WHY *OBERGEFELL* SHOULD NOT IMPACT AMERICAN INDIAN TRIBAL MARRIAGE LAWS

INTRODUCTION

Catalyzed by Massachusetts's legalization of same-sex marriage in 2003, the debate surrounding marriage equality surged to the forefront of this country's public discourse, culminating in the Supreme Court's momentous decision in *Obergefell v. Hodges*.[1] Prior to *Obergefell*, thirty-seven states and the District of Columbia had legalized same-sex marriage.[2] Most of these jurisdictions instituted same-sex marriage judicially.[3]

While *Obergefell* might have quelled the same-sex marriage debate in state and federal circles, discussions continue to surge within Native American nations.[4] Prior to *Obergefell*, a number of individual tribes had definitively taken sides, either affirmatively allowing or banning same-sex marriage among their members.[5] With same-sex marriage becoming the law of the land in the United States, some tribes "could become islands of nonconforming law" in which the union is still banned.[6] In the wake of

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1. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (holding 5–4 that same-sex marriage licenses and state recognition of same-sex marriages from other states are fundamental constitutional rights under substantive due process and equal protection); Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html, *archived at* http://perma.cc/S8NR-EA6V (noting that *Obergefell* "marked the culmination of an unprecedented upheaval in public opinion and the nation's jurisprudence"); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003) (holding that the Massachusetts state constitution guarantees the right to same-sex marriage).

2. *Same-Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx (last visited Apr. 6, 2016), *archived at* http://perma.cc/R5RD-3F53 (providing a survey and brief history of the proliferation of same-sex marriage law changes throughout the United States leading up to *Obergefell*).

3. *Id.*

4. *See, e.g.*, Julian Brave NoiseCat, *Fight for Marriage Equality Not Over on Navajo Nation*, HUFFINGTON POST (July 2, 2015), http://www.huffingtonpost.com/2015/07/02/navajo-marriage-equality_n_7709016.html, *archived at* perma.cc/YJ8T-BWHQ. This Note uses "Native American," "American Indian," and "Indian" interchangeably, reflecting the usage of federal statutory and case law. Similarly, "Indian nations," "tribal nations," "tribal sovereigns," "tribal governments," etc., are also used interchangeably.

5. *See infra* Part II.

6. Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 59–60 (2006). It is interesting to note that Fletcher's description of "islands of non-conforming law in an area where the American people appear to have spoken with finality" referred to tribes that allowed same-sex marriage while states surrounding the tribes still banned the union. Now that *Obergefell* has invalidated state bans, only the reverse is possible. Fletcher's description now describes tribal jurisdictions that *ban* same-sex marriage. Still, *Obergefell*'s dissenters might point out

Obergefell, Native sovereigns continue to institute laws permitting and laws prohibiting same-sex marriage.[7]

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.[8] In an age in which "forgetting the third sovereign is endemic,"[9] it is worth remembering the special status of the 566 federally recognized tribal nations[10] whose members are simultaneously citizens of the United States, of their individual state, and of their tribal nation.[11]

This Note explores what *Obergefell* means for members of American Indian nations, and it argues that *Obergefell* should not constrain tribal governments. Part I briefly recounts *Obergefell*, including the Court's reasoning and language that might be pertinent for tribal sovereigns. Part II briefly surveys the status of tribal same-sex marriage laws to reveal the pluralism amongst the Native nations that have definitively decided the issue. Part III discusses how these tribes' decisions are rooted in tradition and self-determination, two indeterminate concepts that contribute to Native pluralism on the issue. Part IV explores the interplay of tribal, state, and federal law, unpacking tribal nations' special status as "domestic dependent nations,"[12] and what this means for tribal marriage laws that accord or contrast with the laws of other jurisdictions. Finally, Part V argues that *Obergefell* should have only a limited, indirect impact on tribal marriage laws, and discusses why the "should" in this sentence and this Note's title is both predictive and normative.

I. *OBERGEFELL*

On June 26, 2015, the Supreme Court ruled that the US Constitution guarantees same-sex marriage as a fundamental right under the due

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that the second half of Fletcher's description ("where the American people appear to have spoken with finality") does not apply to the *Obergefell* majority, because the dissenters characterize the holding as counter-majoritarian and contrary to history. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) ("The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.").

7. *See infra* Part II.

8. *See infra* Part IV.

9. Fletcher, *supra* note 6, at 71.

10. For more information about federally recognized tribes, including a directory, see *Tribal Directory*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernment Services/TribalDirectory/ (last visited Mar. 15, 2016).

11. *See* Fletcher, *supra* note 6, at 63.

12. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

process and equal protection clauses of the Fourteenth Amendment.[13] The Court answered affirmatively both of the questions before it: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex," and "whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right."[14]

Justice Kennedy's majority opinion first described the history of societal views on marriage and same-sex relations, stressing that "the annals of human history reveal" the dignified status that marriage bestows.[15] The majority implied that the concept of dignity surrounding marriage approached cultural universality, citing Confucius, Cicero, and other "references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms."[16] Still, the Court emphasized that marriage is dynamic, having evolved throughout time and space, and that these changes "have strengthened, not weakened, the institution of marriage."[17]

The first and primary foundation upon which the Court based its decision was the Fourteenth Amendment's due process clause.[18] The Court noted that it had invalidated parts of the Defense of Marriage Act just two years prior.[19] Next, the Court explained that the Fourteenth Amendment protects "fundamental rights," including the right to marriage.[20] This right encompasses same-sex couples who wish to wed.[21] The Court emphasized that the due process clause guarantees marriage rights to same-sex couples because marriage "is a keystone of our social order."[22] Because society

13. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015). *Obergefell* reviewed a Sixth Circuit decision upholding state bans on same-sex marriage. *See* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014); *see also* Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES (Jan. 16, 2015), http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html?_r=0. When the Sixth Circuit upheld state bans on same-sex marriage, four other circuits had already overturned such state bans. *See* Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

14. *Obergefell*, 135 S. Ct. at 2593.

15. *Id.* at 2593–94.

16. *Id.* at 2594. The Court conceded that the historical view contemplates marriage as "a union between two persons of the opposite sex." *Id.*

17. *Id.* at 2596.

18. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also Obergefell*, 135 S. Ct. at 2597–601.

19. *Obergefell*, 135 S. Ct. at 2597 (citing United States v. Windsor, 133 S. Ct. 2675 (2013) (invalidating Section 2 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996))).

20. *Id.* at 2597–98 (citing Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987)).

21. *Id.* at 2599.

22. *Id.* at 2601.

structures social support and benefits around marital status, preventing a committed couple from accessing marriage has a destabilizing and stigmatizing effect.[23] Importantly, the Court explained that "[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[24]

Next, the Court moved to a shorter discussion about how its decision adheres to the Fourteenth Amendment's equal protection clause.[25] Suggesting that due process rights and equal protection rights are related and sometimes overlap, the Court held that laws banning same-sex marriage deny equal protection to same-sex couples.[26]

The Court then described how a wait-and-see approach would perpetuate inequality and continue to stigmatize same-sex couples.[27] Finally, the Court recognized that its holding obviated the need to answer the question about marriage recognition.[28] After *Obergefell*, all states must now recognize validly performed same-sex marriages from other states.[29]

Chief Justice Roberts wrote an especially critical dissenting opinion, accusing the majority of rewriting history.[30] Roberts wrote that the majority undermined "a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history."[31] Like the majority, Roberts also named historical societies, but he claimed that a *restrictive* view of marriage was universal, citing "the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"[32] He argued that the Court's decision creates a slippery slope to polygamy, which—unlike same-sex marriage—at least has some historical precedent, according to Roberts.[33] Roberts also

23. *Id.* at 2601–02.

24. *Id.* at 2602.

25. *Obergefell*, 135 S. Ct. at 2602–04; *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

26. *Obergefell*, 135 S. Ct. at 2603–04 (noting that Loving v. Virginia, 388 U.S. 1 (1967), was based on both due process and equal protection grounds). The Court did not describe a standard of scrutiny for classifications based on sexual orientation.

27. *Id.* at 2605–06.

28. *Id.* at 2607–08.

29. *Id.*

30. *Id.* at 2611 (Roberts, C.J., dissenting). Justices Scalia, Thomas, and Alito each wrote their own dissenting opinions, as well. *Id.*

31. *Id.*

32. *Id*. at 2612.

33. *Id*. at 2621–22.

criticized the majority for its "conclusory" equal-protection analysis.[34]

Although it may have dismayed Chief Justice Roberts and other onlookers, *Obergefell* will go down as a landmark case and a historic step in the LGBTQ-rights movement. But despite *Obergefell*'s sweeping effect, the litany of societies and historical cultures invoked by both sides, and even the decision below in the Sixth Circuit,[35] the Court's *Obergefell* opinion did not reference Native Americans.

II. TRIBAL SAME-SEX MARRIAGE LAWS

The federal government has virtually limitless legislative authority over American Indian sovereigns, though tribes retain broad authority, inherent in their preconstitutional sovereignty, over domestic relations.[36] Thus, tribal sovereigns continue to vary widely in their legal treatment of same-sex marriage despite *Obergefell* bringing consistency to all fifty states.

While some have unequivocally taken sides, the vast majority of the 566 federally recognized tribal sovereigns have laws or policies that are difficult to discern for a number of reasons. One reason is that many tribes "do not always make their laws public" or otherwise available to non-members.[37] Another complication is that news and online sources do not always provide reliable information about tribal laws.[38] Additionally, not all tribes issue marriage licenses, so for many tribal nations, the matter of same-sex marriage may never arise.[39] Still other tribal sovereigns reserve

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34. *Id.* at 2623.

35. The Sixth Circuit's decision made one passing reference to "Native Americans" in its argument that marriage restrictions need not trigger strict scrutiny. DeBoer v. Snyder, 772 F.3d 388, 412 (6th Cir. 2014) (quoting NANCY F. COTT, A HISTORY OF MARRIAGE AND THE NATION (2000)) (internal quotation marks omitted) (noting that "the federal government encouraged or forced Native Americans to adopt [monogamy]," which has been a historically unquestioned restriction on marriage).

36. *See infra* Part IV.

37. William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES (Aug. 11, 2011), http://www.nytimes.com/2011/08/12/us/12tribe.html.

38. *See* Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 109–10 (2015) (noting that news outlets falsely reported that the Iowa Tribe of Oklahoma had a ban on same-sex marriages, while the tribe's court administrator disclaimed such information). Professor Tweedy's article is commendable for its survey of tribal laws. Because of the difficulties of presenting a survey of all tribal laws on same-sex marriage, this Note does not purport to provide a comprehensive list. The tribal sovereigns that are named in this Part are confirmed by multiple sources, and, whenever possible, the primary legal document stating a sovereign's standpoint is cited.

39. Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 234 & n.171 (2010).

