 9.

135. *Id.*

136. *Id.* (“If the murder is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen.”).

137. See Matthew Fletcher, *The Supreme Court’s Legal Culture War Against Tribal Law*, 2 *INTERCULTURAL HUM. RTS. L. REV.* 93, 96 (2007) (“[*Crow Dog*] was punished according to Lakota custom and tradition.”).

138. See, e.g., *id.* at 96 (discussing that after a tribal council meeting and

bloodthirsty, barbaric, and unfair, the government was able to depict it as inferior to the American criminal justice system.<sup>139</sup> However, it was actually federal law, not tribal law, that was premised on revenge.<sup>140</sup> Unlike tribal law, which required restitution to the murder victim's family, federal law demanded the perpetrator's death.<sup>141</sup> Unfortunately, the veracity of the government's revenge claims did not matter. The fabricated difference between Indian and non-Indian justice was accepted and then used to justify extending federal criminal law over Indian country.<sup>142</sup> Shortly after the *Crow Dog* decision, Congress passed the Major Crimes Act and gave federal courts the power to punish murder and other serious crimes that occurred in Indian country.<sup>143</sup>

Although *Crow Dog* is an old case, the arguments it inspired, namely that Indian justice is different and inferior to non-Indian justice, have not disappeared.<sup>144</sup> Every time a tribal government enacts laws that conflict with fundamental American law principles, there is the danger of reinforcing this perception.<sup>145</sup> This does not mean that tribal courts and legislatures should parrot federal law, but it does mean that visible and controversial conflicts with federal law cannot be considered purely tribal affairs. A tribe's decision to prefer male members, expel black members, or ban marriage between LGBT members strongly influences how non-Indians view

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mediation, *Crow Dog* was ordered to pay \$600, eight horses, and one blanket to Spotted Tail's people).

139. *See id.* at 96–97 (“Non-Indians, fueled by local Indian agents, were enraged by what they viewed as a lack of punishment.”).

140. *Compare id.* at 96 (the Tribal community punished *Crow Dog* by requiring him to pay restitution to the victim's family), *with Ex parte Kan-Gi-Shun-Ca* (*Crow Dog*), 109 U.S. 556, 557 (1883) (citing Act of April 30, 1790, ch. 9, 1 Stat. 112 (Section 3 of that Act)) (“[E]very person who commits murder . . . within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death.”).

141. *Id.* at 96.

142. *Id.* at 97 (describing how Congress's reaction to *Crow Dog* was to extend federal criminal jurisdiction into Indian Country).

143. 18 U.S.C. § 1153 (Supp. IV 1998).

144. *E.g., infra* Sections IV.B.1–2 (discussing the arguments put forth by Petitioners in the *Dollar General* case that tribal courts are unsophisticated and founded on traditions, custom, and bias).

145. Brief for Respondent, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 6083240, at \*18 (“In the end, petitioner's argument is predicated on the baseless assertion that tribal courts are unfit for nonmembers.”).

tribal justice, and the recent *Dollar General* case demonstrates how these views continue to threaten tribal sovereignty.<sup>146</sup>

*B. Mississippi Band of Choctaw Indians v. Dollar General Corp.*

On June 23, 2016, the Supreme Court issued its judgment in *Mississippi Band of Choctaw Indians v. Dollar General Corp.*<sup>147</sup> The Court split 4-4, and the lower court's decision was affirmed.<sup>148</sup> This was the narrowest of wins for the tribe, and, because there was no majority decision, it does not eliminate the possibility of similar challenges in the future.<sup>149</sup> As the *Dollar General* case demonstrates, claims regarding tribal injustice remain a powerful litigation strategy both for organizations and individuals seeking to avoid tribal court jurisdiction.<sup>150</sup>

*Dollar General* involved a sexual assault against a minor that was allegedly perpetrated by a non-Indian employee of a Dollar General store located in Indian country.<sup>151</sup> This was a criminal assault, and it should have led to criminal charges.<sup>152</sup> Nevertheless, *Dollar General* was filed as a civil suit and was only filed after it became clear there would be no criminal prosecution of the non-Indian perpetrator.<sup>153</sup>

146. See generally *infra* Sections IV.B.1–2 (discussing the arguments put forth by Petitioners in the *Dollar General* case).

147. 136 S. Ct. 2159.

