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Indigenizing Equality

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Introduction

Cleo Pablo is a citizen of the Ak-Chin Tribal Community. She lives on the Ak-Chin Indian Reservation, located within the geographical boundaries of Maricopa County within the state of Arizona.[1] Under the Ak-Chin Constitution, she qualifies for enrollment in the Ak-Chin Tribe—in other words, she is eligible for tribal citizenship and has all the rights and privileges that go along with it. Among those benefits are tribally funded housing, food stipends, household services, educational scholarships, and perhaps health care.[2] Cleo Pablo is a lesbian.[3] She has a partner, Tara Roy, a non-Indian.[4] Like all other couples, they wish to live together and have their relationship confirmed under the laws of the sovereign under which they live—in this case, the Ak-Chin Indian Community.[5] However, Ak-Chin law mandates that marriage exist only between a man and a woman.[6] Furthermore, Ak-Chin law requires that couples living together in tribal housing on the reservation be married.[7] Accordingly, Ms. Pablo and Ms. Roy are unable to be legally married in their community and, therefore, will never have the full rights and privileges provided to similarly situated married heterosexual couples under the current legal regime. This inequality, in many ways, mirrors the state of affairs that predominated in some

1. Letter from Sonia Martinez, Att'y, to Ak-Chin Indian Community et al. 2 (June 21, 2015), http://turtletalk.files.wordpress.com/2015/09/cleo-pablo-notice-of-claim.pdf [http://perma.cc/L5VF-7ZW3].

2. *Id.*; *see also* Alan P. Meister et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 390 (2009) ("The tribes have used gaming revenue to fund tribal government positions and services, provide health care and child care, build infrastructure, and generally provide for the welfare of tribal members.").

3. Letter from Sonia Martinez, *supra* note 1, at 1, 2.

4. *Id.*

5. *Id.*

6. Pablo v. Ak-Chin Indian Cmty., No. CV2015-0024 (Ak-Chin Tribal Ct. Sept. 30, 2015) (citing Ak-Chin Law and Order Code §9.1.1(B), which states that "[m]arriage between persons of the same sex is prohibited and void"). The Ak-Chin Indian Community has not given permission for the full-text of its Law and Order Code to be available online. *Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona-Tribal Code*, NAT'L INDIAN L. LIBR., http://www.narf.org/nill/codes/ak-chin/ [http://perma.cc/VRH2-JV3R].

7. Letter from Sonia Martinez, *supra* note 1.

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areas of the United States prior to 2015, when the Supreme Court handed down its decision in *Obergefell v. Hodges*.[8]

We argue that marriage equality could become the rule of law in all Indian Tribes just as it has in the United States in one of three ways: (1) through imposition by Congress, (2) through a federal court mandate, or (3) through the recognition of marriage equality by the tribes themselves. Below, we address each of these possible avenues to marriage equality. The discussion of these three alternatives highlights the tension that frames the question of marriage equality in Indian Country: individual liberty and equality, the right to marry for everyone, and a broader iteration of tribal sovereignty. We believe that this tension would best be navigated through the third avenue for marriage equality—recognition of same-sex marriage by tribes themselves. This approach, which we term "indigenizing equality," would be both efficient and have the significant positive impact of redoubling the concept that tribal communities are self-governing entities worthy of political and legal deference by the United States.[9]

A broader historical and political context is necessary to fully frame the questions this Article considers. Discrimination and inequality are deeply embedded in the history of this country. Past struggles are reiterated through the lives of minority groups and leaders. For example, actors within the civil rights movement, the women's movement, and the LGBTQ rights movement continue to defend the idea that liberty and the pursuit of happiness frame the foundation of U.S. sovereignty. These movements have sought restrictions on the authority of government to limit personal and political freedoms desired by members of non-male, non-White, and non-heterosexual groups. Thus, concepts of liberty and equality anchor both national identity and legal existence in the United States. This Article, in turn, focuses on a continuing and parallel struggle for liberty shielded from governmental reach. The playing field for this particular struggle, however, is not a U.S. jurisdiction. Rather, the locus is Indian Country. As nations—albeit of a different kind and character—Indian tribes are facing the same challenges that the United States has faced time and time again.

Tribal sovereignty and federal law have a long-standing and complex relationship. Here, we address the question: what is the effect of *Obergefell*—and the resulting changes to federal marriage law—on the modern expression of tribal sovereignty through tribal governmental interactions with LGBTQ individuals and families? The U.S. Supreme Court's recent decision in *Obergefell v. Hodges* foregrounds that question, as it held that same-sex couples have a

8. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2594–98 (2015) (discussing the history of same-sex marriage rights).

9. *See, e.g.*, William Bradford, *"Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 74–77 (2004) (describing "ongoing historical process whereby tribal sovereignty, once accorded great deference by the international community, has been incrementally denatured and corroded by federal Indian law").

fundamental right to marry.[10] The history of relations between the indigenous nations of this continent and the various European nations that colonized them necessarily colors and informs any treatment of this question. The survival of indigenous peoples, cultures, and nations is a testament to the strength and connectedness of tribal communities. Colonization—the violent imposition of Western values upon indigenous peoples—is legally, historically, and socially well documented within both Western and indigenous societies.[11] Accordingly, an essential question addressed at the outset of this Article is whether bringing marriage equality to those tribal communities currently opposed to it would constitute further colonization of indigenous values.[12] The answer depends on *how* marriage equality comes to Indian Country. We propose that tribal sovereignty would best be served if tribes themselves recognize marriage equality internally, rather than if marriage equality were imposed by Congress.

Recent polling indicates that, as of May 2016, nearly two-thirds of Americans support marriage equality, although pockets of resistance continue to exist

10. 135 S. Ct. at 2607–08.

11. *See* Am. Bar Ass'n, *ABA Resolution and Report on the Akaka Bill*, 10 HAW. B.J. 80, 93 (2006) ("Like the histories and experiences of Native Americans and Alaskan Natives, the U.S. imposition of their form of governance on native people has been difficult and detrimental. Many indigenous peoples are unable to adjust to the dramatic change to Western values, laws and lifestyles that now surround and evaluate them."); Ann E. Beeson, *Dancing with Justice: Peyotism in the Courts*, 41 EMORY L.J. 1121, 1126 (1992) ("Because the Westerners were in the dominant position, they imposed their mores on the subordinate Native Americans. Shamanistic and other cultural practices (such as polygamy) that reinforced traditional Native American values or competed with Western values were prohibited. To expedite acculturation, Native American children were sent off the reservation to schools run by Westerners."); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 14 (2002) (noting the "shattering of the geographical domain of tribal authority, the forced encroachment of outsiders into the tribal community, or the attempted imposition of western values upon individual tribal members"); Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123, 149 (2002); David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL'Y 732, 741 (2000) (noting "the forces of American colonialism—including the imposition of western religious beliefs, western values, and western property arrangements—have unabashedly sought to incorporate Indian lands, resources, and citizens").

12. *See* Steven J. Alagna, *Why Obergefell Should Not Impact American Indian Tribal Marriage Laws*, 93 WASH. U. L. REV. 1577, 1578 (2016) ("The issue of same-sex marriage, therefore, continues to raise important questions related to American Indian nations' status as third sovereigns—within the United States, but separate from the federal and state governments.").

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throughout the United States.[13] Tribal communities represent one such area of resistance.[14] For example, one of the largest tribal governments, the Navajo Nation, has passed tribal statutes that expressly foreclose tribal members from the right to same-sex marriage.[15] At the same time, some tribal communities recognized and performed marriages for LGBTQ couples well before *Obergefell* was decided, and thus before marriage equality existed in many states.[16] As other commentators have noted, the resistance or acceptance of marriage equality among tribal communities loosely tracks the underlying political views of the state in which the tribe is located.[17] We propose that this pattern reflects a continued colonization—or colonization amnesia.[18]

Tribal resistance to marriage equality creates three simultaneous harms: (1) the denial of rights to LGBTQ tribal citizens; (2) the downplaying, if not complete erasure, of the deep and long-standing tribal tradition of recognizing and celebrating two-spirit people in many tribal communities; and (3) the reinforcement of the view that tribal communities are backward, out-of-touch, and not worthy of respect as modern sovereign nations. Furthermore, the U.S. legal and normative landscape surrounding marriage equality has changed in signifi-

13. *See, e.g.*, *In Depth: Topics A–Z: Marriage*, GALLUP, http://www.gallup.com/poll/117328/marriage.aspx [http://perma.cc/5YCB-N3M4]; *Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed*, PEW RES. CTR. (June 8, 2015), http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/ [http://perma.cc/L47A-755H].

14. *See generally, e.g.*, Alagna, *supra* note 12; Ann Tweedy, *Tribes, Same-Sex Marriage and* Obergefell v. Hodges, FED. LAW. 6 (2015); Julian Brave NoiseCat, *Fight for Marriage Equality Not over on Navajo Nation*, HUFFINGTON POST (July 2, 2015, 11:34 AM), http://www.huffingtonpost.com/2015/07/02/navajo-marriageequality_n_7709016.html [http://perma.cc/7Q96-RTAF].

15. *See States May Recognize Same-Sex Marriages, But Navajo Nation Won't*, NAT'L PUB. RADIO (Jan. 9, 2014, 1:46 PM), http://www.npr.org/sections/codeswitch/2014/01/09/261048308/states-may-recognize-same-sex-marriages-but-navajo-nation-wont [http://perma.cc/4A4V-86V2]. Not all tribal governments have resisted marriage equality. For example, in 2008, the Coquille Tribe changed its laws to ensure equal access to marriage regardless of sexual orientation or gender identification. Ann Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 112–14 (2015).

16. Tweedy, *supra* note 15, at 112–14.

17. *See, e.g.*, *id.*

18. *See* Trista Wilson, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. INDIAN L. REV. 161, 175 (2012); *see also* Porter, *supra* note 11, at 135 (defining colonization amnesia as "the phenomenon by which any and all memory of the Euro-American colonization has been erased from the individual and collective memory of Indigenous peoples").

cant ways in the run-up to and aftermath of *Obergefell*,[19] suggesting that the time may be ripe for Congress to intervene where tribal governments deny equal rights to LGBTQ tribal citizens. Therefore, the time for tribal nations to (perhaps preemptively) indigenize equality is now.

