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Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum

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I. Introduction

Same-sex marriage opponents sometimes suggest that the recognition of same-sex marriage will lead to the recognition of polygamous marriages,¹ as if no more needs to be said when discussing either. Implicit within this argument is that there are no important differences between same-sex and polygamous unions, and that the recognition of polygamous unions in this country is simply unfathomable. Yet, neither of these implicit contentions is correct. There are important differences between same-sex and polygamous unions,² and certain polygamous unions were recognized as a matter of course in this country. The focus of this essay is on why Native American polygamous unions tended to be recognized, and the implications that these recognition practices might have for the validity of same-sex marriages across state lines.

The treatment of Native American marriages in the state and federal courts is of interest for two distinct reasons. First, tribes have been willing to recognize marriages that not only were not permitted in other jurisdictions but were considered void because violating an important public policy. Second, most but not all states recognized those unions validly celebrated according to tribal practices, notwithstanding that those same unions violated public policy and would have been denied recognition had they been celebrated elsewhere.

Part II of this essay describes some of the historical Native American domestic relations practices and explains why states recognized certain Native American marital unions that would not have been recognized had they been celebrated elsewhere. Part III analyzes the implications of these recognition practices for current debates regarding the interstate recognition of same-sex relationships. The essay concludes that the historical treatment of Native American polygamous marriages suggests that Congress has the power to step into the breach and assure that same-sex couples who marry in accord with the law of

¹ See, for example, George W. Dent, Jr., “How Does Same-Sex Marriage Threaten You?” 59 Rutgers L. Rev. 233, 257 (2007) (“Recognition of SSM [same-sex marriage] would also generate unbearable pressure to expand further the legal definition of marriage to include, at least, polygamy and endogamy.”); Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, The Alaska Marriage Amendment: The People’s Choice on the Last Frontier, 16 Alaska L. Rev. 213, 230 n.105 (1999) (“the recognition of same-sex marriage might have a slippery-slope effect leading to recognition of relationships such as polygamy”).

² For a discussion of some of the differences, see generally Maura I. Strassberg, Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage, 75 N.C. L. Rev. 1501 (1997).
their domicile will enjoy the kinds of rights and protections that almost all other families enjoy when traveling through or, perhaps, moving to other states.

II. Tribal Domestic Relations Practices

Historically, Native American marriage practices were given deference in two distinct respects. First, Congress was deferential when it declined to exercise its power to limit the types of tribal marriages that would be valid. Second, states were deferential in that they recognized marriages that were valid according to tribal customs and laws, notwithstanding that such recognition would not have been accorded had those marriages taken place in a different jurisdiction. While courts tended not to offer detailed explanations of why such marriages would be recognized, a rationale can be inferred that justifies distinguishing between tribal and other marriages for interjurisdiction recognition purposes, making recognition of the former mandatory and recognition of the latter subject to evaluation in light of local public policy.

A. Tribes as Separate Sovereignties

Courts have had some difficulty in offering the most felicitous characterization of the Native American tribe, which is neither the legal equivalent of a separate state existing within the United States nor of a foreign nation existing outside of the geographical limitations of the United States. Indeed, the non-equivalence of a tribe to either a state or a foreign nation is suggested by the tribes being explicitly and separately mentioned in the United States Constitution.

The Supreme Court has described the tribes as “domestic dependent nations,” who are “completely under the sovereignty and dominion of the United States.” The Court explained in United States v. Wheeler that “until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes

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3 See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 755-56 (1998) (“We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States.”) (citing Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991)).
4 See Jones v. Meehan, 175 U.S. 1, 10 (1899) (“The Indian tribes within the limits of the United States are not foreign nations.”).
5 See U. S. Const, art. 1, sec. 8, cl. 3 (“Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).
6 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
7 Id.
still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a
necessary result of their dependent status.”

For purposes here, it is not necessary to spell out the implications of domestic dependent nation status
or even to discuss whether some other formulation would more accurately capture the legal status of the
tribes. Instead, it is only necessary to point out that the tribes are considered separate sovereignties,
capable of regulating their internal affairs. Absent congressional action to the contrary, tribes can
regulate the conditions under which tribal members on Native lands can marry and divorce. The focus
here is on a particular aspect of domestic relations, namely, whether and why a state will recognize a
marriage valid in light of tribal law but invalid in light of local law.

B. Marriage Law

It has long been recognized that tribal marital practices may not mirror those of the states. For
example, in Jones v. Meehan, the United States Supreme Court recognized that a particular Chippewa
chief had “two wives, both living at the same time.” Rather than suggest that the children of the second
wife would be considered illegitimate and thus not entitled to inherit from their grandfather, the Court

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9 Id. at 323 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
10 Cf. Matthew L.M. Fletcher, Same-Sex Marriage, Indian Tribes, and the Constitution, 61 U. Miami L.
Rev. 53, 62 (2006) (“Indian tribes, Indian Country, and federal Indian law were and are sui generis –
‘extraconstitutional.’”).
11 See Worcester v. Georgia, 31 U.S. 515, 581 (1832) (M’Lean, J., concurring) (“In the management of
their internal concerns, they are dependent on no power.”).
12 Nevada v. Hicks, 533 U.S. 353, 361-62 (2001) (noting that state law can have force within the
boundaries of the reservation). See also Matthew L.M. Fletcher, Retiring the “Deadliest Enemies” Model of
Tribal-State Relations, 43 Tulsa L. Rev. 73, 74 (2007) (“In general, state laws and regulations do not have
effect inside of Indian Country absent Congressional authorization.”).
13 See Wheeler, 435 U.S. at 322 (“Their right of internal self-government includes the right to prescribe
laws applicable to tribe members.”) (citing United States v. Antelope, 430 U.S. 641, 643 n. 2 (1977));
Geoffrey D. Strommer & Stephen D. Osborne, “Indian Country” and the Nature and Scope of Tribal Self-
authority to make criminal and civil laws for internal affairs. . . . Examples of “internal affairs” subject to
tribal legislation include . . . recognition of marriage and divorce.”).
14 See In re Kansas Indians, 72 U.S. 737, 745-746 (1866) (“The Shawnees have a custom of their own with
guard to marriage. Some marry according to the old custom, and some marry by the minister.”).
15 175 U.S. 1 (1899).
16 Id. at 26.
17 See Kalyton v. Kalyton, 74 P. 491, 493 (Or. 1903), rev’d on other grounds, McKay v. Kalyton, 204 U.S.
458 (1907) (“if a marriage entered into by members of a tribe, according to the customs thereof, is to be
held invalid, and the issue illegitimate, the offspring could never inherit from the father”). Cf. James v.
Adams, 155 P. 1121, 1122 (Okla. 1915) (“Whether they [the plaintiffs] are half brothers and sisters of the
allottee, and therefore his heirs, depends upon both them and the allottee being legitimate children of Silas
Anderson.”).
instead consulted “the laws, usages, and customs of the Chippewa Indians,”\footnote{Jones, 175 U.S. at 31.} and decided who would inherit in light thereof.\footnote{See id. (“it is quite clear that, by the laws, usages, and customs of the Chippewa Indians, old Moose Dung’s eldest son and successor as chief inherited the land of his father, to the exclusion of other descendants”).} As the Eight Circuit Court of Appeals explained in \textit{Hallowell v. Commons},\footnote{210 F. 793 (8th Cir. 1914).} “the government has never recognized any distinction as to the right of inheritance among the Indians between the children of the first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy.”\footnote{Id. at 796.}

In \textit{United States v. Quiver}, the Supreme Court noted that it was Congress’s settled policy to “permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws.”\footnote{U.S. v. Quiver, 241 U.S. 602, 603-604 (1916).} This deference was to be accorded even with respect to polygamy,\footnote{Id. at 605.} “save when Congress expressly or clearly directs otherwise.”\footnote{Id. at 606.  See also \textit{Hallowell}, 210 F. at 800 (“The Indians were subject, while their tribal relations existed, to the laws only of Congress, and in the absence of such laws were left to be governed by their own laws and customs as to domestic and social practices including marriage, and whether they should practice monogamy or polygamy was left wholly to them.”).} Congress has not expressly directed otherwise,\footnote{\textit{Hallowell}, 210 F. at 800 (“Congress could have passed a law prohibiting plural marriages among tribal Indians if it saw fit, but it did not do so.”).} although the federal government has attempted to influence tribal marriage practices in other ways.\footnote{See Jill Elaine Hasday, \textit{Federalism and the Family Reconstructed}, 45 \textit{UCLA L. Rev.} 1297, 1358 n.233 (1998) (discussing an attempt by the Commissioner of Indian Affairs to discourage plural marriages among the tribes).}

\section*{C. Was the Marriage Valid Where Celebrated?}

When analyzing the Native American marriage cases, a number of issues should not be conflated. One issue is whether the marriage was valid where celebrated; another is whether the marriage valid where celebrated would be recognized in a different jurisdiction where the marriage could not have been celebrated locally; and still another involves why such a marriage might be recognized.