148. *Id.*

149. *Id.*

150. See generally Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 816–18 (2012).

151. *Dolgen Corp., Inc. v. Miss. Band of Choctaw Indians*, No. 4:08-CV-22TSL-JCS, 2008 WL 5381906, at \*1 (S.D. Miss. Dec. 19, 2008), *disapproved in later proceedings sub nom. Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646 (S.D. Miss. 2011), *aff'd*, 746 F.3d 167 (5th Cir. 2014), *aff'd sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159.

152. *But see* *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes do not have inherent authority to exercise criminal jurisdiction over non-Indians); *see also* *Montana v. United States*, 450 U.S. 544, 565 (1981) (reaching the same conclusion as *Oliphant*). Thus, because the Tribe lacked criminal jurisdiction over the alleged perpetrator—a non-Indian—it was the responsibility of the federal government to prosecute, which it failed to do. See Ned Blackhawk, *The Struggle for Justice on Tribal Lands*, N.Y. TIMES (Nov. 25, 2015), <https://www.nytimes.com/2015/11/25/opinion/the-struggle-for-justice-on-tribal-lands.html>.

153. *Dolgen*, 2008 WL 5381906, at \*1.

Sadly, this sequence of events is not unique.<sup>154</sup> Most sexual assaults in Indian country are never prosecuted.<sup>155</sup>

There are two reasons for the lack of criminal prosecution in Indian country. The first stems from the 1978 case *Oliphant v. Squamish Indian Tribe*,<sup>156</sup> in which the Supreme Court held that tribes have no criminal jurisdiction over non-Indians.<sup>157</sup> Pursuant to *Oliphant*, only the federal government can prosecute non-Indians for crimes committed in Indian country, and in *Dollar General*, as in the majority of Indian sexual assault cases, the federal government declined to prosecute.<sup>158</sup>

Once it appeared that the sexual assault would go unpunished, the child and his family brought a civil suit against Dollar General in tribal court.<sup>159</sup> Dollar General objected.<sup>160</sup> It argued that the Tribe did not have jurisdiction over it, but the lower courts disagreed and ruled for the Tribe.<sup>161</sup> The Supreme Court then granted certiorari to address the question of a tribe's right to assert civil jurisdiction over non-Indians.<sup>162</sup>

In its Supreme Court briefs, Dollar General had two primary arguments for why tribal courts should not be able to assert

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154. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE 63 (2006), <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> (“[F]indings indicate that federal prosecutors frequently decline to pursue cases of sexual violence against Native American women.”).

155. *Id.* at 62 (“The lack of comprehensive and centralized data collection by tribal, state and federal agencies renders it impossible to obtain accurate information about prosecution rates. However, survivors of sexual abuse, activists, support workers and officials reported that prosecutions for crimes of sexual violence against Indigenous women are rare in federal, state and tribal courts.”)

156. 435 U.S. 191 (1978).

157. *Id.* at 210–12. This case was the culmination of efforts that began with *Ex parte Crow Dog* to strip Indian tribes of criminal jurisdiction.

158. See Louise Erdrich, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013) (noting that “[m]ore than 80 percent of sex crimes on reservations are committed by non-Indian men, who are immune from prosecution by tribal courts,” and that “federal prosecutors decline to prosecute 67 percent of sexual abuse cases”).

159. *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014), *aff'd sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

160. *Id.*

161. *Dollar Gen.*, 136 S. Ct. 2159 (affirming lower courts' judgments that the tribal court has jurisdiction over Doe's claims).

162. *Id.*

jurisdiction over non-Indians.<sup>163</sup> First, it argued that since tribal courts lack criminal jurisdiction over nonmembers, they are similarly barred from exercising civil jurisdiction; and second, knowingly consenting to tribal regulation is impossible because that would require a jury to decide the Tribe's unwritten tort law.<sup>164</sup> Dollar General attempted to support these positions by arguing that tribal courts are unsophisticated compared to state and federal courts and that they are inherently unjust.<sup>165</sup> Paraphrasing Dollar General's argument, *The Atlantic* journalist Garrett Epps wrote that the company argued that tribes "are poorly organized and badly run; lack independence from tribal governments; don't respect constitutional rights; and enforce 'tribal law, custom, and traditions' rather than actual law. They aren't really courts at all."<sup>166</sup> In the same article, Epps also quoted Brendan Johnson, a former U.S. attorney and experienced Indian-law litigator, who explained that "the premise of Dollar General's case is that tribal courts are inherently incompetent and biased against non-members."<sup>167</sup>