This Article proceeds in two Parts. Part I discusses the historical and enduring importance of tribal sovereignty through a description of the foundation of Federal Indian Law, commonly known as the Marshall Trilogy. It then situates the marriage equality question against the background of another landmark Federal Indian Law case—the more recent decision in *Santa Clara Pueblo v. Martinez*.[20] The *Santa Clara Pueblo* decision, which held that the principle of sovereignty dictates that *only* tribes have the power to determine who is a tribal member, appears, at first blush, to foretell the failure of a lawsuit for marriage equality. However, a closer examination reveals that *Santa Clara Pueblo* would be distinguishable from a marriage equality action. As a result, we argue, federal courts would likely decline to extend *Santa Clara Pueblo* to such a marriage equality case. Taken together, historical and modern precedent paints a picture of the fraught nature of tribal sovereignty. Yet, while at times contested and uncertain, sovereignty is a defining characteristic of American Indian tribes. Its essential value to the core identity of tribes is the basis of this Article's recommendation that tribes themselves should enact marriage equality. This path to marriage equality ultimately will serve to legitimize tribal sovereignty, despite any purported initial appearance that tribes would bend in the face of U.S. colonialism by following *Obergefell*'s lead.

Part II addresses the holding and impact of *Obergefell* on the legal landscape of Indian Country and on tribal sovereignty. It situates its analysis within the fundamental building blocks of Federal Indian Law—and particularly the recognition of inherent tribal sovereignty, which is at its apex when dealing with domestic relations within the tribal community. Part II begins with brief descriptions of *Obergefell*'s holding and the status of marriage equality in Indian Country. It notes that, prior to *Obergefell*, the issue of marriage equality presented an opportunity for tribes to exercise their sovereignty progressively. Because tribes have the sovereign authority to define tribal marriages,[21] tribes had

19. Same-sex couples may now be legally married in all fifty states, and all state governments, as well as the federal government, must recognize those marriages and provide same-sex couples with all of the legal rights associated with marriage. Moreover, *Obergefell* has an expressive function. It has the potential to further impact the normative climate for LGBTQ people by humanizing and legitimizing LGBTQ people generally, as well as same-sex couples and their children in particular. *See, e.g.*, Kyle C. Velte, Obergefell*'s Expressive Promise*, 6 HOUS. L. REV.: OFF REC. 157, 161 (2015).

20. 436 U.S. 49 (1978).

21. *See* Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 54 (2006) ("It remains settled black-letter law, however, that Indian tribes retain plenary and exclusive inherent authority over 'domestic relations among tribal members.'" (internal citation omitted)).

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the chance to lead, rather than follow, in the march toward marriage equality by extending rights to tribal citizens that were then unavailable to many U.S. citizens. Post-*Obergefell*, however, Indian tribes may now use tribal sovereignty as a shield to defend regressive and discriminatory bans on same-sex marriage that demean LGBTQ tribal citizens.[22] This puts advocates of tribal sovereignty in a difficult position and necessitates the careful balancing of political and legal risk factors in identifying a course of legal action or non-action.

Part II then describes in more detail the three ways in which marriage equality may come to tribal communities, and ultimately recommends the third option—indigenizing equality. On its way to that conclusion, the Article explores the reasons behind some tribes' resistance to marriage equality. It posits that colonialism is a meaningful factor in explaining why some tribes have resisted marriage equality. It then contends that if tribes look backward—to past traditions of fully accepting and integrating "two-gender" tribal members—and revive and embrace those traditions as a reason to adopt marriage equality, sovereignty will be served and legitimized.

In this way, notions of sovereignty and self-determination are both backward looking and forward looking.[23] Both aspects are important to our indigenizing equality proposal. The backward-looking component of sovereignty and self-determination, specifically tribes' historical practice of recognizing and celebrating two-spirit Indians and their relationships, serves as a particularized and powerful reminder of long-standing tribal values. The forward-looking component surfaces the centrality of revitalizing and strengthening the way tribal sovereignty is viewed (both by the tribal nations themselves and by the United States). The actualization of each of these components of sovereignty and self-determination is possible because black-letter law provides that tribes have the sovereign authority to regulate marriage.[24]

This Article concludes by contextualizing this issue within the broader spectrum of current tribal legal and political jurisdictional battles. The absence of marriage equality in Indian Country is largely symptomatic of the root problem of colonization's continued influence of tribal lifeways, jurisprudence, and community norms.

22. *See* The Current Status of Marriage Equality in Tribal Nations, *infra* Section II.A.2. We contend that this assertion of sovereignty toward a discriminatory end reflects a continued, collective colonized mindset within those tribes that take such a position.

23. *See infra* Section I.C.; *see also* Alagna, *supra* note 12, at 1608–09 (quoting Tim Rowse, *Self-Determination as Self-Transformation*, *in* RESTORING INDIGENOUS SELF-DETERMINATION: THEORETICAL AND PRACTICAL APPROACHES 34, 34 (Marc Woons ed., 2015)) (arguing that applying *Obergefell* to tribes would undermine self-determination and noting that such self-determination is both backward looking and forward looking).

24. *See* Fletcher, *supra* note 21, at 53–54.

I. Federal Indian Law: Tracing Tribal Sovereignty from European Contact to Contemporary Times

A. *The Marshall Trilogy*

Prior to contact with European settlers, the indigenous peoples of the North American continent were sovereign nations with rich rule-based systems of governance capable of dealing with internal matters as well as external relations. Contact with European nations changed the legal and political landscape for indigenous peoples. After the founding of the United States, relations between the hundreds of tribal sovereigns, the states, and the new federal government were unsettled.[25] Indeed, interactions between Indian tribes and these new U.S. and state government actors brought considerations of federalism and state authority into plain view.

Federal authority in Indian Country was specifically addressed in the landmark decision *Johnson v. M'Intosh*,[26] the first of three cases constituting the Marshall Trilogy. These cases establish the bedrock for Federal Indian Law. In *Johnson*, two parties claimed title to land: one had obtained title from the Piankeshaw Tribe, while the other had obtained title from the federal government.[27] Chief Justice Marshall, writing for the majority, held that title received from the federal government was superior to title received from an Indian tribe.[28] Marshall reasoned that tribes were uncivilized and unable to maintain productive property rights.[29] *Johnson* set the course of the development of Federal Indian Law, reflecting the idea that Indian tribes are not truly sovereign.

In *Cherokee Nation v. Georgia*, the Cherokee Nation sued the state of Georgia in the U.S. Supreme Court, under its original jurisdiction.[30] To trigger the Court's original jurisdiction, the Court held, the tribe must be considered a foreign nation or one of the several states.[31] Chief Justice Marshall, writing for the Court in a plurality opinion, quickly determined that the Cherokee Nation was

25. *See generally* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1001–09 (2014) (discussing relations among tribal sovereigns, states, and the federal government following the founding of the United States).

26. 21 U.S. 543 (1823).

27. *Id.*; *see also id.* at 561–63.

28. *Id.* at 587–88.

29. *Id.* at 590 ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.").

30. 30 U.S. 1, 15 (1831).

31. *Id.* at 16–17.

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not a state. In so ruling, he engaged in a more thorough analysis of the exact nature of tribes' sovereign status.[32] Marshall ultimately concluded that Indian tribes were *domestic dependent nations*—a status that was clearly *not* equivalent to that of a foreign nation as required for the Court to exercise its original jurisdiction.[33]

The final act in the Marshall Trilogy, by contrast, may more easily be characterized as a victory for tribal sovereignty. In *Worcester v. Georgia*,[34] Worcester was indicted for living in the Cherokee Nation without license to do so, in violation of a state law.[35] He challenged his indictment, and the Supreme Court determined that the Georgia law had no effect within the boundaries of the Cherokee Nation.[36] Chief Justice Marshall described tribes as "separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[37] Although Marshall affirmed tribal sovereignty, the primary principle the Court established concerned state authority relative to federal authority in Indian Country.[38] The Court held that the Georgia law had no force because under the federal Constitution, a treaty between the United States and the tribe, under which the tribe accepted the exclusive protection of the United States, was "the supreme law of the land."[39] In sum, *Worcester* makes clear that: (1) state law is inapplicable within tribes, and (2) the federal government has the sole authority to deal with Indian tribes, to the exclusion of any attempt by states to legislate within tribes.[40]

The Marshall Trilogy defined the contours of tribal sovereignty that continue to guide courts today. As relevant here, the Marshall Trilogy established that (1) tribes, although nations, are not on equal footing with the United States; thus tribal sovereignty is not co-equal with U.S. sovereignty, but rather subservient to it in many respects, (2) tribal nations interact with the United States via the federal government, not through the states, and (3) tribal sovereign authority is at its apex when it addresses matters of intra-tribal relations.

32. *Id.* at 12–19.

33. *Id.* at 17–20.

34. 31 U.S. 515 (1832).

35. *Biographies: Samuel Worcester*, CHEROKEE NATION, http://www.cherokee.org/AboutTheNation/History/Biographies/SamuelWorcester.aspx [http://perma.cc/R5UV-SPM6].

36. *Worcester*, 31 U.S. at 594–95.

37. *Id.* at 542–43.

38. *See id.* at 594.

39. *Id.* at 559, 561.

40. *See id.* at 558–60; *see also id.* at 594–95.

B. *Plenary Power and the U.S. Constitution*

After the Marshall Trilogy, the Supreme Court addressed two additional issues that bear directly on our inquiry: the application of the U.S. Constitution to Indian tribes and the breadth of congressional authority to regulate Indian Country.

In the late nineteenth century, the United States became increasingly concerned with perceived lawlessness in Indian Country.[41] Modern research indicates that such concern was likely overblown and based in the mythology concerning warlike savages interacting with Americans settling the west.[42] However, the Bureau of Indian Affairs, the federal delegate on the ground in Indian Country, wanted to bring whatever problem there was under federal control. It first attempted to do so in *Ex Parte Kan-Gi-Shun-Ca* (*Crow Dog*).[43] In *Crow Dog*, the tribal government resolved an Indian-on-Indian murder in its traditional manner, which involved no prison sentence.[44] In response, the federal government prosecuted him.[45] The Court held that the federal government lacked the

41. *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 54–55 (2002) (noting that the last two decades of the nineteenth century saw an aggressive assertion of U.S. jurisdiction over Indian tribes—"Congress's new freedom to legislate over Indian relations brought unprecedented federal intrusion into internal tribal affairs . . . [and] extended federal criminal jurisdiction over Indian lands for seven serious crimes committed between Indians"—and explaining that "[r]apid western expansion and demands by settlers for Indian lands spurred much of this increased intervention. Land hunger combined with fervent assimilationist convictions that Indian tribes must be destroyed and their members civilized, Christianized, and integrated into the white polity"); James Bradley Thayer, *A People Without Law*, 68 ATLANTIC MONTHLY 540, 676 (1891); *see also* Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37, 62 (2011); Rebecca A. Hart & M. Alexander Lowther, *Honoring Sovereignty: Aiding Tribal Efforts To Protect Native American Women from Domestic Violence*, 96 CALIF. L. REV. 185, 198 (2008); Michelle Zehnder, *Who Should Protect the Native American Child: A Philosophical Debate Between the Rights of the Individual Verses the Rights of the Indian Tribe*, 22 WM. MITCHELL L. REV. 903, 917 (1996).

42. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 104–05 (1994); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 803–04 (2006).

43. 109 U.S. 556 (1883).