As a general matter, courts have held that Native American marriages established in accord with tribal customs and usages were valid, as long as the marriage involved at least one tribal member\footnote{Many of the cases involved marriages between a member and a non-member of the tribe. \textit{See} notes 38-46 and 72-102 and accompanying text infra.} and were on
Native American lands. The latter qualifications were important, especially when one considers that tribal and state marriage practices often differed with respect to who would be permitted to marry whom, what formal requirements would have to be met before a marriage would be recognized, or even how many spouses one might have.

Some tribes did not require any formal ceremony in order for a couple to be considered married, instead merely requiring cohabitation of the parties as husband and wife. This practice mirrored common law marriage, in that such marriages also do not require any formal ceremony. Further, as is true with respect to the criteria used by some states for common law marriages, some tribes required evidence of an agreement by the parties to be married—mere cohabitation would not suffice.

Similarities between state and tribal marriage recognition practices notwithstanding, an important difference between tribal practices and the practices of those jurisdictions recognizing common law marriage.

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28 Cyr v. Walker 116 P. 931, 934 (Okla. 1911)
So long as Indians live together under the tribal relation and tribal government, they are subject only to the jurisdiction of Congress. . . . They have been uniformly recognized as capable of regulating and managing their own tribal affairs, including their domestic relations; and domestic relations formed under their customs and laws have been treated by the courts as valid.

29 Id. (“Mere meeting and co-habitation as husband and wife constituted a marriage.”).

30 See In re Golding’s Estate, 89 P.2d 1049, 1053 (Nev. 1939) (discussing the similarities between the tribal marriage custom and common law marriage). The requirements of common law marriage themselves differed across jurisdictions. See In re McLaughlin’s Estate, 30 P. 651, 655 (Wash. 1892)
There is considerable conflict in the authorities as to the acts which are necessary to establish a common-law marriage, some courts even going to the extent of holding that continued cohabitation alone is sufficient, while others hold that there must have been a contract between the parties, and others to the still further extent that this must have been evidenced by some kind of a ceremony, or, at least, a declaration to that effect in the presence of other parties.

To establish a common law marriage, the party asserting the existence of the marriage must prove that: (1) the parties were competent to enter into a marriage; (2) the parties assumed a marital relationship by mutual consent and agreement; and (3) the parties confirmed their marriage by cohabitation and public repute.

32 See In re Marriage of Martin, 681 N.W.2d 612, 617 (Iowa 2004) (discussing the common law requirement of “a present intent and agreement to be married”).

33 See Henry v. Taylor, 93 N.W. 641, 643 (S.D. 1903) (“Granting that an agreement to live together, followed by cohabitation, constitutes the Indian custom of marriage, it was necessary to prove that Sam and Alice made an express agreement of that character, and actually lived together pursuant thereto, and not otherwise.”). But see Compo v. Jackson Iron Co., 16 N.W. 295, 295 (Mich. 1883)
And it would be a singular state of things, under a custom for parties to take each other for husband and wife at pleasure, and dissolve the relation at pleasure, without any ceremony whatever, if the legality in law were to be made to depend on somebody having been present to hear their conversation, and know whether they used the word marriage or not. If we recognize at all these polygamous and temporary marriages, we must, of necessity, assume that the marriage is constituted by the mere living together of the man and woman in the relation which the tribes recognize as that of matrimony.
marriage. Where a common law marriage has been contracted, the union must be dissolved formally. In contrast, however, some of the tribes did not require any formal ceremony to dissolve the marriage, instead merely requiring separation of the parties.

When courts were attempting to determine whether a valid marriage had existed, they had a number of factors to consider. They had to determine what the particular tribal practices and usages were, whether what had taken place was in conformity with those practices and usages, and where the couple had lived.

At issue in In re Pacquet’s Estate was whether Ophelia and Fred Pacquet had been legally married. While there was evidence that the two had married according to Clatsop Indian custom, the Oregon Supreme Court noted that Ophelia and John had not been living on Native lands but, instead, in a place where state law governed. Because Oregon law precluded intermarriage between Native-Americans and

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34 See Phillips v. The Dow Chemical Co., 186 S.W.3d 121, 127 (Tex. App. 2005) (“whether established ceremonially or at common law, a marriage can terminate only by death, divorce, or court-decreed annulment”) (citing Villegas v. Griffin Indus., 975 S.W.2d 745, 750 (Tex. App. 1998). Cf. In re Estate of Marson, 120 P.3d 382, 383 (Mont. 2005) (suggesting that because the deceased’s first common law marriage had never been dissolved, the deceased’s partner in the second common law marriage could at best be a putative spouse).

35 Cyr v. Walker, 116 P. 931, 934 (Okla. 1911) (“[T]he dissolution of such marriage was effected by separation of the parties, with the intention of no longer living together as husband and wife, which separation, by mutual consent or by abandonment by one or the other, was equivalent to an absolute divorce, and the parties thereafter were free to form other marital alliances.”) See also Earl v. Godley 44 N.W. 254, 254 (Minn. 1890)

36 See Henry v. Taylor, 93 N.W. 641, 643 (S.D. 1903) (analyzing whether the relevant criteria had been met).

37 See, for example, Wall v. Williamson, 1845 WL 183,* 3 (Ala. 1845) (“the marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid”).

38 200 P. 911 (Or. 1921)

39 See id. at 913.

40 See id. at 913-14.

41 Id. at 914 (noting that the two had lived “within Tillamook county and at a place where the state would have original and exclusive jurisdiction over any marriage contract between them”).
whites, the marriage was held void and of no legal effect. The court explained, “Such a marriage would only be valid where Indians lived together under the tribal relation and a tribal form of government and for the reason that they would then be subject only to the jurisdiction of Congress.” Perhaps as a way of mitigating the obvious injustice that was occurring, the court noted that because Ophelia had “lived with him as a good and faithful wife for more than 30 years . . . , in the interests of justice, a fair and reasonable settlement should be made.” That said, however, John Pacquet was under no legal obligation to share the estate with his brother’s not-legally-recognized widow and, as the court recognized, the issue of what would be fair to Ophelia was “not before this court.”

Sometimes, tribes had several criteria by which to determine whether an individual was married, and the relationship would be recognized as long as any one of them was met, for example, individuals might participate in a Native ceremony, might be married by a minister, or might simply live together as husband and wife. So, too, there were different ways by which individuals might come to be recognized as having ended their marriage. Further, those who had married ceremonially were not required to end it ceremonially. On the contrary, a couple married by a justice of the peace might end their union in accord with custom by simply ceasing to live together.

Needless to say, a system in which individuals might end their marriages by simply separating would cause some indeterminacy with respect to marital status. It might not be clear, for example, whether an individual who was no longer living with his wife had left permanently or, instead, was planning on

42 Id. at 913 (explaining that the law prohibited “any white person male, or female [from marrying] . . . any person having more than one-half Indian blood”) (citing Or. L. sec. 2163).
43 See id. at 914.
44 See id.
45 Id.
46 Id.
47 See Wall v. Williams, 1847 WL 295, *2 (Ala. 1847) another witness . . . stated that he was acquainted with the law of marriage among the Choctaws up to 1833; that they were sometimes married by a minister, sometimes by a Choctaw ceremony, and sometimes a man and woman took each other (without ceremony), lived together and were considered man and wife. Marriages were also solemnized by a justice of the peace from an adjoining county.
48 Rogers v. Cordingley, 4 N.W.2d 627, 629 (Minn. 1942) So in the instant case as to these Indians, who always have resided on their Indian reservations, even if they had gone to another state and there married as prescribed by statute and then returned to their reservation in this state, we apprehend that they could then be divorced according to the usages and customs of the tribe. It was error to exclude the offer of proof made by plaintiff.
returning.\textsuperscript{49} To make matters more complicated, some tribes recognized plural marriages,\textsuperscript{50} which might make it even more difficult to determine who was married to whom.

