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

Marcia Zug·



*"In another time he would have been honored.*

*Instead he was murdered."*[1]

The above statement is from the PBS documentary *Two Spirit*, a film examining the life and tragic death of Fred Martinez, a sixteen-year-old Navajo Indian, born physically male, who identified as female. The documentary explores the circumstances that led to Martinez's death while also discussing the treatment of gay, lesbian, and transgendered Navajo people more broadly. As the film notes, gender non-conformity was once an accepted part of Navajo culture. Traditionally, the Navajo recognized four genders: male, female, male-

· 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* ICTMN Staff, *PBS Documentary Explores Navajo Belief in Four Genders*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM, Nov. 5, 2013, http://indiancountrytodaymedianetwork.com/2013/11/05/pbs-documentary-explores-navajo-belief-four-genders-152094.

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.[2] The Navajo view of two-spirit people was not unique. Historically, many American Indian tribes honored their transgendered members, but by the nineteenth century, this tolerance began to disappear. European colonizers and their descendants viewed homosexuality as an intolerable sin and they exerted increasing pressure[3] on tribal communities to adopt similar views regarding family and sexuality.[4] Eventually, this pressure led to a dramatic decline in tribal acceptance of homosexual and transgendered Indian people.[5]

---

2. It is estimated that at least 155 tribes recognized two-spirit people. 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, 823 (2006) (noting that historically, two-spirit people were "accepted and even honored"). *See also* WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 3 (1998) ("accepted and sometimes honored). *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"). 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-Native 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.").

3. Christian missionaries and Indian agents would target gender non-conforming Indians through the provisions of the Religious Crimes Code. *See* Trista Wilson, Comment, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. IND. L. REV. 161, 173 (2012) (noting that "[b]y 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.").

4. 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 2, at 13–14.

5. *Id.* at 13 (stating that Anglo-American aversion toward of homosexuality was clearly "communicated to the Indians" causing gender non-conforming Indians to lead "repressed or disguised lives").

Today, many tribes are rejecting these colonially imposed beliefs regarding gender and homosexuality. For instance, a substantial number of tribes were at the forefront of the fight for marriage equality.[6] These path-breaking tribes used their unique status as separate sovereigns to recognize same-sex marriages before, and sometimes in defiance of, the surrounding states. In a few instances, the marriages codes of these tribes even served as a model for subsequent state legalization.[7] Similarly, many tribes are also rediscovering their "two-spirit" traditions.[8] 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 LBGT advocates believe should be adopted by both Indian and non-Indian communities.[9] Such changes are encouraging.

---

6. For example, in 2008, the Coquille Indian Tribe in Oregon passed a law allowing same-sex marriage. 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). *See also* Ann E. Tweedy, *Tribal Laws and Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 112 (2015) ("At the time Coquille passed its law in February 2008, Massachusetts was the only state that allowed same-sex marriages.") Similarly, the Suquamish tribe of Washington legalized same-sex marriage well before Washington state, where it is located. See William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, The New York Times, Aug. 11, 2011) and Ashley Fantz, *Washington Voters Pass Same-Sex Marriage*, CNN, Nov. 9, 2012.

7. In fact, tribal codes often served as a model for subsequent state law changes. *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 TODAY MEDIA NETWORK.COM (June 6, 2011), http://indiancountrytodaymedianetwork.com/article/momentum-mounts-to-again-embrace-two-spirits-35837 (discussing the re-incorporation of a gender variant identity into many tribal cultures).

8. Wilson, *supra* note 3, 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").

9. *See* e.g., Jacobi, *supra* note 2, at 848 (encouraging tribes to use their "sovereignty to make independent decisions on this matter [same-sex marriage]" and warning that they "should be wary of disregarding their traditions, which are integral to tribal identity."); and Wilson, *supra* note 3, 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.").

Unfortunately, they are not universal. More than a year after the Supreme Court's decision in *Obergefell v. Hodges*,[10] in which the Court found same-sex marriage bans unconstitutional, many tribes have little interest in accepting same-sex marriage or the two-spirit tradition.

Currently, a significant number of tribes, including the two largest, still ban same-sex marriage.[11] Prior to the Supreme Court's *Obergefell* decision, these bans elicited little national notice. However, once the Court declared state marriage bans unconstitutional, tribal bans became the glaring exception to nationwide marriage equality. 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, but so far, these requests have been ignored.[12]

---

10. 135 S. Ct. 2584 (2015).

11. *See infra* note 20 (discussing the Navajo and Cherokee 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 (describing potential discrimination in tribal housing projects), http://www.ibtimes.com/native-american-lgbt-discrimination-obama-administration-pushing-housing-protections-1942835. *See also*, ICTMN Staff, STUDY: TRANSGENDER NATIVE AMERICANS EXPERIENCE DISCRIMINATION AT WORST RATES, INDIAN COUNTRY TODAY MEDIA NETWORK.COM, Oct. 12, 2012, http://indiancountrytodaymedianetwork.com/2012/10/12/study-transgender-native-americans-experience-discrimination-worst-rates-139388 (noting that the bias experienced by these transgender people "extends into virtually all aspects of their lives").

