

4-1-2010

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

Mark P. Strasser

Capital University Law School, mstrasser@law.capital.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>



Part of the [Family Law Commons](#), and the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. Third World L.J. 207 (2010), <http://lawdigitalcommons.bc.edu/twlj/vol30/iss2/1>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

TRIBAL MARRIAGES, SAME-SEX UNIONS, AND AN INTERSTATE RECOGNITION CONUNDRUM

MARK P. STRASSER*

Abstract: This Article focuses on the reasons for state and federal recognition of Native American polygamous unions and the implications of states' recognition of these unions for the validity of same-sex marriages across state lines. It discusses some 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 locally. This Article also analyzes the significance of the recognition of these unions for the debate surrounding recognition of same-sex unions. The historical treatment of Native American polygamous unions suggests Congress has the power to assure that same-sex couples have the same rights and protections as do different-sex couples as long as their marriages were valid in the domicile at the time of celebration.

INTRODUCTION

Opponents of same-sex marriage suggest that the recognition of such marriages will lead to the recognition of polygamous marriages.¹ This argument implies both 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. Neither of these implicit contentions is correct. Same-sex and polygamous unions differ in important ways.² Moreover, the United States has recog-

* Trustees Professor of Law, Capital University Law School.

¹ See Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 230 n.105 (1999) (“[T]he recognition of same-sex marriage might have a slippery-slope effect leading to recognition of relationships such as polygamy.”); 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.”).

² See generally Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1505 (1997) (discussing some of the differences between same-sex marriage and Mormon polygamy).

nized Native American polygamous unions as a matter of course.³ Tribes recognized marriages that states customarily considered void for violating an important public policy of the state.⁴ Nonetheless, most states recognized those unions as valid, even though these unions would have been void had they been celebrated on non-tribal land.⁵

This Article focuses on why Native American polygamous unions were recognized by federal and state governments. It explores what states' recognition of these unions means for the validity of same-sex marriages across state lines. Part I describes some 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 II analyzes what recognition of these unions means for the debate surrounding recognition of same-sex unions. This Article concludes by arguing that the historical treatment of Native American polygamous marriages suggests Congress has the power to assure same-sex couples the same rights and protections that almost all other families enjoy when traveling through or moving to other states.

I. TRIBAL DOMESTIC RELATIONS PRACTICES

Historically, Native American marriage practices were given deference by both the federal government and the states.⁶ Congress did not limit the types of tribal unions that the federal government would recognize.⁷ Similarly, states recognized Native American unions as long as they were valid under tribal customs and laws.⁸ In doing so, the states did not discuss whether these unions would have been recognized had they involved no Native Americans.⁹ Unfortunately, courts did not offer detailed explanations as to why such unions would be recognized.¹⁰ They did, however, imply an unspoken rule

³ See, e.g., *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889); *Ortley v. Ross* 110 N.W. 982, 983 (Neb. 1907).

⁴ See *Scott v. Epperson*, 284 P. 19, 19 (Okla. 1930); *Blake v. Sessions*, 220 P. 876, 878 (Okla. 1923).

⁵ See, e.g., *James v. Adams*, 155 P. 1121, 1122 (Okla. 1915); *Cyr v. Walker*, 116 P. 931, 934 (Okla. 1911).

⁶ See, e.g., *Kobogum*, 43 N.W. at 605; *Earl v. Godley*, 44 N.W. 254, 255 (Minn. 1890); *Ortley v. Ross*, 110 N.W. 982, 983 (Neb. 1907).

⁷ See, e.g., *James*, 155 P. at 1122; *Cyr*, 116 P. at 934.

⁸ See *Hallowell v. Commons*, 210 F. 793, 800 (8th Cir. 1914).

⁹ See, e.g., *James*, 155 P. at 1122; *Cyr*, 116 P. at 934.

¹⁰ See *Kobogum*, 43 N.W. at 605; *Earl*, 44 N.W. at 255; *Ortley*, 110 N.W. at 983.

making recognition of tribal unions mandatory but allowing local public policy to determine the validity of non-tribal marriages.¹¹

A. Tribes as Separate Sovereign Nations

Before delving into historical aspects of tribal marriage and states' reasons for their recognition, it is important to understand the extent to which tribes can legally regulate their own affairs. A Native American tribe is an unusual legal entity.¹² It is not the legal equivalent of a state within the United States.¹³ It is also not, however, considered a foreign nation existing separately from the United States.¹⁴ This special legal status derives from the Constitution, wherein tribes are explicitly mentioned and are differentiated both from states and from foreign nations.¹⁵

Indeed, the Supreme Court has described Native American tribes as "domestic dependent nations," which are "completely under the sovereignty and dominion of the United States."¹⁶ Yet, in the eyes of the Court, tribes are also separate sovereignties capable of regulating their internal affairs.¹⁷ In *United States v. Wheeler*, the Court explained that "until Congress acts, the tribes retain their existing sovereign powers."¹⁸ The Court further clarified that Native American tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or [withdrawn] by implication as a necessary result of their dependent status."¹⁹ Absent congressional action to the contrary, tribes

¹¹ See *Kobogum*, 43 N.W. at 605; *Earl*, 44 N.W. at 255; *Ortley*, 110 N.W. at 983.

¹² See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755–56 (1998); *Jones v. Meehan*, 175 U.S. 1, 10 (1899).

¹³ See *Kiowa Tribe*, 523 U.S. at 755–56 ("We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States." (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991))).