Some sovereigns recently amended their laws to begin issuing marriage licenses to same-sex and opposite-sex couples, alike. One example is the Confederated Tribes of Grand Ronde. *See* Dean Rhodes, *Tribal Council Approves New Marriage Ordinance*, CONFEDERATED TRIBES OF GRAND RONDE (Oct. 29, 2015), http://www.grandronde.org/news/smoke-signals/2015/10/29/tribal-council-

the right to perform marriages and govern domestic relations, but tether their marriage requirements to state-law parameters.[40] Now that all states must issue licenses to same-sex couples and recognize same-sex marriages from other states,[41] it is unclear whether tribes in this category will institute same-sex marriage for their members.[42] Still, at the publication of this Note, at least sixteen tribal sovereigns allow for or support same-sex marriage, and at least eleven affirmatively ban it.[43]

All in all, even though only a fraction of the 566 federally recognized tribes have taken a stance on same-sex marriage, the tribal legal landscape is already characterized by pluralism. Thus, even if *Obergefell* may have settled the same-sex marriage debate among states, tribal sovereigns will continue to grapple with the issue themselves, and the legal landscape will remain in flux in Native jurisdictions.

A. Tribes that Allow or Support Same-Sex Marriage

At least sixteen tribal sovereigns support and/or issue licenses for same-sex marriages: the Cheyenne-Arapaho,[44] the Colville,[45] the Confederated Tribes of Grand Ronde,[46] the Coquille,[47] the Keweenaw Bay Indian Community,[48] the Leech Lake Band of Ojibwe,[49] the Little Traverse

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approves-new-marriage-ordinance/#sthash.GM1g7aRV.yL2wjvAX.dpbs, *archived at* perma.cc/W3W7-2LKX (noting that the tribe's law instituting the power to issue marriage licenses also contained a controversial non-discrimination clause that mandated that licenses be available to same-sex couples).

40. *See, e.g.*, CONSTITUTION AND BY-LAWS OF THE SAN CARLOS APACHE TRIBE, ARIZONA art. 5, § XII ("The council shall have the power to regulate the domestic relations of members of the tribe, but all marriages in the future shall be in accordance with the State laws.").

41. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–08 (2015).

42. The Eastern Cheyenne and Northern Arapaho Tribes officiated a same-sex marriage after Wyoming legalized the union, because the Tribes' law is tied to state law. Tweedy, *supra* note 38, at 122.

43. *See infra* Part II.A–B.

44. Heide Brandes, *Oklahoma Gay Couple Marry Under Native American Law*, REUTERS (Nov. 1, 2013, 12:02 PM), http://www.reuters.com/article/us-usa-gaymarriage-oklahoma-idUSBRE9A00JW20131101, *archived at* http://perma.cc/7GH7-FAC8.

45. K.C. Mehaffey, *Colville Tribes Vote to Recognize Same-Sex Unions*, THE SPOKESMAN-REVIEW (Sept. 8, 2013), http://www.spokesman.com/stories/2013/sep/08/colville-tribes-vote-to-recognize-same-sex-unions/, *archived at* http://perma.cc/Q3QK-KVFH.

46. *See* Rhodes, *supra* note 39.

47. Bill Graves, *Coquille Same-Sex Marriage Law Takes Effect*, THE OREGONIAN (May 21, 2009, 5:47 PM), http://www.oregonlive.com/news/index.ssf/2009/05/coquille_samesex_marriage_law.html, *archived at* perma.cc/3G3K-4SWR.

48. *See* Tweedy, *supra* note 38, at 110–11; Dan Roblee, *KBIC Legalizes Tribally Sanctioned Same-Sex Marriage*, HOUGHTON DAILY MINING GAZETTE (June 10, 2015), http://www.miningjournal.net/page/content.detail/id/620457/KBIC-legalizes-tribally-sanctioned-same-sex-marriage.html?nav=5243, *archived at* http://perma.cc/538X-V9VA; *KBIC General Election December 13, 2014 Unofficial*

Bay Bands of Odawa Indians,[50] the Mashantucket Pequot,[51] the Oneida Tribe of Indians of Wisconsin,[52] the Pokagon Band of Potawatomi Indians,[53] the Puyallup,[54] the Iipay Nation of Santa Ysabel,[55] the Shoshone-Arapaho Tribes at Wind River,[56] the Siletz,[57] the Suquamish,[58] and the Tlingit and Haida.[59]

The Coquille Indian Tribe is regarded as the first tribe to allow same-sex marriage, passing legislation in 2008.[60] The law took effect in 2009.[61]

Results, KEWEENAW REP., http://www.keweenawreport.com/wp-content/uploads/2014/12/KBIC-Election-Results.jpg (last visited Apr. 6, 2016), *archived at* perma.cc/G973-TCYT.

49. Andrew Potts, *8th US Native American Tribe Allows Same-Sex Couples to Wed*, GAYSTARNEWS (Nov. 16, 2013), http://www.gaystarnews.com/article/8th-us-native-american-tribe-allows-same-sex-couples-wed161113, *archived at* http://perma.cc/5JBS-FCZB.

50. Sonya Houston, *Tribe Marries Same-Sex Couple but State Won't Recognize It*, CNN (Mar. 17, 2013, 5:41 PM), http://www.cnn.com/2013/03/17/politics/michigan-same-sex-marriage/index.html, *archived at* http://perma.cc/25QX-3X7J.

51. MASHANTUCKET PEQUOT TRIBAL LAWS ANN. tit. 6, ch. 3 (Supp. 2010-11), *available at* http://www.mptnlaw.com/laws/2010-2011%20Pocket%20Part%20to%202008%20Tribal%20Laws.pdf; Trudy Ring, *No Reservations*, THE ADVOCATE (July 29, 2010, 3:05 PM), http://www.advocate.com/news/news-features/2010/07/29/no-reservations, *archived at* perma.cc/BK37-EGEF.

52. Dawn Walschinski, *Oneida's Marriage Law Changed to Allow Same Sex Marriages*, KALIHWISAKS, http://oneidanation.org/newspaper/page.aspx?id=41256, *archived at* https://perma.cc/L8M8-H9QE. In May of 2015, the Oneida changed its marriage law from restricting marriage to opposite-sex couples to allowing for same-sex marriage. *Id.*; *see also* ONEIDA TRIBE MARRIAGE LAW ch. 71, §§ 71.3–71.4 (2015), *available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/Marriage-Law-BC-05-25-16-A.pdf. An older version of the statute had a restrictive definition of marriage. *See* ONEIDA TRIBE MARRIAGE LAW ch. 71 (2010) (on file with the *Washington University Law Review*).

53. POKAGON BAND OF POTAWATOMI INDIANS MARRIAGE CODE § 1.06(j) (2013), *available at* http://www.pokagonband-nsn.gov/sites/default/files/assets/group/tribal-council/form/2013/marriage-code-3-9-13-1369-1173.pdf; John Eby, *Same-Sex Couple Says, 'I Do,'* LEADER PUBLICATIONS (June 20, 2013, 4:46 PM), http://www.leaderpub.com/2013/06/20/same-sex-couple-says-i-do/.

54. Matt Nagle, *Puyallup Tribe Recognizes Same-Sex Marriages*, TACOMA WKLY. (July 16, 2014), http://www.tacomaweekly.com/news/view/puyallup-tribe-recognizes-same-sex-marriages/.

55. ICTMN Staff, *Santa Ysabel Tribe First in California to Support Same-Sex Marriage*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 28, 2013), http://indiancountrytodaymedianetwork.com/2013/06/28/santa-ysabel-tribe-first-california-support-same-sex-marriage-150179. Although the Santa Ysabel does not issue marriage licenses, the tribal council passed a policy expressing support for the union. Tweedy, *supra* note 38, at 107.

56. *Wind River Tribal Judge Presides over First Same-Sex Marriage*, INDIANZ.COM (Nov. 17, 2014), http://www.indianz.com/News/2014/015673.asp. The Eastern Shoshone and Northern Arapaho Tribes at Wind River officiated a same-sex marriage after Wyoming legalized same-sex marriage. Tweedy, *supra* note 38, at 111.

57. SILETZ MARRIAGE ORDINANCE, SILETZ TRIBAL CODE § 8.403 (2015), *available at* http://www.ctsi.nsn.us/uploads/downloads/Ordinances/Marriage%20Ordinance%205-15-15.pdf.

58. Yardley, *supra* note 37.

59. Tweedy, *supra* note 38, at 110; Melissa Griffiths, *Same-Sex Marriage Mixes with Tribal Sovereignty*, JUNEAU EMPIRE (Feb. 24, 2015, 1:03 AM), http://juneauempire.com/local/2015-02-23/same-sex-marriage-mixes-tribal-sovereignty.

60. Trista Wilson, Comment, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 AM. INDIAN L. REV. 161, 181 (2012).

61. *See* Graves, *supra* note 47.

The Tribe, whose lands are located in Washington and Oregon, enacted the law at a time in which these states had not yet legalized same-sex marriage.[62] After the Coquille, other tribes followed suit, with the bulk of tribes (Cheyenne-Arapaho, Colville, Leech Lake Band of Ojibwe, Little Traverse Bay Bands of Odawa Indians, Pokagon Band of Potawatomi Indians, and Santa Ysabel) legalizing same-sex marriage in the same year—2013.[63]

Some tribal sovereigns, such as the Cheyenne-Arapaho, Coquille, and the Little Traverse Bay Bands of Odawa Indians, issued licenses for same-sex marriages in states that banned such unions at the time.[64] In fact, the Keweenaw Bay Indian Community's affirmation of same-sex marriage was at least partially a reaction to the Sixth Circuit's decision to uphold state marriage bans.[65] Other sovereigns, such as the Mashantucket Pequot, Santa Ysabel, and Suquamish, decided to allow same-sex marriages after their respective adjacent state governments had already begun issuing marriage licenses to same-sex couples.[66]

Still more tribal sovereigns may now allow for same-sex marriage, because some sovereigns tie their marriage-eligibility requirements to state law. For example, the Sault Ste. Marie Tribe of Chippewa Indians will issue marriage licenses to citizens that meet Michigan's eligibility requirements "in terms of the sex of the parties to the proposed marriage."[67] Michigan was one of the last states to allow same-sex marriage, defending its ban before the Supreme Court in *Obergefell*.[68] Now that Michigan's state ban has been overturned, same-sex marriage has presumably become legal in the Sault Ste. Marie Tribe of Chippewa Indians, as well.[69]

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62. *Id.*

63. *See supra* notes 44, 45, 49, 50, 53 & 55.

64. Brandes, *supra* note 44 (Oklahoma); Graves, *supra* note 47 (Washington and Oregon); Houston, *supra* note 50 (Michigan).

65. Dan Roblee, *Big Decisions: KBIC Members to Vote on Marijuana, Same Sex Marriage*, HOUGHTON DAILY MINING GAZETTE (Nov. 8, 2014), http://www.mininggazette.com/page/content.detail/id/538875.html (noting that the tribal council member who proposed the referendum on same-sex marriage was reacting to the Sixth Circuit's decision).

66. Ring, *supra* note 51 (Connecticut); Yardley, *supra* note 37 (Washington, after the state began allowing same-sex marriages); ICTMN Staff, *supra* note 55 (California).

67. SAULT TRIBE OF CHIPPEWA INDIANS, TRIBAL CODE § 31.104 (2015), *available at* https://www.saulttribe.com/images/stories/government/tribalcode/chaptr31.pdf.

68. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

69. Still, this is unclear in this case, as another provision in the tribal code limits recognition of marriage to male-female couples. SAULT TRIBE OF CHIPPEWA INDIANS, TRIBAL CODE § 31.102 (2015), *available at* https://www.saulttribe.com/images/stories/government/tribalcode/chaptr31.pdf (recognizing "as a valid and binding marriage any marriage between a man and a woman"). It is also possible that the issue of "licensing" and "recognizing" same-sex marriage could be separated for the tribe, just as

Most tribal sovereigns that instituted same-sex marriages did so via legislative action through their respective tribal councils.[70] Others did so administratively. For example, the Cheyenne-Arapaho's marriage laws do not explicitly specify gender, and so the tribal government simply began issuing marriage licenses to same-sex couples.[71] Since many other tribal marriage laws are sex-neutral,[72] there may be more tribal sovereigns that join ranks with the Cheyenne-Arapaho. The Keweenaw Bay Indian Community's establishment of tribal same-sex marriage is unique in that the Tribal Council's action was the result of a popular tribal referendum.[73]

Also, each tribal sovereign has its own restrictions on marriage eligibility. To illustrate, the Pokagon Band of Potawatomi Indian's Marriage Code has a number of requirements: at least one partner must be a citizen of the tribe, both parties must be age eighteen or over, both must have the mental capacity to consent, both must be tested for HIV, neither may be related to the other by blood closer than third-degree cousins, and both must receive "written educational materials from the Band regarding HIV[] [and] prenatal care," among other requirements.[74] While each tribe has its own set of marriage criteria, every Native sovereign requires that at least one partner be a citizen of the tribe.[75]

Still other Native nations do not perform same-sex marriages at all, but instead offer the equivalent of a civil union.[76] Sovereigns in this category include the Confederated Tribes of Umatilla, the Tulalip Tribes, and the Ponca Tribe of Nebraska.[77] And other sovereigns do not issue marriage licenses but mandate the recognition of marriages (presumably including same-sex ones) performed by foreign, state, or other tribal sovereigns.[78]

B. Tribes That Ban Same-Sex Marriage

At least eleven tribal sovereigns have legislative bans on same-sex

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the Supreme Court defined the issues of licensing and recognition as two separate questions. *See Obergefell*, 135 S. Ct. at 2593 (stating the two questions under review); *see also* Tweedy, *supra* note 38, at 124–25.

70. *See, e.g.*, COLVILLE CONFEDERATED TRIBES, COLVILLE BUSINESS COUNCIL, RESOLUTION INDEX (2013), *available at* http://www.colvilletribes.com/media/files/5-2-13.pdf (establishing same-sex marriage in resolution 2013-344l&j).

71. Brandes, *supra* note 44.

72. Tweedy, *supra* note 38, at 128–29.

73. Roblee, *supra* note 48; *KBIC General Election December 13, 2014 Unofficial Results*, *supra* note 48.

74. POKAGON BAND OF POTAWATOMI INDIANS MARRIAGE CODE § 2.01 (2013).

75. *See, e.g.*, *id.*

76. *See* Tweedy, *supra* note 38, at 126–27.

77. *Id.*

78. *Id.* at 130–31.

marriage, including the two largest nations, the Navajo Nation and the Cherokee Nation.[79] Other tribes with restrictive marriage laws include the Ak-Chin,[80] the Blue Lake Rancheria,[81] the Chickasaw Nation,[82] the Kalispel Indian Community,[83] the Kickapoo Tribe of Oklahoma,[84] the Muscogee (Creek) Nation,[85] the Nez Perce,[86] the Sac and Fox Tribe of the Mississippi in Iowa,[87] and the Seminole Nation.[88] Many more Native sovereigns have laws with sex- or gender-specific language in their definitions of marriage, but lack any provision that affirmatively bans same-sex marriage.[89]

It is worth briefly recounting how the Cherokee and Navajo marriage bans came to be. In 2004, the Cherokee Nation's marriage law did not have gender-specific language, and two Cherokee women, Dawn McKinley and Kathy Reynolds, easily obtained an application for a marriage license.[90] However, the tribal government refused to accept their completed application.[91] Soon after the Nation denied the McKinley-Reynolds application, the Cherokee Tribal Council unanimously amended

79. Fletcher, *supra* note 6, at 55; Wilson, *supra* note 60, at 177. Although it is less clear than for the above-mentioned tribes, other tribal nations have also been known to prohibit same-sex marriage, including the Muscogee Creek Nation and the Iowa Tribe of Oklahoma. *Tribal Marriage Equality*, NATIVEOUT, http://nativeout.com/twospirit-rc/tribal-marriage-equality/ (last visited Apr. 6, 2016).

80. *See* Felicia Fonseca, *Gay Marriage Is Legal but Not on Tribal Lands*, ASSOCIATED PRESS (Nov. 27, 2015, 10:22 PM), http://bigstory.ap.org/article/cd8de7dfe71c41e69723e0bebd0887d8/gay-marriage-legal-not-tribal-lands (noting that a tribal member is suing the Ak-Chin to challenge its ban on same-sex marriage).

81. *See* Tweedy, *supra* note 38, at 131 (citing BLUE LAKE RANCHERIA ORDINANCE 01-01, § 6(c) (2001), *available at* http://www.bluelakerancheria-nsn.gov/BLR_Marriage_Ordinance_01-01.pdf).

82. CHICKASAW NATION CODE tit. 6, § 6-103.2 (2014), *available at* https://www.chickasaw.net/Documents/Long-Term/Chickasaw-Code/Title-06.aspx (defining marriage as "between a man and a woman"); *see also id.* § 6-103.5 (prohibiting recognition for citizens with same-sex marriages performed in other jurisdictions).

83. THE LAW AND ORDER CODE OF THE KALISPEL TRIBE OF INDIANS ch. 8, §§ 1.03(3)–2.01 (2014), *available at* http://9ef74bdbbf37fca83a69-2b1e9749bacf0913693514d94e391aa4.r28.cf2.rackcdn.com/pdf-uploads/Legal/KTI_LOC_20141029v2.pdf.

84. KICKAPOO TRIBE OF OKLAHOMA MARRIAGE AND DIVORCE ORDINANCE ch. A, art. 12 (2011), *available at* http://www.kickapootribeofoklahoma.com/forms/marriagedivorceordinance.pdf.

85. MUSCOGEE (CREEK) NATION CODE ANN. tit. 6, § 2-104 (2001), *available at* http://www.creeksupremecourt.com/images/code/webver/title6.pdf.

86. *See* Tweedy, *supra* note 38, at 131 (citing NEZ PERCE CODE tit. 4, § 4-5-1(o), *available at* http://nezperce.org/~code/pdf%20convert%20files/Code%20with%20TOC%208dec15.pdf).

87. CODE OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA tit. 6, § 6-1203(c) (2014), *available at* http://www.meskwaki.org/Titles/Title%206.%20Family%20Relations%20%20FINAL%2009.03.2014.pdf.

88. SEMINOLE NATION CODE OF LAWS tit. 13A, § 104 (2012), *available at* http://sno-nsn.gov/Government/GeneralCouncil/CodeofLaws/Title13C2.pdf.

89. *See* Tweedy, *supra* note 38, at 140–41.

90. Wilson, *supra* note 60, at 178.

91. *Id.*

the marriage law to limit marriages to male-female couples.[92]

In the wake of the controversy surrounding the Cherokee Nation's decision to ban same-sex marriages, the Navajo Nation adopted the Diné Marriage Act of 2005.[93] The Diné Marriage Act states that "[m]arriage between persons of the same sex is void and prohibited."[94] Although the Nation's President, Joe Shirley, Jr., vetoed the Act, the Tribal Council overrode the veto, and the Diné Marriage Act is still good law in the Navajo Nation.[95] Critics of the Diné Marriage Act continue to challenge the Navajo Nation's ban on same-sex marriage,[96] including former President Joe Shirley, Jr., who stated that the Navajo Nation has "some catching up here to do with our laws, our codes and what we operate our government under."[97]

Finally, although it is difficult to track down legislative history for tribal sovereigns' bans on same-sex marriage, the dates associated with relevant code revisions can shed some insight. For example, the Chickasaw Nation's tribal code was amended as recently as September 30, 2014, and contains one provision that defines marriage as between one man and one woman and another provision that denies recognition to same-sex marriages performed in other jurisdictions.[98] The Kalispel Indian Community's prohibition is likewise manifested in the Community's code of laws, which was revised as late as October of 2014.[99] Furthermore, the specific provisions in the Seminole Nation's prohibition on same-sex marriage are dated 2012.[100] These dates fall within with the larger national debate on same-sex marriage and may indicate that these tribes amended their laws in order to act decisively on the issue for their sovereign populations.

III. REASONS TRIBES ENACT MARRIAGE LAWS: SELF-DETERMINATION

92. *Id.* at 178–79.

93. *Id.* at 180; Diné Marriage Act, 20th Navajo Nation Council, CAP-29-05 (2005), *available at* http://www.navajocourts.org/Resolutions/29-05%20Marriage%20Act.pdf.

94. Diné Marriage Act § 2(B).

95. Wilson, *supra* note 60, at 180.

96. *States May Recognize Same-Sex Marriages, But Navajo Nation Won't*, NPR (Jan. 9, 2014, 1:46 PM), http://www.npr.org/blogs/codeswitch/2014/01/09/261048308/states-may-recognize-same-sex-marriages-but-navajo-nation-wont; *see also* COAL. FOR DINÉ EQUAL., http://www.navajoequality.org (last visited Apr. 6, 2016).

97. Shondiin Silversmith, *A Question of Human Rights: Is It Time to Repeal the Diné Marriage Act?*, NAVAJO TIMES (July 4, 2013), http://www.navajotimes.com/news/2013/0713/070413marriage.php#.VERxskvC5G4.

98. CHICKASAW NATION CODE tit. 6, §§ 6-103.2, 6-103.5 (2014).

99. THE LAW AND ORDER CODE OF THE KALISPEL TRIBE OF INDIANS ch. 8, §§ 8-1.03–8-2.01 (2014).

100. SEMINOLE NATION CODE OF LAWS tit. 13A, § 104 (2012).

AND TRADITION

Just as there is variation among the Native sovereigns that have taken a stance on same-sex marriage, Native sovereigns may also have myriad reasons that motivate their respective decisions. Still, two common rationales emerge from the comments of tribal council members and the text of tribal statutes: self-determination and tradition. "Self-determination" refers to the Native sovereigns' inherent ability to govern themselves and their own internal affairs.[101] "Tradition," as will be explained, has a more complicated interpretation that has become more difficult to discern post-European contact. Importantly, as advocates on both sides of the debate have demonstrated, "self-determination" and "tradition" are indeterminate and can cut either way on the issue of same-sex marriage.