44. HARRING, *supra* note 42, at 104–05 (discussing traditional tribal council arrangements for peaceful reconciliation of the parties through exchange of horses, blankets, money, and other property; however, this decision "was one of a number of conflict resolution mechanisms available to the Sioux").

45. *Crow Dog*, 109 U.S. at 568.

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authority to prosecute the case because no federal statute conferred federal jurisdiction over criminal matters within Indian Country.[46] *Crow Dog* reaffirmed the principle of tribal sovereignty in the face of the limited authority of the federal government in Indian Country.

The Court again addressed the issue of federal criminal jurisdiction in Indian Country in *United States v. Kagama*.[47] The United States charged two Indians with the murder of another Indian on a reservation.[48] In 1885, prior to *Kagama*, Congress had enacted the Major Crimes Act,[49] which purported to resolve the jurisdictional deficiency laid bare in *Crow Dog*.[50] Fundamentally, the Court was asked to consider whether Congress had authority to enact the Major Crimes Act.[51] The *Kagama* Court held that Congress did possess such authority over Indian affairs.[52] The Court reasoned that this congressional power grew out of the fact that Indian tribes were weak and in need of protection, and because such federal power "has never been denied; and because [the United States] alone can enforce its laws on all the tribes."[53]

46. *Id.* at 571–72.

47. 118 U.S. 375, 376 (1886).

48. *Id.*

49. *Id*.

50. *Id.* at 382–83. As summarized by the Court, the Major Crimes Act created federal jurisdiction where: (1) there is either an Indian victim or perpetrator, (2) a statutorily enumerated felony is committed, and (3) the crime occurred in Indian Country. *Id.*

51. *Id.* at 384–85.

52. *Id.*

53. *Id.* The Court did not cite to any constitutional provision to support its conclusion. *See id.* Since *Kagama*, scholars, jurists, practitioners, and tribal officials have attempted to recreate the basis for congressional authority of this nature. Scholars have suggested that the (1) Commerce Clause, (2) Property Clause, (3) War Powers Clause, and/or the (4) inherent ability of a sovereign to interact with indigenous peoples form the constitutional base(s) for the Court's holding in *Kagama*. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1082 (2015) ("Little has changed in plenary power doctrine in the century since *Kagama* was decided, except that as the racialized rhetoric and theories of unenumerated federal powers employed in *Kagama* fell out of favor in the late twentieth century, the Court dragged in the Indian Commerce Clause post hoc to sanitize the doctrine."); Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103, 107 (2006) ("[M]ore benign arguments . . . have been made in support of this claim of power on the part of the federal government—the Commerce Clause, treaty powers, war powers, and so on. Yet it is this 'extraconstitutional power' formed out of an idea of racial superiority that seems to prevail in these earlier cases.").

The Court further defined the contours of tribal sovereignty in the 1896 case of *Talton v. Mayes*.[54] In *Talton*, the Cherokee Nation prosecuted an Indian, under Cherokee law, for the murder of another Indian.[55] The defendant argued that the grand jury process by which he was charged—which differed from the federal grand jury process—violated his Fifth Amendment due process rights.[56] The Court disagreed and held that tribes, like states, may—consistent with the U.S. Constitution—create their own grand jury procedures.[57] In so holding, the Court reaffirmed tribes' right to self-government.[58] The source of sovereignty for both states and tribes is non-federal, meaning separate and distinct from federal authority.[59]

Taken together, these six cases delineate the guiding principles of Federal Indian Law in the United States. First, tribes enjoy some measure of sovereignty, although that sovereignty has been, and likely will continue to be, contested and contingent. Second, Congress possesses plenary power over Indian Country. Although its metes and bounds are fluid, it clearly exists as a matter of federal common law. Congress today has wide latitude to legislate matters directly and indirectly affecting the inner-workings of tribal communities.[60] This nearly unfettered congressional power should give tribes pause when it comes to resolving the marriage equality question. For, now that the U.S. Supreme Court has declared same-sex marriage a fundamental right, Congress is empowered to compel the enforcement of marriage equality in Indian Country pursuant to its well-established plenary power.

Before further discussing the impact of Congress's plenary power in the context of marriage equality in Indian Country, we next turn to the further development and evolution of Federal Indian Law in *Santa Clara Pueblo v. Martinez*.

54. 163 U.S. 376 (1896).

55. *Id.* at 378–79.

56. *Id.* at 379.

57. *Id.* at 384.

58. *Id.* at 379–80.

59. *Id.* at 381–82 ("The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee Nation is, therefore, clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation.").

60. *See, e.g.*, Louis G. Leonard, III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision To Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 671 (1997) ("The federal plenary power grants broad latitude to Congress to legislate specifically with respect to tribal lands. . . . Under this general plenary power, Congress has virtually unlimited authority to legislate with respect to Native Americans.").

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C. *Santa Clara Pueblo v. Martinez*

These potentially conflicting principles of Federal Indian Law—congressional plenary power coexisting with some degree of inherent tribal sovereignty—came to a head in the 1970s. Specifically, the Supreme Court considered the question of just how far Congress may reach into the inner workings of a tribal community's determination of who is eligible for citizenship. Ms. Julia Martinez was a citizen of the Santa Clara Pueblo Tribe.[61] In 1941, she married a Navajo man and they had several children together, including Ms. Audrey Martinez.[62] Two years prior to Ms. Julia Martinez's marriage, the Santa Clara Pueblo Tribe passed a law that conditioned citizenship rights on the citizenship status of applicants.[63] Specifically, the Tribe denied "membership in the tribe to children of female members who marry outside the tribe, while extending membership to children of male members who marry outside the tribe."[64] Ms. Martinez attempted to persuade the tribal government to change the law.[65] When the Tribe refused, Ms. Martinez sued to remedy the Tribe's denial of citizenship rights to her daughter.[66]

The Court began by asserting that tribes are distinct political entities, no longer in possession of full sovereignty, unconstrained by constitutional provisions, but subject to Congress's authority to limit, modify, or eliminate the powers of local self-government.[67] The Court recognized the existence of common law sovereign immunity that any sovereign, including tribal governments, is entitled to enjoy. Therefore, the Tribe was immune from suit by Ms. Martinez, and unless she was able to identify a waiver of that immunity in federal or tribal law, the federal court could not render a decision. However, the Court found that while the Tribe itself was immune from suit, the action could proceed against its officers because Ms. Martinez sought injunctive relief to prevent the tribal government from denying citizenship rights to her children on the basis of their parentage.[68] This became the *Ex Parte Young* exception, defined in federal com-

61. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52 (1978).

62. *Id.*

63. *See id.* at 52 n.2 (noting that "[a]ll children born of marriages between members of the Santa Clara Pueblo shall be members of the Santa Clara Pueblo" and that "[c]hildren born of marriage between *female members* of the Santa Clara Pueblo and *non-members* shall *not* be members of the Santa Clara Pueblo" (emphasis added)).

64. *Id.* at 51.

65. *Id.* at 53.

66. *Id.*

67. *Id.* at 55–58.

68. *Id.* at 51–53,

mon law.[69] The *Ex Parte Young* exception allows plaintiffs to sue officers of a sovereign entity when the officers have allegedly engaged in "an ongoing violation of federal law" and the relief sought by plaintiff is prospective.[70] Ms. Martinez could identify the tribal council members, who are not shielded by sovereign immunity when acting in their official capacities and in contradiction to federal law.

Next, Ms. Martinez had to identify an express or implied private cause of action in federal statutory or common law that provided her a basis for suit.[71] Ms. Martinez's primary argument originated from the Indian Civil Rights Act (ICRA).[72] Passed in 1968 under Congress's plenary power, the Act purported to provide Indian citizens with many of the rights contained in the Bill of Rights and applied specifically to tribal governments.[73] In theory, tribal courts were then bound by the limitations contained within ICRA under federal law.[74] For example, Section 1302(8) forbids a tribal government from "deny[ing] to any person within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law . . . ."[75] Ms. Martinez argued that the tribal government's gender-based criterion[76] for citizenship violated Section 1302(8).[77]

While the Tribe conceded that Section 1302(8) and the other provisions of ICRA modified substantive tribal law, thereby shoring up the concept of Congress's plenary power over internal tribal affairs, the Tribe also argued that "Congress did not intend to authorize federal courts to review violations of its provisions except as they might arise on habeas corpus."[78] In assessing this ar-

69. Ex Parte Young, 209 U.S. 123, 158–60 (1908). *Ex Parte Young* created an exception to the general rule of state officials' sovereign immunity to suit. It held that states may not confer immunity upon state officials who are alleged to have violated the U.S. Constitution. *Id.* at 160.

70. Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted); *see also* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4232 (3d ed. 2007).

71. *Santa Clara Pueblo*, 436 U.S. at 51–52.

72. *Id.* at 51, 54, 62.

73. *Id.* at 64–65.

74. United States v. Bryant, 136 S. Ct. 1954, 1961–62 (2016).

75. 25 U.S.C. § 1302 (a)(8) (2012); *see Santa Clara Pueblo*, 436 U.S. at 57 n.8.

76. The criterion is gender-based because the issuance of a marriage license depends on the gender of the parties seeking to marry. While a woman is permitted to marry a man, a woman is not permitted to marry a woman, thus creating a gender-based criterion. *See supra* notes 63–64.

77. *Santa Clara Pueblo*, 436 U.S. at 51.

78. *Id.* at 58.

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gument, the Court was mindful that "providing a federal forum for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself."[79] Here again, the Court acknowledged the self-governing nature of tribal communities and demonstrated an understanding of the ramifications of federal intervention.[80] Following a well-recognized canon of Indian law statutory construction, the Court decided that it would "tread lightly in the absence of clear indications of legislative intent" to create an implied right and trigger possible federal intervention.[81]

Ultimately, the Court declined to find an implied right and dismissed Ms. Martinez's claim. The Court argued, first, that it was not clear that the fulfillment of ICRA's purpose required a finding of an implied right and federal court oversight and, second, that the statutory structure of ICRA provided an express right to seek habeas review in federal court but it contained no corollary right for other remedies.[82] The Court was uneasy about re-allocating the rights and remedies available in light of the structure that Congress purposefully created.[83] Furthermore, the existence of tribal sovereignty may have dissuaded the Court from attempting to fashion an implied right.[84] The statute and the legislative history, the Court stated, demonstrated "Congress' desire not to intrude needlessly on tribal self-government."[85] Moreover, the Court suggested that civil questions, such as the one before the court, "will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[86] The Court emphasized that "the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments."[87] Finally, the Court recognized that a finding of an implied right in this context "may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity."[88] In sum, the tribal government's gender-discriminating citizenship provision was upheld on procedural grounds.