¹⁴ See *Jones*, 175 U.S. at 10 ("The Indian tribes within the limits of the United States are not foreign nations . . .").

¹⁵ See U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

¹⁶ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁷ 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."). This article will not spell out the implications of domestic dependent nation status or discuss whether some other formulation would more accurately capture the legal status of the tribes. 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.'").

¹⁸ 435 U.S. 313, 323 (1978).

¹⁹ *Id.* (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

can regulate their own internal affairs, including the conditions under which tribal members on Native lands can marry and divorce.²⁰

B. *Deference to Tribal Domestic Relations Law*

It has long been recognized that tribal marital practices may not mirror those of the states.²¹ Because tribes have the authority to govern their members, tribal unions do not have to conform to the laws of the states in which they are located.²² The Supreme Court confronted the question of whether tribal inheritance laws must conform to state inheritance laws in *Jones v. Meehan*.²³ There, the Court addressed whether the eldest son of a polygamous chief would inherit his father's land.²⁴ The son's inheritance hinged on whether the Court followed state or tribal inheritance law.²⁵ Ultimately, the Court looked to "the laws, usages, and customs of the Chippewa Indians," and decided in favor of the eldest son.²⁶ The Court reasoned that Chippewa law controlled because only Congress—and not the state—had the power to substitute state or federal law for tribal law.²⁷ Indeed, "the government has never recognized any distinction as to the right of inheritance among the Indians between the children of the

²⁰ See *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (noting that state law can have force within the boundaries of the reservation); *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); *Talton v. Mayes*, 163 U.S. 376, 380 (1896); *Ex parte Crow Dog*, 109 U.S. 556, 571–72 (1883))); 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." (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2] (Lexis 2005))); Geoffrey D. Strommer & Stephen D. Osborne, "Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska, 22 ALASKA L. REV. 1, 11 (2005) ("The powers of tribal self-government include the authority to make criminal and civil laws for internal affairs. . . . Examples of "internal affairs" subject to tribal legislation include . . . recognition of marriage and divorce . . .").

²¹ See, e.g., *In re Kansas Indians*, 72 U.S. 737, 745–46 (1866) ("The Shawnees have a custom of their own with regard to marriage. Some marry according to the old custom, and some marry by the minister.").

²² See *Worcester*, 31 U.S. at 581 (M'Lean, J., concurring).

²³ See 175 U.S. at 2, 29.

²⁴ *Id.* at 26 (noting that the chief had "two wives, both living at the same time").

²⁵ See *id.* at 2, 29.

²⁶ See *id.* at 31 ("[I]t 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.").

²⁷ See *Jones*, 175 U.S. at 28 (citing *United States v. Shanks*, 15 Minn. 369 (1870)); *In re Kansas Indians*, 72 U.S. at 737.

first wife and the children of a polygamous consort, where the Indians by their customs, while in a tribal state, permitted polygamy.”²⁸

Later, in *United States v. Quiver*, the Supreme Court noted a well-established Congressional policy to “permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws.”²⁹ The Court further noted that this deference to tribal custom and law was accorded even to polygamy and revoked only “when Congress expressly or clearly directs otherwise.”³⁰ Considering in that case whether a federal criminal statute making adultery a crime could be enforced against two adulterous Native Americans, the Court held that the adultery law did not apply to the Native Americans because “bigamy, polygamy, incest, adultery [and] fornication . . . always hav[e] been left to the tribal customs and laws.”³¹

II. SHOULD THE TRIBAL MARRIAGE BE RECOGNIZED?

Although the states and the federal government usually do not interfere with tribal domestic relations, several issues should be addressed clearly and separately when analyzing cases addressing the validity of Native American marriages. The first of these issues is whether the marriage was valid where celebrated. Even if valid where celebrated, a different issue is whether that marriage would also be recognized in a different jurisdiction where such marriages were prohibited. Finally, the reasons behind the marriage’s recognition should be delineated.

A. Was the Marriage Valid Where Celebrated?

As a general matter, courts have held that Native American marriages established in accord with tribal customs and usages were valid,

²⁸ *Hallowell*, 210 F. at 799.

²⁹ 241 U.S. 602, 603–04 (1916).

³⁰ *Id.* at 605–06; see also *Hallowell*, 210 F. at 800 (“[T]he 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.”). To date, Congress has not expressly directed polygamous tribal unions be declared void, although the federal government has attempted to influence tribal marriage practices in other ways. See *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.”); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1358 n.233 (1998) (discussing an attempt by the Commissioner of Indian Affairs to discourage plural marriages among the tribes).

³¹ *Quiver*, 241 U.S. at 605.

as long as the marriage involved at least one tribal member and were on Native American lands.³² The latter qualifications were important because tribal and state marriage practices often had different rules regarding: (1) who could marry whom; (2) the formal requirements of marriage; and (3) the number of spouses in a marriage. As such, determining the validity of a tribal marriage under tribal law was a fact-intensive inquiry.

For example, some tribes did not require any formal ceremony in order for a couple to be considered married.³³ Instead, these tribes merely required the parties to cohabit as husband and wife.³⁴ This practice mirrored common law marriage, in that such marriages also do not require any formal ceremony.³⁵ Other tribes, however, would not accept mere cohabitation and instead required evidence of an

³² Many of the cases involved marriages between a member and a non-member of the tribe. *See, e.g.*, *Scott v. Epperson*, 284 P. 19, 19 (Okla. 1930); *Blake v. Sessions*, 220 P. 876, 876 (Okla. 1923); *Cyr v. Walker*, 116 P. 931, 934 (Okla. 1911). In *Cyr v. Walker*, the court explained:

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.