A. Self-Determination

Some tribal governments have passed pro-same-sex marriage laws as an exercise of their authority as sovereigns. For instance, a statement of self-determination can be found within the text of the resolution affirming same-sex marriage for the Colville: "To approve in the spirit of fairness and tolerance, *exercising our authority as a sovereign nation*, the Colville Business Council Law & Justice Committee support[s] and acknowledges same-sex marriage."[102]

Exercising self-determination can be a reactive move in the face of threats to Native identity. For instance, when the Suquamish Tribe began allowing same-sex marriages in 2011, many saw it as "an important act of self-determination. . . . [and] an effort to assert tribal culture and authority over outside influences by people whose very identities have been under assault for more than two centuries, since non-Indian settlers began arriving in the Pacific Northwest."[103] 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.[104]

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101. For a more in-depth discussion of tribes' special status as sovereigns, see *infra* Part IV.

102. COLVILLE CONFEDERATED TRIBES, *supra* note 70 (emphasis added).

103. Yardley, *supra* note 37.

104. For instance, the Keweenaw Bay Indian Community's decision to propose same-sex marriage in a popular referendum may have been at least partially in response to the Sixth Circuit's affirmation of state bans on same-sex marriage. Roblee, *supra* note 65.

Self-determination may also involve advancing values that are seen as important to tribal culture. Many tribes that legalized same-sex marriage did so while citing equality and justice. For example, when the Santa Ysabel legalized same-sex marriages in 2013, Tribal Chairman Virgil Perez explained that the tribe was exercising its right to self-govern in order to promote equality, stating, "Native Americans have fought hard to establish and protect their own rights, and Santa Ysabel is determined to support our own, and other same-sex couples in their struggle to be recognized and treated fairly as citizens of this great nation."[105] Similarly, when the Little Traverse Bay Bands of Odawa Indians began recognizing same-sex marriage, one official stated that the move "advance[d] tribal sovereignty and self-determination by utilizing the tribe's own values and principles as its source of law, instead of conforming to outside sources."[106]

However, as easily as self-determination can be an argument for supporting same-sex marriage, it may also support a tribal sovereign's decision to ban same-sex marriage. In fact, Native nations may be especially likely to cite self-determination as a reason for supporting bans on same-sex marriage now that the unions are legal in all states.[107] For instance, the "Family Relations" title of the Sac and Fox Tribe's code of laws, which includes a ban on same-sex marriages,[108] begins with a purpose that strongly invokes self-determination:

> The Sac & Fox Tribe of the Mississippi in Iowa has the inherent sovereign power to regulate the family relations of its members. . . . No more important power is exercised by Indian Tribes than the power to protect and govern the family relations of their members. The purpose of this Title is to inform Sac & Fox Tribal members of that inherent sovereign authority and enable them to use their own Tribal forum which will use Meskwaki values, beliefs and religion to resolve and bring healing to Meskwaki families.[109]

Similarly, the sponsor of the Navajo Diné Marriage Act stated that the "sovereignty of the Navajo Nation was the basis for the marriage act."[110]

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105. ICTMN Staff, *supra* note 55.

106. Brenda Austin, *Little Traverse Band Recognizes Same-Sex Marriages*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 28, 2013), http://indiancountrytodaymedianetwork.com/2013/03/28/little-traverse-band-recognizes-same-sex-marriages-148418.

107. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

108. CODE OF THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA tit. 6, § 6-1203(c) (2014), *available at* http://www.meskwaki.org/Titles/Title%206.%20Family%20Relations%20%20FINAL%2009.03.2014.pdf.

109. *Id.* § 6-1011.

110. *Same-Sex Marriage Ban Becomes Law*, NBC NEWS (June 13, 2005, 2:47 PM),

This shows that as much as tribal sovereigns can cite self-determination as a reason to support tribal same-sex marriages, other Native nations can use the same line of reasoning to restrict tribal same-sex marriages.

The Oneida Tribe of Indians of Wisconsin might be the best example of how the same argument about self-determination can support either a same-sex marriage ban or its authorization. The Oneida Tribe had a law banning same-sex marriage until May of 2015, when the law was amended to allow for same-sex marriage.[111] Interestingly, both versions of the law cite the same self-determinative "Purpose" statement: "to exercise the sovereign right of the Oneida tribe to regulate the rights and responsibilities relating to marriage."[112]

But the picture becomes even more complicated. The Oneida Tribe also illustrates how marriage is an especially complex area of the law when it comes to self-determination, because in some instances, having an assimilationist marriage law might promote tribal governmental power more than having a nonconforming one.[113] One member of the Oneida Tribal Council said that the Tribe's same-sex marriage ban originally existed merely to comply with Wisconsin law.[114] While it may appear that this reasoning undermines self-determination, the Tribal Council wanted Oneida marriage licenses "to be recognized . . . everywhere," which it felt would only be possible with a compliant marriage law.[115] So, in order for the Tribe to support self-determination by issuing marriage licenses with meaning, the Tribe paradoxically had to undermine self-determination by instituting an assimilationist marriage law. Now that *Obergefell* has removed all state bans,[116] the self-determination justification may have lost a layer of complexity.[117] Still, it is likely that self-determination will

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http://www.nbcnews.com/id/8206025/ns/us_news-life/t/same-sex-marriage-ban-becomes-law/#.VGUz7Ydpv8E. However, one commentator suggests that the Navajo's passage of the Diné Marriage Act reflected the federal policy under George W. Bush of banning same-sex marriage. *See* Brave NoiseCat, *supra* note 4. If this is true, then it undercuts Navajo self-determination.

111. *Compare* ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.3(d) (2010) (on file with the *Washington University Law Review*) (defining marriage as creating a legal status "of husband and wife"), *with* ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.3(d) (2015), *available at* https://oneida-nsn.gov/wp-content/uploads/2016/02/Marriage-Law-BC-05-25-16-A.pdf (defining marriage as creating a legal status "of spouses").

112. ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.1 (2010); ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.1 (2015).

113. *See* Walschinski, *supra* note 52.

114. *Id.* One commentator also suggests that the Cherokee Nation instituted its ban on same-sex marriage, in part, to accord with Oklahoma law at the time. *See* Tweedy, *supra* note 38, at 137.

115. *See* Walschinski, *supra* note 52.

116. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

117. This is assuming that other sovereigns will not refuse to recognize marriage licenses from tribes that ban same-sex marriage. Given the fact that the state of Wisconsin originally threatened to

continue to be an argument both for and against tribal same-sex marriages.

B. Tradition

Similarly, tribal sovereigns have cited "tradition" as an argument both to support same-sex marriages and to oppose them.[118] When Native sovereigns argue that tradition supports same-sex marriage, they usually point to a documented history of a "two-spirit" (non-gender conforming) role within the tribe; when sovereigns argue that tradition prohibits same-sex marriage, they usually point to a need to protect the "traditional" family. Both phenomena are discussed below.

1. The Two-Spirit Tradition as a Foundation for Same-Sex Marriage

A number of tribal sovereigns that have adopted same-sex marriage have done so explicitly in recognition of the tribe's historic inclusion of the two-spirit identity.[119] For example, Colville Council Chair Michael Finley argued that two-spirit individuals have "always been accepted," and that the Colville's same-sex marriage law codifies historical and cultural acceptance of tribal members who do not conform to traditional gender roles and/or who are attracted to members of the same sex.[120] Also, one member of the Keweenaw Bay Indian Community cited a two-spirit tradition in support of the sovereign's resolution in support of same-sex marriage, stating, "[As] [p]eople outside of the Anglo norm we feel are touched by the Great Spirit. . . . [Two-spirit tribe members] were raised by the community and helped to do what they do. We didn't ban them. There was no abnormality."[121] Similarly, Puyallup Council Member Maggie Edwards cited a two-spirit history when drafting the tribe's resolution affirming same-sex marriage:

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refuse recognition of Oneida marriage licenses absent a same-sex-marriage ban, along with the momentum of pro-same-sex-marriage sentiment, such a situation is not unthinkable. Walschinski, *supra* note 52. This means that the reverse of the Oneida's situation may occur, and tribes may have to undermine self-determination and have permissive same-sex marriage laws when they violate tribal tradition (undermining self-determination) in order to have meaningful marriage licenses (expressing self-determination). Of course, an easy, pro-native solution is that all sovereigns should recognize tribal marriage licenses, no matter what.

118. *See* Tweedy, *supra* note 38, at 154 ("Sweeping generalizations about tribal traditions are made on both sides of the same-sex marriage controversy."). Interestingly, this draws a parallel to the divided *Obergefell* court, as both the majority and the chief dissenting opinion pointed to historical-cultural examples. *See supra* notes 17, 33 and accompanying text.

119. *See, e.g.*, Tweedy, *supra* note 38, at 120 (noting that the Little Traverse instituted same-sex marriage partly because "recognizing same-sex relationships was consistent with the Tribe's oral history").

120. Mehaffey, *supra* note 45.

121. Roblee, *supra* note 65.

> WHEREAS, LGBT, (Lesbian, Gay, Bi-Sexual and Transgendered) persons have been acknowledged in tribal societies pre-European Colonization of America; and [in] a good and respectful way, they have been known in tribal custom and tradition as "Two-Spirit People" and this refers to the traditional belief that LGBT people have both a Male and Female Spirit inside them, which allows them to transcend traditional gender barriers . . . .[122]

As the above clause suggests, the precise history of the status of two-spirit individuals is difficult to ascertain because European contact disrupted traditional, pre-contact ways of tribal life.[123] Also, anthropological and other academic study of the two-spirit role did not develop until the twentieth century, long after the fact of European contact.[124] Still, it is believed that there is documented evidence for two-spirit and non-gender-conforming roles in at least 155 tribes, and it is possible that the presence of a two-spirit role was even more widespread.[125] The two-spirit identity was not limited to a particular geographic area within the continent, and it has been described as "one of 'the most widely shared features of North American societies.'"[126]

Although the phrase "two-spirit" is typically used today to describe any Native American individual who identifies as LGBTQ, the traditional two-spirit role in tribes was not strictly analogous to modern LGBTQ Natives.[127] Two-spirit individuals were often not characterized by sexual orientation (i.e., as "homosexual") in the same way as modern LGB individuals.[128] For one thing, two-spirit people often assumed the work

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122. Nagle, *supra* note 54.

123. Jeffery S. Jacobi, Note, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policies*, 39 U. MICH. J.L. REFORM 823, 834 (2006). One queer theorist eloquently describes the indeterminacy of ascertaining "tradition" after European contact:

> What constitutes tradition? Who decides, and under what circumstances are such determinations made? Or, put another way, can the effort to locate tradition be distinguished entirely from the process of imperial interpellation, including its heteronomaritive dimensions? . . . [A]nd how might such identities be dependent on ideologies of straightness?

MARK RIFKIN, WHEN DID INDIANS BECOME STRAIGHT? 21 (2011).

124. Jacobi, *supra* note 123, at 838.

125. *Id.*; Wilson, *supra* note 60, at 169.

126. Jacobi, *supra* note 123, at 834 (quoting WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 7 (1998)).

127. *Id.* at 835. In the text that follows, I illustrate the two-spirit identity with examples from two particular tribes: the Navajo and the Lakota. Although a two-spirit identity was common to many tribes across the continent, the role varied from tribe to tribe. While I recognize that it is improper and inaccurate to speak of two-spirit people as a monolith, I will draw upon generalities for the purpose of this discussion.