Often, courts were asked to determine whether or when parties had been married when at least one of them had died and it was necessary to distribute the assets of an estate,\textsuperscript{51} although courts might be asked to make such a determination for other reasons as well, e.g., because the marital testimonial privilege had been asserted.\textsuperscript{52} Regrettably, courts determining the validity of particular marriages did not always make clear whether their examination was being conducted in light of the state’s law or the tribe’s law. For example, at issue in \textbf{Palmer v. Cully}\textsuperscript{53} was whether two Seminoles had legally married. Pheney Bowlegs had married Kintah Palmer in accord with Seminole custom in 1905.\textsuperscript{54} However, Kintah had previously

\textsuperscript{49} See, for example, La Framboise v. Day, 161 N.W. 529, 530-31 (Minn.1917) (discussing circumstances in which Alexis and Quana had married, he had left her, but then had come back, and the question at issue was fixing the time of divorce). Cf. Wall v. Williams, 1847 WL 295, *1 (Ala. 1847) (“Wall . . . and defendant lived together as husband and wife . . . [T] o avoid a prosecution, [he] left the county and went to his tribe west of the Mississippi, and has never returned. But defendant has received letters from him, in which he threatened to return . . . ”).

\textsuperscript{50} Oklahoma Land Co. v. Thomas, 127 P. 8, 9 (Okla. 1912) (“[P]rior to the passage of said act, . . . it was customary for a man to cohabit with two or more women, all of whom were considered as his wives.”); Pompey v. King, 225 P. 175, 175 (Okla. 1923) In the instant case there was testimony tending to prove a Seminole custom permitting plural marriages. No law of the Seminole Nation prohibiting plural marriages has been called to our attention; hence we are of the opinion that the learned trial judge committed error in preventing the jury from determining whether, under the facts proved, the custom existed among the Seminole Indians permitting plural marriages.

\textsuperscript{51} See, for example, Cyr v. Walker 116 P. 931, 931 (Okla. 1911) (“Whether plaintiff in error is entitled to share with Joel Delonias, the son of her deceased husband, in said allotment depends upon whether she was Xavier Delonias’ wife at the time of his decease, or had been, prior to said time, divorced according to the laws and customs of the Pottawatomie Tribe of Indians.”); Palmer v. Cully, 153 P. 154, 155 (Okla. 1915) (“The allegations of the petition necessary to the determination of the questions presented for review are, in substance, that plaintiff is a full-blood Seminole Indian, illiterate, and ignorant of the law; that she is the widow of one Kintah Palmer, a Seminole Indian, who died intestate and without issue, in March, 1912, seised and possessed of certain lands”).

\textsuperscript{52} State v. Pass, 121 P.2d 882, 882 (Ariz. 1942) (“The principal witness against him [Frank Pass] was Ruby Contreras Pass. Without her testimony it is clear there could have been no conviction. When she was offered by the state as a witness, defendant promptly objected on the ground that she was his wife and disqualified by statute to testify against him except with his consent.”).

\textsuperscript{53} 153 P. 154 (Okla. 1915).

\textsuperscript{54} \textit{Id.} at 155.
married Lowina Palmer and had lived with her until about a year before he had married Pheney Bowlegs. Lowina did not formally divorce Kintah until 1911.

The Oklahoma Supreme Court concluded that Kintah had not become divorced from Lowina in accord with local law until 1911. Basically, while separation from a spouse prior to April 28, 1904, would have sufficed as a matter of local custom to have effectuated a divorce, marriage dissolutions after that date could only be obtained through court proceedings. Because Kintah and Lowina had not divorced, the court held that Kintah and Pheney could not have legally married, notwithstanding that they were viewed by all who knew them as husband and wife.

Yet, the court failed to make clear one of the hidden assumptions in its analysis, namely, that a man could not have more than one wife at the same time. Basically, notwithstanding that Pheney and Kintah had established a marriage in accord with Seminole custom, the court held that their marriage was not valid because a preexisting marriage between Lowina and Kintah had not been dissolved until 1911. Yet, the court failed to make clear whether it was basing its analysis on Oklahoma rather than Seminole law. If Seminole law permitted a man to have more than one wife, the marriage between Lowina and Kintah and the marriage between Pheney and Kintah might both have been valid.

The Palmer court’s failure to address whether polygamy was recognized by the Seminole tribe did not escape the attention of the Oklahoma Supreme Court in Pompey v. King. At issue in Pompey was the validity of the marriage between John Pompey and Rose Lottie. At the time that John and Rose allegedly

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55 Id.
56 Id.
57 Id. at 157.
58 See id.
59 Id.
60 Id. ("The marriage of the plaintiff and Kintah Palmer in 1905 in accordance with the Seminole laws was therefore invalid, he at the time having a living, undivorced wife, and being incompetent to contract the same.").
61 225 P. 175 (Okla. 1923).
62 See id. at 175.
married, John was already married to someone else. The sole issue before the court was whether the Seminoles recognized plural marriages.

While admitting that the validity of the marriage should be determined in light of the “tribal laws, customs, and usages of the Seminole tribe,” the defendants asserted that Palmer established that the Seminoles did not recognize plural marriages. After all, if plural marriage was recognized, then Pheney might have been Kintah’s wife even if Lowina was also his wife. Nonetheless, the Pompey court noted that no Seminole law prohibited plural marriages, and that there had been testimony suggesting that Seminole custom permitted such unions. The Pompey court remanded the case so that a jury would determine whether Seminole custom permitted plural marriage.

D. State Recognition of Tribal Marriages

State courts deciding whether a tribal marriage would be recognized were often in fact deciding two separate questions: (1) whether the marriage was valid in light of tribal laws, customs, and practices, and (2) if so, whether that marriage would be recognized by the state. As a general matter, courts answering the first question in the affirmative would answer the second question in the affirmative as well.

In Cyr v. Walker, the Oklahoma Supreme Court explained that the tribes “have been uniformly recognized as capable of regulating and managing their own tribal affairs, including their domestic relations; and domestic relations formed under their customs and laws have been treated by the courts as valid.” However, Oklahoma did not always follow that rule. For example, in Blake v. Sessions, the

63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 See Kobogum v. Jackson Iron Co., 43 N.W. 602, 605 (Mich. 1889) (“The decisions in Alabama, Tennessee, Missouri, and Texas, above cited, all sustain the right of Indians to regulate their own marriages, and there is no respectable body of authority against it; on the contrary, it is a principle of universal law that marriages valid by the law governing both parties when made must be treated as valid everywhere.”).
70 116 P. 931 (Okla. 1911).
71 Id. at 934. See also James v. Adams, 155 P. 1121, 1122 (Okla. 1915) (“It has been very generally, if not universally, held by the American courts, that marriages contracted between tribal Indians, according to the laws and customs of their tribe, at a time when the tribal relations and government were existing, would be upheld, in the absence of a federal law rendering such tribal laws and customs invalid.”).
72 220 P. 876 (Okla. 1923).
validity of a marriage between James Grayson and Myrtle Segro was at issue.\textsuperscript{73} James was of African descent, while Myrtle was not.\textsuperscript{74} The court noted that this marriage, if it had been celebrated and solemnized by all the priests, bishops, ministers, and civil authorities, authorized to perform marriage ceremonies in this state, would be within the prohibition of the statutes of this state, and was unlawful, under the clear and express language of the statutes and the Constitution of this state.\textsuperscript{75}

However, that did not end the matter, since it was claimed that Creek tribal law rather than Oklahoma law determined the marriage’s validity.\textsuperscript{76} The court rejected that Creek law governed, suggesting instead that the state police power included the authority to determine who could marry whom.\textsuperscript{77}

Even if one brackets that the Fourteenth Amendment imposes limits on the power of the states to prohibit marriages on the basis of race,\textsuperscript{78} the Blake court was addressing the wrong question. Given that the marriage was celebrated according to tribal law on tribal lands and involved a member of the tribe,\textsuperscript{79} the sovereignty’s power to determine who could marry whom would militate in favor of the marriage’s validity. The question before the Blake court was whether a marriage in accord with the law of the sovereign at the time of celebration would be recognized by Oklahoma.