79. *Id.* at 59.
80. *Id.*
81. *Id.* at 60.
82. *Id.* at 61–62.
83. *Id.* at 68–71.
84. *Id.*
85. *Id.* at 71.
86. *Id.*
87. *Id.*
88. *Id.* at 72.

The legal analysis of the *Santa Clara Pueblo* opinion provides only a piece of the necessary understanding of the dispute over citizenship at Santa Clara Pueblo. Dr. Rina Swentzell, a member of Santa Clara Pueblo, explains:

> By the time the *Martinez* case arose, Santa Clara was already on its way to being assimilated into Western ideas and values. Fewer children in the community spoke the language. Ceremonies and dances were still happening, but the acknowledging of the mountains, clouds, skunks, and deer with whom we share the world and who give us contextual sustenance and well-being was beginning to shift to dancing for performance, mostly, for the inside and outside world.[89]

Dr. Swentzell contextualizes the decision within the state of tribal communities in the late twentieth century and the pressure created by emerging cultural influence from the outside:

> 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 . . . I felt that Santa Clara would l[o]se any remnants of itself as a vital, self-determining community.[90]

In this way, Swentzell provides a valuable first-hand perspective on the high stakes of *Santa Clara Pueblo*. Ultimately, she expressed relief at hearing the decision. She understood the Court's holding as allowing the Santa Clara tribal community to "retain the on-going conversation about who is a recognized member of the community."[91] In the bigger picture, Swentzell saw the outcome as a step in the right direction—as an acknowledgment by a corner of the Western world of a non-White way of life that "traditionally honored nurturing and feminine qualities," but in culturally distinct ways.[92]

Swentzell frames the holding in a dynamic fashion. The tribal community would participate in an "on-going conversation" about membership, belonging, and citizenship.[93] These concepts are non-identical; they overlap and misalign, requiring deep communal conversations and considerations that extend far beyond any simplistic legal definition. The recognition and retention of the tribal community's right to pursue that conversation's end was the victory for Swentzell. The continued capacity of the tribe to discuss, disagree, and change its mind is at the heart of any rigorous understanding of sovereignty. Swentzell continues:

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

90. *Id.* at 98–99.

91. *Id.*

92. *Id.*

93. *Id.*

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> [O]ur myths, stories, and songs tell us . . . there are tensions and struggles in life. Our traditional beliefs tell us that we are all relations, that we are all children of the community . . . which daily harmonizes opposites. It also tells us that it is an inclusive, not exclusive, world that we share and cooperation, not competition, is ideal behavior. That world also knows that "things come around"—that things will change.[94]

Dr. Swentzell describes the traditional ways of the Santa Clara people and frames communal norms and beliefs as underpinning the basis for tribal sovereignty.[95] She attempts to assuage those that view the decision as a loss for women by underlining the resilience of indigenous values. She continues to describe this issue under this lens:

> What has been introduced by outside thinking is that we have to choose between uncompromising opposites, between male and female dominance, between individual rights or community wellbeing. We cannot have both. In this either/or world, those who are included must be better than those who are excluded. We are even tempted to think that American law can bring equality by written mandates, making us forget that we are capable of remembering a system in which focus on relationships might lead us to different solutions.[96]

Professor Valencia-Weber agrees with Swentzell and states that the conflict in *Santa Clara Pueblo* centrally "reflects disparate cultural visions between mainstream society and American Indians."[97]

By contrast, the outside thinking referenced by Swentzell is apparent in the critiques of the decision levied by noted feminist legal scholar Catherine MacKinnon. MacKinnon claims that "cultural survival is as contingent upon equality between women and men as it is upon equality among peoples."[98] Like Swentzell, other minority feminist scholars cast Mackinnon's position as "essentialist" and grounded in the experience of white women.[99] Angela Harris, for example, argued that "gender essentialism is dangerous to feminist legal theory because in the attempt to extract an essential female self and voice from the diversity of women's experience, the experiences of women perceived as 'different' are ignored or treated as variations on the (white) norm."[100]

94. *Id.* at 101.

95. *Id.* at 100–01.

96. *Id.* at 101.

97. Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty-five Years of Disparate Cultural Visions*, 14 KAN. J.L. & PUB. POL'Y 49, 50 (2004).

98. Catharine A. MacKinnon, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, *in* FEMINISM UNMODIFIED: DISCLOSURES ON LIFE AND LAW 68 (1987).

99. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

100. *Id.*

Swentzell identifies "[d]eep harmony" as coming from "our efforts to balance universal tensions, such as between male and female" and asserts that harmony is lost when those tensions are whitewashed by traditional American norms of gender equality.[101] Erasing this tension by creating monolithic sameness via gender equality disregards the "history of indigenous peoples who have continuity because they engaged in conservation of custom and innovation that responds to changed circumstances."[102] Bethany Berger, also supporting Swentzell's position, states that "the Santa Clara Pueblo experience suggests that appeal to outside authorities may shut this discussion down, by casting protests against discrimination as attacks on sovereignty, rather than demands for equal participation within the sovereign community."[103] Matthew Fletcher similarly emphasizes the role of the tribal community in reclaiming its indigenous lifeways through new fora (like Westernized tribal courts) because doing so preserves the indigenous nature of the conversation via indigenous legal constructs.[104] For Swentzell and the other feminists described herein, *Santa Clara Pueblo* was an affirmation of the validity, independence, and resilience of Native thought and being.

Santa Clara Pueblo, Swentzell's commentary, and other thinkers expressing support for non-majoritarian conceptions of feminism, have implications for the question of marriage equality in tribal communities. We caution against over-reliance on *Santa Clara Pueblo* and suggest that the demand for marriage equality under tribal laws is distinguishable from the question of tribal citizenship requirements. Of course, the centrality of *Santa Clara Pueblo* to the issue of marriage equality in Indian Country cannot be understated. What is uncertain, however, is how a court might view the breadth of *Santa Clara Pueblo*'s holding. Much has changed in the thirty-eight years since the decision was announced. Majoritarian culture increasingly views differential treatment based on gender as inherently anti-woman. For tribal advocates and scholars, it may be tempting to rely on *Santa Clara Pueblo*'s holding alone, and suggest it has a bulletproof quality given that internal tribal relations lie at its core. We think this view is dangerous and places tribal sovereignty at risk for all of Indian Country.

101. Swentzell, *supra* note 89, at 100.

102. Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 370 (2004).

103. Bethany Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103, 114 (2004).

104. Matthew L.M. Fletcher, *Towards a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 728 (2006); *see also* VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION (3d ed. 2003); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (1988). Swentzell's critique of Western individualism and legal process is rooted in a concern about the loss of traditional life-ways and values. Swentzell's commentary connects with Native thinkers like Vine Deloria, who sought to indigenize American intellectualism by questioning dominant Western/American paradigms of all kinds.

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II. Bringing Marriage Equality to Indian Country After *Obergefell*

This Part begins with an overview of marriage equality in the United States and Indian Country. It then lays out three paths for achieving marriage equality in those tribes that have not yet adopted it: a litigation option, a legislative option, and a tribal option. It argues that the third option is the best overall because it indigenizes equality in a way that reclaims and revitalizes tribal traditions, thus strengthening and legitimizing tribal sovereignty.

A. *Marriage Equality in the United States and Indian Country*

1. *Obergefell*'s Holding

The issues presented in *Obergefell* were whether the Fourteenth Amendment requires a state to (1) license a same-sex marriage, and (2) recognize a same-sex marriage licensed and performed in another state.[105] Because the Court addresses marriage from the perspective of American federal law, its discussion is necessarily grounded in the American tradition of marriage. The opinion recounts both the development of the institution of marriage,[106] and the changed understanding and legal treatment of LGBTQ people[107] throughout American history. Both the American institution of marriage and the American treatment of LGBTQ and gender non-conforming people are much different from the corresponding tribal traditions.[108] These differing histories—an abjectly anti-LGBTQ history in America and a markedly different Indian tradition of recognizing and celebrating two-spirit people and their relationships—lends additional support to our indigenizing equality proposal. Should tribes continue to resist marriage equality such that Congress acts to require marriage equality in Indian Country, that forced equality would be an equality that arose under American law and tradition, rather than Indian law and tradition. Tribal marriage equality mandated in the shadow of discriminatory and oppressive American traditions undermines and erases tribal traditions and in turn diminishes tribal sovereignty—in perception and in practice.

105. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

106. *Id.* at 2593–94 (describing marriage as having "transcendent importance," as promising "nobility and dignity," as "essential to our most profound hopes and aspirations," and as "binding families and societies together"); *id.* at 2595–96 (describing the evolution of marriage from arranged marriages, to coverture, to gender equality in marriage, to the acceptance of interracial marriage).

107. *Id.* at 2596.

108. *See infra* Section II.D; *see also* Alagna, *supra* note 12, at 1591–95; 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, 834–37 (2006).

The Court in *Obergefell* based its holding on both the Due Process and Equal Protection Clauses, with an emphasis on the longstanding, fundamental Due Process right to marry. Justice Kennedy, writing for the Court, recounted prior decisions holding that the fundamental right to marry is part of the constitutionally protected liberty interests in "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[109]

American marriage law historically has been grounded in an opposite-sex assumption.[110] In contrast, American Indian tribes have a tradition of permitting and recognizing marriage between same-gender people, as well as between gender non-conforming people, known as two-spirit people.[111] Justice Kennedy dispensed with the Court's (and American society's) historical reliance on the opposite-sex assumption by stating that the line of marriage cases relied on more fundamental and essential attributes of marriage, which transcend the assumption that the institution is, or should be, solely an opposite-sex institution.[112] The Court noted that excluding same-sex couples from marriage and its attendant social and legal benefits "consign[s] [same-sex couples] to an instability many opposite-sex couples would deem intolerable in their own lives"[113] and "teach[es] that gays and lesbians are unequal in important respects."[114] The Court thus concluded that "laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."[115]

109. 135 S. Ct. at 2597. Beginning with *Loving v. Virginia*, 388 U.S. 1, 12 (1967), in which the Court struck down anti-miscegenation laws, to *Zablocki v. Redhail*, 434 U.S. 374, 388–91 (1978), in which the Court struck down a law prohibiting fathers who were delinquent on their child-support payments from marrying, to *Turner v. Safley*, 482 U.S. 78, 99–100 (1987), in which the Court held that prisoners continue to enjoy the right to marry notwithstanding their confinement, the Court reinforced that the "right to marry is protected by the Constitution." *Id.* at 2598.

110. *Id.* at 2598.

111. *See infra* Section II.D; *see also* Alagna, *supra* note 12, at 1591–95; Jacobi, *supra* note 108, at 834–37.

112. *Obergefell*, 135 S. Ct. at 2598–99. These essential attributes are (1) the right to marry is "inherent in the concept of individual autonomy" and "among the most intimate that an individual can make," (2) marriage "supports a two-person union unlike any other in its importance to the committed individuals," (3) to deny the right to marry to same-sex couples impermissibly stigmatizes, harms, and humiliates the children of same-sex couples, and (4) marriage is "a keystone of our social order" and a "building block of our national community." *Id.* at 2599–2601.