128. *Id.* For a discussion of modern navigation of the two-spirit identity, see Samantha Mesa-

roles of the gender that did not typically align with their sex determined at birth.[129] In other words, "male-bodied" two-spirits adopted the roles of women, and vice versa. For this very reason, some tribes highly regarded their two-spirit members, while others regarded their differences with fear. For example, Navajo two-spirit people were called *nádleehé*, or "he changes," and they were deeply respected for their perceived ability to perform tasks associated with multiple genders, as well as for their compassion and care.[130] However, while Lakota two-spirit people, or *winkte*, were valued and recognized as *wakan* (powerful or sacred), these same qualities roused fear.[131]

While two-spirit people often engaged in same-sex sexual relations, it was rare (and in some cases, considered unthinkable) for them to engage in sex with each other.[132] This highlights the tribal understanding that two-spirit status was not necessarily a strict sexual orientation, but perhaps more of a gender identity. So, while two-spirit sex was homosexual in that it involved partners of the same birth-determined sex, it was heterosexual in gender; that is, when a two-spirit individual had sex with a man, it was usually not seen as homosexual sex, but rather sex between a man and a two-spirit person.[133]

It follows that marriages between pairs of two-spirit individuals rarely occurred, if ever.[134] However, marriages between a two-spirit individual and a tribal member of the same birth-determined sex were common.[135] This was especially true in polygamous marriages. For example, Lakota *winktes* could marry, but usually only to men that already had other wives.[136] Tribal attitudes towards such marriages, however, seemed to have been more ambivalent.[137] In Navajo history, *nádleehé* were often

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Miles, *Two Spirit: The Trials and Tribulations of Gender Identity in the 21st Century*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 13, 2015), http://indiancountrytodaymedianetwork.com/2015/01/13/two-spirit-trials-and-tribulations-gender-identity-21st-century-158686.

129. Mesa-Miles, *supra* note 128.

130. Jacobi, *supra* note 123, at 839–40.

131. ROYAL B. HASSRICK, THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY 123 (1964).

132. Jacobi, *supra* note 123, at 835–36.

133. *Id*. at 836. For a critical take on two-spirit relations as a justification for modern, non-tribal same-sex marriage, see Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993) (arguing that using such gendered historical relations as a justification for modern same-sex marriage will perpetuate a patriarchal and oppressive model of the institution of marriage). For a disambiguation of "sex" from "gender," see generally Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995).

134. Polikoff, *supra* note 133, at 1540.

135. Jacobi, *supra* note 123, at 837.

136. *Id*. at 843.

137. *Id*. at 837.

discouraged from marrying, but marriages happened nevertheless.[138] Still, even if more formal marriages were not recognized, informal cohabitation with two-spirits may have been more common.[139] And, at least as seen by a handful of state courts at the turn of the twentieth century, many tribes recognized cohabitation as constituting a kind of marriage, anyway.[140]

It is difficult to know whether tribal members looked down upon two-spirit relationships organically or because of European influence, since ethnographic and other cultural studies of tribes and the status of two-spirit people were undertaken long after European contact.[141] It is known, however, that early European arrivers to the Americas disparaged two-spirit people and cited the identity as evidence of indigenous Americans' cultural inferiority.[142] As European contact and suppression of Native culture increased, two-spirit culture became further marginalized (even within tribes), and "in many cases, it was altogether hidden or eliminated."[143] One modern-day result of this may be that "a large faction of Native Americans condemn homosexuality and completely reject same-sex unions largely because of the influence of European and American religion and culture."[144] For this reason, there is tension between "the modern attitude toward same-sex marriage and the two-spirit tradition within Indian culture, provoked perhaps by the 'Christianization' of many Native Americans."[145] Still, as made apparent by the Colville and Puyallup tribes, American Indian proponents of same-sex marriage often turn to the historical role of two-spirit people to bolster their arguments.

2. Traditional Family Roles as a Justification for Bans on Same-Sex Marriage

Tribes that oppose same-sex marriage also use arguments of tradition as ammunition in the debate. For instance, the Navajo's Diné Marriage Act, which outlaws same-sex marriage, states that one of its purposes is

138. *Id*. at 840.
139. *Id*. at 844.
140. *See, e.g.*, Earl v. Godley, 44 N.W. 254, 254 (Minn. 1890) ("And in respect to this Indian custom it is found that . . . the man and woman would thereupon . . . live and cohabit together as husband and wife without other or further marriage ceremony . . . ."); Ortley v. Ross, 110 N.W. 982, 982 (Neb. 1907) ("The evidence shows that . . . the only ceremony requisite was a mutual agreement between the parties to live together as husband and wife . . . ."); Cyr v. Walker, 116 P. 931, 934 (Okla. 1911) ("Mere meeting and cohabitation as husband and wife constituted a marriage . . . .").
141. *See supra* note 123 and accompanying text.
142. Wilson, *supra* note 60, at 172.
143. *Id*. at 173.
144. Jacobi, *supra* note 123, at 825.
145. Wilson, *supra* note 60, at 173–74.

"to *preserve* and strengthen family values."[146] Despite the well-documented historical evidence of the Navajo two-spirit, or *nádleehé*,[147] the sponsor of the Diné Marriage Act argued that the tribe's ban on same-sex marriage stems from a traditional prohibition against marriage between individuals of the same clan within the Navajo Nation, stating: "Any marriage not based on our marriage ceremony and clan system will only destroy us as a nation. Likewise, any marriage not based on our marriage ceremony and clan system is not a basic family unit as we know it under Navajo tradition and culture."[148] His statement seems to assume that a same-sex marriage or a marriage involving *nádleehé* would fall outside the traditional Navajo clan system.

The Navajo Nation is not the only tribal sovereign to hear arguments that tradition mandates the exclusion of same-sex tribal marriages. During the heated debate in the Cherokee Nation, Todd Hembree, the attorney for the Cherokee Tribal Council, argued that "Cherokees have a strong traditional sense of marriage," and that "there's never been a tribal recognition of same-sex marriage."[149] Similarly, the tribal court's reason for refusing to accept the marriage application of McKinley and Reynolds was that it "would only recognize 'traditional' marriages."[150] Here, it seems as though the Cherokee's definition of "traditional marriage" aligns with "tradition" in the European, Christian sense, to the exclusion of same-sex marriages.

Since tradition is such an integral part of tribal identity and sovereignty, it is natural for both factions of a debate to argue that tradition is on their side. However, "historical Native American religious and cultural tradition is vastly different from majoritarian Euro-Christian religious and cultural tradition,"[151] so it can be difficult to disentangle tribal cultural traditions from European-influenced ones.[152] This adds to the indeterminacy of invoking tradition to support or oppose tribal same-

146. Diné Marriage Act, § 3, 20th Navajo Nation Council, CAP-29-05 (2005) (emphasis added).

147. Wilson, *supra* note 60, at 179.

148. *Same-Sex Marriage Ban Becomes Law*, *supra* note 110; *see also* RIFKIN, *supra* note 123, at 21 (describing the Navajo same-sex marriage ban and arguing that "tradition" can be assimilationist and reflect imperialism).

149. Jacobi, *supra* note 123, at 828–29 (quoting Arnold Hamilton, *Marriage Flight Taken to Cherokees: Lesbian Couple with License from Nation Now Battling to File It*, DENTON REC.-CHRON., Aug. 16, 2005).

150. Wilson, *supra* note 60, at 178.

151. *Id.* at 186.

152. Just as the same self-determination argument justified both the Oneida's ban on same-sex marriage and its institution of same-sex marriage, the same "tradition" argument ("Marriage is a foundation of Tribal society that stabilizes families which the Tribe acknowledges by recognizing the legal relationship of a union between two adults.") also justifies both laws. ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.1 (2010); *see also* ONEIDA TRIBE MARRIAGE LAW ch. 71, § 71.1 (2015).

sex marriage.

In sum, while the proponents and opponents of tribal same-sex marriage have many strategies, two (indeterminate) arguments are commonly invoked on both sides of the debate: tradition and self-determination.[153] Importantly, what these two values have in common is that they involve Native-society interiority, independent of (and sometimes opposed to) external influences.

IV. THE INTERPLAY OF TRIBAL, STATE, AND FEDERAL LAW

As explained above, tribal sovereigns' arguments for and against same-sex marriage are both separate from and connected to state and federal developments. Accordingly, a discussion of the interaction of laws at the tribal, state, and federal levels of government is in order. The first Subpart of this Part describes the general framework of American Indian law in Indian Country[154] in connection with state and federal bodies of law. The second Subpart provides a more specific discussion of marriage at those respective levels of analysis.

A. American Indian Law at the Tribal, State, and Federal Level

American Indians' national existence predates the Constitution and the founding of the United States.[155] Accordingly, the legal status of American Indian law is a complex interaction of tribal, state, and federal laws. This Subpart does not aspire to cover all of the intricacies of Indian law comprehensively, but some pertinent aspects bear mentioning briefly.

First, because of Native tribes' historic presence on the North American continent, they are domestic nations, but because of the supremacy of US federal law, they are dependent ones.[156] Thus, American Indian tribal sovereigns are sometimes described as "domestic dependent

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153. Although this Note divides "self-determination" and "tradition" into separate sections, the reality may be that the two issues are the same or interrelated:

> [T]ribal members value tradition in their laws because tradition allows tribes to maintain their sovereign identities. Where tribes change legislation to mirror state and federal law, the end result is assimilation with general American identity and arguably a consequent loss of tribal identity. . . . [F]or many tribes tradition is law, and perhaps more importantly, tradition helps tribes maintain identities as sovereign entities and is fundamental to all tribal law.

Jacobi, *supra* note 123, at 848.

154. "Indian Country" is a term of art defined in 18 U.S.C. § 1151 (2014). Briefly, "Indian Country" includes reservation land, "dependent Indian communities," and Indian allotments. *Id.*

155. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

156. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

nations."[157] Tribal sovereigns have aspects of sovereignty (such as inherent authority over their own members) that inhere in nations and were not granted by the US government.[158] As a corollary, states generally do not have regulatory authority over tribal members in Indian Country.[159] However, tribal sovereignty is limited by congressional plenary power to legislate over tribal affairs.[160] The tension between inherent tribal sovereignty and the status of being subjected to federal plenary power is one of the hallmarks of American Indian law.[161]

Since congressional plenary power over Native nations is so pervasive, it merits a description in a bit more depth. The Supreme Court has located the authority for Congress's plenary power over Indian affairs in the Constitution's Indian Commerce Clause, the only non-obsolete mention of American Indians in the document.[162] Congress's plenary authority has been used to abrogate treaties,[163] assume federal jurisdiction for crimes committed in Indian Country,[164] define tribes,[165] assume *state* jurisdiction over criminal and some civil issues in Indian Country,[166] and even terminate tribes.[167] Despite its volatile history and the almost limitless power of congressional plenary power, Congress seems to have settled into a policy of generally respecting tribes' ability to retain local control over the reservation.[168]

In contrast, the Supreme Court has been an even more unpredictable force in American Indian law. As Matthew Fletcher notes:

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157. *Id*.