12. *See e.g.*, Felicia Fonseca, *U.S. Same-Sex Marriage Challenged by Native American Sovereignty*, THESTAR.COM, Nov. 27, 2015, https://www.thestar.com/news/world/2015/11/27/us-same-sex-marriage-challenged-by-native-american-sovereignty.html; 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 Indian's 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/.

Tribal marriage bans prevent thousands of native men and women from marrying their chosen partners. However, the impact 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 reflects a position specifically and forcefully rejected by American law.[13] 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 is perceived. This perception could then become the catalyst for reversing many of the recent gains in tribal court jurisdiction.[14]

*Traditional Problems*, 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

---

13. *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 (noting that under tribal sovereignty case law, "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.").

14 See infra section IV.

limiting marriage to one man and one woman no longer reflect contemporary understandings of equality and cannot continue. Tribes argue that they are not bound by *Obergefell* and have the right to continue to promote their traditional concept of marriage.[15] They are correct, but they should be wary of making such arguments.

American courts and legislatures have repeatedly used the difference, or at least the supposed difference, between Indian and non-Indian values to justify limiting tribal sovereignty. 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. Therefore, 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 I of this Article discusses the semi-sovereign status of tribes and explains how this status enables tribes to ban same-sex marriage post-*Obergefell*.

---

15. For example, Todd Hembree, the lawyer for the Cherokee Nation who drafted the amendment banning same-sex marriage argued that "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 2, at 828–29. Similarly, Otto Tso, a Navajo legislator and medicine man, stated, "We have to look at our culture, our society, where we come from, talk to our elders." Julie Turkewitz, *Among the Navajos, a Renewed Debate About Gay Marriage*, NY TIMES, Feb. 21, 2015, http://www.nytimes.com/2015/02/22/us/among-the-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." Navajo member Harriet Becenti noted, "Men and women have been created in a sacred manner. We need to honor this." And 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." 2005 Diné Coalition for Cultural Preservation, *A History of the Dine Marriage Act and the Efforts to Stop It from Becoming Law*, NATIVE OUT, April. 22, 2005, http://nativeout.com/twospirit-rc/tribal-marriage-equality/dine-marriage-act-of-2005/.

Part II examines the connection between Indian sovereignty and conflicts between Indian and non-Indian customs. Using the well-known cases of *Santa Clara Pueblo v. Martinez*[16] and the *Cherokee Freedmen*,[17] this section demonstrates that assertions of tribal sovereignty in contested values cases can create the perception that Indian sovereignty perpetuates unjust and problematic values. Part III examines the recent *Dollar General*[18] decision and argues that cases like *Dollar General*, which were brought to limit tribal sovereignty, and cases like *Santa Clara* and *Cherokee Freedmen* cases, which attempt to affirm it, are actually two sides of the same coin. The latter are typically described as "wins" for tribal sovereignty, but they have actually been instrumental in undermining it. As *Dollar General* demonstrates fear of tribal custom and tradition remain an effective means of attacking tribal jurisdiction. Finally, Part IV explores the recent gains in tribal criminal jurisdiction. It 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.

---

16. 436 U.S. 49 (1978).

17. Nero v. Cherokee Nation, 892 F.2d 1457, 1460–61 (1989); Lucy Allen v. Cherokee Nation Tribal Council, JAT-04-09, 19 (Okla. Trib. Mar. 7, 2006), http://www.cornsilks.com/allendecision.html [hereinafter "Lucy Allen"], *rev'g* Riggs v. Ummerteskee, JAT-97-03-K (Okla. Trib. Aug. 15, 2001), http://www.freedmen5tribes.com/pdf/Riggs_Vs_Ummerteskee_JAT97_03_K.pdf.; Cherokee Nation Registrar v. Nash, No. SC-2011-02, at 9

18. Dollar General Corp v. Mississippi Band of Choctaw Indians, 136 S.Ct 2159 (2016).

## I. 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 and Equal Protection Clauses of the Fourteenth Amendment. As a result of this decision, state marriage bans immediately became unenforceable. Nevertheless, despite the *Obergefell* decision, tribal marriage bans remain in effect.

Tribes approach same-sex marriage in a variety of different ways. A number of tribes were at the forefront of same-sex marriage movement[19] but others, including the Navajo and the Cherokee tribes, continue to ban such unions. These two tribes alone have a population of more than 600,000 members[20] and there are at least another 350,000 members of smaller tribes who are also

---

19. 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 6, at 125. (noting 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."). *See also* Jean Walcher, *California Native American Tribe Announces Support of Same Sex Marriage: Santa Ysabel Tribe First in California to Make Proclamation*, BUSINESSWIRE, June 24, 2013, http://www.businesswire.com/news/home/20130624005344/en/California-Native-American-Tribe-Announces-Support-Sex. Similarly, the Collville Tribe of Oregon began recognizing same-sex marriages in 2009, five years before the state recognized these unions. The Cheyenne and Arapaho tribes, located in Oklahoma, began recognizing same-sex marriage in 2013. The surrounding state of Oklahoma did not recognize these marriages until *Obergefell*. Andrew Potts, *8th US Native American Tribe Allows Same-Sex Couples to Wed*, GAY STAR NEWS, Nov. 16, 2013, .gaystarnews.com/article/8th-us-native-american-tribe-allows-same-sex-couples-wed161113/#gs.
Pu=_B7g. Other tribes that affirmatively passed marriage equality laws before *Obergefell* include "Coquille, Suquamish, Pokagon, Tlingit and Haida, and Puyallup, . . . Mashantucket Pequot, Colville, and Little Traverse. . . . Cheyenne and Arapaho Tribes . . . and the Leech Lake Band of Ojibwe. . . . Eastern Shoshone and Northern Arapaho Tribes . . . Iipay Nation of Santa Ysabel . . . Keweenaw Bay Indian Community. Tweedy, *supra* note 6, 110–11.