### 1. *Unsophisticated Tribal Courts*

Dollar General's argument regarding the unsophistication of tribal courts was based on outdated and misleading information. The company began this section of its brief by noting that "few Indian tribes had operating judicial systems in place in the late 1970's."<sup>168</sup> It then used this statement to imply that little had changed.<sup>169</sup> However, much has changed. The state of tribal justice systems in the 1970s has little bearing on the sophistication of modern tribal justice systems.<sup>170</sup> In the 1990s, Congress approved

163. See Brief for Petitioners, *Dollar Gen.*, 136 S. Ct. 2159 (No. 13-1496), 2015 WL 5169095, at \*16-19.

164. *Id.*

165. See *infra* pages 44-52 and accompanying notes.

166. Garrett Epps, *Who Can Tribal Courts Try?*, THE ATLANTIC (Dec. 7 2015), <http://www.theatlantic.com/politics/archive/2015/12/who-can-tribal-courts-try/419037/>.

167. *Id.*

168. Brief for Petitioners, *supra* note 163, at \*2 (citing *Court of Indian Offenses*, U.S. DEP'T INTERIOR, INDIAN AFF., <https://www.bia.gov/WhoWeAre/RegionalOffices/SouthernPlains/WeAre/ciospr/index.htm>).

169. *Id.* at \*2-3.

170. The Petitioners' brief cites also a 2002 statistic showing that only approximately 60% of tribes had such court systems. *Id.* However, this argument is a red herring and an attempt to distract from the actual issue in the case—the

billions of dollars in funding to improve and enhance tribal law enforcement and court systems.<sup>171</sup> Consequently, over the past thirty years, there has been a rapid increase in the construction of new tribal courthouses and jails, as well as significant investments in technology, communications, and public safety programs.<sup>172</sup> In addition, hundreds of millions of dollars in additional funding was approved to train tribal court judges, lawyers, paralegals, and other courthouse personnel.<sup>173</sup>

The implication of Dollar General's general attack on tribal justice systems is that tribes should be treated as monolithic and that the weakness of one tribal court should be considered a failing of them all. This argument is wrong. Regardless of the state of tribal justice systems in general, the Mississippi Band of Choctaw Indians' justice system is one of the most sophisticated and successful tribal

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jurisdiction of the Choctaw Tribal Court, which is a well-established and highly respected tribal court. Whether other tribes have less sophisticated courts is irrelevant and was mentioned by Dollar General solely to cast doubt on the fairness of tribal justice in general. As the brief of amici Cherokee Nation et al. noted,

Much of the States' argument against tribal jurisdiction here rests on a sweeping indictment of all tribal judicial systems. With strikingly few citations, the States broadly condemn tribal courts as biased and lacking independence, and tribal law as mysterious, in-accessible, and indeed all but incoherent. Based on this far-reaching attack, the States—despite asserting that “tribal court systems vary wildly,” and contrary to their argument that “[t]his Court should not impose a one-size-fits-all rule”—urge the Court to deprive *every* tribal court in the country of jurisdiction over civil tort claims like the one asserted here.

Brief for the Cherokee Nation, et al. as Amici Curiae Supporting Respondents, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), 2015 WL 6445772, at \*16.

171. Indian Self Determination and Educational Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975). This program was highly successful. See Brief for the Cherokee Nation, et al. as Amici Curiae Supporting Respondents, *supra* note 170, at \*26 (explaining that many tribal courts are sophisticated and “closely resemble federal and state courts,” as “[t]hey are established by (publicly available) constitutions and laws; their structure, personnel, and procedures are set by (publicly available) tribal laws; they apply published tribal statutes and the common law to decide disputes; and their decisions are publicly available, including on the Internet”).

172. Suzette Brewer, *Tribal Justice on Trial: Dollar General Part II*, INDIAN COUNTRY MEDIA NETWORK (Nov. 24, 2015), <https://indiancountrymedianetwork.com/news/politics/tribal-justice-on-trial-dollar-general-part-ii/>.

173. *Id.*



justice systems in the country.<sup>174</sup> In 2012, the National Council of Juvenile and Family Court judges recognized the Mississippi Band of Choctaw court as a model court.<sup>175</sup> Similarly, John Echohawk, co-founder of the Native American Rights Funds, singled out the Mississippi Choctaw court for special recognition, noting “Many tribal courts across the country, including the Mississippi Choctaw, have some of the best, most experienced litigators and legal practitioners in the country.”<sup>176</sup> Dollar General’s arguments about the unsophistication of tribal courts were therefore particularly inapplicable to the Mississippi Choctaw.