Consider Scott v. Epperson,\textsuperscript{80} in which the validity of the marriage between Lucy Grayson, who was of African descent\textsuperscript{81} and James Scott, who was not,\textsuperscript{82} was at issue. Their ceremonial marriage in Indian Territory\textsuperscript{83} in accord with local law\textsuperscript{84} was prior to Oklahoma’s becoming a state, and thus preceded the state

\textsuperscript{73} Id. at 878.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 879 (noting defendant’s assertion that “the marriage law of the state is not applicable to marriages between citizens of the Creek Nation, and that the Legislature of the state cannot pass any laws regulating marriages between Indians, and assert as a reason therefor that the United States reserved the right to legislate and regulate marriages between citizens of the Five Civilized Tribes, and that the state statute has no application”).
\textsuperscript{77} Id. (“the laws regulating marriages come clearly within the police power of the state, and, in the exercise of the state's sovereign right, it has the sole and only power within the state to regulate who shall, or who shall not, marry”).
\textsuperscript{78} See Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia’s antimiscegenation law)
\textsuperscript{79} See Blake, 220 P. at 878 (“Myrtle Segro [was] . . . three-fourths Indian”).
\textsuperscript{80} 284 P. 19 (Okla. 1930).
\textsuperscript{81} Id. at 19.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 20 (“We are of the opinion that there was no inhibition against the marriage of Lucy Grayson, who was of African descent, and James Scott, a full-blood Indian, in the Indian Territory in 1903.”).
statute and constitutional provision prohibiting intermarriage.\textsuperscript{85} The Oklahoma Supreme Court reasoned that the act prohibiting interracial marriage was intended to preclude the celebration of such marriages rather than to annul those marriages that had already been celebrated in accord with local law,\textsuperscript{86} and thus that the marriage was valid.

Yet, the marriage at issue in Blake had also been in accord with local law, and it was not as if the couple had been contracting a marriage that they knew to be prohibited. Blake and Eggers are reconcilable only if the court believed that Oklahoma rather than Creek law governed the marriage at issue in Blake. While the federal language creating the state of Oklahoma provided that Native law would not be preempted by the new state’s law,\textsuperscript{87} Oklahoma courts sometimes acted as if tribal authority had been destroyed upon the creation of the state.\textsuperscript{88}

If it had been true that the tribal authority had been destroyed upon Oklahoma statehood, then the marriage in question in Blake would have taken place within the jurisdiction of the state and would have to have been evaluated in light of state law. Interjurisdictional recognition would not have been at issue. Rather, the marriage simply would not have been valid, because not in accord with governing law.\textsuperscript{89} However,

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\textsuperscript{85} See id. ("But it is contended that even though James Scott and Lucy Grayson were legally married in 1903, the marriage relation could not be maintained between them after statehood by reason of the applicable provisions of the statutes and constitution, which were put in force over the Indian Territory at statehood.").
\textsuperscript{86} Id. at 21 ("We are of the opinion that section 7499 was never intended as an annulment act, but as to those domiciled within the state it was merely intended to prohibit future marriages between such persons.")
\textsuperscript{87} See Stacy L. Leeds, Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah, 43 Tulsa L. Rev. 5, 10 (2007).
\textsuperscript{88} Cf. id. at 11-12 (discussing the “misconception that Oklahoma had already obtained full jurisdictional powers everywhere within the state”).
\textsuperscript{89} Cf. In re Walker's Estate, 46 P. 67, 69 (Ariz.Terr. 1896)
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There are not two sovereignties here, one for the power owning the reservation and one for the territory. There is only one sovereignty here,-that of the United States,-which delegates its power to the territory to legislate on all rightful subjects of legislation; and the legislative acts of the territory are operative in all parts of the territory, including Indian and all other executive or legislative reservations, unless expressly forbidden by the congress of the United States.

See also Wilbur's Estate v. Bingham, 35 P. 407, 409 (Wash. 1894) (holding that intermarriage between Indian and white was not valid in light of governing territorial law, notwithstanding that the marriage was in accord with tribal custom).
because tribal law had not been preempted or destroyed when Oklahoma became a state, Oklahoma law did not govern a marriage celebrated by a tribal member on Native lands in accord with local custom. Had the Blake court followed the majority rule and applied tribal law to determine the validity of the marriage, the result would have been quite different.  

The analysis that should have taken place in Blake must not be conflated with the analysis that should take place in a different kind of scenario. Eggers v. Olson involved an interracial marriage between Oklahoma domiciliaries who had gone to Arkansas to marry so that they could evade Oklahoma law. Because the law of the domicile at the time of the marriage is generally understood to determine the validity of the marriage at the time of its celebration, the Oklahoma court held that the marriage was invalid. Here, the Oklahoma court was correct in applying Oklahoma law, although it is of course a separate issue whether Oklahoma could maintain such a law without violating federal constitutional guarantees.  

State attempts to prevent interracial marriage imposed numerous burdens. Not only did it destroy families that might have been together for decades, but the fact that different states prohibited different

90 See Pacquet’s Estate, 200 P. at 914 (suggesting that an interracial marriage invalid according to Oregon law would have been valid had it been celebrated in accord with tribal law on tribal lands).
91 231 P. 483 (Okla. 1924).
92 Id. at 483-84 (“About two years prior to her death she [Emily Lewis, a Choctaw Indian] went out of the state with a negro by the name of William Yates, and married him at Ft. Smith in the state of Arkansas on April 13, 1914, and after about a week returned to her home with him in Haskell county, where they lived together until her death.”).
93 See Restatement (First) of the Conflict of Laws § 134 (1934); Restatement (Second) of the Conflict of Laws § 283 (1971) (the validity of a marriage celebrated in accord with the law of the state of celebration is determined by the law of the domicile at the time of the marriage).
94 Eggers, 231 P. at 485
95 Antimiscegenation laws were not struck down until the Court decided Loving v. Virginia, 388 U.S. 1 (1967).
96 See Pacquet’s Estate, 200 P. at 914 (invalidating marriage of couple that had been together for over three decades).
kinds of marriages meant that certain marriages were permissible in some states but impermissible in others. For example, Oklahoma law was designed to prevent individuals of African descent from marrying individuals not of African descent.\footnote{Eggers, 231 P. at 484 (“These provisions of our law apply to all persons, citizens, residents, and transients in the state, and are intended to prohibit marriage of the descendants of the African race with any other race in this state.”).} Arizona law was designed to prevent whites from marrying non-whites.\footnote{State v. Pass, 121 P.2d 882, 884 (Ariz. 1942) (“The evident purpose of the miscegenation statute was to prevent the named races, to wit, Indians, Negroes, etc., from mixing their blood with the blood of the white man.”).} A marriage permissible in Arizona, e.g., one between someone of African descent with someone who was a full-blooded Indian, would not be permissible in Oklahoma. Further, as the Arizona Supreme Court recognized, the Arizona law had a special twist, namely, individuals who were part Caucasian were unable to marry anyone. The court explained that “a descendant of mixed blood such as defendant cannot marry a Caucasian or a part Caucasian, for the reason that he is part Indian. He cannot marry an Indian or a part Indian because he is part Caucasian. For the same reason a descendant of mixed Negro and Caucasian blood may not contract marriage with a Negro or a part Negro, etc.”\footnote{Id.} While recognizing that this was an “absurd” result,\footnote{Id.} the court did not strike down the statute but instead expressed hope that “the legislature will correct it by naming the percentage of Indian and other tabooed blood that will invalidate a marriage.”\footnote{Id.}

While states differed in who would be prohibited from marrying whom, they agreed as a general matter that marriages violating their antimiscegenation laws were void because violating an important public policy.\footnote{See, for example, In re Atkins' Estate, 3 P.2d 682, 686 (Okla. 1931) (“[T]he pretended marriage between this Indian and negro was illegal and void. No marriage in fact could have been consummated in Oklahoma, at the time heretofore indicated or thereafter, between a negro and an Indian or white, either by ceremony, common law, or statute.”); State v. Miller, 29 S.E.2d 751, 752 (N.C. 1944) (“The section of the Constitution and the statute referred to above, provide in substance, that all marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, shall be void.”); Grant v. Butt, 17 S.E.2d 689, 692 (S.C. 1941) Section 1438 of the Code 1932, provides: “It shall be unlawful for any white man to intermarry with any woman of either the Indian or negro races, or any mulatto, mestizo, or half-breed, or for any white woman to intermarry with any person other than a white man, or for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage, or attempted marriage, shall be utterly null and void and of none effect.} So, too, polygamous marriages as a general matter were viewed as void because violating an
important public policy. It is thus of some interest to figure out why courts felt compelled to recognize marriages that were considered void in the forum jurisdiction.