158. United States v. Wheeler, 435 U.S. 313, 323 (1978); Fletcher, *supra* note 6, at 66.

159. Worcester v. Georgia, 31 U.S. 515, 561–62 (1832); Fletcher, *supra* note 6, at 66.

160. Fletcher, *supra* note 6, at 61. Congressional plenary power is extensive and includes, among other things, the power to abrogate rights codified in treaties between the federal government and tribes. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

161. Kate Redburn, *Navajo Equality? Gay Marriage and the Limits of Tribal Sovereignty*, DISSENT MAG. (Apr. 1, 2014), http://www.dissentmagazine.org/online_articles/navajo-equality-gay-marriage-and-the-limits-of-tribal-sovereignty (calling this tension the "fundamental contradiction at the heart of Native American constitutional law").

162. Fletcher, *supra* note 6, at 61. The so-called Indian Commerce Clause is an enumerated power that authorizes Congress to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

163. *See, e.g.*, *Lone Wolf*, 187 U.S. at 566 (upholding Congress's ability to abrogate a treaty provision requiring signatures from 75% of male members to cede land).

164. United States v. Kagama, 118 U.S. 375, 385 (1886) (upholding the Major Crimes Act of 1885, 18 U.S.C. § 1153).

165. United States v. Sandoval, 231 U.S. 28, 48 (1913) (applying federal Indian statutes to the Pueblo).

166. Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18, 25 & 28 U.S.C.).

167. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 410 (1968).

168. Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW. 38, 42 (2006).

> In the end, the Supreme Court decides what the Constitution means. Although the Court granted almost unlimited deference to Congress when it made positive law in the field, where Congress has been silent or vague, the Court has taken the lead as both constitutional interpreter and, according to many legal authorities, national federal Indian policymaker.[169]

Arguing that Justices feel unconstrained in their ability to decide Indian affairs,[170] Fletcher points out that federal courts (including the US Supreme Court) "are slow to recognize the validity of exercises of tribal governmental authority."[171] As a result, the Supreme Court has typically favored state interests over tribal sovereignty, especially in recent times.[172]

Another complicated aspect of American Indian law is the applicability of US constitutional rights to tribal members. Individual members of tribes are simultaneously citizens of the tribe, the state in which they reside, and the United States.[173] As citizens of individual states and the United States, tribal members are afforded the protections of state and federal constitutions.[174] But because tribes were not a party to the drafting of the Constitution, the Bill of Rights does not constrain tribal governments in Indian Country.[175]

To remedy concerns about tribal sovereigns having unchecked power that could undercut federal constitutional rights, Congress passed the

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169. Fletcher, *supra* note 6, at 67 (footnotes omitted).

170. *Id*. at 68.

171. *Id*. at 58.

172. Fletcher, *supra* note 168, at 41; *see also* Stephen Wermiel, *SCOTUS for Law Students: Indian Cases at the Court*, SCOTUSBLOG (Jan. 4, 2016, 9:48 AM), http://www.scotusblog.com/2016/01/scotus-for-law-students-indian-cases-at-the-court/ (noting that in the last twenty-nine years, the Supreme Court has "ruled against the interests of Indians" 72% of the time).

173. Fletcher, *supra* note 6, at 63; *see also* Redburn, *supra* note 161 ("It seems to raise the possibility that the Supreme Court could strip away parts of tribal authority however it wants, regardless of the relevant tribal laws.").

174. *See* U.S. CONST. amend. XIV, § 1.

175. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."); Fletcher, *supra* note 6, at 64–65. For this reason, Indian law is sometimes called "extraconstitutional," or "*sui generis*." *Id*. at 62; *see also* United States v. Wheeler, 435 U.S. 313, 328–30 (1978), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized in* United States v. Lara, 541 U.S. 193 (2004) (finding that the Fifth Amendment's double jeopardy provision does not constrain the Cherokee Tribe); Talton v. Mayes, 163 U.S. 376, 384 (1896) (finding that the Fifth Amendment's grand jury provision does not constrain the Cherokee Tribe). Curiously, the exception to this rule seems to be the Twenty-Sixth Amendment's establishment of the voting age at eighteen. Fletcher, *supra* note 6, at 77–78 (citing Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085, 1089 (8th Cir. 1977) (holding that the tribe's secretarial election was "federal" enough for the Twenty-Sixth Amendment to allow those eighteen and older to vote)).

Indian Civil Rights Act of 1968 ("ICRA"), pursuant to its plenary power over Indian affairs.[176] ICRA establishes many (but not all) of the rights in the Bill of Rights and the Fourteenth Amendment in Indian Country, including an "equal protection" and a "due process" provision.[177] In a sense, ICRA mandates that tribal sovereigns import certain rights similar to those under the US Constitution. Because tribal sovereigns have sovereign immunity, this leaves ICRA-based claims to the exclusive jurisdiction of tribal courts (unless the plaintiff is seeking a federal habeas remedy).[178]

In sum, tribal sovereigns retain inherent aspects of self-government that are subject only to congressional plenary power, but Supreme Court jurisprudence has also found a way to limit tribal authority in some situations. Still, states are generally prohibited from regulating conduct within Indian Country.[179] The issue of federal rights applying to tribes is especially complicated, and ICRA imports some Constitutional rights into Indian Country.[180]

B. Relevant Tribal, State, and Federal Law on Marriage

Having given an overview of the way that federal, state, and Native tribal law interact generally, this Subpart turns to a more focused analysis of the relationship between federal, state, and tribal laws concerning marriage.

1. Inherent Tribal Authority over Domestic Relations

Since tribes have inherent authority as sovereigns, they "have been accorded the widest possible latitude in regulating the domestic relations of their members."[181] Federal and state statutes and courts consistently recognize American Indian custom as the ultimate arbiter of tribal

176. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2014).

177. *Id.* ICRA does not include provisions analogous to the US Constitution's "free exercise" or "establishment" clauses, a right to bear arms, or the right to indigent defense counsel, among others. *See id.*

178. *Santa Clara Pueblo*, 436 U.S. at 49 (holding that ICRA did not abrogate tribal sovereign immunity for non-habeas claims, and that the Santa Clara Pueblo's sovereign immunity barred federal adjudication of an ICRA-based claim relating to membership requirements).

179. *See* Worcester v. Georgia, 31 U.S. 515, 561–62 (1832).

180. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303.

181. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 137 (1942) (footnote omitted); *see also* Fletcher, *supra* note 6, at 54 (quoting COHEN, *supra*, at 215) ("It remains settled black-letter law, however, that Indian tribes retain plenary and exclusive inherent authority over 'domestic relations among tribal members.'"); Strasser, *supra* note 39, at 208.

marriages.[182] The untouchability of tribal domestic relations and marriage custom has even largely withstood the volatile history of federal plenary authority that abrogated treaties and terminated tribes.[183]

It should not be surprising, therefore, that courts almost always recognize the "validity of marriages and divorces consummated in accordance with tribal law or custom."[184] With one possible exception,[185] state laws generally have no impact on the "hard inner core of tribal authority over domestic relations,"[186] even though tribal members are also state citizens.[187] Historically, states have recognized tribal marriages, treating them with at least as much deference as foreign marriages.[188] This was true even for polygamous tribal marriages.[189] The most famous case to this effect is *Kobogum v. Jackson Iron Company*.[190] In *Kobogum*, Michigan's Supreme Court upheld the inheritance rights of children in a polygamous tribal marriage, and in the process of doing so recognized the marriage as valid.[191] The *Kobogum* court famously held that it had no right to control tribal marriages, stating:

> We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are

182. COHEN, *supra* note 181, at 137; *see also* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 26 (Preliminary Draft No. 4, 2016) ("Indian tribes have the power to regulate the domestic relations of tribal members.").

183. Fletcher, *supra* note 6, at 54. It is worth noting that Congress has enacted statutes that touch on issues relating to tribal domestic relations, but these statutes do not constrain tribal authority to regulate domestic relations. For example, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2014), explicitly recognizes tribal authority over certain adoptions of minor Native American children. Interestingly, the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), also purported to confer tribal authority to refuse recognition of same-sex marriages from other jurisdictions, including other tribal sovereigns. But because tribal governments already have full authority to regulate domestic relations, DOMA's purported authorization was "superfluous." *See* Tweedy, *supra* note 38, at 133. For an explanation of inter-tribal recognition of tribal court orders generally, see Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297 (2004).

184. COHEN, *supra* note 181, at 138; Strasser, *supra* note 39, at 218 ("Indeed, as a general matter, courts finding a marriage valid under tribal laws would also find it valid under state laws as long as the marriage did not involve the imposition of fraud on any other jurisdiction.").

185. *See infra* Part IV.B.2.

186. Fletcher, *supra* note 6, at 80.

187. COHEN, *supra* note 181, at 137.

188. Strasser, *supra* note 39, at 224. Although it appears that some states threatened to decline recognition of tribal marriages unless the tribes instituted a ban on same-sex marriage, *see supra* note 53 and accompanying text, there appear to be no instances of states following through on such threats.

189. COHEN, *supra* note 181, at 138 ("Legal recognition has not been withheld from marriages by Indian custom, even in those cases where Indian custom sanctioned polygamy."); Strasser, *supra* note 39, at 208.

190. Kobogum v. Jackson Iron Co., 43 N.W. 602 (Mich. 1889).

191. *Id.* at 605–06; *see also* Fletcher, *supra* note 6, at 53.

> so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.[192]

The court went on to reason that tribal domestic relations could not be subject to state laws, which had never bound tribes.[193] Other historical examples of states recognizing tribal marriages under *Kobogum*'s logic abound.[194]

Along with states, the federal government has also historically recognized tribal custom marriages.[195] Congress settled on a policy to allow tribal sovereigns to govern their own domestic relations.[196] And although there is a modicum of uncertainty as to whether generally applicable laws apply in Indian Country, it is settled that Native nations still retain their inherent authority to "make their own laws and be governed by them," especially in the area of domestic relations.[197]

2. Public Law 280

Still, congressional plenary authority can strip even this inherent power of tribal sovereigns. One example of this may be "Public Law 280," which gives six "mandatory" states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—some civil adjudicatory jurisdiction over Indian Country, in addition to criminal jurisdiction.[198] In addition to the six states explicitly mentioned in Public Law 280, Idaho and Washington have assumed "optional" Public Law 280 jurisdiction for specific issue areas, including domestic relations.[199]

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192. *Kobogum*, 43 N.W. at 605.

193. *Id*. at 605–06.

194. *See, e.g.*, Hallowell v. Commons, 210 F. 793, 800 (8th Cir. 1914); Earl v. Godley, 44 N.W. 254, 255 (Minn. 1890); Ortley v. Ross, 110 N.W. 982, 983 (Neb. 1907); James v. Adams, 155 P. 1121, 1122 (Okla. 1915).

195. *See, e.g.*, United States v. Quiver, 241 U.S. 602, 606 (1916) (holding that a US statute criminalizing adultery would not apply to Indian domestic relations absent clear intent by Congress to use its plenary authority over tribes).

196. *Quiver*, 241 U.S. at 603–04. But congressional plenary authority over Indian tribes vests the federal government with the power to change this. *See id.* at 606; *see also* Strasser, *supra* note 39, at 209–10.