116 P. at 934 (citing *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 602 (Mich. 1889); *Boyer v. Dively*, 58 Mo. 510, 510 (1875)).

³³ *Cyr*, 116 P. at 934.

³⁴ *Id.* (“Mere meeting and co-habitation as husband and wife constituted a marriage . . .”).

³⁵ *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). In *In re McLaughlin*, the court noted:

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.

Id. Montana’s common law marriage requirement states that the party 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.” *State v. Bullman*, 203 P.3d 768, 771–72 (Mont. 2009) (citing *In re Estate of Ober*, 62 P.3d 1114 (Mont. 2003)).

agreement by the parties to be married.³⁶ This approach is similar to the approach used by some states.³⁷ Other tribes had several criteria by which to determine whether an individual was married, while others only required that one of several criteria be met for the relationship to be recognized. For example, in the Choctaw tribe, individuals could enter into a valid marriage by participating in a Native ceremony, being married by a minister, or simply living together as husband and wife.³⁸

While there were similarities between state and tribal marriage practices, there were important differences as well. For example, when a common law marriage has been contracted, states would require that the union be dissolved formally.³⁹ In contrast, some tribes

³⁶ 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, 296 (Mich. 1883). In *Compo v. Jackson*, the court commented:

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.

Id.

³⁷ 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”).

³⁸ See *Wall v. Williams*, 11 Ala. 826, 829 (1847). In *Wall v. Williams*, the court said:

[A]nother 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.

Id.

³⁹ See *Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 127 (Tex. Ct. App. 2005) (“[W]hether 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. Ct. 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).

did not require any formal ceremony to dissolve a marriage.⁴⁰ Instead, the tribe required only separation of the parties.⁴¹

The differences between state and tribal marriages forced courts charged with determining a marriage's validity to consider a number of factors.⁴² First, they would determine what the particular tribal practices and usages were.⁴³ Second, they would determine whether

⁴⁰ See *La Framboise v. Day*, 161 N.W. 529, 530–31 (Minn. 1917); *Earl v. Godley*, 44 N.W. 254, 254; *Cyr*, 116 P. at 934.

⁴¹ See *La Framboise*, 161 N.W. at 530–31 (“According to the custom of the Sioux Indians an Indian marriage might be terminated, and either party be at liberty to marry again, by mere abandonment, without further ceremony.”); *Cyr*, 116 P. at 934 (“[T]he dissolution of such marriage was effected by separation of the parties, . . . 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.”). In *Earl v. Godley*, the court elaborated:

[A]mong the Indian tribe there was a custom or law that any member of the tribe who desired to obtain a wife might purchase one, and the man and woman would thereupon, in accordance with such custom, live and cohabit together as husband and wife without other or further marriage ceremony; and that, in accordance with the usage and established custom prevailing among them, the parties might either of them also divorce themselves by dismissing or abandoning the other, without further ceremony, and thereupon either were at liberty to take another husband or wife

44 N.W. at 254.

⁴² See, e.g., *State v. Pass*, 121 P.2d 882, 882 (Ariz. 1942); *Palmer v. Cully*, 153 P. 154, 155 (Okla. 1915); *Cyr*, 116 P. at 931. The court in *Palmer v. Cully* found that the issues for review included “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.” *Palmer*, 153 P. at 155. Often, courts were asked to determine whether or when parties had been married upon death of one of the parties so as to distribute the assets of an estate. *Cyr*, 116 P. at 931. In *Cyr*, the court held:

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.

Id. Courts were also asked to determine the validity of marriages for other reasons such as when the marital testimonial privilege was asserted. See *State v. Pass*, 121 P.2d 882, 882 (Ariz. 1942). In *State v. Pass* the court stated:

The principal witness against [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.

Id.

⁴³ See, e.g., *Henry*, 93 N.W. at 643.

the marriage conformed to those practices and usages.⁴⁴ Third, the court would determine where the couple had lived.⁴⁵

The court in *In re Paquet's Estate* used these factors to determine whether a couple, Ophelia and Fred Paquet, had been legally married and thus whether Ophelia was entitled to her husband's estate.⁴⁶ Although there was evidence that the two had married according to Clatsop Indian custom, the Oregon Supreme Court noted that Ophelia and Fred had not been living on Native lands but, instead, in a place where state law governed.⁴⁷ Oregon law precluded intermarriage between Native-Americans and whites.⁴⁸ As a result, the court held that the marriage was void and of no legal effect.⁴⁹ The court explained that "[s]uch a marriage would only be valid where Indians lived together under the tribal relation and a tribal form of government . . . [because] they would then be subject only to the jurisdiction of Congress."⁵⁰ As a result, the court held that Ophelia had no legal claim to Fred's estate.⁵¹

Determining whether or when individuals were married also required careful examination of differing tribal marriage dissolution practices. For example, the Choctaw recognized different ways by which individuals could validly end their marriage.⁵² Specifically, those who had married ceremonially were not required to end the marriage ceremonially.⁵³ Similarly, a couple married by a justice of the peace might end their union by the tribal custom of simply ceasing to live together.⁵⁴

⁴⁴ See *id.*

⁴⁵ See, e.g., *Wall*, 8 Ala. at 53 ("[T]he marriage, if contracted according to Choctaw usage, between members of the tribe, in their own territory, before their laws were abrogated, was valid . . .").