E. Why Must Tribal Marriages Be Recognized

There was a surprising amount of variation in the reasons offered for why tribal marriages had to be recognized. For example, the Minnesota Supreme Court explained that the “general rule is that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages, where the tribal relation still exists.” This justification implies that tribal marriages, like other marriages, should be given deference, although the court does not seem to be suggesting that tribal marriages should be given more deference than other kinds of marriages.

In contrast, the Nebraska Supreme Court suggested that tribal practices were owed greater deference, perhaps as a matter of federal supremacy. At issue in Ortley v. Ross was the validity of a polygamous marriage. The court noted that the union at issue would not have been valid “if this marriage had taken place between citizens of the United States in any state of the Union.” However, a different rule is to be

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103 See Whitney v. Whitney, 134 P.2d 357, 359 (Okla. 1942) (“But, if one of the parties to a so-called common law marriage has a living spouse of an undissolved marriage, the common law marriage attempted is as polygamous and plural and, therefore, as void as a ceremonial marriage attempted under the same circumstances.”); Heflinger v. Heflinger, 118 S.E. 316, 320 (Va. 1923)

104 Earl v. Godley, 44 N.W. 254, 255 (Minn. 1890). See also Morgan v. McGhee, 1844 WL 1857, *1 (Tenn. 1844) (“Our courts of justice recognize as valid all marriages of a foreign country, if made in pursuance of the forms and usages of that country; and there is no reason why a marriage made and consummated in an Indian Nation should be subject to a different rule of action.”).

105 110 N.W. 982 (Neb. 1907).

106 Id. at 983 (“as the alleged marriage between the father and mother of the plaintiff was polygamous”)

107 Id.
used if tribal marriages are at issue, namely, “marriages valid by the law governing both parties when made must be treated as valid everywhere.”

The rationales offered by the Minnesota and Nebraska courts were both offered by the Michigan Supreme Court, and an examination of Kobogum v. Jackson Iron Company helps to clarify why jurisdictions were willing to recognize Native American polygamous unions but not other polygamous unions. The Michigan Supreme Court noted that the “United States supreme court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations.” The court understood that this meant that polygamous marriages would be valid according to tribal law (assuming that the tribe recognized polygamous marriage). Yet, a recognition that the marriage was valid where celebrated would not end the matter—the question for most courts was not whether the marriage was valid according to tribal law, but whether the marriage valid in accord with tribal law would be recognized by the forum state.

Suppose, for example, that a state had permitted polygamous unions and that the validity of such a union was at issue in another state. The court determining whether the marriage was valid might admit that the union was recognized in the other state but nonetheless deny its validity locally. Thus, a finding that one jurisdiction permitted the celebration of certain unions would be no guarantee that such a union would be recognized in a different jurisdiction.

The Kobogum court noted that there were no federal laws or treaties “on the subject of Indian marriages,” which would have “interfered with Indian usages on the subject.” Thus, the court suggested, the federal government might have prohibited polygamous unions but chose not to do so, instead

108 Id. See also Boyer v. Dively, 1875 WL 7701, *12 (Mo. 1875) (“Although located within the State lines, yet so long as their tribal customs are adhered to, and the Federal Government manages their affairs by agents, they are not regarded as subject to the State laws, so far at least, as marriage, inheritance, etc. are concerned.”).
109 Ortley, 110 N.W. at 983 (citing Kobogum v. Jackson Iron Company, 43 N. W. 605 (Mich. 1889). See also Johnson v. Johnson's Adm'r, 1860 WL 5991, *9 (Mo. 1860) (“It is well settled, as a general proposition, that a marriage, valid according to the law or custom of the place where it is contracted, is valid everywhere.”).
110 43 N.W. 602 (Mich. 1889).
111 Id. at 605 (citations omitted).
112 Id. (“The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid.”).
113 See Ortley, 110 N.W. at 983 (“as the alleged marriage between the father and mother of the plaintiff was polygamous”).
114 Kobogum, 43 N.W. at 605.
115 Id.
permitting tribal law and custom to govern domestic relations. By refraining from regulating Native American domestic relations law, the federal government made it possible for the tribes to choose whether to recognize polygamous unions.

The Kobogum court reasoned,

While most civilized nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. 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 so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes.\footnote{116}

Yet, this analysis is much too fast. First, even were a jurisdiction to refuse to recognize Native American polygamous marriages, that would hardly entail that no Native American marriages could be recognized--non-polygamous marriages, whether or not celebrated ceremonially, could be recognized even if polygamous marriages were not. Second, given that states recognize non-polygamous marriages celebrated in countries where polygamy is permissible,\footnote{117} the Kobogum court’s analysis implies that polygamous marriages validly celebrated in such countries would also have to be recognized. After all, the court seemed to believe that either all or no marriages valid where celebrated must be accorded recognition. But this is simply false. Indeed, as the Michigan Supreme Court would itself announce in a later case, polygamous marriages need not be recognized even if valid where celebrated.\footnote{118}

The Kobogum court noted that the tribes “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.”\footnote{119} This point would seem dispositive insofar as the question was whether the marriage was valid where celebrated. However, because as a general matter a polygamous marriage valid where celebrated

\footnote{116}{Id.}
\footnote{117}{See Royal v. Cudahy Packing Co. 190 N.W. 427, 428 (Iowa 1922) (recognizing the contested marriage because although the deceased could have taken four wives, the “marriage between deceased and claimant was not in itself polygamous”).}
\footnote{118}{See In re Miller’s Estate, 214 N.W. 428, 429 (1927).}
\footnote{119}{Kobogum, 43 N.W. at, 605.}
was not viewed as entitled to recognition elsewhere, a polygamous marriage valid in another country would likely nonetheless be denied recognition in the United States.

Suppose that there were no relevant federal law and that the recognition of a plural marriage was to be decided solely in terms of the state’s public policy. Perhaps there would be individual instances in which a plural marriage might be recognized for certain purposes. Or, perhaps, there would be compelling individual circumstances justifying an exception e.g., because an individual had remarried based on the reasonable belief that her spouse was dead but then had subsequently discovered that her first husband was alive after all—the second (and plural) marriage might be recognized for all purposes as long as the first husband divorced his wife so that the second marriage could continue undisturbed.