113. *Id.* at 2601.

114. *Id.* at 2602.

115. *Id.* The Court also grounded its decision on the principles of the Equal Protection Clause. *Id.* at 2603–05. The Due Process analysis, however, leads to the central holding of the opinion. *Id.* at 2604.

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In sum, *Obergefell*'s holding was grounded in a long tradition of discrimination against LGBTQ Americans, discrimination that the Court sought to remedy by recognizing same-sex marriage as a fundamental right. Many Indian Tribes do not have that discriminatory tradition. Instead, many tribes developed a tradition in which LGBTQ and gender non-conforming tribal members are recognized as equal members of the tribe who are fully integrated into the tribe, and are often honored and revered.[116] As argued below, this different—and more inclusive—tradition is one that tribes that currently ban same-sex marriage should reclaim and make central to their decision to recognize marriage equality. Indigenizing equality thus would mean rejecting the American version of marriage equality—one that is tainted by a violent and discriminatory anti-LGBTQ history. Indigenizing equality would mean embracing tribal marriage equality based on inclusive and tolerant tribal traditions, which would enhance tribal sovereignty, both in perception and in practice.

2. The Current Status of Marriage Equality in Tribal Nations

Tribes began to recognize same-sex marriage as early as 2008, when the Coquille Indian Tribe did so through legislation.[117] Today, seventeen tribes have recognized marriage equality, either through express marriage laws or through neutral marriage laws that arguably permit such unions: the Cherokee Nation, the Cheyenne and Arapaho, the Colville, the Confederated Tribes of Grand Ronde, the Coquille, the Keweenaw Bay Indian Community, the Leech Lake Band of Ojibwe, the Little Traverse Bay Bands of Odawa Indians, the Mashantucket Pequot, the Oneida Tribe of Indians of Wisconsin, the Pokagon Band of Potawatomi Indians, the Puyallup, the Iipay Nation of Santa Ysabel, the Shoshone-Arapaho Tribes at Wind River, the Siletz, the Suquamish, and the Tlingit and Haida.[118] Six of these tribes recognized same-sex marriage in 2013.[119] Marriage equality in these tribes came about mainly via tribal legislation, though some tribes achieved marriage equality through administrative action.[120]

Three tribes have facially neutral marriage laws, and the legislative history of these laws suggests intent to allow same-sex marriage.[121] These tribes are the

116. *See infra* Section II.D; *see also* Alagna, *supra* note 12, at 1591–95; Jacobi, *supra* note 108, at 834–37.

117. *See* Alagna, *supra* note 12, at 1583.

118. *See id.* at 1583 (regarding all tribes except the Cherokee Nation); *see also* Tweedy, *supra* note 15, at 110; Tim Talley, *Cherokee Nation Attorney General: Tribe Must OK Gay Marriage*, ASSOCIATED PRESS (Dec. 12, 2016), http://apnews.com/bf9dee32310e4567a0149bc05df35b9a/cherokee-nation-attorney-general-tribe-must-ok-gay-marriage [http://perma.cc/3P3V-EMEZ] (regarding the Cherokee Nation, which only recognized same-sex marriage on December 11, 2016).

119. *See* Alagna, *supra* note 12, at 1584.

120. *Id.* at 1585.

121. *See* Tweedy, *supra* note 15, at 110–11.

Mashantucket Pequot, the Little Traverse Bay Bands of Odawa Indians, and the Confederated Tribes of the Colville Reservation. Two other tribes allow same-sex couples to marry under facially neutral laws that lack clear legislative history supporting marriage equality—the Cheyenne and Arapaho and the Leech Lake Band of Ojibwe.[122]

The Eastern Cheyenne and the Northern Arapaho tribes have performed same-sex marriage and relied on the incorporation of state law to do so.[123] Two tribes—the Iipay Nation and the Keweenaw Bay Indian Community in Michigan—have expressed non-binding policy support for marriage equality.[124]

Fourteen tribes have sex-neutral laws that may or may not be interpreted to allow same-sex marriage. However, most of these laws have not yet been tested.[125] Seven tribes may recognize same-sex marriages performed elsewhere.[126] As Professor Ann Tweedy notes:

> Although these tribes may well recognize same-sex marriages that were validly performed elsewhere, assumptions should not be made either way because some tribes with broad provisions regarding recognition of foreign marriages would undoubtedly refuse to recognize same-sex marriages based on public policy. Such refusal is probably especially likely if the tribe has its own defense of marriage act.[127]

122. *Id.* at 122.

123. *Id.* at 111.

124. *Id.* The Iipay Nation of Santa Ysabel passed a resolution in support of same-sex marriage because the tribe does not have laws that govern marriage. *Id.* at 108 (citing *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#.VODn-VPF9tI [http://perma.cc/N33S-K7S8]. The Keweenaw Bay Indian Community passed a referendum supporting same-sex marriage to serve as policy guidance to the Tribal Council in considering the issue. Res. KB-063-2014, Keweenaw Bay Indian Cmty. Tribal Council (2014) (undated Keweenaw Bay Indian Community Tribal Council resolution approving referendum language); Dan Roblee, *The Tribe Has Spoken*, DAILY MINING GAZETTE (Dec. 15, 2014), http://www.mininggazette.com/news/local-news/2014/12/the-tribe-has-spoken [http://perma.cc/KZ9E-7EU5].

125. *See* Tweedy, *supra* note 15, at 128–29. These are: the Yurok, the Hoopa Valley, the Coushatta Tribe, the Tohono O'odham, the Iowa Tribe, the White Mountain Apache, the Poarch Band of Creek, the St. Regis Mohawk, the Tulalip, the Ute, the Rosebud Sioux, the Winnebago, the Ponca Tribe of Nebraska, and the Yankton Sioux. *Id.*

126. *Id.* at 130–31. These are: the Chitimach, the Tulalip, the Ponca Tribe of Nebraska, the Eastern Band of Cherokee, the Hoopa Valley, and the Yurok Squaxin Island Tribe. *Id.*

127. *Id.* at 130.

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Finally, ten tribes have "Defense of Marriage" laws that ban same-sex marriage.[128] These bans were enacted beginning in 2004 and continued to appear as recently as 2014.[129]

Why have some tribes been reluctant to accept marriage equality or to explicitly prohibit it? As noted below, the opposition to marriage equality is inconsistent with deep tribal traditions of eschewing the gender binary. Given that adherence to a fixed gender binary underlies much of the American opposition to marriage equality,[130] the "why" of tribal antipathy to same-sex marriage is likely colonialism.[131] Indian history and tradition support this conclusion.[132] However, we suggest that what we call the "tribal option"[133]— tribes embracing marriage equality of their own volition—presents an opportunity for tribes to

128. *Id.* at 131–33. These are: the Navajo Nation, the Ak-Chin, the Blue Lake Rancheria, the Chickasaw Nation, the Confederated Tribes of the Coos, the Lower Umqua, the Siuslaw Indians, the Grand Traverse Band of Chippewa Indians, the Nez Perce Tribe, the Oneida Indian Nation, the Sac & Fox Tribe of the Mississippi in Iowa, and the Muscogee (Creek) Nation. *Id.*; *see also* Alagna, *supra* note 12, at 1586.

129. *See* Alagna, *supra* note 12, at 1586.

130. *See generally* Heather Lauren Hughes, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237, 240–41 (1998) ("Statements in support of the DOMA situate the real/imaginary distinction in congruence with binary oppositions such as biology/social construction, natural/fabricated, and legitimate/illegitimate that link heterosexual marriage to the natural and legitimate in production of a moral order."); Marc R. Poirier, *Piecemeal and Wholesale Approaches Toward Marriage Equality in New Jersey: Is* Lewis v. Harris *a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291, 293 n.10 (2007) ("The male/female binary both derives from and reinforces other social structures, including masculine/feminine and heterosexual/homosexual binaries."); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 156 (2016) ("[A] social commitment to preserving such roles helps to explain much of the opposition to same-sex marriage.").

131. *See, e.g.*, William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1473 (1993) ("Just as Western-nation-states in the early modern period conquered the New World and killed most of its people, colonized and enslaved Africa, and cartelized and evangelized Asian cultures, so they exported their anti-homosexual attitudes and aggressively suppressed these cultures' indigenous attitudes and institutions."); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 8 n.52 (1997) ("The absence of . . . recognition [of same-sex marriage] anywhere in the world today is hardly a manifestation of the shared ancient wisdom of humankind. Militarily useful munitions were first developed in the Christian nations of Western Europe, which interpreted their religious traditions as condemning homosexuality and which soon became colonial powers. They had no scruples about imposing their mores on the rest of the world."); Wilson, *supra* note 18, at 172–75.

132. *See infra* Section II.D.

133. *See infra* Section III.C.

eschew the negative impacts of colonization by reclaiming their pre-colonial tradition of recognizing and celebrating two-spirit and third-gender Indians.[134]

B. Likely Federal Litigation

As in *Santa Clara Pueblo*, a citizen of a tribal nation who is denied marriage equality may pursue an action in federal court.[135] One possible result, of course, is that the district and appellate courts may simply cite to *Santa Clara Pueblo*, construe its holding broadly, and wash its hands of the dispute. Indeed, this result is fully possible, perhaps even likely. Many advocates of tribal sovereignty would prefer and expect this result.[136] The inquiry we explore considers a federal court's possible alternative approach to resolving this claim. In other words, with the precedent of *Obergefell* in place, coupled with the relevant distinctions between the two types of injuries, there might be additional risk borne by tribal advocates in relying so readily on *Santa Clara Pueblo*'s presumed invincibility.[137]

Plaintiffs in litigation against a tribal government that forbids marriage equality would proceed in much the same fashion as the litigation initiated by Ms. Martinez in *Santa Clara Pueblo*. First, of course, one plaintiff must be a tribal member seeking rights guaranteed to tribal members who are married under tribal law or other marital benefits in recognition of their marriage under tribal law and be denied those rights or benefits.[138] The tribal member against whom the tribe discriminated would file a complaint in federal district court, pursuant to Section 1302(a)(8) of the Indian Civil Rights Act of 1968, alleging a denial of equal protection and due process. The defendants would need to be the officers of the tribal government, and not the tribal government itself, in

134. *See infra* Section II.D.

135. Federal subject matter jurisdiction exists because the question arises under the laws of the United States. The body of Federal Indian Law (establishing the boundaries of tribal sovereignty) is a product of federal common law. Furthermore, the claim would be brought pursuant to the Indian Civil Rights Act of 1968. *See* 25 U.S.C. § 1302 (2012).