⁴⁶ See 200 P. 911, 913 (Or. 1921).

⁴⁷ *Id.* at 913–14 (noting that the two had married "within Tillamook county and at a place where the state would have original and exclusive jurisdiction over any marriage contract between them").

⁴⁸ *Id.* at 913 (explaining that the law prohibited any white person from marrying "any person having more than one-half Indian blood" (quoting 1921 Or. Laws. 2163, *repealed by* 1951 OR. Laws. ch. 455 § 2)).

⁴⁹ See *id.* at 914.

⁵⁰ *Id.*

⁵¹ *In re Paquet's Estate*, 200 P. at 914. The court noted in dicta, however, that "in the interests of justice, a fair and reasonable settlement should be made" because Ophelia had "lived with [Fred] as a good and faithful wife for more than 30 years." *Id.*

⁵² See *Rogers v. Cordingley*, 4 N.W.2d 627, 629 (Minn. 1942).

⁵³ See *id.* at 628–29.

⁵⁴ See *id.*

Needless to say, a system in which individuals might end their marriages by simply separating can leave the status of some marriages unclear. It might not be clear, for example, whether an individual who was no longer living with his wife had left permanently or, instead, planned on returning.⁵⁵ To make matters more complicated, it was sometimes not clear when and to what marriages tribal law applied. For example, in *Palmer v. Cully* the Oklahoma Supreme Court examined tribal law, federal treaties and state laws to determine whether two Seminoles had legally married.⁵⁶ Pheney Bowlegs had married Kintah Palmer in accord with Seminole custom in 1905.⁵⁷ Kintah Palmer, however, had previously married and lived with another woman, Lowina Palmer, until about a year before he married Pheney Bowlegs.⁵⁸ Lowina did not formally divorce Kintah in accordance with local law until 1911.⁵⁹

The court found that prior to April 28, 1904, parties married under Seminole custom could be divorced according to Seminole custom by simply separating physically.⁶⁰ After that date, however, a marriage could only be dissolved under state law through court proceedings.⁶¹ The court found that because Kintah and his first wife, Lowina, had only physically separated and not obtained a divorce through court proceedings, Kintah and his second wife, Pheney, could not have legally married because bigamy was not legal under state law.⁶² Had the court applied tribal law,

⁵⁵ See *Wall*, 11 Ala. at 828–29 (“[Wall and Williams] lived together as husband and wife . . . and to avoid a prosecution, left the county and went to his tribe west of the Mississippi, and has never returned. But [Williams] has received letters from him, in which he threatened to return . . .”); *La Framboise*, 161 N.W. at 530–31 (fixing the time of divorce for Alexis and Quana after Quana had left but then returned to Alexis).

⁵⁶ 153 P. at 155–57.

⁵⁷ *Id.* at 155.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *id.* at 156, 157.

⁶¹ See *Palmer*, 153 P. at 157 (“Upon . . . erection of the state, members of the Seminole Tribe became citizens of Oklahoma, subject to the general laws of the state relative to marriage and divorce, since which time the validity of their marriage contracts and all rights consequent or arising therefrom have been dependent upon such laws.”).

⁶² See *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 . . .”). The court noted but did not give any weight to the fact that Kintah and Pheney were viewed by all who knew them as husband and wife. The court stated:

It was the apparent purpose of plaintiff and Kintah Palmer to contract a lawful marriage, to accomplish which they did all things deemed necessary according to their understanding of the requirements, and assumed the marriage relation innocently and in good faith, believing that they had complied

the marriage might have been found valid if Seminole custom recognized plural marriage.⁶³

Determining whether a marriage was valid was also complicated by the fact that some tribes—but not all—recognized plural marriages.⁶⁴ In *Pompey*, the Oklahoma Supreme Court addressed the validity of the marriage between John Pompey and Rose Lottie.⁶⁵ At the time that John and Rose allegedly married, John was already married to someone else.⁶⁶ Both marriages had, however, occurred before April 28, 1904. Therefore, unlike the first marriage in *Palmer*, it was clear that tribal law—and not state law—governed the marriage. The sole issue before the court was whether the Seminoles recognized plural marriages.⁶⁷

The court acknowledged the marriage's validity should be determined by the "tribal laws, customs, and usages of the Seminole tribe."⁶⁸ The defendants asserted that the Seminole laws quoted in *Palmer* demonstrated that the Seminoles did not recognize plural

with the law in this respect. They were recognized as husband and wife by their kinsmen, friends, and acquaintances, all of whom knew of their past domestic relations. They lived together in this manner for eight years, and for nearly a year after Kintah had been divorced from his former wife, and until his death, mutually agreeing, understanding, and believing that they were in law husband and wife.

Id.

⁶³ See *id.* at 157–58.

⁶⁴ Okla. 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 . . .”). In *Pompey v. King* the court held:

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.

225 P. 175, 175 (Okla. 1923). Similarly, in *Ortley v. Ross* the court held:

The evidence shows that the laws and customs of the Santee Sioux Indians, place slight restrictions on matrimonial alliances between members of the tribe, that polygamy was practiced with impunity, that the only ceremony requisite was a mutual agreement between the parties to live together as husband and wife

110 N.W. at 982.

⁶⁵ See 225 P. at 175.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *id.*

marriages.⁶⁹ The *Pompey* court, however, noted that the laws quoted in *Palmer* did not “directly or indirectly” prohibit plural marriages.⁷⁰ The court further noted that defendants had presented no other examples of Seminole laws suggesting that Seminole custom permitted such unions.⁷¹ Consequently, the *Pompey* court remanded the case so that a jury could determine whether Seminole custom permitted plural marriage.⁷²

B. State Recognition of Tribal Marriages

Once a marriage is determined to be valid under tribal law, the next question is whether that marriage would be recognized by the state.⁷³ In *Cyr*, 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 noted that “domestic relations formed under [tribal] customs and laws have been treated by the courts as valid.”⁷⁴ 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.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Pompey*, 225 P. at 175.