Even were such exceptions recognized at all, however, they would presumably be rare. Many states refuse to recognize polygamous marriages for any purpose, even if validly celebrated elsewhere. Just as a state might refuse to recognize a polygamous union celebrated in another country, states would seem free to refuse to recognize a polygamous union celebrated according to tribal usages. Further, there would be Supreme Court precedent to justify such a refusal. For example, in Lee Lung v. Patterson, the United States Supreme Court upheld a refusal to permit the second (polygamous) wife of Lee Lung to enter the

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120 See Earle v. Earle, 126 N.Y.S. 317, 320 (N.Y. App. Div. 1910) (“The [polygamous] marriage, being odious by common consent of the nations, is not protected by the rules of international law.”).
121 See Ex parte Chace, 58 A. 978, 980 (R.I. 1904) (“a polygamous marriage, although valid and binding in the country where it was contracted, would probably be denied validity in all countries where such unions are prohibited”).
122 Polygamous marriages have sometimes been recognized for certain purposes. At issue in In re Dalip Singh Bir’s Estate, 188 P.2d 499 (Cal.App.1948) was the estate of an individual who had died intestate. See id. at 499. The California appellate court recognized the inheritance rights of both wives. See id. at 502.
123 See Steinke v. Steinke, 357 A.2d 674, 683 (Pa. Super. 1975) (“There is also what might be described as a good faith bigamy exception. Thus, a husband may obtain a divorce if he returns after an absence of two years, to find that his wife, believing him dead, has remarried; his wife’s second marriage is then undisturbed. The same right is given a wife.”).
124 But see Commonwealth v. Mash, 1844 WL 4192, 1 (Mass. 1844) (“a woman whose husband suddenly left her without notice, and saying, when he went out, that he should return immediately, and who is absent between three and four years, though she have made inquiry after him, and is ignorant of his being alive, but honestly believes him to be dead, if she marries again, is guilty of polygamy”).
125 See, for example, U.S. v. Tenney, 11 P. 472, 479 (Ariz. Terr. 1886) (“Every bigamous or polygamous marriage is void”); State v. Graves, 307 S.W.2d 545, 547 (Ark. 1957) (“The general rule is, of course, that a marriage valid where it is celebrated is recognized as being valid everywhere. Restatement, Conflict of Laws, p. 185. But there are certain exceptions to the rule: (1) Polygamous marriage...”); Marianacci v. Marianacci, 299 N.Y.S. 146, 149 (N.Y. Dom. Rel. Ct. 1937) (“The law does not recognize polygamous marriages, and the court will not, by even indirect, sanction or acquiesce in such marriages.”); U. S. ex rel. Devine v. Rodgers, 109 F. 886, 887 (D.C. Pa. 1901) (suggesting that no foreign polygamous unions would be recognized as valid).
126 186 U.S. 168 ((1902)).
United States, because she was not viewed as his valid wife. Had she been recognized as his lawful spouse, she would have been permitted entry. Further, in a different context, Congress had passed a law prohibiting polygamous marriages, so it could not be thought that as a general matter the federal government believed such unions entitled to recognition.

Basically, although one might expect that there would be one or two instances in which a Native American plural marriage would be recognized because not offensive to the public policy of the state, one would expect that state courts would almost always refuse to recognize such marriages. However, just the opposite was true—as a general matter, such marriages contracted by at least one tribal member on Native lands were recognized if valid in light of tribal law or custom. This surprising result was not adequately explained in any of the opinions.

One plausible explanation of the tendency of state courts to recognize Native American plural marriages is that federal law was playing a role here. While the Kobogum court was correct to note that there were no federal laws or treaties “on the subject of Indian marriages,” such a comment was nonetheless somewhat misleading—it might lead one to think that there were no applicable federal laws when there were federal treaties of some relevance. The Kobogum court noted without elaboration that “treaties made between the United States and this very tribe, which are quite numerous, all recognize heritable relations among them, and in many instances, . . . provided for the Indian families of persons who had other families; recognizing the Indian nation as entitled to say who should share in tribal benefits.” Regrettably, the Kobogum court failed to emphasize the importance of such treaties. Basically, the reference to these treaties suggests that polygamous tribal marriages were recognized, not merely because they were valid where celebrated, but because the treaties required that they be recognized, at least for certain purposes such as inheritance rights.

127 See id. at 173.
128 See U.S. v. Gue Lim, 176 U.S. 459, 468-69 (1900) (“When the fact is established to the satisfaction of the authorities, that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate.”).
129 See Rohwer v. District Court of First Judicial Dist., 125 P. 671, 674 (Utah 1912) (noting that “Congress had passed laws whereby polygamous and plural marriages were prohibited”).
130 Cf. In re Dalip Singh Bir's Estate, 188 P.2d 499 (Cal.App.1948). The Dalip Singh Bir court reasoned, “'Public policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties.” See id. at 502.
131 Kobogum, 43 N.W. at 605.
132 Id.
Many of the courts explaining why Native American plural marriages had to be recognized were content to say that a marriage valid where celebrated would be recognized anywhere. While such a justification supports the recognition of such marriages, it does not helpfully distinguish between these unions and those polygamous unions, valid where celebrated, that nonetheless would not be recognized. However, when one also considers that federal law supported the inheritance rights of those born into polygamous unions that were valid in light of tribal law, then it becomes clear that federal action and inaction led to the recognition of the marriages at issue. First, Congress refused to supplant tribal laws and customs with respect to marriage, which made valid those marriages involving at least one tribal member that were celebrated on Native lands in accord with tribal law or custom. Second, the federal government via treaty agreed that tribal family relations as defined by tribal custom and law would be recognized by the United States. Because state law is preempted by valid federal law or treaty, a treaty requiring that families be recognized in light of tribal law would be binding on the states, even if the states would have been free to refuse to recognize the families at issue had there been no treaty.

Suppose that the United States entered into a multilateral treaty specifying that polygamous marriages valid where celebrated would be recognized here. In that event, states would not be free to refuse to recognize such marriages, even if those unions violated an important public policy of the state. Because there was a treaty speaking to the validity of Native American marital unions (at least for purposes of inheritance laws) but no treaty requiring recognition of polygamous unions celebrated in other countries, the states had to recognize the former but were free to decide how to treat the latter.

III. Application of the Tribal Marriage Recognition Practices to Interstate Recognition of Same-Sex Unions

133 See Hallowell v. Commons, 210 F. 793, 796 (8th Cir. 1914) (“the government has never recognized any distinction as to the right of inheritance among the Indians between the children of the first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy.”).
134 See U.S. Const. art VI, sec. 2
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
Commentators sometimes suggest that the recognition of same-sex unions will lead to a parade of horribles including the recognition of polygamous unions.\textsuperscript{135} While the unions are distinguishable,\textsuperscript{136} a consideration of the native American polygamy cases may provide some important lessons for those interested in securing marriage equality.

A. The Danger of Recognizing Same-Sex Unions

Opponents of marriage equality for same-sex couples have offered a variety of argument to justify their position. Some commentators imply that same-sex marriage is too novel and contentious to permit\textsuperscript{137} or, perhaps, that recognition of such unions would be dangerous\textsuperscript{138} and might lead to the recognition of a whole host of currently prohibited relationships.\textsuperscript{139}

Yet, same-sex marriage is becoming much less novel. Further, the prediction that there would be horrible consequences were same-sex relationships officially recognized has not been born out in the jurisdictions recognizing same-sex marriage and civil unions.\textsuperscript{140} Indeed, many of the other arguments offered in support of same-sex marriage bans have also been unpersuasive, having been based either on errors in logic or on wildly implausible empirical claims. For example, the New York Court of Appeals offered two reasons to justify that state’s ban:

\begin{itemize}
  \item \textsuperscript{135} See Kelly Elizabeth Phipps, Note, \textit{Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862-1887}, 95 \textit{Va. L. Rev.} 435, 437-38 (2009) (“Contemporary critics of same-sex marriage invoke legalized polygamy as the inexorable result of expanding marriage rights.”).
  \item \textsuperscript{136} \textit{Cf. In re Marriage Cases, 183 P.3d 384, 434 n.52 (Cal. 2008) (rev’d by referendum)}
  \begin{itemize}
    \item Although the historic disparagement of and discrimination against gay individuals and gay couples clearly is no longer constitutionally permissible, the state continues to have a strong and adequate justification for refusing to officially sanction polygamous or incestuous relationships because of their potentially detrimental effect on a sound family environment.
  \end{itemize}
  \item \textsuperscript{137} See, for example, Lynn D. Wardle, \textit{From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations}, 2008 \textit{B.Y.U. L. Rev.} 1855, 1919 (2008) (discussing “contemporary same-sex marriage and similar contentious novel forms of family relationships”).
  \item \textsuperscript{138} Lynn D. Wardle, \textit{The Attack on Marriage as the Union of a Man and a Woman}, 83 \textit{N.D. L. Rev.} 1365, 1378 (2007) (“the attempt to legalize same-sex marriage or give equivalent legal status and benefits to same-sex couples constitutes a very real and dangerous attack upon the institution of conjugal marriage”).
  \item \textsuperscript{139} See Glen Staszewski, \textit{Reason-Giving and Accountability}, 93 \textit{Minn. L. Rev.} 1253, 1316 (2009) (“opponents of same-sex marriage . . . routinely contend that the legal recognition of gay and lesbian unions would be the first step down a slippery slope that would ultimately foreclose legal prohibitions on minors entering into marriage, polygamy, incest, and even bestiality”); Hema Chatlani, \textit{In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy}, 6 \textit{Appalachian J. L.} 101, 128 (2006) (“The primary argument set forth by opponents of gay marriage is that opening the door to same-sex marriage will result in a parade of horribles, such as bestiality, incest, and polygamy.”)
  \item \textsuperscript{140} Staszewski, supra note 139, at 1317 (“the slippery-slope argument is not supported by the experience of a single jurisdiction that has legally recognized same-sex marriage or registered partnerships”).
\end{itemize}
(1) “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”\textsuperscript{141} The court reasoned that “[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”\textsuperscript{142}