197. Fletcher, *supra* note 6, at 79 (citing Williams v. Lee, 358 U.S. 217, 222 (1959)).

198. Pub. L. No. 83-280, § 2, 67 Stat. 588, 588–89 (1953) (codified as amended at 28 U.S.C. § 1360).

199. *See* IDAHO CODE ANN. § 67-5101 (2014); WASH. REV. CODE ANN. § 37.12.010 (LexisNexis 2014).

This means that eight states (Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin, Idaho, and Washington) may be able to adjudicate issues of tribal domestic relations, including marriage. Since *Obergefell* held that same-sex marriage is a constitutional right, all eight of these states must now have legal same-sex marriage.[200] At the publication of this Note, at least three tribal sovereigns have same-sex marriage bans (and therefore marriage laws that conflict with local state law) in the relevant Public Law 280 states: the Blue Lake Rancheria (California),[201] the Kalispel Indian Community (Washington),[202] and the Nez Perce (Idaho).[203]

It remains unclear whether a state-court challenge to these tribes' bans would allow application of state law under Public Law 280, or if the tribes' inherent authority to govern their own domestic relations would prevail. Civil jurisdiction pursuant to Public Law 280 is a murky area, to say the least, especially when applied to the special status of tribal domestic relations. Civil authority pursuant to Public Law 280 is not regulatory, but rather adjudicatory, allowing state courts to hear cases from Indian Country and apply state laws, even where there would typically be tribal or federal exclusive jurisdiction.[204] For example, while California cannot directly regulate tribal domestic issues,[205] Public Law 280 would apparently allow California courts to hear and decide cases regarding tribal family matters and even apply California domestic-relations law, assuming such law is not considered "regulatory."[206] While it appears as though Public Law 280 jurisdiction can apply even to tribal domestic relations,[207] there are examples of courts overturning some state exercises of Public Law 280 authority.[208] Accordingly, Public Law 280 could potentially play

200. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

201. *See supra* note 81.

202. *See supra* note 83.

203. *See supra* note 86.

204. *See* Bryan v. Itasca Cnty., 426 U.S. 373, 391–92 (1976) (holding that Public Law 280 did not grant Minnesota the authority to tax tribes, but only the power to adjudicate and apply state law).

205. *See* Worcester v. Georgia, 31 U.S. 515, 561–62 (1832); RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 26 (Preliminary Draft No. 4, 2016).

206. *See* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 934 (2012) (citing Doe v. Mann, 415 F.3d 1038, 1058–59 (9th Cir. 2005) (noting that the Ninth Circuit determined that a state's dependency proceeding that terminated parental rights was not "regulatory" and was therefore within the scope of Public Law 280's conferral of authority)).

207. *See, e.g.*, H.R. REP. NO. 95-1386, at 35 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7558 ("[C]ourts have consistently recognized that tribal governments have exclusive jurisdiction over the domestic relationships of tribal members located on reservations, unless a State has assumed concurrent jurisdiction pursuant to Federal legislation such as Public Law 83–280.").

208. *See, e.g.*, Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164, 1166–68 (8th Cir. 1990) (holding that South Dakota's assumption of optional Public Law 280 jurisdiction over state highways

an important, if inconclusive, role in the interplay between state and tribal domestic relations laws.[209]

V. *OBERGEFELL*'S LIMITED IMPACT ON TRIBAL SAME-SEX MARRIAGE LAWS

Obergefell should have only limited, if any, implications for tribal marriage laws. This is not a statement about the merits of marriage equality, but rather about federal American Indian law. As explained in Part I, *Obergefell* held that states must issue marriage licenses to same-sex couples and recognize valid same-sex marriages from other states.[210] The Court rested its holding on both due process and equal protection grounds.[211] Throughout the opinion, the Court emphasized marriage's important role in culture, and especially noted that "*the Nation's traditions* make clear that marriage is a keystone of *our* social order."[212]

But even as correct as marriage equality may be, Native nations need not subscribe to the "social order" of the United States. In fact, as Part II illustrated, tribal sovereigns can have any host of permutations of marriage laws. And as Part III demonstrated, all of this pluralism among Native sovereigns can arguably be rooted in tribal traditions and self-determinative interests. Although federal law can trump tribal interests in many important ways, as explained in Part IV, *Obergefell* will and should have only an indirect influence over marriage laws in Indian Country.

Unlike the Sixth Circuit's opinion that was granted certiorari, *Obergefell* made no reference to Native Americans.[213] *Obergefell*'s holding that states' bans on same-sex marriage are unconstitutional does

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in Indian country was inconsistent with the purpose of Public Law 280).

209. Before *Obergefell*, prior drafts of this Note included a discussion of DOMA. DOMA's Section Three, which prohibited federal recognition of same-sex marriages, was overruled in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Section Two survived *Windsor*, and purported to give every "State, territory, or possession of the United States, or Indian tribe" the right to refuse recognition of same-sex marriages. DOMA § 2. DOMA was notable, but not unique, in its explicit inclusion of tribal sovereigns. Fletcher, *supra* note 6, at 58; Tweedy, *supra* note 38, at 106. Still, while *Obergefell* did not explicitly overturn DOMA's Section Two, it is essentially a dead letter, since all states must license and recognize valid same-sex marriages. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015). Even DOMA's purported authorization to tribal sovereigns to deny marriage recognition is without substance. *See supra* note 183.

210. *See supra* Part I; *see also Obergefell*, 135 S. Ct. at 2604–05.

211. *Obergefell*, 135 S. Ct. at 2604.

212. *Id.* at 2601 (emphasis added).

213. *See supra* note 36. In its decision to uphold state same-sex marriage bans, the Sixth Circuit only made one passing mention of "Native Americans" in reference to the court's argument that not all marriage restrictions have historically been subject to strict scrutiny. DeBoer v. Snyder, 772 F.3d 388, 412 (6th Cir. 2014) (quoting COTT, *supra* note 35) (internal quotation marks omitted) ("[T]he federal government encouraged or forced Native Americans to adopt [monogamy].").

not amount to requiring Indian tribes to implement pro-same-sex marriage laws.[214] The decision does not change the traditional deference to Native tribes' inherent authority on matters of their own domestic relations.[215] Thus, tribal implementations of same-sex marriage—like the Coquille's—and tribal bans on same-sex marriage—like the Navajo Nation's—remain intact.

For tribal sovereigns that already allow for same-sex marriage, *Obergefell*'s only impact may be that same-sex, tribal-member couples who were married under tribal law will now have their marriages recognized in all fifty states.

For tribal sovereigns that ban same-sex marriage, *Obergefell* may have important but only indirect consequences, through one of two routes. First, it may catalyze grassroots movements within Native communities to convince tribal councils to change laws. Since *Obergefell* was a high-profile case,[216] it can go far to motivate tribal members to push back against tribal same-sex marriage bans. The momentum of this blockbuster decision may inspire grassroots, civic-movement organizations, such as the Navajo Nation's Coalition for Navajo Equality.[217] This strategy has proven effective in the past, and it may work best in small tribes.[218]

The second indirect effect *Obergefell* may have is supporting tribal-court ICRA challenges to tribal bans on same-sex marriage.[219] Because *Obergefell* rested on the Fourteenth Amendment,[220] the opinion may provide persuasive authority to plaintiffs who argue that tribal same-sex

214. The only possible exception to this would be the states with jurisdiction under Public Law 280, *see supra* Part IV.B.2, but *Obergefell* did not change the situation because California, Idaho, and Washington (the only "P.L. 280" states with local tribal sovereigns that banned same-sex marriage) had already legalized same-sex marriage prior to *Obergefell*. *See* Alex Tribou & Keith Collins, *This Is How Fast America Changes Its Mind*, BLOOMBERG (June 26, 2015), http://www.bloomberg.com/graphics/2015-pace-of-social-change/.

215. *See supra* Part IV.B.1.

216. *See* Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html (noting that the historic decision "set off jubilation and tearful embraces across the country, the first same-sex marriages in several states, and resistance—or at least stalling—in others").

217. *See* COAL. FOR DINÉ EQUAL., *supra* note 96; *see also* Brave NoiseCat, *supra* note 4 (noting that "[h]uge court decisions, like [*Obergefell*], definitely empower" conversations about marriage equality).

218. Tweedy, *supra* note 38, at 142 (noting that grassroots movements among tribal members result in more pro-same-sex-marriage laws than bans, and that grassroots movements may be "particularly effective for those who are members of small tribes").

219. A tribal member-plaintiff will not be able to bring such a challenge in state or federal court because of tribes' sovereign immunity. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (holding that tribal sovereign immunity barred federal adjudication of an ICRA-based challenge to tribal law).

220. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

marriage bans cannot withstand ICRA's "equal protection" or "due process" guarantees. While *Obergefell* does not bind tribal courts, tribal judges may give the Court's Fourteenth Amendment analysis persuasive weight when interpreting ICRA's "due process" or "equal protection" provisions.[221] Because ICRA-based challenges to tribal same-sex marriage bans are more likely after *Obergefell*, this Note explores this possibility in more depth.

A. Tribal-Court ICRA Challenges to Bans on Same-Sex Marriage

As a practical matter, Professor Ann E. Tweedy hypothesizes that tribal members may be less likely to resort to tribal courts to challenge tribal same-sex-marriage bans.[222] But there is at least one documented case, post-*Obergefell*, of a tribal member challenging a tribal sovereign's restrictive marriage law.[223] Cleo Pablo, a member of the Ak-Chin Indian Community, is suing in tribal court to challenge the Ak-Chin's ban on same-sex marriage.[224] With one documented case in Indian Country, it is likely that more will follow. It is also worth noting that challenging tribal law via ICRA and *Obergefell* will "take years, perhaps decades of (likely) Tribal Court litigation."[225]

Once a tribal court is faced with an ICRA or tribal-constitutional challenge to a ban on same-sex marriage, the question becomes whether the tribal court will follow the Supreme Court's *Obergefell* decision.[226] Ultimately, tribal courts may or may not look to federal law for guidance.[227] One commentator points out that the Fourteenth Amendment

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221. *See* Ann E. Tweedy, *Tribes, Same-Sex Marriage, and* Obergefell v. Hodges, FED. LAW., Oct.–Nov. 2015, at 6, 7, *available at* https://turtletalk.files.wordpress.com/2015/10/tweedy-on-same-sex-marriage.pdf ("If faced with a lawsuit challenging a tribal DOMA under ICRA, however, it appears that many tribes would apply *Obergefell* as persuasive authority and strike down the tribal DOMA.").

222. *See id.*; *see also* Tweedy, *supra* note 38, at 109 (noting that a lack of tribal case law "suggests that tribal members are much less likely than other Americans to go to court to enforce marriage rights"). Also, the availability of a tribal judicial forum may vary from tribe to tribe because of sovereign immunity. *See generally* Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137 (2004).

223. *See* Fonseca, *supra* note 80.

224. *Id.*

225. Anthony Broadman, *ICRA, Obergefell, and Tribal Marriage Equality*, GALANDRA BROADMAN (Apr. 27, 2015), http://www.galandabroadman.com/2015/04/icra-obergefell-and-tribal-marriage-equality.

226. *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1056 (2007) (noting that increasing claims against tribal governments raises the question about to what extent a tribal government may deviate from dominant liberal norms). Riley argues that tribal governments should not feel constrained by western notions of good governance, but should instead work towards "good Native governance." *Id.* at 1055.