⁷¹ *Id.*

⁷² *Id.* at 176.

⁷³ See *Kobogum*, 43 N.W. at 605.

⁷⁴ 116 P. at 934. In another case, approximately four years later, the Oklahoma Supreme Court noted:

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.

James v. Adams, 155 P. 1121, 1122 (Okla. 1915) (citing *Cyr*, 116 P. at 934).

⁷⁵ See *Kobogum*, 43 N.W. at 605; *Compo*, 16 N.W. at 295, 301 (noting that generally “marriages which are valid where made and not fraud on any other jurisdiction, are valid everywhere”). In *Kobogum* the court stated:

The decisions in Alabama, Tennessee, Missouri, and Texas . . . 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.

43 N.W. at 605.

Oklahoma courts, however, did not always defer to tribal customs if they felt that a marriage was contrary to that state's public policy.⁷⁶ For example, in *Blake v. Sessions*, the court examined whether a marriage between James Grayson and Myrtle Segro was valid under Oklahoma law.⁷⁷ James was one-quarter African and three-fourths Creek Indian.⁷⁸ Myrtle was one-fourth white and three-fourths Creek Indian.⁷⁹ The court noted that even if the marriage "had been celebrated and solemnized by all the priests, bishops, ministers, and civil authorities, authorized to perform marriage ceremonies in this state," it would still have been "unlawful."⁸⁰ The court rejected the argument that Creek tribal law rather than Oklahoma law determined the marriage's validity because it held that forbidding interracial marriage was "entirely within the [police] power of the state."⁸¹

Instead of focusing on whether Oklahoma had the power to prohibit interracial marriages, the *Blake* court should have focused on whether a marriage that was valid under the law of the sovereign at the time of celebration would be recognized by Oklahoma.⁸² James and Myrtle were each of Creek descent, and they celebrated their marriage according to Creek law on Creek lands.⁸³ The tribe's sovereign power to determine who could marry whom would militate in favor of the marriage's validity.⁸⁴

Indeed, in a factually similar case the same court just seven years later held a tribal interracial marriage was valid because tribal law and not state law determined its validity. In *Scott v. Epperson*, the Oklahoma

⁷⁶ See *Blake*, 220 P. at 878, 879.

⁷⁷ See *id.* at 878.

⁷⁸ *Id.* at 877.

⁷⁹ *Id.* at 878.

⁸⁰ *Id.*

⁸¹ *Blake*, 220 P. at 879. The court rejected plaintiff's assertion that:

[T]he 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.

Id. It reasoned that "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." *Id.*

⁸² See *id.* at 878–79; see also *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (striking down Virginia's antimiscegenation law).

⁸³ See *Blake*, 220 P. at 876–79.

⁸⁴ See, e.g., *James*, 155 P. at 1122; *Cyr*, 116 P. at 934.

Supreme Court considered the validity of the marriage between Lucy Grayson, who was three-quarters Seminole and one-fourth African-American, and James Scott, who was a full-blood Creek Indian.⁸⁵ They had been married in Indian Territory in accordance with local law before Oklahoma became a state and before the enactment of Oklahoma's constitutional and statutory provisions prohibiting interracial marriage.⁸⁶ The Oklahoma Supreme Court held the marriage between Lucy and James valid, reasoning that those provisions prohibiting interracial marriage were intended to prevent future marriages rather than annul existing ones.⁸⁷

The *Scott* and *Blake* decisions stand in opposition to each other since both marriages had been valid under tribal law.⁸⁸ Moreover, neither party in either *Blake* or *Scott* was attempting to skirt Oklahoma law by marrying on tribal land. These cases can only be reconciled if Oklahoma law and thus Oklahoma public policy rather than Creek law governed the marriage at issue in *Blake*.⁸⁹ Yet, the law which created the state of Oklahoma provided that Native law would not be preempted by the new state's law.⁹⁰ Oklahoma courts sometimes ignored this provision and ruled as if tribal authority had been destroyed upon the creation of the state.⁹¹

If those courts were correct and tribal authority had been destroyed upon Oklahoma statehood, then the marriage in *Blake* should have been evaluated in light of existing Oklahoma state law and the

⁸⁵ See 284 P. at 19.

⁸⁶ See *id.* at 20. The court held:

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

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.

Id.

⁸⁷ See *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.").

⁸⁸ Compare *Scott*, 284 P. at 21 (finding an interracial marriage valid under tribal law), with *Blake*, 220 P. at 878 (invalidating an interracial marriage under Oklahoma state law).

⁸⁹ See *Blake*, 220 P. at 878.

⁹⁰ See Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 10 (2007).