The company’s attack on tribal courts ignored the decades of improvements that many tribes have undergone and the fact that many tribes now have courts that are notably more sophisticated than their surrounding state and county courts.<sup>177</sup> It is extremely telling that the same report Dollar General cited to demonstrate the unsophistication of tribal courts also described the weaknesses of many state courts.<sup>178</sup> In fact, this study included the astounding statistic that “more than 40% of the magistrates in Alaska’s *state* courts ‘are *not* law trained.’”<sup>179</sup> This statistic is shocking, yet Dollar

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174. Another is the Navajo justice system, which adjudicates nearly 75,000 cases a year in its tribal court system. *Id.*

175. According to *Indian Country Media Network*, the organization praised the Tribe for its “brand new, state-of-the-art justice complex” and its ability to handle “all manner of criminal, civil, youth, and peacemaking courts.” *Id.* In addition, the Tribe’s three-member Supreme Court includes Edwin R. Smith, “a battle hardened Mississippi lawyer who is no stranger to the U.S. Supreme Court.” *Id.* Smith represented the Tribe in two pivotal Indian law cases, *United States v. Smith John* and *Mississippi Band of Choctaw Indians v. Holyfield*. *Id.*; see also, Lee Romnet, *Tribal Judge Works for Yurok-Style Justice*, L.A. TIMES (Mar. 5, 2014), <http://www.latimes.com/local/la-me-yurok-tribal-judge-20140305-dto-htmstory.html> (profiling Abby Abinanti, Chief Judge of the Yurok Tribe and San Francisco Superior Court Commissioner).

176. Brewer, *supra* note 172 (describing how “tribal tribunals are as sophisticated as any municipal court in Arizona in terms of how they operate.”).

177. *E.g.*, Brief of the United States as Amicus Curiae Supporting Respondents at 32 n.13, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

178. NEIL NESHEIM, INST FOR COURT MGMT., EVALUATING RESTORATIVE JUSTICE IN ALASKA: THE KAKE CIRCLE 7 (2010), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/famct/id/293> (arguing that the “North American criminal justice system is broken”).

179. Brief of the United States as Amicus Curiae, *supra* note 177, at 32 n.13.

General suggests that even these courts are preferable to a tribal court.

Dollar General attempted to support its position by arguing that “the lack of judicial training and independence, the risk of local bias and the limited protections against it, etc.” are “the features of tribal courts that risk unfair treatment of outsiders.”<sup>180</sup> However, simply declaring tribes to be biased does not make it true. In fact, studies on the subject of tribal bias have demonstrated tribal court impartiality. For example, in her 2005 article, *Tribal Justice and the Outsider*, Professor Bethany Berger examined Navajo appellate decisions involving disputes between Navajos and non-Navajos and found that they were closely balanced. According to Berger, non-Navajos won 47.4% and lost 52.6% of the cases in which they appeared before the tribal court from 1969 to 2004.<sup>181</sup> As Berger’s study indicates, Indians and non-Indians have a nearly equal chance of winning in tribal court.<sup>182</sup>

Unfortunately, the perception of unfairness raised in the Dollar General’s briefs was not simply an accusation of bias against non-Indians; it was also the claim that simply subjecting non-Indians to Indian customs and traditions is itself unfair.<sup>183</sup> This was Dollar General’s second argument, and the one that, because it is based more on perception than facts, is much more difficult to refute.

## 2. *Traditions, Customs, and Bias*

Dollar General’s second criticism of tribal courts was that they are unfair to non-Indian defendants.<sup>184</sup> The company argued that non-Indian defendants are not likely to be familiar with tribal customs.<sup>185</sup> Additionally, it argued that even if non-Indians were

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180. Brief for Petitioners, *supra* note 163, at \*54.

181. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1075–76 (2005) (noting that this rate was “consistent across . . . various kinds of disputes,” “[w]hether the issue is child custody, torts, contracts, or employment”).

182. *Id.* at 1075.

183. See Brief for Petitioners, *supra* note 163, at \*38 (“Subjecting nonmembers to civil claims for punitive and other damages by a sovereign operating within the boundaries of the United States but existing outside of the constitutional structure is . . . inconsistent with the constitutional plan.”).

184. *Id.* at \*8 (“Nonmembers’ status as outsiders thus can give rise to a substantial risk of unfair treatment.”).