136. *See generally* Bruce A. Wagman, *Advancing Tribal Sovereign Immunity as a Pathway to Power*, 27 U.S.F. L. REV. 419, 471 (1993) ("In light of current judicial hostility to tribal sovereign immunity, it is important for lawyers and for all branches of tribal government to grasp what is left of the protections afforded by the doctrine, use the doctrine to maximum efficiency, and hold fast . . . to avoid giving the Supreme Court an opportunity to overturn or severely restrict *Santa Clara Pueblo*.").

137. *See generally* Alex Tallchief Skibine, *Respondent's Brief:* Julia Martinez, Petitioner v. Santa Clara Pueblo, 14 KAN. J.L. & PUB. POL'Y 79, 87 (2004) (noting that "Congress has not seen fit to overturn the decision or amend the law in more than twenty-five years, in spite of encouragements from the Supreme Court that perhaps it was time for Congress to abrogate or at least modify the doctrine of tribal sovereign immunity").

138. 25 U.S.C. § 1302(a)(8) (2012).

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order to avoid dismissal on sovereign immunity grounds.[139] Suing the tribal officers allows the plaintiff to proceed under the *Ex parte Young* doctrine, as long as the plaintiff seeks injunctive and declaratory relief rather than monetary damages.[140]

With this background in place, the court's inquiry would focus on the precise issue considered in *Santa Clara Pueblo*—whether or not there is an implied right to bring a claim for marriage equality under tribal law in federal court.[141] As discussed above, the court could simply cite *Santa Clara Pueblo* and dismiss the case as exactly the same. But this case is distinguishable. The similarities are obvious: a tribal law engages in express legal discrimination against LGBTQ tribal members seeking marital rights equal to those of opposite sex partners. However, the major legal differences are (1) the impact of *Obergefell* and (2) the type of rights being pursued under tribal law.

For most Americans, including judges and lawyers, tribal citizenship is an oddity. Based on the most recent U.S. Census, at most only 1.2 percent of Americans are Native American, although this number does not describe enrolled tribal members.[142] For most people, the ramifications of being denied tribal citizenship might not resonate because there is no common cultural touchstone. Most people—even federal judges—likely do not understand the weight of being denied enrollment status in an Indian tribe. After all, respondents might say, Ms. Martinez's children are still American citizens, "so what's the big deal?" This is not the case with respect to the right to marry—Indians and Americans share a deep understanding of and reverence for the institution of marriage.

139. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). There is a doctrinal question regarding whether dismissing the case on immunity grounds is properly jurisdictional or procedural, but that debate is immaterial for purposes of this Article.

140. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Nation, 498 U.S. 505, 514 (1991) (stating that the Supreme Court "[has] never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State") (citing Ex parte Young, 209 U.S. 123 (1908)); *Santa Clara Pueblo*, 436 U.S. at 59 (holding that "[an officer of the Tribe] is not protected by the tribe's immunity from suit"); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 171–72 (1977) (holding that the doctrine of sovereign immunity does not immunize individual members of the tribe).

141. *Santa Clara Pueblo*, 436 U.S. at 51.

142. *See Quick Facts: United States*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/RHI325215/00 [http://perma.cc/6DPG-UTR4]. This is because the census data collected is self-identified responses from individuals. Tina Norris, Paula L. Vines & Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population: 2010 Census Briefs*, U.S. CENSUS BUREAU (Jan. 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf [http://perma.cc/7R4N-CGYX]. The complexity of Indian identity renders it entirely plausible that some enrolled tribal members may not consider themselves "racially" Indian whereas some other non-tribally enrolled individuals will consider themselves "racially" Indian. *See id.*

This difference in result, between the shared understanding of the importance of marriage and the general lack of American understanding of the importance of tribal membership, can be attributed to *Obergefell*.

As described above, Americans are well-versed in the issue of marriage equality. Marriage is a part of everyday American life—the exact opposite of the comparatively alien concept of tribal citizenship. Therefore, upon being confronted with a tribal government's specific and intentional discrimination against LGBTQ people in their pursuit of marriage equality, judges and lawyers will have a clearer understanding of what is at stake and the harm caused by such a denial of basic rights. This common cultural understanding alone makes this case different—and riskier for tribes—than *Santa Clara Pueblo*. The risk to tribes, and to tribal sovereignty, is plain. A court could do as Dr. Swentzell feared—rule on behalf of the plaintiff and alter tribal law from outside the community. This is not the exercise of sovereignty for tribal communities. It is the continuation of colonialism by judicial action, but at an intra-tribal level.

From a legal standpoint, the court could determine that the issue of marriage equality in tribal communities is very different than the right of citizenship. The court's inquiry would ultimately ask if there is a substantive difference between the court deciding who belongs in the tribe and the court making a determination of the rights to be granted to undisputed members of the tribe. The holding in *Santa Clara Pueblo* would be framed as the Court deciding who is and is not a member of the tribe—supplanting the sovereign conversation with the views of foreign justices. In the case of marriage equality, the holding would be framed as whether the federal statutory law permits the tribe to afford undisputed tribal members fundamental rights on a discriminatory basis. The court's inquiry would not seek to determine whether an individual belonged in the tribe or not. Instead, it would involve an assessment of the availability of fundamental rights to all tribal citizens under tribal law consistent with federal statutory requirements. In this way, the court may frame the legal inquiry in a narrower way that may track the plain language of § 1302(a)(8) concerning the denial of equal protection.

A court could also incorporate the Supreme Court's commentary on marriage as expressed in *Obergefell*. Recall that the Court construed the right to marry as "fundamental."[143] It further explained that "essential attributes" of marriage—and not the historical presumption that it is solely an opposite-sex institution—are the basis of its existence.[144] A court might see *Obergefell* as informing the rights conferred under § 1302(a)(8) and better defining what those rights are. The court might incorporate this precedent in distinguishing the issue from tribal citizenship determinations. Precluding the enrollment of certain individuals who may have Indian blood is not necessarily denying equal protection. Rather, it is the act of a sovereign making a determination as to who is and is not a member of the community. On the other hand, once those people are

143. Obergefell v. Hodges, 135 S. Ct. 2584, 2597–99 (2015).

144. *Id.* at 2598–99.

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found to be enrolled members of the tribal community, the court may be more inclined to find an implied right under § 1302(a)(8) because the degree of intrusion into the internal affairs of the tribal community is far less. The court may confirm the holding in *Santa Clara Pueblo* and uphold the primacy of Dr. Swentzell's vision that a sovereign community will continue the conversation of belonging. Or, the court could effectuate the intent of the Indian Civil Rights Act by prohibiting the tribal government from expressly discriminating against undisputed members of the tribe.

As advocates for tribal sovereignty and LGBTQ rights and equality, we believe intrusion into internal tribal affairs by a federal court would not be ideal. While we favor marriage equality in *all* tribes, we feel strongly that the manner in which marriage equality is achieved in Indian Country is meaningful and important. A federal court ordering a tribe to recognize marriage equality would be an intrusion on tribal sovereignty. We believe that such an outcome is undesirable because of the statement it would make about tribal sovereignty, namely that such sovereignty is weak and diminishing, and even lacking in legitimacy. Instead, we described the very real distinctions between the two cases and the change in legal landscape since *Obergefell*, which likely would *permit* a federal court to thrust marriage equality upon tribes, notwithstanding the negative impact on tribal sovereignty that such a court order would have.

C. *The Federal Legislative Option*

While a federal court may elect to read *Santa Clara Pueblo*'s holding broadly, thereby dismissing an action under § 1302(a)(8), this does not signal the complete victory for tribal governments choosing to discriminate against LGBTQ tribal members. As described above,[145] Congress's plenary power over tribes is longstanding and well-recognized. Congress thus has broad authority to legislate in Indian Country—as evidenced by the enactment of the very statute, the ICRA, providing the legal basis for the federal court action. That statute, as well as countless others specifically targeting Indian tribes, have routinely been upheld as constitutional and within Congress's plenary authority.[146] The

145. *See supra* Section I.B.

146. *See, e.g.*, Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 234–35 (1984) ("The following is a partial list of the congressional actions receiving the Court's sanction in modern times, often in decisions citing the major cases of the plenary power era. The Court has upheld congressional power to reduce the boundaries of a reservation without tribal consent or compensation, thereby reducing, for all practical purposes, a tribe's power to govern. In addition the Court has upheld power to divest a tribe of all criminal, civil, or regulatory jurisdiction; to abrogate treaties; and to subject tribal laws and constitutions to federal approval. As to tribal property rights, congressional power remains as sweeping as it was during the plenary power era. Congress may require the Secretary of the Interior to approve land sales and leases by tribes, and contracts obligating money held by the federal government but owed to the tribe. Congress may abrogate without liability future interests in

doctrine of plenary power over Indian affairs has been exhaustively covered elsewhere,[147] especially in the frank concurrences and dissents of Justice Clarence Thomas, who openly questions the constitutionality of the plenary power doctrine and, in turn, many of the statutes that specifically legislate with respect to Indian tribes.[148]

As a result, Congress could clarify the ICRA and expressly provide for a federal cause of action to address aspects of discrimination perpetrated by tribal governments in federal court. However, given the 2016 election, which resulted in a Republican president and a Republican majority in both houses of Congress, it is unlikely that the current Congress will exercise its plenary power over tribes in this way.

However, should this approach gain political momentum within Congress, or should the composition of Congress shift in the 2018 midterm elections such that it becomes a viable option, it is important to note that this option presents significant risks for tribal governments. Achieving tribal marriage equality through a congressional mandate would be an express limitation and infringement on tribal sovereignty. Moreover, it would further entrench the doctrine of congressional plenary power over Indian tribes. Finally, the result of the congressional action would apply to all Indian tribes regardless of their approach to LGBTQ citizens.

Perhaps the most concerning aspect of such a legislative proposal is the extent to which it alters tribal laws. Depending on the specificity of the provision, it may present ambiguity as to exactly how far it reaches into tribal self-government, thereby resulting in increased risks for litigation and further diminishment of tribal sovereignty. As a result, we do not advocate for this approach as the ideal path to marriage equality in tribal communities.

Indian lands granted by earlier statutes, and may enlarge or decrease the class of beneficiaries of tribal trust funds or lands. Congress may take one kind of tribal property, aboriginal Indian property, without paying compensation; it may, without consent, dispose of recognized-title tribal property under the guise of management and sell it at less than fair market value without liability, as long as the tribe receives some proceeds. According to some observers, it may even extinguish legal land claims of Indian tribes by retroactively extinguishing both title to the land and any claims based on that title." (internal citations omitted)).

147. *See* Ablavsky, *supra* note 53; Fletcher, *supra* note 21; Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Newton, *supra* note 146; Skibine, *supra* note 137.

148. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2570–71 (2013) (Thomas, J., concurring) (questioning whether Congress has the requisite authority to enact the Indian Child Welfare Act); United States v. Lara, 541 U.S. 193, 214–15, 224–25 (2004) (Thomas, J., concurring) (asking whether inherent tribal sovereignty was consistent with the plenary power of Congress).