227. *See* Tweedy, *supra* note 38, at 150–51.

and ICRA's analogous guarantees are not coextensive, but they might overlap on the issue of same-sex marriage.[228] Still, as Mark D. Rosen notes, tribal governments are free to interpret ICRA's provisions however they wish—even those provisions based on constitutional rights that have been interpreted by the Supreme Court: "[D]ue process means one thing in Manhattan, another in the 25,000 square miles of Navajo land, and yet something else on the Winnebago reservation."[229]

Tribal interpretations of ICRA are not capricious, however. Rosen's study found that tribal governments "take their charge of interpreting ICRA seriously" and have empirically limited their own power in significant ways, including striking down provisions that violate due process and equal protection.[230] Rosen found that tribal courts often give deference to federal constitutional law, which is "cited in nearly every tribal court opinion and plays an important role in tribal court construction of ICRA."[231] Indeed, Rosen's study found that "much of the ICRA case law bears a significant resemblance to federal constitutional law."[232] This makes sense, given that tribal courts will often have less of a body of precedent and prior case law from which to draw. The link between tribal law and federal law may also be why the Coquille Tribe, in drafting its marriage law, incorporated language about "fundamental rights," implicitly invoking federal jurisprudence on marriage rights.[233]

B. When Should Tribal Courts Apply Obergefell*?*

Since tribal courts occasionally look to federal constitutional law, when should tribal courts look to *Obergefell*? Professor Tweedy suggests that tribal courts should look to federal case law like *Windsor* and *Obergefell* when there is a lack of "available information on tribal custom and tradition either in the context of same-sex relationships or as to equal

228. "The 14th Amendment and the ICRA Equal Protection clause . . . are not coequals. . . . They do not even mean the same thing. But if the United States Supreme Court finds that the federal Equal Protection clause prohibits marriage discrimination, ICRA Equal Protection likely does, too." Broadman, *supra* note 225.

229. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 483 (2000).

230. *Id*. at 523–24.

231. *Id*. at 524.

232. *Id*. at 529; *accord* Tweedy, *supra* note 38, at 151 ("[A] significant number of tribes look to federal constitutional cases when construing ICRA-based rights in the absence of tribal precedent or readily available information on tribal tradition and custom . . . .").

233. Tweedy, *supra* note 38, at 113–14 (citing COQUILLE INDIAN TRIBAL CODE § 740.010(2) (2008) (noting that "Marriages and Domestic Partnerships involving tribal members are fundamental rights")).

protection and due process generally."[234] Writing after *Windsor* but before *Obergefell*, she argued that:

> [T]ribes should apply *Windsor* as persuasive authority unless there is clear evidence of tribal custom and tradition that points to a different approach with respect to same-sex relationships. . . . [T]ribal courts sometimes consider federal approaches and cases in conjunction with approaches from other tribes, and, in such situations (and similar ones), it makes sense for Windsor to play a significant role in a multi-faceted analysis, rather than playing the starring role.[235]

Tweedy would have tribal courts "require solid evidence to avoid allowing contemporary prejudice to masquerade as tribal tradition."[236] Thus, she advocates applying the Supreme Court cases unless a tribal sovereign can meet a substantial evidentiary standard: "[T]ribal courts should require some *clear evidence* of a tradition or custom of lack of openness to same-sex relationships or LGBT identities as a justification for not applying either *Windsor* or tribally-derived protections against discrimination in a marriage equality case under the ICRA."[237] Although she mentions *Windsor*, it seems as though her argument applies equally to *Obergefell*.[238]

Professor Tweedy's argument is valuable because it recognizes that tribal law should be rooted in tribal history and tradition rather than in federal law.[239] But the presumption that tribal courts should apply *Obergefell* absent "clear evidence" of a tribal history of excluding same-sex marriage is problematic for a number of reasons. First, it is unclear whether oral history would meet Professor Tweedy's "clear evidence" standard.[240] Considering that documented information related to the status of same-sex couples in tribal histories is limited and difficult to detangle

234. *Id.* at 151.
235. *Id*. at 153.
236. *Id.* at 154.
237. *Id.* at 155 (emphasis added).
238. *See* Tweedy, *supra* note 221, at 7 ("If faced with a lack of information as to tribal culture and tradition, as most tribal courts would be, many would likely apply *Obergefell*."); *see also* Broadman, *supra* note 225 (citing Professor Tweedy's article on *Windsor* and noting that "[t]he same will be true for *Obergefell*").
239. *See* Tweedy, *supra* note 38, at 149 ("[A] requirement that tribal courts protect due process and equal-protection [rights] . . . in exactly the same way that the states and federal government do would have an assimilating effect on tribal culture.").
240. For discussions about the role and admissibility of tribal oral history in US courts, see generally Rachel Awan, Comment, *Native American Oral Traditional Evidence in American Courts: Reliable Evidence or Useless Myth?*, 118 PENN ST. L. REV. 697 (2014); Hope M. Babcock, *"[This] I Know from My Grandfather:" The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19 (2013).

from colonialist accounts of tribal culture,[241] oral history will likely be a useful tool for tribal courts reviewing an ICRA challenge to tribal marriage laws.

Second, automatically applying *Obergefell* absent clear evidence of a tribal history to justify bans on same-sex-marriage would undermine self-determination. While many tribal sovereigns will want to look to past practices and customs in ascertaining tribal law, self-determination is also forward-looking.[242] As Tim Rowse puts it:

> Indigenous self-determination is both backward-looking and forward-looking; it is not only conservative and restorative, but also exploratory of progressive change. Self-determination necessitates a politics of cultural revision and adaptation in which Indigenous people cannot avoid debating among themselves what elements of their traditions they wish to preserve and what they would give up for the sake of adaptive innovation. Unavoidably, such debate among Indigenous people takes place in a context shaped by non-Indigenous political authorities and by global structures of economic opportunity and exploitation; self-determining Indigenous peoples have not chosen these contexts, nor can they ignore them.[243]

This means that tribal sovereigns should be free to write marriage laws that are in the best interests (including culturally) of the Native nation, regardless of history. This may align with *Obergefell* for some tribal sovereigns, but not for all.[244]

An important counterargument to the idea that tribal courts should be fully empowered to determine their own tribal marriage laws is that tribal judges may be improperly influenced by external pressures, which might even perpetuate colonialist and assimilationist values.[245] Professor Tweedy

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241. Tweedy, *supra* note 221, at 7; *see also supra* notes 126–27 and accompanying text.

242. Tim Rowse, *Self-Determination as Self-Transformation*, *in* RESTORING INDIGENOUS SELF-DETERMINATION: THEORETICAL AND PRACTICAL APPROACHES 34, 34 (Marc Woons ed., 2015), *available at* http://www.e-ir.info/wp-content/uploads/2015/10/Restoring-Indigenous-Self-Determination-New-Version-E-IR.pdf.

243. *Id.*

244. *See* Rosen, *supra* note 229, at 525 (noting that tribal courts "do not merely parrot federal approaches," but rather adopt them when they align nicely with tribal values, and diverge when necessary). The idea that tribal courts should apply *Obergefell* only when it makes sense from a tribal perspective aligns with Riley's argument for good Native governance. *See* Riley, *supra* note 226, at 1055.

245. It may even be true that any inquiry into history will necessarily invite a colonialist tendency towards heterosexism. *See* RIFKIN, *supra* note 123, at 22 ("[T]he effort to locate a particular set of practices and/or principles as tradition takes place within a context in which there are numerous incentives toward straightness and in which adopting (aspects of) heteronormativity can serve as a

notes, "from the information we have about Cherokee and Navajo, we know that adoption of tribal [bans on same-sex marriage] is inspired at least in some instances by political developments in the dominant culture, rather than by tribal customs and traditions."[246] She also notes that heterosexism has historically been used as a tool of colonization, marginalizing Native kinship systems and other Native family values.[247] Indeed, many see the Navajo Nation's ban on same-sex marriage as a reflection of US policy at the time and certain non-Native Christian values, undermining Navajo self-determination.[248]

These are important concerns, and Professor Tweedy is apt to advocate for caution among tribal courts when considering tribal marriage laws.[249] Still, like arguments about tradition and self-determination,[250] arguments about eschewing external influences are indeterminate. For example, while some blame the Navajo marriage ban on external influence from the dominant culture, others see advocacy for same-sex marriage as equally foreign to tribal culture and tradition.[251] While requiring "clear evidence" of custom and tradition may alleviate some indeterminacy, it likely will not solve all situations. It might also shackle tribal courts to a backward-looking view of self-determination, which is contrary to true self-rule and sovereignty.[252] Thus, there is no formula for tribal courts reviewing ICRA challenges to bans on same-sex marriage.

CONCLUSION

If the current landscape of tribal laws on same-sex marriage and the arguments being made from both sides are any indication, tribal courts will vary widely in their determination of marriage rights. In each case, both sides will likely argue that tradition is in their favor. And tribal courts may even base the reasons for their decisions outside of tribal history and tradition. This kind of indeterminacy and pluralism amongst tribal

means of carving out space for certain kinds of indigenous association, belief, and practice.").

246. Tweedy, *supra* note 38, at 156.

247. *Id.* at 156–57; *see also* RIFKIN, *supra* note 123, at 22.

248. *See, e.g.*, Tweedy, *supra* note 38, at 134–36.

249. *Id.* at 158.

250. *See supra* Part III.

251. *See* Brave NoiseCat, *supra* note 4 (noting that many tribal members "view same-sex marriage as a foreign imposition creeping into Navajo life from cities like Albuquerque and San Francisco").

252. The United Nations Declaration on the Rights of Indigenous Peoples demonstrates how true sovereignty and self-determination involve flexibility: "Indigenous peoples have the right to self-determination. By virtue of that right they *freely* determine their political status and *freely* pursue their economic, social and *cultural development*." G.A. Res. 61/295, at 4, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (emphasis added).

courts—and indeed, amongst tribal family structures, as Part III discussed—is necessary if tribal sovereignty and self-determination are to have meaning.[253] Tribal sovereigns, including tribal courts,[254] are the only actors that can appropriately determine tribal marriage laws. This means that *Obergefell* should have limited effect in Indian Country, and the word "should" in this sentence is both predictive and normative. American Indian tribal sovereigns' inherent right to self-govern "existed prior to the Constitution" and does not stem from it.[255] Indian nations have "always been considered as distinct, independent political communities, retaining

253. Riley notes that tribal sovereignty and self-rule are key to Native nations' very existence. Riley, *supra* note 226, at 1063 ("[W]ithout self-rule, tribes will not only disappear as political entities within the United States, they may cease to exist altogether.").

254. *See* Indian Tribal Justice Act, 25 U.S.C. § 3601 (2014) (finding that tribal-court adjudication is central to tribal self-determination and sovereignty).

255. Talton v. Mayes, 163 U.S. 376, 384 (1896).

their original natural rights."[256] If this means anything, then the ultimate arbiter of tribal domestic affairs must be the tribes, themselves, as against all others—even the US Supreme Court.

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256. Worcester v. Georgia, 31 U.S. 515, 559 (1832).

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