20. Steve Russell*, The Headlines Are Wrong! Same-Sex Marriage Not Banned Across Indian County*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM, Apr. 23, 2015, http://indian countrytodaymedianetwork.com/2015/04/23/headlines-are-wrong-same-sex-marriage-not-banned-across-indian-country-160091 (noting that "[t]he Cherokee Nation of Oklahoma passed an anti-gay marriage statute in a panic because two Cherokee women, Dawn McKinley and Kathy Reynolds, had gotten a marriage license in 2004.").

affected by tribal marriage bans.[21] Consequently, even after *Obergefell*, there are nearly one million 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.[22] As the Supreme Court explained in *Talton v. Mayes*,[23] 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.[24]

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. Therefore, although the equal

---

21. James King, *Two Largest Native American Tribes in U.S. Ban Gay Marriage*, VOCATIV, April 7, 2015. Tribes with such bans include: "Cherokee Nation, 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 6, at 131–32.

22. *See* Tweedy, *supra* note 6, at 147 (explaining that "tribes, being distinct from both states and the federal government, are not generally subject to the constitutional obligations in the Bill of Rights.").

23. Talton v. Mayes, 163 U.S. 376 (1896).

24. *Id*. at 384.

protection and due process rights encapsulated in the Fourteenth and Fifth 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.[25]

The goal of ICRA is to ensure American Indians receive basic constitutional rights and are protected "from arbitrary and unjust actions of tribal governments." 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."[26] 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.[27]

---

25. As Prof. Anne Tweedy has explained, "ICRA reflects a compromise between protecting tribes' rights to self-determination and protecting the rights of 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." Ann Tweedy, *Tribes, Same-Sex Marriage, and* Obergefell v. Hodges*,* FEDERAL LAWYER 7 (2015).

26. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

27. 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 CAL. L. REV. 799, 810n.70 (1997) (noting that "[s]ome tribes have gone further than ICRA's mandates and ensure the right to counsel for indigent defendants in criminal cases." Citing 1 NAVAJO NATION 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"). *Id.*

*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. 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. In considering the case, the Court weighed Martinez's individual right to be free of discrimination against the Pueblo's interest in controlling its membership. Describing the importance of this control, the 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.[28]

The Court then cited to *Worchester v. Georgia*[29] and similar cases,[30] in order to demonstrate that tribes have the right to manage their internal decisions and

---

28. Santa Clara Pueblo v. Martinez, 436 U.S. 49 at 54 citing Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 15 (D. N.M. 1975).

29. *Id.* at 55. Worcester v. Georgia, 31 U.S. 515, 517 (1832).

30. Id. These cases recognize and affirm tribal sovereignty. They include United States v. Mazurie, 419 U.S. 544, 557 (1975); United States v. Kagama, 118 U.S. 375, 381–382 (1886); United States v. Wheeler, 435 U.S. 313 (1978); Roff v. Burney, 168 U.S. 218 (1897); Jones v. Meehan, 175 U.S. 1, 29 (1899); United States v. Quiver, 241 U.S. 602 (1916); Williams v. Lee, 358 U.S. 217 (1959).

that this right includes membership choices. The Court agreed that ICRA protects tribal members against equal protection violations like the gender discrimination claim brought by Martinez, but it also clarified that ICRA protections are not necessarily the same as constitutional protections. According to the Court, the equal protection challenges pursuant to ICRA must 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.[31] The *Santa Clara* decision, therefore, confirmed 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.[32]

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. *Santa Clara* also means that tribes are also not bound by the *Obergefell* Court's

---

31. Citing the district court, the Santa Clara court explained that:
> the equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and 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 Martinez*, 402 F.Supp. at 18–19.

32. 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." *Santa Clara Pueblo*, 436 U.S. 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.

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.

## II. TRIBAL SOVEREIGNTY, TRADITION, AND UNFAIRNESS

*Santa Clara Pueblo* was considered a win for the tribe and tribal sovereignty. However, it was not considered a win for Indian women. 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. 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."[33] 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.

### *A. Interpreting* Santa Clara

A few scholars have suggested that the Pueblo's claim of a patrilineal membership tradition was overstated and that the case did not truly present a conflict between cultural traditions.[34] Nevertheless, most commentators

---

33. *Id.* at 64.

34. 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

accepted the tribe's description of its patrilineal traditions and, like the Court, viewed the case as a disagreement between two different cultures with very different values. 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."[35] According to Valencia-Webber, the case revealed the "chasm between two cultural frameworks."[36] 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 Pueblo and an expert on Santa Clara culture believed tribal sovereignty was worth this sacrifice. 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. She stated:

---

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 the 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.).