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D. *Indigenizing Equality: The Expressive Power of Tribal Law and the Value of the Proactive Tribal Solution*

Marriage equality in Indian Country is a matter of "when," not "if." While the legislative and litigation avenues to marriage equality in Indian Country are both viable and possible, we argue that the best avenue for marriage equality is the internal tribal approach. The *legal* outcome of all three possible avenues would be the same: marriage equality in Indian Country. But the normative and cultural outcome and impact of the three possible avenues differ dramatically. The vastly different outcome would result from the expressive power of the law, rather than from its substantive power.

It is axiomatic that law plays a cultural role as well as a strictly legal role; this is the "expressive" function of law.[149] As opposed to the "legal" role of the law—the role law plays in regulating the behaviors of people, either the litigants in a lawsuit or the populations targeted by legislation—the "expressive" function of the law sends a normative and cultural message about the shared values of a community. The law's "expressive power" is thus the power of the law to influence norms—described as "norm management"[150]—and behavior independent of any substantive component of the law itself.[151] The expressive power of *Obergefell* is potentially transformative in the normative and political arenas of American federal law. Its expressive power can and should be leveraged to enact broad legislative protections for LGBTQ individuals in all facets of society, beyond the institution of marriage.[152]

The expressive function of the law is particularly salient and conspicuous in the interplay between tribal law and federal law.[153] In this context, the expressive significance of the law is most strongly felt in the *source* of the law. Whether the

149. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2051 (1996); *see also* Judith Resnik, *Changing the Topic*, 8 CARDOZO STUD. L. & LITERATURE 339, 344 (1996) ("[C]ontemporary law in the United States is filled with conflict over who has controlled the underlying narratives and the resulting shape of legal doctrine, as well as whether the culture will recognize, let alone explore, new plots.").

150. Sunstein, *supra* note 149, at 2049.

151. *See* Velte, *supra* note 19, at 160.

152. *Id.* at 165–66; *see also* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representations, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996) ("What courts offer . . . are opportunities for public participation, for transformative exchanges about, as well as reaffirmation of, social and moral values. . . . [C]ourts attain legitimacy in part because they offer such participatory, expressive, and ideological moments.").

153. For example, when the U.S. Supreme Court held, in *Talton v. Mayers* and *Cherokee Nation v. Georgia*, that federal law did not apply to actions that took place among Indians on reservations, the message sent by those opinions was one that bolstered and legitimized the principle of tribal sovereignty. Talton v. Mayes, 163 U.S. 376 (1896); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

law governing tribes originates in Congress or originates in tribes themselves matters, because of the history of colonization and exploitation of tribes and the usurpation of tribal autonomy by the United States. If the source of marriage equality in tribal nations is an act of Congress or a decree from a federal judge, the expressive impact of that action is one that underscores the generations-long experience of colonization, exploitation, and usurpation.[154] Such an act or decree would send a message that the United States is forcing tribes to follow U.S. law, signaling imperialism, dominance, and power. These negative expressions engendered by the law would further reinforce the history of colonization and the concomitant erasure of tribal values and tradition. Moreover, this negative expressive function easily could result in violent reactions.[155] It would not be surprising if, as a result of tribes being forced to again submit to the dominance, power, and imperialism of the United States, discrimination and hate crimes against LGBTQ tribal members were to increase. Moreover, the grassroots positive internal narrative that LGBTQ tribal members have been able to establish within their tribes[156] would be imperiled by the negative messages sent

154. *See* Jacobi, *supra* note 108, at 835 (noting that "[b]y the 1930s, acculturation and assimilation had dissuaded Native Americans from talking about two-spirits and inhibited much of the gender role change that had been common in earlier times"); *id.* at 845 ("Government schools degraded and punished the practice of Native American culture. . . . Government education degraded and assimilated two-spirits."); Koppelman, *supra* note 131, at 8 n.52 ("The absence of . . . recognition [of marriage equality] anywhere in the world today is hardly a manifestation of the shared ancient wisdom of humankind. Militarily useful munitions were first developed in the Christian nations of Western Europe, which interpreted their religious traditions as condemning homosexuality and which soon became colonial powers. They had no scruples about imposing their mores on the rest of the world."); Tweedy, *supra* note 15, at 105 ("Another reason that tribal courts should view same-sex marriage bans with suspicion is that such bans reflect a heteronormative conception of the nuclear family that has been historically imposed on tribes by the U.S. government and other colonial forces and that continues to be imposed to some degree today.").

155. *See generally* Tracy Clark-Flory, *FBI Anti-LGBT Hate Crime Statistics Point to Reporting Problem*, VOCATIV (June 22, 2015), http://www.vocativ.com/culture/lgbt/fbi-anti-lgbt-hate-crime-statistics-point-to-reporting-problem/ [http://perma.cc/T8RG-86RK] ("I think it's extremely likely that we will see anti-gay hate crime go up if and when same-sex marriage is legalized throughout the country.").

156. The National Congress of American Indians (NCAI) issued a report in 2015 noting that a number of two-spirit societies exist within North American tribes. *See A Spotlight on Two Spirit (Native) Communities*, NCAI POL'Y RES. CTR. 1 (2015), http://www.ncai.org/policy-research-center/research-data/prc-publications/A_Spotlight_on_Native_LGBT.pdf [http://perma.cc/4KNF-S4XL]. In 2013, the National Confederacy of Two-Spirit Organizations and NorthEast Two-Spirit Society issued a Two-Spirit Resource Directory that reflects seventeen two-spirit societies within the United States. *See* Harlan Pruden, *Two-Spirit Resource Directory*, NAT'L CONFEDERACY TWO-SPIRIT ORGS. (2013), http://lgbt.wisc.edu/documents/two-spirit-resource-directory-jan-2013.pdf [http://perma.cc/L9KM-

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by the United States mandating marriage equality in Indian Country. Backlash—including actual violence against LGBTQ tribal members as well as severe undermining of the grassroots progress for LGBTQ tribal members that has been building organically within tribes—is a real and present danger posed by the expressive messages that would be sent if the United States were to impose marriage equality on Indian Country.

In contrast, if tribes themselves institute marriage equality, the positive results are three-fold. First, tribal sovereign power is preserved, promoted, and reinforced. Second, this option would signal a stand against colonialism and a simultaneous reclaiming and celebration of the uniquely Indian concept of two-spirit and third-gender people. Third, this option would offer the best protection for and integration of LGBTQ Indians within their tribes.

1. Tribal Sovereignty

As noted above, tribal sovereignty, although not comprehensive, is a centrally important piece of Indian identity. As Congress has acted over the years to erode tribal sovereignty,[157] the importance of sovereignty, and holding on to the sovereignty that remains, only increases. If Congress, rather than tribes, acts to impose marriage equality, sovereignty will be further eroded, resulting in a greater loss of this central and unifying piece of Indian identity. Marriage equality achieved in this way would have less legitimacy than if tribes create marriage equality themselves.

Sovereignty is "both backward-looking and forward-looking; it is not only conservative and restorative, but also exploratory of progressive change."[158] Thus, the expressive function of the internal tribal approach, rather than the federal legislative or litigation options, is powerful. As one scholar has noted, "intentional norm management is a conventional and time-honored part of

BA9L]. These publications indicate a robust LGBT-rights movement within tribal communities. *Id.*

157. *See* 25 U.S.C. §§ 2701–2721 (2012) (the Indian Gaming Regulatory Act imposed limitations on a tribe's ability to engage in casino-style gaming); Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (federal law requiring six states to assert jurisdiction over actions in Indian Country thereby undermining the functioning of tribal governments); General Allotment Act of 1887, ch. 119, 24 Stat. 388 (the Dawes Act imposed the allotment of tribally held reservations resulting in the breakup of tribal land holdings and undermining tribal sovereignty). The various so-called "Termination Acts" also unilaterally ended the federal/tribal government-to-government relationship with certain Indian tribes. Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983) (listing the tribes and federal statutes terminating the federal recognition of over one hundred Indian tribes).

158. Tim Rowse, *Self-Determination as Self-Transformation*, *in* RESTORING INDIGENOUS SELF-DETERMINATION: THEORETICAL AND PRACTICAL APPROACHES 34, 34 (Marc Woons ed., 2015).

government."[159] The normative, not to mention cultural, importance of tribal sovereignty cannot be overstated. Thus, this norm will be reinforced and promoted if tribes adopt marriage equality rather than having marriage equality imposed from the outside. This is because "efforts at norm management are more legitimate if they have a democratic pedigree."[160] The "management" of the sovereignty norm vis-à-vis marriage equality will best be achieved if the tribes themselves adopt marriage equality. That self-directed, empowered decision to adopt marriage equality will have a democratic pedigree that serves to reify the tribal sovereignty that is integral to the collective Indian character.[161]

2. Anti-Colonialism

We believe the anti-marriage-equality sentiment and actions within tribes originates, in part, from tribal adoption of American discriminatory biases through the apparatus of colonialism. Put another way, but for American colonization of Indians, we believe that tribes would be much more welcoming of and open to marriage equality. Indian history and tradition confirm this.[162] This concept is not limited to biases regarding marriage equality. The United States has long imposed practices and policies on tribal communities that undermine indigenous gender roles.[163]

One reason we believe this to be true is the generations-long tradition of Indian recognition of two-spirit and third-gender people. Two-spirit is the de-

159. *See* Sunstein, *supra* note 149, at 2049.

160. *Id.* at 2052.

161. *See* Alagna, *supra* note 12, at 1588–89 ("Some tribal governments have passed pro-same-sex marriage laws as an exercise of their authority as sovereigns. . . . Exercising self-determination can be a reactive move in the face of threats to Native identity. . . . In other words, not only was passing the law on same-sex marriage an exercise in self-government, but it was also a form of identity assertion. Thus, self-determinative action can also be reactive to other sovereigns, such as the federal and state governments.").

162. While there is a distinction between historic and modern practices within the distinct tribal nations, see Jacobi, *supra* note 108, at 845, we argue that historical practices concerning two-spirit people can not only inform and support the Tribal Option, but also can help reclaim those historic practices in a way that indigenizes equality and legitimizes tribal sovereignty. We believe this to be attainable notwithstanding that tradition has a "more complicated interpretation that has become more difficult to discern post-European contact" and that "'self-determination' and 'tradition' are indeterminate and can cut either way on the issue of same-sex marriage." Alagna, *supra* note 12, at 1588.

163. *See* Jacobi, *supra* note 108, at 845 ("The influence of European culture diminished the status of two-spirits. . . . Androgynous boys were forced to play boys' games and to dress like other boys. . . . Government education degraded and assimilated two-spirits.").