185. See *id.* at \*6–7 (explaining that “the content of tribal law is often knowable only to a few tribe members”); see also *id.* at \*39 (highlighting that because tribal

familiar with such customs, they should still not apply because Indian customs and traditions are manifestly unfair when applied to non-members.<sup>186</sup> It is this belief that formed the crux of the company's criticism of tribal justice.<sup>187</sup>

In the section of its brief titled "Background on Tribal Courts," Dollar General argued that the primary danger of tribal court jurisdiction was the use of custom and tradition.<sup>188</sup> The company noted that traditional tribal methods of dispute resolution "differed substantially from state and federal legal systems."<sup>189</sup> It then added that many modern tribes continued to "require their courts to apply tribal law, custom, and traditions."<sup>190</sup> Later in the brief, the company further emphasized the role of tradition when it stated that "forty percent [of tribes] had some unpublished tribal laws or customs applying to non-Indians."<sup>191</sup>

Tribal custom and tradition were repeatedly invoked throughout Dollar General's brief as a kind of boogeyman to be feared.<sup>192</sup> In fact, the words "tradition" and "custom"—or their derivatives—are mentioned eighteen times in the brief.<sup>193</sup> For example, Dollar General stated, "In both civil and criminal cases, tribal courts 'are influenced by the unique customs, languages, and usages of the tribes they serve.'<sup>194</sup> It then cited an earlier Supreme Court case, *Plains Commerce*, and the "'novel' legal rule applied by [the] tribal court based on 'Lakota tradition . . . and custom.'<sup>195</sup> Later, Dollar General noted that "these differences can be a point of pride among . . . tribes, reflecting each tribe's 'unique customs, languages, and usages,'" but emphasized that the differences create

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courts "are influenced by the unique customs, languages, and usages of the tribes they serve," authority should not extend over those who have not given consent).

186. *See id.* at \*36–40.

187. *See id.* (noting that in the past the Supreme Court has held "that tribal courts . . . [that] have civil jurisdiction over nonmembers would raise serious constitutional questions").

188. *See id.* at \*6–9.

189. *Id.* at \*3.

190. *Id.* at \*6.

191. *Id.* at \*7.

192. *See, e.g., id.* at \*6 ("Numerous tribes, including the Mississippi Band of Choctaw Indians, require their courts to apply tribal law, custom, and traditions, looking to state law only to fill in gaps in tribal law.").

193. *Id. passim.*

194. *Id.* at \*39 (quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990)).

195. *Id.* at \*53 (quoting *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 338 (2008)).

unfairness for non-Indians because “it is often impossible for a business to discern the content of all the . . . tribal traditions potentially applicable to its relationship with tribal employees and customers.”<sup>196</sup> Then, to emphasize this point even further, Dollar General wrote,

Like other tribes, the Choctaw contemplate that even tribal judges may be ignorant of the law they must apply in all its relevant details, providing that, when “doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages.”<sup>197</sup>

Dollar General’s reference to strange and unfair tribal customs is a red herring. As the federal government noted in its amicus brief in support of the Tribe, “Here, in particular, there is no suggestion that proving a breach of duty to refrain from sexual molestation would require resort to ‘unique customs, languages, and usages’ of the Tribe.”<sup>198</sup> Prohibiting child molestation is not some “strange” Indian custom.<sup>199</sup> It is a core tenet of American criminal law, and consequently, Dollar General’s arguments regarding the dangers of tribal traditions and customs in this context should have appeared absurd. The fact that they did not is both illuminating and disheartening. Concern regarding tribal customs and traditions remained so great that Dollar General believed these fears could even outweigh the strong desire to protect children from sexual predators.

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196. *Id.*

197. *Id.* (quoting Choctaw Tribal Code § 1-1-4). The amici brief of the states of Oklahoma, Wyoming, and South Dakota raised similar concerns, stating that “[w]here important rules of decision reside in tribal customs as communicated by tribal elders, even if judges are independent, the really important decisions on tribal law may be made by tribal elders with no obligations of independence.” Brief Amicus Curiae of the States of Oklahoma, et al. in Support of Petitioners at 10–11, *Dollar Gen. Corp. v. Miss. Band of the Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

198. Brief for the United States as Amicus Curiae Supporting Respondents, *supra* note 177, at 22.

199. *See generally* PAT SEKAQUAPTEWA ET AL., A VICTIM-CENTERED APPROACH TO CRIMES AGAINST AMERICAN INDIAN AND ALASKA NATIVE CHILDREN (2008) (providing an overview of tribal laws and underlying policies impacting the well-being of children, including the prohibition of child molestation).