35. 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).

36. *Id. See also* 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); Francine R. Skenandore, Comment, *Revisiting* Santa Clara Pueblo v. Martinez*: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN'S L.J. 347, 368 (2002) (stating "*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.")

> 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 felt Santa Clara would lose 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.[37]

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. For instance, in her excoriating critique of the *Santa Clara* decision, Professor Catharine MacKinnon wrote, "cultural survival is as contingent on equality between women and men as it is upon equality between people."[38] She therefore concluded that a culture based on gender inequality is not one worthy of protection.

---

37. Rina Swentzell, Testimony of a Santa Clara Woman, 14 KAN. J.L. & PUB. POL'Y 97, 98-99 (2004).

38. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 68 (1987).

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 first to do so after the passage of ICRA, which many supporters had hoped would eliminate these types of cultural conflicts.[39] It did not. As the *Santa Clara* decision demonstrated, ICRA could not force tribes to discard controversial customs and traditions. This was a blow to the Act's supporters, but a bigger blow was still to come.[40] *Santa Clara* paved the way for the *Cherokee Freedmen* cases, a set of cases that seemed to confirm critics' worst fears regarding Indian sovereignty and injustice.

### *B. The Cherokee Freedmen*

The Cherokee freedmen are the descendants of former Cherokee slaves. In 1866, a treaty between the Cherokee Nation and the United States freed these

---

39. *See e.g.*, 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 Constitutionalism and Internal Self-Governance*, 20 WILLAMETTE J. INT'L L. & DISP. RESOL. 18, 38 (2012) (noting that ICRA was "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."). Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1705 (2012).

40. *See* Skenandore, *supra* note 36, at 368 (noting that in response to the decision, "equal rights supporters propose to amend ICRA as a means to protecting the equal rights of Julia Martinez and other women within their tribes."). see also, Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169, 170 (1991) (arguing "that an expansion of the ICRA is necessary to protect Native American women from discriminatory actions by their tribes.").

men and women and granted them the rights and privileges of Cherokee citizenship. Despite this treaty promise, the Freedmen were routinely and systematically excluded from participation in tribal affairs and, over time, this exclusion became increasingly pronounced. By the late 1970s, the Freedmen had been entirely disenfranchised and denied their citizenship rights.[41]

The disenfranchisement of the Freedmen occurred when the Cherokee tribal council changed the tribe's membership criteria. 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. The catch, however, was that the Dawes Rolls did not list a degree of blood for Freedmen tribal members.[42] Consequently, this new rule effectively removed most Freedmen and their descendants from tribal membership.[43]

---

41. "When the Cherokee Nation reorganized its government between 1970 and 1976 . . . the Freedmen were quietly disenfranchised and denied their right to citizenship. . . . These changes occurred without the knowledge or input of the Cherokee freedmen. When 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, 180 (2002).

42. "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 through Sexual Assimilation*, 2007 WIS. L. REV. 409, 456–57.

43. 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

In 1984, a group of Freedmen sued the Cherokee tribe alleging that the new membership criteria constituted unconstitutional race discrimination. The district court dismissed the Freedmen's claims and the Tenth Circuit affirmed the decision.[44] 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."[45] The court, thus, 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."[46]

The fight regarding the Freedmen continued for many years, but in 2002, the Cherokee government sought to amend their constitution to fully complete the disenfranchisement of the Freedmen. This move was again challenged by a group of Freedmen and initially, they won. In March 2006, the Cherokee Supreme Court held the amendment impermissible and declared that the Freedmen were entitled to citizenship under the 1975 constitution.[47] Many

---

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.").

44. *See* Nero v. Cherokee Nation, 892 F.2d 1457, 1460–61 (1989) (confirming that *Santa Clara* provides the tribes with immunity from suit for violations of ICRA).

45. *Id.* at 1463 (citing *Santa Clara*, 476 US at 72n.32).

46. *Santa Clara Pueblo*, 436 U.S. at 72.

47. Lucy Allen v. Cherokee Nation Tribal Council, JAT-04-09, 19 (Okla. Trib. Mar. 7, 2006), http://www.cornsilks.com/allendecision.html [hereinafter "Lucy Allen"], *rev'g* Riggs v.

Cherokee members were unhappy with this decision and a constitutional referendum was called to address the issue. An overwhelming majority of voters then voted to amend the Cherokee constitution to limit tribal membership to persons with documented Cherokee ancestry. In 2011, the Cherokee Nation Supreme Court upheld the referendum results.[48]

Like *Santa Clara*, the *Cherokee Freedmen* cases were viewed as a conflict between Indian and non-Indian values. The Cherokee argued that, as a sovereign nation, they had the right to define their membership and to do so in accordance with traditional Cherokee values that emphasized the importance of ancestry and clan. 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. Consequently, although the courts in the Freedmen cases held that the principle of tribal sovereignty prevented them from interfering with and directing tribal membership decisions others, most notably the federal government, were as not nearly so sanguine about the tribe's actions. In fact, in this case, the government's response demonstrated an outright refusal to respect tribal sovereignty.