⁹¹ See *id.* at 11–12 (discussing the "misconception that Oklahoma had already obtained full jurisdictional powers everywhere within the state").

public policy behind it and not tribal law as it existed at the time of the marriage.⁹² Moreover, if tribal authority had been destroyed, the court would not have had to decide whether marriages performed on tribal land would be recognized outside of the tribe's jurisdiction.⁹³ Rather, the court could have ruled the marriage invalid because it was invalid under existing Oklahoma law.⁹⁴ Tribal law, however, had not been preempted or destroyed when Oklahoma became a state, and consequently Oklahoma law did not govern a marriage celebrated by a tribal member on Native lands in accord with local custom.⁹⁵ Had the *Blake* court followed the majority of courts and applied tribal law to determine the validity of the marriage, James and Myrtle's marriage would have been valid.⁹⁶

Oklahoma courts did apply the majority rule when determining the validity of interracial marriages across state lines. For example, in *Eggers v. Olson* an interracial couple permanently residing in Oklahoma married in Arkansas to evade the Oklahoma law banning interracial marriages.⁹⁷ The Oklahoma court held the marriage invalid because the law of the domicile at the time of the marriage—here, Oklahoma—determines the validity of the marriage at the time of its

⁹² See *Blake*, 220 P. at 878.

⁹³ *Id.*

⁹⁴ See *In re Walker's Estate*, 46 P. 67, 69 (Ariz. 1896); 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). The *In re Walker's Estate* the court held:

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.

46 P. at 69.

⁹⁵ See *Leeds*, *supra* note 90, at 10–12.

⁹⁶ See, e.g., *In re Paquet's Estate*, 200 P. at 914 (suggesting that an interracial marriage invalid under Oregon law would have been valid had it been celebrated in accord with tribal law on tribal lands).

⁹⁷ 231 P. 483, 483–84 (Okla. 1924) (“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.”).

celebration.⁹⁸ The Oklahoma court was correct to apply Oklahoma law.⁹⁹

State attempts to prevent interracial marriage imposed numerous social and legal burdens. Socially, these laws destroyed otherwise healthy families.¹⁰⁰ Legally, different states' laws regarding the validity of interracial marriages meant that a marriage might be permissible in certain states but impermissible in others. For example, Oklahoma law prevented individuals of African descent from marrying individuals not of African descent.¹⁰¹ Arizona law, on the other hand, prevented whites from marrying non-whites.¹⁰² As a result, a marriage between someone of African descent and a full-blooded Indian, would be valid in Arizona but not in Oklahoma.¹⁰³

Further, Arizona's law had a special twist, which prohibited individuals who were part Caucasian from, in reality, marrying anyone.¹⁰⁴ In *State v. Pass*, the court explained that "a descendant of mixed blood

⁹⁸ See *id.* at 485. The court reasoned:

[T]he marriage of William Yates with Emily Lewis was prohibited by the laws of this state, [Oklahoma], and they could not, while citizens of this state, evade the law of marriage by going out of the state and marrying under the laws of another state and then return to this state to live and maintain the marriage assumed in that state, which was prohibited in this state, and expect the marriage to be recognized and protected in this state. The inhibition is not only against the form but the substance also.

Id.; see also *Stevens v. United States*, 146 F.2d 120, 122–23 (10th Cir. 1944) (upholding determination that evasive, interracial marriage was void under Oklahoma law); *Baker v. Carter*, 68 P.2d 85, 86 (Okla. 1937) ("If it is a fact that plaintiff is of African descent and the defendant is a full-blood Indian, then their marriage is a nullity. This is so even though the marriage was contracted in another state, the parties being residents of this state." (citations omitted)); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 283 (1971) (declaring that the validity of a marriage celebrated in accord with the law of the state of celebration is determined by the law of the state which had the most significant relationship to the couple at the time of marriage, which is generally the state of domicile at the time of the marriage).

⁹⁹ See *Eggers*, 231 P. at 485–86. Whether Oklahoma could maintain such a law without violating federal constitutional guarantees is, of course, a separate issue. Antimiscegenation laws were not struck down until 1967. See *Loving*, 388 U.S. at 12.

¹⁰⁰ See *In re Paquet's Estate*, 200 P. at 914 (invalidating marriage of couple that had been together for over three decades).

¹⁰¹ *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.").

¹⁰² *Pass*, 121 P.2d at 884 ("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.").

¹⁰³ Compare *Eggers*, 231 P. at 484, with *Pass*, 121 P.2d at 884.

¹⁰⁴ See *Pass*, 121 P.2d at 884.

. . . cannot marry a Caucasian or a part Caucasian, for the reason 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.”¹⁰⁵ Although recognizing that this result was “absurd,” the court did not strike down the statute.¹⁰⁶ Rather, it expressed hope that “the legislature will correct it by naming the percentage of Indian and other tabooed blood that will invalidate a marriage.”¹⁰⁷

Generally, laws prohibiting miscegenation were alleged to promote an important public policy.¹⁰⁸ Similarly, polygamous marriages were seen as invalid because they violated an important public policy.¹⁰⁹ Considering the strong public policy rationale for invalidating these marriages, it might be thought surprising that some courts felt

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g.,* 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.”); *In re Atkins’ Estate*, 3 P.2d 682, 686 (Okla. 1931) (Riley, J., dissenting) (“[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.”). In *Grant v. Butt* the court explained:

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 . . .*”

17 S.E.2d 689, 692 (S.C. 1941).

¹⁰⁹ *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.”); Pennegar v. State, 10 S.W. 305 (Tenn. 1889). In *Heflinger v. Heflinger* the court stated:

Undoubtedly, the general rule is that a marriage valid where performed is valid everywhere; but there are exceptions to the rule as well established as the rule itself. These exceptions are generally embraced in two classes: First, marriages deemed contrary to the laws of nature as generally recognized in Christian countries, and include only those which are void for polygamy or incest; second, marriages forbidden by statute because contrary to the public policy of the state.