C. *The Indian Child Welfare Act*

Dollar General's arguments focused on the potential danger of imposing Indian traditions on non-Indians. However, it has typically been the converse—the imposition of non-Indian customs and values on tribal members—that has caused the most significant harm.<sup>200</sup> For decades, Indian children were removed from their families and placed in Indian boarding schools and adoptive homes because Anglo-American society deemed Indian culture and customs backwards and harmful.<sup>201</sup> In 1978, Congress enacted the Indian Child Welfare Act (ICWA)<sup>202</sup> in an attempt to finally protect Indian families from courts and state agencies seeking to impose western values and traditions on Indian families.<sup>203</sup>

ICWA has often been called the most important piece of Indian law ever passed;<sup>204</sup> yet its ability to overcome non-Indian biases against Indian culture and customs has been minimal. Thirty-seven

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200. *Id.* at 10 (explaining that forced boarding school policies separating native children from their tribal customs left many children “victims of child physical, sexual, torture and/or emotional abuse” and those “victims . . . were largely left untreated and many were at risk for poor parenting, drug and alcohol abuse, mental health issues, relationship and health challenges”).

201. See Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 149 (2007) (explaining that boarding school policies were an “attempt [by] the federal government to eradicate the language and culture of American Indians in an attempt to turn them into a white man with different colored skin”); see also SEKAQUAPTEWA, *supra* note 199, at 10 (“Forced boarding school policies in the late 1880’s separated Native children from their families and communities and placed them at great risk in unfamiliar institutional settings.”).

202. 25 U.S.C. §§ 1901–1963 (1978).

203. See *id.* In addition, *Dollar General* is not the only recent case to make this argument. In *FMC Corp. v. Shoshone-bannock Tribes*, No. 4:14-CV-489-BLW, 2015 WL 6958066, at \*2 (D. Idaho Nov. 9, 2015), FMC argued that the tribal court process was biased and that the two judges hearing its case were also biased.

204. See, e.g., Kathryn E. Fort & Peter S. Vicaire, *The Invisible Families: Child Welfare and American Indian Active Duty Servicemembers and Veterans*, FED. LAW., at 1 (Apr. 15, 2015) (describing ICWA as “one of the most important pieces of federal legislation for American Indian families”); Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 59 (2002) (calling ICWA “one of the most important and far-reaching pieces of legislation protecting Indian tribes”); Alex T. Skibine, *Indian Gaming and Cooperative Federalism*, 42 ARIZ. ST. L.J. 253, 284–85 (2010) (referring to ICWA as “perhaps the most important legislation enacted during this [self-determination] era”).

years after ICWA, Indian children are still routinely removed from their Indian families.<sup>205</sup> As recently as 2015, South Dakota was held to have violated ICWA by disproportionately removing Indian children from their families and placing them in white homes.<sup>206</sup> In one particularly telling example, South Dakota Judge Jeff Davis was found to have removed Indian children from their families one hundred percent of the time.<sup>207</sup> Matthew Newman, an attorney at the Native American Rights Fund, stated, “We’re often finding states inventing any reason under the sun . . . not to place [the] child with [his or her] family.”<sup>208</sup>

In response to these high rates of non-compliance, the BIA recently passed new regulations to guide state courts and private and public agencies on the implementation of ICWA.<sup>209</sup> One of the most important goals of these new regulations is to limit what can be considered “good cause” for placing Indian children in non-Indian homes.<sup>210</sup> Indian advocates hope these new regulations will help keep Indian children with their families and tribes and counteract the extreme biases against Indian customs and traditions that made ICWA necessary in the first place.<sup>211</sup>

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205. Stephen Pevar, *Why Are These Indian Children Being Torn Away from Their Homes?*, ACLU: SPEAK FREELY (July 23, 2014), <https://www.aclu.org/blog/why-are-these-indian-children-being-torn-away-their-homes> (“Congress passed the Indian Child Welfare Act (ICWA) in 1978 in an effort to stop American Indian families from having their children removed by state and local officials for invalid and sometimes even racist reasons. Yet 36 years later, Indian children in South Dakota are 11 times more likely to be removed from their families and placed in foster care than non-Indian children.”).

206. Laura Sullivan, *Native American Tribes Win Child Welfare Case in South Dakota*, NPR (Mar. 31, 2015), <http://www.npr.org/2015/03/31/396636927/native-american-tribes-win-child-welfare-case-in-south-dakota> (noting that in South Dakota, “[m]ore than 80 percent of native children are placed in white foster homes” and that “[o]ne of the biggest complaints of native families who lost children is that they were never allowed to present their side”).

207. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 757 (D.S.D. 2015).

208. Casey Tolan, *A Series of New Lawsuits Is Challenging How Native American Kids Are Adopted*, FUSION (July 17, 2015), <http://fusion.net/story/168764/a-series-of-new-lawsuits-is-challenging-how-native-american-kids-are-adopted>.

209. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146, 10149 (Feb. 25, 2015).

210. Tolan, *supra* note 208.

211. *See id.*

The original goal of ICWA was to combat the widespread prejudice against Indian customs.<sup>212</sup> Through the Act, Congress sought to demonstrate that Native and non-Native child rearing practices were not in conflict; though traditional Native customs might differ from Anglo-American child rearing norms, these practices could, and in fact were likely to, protect a child's best interest.<sup>213</sup> As stated in the preamble, the goal of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."<sup>214</sup> Unfortunately, as both *Dollar General* and recent ICWA cases demonstrate, the distrust of tribal traditions is well entrenched in American society, and it may take more than new regulations to change how non-Indians view Indian families and Indian practices in general.

## V. THE FUTURE

Some of the distrust of tribal customs is simple prejudice. Nevertheless, cases like *Santa Clara* and the Cherokee Freedmen cases make it harder to dismiss non-Indian concerns regarding tribal justice.<sup>215</sup> As *Dollar General* demonstrated, legitimate concerns regarding tribal traditions and justice paved the way for broader arguments in favor of limiting tribal civil jurisdiction over non-Indians.<sup>216</sup> A decision favoring *Dollar General* would have been a

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212. Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 358 (2009) (citing 25 U.S.C. § 1902 (1978)) ("ICWA was to establish standards for the removal of Indian children that would 'reflect the unique values of Indian culture' and provide 'assistance to Indian tribes in the operation of child and family service programs.'").

213. *See id.* at 365 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34–35 (1989)) ("One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by non-tribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.").

214. 25 U.S.C. § 1902 (1978).

215. Zug, *supra* note 23 ("Historically, when tribal and Anglo-American values were in conflict, non-Indians tended to disparage tribal values as backwards, inferior, and unjust. These instances put tribal sovereignty at risk, as evidenced by [*Santa Clara Pueblo v. Martinez*].").

216. *See* Brief for Petitioners, *supra* note 163, at \*16.

devastating blow to tribal sovereignty. The narrow victory in that case should serve as a warning: Using tribal sovereignty to protect discriminatory traditions can wind up harming tribal sovereignty in the long run. This is particularly true right now when tribes are just beginning to regain an important measure of criminal jurisdiction over both Indian and non-Indian defendants.<sup>217</sup>

The first major change to tribal court criminal jurisdiction occurred in 2010, when President Obama signed the Tribal Law and Order Act (TLOA),<sup>218</sup> which allowed tribes to impose stronger penalties on Indian defendants charged with serious crimes.<sup>219</sup> A few years later, tribal court criminal jurisdiction was expanded further; in 2013, the Violence Against Women Act (VAWA) was amended to permit tribal governments to assert criminal jurisdiction over non-Indian defendants and impose harsher sentences on them.<sup>220</sup> Although both of these changes were implemented in order to help tribes address the domestic violence crisis plaguing Indian country, they were still highly contentious.<sup>221</sup> The VAWA amendments only passed after numerous “safeguards” were put in place to ensure the defendants would be treated fairly, meaning would be treated fairly as if they were being tried in a non-Indian court.<sup>222</sup> One author

217. See *infra* note 218–20 and accompanying text.

218. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of the U.S. Code).

219. 25 U.S.C. § 1302(b) (2012) (defining crimes to which enhanced sentences may be applied).

220. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 4, 127 Stat. 54, 120–21.

221. The Court’s recent unanimous decision in *U.S. v Bryant*, 136 S. Ct. 1954, 1966 (2016), may indicate that, at least with Indian defendants, increased tribal court jurisdiction is becoming less controversial. In that case, the Court held there was no Sixth Amendment violation when the federal court used Bryant’s previous tribal court convictions for domestic violence to charge him as a “habitual offender” and subject him to an increased sentence. However, even if *Bryant* does portend such a change with regard to Indian defendants, it may have little implication for acceptance of tribal jurisdiction over non-Indians. There is a long history of greater acceptance of tribal court jurisdiction over Indians, including non-member Indians. See, e.g., *United States v. Lara*, 541 U.S. 193 (2004).