After the Cherokee Supreme Court issued its decision upholding the amendment expelling the freedmen, Larry Echo Hawk, Assistant Secretary for

---

Ummerteskee, JAT-97-03-K (Okla. Trib. Aug. 15, 2001), http://www.freedmen5tribes.com/pdf/Riggs_Vs_Ummerteskee_JAT97_03_K.pdf.

48. *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 and Final Order at 1, *In re* 2011 General Election, No. SC-2011-06 (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.

Indian Affairs in the U.S. Department of the Interior, issued a menacing letter to the Cherokee government. He wrote that the 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." 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."[49]

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.[50] It was also, not the only government threat the tribe received. Ten days earlier, the U.S. Department of Housing and Urban Development froze thirty-three million dollars of housing funds which they stated would only be restored to the tribe once "the [Freedmen] issue is resolved."[51] In addition, the 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 a year) and

---

49. Cody McBride, *Placing a Limiting Principle on Federal Monetary Influences of Tribes*, 103 CAL. L. REV. 387, 408–09 (2015). The 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." Larry Echo Hawk, *Letter from Echo Hawk Regarding Cherokee Freedmen, Upcoming Election*, NATIVE TIMES, Sept. 12, 2011, http://www.nativetimes.com/index.php/news/tribal/6005-letter-from-echo-hawk-regarding-cherokee-freedmen-upcoming-election

50. In 1997, federal intervention was needed to remove corrupt tribal leaders. At the time, Chad Smith called the intervention by federal agents "humiliating" and "embarrassing." It was a clear sign that the nation was seen as unable to govern itself. Sam Howe Verhovek, *Cherokee Nation Facing a Crisis Involving Its Tribal Constitution*, NY TIMES, July 6, 1997, http://www.nytimes.com/1997/07/06/us/cherokee-nation-facing-a-crisis-involving-its-tribal-constitution.html?src=pm

51. McBride, *supra* note 49, at 408.

suspend its ability to conduct gaming operations until full citizenship to the Freedmen was restored.[52]

Cherokee leaders recognized that these threats posed a grave risk to Cherokee sovereignty. 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."[53] The National Congress of American Indians (NCAI) also expressed their disapproval of the bill, describing it akin to earlier governmental policies designed to destroy Indian.[54] Similarly, Echo Hawk's letter led acting principle Chief Joe Crittenden to declare, "The Cherokee Nation will not be governed by the U.S. Bureau of Indian Affairs."[55] These objections to the

---

52. 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. Rep. Diane Watson (D-California), one of the 25 Congressional Black Caucus members who signed a letter asking the BIA to investigate the Freedmen situation, introduced H.R. 2824. This bill seeks to sever the Cherokee Nation's federal recognition, strip the Cherokee Nation of their federal funding (estimated $300 million annually), and stop the Cherokee Nation's gaming operations if the tribe does 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.

53. Casteel, *supra* note 52.

54. 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 TODAY MEDIA NETWORK.COM, June 29, 2007, http://indiancountrytodaymedianetwork.com/2007/06/29/freedmen-status-issue-washington-91054.

55. He 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-cherokee-nation-accept-descendants-slaves. Because the Cherokee Nation constitution does not allow elected officials to remain in office past Inauguration Day, Smith was

threatened government interference were valid, but it was also clear that they would be ineffective.

The Cherokee government agreed to reinstate the freedmen as citizens[56] once it became clear that their decision to justify racial discrimination as a right of sovereignty wound up threatening that very sovereignty. As both the Santa Clara Pueblo and the Cherokee Freedmen cases demonstrate, when tribes use sovereignty as the justification for discriminatory actions, they actually wind up jeopardizing the future of tribal sovereignty.

## III. 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 tens 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.

---

required to leave office on Aug. 14, 2011. Joe Crittenden was then sworn in as deputy chief, and elevated to acting principal chief in accordance with the constitutional chain of succession.

56. McBride, *supra* note 49, at 409.

*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. 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. The case that spurred the call for federal assumption of criminal jurisdiction over Indian country is *ex parte Crow Dog*.[57] 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.[58]

*Ex Parte* Crow Dog involved the murder of one member of the Brule Sioux band of the Sioux Nation by another member. The question for the U.S. Supreme Court was whether the laws of the United States governed this crime. The Court held they did not. 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."[59] Therefore, the Court

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

58. There are increasing arguments that the death penalty should be abolished and that it violated the Eighth amendment against cruel and unusual punishment. *See e.g.* John Bessler, Cruel and Unusual: The American Death Penalty and the Founders Eighth Amendment (Northeastern University Press, (2012); David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition (Harvard, 2010); A. Welsh-Huggins, No Winners Here Tonight: Race, Politics, and Geography in One of the Country's Busiest Death Penalty States, (Ohio Univ. Press, 2009); and Jeffrey Kirchmeier, "Imprisoned by the Past: Warren McCleskey and the American Death Penalty," (Oxford, 2015)

59. *Crow Dog*, 109 US at 571.

concluded that it would not "measure[] the red man's revenge by the maxims of the white man's morality."[60]

As the Court's explanation suggests, in 1883, when *Crow Dog* was decided, there was the widespread perception that Indian and Anglo-American forms of justice were vastly different. The *Crow Dog* Court held that this difference justified exempting Indians from federal criminal laws, 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. Consequently, shortly after *Crow Do*g was decided, the Secretary of the Interior, Samuel Kirkwood, used the decision to demand legislation permitting the federal courts to punish reservation crimes. He stated:

> [i]f 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.[61]

Kirkwood's statement accused tribal justice of demanding indiscriminate revenge killings. This was incorrect. The traditional form of justice the Sioux

---

60. *Id*.
61. SEC'Y OF THE INTERIOR, ANN. REP. at 9 (1884).

used to deal with murder was restitution.[62] Nevertheless, by portraying tribal justice as random, bloodthirsty, barbaric and unfair, the government was able to depict it as inferior to the American criminal justice system. However, it was actually federal law, not tribal law that was premised on revenge. Unlike tribal law, which required restitution to the murder victim's family, federal law demanded the perpetrator's death. Unfortunately, the veracity of the government's revenge claims did not matter. The fabricated difference between Indian and non-Indian justice was accepted and was then used to justify extending federal criminal law over Indian country. Shortly after the *Crow Dog* decision, Congress passed the Major Crimes Act and gave the federal courts the power to punish murder and other serious crimes that occurred in Indian country.[63]

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. Every time a tribal government enacts laws that conflict with fundamental American law principles, there is the danger of reinforcing this perception. 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

---

62. After a tribal council meeting and mediation, Crow Dog was ordered to pay $600, eight horses, and one blanket to Spotted Tail's people. See Matthew Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 Intercultural Hum. Rts. L. Rev at 96 (2007)

63 18 U.S.C. § 1153 (Supp. 1998).

strongly influences how non-Indians view tribal justice and the recent *Dollar General* case demonstrates how these views continue to threaten tribal sovereignty.

*B.* Dollar General

On June 23 2016, the Supreme Court issued its judgment in *Mississippi Band of Choctaw Indians v. Dollar General*.[64] The court split 4-4 and the lower court's decision was affirmed. 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. 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.

*Dollar General* involved a sexual assault against a minor allegedly perpetrated by a non-Indian employee of Dollar General. This was a criminal assault and it should have led to criminal charges. Nevertheless, Dollar General was a civil suit filed and was only filed after it became clear there would be no criminal prosecution of the non-Indian perpetrator. Sadly, this sequence of events is not unique. Most sexual assaults in Indian country are never prosecuted.

There are two reasons for the lack of criminal prosecution in Indian country. The first stems from the 1978 case, *Oliphant v Squamish*[65] in which the Supreme

---

[64] 126 S.Ct 2159 (2016).
[65] 435 U.S. 191 (1978).

Court held that tribes have no criminal jurisdiction over non-Indians.[66] 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.[67]

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. Dollar General objected. They argued that the tribe did not have jurisdiction over them, but the lower courts disagreed and ruled for the tribe. The Supreme Court then granted certiorari to address the question of a tribe's right to assert civil jurisdiction over non-Indians

In its Supreme Court briefs, Dollar General had two primary arguments for why tribal courts should not be able to assert jurisdiction over non-Indians. The first was that tribal courts are unsophisticated compared to state and federal courts; the second was that they are unjust.[68] Paraphrasing Dollar General's argument, *Atlantic* journalist Garrett Epps wrote that the company argues that tribes "are poorly organized and badly run; lack independence from tribal governments; don't respect constitutional rights; and enforce "'ribal law, custom, and traditions' rather than actual law. They aren't really courts at all."[69]

---

[66] This case was the culmination of efforts that began with *Crow Dog*, to strip Indian tribes of criminal jurisdiction.

[67] *See* Louise Edrich, *Rape on the Reservation*, NY TIMES (Feb 26, 2013) (noting that "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.").

[68] See *infra* pages 28-32 and accompanying notes.

[69] Garrett Epps, *Who Can Tribal Courts Try?,* The Atlantic, Dec. 7 2015.

Similarly, Brendan Johnson, a former U.S. attorney and experienced Indian-law litigator, explained, "the premise of *Dollar General*'s case is that tribal courts are inherently incompetent and biased against non-members."[70]

i. Unsophisticated Tribal Courts

Dollar General's first argument regarding the unsophistication of tribal courts was based on outdated and misleading information. It noted "few Indian tribes had operating judicial systems in place in the late 1970's"[71] and used this statement to imply little had changed. However, much has changed. The state of tribal justice systems in the 1970s has little bearing on the sophistication of modern tribal justice systems. In the 1990s, Congress approved billions of dollars in funding to improve and enhance tribal law enforcement and court systems.[72] 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.[73] Hundreds of millions of dollars in additional funding was also approved to train tribal court judges, lawyers, paralegals and other courthouse personnel.[74] Some of this funding went to the tribal court system of the Mississippi Band of Choctaw Indians, justice system at issue in Dollar General, and it is now considered one of the flagship tribal justice systems in the

---

[70] Id.
[71] Brief of Pet. at 2.
[72] Indian Self Determination and Educational Assistance Act, PL 93-638
[73] Suzette Brewer, *Tribal Justice on Trial: Dollar General Part II*, Indian Country Today, 11, 24, 15
[74] Id.

country.[75] In 2012, the National Council of Juvenile and Family Court judges recognized the Mississippi Band of Choctaw court as a model court.[76] Similarly, John Echohawk, co-founder of the Native American Rights Funds singled the Mississippi Choctaw court out 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."[77]

As a result of these improvements, many tribes now have courts that are notably more sophisticated than their surrounding state and county courts. For example, the same report that Dollar General cited to demonstrate the unsophistication of tribal courts also described the weaknesses of many state courts. In fact, it included the astounding statistic that "more than 40% of the magistrates in Alaska's *state* courts 'are *not* law trained.'"[78] This statistic is shocking, yet according to Dollar General, there remains a much greater risk of bias in tribal courts.