(2) “The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”\textsuperscript{143}

Yet, both justifications were specious. The first rationale presented a false dichotomy and then suggested that the Legislature had acted reasonably when choosing one option rather than the other. But the Legislature did not have to choose between permitting different-sex couples to marry and permitting same-sex couples to marry. On the contrary, as Chief Justice Kaye pointed out in dissent, “[t]here are enough marriage licenses to go around for everyone.”\textsuperscript{144}

Suppose that a Legislature had decided to exclude the elderly from marrying because their sexual relations were less likely to be procreative.\textsuperscript{145} Even were such a law not to offend due process guarantees,\textsuperscript{146} one would wonder why it would be necessary to choose between permitting the elderly and permitting the non-elderly to marry when one might extend marriage rights to both the elderly and non-elderly alike. Because permitting the elderly to marry would in no way undermine the ability or desire of the non-elderly to marry, such a rationale would be an obviously specious attempt to justify a policy that had been adopted for other reasons. So, too, because permitting same-sex marriage would in no way undermine the ability or desire of different-sex couples to marry, such a rationale was obviously a specious attempt to justify a policy that had been adopted for other reasons.

The second rationale was no more persuasive. Even if it would be better for children to grow up with a mother and a father rather than two mothers or two fathers,\textsuperscript{147} that would not be a reason to prevent same-

\textsuperscript{141} Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006).
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 30 (Kaye, C.J., dissenting).
\textsuperscript{145} Cf. id. (Kaye, C.J., dissenting) (“Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry.”).
\textsuperscript{146} See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“the right to marry is of fundamental importance for all individuals”).
\textsuperscript{147} See Michael S. Wald, Adults’ Sexual Orientation and State Determinations Regarding Placement of Children, 40 Fam. L.Q. 381, 386 (2006) (“the claim that children raised with two heterosexual parents do
sex couples from marrying. After all, many couples, whether composed of individuals of the same-sex or of different sexes, wish to marry but have no interest in raising children. Assuming that marriage provides benefits to society and the individuals themselves that are unrelated to the having or raising of children, the fact that a couple will not have children should not be a bar to their being able to marry.

Suppose that it were true that same-sex couples would be good parents but not as good as different-sex couples and, further, that there was no reason to permit individuals to marry unless they would be parenting children. Even so, the rationale provided would not make sense. No state precludes all but the most optimal parents from marrying, and with good reason. Were the state to do that, there would be many children who would be denied the opportunity of being in a good, albeit not optimal, home. By allowing the state to ban same-sex marriage, the state was being permitted to reduce the number of marital homes in which children might thrive.

It was almost as if the court believed that same-sex couples would only be raising children if permitted to marry. But that has not been the experience in New York, where a growing number of same-sex couples are having and raising children. Indeed, New York permits each member of a same-sex couple to be recognized as the legal parent of the same child, so this rationale for denying same-sex couples the right to marry makes even less sense. Basically, the New York court justifies the state’s same-sex marriage ban by appealing to the interests of children, notwithstanding that same-sex couples are having and raising children and notwithstanding that precluding same-sex couples from marrying will deprive the children that such couples are raising of benefits to which they would otherwise be entitled.

better with respect to their academic, social, emotional, or behavioral development than children raised by two same-sex parents is not supported by the evidence”).

148 Hernandez, 855 N.E.2d at 31 (Kaye, C.J., dissenting) (“Marriage is about much more than producing children.”).

149 See id. at 32 (Kaye, C.J., dissenting) (discussing the “tens of thousands of children . . . currently being raised by same-sex couples in New York”).


151 See Hernandez, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (“Civil marriage provides tangible legal protections and economic benefits to married couples and their children, and tens of thousands of children are currently being raised by same-sex couples in New York. Depriving these children of the benefits and protections available to the children of opposite-sex couples is antithetical to their welfare.”).
Many of the reasons cited to support same-sex marriage bans are specious. Arguably, the right to marry a same-sex partner is protected by the Federal Constitution. Nonetheless, the focus here is not on whether the Federal Constitution protects such a right but merely on the lessons offered by the Native American polygamy cases for interstate recognition practices.

B. DOMA

As a general matter, tribes no longer recognize polygamous marriages. However, two same-sex tribal marriages have recently been celebrated, so it might seem that such marriages would have to be recognized in all states, just as polygamous marriages had to be recognized.

Were such recognition required, the jurisprudence suggests that states would be bound to recognize such unions only if they (1) were contracted on Native lands, (2) in accord with tribal custom or law, and (3) by at least one tribal member. However, such interjurisdictional recognition is not in fact required, because the Federal Defense of Marriage Act specifically authorizes the non-recognition of same-sex marriages celebrated elsewhere. The relevant provision of that Act reads:

No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is

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152 See Matthew Coles, Lawrence v. Texas & the Refinement of Substantive Due Process, 16 Stan. L. & Pol'y Rev. 23, 49 (2005) (“The most obvious constitutional problem with the exclusion of same-sex couples from marriage is that it interferes with the federal constitutional right to marry.”).

153 As a general matter, the tribes no longer engage in the practices described here. See Fletcher, supra note 10, at 54 (“Times have changed. Most, if not all, Indian tribes no longer recognize polygamous marriages and Indian people tend to utilize the divorce laws as much as non-Indian people.”).

154 See Jeffrey S. Jacobi, Note, Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy, 39 U. Mich. J.L. Reform 823, 824 -25 (2006) (noting that in 2004, “two Cherokee women applied for and received a marriage license in Oklahoma”); id., at 827 (“In a ceremony presided over ‘by a minister certified by the Cherokee Nation’ and attended by friends, family, and the media, the couple wed at a park.”) (citation omitted). See also Bill Graves, Local News, Portland Oregonian 5/22/09, 2009 WLNR 9832995 (“A Coquille Indian Tribe law allowing same-sex marriage took effect this week, and two women plan to marry Sunday on the tribe’s Coos Bay reservation. Tribal member Kitzen Branting, 26, and her partner, Jeni Branting, 28, of Edmonds, Wash., will become the first same-sex couple to legally marry in Oregon, though their marriage will be recognized only by the tribe.”)

155 See text accompanying notes 27-28 supra (specifying these limitations).

156 Fletcher, supra note 10, at 70 (“DOMA allows, however, that if a tribe authorizes or recognizes same-sex marriage, states and other tribes have no obligation to recognize that [relationship].”).
treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.\textsuperscript{157}

Suppose that DOMA were repealed. Then, subject to the limitations mentioned above,\textsuperscript{158} some same-sex marriages would be entitled to recognition, assuming that such marriages were still permitted by tribal law.\textsuperscript{159} Nonetheless, while such interjurisdictional recognition might have symbolic value, there would presumably be so few same-sex marriages meeting the relevant criteria that the issue of interjurisdictional recognition would rarely if ever arise.\textsuperscript{160} That said, a consideration of DOMA and of the polygamous marriage cases raising an intriguing possibility, even though there may be no realistic likelihood of this occurring in the foreseeable future.