222. Pascua Yaqui Tribe, *Violence Against Woman Act Special Domestic Violence Criminal Jurisdiction*, TRIBAL ACCESS TO JUST. INNOVATION, <http://www.tribaljustice.org/program-profiles/violence-against-women-act-special-domestic-violence-criminal-jurisdiction> (last visited Jan. 6, 2017) (“The Violence Against Women Reauthorization Act of 2013 contains a series of legal requirements that must be satisfied in order for a tribe to exercise Special Domestic Violence Criminal Jurisdiction. These requirements act as procedural safeguards to ensure



reviewing the legislation noted that “[s]ome members of Congress had fought hard to derail the legislation, arguing that non-Indian men would be unfairly convicted without due process by sovereign nations whose unsophisticated tribal courts were not equal to the American criminal justice system.”<sup>223</sup> Due to these objections, the Obama administration was only able to push through the narrowest version of the law—the law does not cover child abuse or sexual assaults committed by non-Indians who are not in a relationship with their victims.<sup>224</sup> Still, it was an important first step.<sup>225</sup>

In the spring of 2015, three “pilot” tribes began hearing domestic violence cases involving non-Indian defendants.<sup>226</sup> Indian advocates hope that these pioneering tribes will allay fears about the sophistication and fairness of tribal courts.<sup>227</sup> Tribes hamper such efforts, however, when they use their sovereignty and customs to defend otherwise unconstitutional laws. As *Dollar General* demonstrated, the widespread perception that tribal customs are foreign and unjust poses a real threat to tribal sovereignty.<sup>228</sup> Consequently, tribes should think long and hard before using their sovereignty to insist on preserving laws that the majority of Americans consider unjust.<sup>229</sup> Accordingly, tribes affirming the right

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that non-Indian defendants are provided the due process protections that they would receive in federal or state court.”).

223. SARI HOROWITZ, *JUSTICE IN INDIAN COUNTRY* 31 (2015) (ebook).

224. See Violence Against Women Reauthorization Act, § 4. VAWA of 2013 requires the tribe to prove that the victim and defendant were in an “intimate” or “dating” relationship before moving forward with prosecution.

225. See HOROWITZ, *supra* note 223, at 31.

226. *Justice Department Announces Three Tribes to Implement Special Domestic Violence Criminal Jurisdiction Under VAWA 2013*, U.S. DEP’T OF JUSTICE (Feb. 6, 2014), <https://www.justice.gov/opa/pr/justice-department-announces-three-tribes-implement-special-domestic-violence-criminal> (selecting Pascua Yaqui, Umatilla, and Tulalip as the three tribes for the pilot project).

227. See *id.* (“[B]y certifying certain tribes to exercise jurisdiction over these crimes, we will help decrease domestic and dating violence in Indian Country, strengthen tribal capacity to administer justice and control crime, and ensure that perpetrators of sexual violence are held accountable for their criminal behavior.”).

228. See, e.g., Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 104 (2005) (“In traditional courts, custom often trumps other sources of decisional law, including statutes and federal law, in a way that is very dissimilar to the use of common law in state courts. In these types of courts, there is some reason to believe that non-members will be subjected to a system that is foreign and unfamiliar and thus lacks a level playing field.”).

229. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69 n.28 (1978) (quoting S. REP. NO. 90-841, at 6 (1967)) (“The purpose of [ICRA] is to protect individual

to ban same-sex-marriages should consider that such an assertion of sovereignty may ultimately prove threatening to tribal autonomy at large.

## VI. CONCLUSION

Tribal customs and traditions have often been used to unfairly deprive Indian tribes of their jurisdiction, their land, and even their children. At the same time, tribes have also relied on their customs and traditions to justify practices that many believe unfairly deprive tribal members of their rights. In this, tribes are not unique. The United States has a long history of refusing to recognize the rights of women, racial minorities, and other disfavored groups. In many cases, it has taken decades or even centuries to correct these injustices. Unfortunately, Indian tribes do not have the luxury of time. When tribes insist on continuing practices that American law has rejected as discriminatory and unjust, they risk proliferating the perception that tribal justice is generally unfair. Certain tribal customs and traditions may justify running such a risk, but it is doubtful that same-sex marriage bans fall into this category.

For the first time in decades, tribes are beginning to exercise their sovereign power to protect their communities, particularly their women and children, from horrific violence. The importance of this change cannot be overstated. It would be a tragedy if banning same-sex marriage derailed this achievement.

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Indians from arbitrary and unjust actions by tribal governments.”).

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