---

[75] Another is the Navajo tribal Justice system, which adjudicates nearly 75,000 cases a year in its tribal court system. Id.

[76] According to Indian Country Today, 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." 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, Lee Romnet, LA TIMES, Mar. 5, 2014 (profiling Abby Abinanti, chief judge of the Yurok tribe and San Francisco Superior Court commissioner)

[77] Suzette Brewer, *Tribal Justice on Trial: Dollar General, Part II*, Indian Country Today. See also, Lee Allen, Are Tribal Courts Developed Enough for VAWA? Pascua Yuqui Prove it, Indian Country Today, May 20, 2015 (describing how "tribal tribunals are as sophisticated as any municipal court in Arizona in terms of how they operate.")

[78] Br. Amicus Curiae of the United States at 32 n.13.

In it's brief, Dollar General listed "the features of tribal courts that risk unfair treatment of outsiders," as "the lack of judicial training and independence, the risk of local bias and the limited protections against it."[79] The facts do not appear to support these allegations. 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 appear before the tribal court.[80] As Berger's study indicates, Indians and Non-Indians have a nearly equal chance of winning in tribal court. Nevertheless, the perception of unfairness raised in the *Dollar General* briefs is not simply an accusation of bias against non-Indians, it is also the claim that simply subjecting non-Indians to Indian customs and traditions itself is unfair. This is Dollar General's second argument and the one that, because it is based more on perception than facts, is much more difficult to refute.

ii. Traditions, Customs and Bias

Dollar General's second criticism of tribal courts is that they are unfair to non-Indian defendants. The Company argued that non-Indian defendants are likely to be unfamiliar with tribal customs. Additionally, they argued that even if non-Indians were familiar with such customs, they should still not apply because

---

[79] Br. of Pet. at 54.

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

Indian customs and traditions are manifestly unfair. It is this belief that forms the crux of the company's criticism of tribal justice.

In the brief section titled "Background on Tribal Courts," Dollar General states that the primary danger of tribal court jurisdiction is the use of custom and tradition. The company begins this argument by noting that traditional tribal methods of dispute resolution "differed substantially from state and federal systems."[81] It then adds that many modern tribes continue to "require their courts to apply tribal law, custom and traditions."[82] A page later, the company further emphasizes the role of tradition stating, "nearly forty percent of tribes had some unpublished tribal laws or customs applying to non-Indians."[83]

Tribal custom and tradition is then repeatedly invoked throughout the brief as a kind of boogey man to be feared. In fact, the words "tradition" and "custom" are mentioned over twenty-five times in the briefs.[84] For example, on page 39, Dollar General states, "In both civil and criminal cases, tribal courts 'are influenced by the unique customs, languages and usages of the tribe they serve."[85] Then, on page 53, they cite the *Plains Commerce* case and the "'novel' legal rule applied by tribal court based on 'Lakota tradition and custom.'"[86] A few lines later, Dollar General notes "these differences can be a point of pride among tribes reflecting each tribe's 'unique customs, languages and usages," but

---

[81] Pet. Br at 3.
[82] Id at 6.
[83] Id at 7
[84] See generally, Pet. Br.
[85] Id at 39
[86] Id at 53

it emphasizes that they create 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."[87] Then, to emphasize this point even further, Dollar General writes "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."[88]

Dollar General's reference to strange and unfair tribal customs is a red herring. As the 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."[89] Prohibiting child molestation is not some "strange" Indian custom. 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

---

[87] Id at 53.

[88] The amicus brief of the states of Oklahoma, Wyoming, South Dakota raised similar concerns stating "Where important rules of decision reside in tribal customs as communicated by tribal elders, even if judges are independence, the really important decisions on tribal law may be made by tribal elders with no obligations of independence." Brief amici curiae of Oklahoma, et al. at 9.

[89] Br. Amicus Curiae of the United States at at 22.

remain so great that Dollar General believed these fears could even outweigh the strong desire to protect children from sexual predators.

### *C. ICWA*

Dollar General's arguments focused on the potential danger of imposing Indian traditions on non-Indians. However, it has typically been the imposition of non-Indian customs and values on tribal members that has caused the most significant harm. 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. In 1978, Congress enacted the Indian Child Welfare Act (ICWA)[90] in an attempt to finally protect Indian families from courts and state agencies seeking to impose western values and traditions on Indian families.[91]

ICWA has often been called the most important piece of Indian law legislation ever passed;[92] yet its ability to overcome non-Indian biases against Indian culture and customs has been minimal. Thirty-seven years after ICWA,

---

[90] 25 U.S.C. §§ 1901-1963 (2006)

[91] In addition, *Dollar General* is not the only recent case to make this argument. In FMC Corporation v. Shoshone-Bannock tribes, FMC argued that the tribal court process was biased and that two judges hearing their case were also biased. 2015 WL 6958066 (allowing the tribal to argue it was deprived of due process due to this bias).