118 S.E. 316, 320 (Va. 1923) (citing Commonwealth v. Lane, 113 Mass. 458 (1873); *Pennegar*, 10 S.W. at 305).

compelled to recognize tribal marriages that were otherwise considered void under state law.

C. *Why Must Tribal Marriages Be Recognized?*

Courts offered surprisingly different reasons as to why tribal marriages had to be recognized.¹¹⁰ For example, the Minnesota Supreme Court noted that the “general rule” in Minnesota was “that marriages valid by the laws of the country where they are entered into are binding here” and that “the same rule must be adopted in relation to Native American marriages, where the tribal relation still exists.”¹¹¹ This justification implies that tribal marriages, like foreign polygamous marriages, should be given deference. The court, however, did not seem to suggest that tribal marriages should be given more deference than marriages entered into under a foreign nation’s laws.

In contrast, the Nebraska Supreme Court suggested that tribal practices were owed greater deference than foreign polygamous marriages.¹¹² In *Ortley v. Ross*, the Nebraska Supreme Court held that a polygamous marriage was valid.¹¹³ 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.”¹¹⁴ It noted, however, that it applied “a liberal rule” when determining the validity of tribal marriages.¹¹⁵ Specifically, it cited the Michigan Supreme Court’s decision in *Kobogum v. Jackson Iron Co.* for the proposition that “marriages valid by the law governing both parties when made must be treated as valid everywhere.”¹¹⁶

¹¹⁰ See *Earl*, 44 N.W. at 255; *Morgan v. M’Ghee*, 24 Tenn. (5 Hum.) 13, 14–15 (1844).

¹¹¹ *Earl*, 44 N.W. at 255; see also *Morgan*, 24 Tenn. (5 Hum.) at 14 (“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.”).

¹¹² *Ortley*, 110 N.W. at 983.

¹¹³ *Id.* (“as the alleged marriage between the father and mother of the plaintiff was polygamous”).

¹¹⁴ *Id.*

¹¹⁵ *Id.*; see also *Boyer v. Dively*, 58 Mo. 519, 529 (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.”).

¹¹⁶ *Ortley*, 110 N.W. at 983 (citing *Kobogum*, 43 N.W. at 605); see also *Johnson v. Johnson’s Adm’r*, 30 Mo. 72, 73 (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.”).

In *Kobogum* the 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.”¹¹⁷ As such, the court reasoned that the state law prohibiting polygamous marriages did not invalidate a tribal polygamous marriage under tribal law.¹¹⁸ The court, however, still had to decide whether this valid tribal law marriage would also be recognized by Michigan.¹¹⁹

On this point, the *Kobogum* court noted that no federal laws or treaties addressed or “interfer[ed] with” Indian marriage usages.¹²⁰ Thus, the court suggested, the federal government might have prohibited polygamous unions but chose not to and instead permitted tribal law and custom to govern domestic relations.¹²¹ The court reasoned that by thus refraining from regulating Native American domestic relations law, the federal government made it possible for the tribes to choose whether to recognize polygamous unions.¹²²

The court’s analysis, however, is faulty. For example, the court noted that it “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.”¹²³ Here the court implied that jurisdictions which refuse to recognize Native American polygamous marriages would also refuse to recognize all non-polygamous Native American marriages. Moreover because non-polygamous marriages entered into in foreign countries are recognized, the court implied that polygamous marriages entered into in foreign countries must also be recognized.¹²⁴ The court’s statement

¹¹⁷ 43 N.W. at 605 (citations omitted).

¹¹⁸ *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 . . .”).

¹¹⁹ A finding that one jurisdiction permitted certain unions would be no guarantee that such a union would be recognized in a different jurisdiction. Suppose, for example, that State A recognized polygamous unions, but State B did not. A court determining whether State B recognized a polygamous marriage entered into in State A might admit that the union was recognized in State A but nonetheless deny its validity in State B. *See Ortle*, 110 N.W. at 983 (noting that “the alleged marriage between the father and mother of the plaintiff was polygamous”).

¹²⁰ 43 N.W. at 605.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *Id.*

¹²⁴ *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”).

that either all or no marriages are valid where celebrated must be accorded recognition is simply false.¹²⁵ Indeed, the Michigan Supreme Court later held that polygamous marriages need not be recognized even if valid where celebrated.¹²⁶

The court seemed to suggest that it would afford Native American polygamous marriages the same deference as foreign polygamous marriages. But a polygamous marriage valid in another country would likely nonetheless be denied recognition in the United States.¹²⁷ This would suggest that Native American polygamous marriages also should not be recognized. The *Kobogum* court reasoned that 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."¹²⁸ But the relevant question is not whether such marriages are valid where celebrated but whether they will be recognized here. Foreign polygamous marriages valid where celebrated were generally not recognized elsewhere, and the court's analysis suggested that the Native American polygamous marriages should not have been recognized.¹²⁹

The *Kobogum* analysis suggests that the recognition of both foreign and tribal polygamous marriages depends upon state public policy and not federal law.¹³⁰ But if that were true, neither kind of polygamous marriage would be recognized as a general matter, although there might be individual instances in which plural marriages would be recognized for certain purposes or because of compelling individual circumstances.¹³¹ Such exceptions would be rare.¹³² Indeed, many

¹²⁵ *Kobogum*, 43 N.W. at 605.