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scriptor generally given to modern gay, lesbian, and bisexual Indians.[164] A third-gender Indian was one who was neither male nor female and was "not confined to the 'gender-binary, bodily-sex-equals-gender' belief that existed among European society at the time."[165] Third-gender Indians were not considered to be "homosexual" in the sense that we understand that identity in its modern social construction.[166]

Prior to the European invasion, two-spirit and third-gender Indians were well regarded and appreciated within their tribes; tribes widely accepted their different gender and sexual orientation expression.[167] Nearly all tribes "had a sophisticated way of understanding sexuality and how it could shape an individual's identity."[168] Tribal communities considered such people to possess unique qualities that had special religious and cultural significance.[169] A number of tribal communities held the view that "[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, and, as a result, they were accepted and sometimes honored."[170]

Two-spirit Indians had various kinds of relationships depending on their tribes, ranging from the recognition of the relationship between long-term male two-spirit partners and describing them as "wives," to a series of shorter relationships during their lives.[171] In addition, "many tribal communities performed traditional weddings for two-spirits and also permitted them to adopt children."[172]

European colonization changed how two-spirit and third-gender Indians were regarded by their tribes. "European discoverers viewed homosexuality as evidence of Native Americans' moral inequity, and as a justification for the conquest of North America. . . . Consequently, the Europeans imposed their own religion and social norms upon the tribes, resulting in . . . the demise of two-spirit aspects of traditional Native American culture."[173] This colonization of Indian cultural and religious values continued for hundreds of years and

164. *See* Wilson, *supra* note 18, at 170.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 171.

169. *Id.* ("Referring to the historic importance of two-spirits in tribal communities and the treatment of their modern-day counterparts, a Crow tribal elder said, 'We don't waste people the way white society does. Every person has their gift.'").

170. *Id.* (internal citations and quotation marks omitted).

171. *Id.* at 172.

172. *Id.*

173. *Id.* at 172–73.

eventually resulted in the erasure of many Indian practices and values.[174] The elimination of the recognition of two-spirits and third-gender Indians was part of colonialism's erasure.[175]

We posit that, had colonialism not erased the rich and meaningful tradition of two-spirit and third-gender Indians, Indian Country might have led, rather than followed, on marriage equality.[176] However, we suggest that the internal tribal approach presents an opportunity for tribes to eschew the negative impacts of colonization by reclaiming their pre-colonial tradition of recognizing and celebrating two-spirit and third-gender Indians.

Cass Sunstein notes that there are many ways in which to describe the impact of a legal rule. Any distinct, singular characterization of the consequences of a legal rule will "be mediated by a set of (often tacit) norms determining how to describe or conceive of consequences. It is possible to see a large part of the expressive function of law in the identification of what consequences count and how they should be described."[177]

Thus, by pushing back against the colonialism-induced erasure of two-spirit and third-gender Indians by recognizing same-sex marriage, Indian Country will reclaim some of its unique and rich history.[178] The fact that *Obergefell* may provide the federal government the opportunity—through litigation or action by Congress—to impose marriage equality on tribes from the outside should motivate tribes to operationalize the Tribal Option and indigenize equality. The "undoing" of some of colonization's erasures can only benefit the collective Indian identity,[179] and do so in ways that extend beyond marriage

174. *Id.* at 173. "By the early 1880s, Christian missionaries and Indian agents were using the Religious Crimes Code 'to aggressively attack Native sexual and marriage practices,' and to pressure tribal communities to adopt the Euro-American ideals on family and sexuality." *Id.*

175. *Id.* ("Christian missionaries tried to eradicate the existence of any 'third-gendered' individuals in Native American culture, forcing male-bodied two-spirits to don the dress and style of heterosexual males."); *see also* Jacobi, *supra* note 108, at 846 ("Many Native American tribes have disregarded the traditional respect given two-spirits, and adopted European American and Christian views on homosexuality and gender difference.").

176. Some tribes did, in fact, lead rather than follow on marriage equality when they permitted and recognized same-sex marriage before the Supreme Court decided *Obergefell*.

177. Sunstein, *supra* note 149, at 2048.

178. *See* Jacobi, *supra* note 108, at 848 ("Outside influence continues to play a role as an increasing number of states pass amendments defining marriage as exclusively between a man and a woman. Armed with the sovereignty to make independent decisions on this matter, tribes should be wary of disregarding their traditions, which are integral to tribal identity.").

179. *See* Alagna, *supra* note 12, at 1596 (noting that "tradition is . . . an integral part of tribal identity and sovereignty"); *see also id.* at 848 ("Tradition helps tribes maintain identities as sovereign entities and is fundamental to all tribal law.");

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equality. In Sunstein's terms, the impact of the internal tribal approach will be that the "description of the consequence"—the narrative about how marriage equality came to be the law of Indian Country—will be one of reclamation, rebirth, and rejection of some of the vestiges of colonialism. Those are the "consequences [that] count."[180] In particular, if tribal courts are the tribal institutions that create marriage equality in Indian Country, that action will undoubtedly be expressive. Courts are "institutions expressive of and accountable to the public," and their acts have normative weight.[181]

3. Full Inclusion of LGBTQ Indians in Tribal Society

A third and final positive consequence of the expressive power of the internal tribal approach is that it would encourage full inclusion and acceptance of LGBTQ Indians into tribal societies. In many tribes, the historical erasure of two-spirit and third-gender Indians through colonization has left a legacy of exclusion of modern-day LGBTQ Indians from tribal life.[182] As a result, homosexual Native Americans viewed themselves as a double minority, racially within the gay movement and sexually within their tribes.[183]

Well before *Obergefell*, in the 1990s, LGBTQ Indians began to organize in an attempt to resurrect the pre-colonialism views of two-spirits and third-genders, and in so doing to create a culture of acceptance for modern-day LGBTQ Indians.[184] Today's Indian LGBTQ activists thus seek to harness the

Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 453–54 (arguing that an essential aspect of tribal sovereignty is the right to protect its collective identity); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1348 (1993) (noting that sovereignty's value stems from "the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity").

180. Sunstein, *supra* note 149, at 2048 (1996); *see also* Rowse, *supra* note 158, at 34 ("Indigenous people may now innovate and adapt with more resources material, legal, political, cultural—than were at their disposal when the colonizing vision of their future was limited to exterminating them or assimilating.").

181. *See* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994).

182. Alagna, *supra* note 12, at 1594; Jacobi, *supra* note 108, at 841–47; Wilson, *supra* note 18, at 175.

183. Wilson, *supra* note 18, at 175.

184. *Id.* at 176 ("'Armed with the knowledge that gender-different persons historically were respected in their communities,' the two-spirit community came together to create a group-based support system, where members were able to connect with other gay Native Americans facing the same struggle—the struggle to be both Indian and gay." (internal citations omitted)).

historical views and treatment of two-spirit and third-gender Indians; these activists understand that "anti-homosexual attitudes only divide already fractured tribal communities and that the recognition of traditional values relating to two-spirits provides validation and 'a heritage to Indian gays.'"[185]

The internal tribal approach can build upon this organic and burgeoning LGBTQ-rights movement already underway within tribes. The expressive power of using the internal tribal approach would reinforce and legitimize this already-existing LGBTQ-rights movement in Indian Country because if change comes from within tribes, it will send a message that LGBTQ Indians are full members of tribal communities—the same message pressed by the LGBTQ-rights movement in Indian Country. This would represent a legal adoption of LGBTQ rights while demonstrating the ability of tribal governments, like any other government, to change over time. Furthermore, LGBTQ-rights activists in tribal communities can, and should, harness the expressive power of *Obergefell* itself. The *Obergefell* opinion sends a message that LGBTQ people have innate dignity that deserves recognition and the protection of rule of law, and that deprivation of this recognition and protection results in impermissible harm to LGBTQ people.[186] This message applies equally to LGBTQ tribal members.

For tribal members who are reluctant to include LGBTQ Indians as full participants in tribal communities to feel comfortable accepting marriage equality, the normative and political atmosphere must be one in which LGBTQs are normalized and seen as a group that deserves to share in the core values of the tribal community. To shift the normative atmosphere takes work. *Obergefell* did much of this expressive work. The expressive impact of the internal tribal approach discussed herein will accomplish even more of that necessary work.

Each of the three benefits described in this Section flow directly from the expressive, rather than the regulatory, power of the law. If marriage equality comes to tribes through the force of the American federal system, the normative and cultural impact will be categorically negative. For these reasons, we believe that the best avenue for marriage equality in Indian Country is the internal one.

Conclusion: Tribal Sovereignty at a Crossroads

The primary inquiry of this Article centers on marriage equality for citizens of tribal governments. Widening our gaze beyond the specific issue of marriage equality reveals close relationships with other tensions and problems in Indian Country. For example, consider the rise in so-called "disenrollment" proceedings. Disenrollment is a nondescript word for a serious undertaking: the removal of an individual's tribal citizenship. It is the near equivalent of an American citizen having their citizenship stripped from them, a grave consequence that is generally available as a remedy only in the case of treason. However, a

185. *Id.* at 176–77 (internal citations omitted).

186. *See* Velte, *supra* note 19, at 164.

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number of tribal communities have used the process of disenrollment for allegedly ulterior motives and under much different (and far less serious) circumstances (i.e., to reduce the number of members receiving tribal benefits for financial reasons).[187]

It is clear that marriage equality and tribal disenrollment are failures of tribal self-government that might induce Congress or the courts to further limit tribal sovereignty. None of this is to say that tribes lack the authority to act in these ways. However, these issues provide critics of tribal self-governance with ready examples that they may invoke as a basis for limiting tribal sovereignty.

From a political and legal standpoint, tribal governments consistently demand to be treated like governments and modern-day nations. We firmly believe that this is warranted and supported under federal Indian law principles, but we also understand that the cause of tribal communities would be made easier by adopting modern customary international principles of human rights. In short, we think tribal nations should act like nations. Angela Riley has long advocated for "good (native) governance" by relying upon each tribe's tradition and custom to allow for the revision of tribal government that may "restore and maintain fairness, balance, and inclusion" within the tribal community.[188] Tribal communities could adopt the United Nations Declaration on the Rights of Indigenous Peoples and other documents setting the standard for how nations are to treat their citizens, especially minority groups like two-spirit people. Where the tribal community affirmatively chooses to do so, and incorporates that law or principles, it becomes what Fletcher termed an indigenous legal construct.[189] This promotes tribal sovereignty and advances the idea that tribal governments are modern-day legal and political actors that demand international and national respect.

There are severe political and legal risks to continuing the practice of express discrimination against LGBTQ tribal members in the context of marriage equality. We believe that the best approach is for tribal governments to decolonize and reclaim traditional indigenous values—to indigenize equality. Tribes should adopt the traditional indigenous views of two-spirit people, embrace them, and re-invigorate the customary values that provide strength to tribal communities.

187. Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 431 (2015).

188. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1054 (2007); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 830–31 (2007).

189. Fletcher, *supra* note 21.