[92] See e.g. Kathryn Fort, and Peter Vicaire, Invisible Families, The Federal Lawyer (apr. 15, 2015) (describing ICWA as "one of the most important pieces of federal legislation for American Indian families"); Alex Skibine, Indian Gaming and Cooperative Federalism, 42 Ariz. St. l. J. 253, 285 (2010) (referring to ICWA as "perhaps the most important legislation enacted during this [the self-determination] era"), and 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.").

Indian child are still routinely removed from their Indian families. As recently as 2015, the state of South Dakota was held to have violated ICWA by disproportionately removing Indian children from their families and placing them in white homes.[93] In one particularly telling example, South Dakota Judge Jeff Davis was found to have removed Indian children from their families 100% of the time. 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 child with their family."[94]

In response to these high rates of non-compliance, the federal Bureau of Indian Affairs recently passed new regulations to guide state courts and private and public agencies on the implementation of ICWA. 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.[95] 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.

The original goal of ICWA was to combat the widespread prejudice against Indian customs. Through the Act, Congress sought to demonstrate that native

---

[93] Laura Sullivan, *Native American Tribes Win Child Welfare Case in South Dakota*, NPR March 31, 2015 (noting "[m]ore than 80 percent of native children are placed in white foster homes. One of the biggest complaints of native families who lost children is that they were never allowed to present their side.").

[94] Casey Tolan, *A series of new lawsuits is challenging how Native American kids are adopted,* Fusion, July 17, 2015.

[95] http://fusion.net/story/168764/a-series-of-new-lawsuits-is-challenging-how-native-american-kids-are-adopted/

and non-native child rearing practices were not in conflict; that traditional native customs might differ from Anglo American child-rearing norms, but that these practices could, and in fact were likely to, protect a child's best interest. 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…."[96] Unfortunately, as both *Dollar General* and recent ICWA cases demonstrate, the distrust of tribal traditions is well entrenched and it may take more than new regulations to change how non-Indians view Indian families and Indian practices in general.

## IV. THE FUTURE

Some of the distrust of tribal customs is simple prejudice. Nevertheless, cases like *Santa Clara* and the Cherokee Freedmen make it harder to dismiss non-Indian concerns regarding tribal justice. 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. A decision favoring *Dollar General* would have been a devastating blow to tribal sovereignty and the narrow victory in this case should serve as a warning. Using tribal sovereignty to protect discriminatory traditions can wind up harming tribal sovereignty in the long run and this is particularly true right now, when tribes are just beginning to regain an important measure of criminal jurisdiction.

### A. Tribal Court Criminal Jurisdiction

---

[96] 25 U.S.C. § 1902 (2000).

The *Dollar General* case threatened to limit tribal civil jurisdiction over non-Indians just as tribes were beginning to regain criminal jurisdiction over both Indian and non-Indian defendants. The first major change to tribal court criminal jurisdiction occurred in 2010, when President Obama passed the Tribal Law and Order Act (TLOA),[97] which allows tribes to impose stronger penalties on Indian defendants charged with serious crimes. Then, 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 as well.[98] Both of these changes were implemented in order to help tribes address the domestic violence crisis plaguing Indian country, but they were still highly contentious.[99] The VAWA amendments only passed after numerous "safeguards" were put in place to ensure the defendants would be treated fairly, meaning essentially the same as if they were being tried in a non-Indian court. As the *Washington Post* reported at the time, "Some members of Congress fought hard to derail the legislation, arguing that non-Indian men

---

[97] 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).

[98] The Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §4, 127 Stat. 54, 64.

[99] The Court's recent unanimous decision in U.S. v Bryant, 136 S.Ct 1954 (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 an "habitual offender" and subject him to an increased sentence. However, even if Bryant does portend such a change with regard to Indian defendants, they 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., US. v. Lara, 541 U.S. 193 (2004).

would be unfairly convicted without due process by sovereign nations whose unsophisticated tribal courts were not equal to the American criminal justice system."[100] 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. Still, it is an important first step.[101]

In the spring of 2015, three "pilot" tribes began hearing domestic violence cases involving non-Indian defendants. Indian advocates hope that these test tribes will allay the fears about unsophisticated and unfair tribal courts. However, such efforts are hampered when tribes use their sovereignty and customs to defend otherwise unconstitutional laws. As *Dollar General* demonstrates, the widespread perception that tribal customs are foreign and unjust poses a real threat to tribal sovereignty. Consequently, tribes should think long and hard before they use their sovereignty to insist on preserving laws that the majority of Americans consider unjust. In the same-sex marriage context, this means that although tribes have the right to ban same sex marriages, such bans may prove to be more of a threat to tribal sovereignty than an assertion of it.

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,

---

[100] Sari Horowitz, Justice in Indian Country, The Washington Post (Diversion Books, 2015)
[101] Id.

tribes have also relied on tribal custom 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 and in many cases, it has taken decades or even centuries to correct these injustices. Unfairly or not, 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 increasing the perception that tribal justice in general in 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 and it would be a tragedy, if banning same-sex marriage derailed this achievement.