C. The Lessons of DOMA and the Native American Polygamous Marriage Cases

Despite President Obama’s having announced his support of DOMA’s repeal,\textsuperscript{161} the United States Department of Justice recently filed a brief in support of DOMA’s constitutionality.\textsuperscript{162} Further, there seems to have been little or no effort in Congress to repeal DOMA.\textsuperscript{163} Given this, it seems quite unlikely that Congress would not only repeal DOMA but would affirmatively act to protect same-sex relationships. Nonetheless, the lessons of DOMA and the Native American polygamy cases might be explored, if only as an “exercise of imagination - the ‘what if?’.”\textsuperscript{164}

\textsuperscript{158} See text accompanying note 155 supra.
\textsuperscript{159} See Fletcher, supra note 10, at 55 (“there remains the distinct possibility that one or more of the 560-plus federally recognized Indian tribes will take action to recognize same-sex marriage in their jurisdictions.”); but see id. at 70 (2006) (suggesting that the tribes might decide not to recognize such unions) and Jacobi, supra note 154, at 827 (“Unlike the Cherokee, not all federally recognized Native American tribes have the ability to issue marriage licenses, and those that can issue marriage licenses do so rarely.”).
\textsuperscript{160} See Jacobi, supra note 154, at 827 (suggesting that this issue would as a practical matter arise rarely if ever).
\textsuperscript{161} See Stephen Dinan and Christina Bellantoni, Gay Man Eyed for Pentagon Post: Obama Still Criticized for Slow Action on Pledge, Wash. Times (D.C.) A01, 6/18/09, 2009 WLNR 11657538 (discussing the view of gay rights groups with respect to “how far Mr. Obama still has to go to make good on his campaign promises . . . to repeal the 1996 Defense of Marriage Act (DOMA).”).
\textsuperscript{163} See Carolyn Lochhead, Activists Shrug at Obama's Action, S.F. Chron. A1, 6/18/09, 2009 WLNR 11637722 (“there is no effort to repeal DOMA”).
While Congress clearly could repeal DOMA, a separate question is whether Congress could require states to recognize same-sex marriages validly celebrated elsewhere. After all, it might be argued that Congress’s forcing states to recognize marriages valid in other states would violate a principle of federalism.

Yet, a few points might be made about DOMA and federalism. As an initial matter, it is not plausible to think of DOMA as simply a federalism measure. After all, DOMA did not give states the power to refuse to recognize any marriage that violates public policy. Instead, it picks out only one kind of marriage and subjects that union to unique treatment. If Congress had been genuinely interested in promoting federalism, it would have given states the option not to recognize any marriage validly celebrated elsewhere or, perhaps, the option not to recognize any marriage that violated an important public policy. DOMA masquerades as a federalism statute but is really designed to impose undeserved burdens on a disfavored minority.

There is some reason to question the sincerity of those describing DOMA as a federalism statute. Indeed, some DOMA proponents defend the proposed Federal Marriage Amendment in terms of federalism, even though such an amendment would have stripped states of the power to recognize same-sex marriage and thus would seem to undermine principles of federalism.

Nonetheless, suppose that it were argued that Congress’s requiring the recognition of same-sex unions celebrated elsewhere would somehow violate the Tenth Amendment to the United

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DOMA does not permit each state to decide whether to recognize a marriage celebrated in another state, as one might expect a federalism statute to do. It does not even permit each state to refuse to recognize a marriage validly celebrated elsewhere if that marriage violates an important public policy of the forum state. Rather, it picks out one kind of marriage, namely, same-sex marriages, and imposes this unique disability on them.


States Constitution. Such an argument would be in error, because the Tenth Amendment has been construed as not limiting the powers of Congress expressly conferred by the Constitution, and the power described here is expressly reserved for Congress.

At least two separate considerations support the claim that considerations of federalism would not bar Congress from requiring recognition of same-sex unions were it to desire to do so. First, the Native American polygamy cases suggest that the federal government could enter into a treaty with another country, say, Canada, that included a provision specifying that same-sex marriages validly celebrated there would be recognized here. Second, many supporting the constitutionality of DOMA have suggested that Congress has broad and possibly plenary powers with respect to fashioning choice of law or full faith and credit rules. But if Congress has plenary powers with respect to such rules, then it of course could require recognition of same-sex unions validly celebrated in another state without violating constitutional guarantees.

It is by no means universally believed that Congress has plenary powers under the Full Faith and Credit Clause and, indeed, some argue that DOMA is unconstitutional. Yet, some of the

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169 See U.S. Const., amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

170 New York v. U.S., 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.")

171 See notes 172-77 and accompanying text infra.

172 See Missouri v. Holland, 252 U.S. 416 (1920) (suggesting that the treaty power is very broad). Indeed, the Court suggested that treaties would be valid and binding as long as made under the authority of the United States. See id. at 432 ("treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land").

173 See, for example, Mark D. Rosen, Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires, 90 Minn. L. Rev. 915, 965 (2006) ("On numerous occasions, however, the Court has indicated in dicta that Congress has the power under the Effects Clause to create full faith and credit rules that differ from those that the Court itself has identified."); Daniel A. Crane, The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act, 6 Geo. Mason L. Rev. 307, 336 (1998) ("evidence clearly demonstrates that the Framers intended that Congress be granted plenary power to determine the extent of faith and credit to be accorded state acts, records, and proceedings in sister states"); Mathew D. Staver, Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria, 2 Liberty U. L. Rev. 459, 468 (2008) ("Under the Full Faith and Credit Clause, the Constitution gives the Congress the power to determine the ‘effects’ of an act, record, or judicial proceeding of another state.").

174 See U.S. Const., art IV, sec. 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and proceedings shall be proved, and the Effect thereof.").
perceived difficulties of DOMA, e.g., that it seems to violate equal protection guarantees, would not similarly be implicated by a statute designed to prevent undeserved burdens from being imposed on a despised minority. Further, those who believe that the Clause permits Congress to increase but not decrease the credit due to other states’ judgments or laws would argue that DOMA, but not a statute requiring recognition of same-sex unions validly celebrated elsewhere, would violate constitutional guarantees. Thus, it would seem that many DOMA proponents and opponents would all agree that Congress would have the power to require states to recognize same-sex unions validly celebrated in other states, although they might disagree with the wisdom of such an action. Further, the Native American polygamous marriage jurisprudence suggests that it would not be unprecedented for Congress to require the recognition of marriages that are viewed by the states as violating local public policy. Thus, there would be no constitutional bar to Congress’s requiring interstate recognition of same-sex unions validly celebrated in the domicile.

IV. Conclusion

Past practices regarding the recognition of Native American polygamous practices suggest that Congress can require states to recognize marriages that are thought to violate an important state public policy. Arguably, states might be constitutionally required to recognize same-sex unions because lacking a sufficiently important reason to justify such a refusal, but that is not the argument here. All that is argued here is that Congress could require such recognition and that the existing jurisprudence suggests both that such a requirement would not be unprecedented and that the states would have to recognize such unions as a matter of federal supremacy.

It is not claimed here that Congress is going to repeal DOMA anytime soon and is certainly not claimed that Congress is ready or willing to mandate the interstate recognition of same-sex marriages. It is merely claimed that the example provided by the Native American polygamy

175 See, for example, Mark Strasser Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution, 58 U. Pitt. L. Rev. 279 (1997) (suggesting that DOMA is unconstitutional for a variety of reasons).
176 See generally Strasser, supra note 166 (suggesting that DOMA is unconstitutional because motivated by animus).
cases is helpful to consider in the same-sex marriage debate for a reason quite different from the one usually prompting its being mentioned in the same-sex marriage debate.

Same-sex marriages are sufficiently different from polygamous marriages that the recognition of one will hardly require the recognition of the other, as should be clear when one considers that those states recognizing same-sex unions do not also recognize polygamous unions. Nonetheless, a consideration of the Native American polygamy cases illustrates that Congress not only can but has required states to recognize marriages, notwithstanding those states having an announced public policy against such recognition.

While it is not claimed that Congress will adopt such a tack in the foreseeable future, it is suggested that there are good policy reasons to support such a statute. Something as fundamental as one’s marriage should not be permitted to go in and out of existence depending upon where one’s plane lands nor be the kind of status that one could be forced to sacrifice so that one could get a new job to support one’s family. The current system puts interests at risk that are simply too important to be left the wishes, whims, or prejudices of individual legislatures. It can only be hoped that Congress will sometime completely reverse course, not only repealing DOMA but acting in a way to secure for same-sex couples and their families some of the benefits and security that most other people can simply take for granted.