¹²⁶ See *In re Miller's Estate*, 214 N.W. 428, 429 (Mich. 1927).

¹²⁷ 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.").

¹²⁸ 43 N.W. at 605.

¹²⁹ 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 . . .").

¹³⁰ See *Kobogum*, 43 N.W. at 605.

¹³¹ Polygamous marriages have sometimes been recognized for certain purposes. At issue in *In re Dalip Singh Bir's Estate* was the estate of an individual who had died intestate. See *In re Dalip Singh Bir's Estate*, 188 P.2d 499, 499 (Cal. Dist. Ct. App. 1948). The California appellate court recognized the inheritance rights of both wives. See *id.* at 502. A different case in which a polygamous marriage might be recognized might involve an individual who had remarried based on the reasonable belief that her spouse was dead but subsequently discovered her first husband was alive after all. See *Steinke v. Steinke*, 357 A.2d 674, 683 (Pa. Super. Ct. 1975). The second (and plural) marriage might be recognized as long as the first husband divorced his wife. See *id.* ("There is also what might be described as a

states refuse to recognize foreign polygamous marriages for any purpose, even if validly celebrated elsewhere.¹³³

This refusal to recognize foreign polygamous marriages is supported by federal case law. The Supreme Court, in *Lee Lung v. Patterson*, upheld a refusal to permit the second (polygamous) wife of Lee Lung to enter the United States because she was not viewed as his valid wife.¹³⁴ Had she been recognized as his lawful spouse, she would have been permitted entry.¹³⁵ The court noted that a federal law prohibiting polygamous marriages negated the argument that the federal government would recognize such unions.¹³⁶

Just as a state might refuse to recognize a polygamous union celebrated in another country on the basis of public policy, states seem free to refuse to recognize a polygamous union celebrated according to tribal usages.¹³⁷ If Native American polygamous unions were treated the same as foreign polygamous unions, state courts would almost always refuse to recognize them.¹³⁸ But just the opposite

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." (citing 23 PA. STAT. ANN. § 10 (West 1972)).

¹³² See *Commonwealth v. Mash*, 48 Mass. (7 Met.) 472, 473 (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.").

¹³³ See, e.g., *United States v. Tenney*, 11 P. 472, 479 (Ariz. 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. But there are certain exceptions to the rule: (1) Polygamous marriage." (citation omitted)); *Marianacci v. Marianacci*, 299 N.Y.S. 146, 149 (Fam. Ct. 1937) ("The law does not recognize polygamous marriages, and the court will not, by even indirection, sanction or acquiesce in such marriages."); *United States ex rel. Devine v. Rodgers*, 109 F. 886, 887 (E.D. Pa. 1901) (suggesting that no foreign polygamous unions would be recognized as valid).

¹³⁴ See 186 U.S. 168, 173 (1902).

¹³⁵ See *United States 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.").

¹³⁶ See *Lee Lung*, 186 U.S. at 173; see also *Rohwer v. Dist. Ct. of First Judicial Dist.*, 125 P. 671, 674 (Utah 1912) (noting that "Congress had passed laws whereby polygamous and plural marriages were prohibited").

¹³⁷ See *James*, 155 P. at 1122; *Cyr*, 116 P. at 934.

¹³⁸ Cf. *In re Dalip Singh Bir's Estate*, 188 P.2d at 502. The *Dalip Singh Bir* court reasoned, "Public policy' would not be affected by dividing the money equally between the two

is true. As a general matter, such marriages contracted by at least one tribal member on Native lands were recognized as long as it was also valid in light of tribal law or custom.¹³⁹ 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 involves deference to federal law. The *Kobogum* court correctly noted that there were no federal laws or treaties "on the subject of Indian marriages."¹⁴⁰ This comment, however, incorrectly suggests that no applicable federal laws existed when, in fact, some federal treaties were relevant. For instance, as the court noted, "numerous" treaties between the United States and this tribe "recognize" inheritance tribal practices.¹⁴¹ The court's reference to these treaties suggests that it recognized polygamous tribal marriages not just because they were valid where celebrated but also because federal treaties required that the unions be recognized, at least for certain purposes such as inheritance rights.

Many courts seemed to recognize Native American plural marriages merely because they were valid where celebrated. Such a justification, however, does not explain why Native American polygamous marriages were recognized but foreign polygamous marriages were not. It seems that these courts were implicitly relying on federal inaction and action as the legal foundation for recognizing Native American polygamous marriages but not foreign polygamous marriages.¹⁴²

Federal inaction supported their recognition because Congress refused to supplant tribal laws and customs with respect to marriage, thereby validating a marriage as long as it involved at least one tribal member, was celebrated on Native lands, and was in accord with tribal law or custom.¹⁴³ Federal action supported the recognition of Native American polygamous unions because the federal government had signed a treaty agreeing that tribal family relations as defined by tribal custom and law would be recognized by the United States.¹⁴⁴

wives, particularly since there is no contest between them and they are the only interested parties." *Id.*

¹³⁹ See *James*, 155 P. at 1122; *Cyr*, 116 P. at 1122.

¹⁴⁰ See 43 N.W. at 605.

¹⁴¹ *Id.*

¹⁴² See *Hallowell*, 210 F. at 799 ("[T]he 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.").

¹⁴³ See, e.g., *James*, 155 P. at 1122; *Cyr*, 116 P. at 934.

¹⁴⁴ See *Kobogum*, 43 N.W. at 605.

Federal laws and treaties preempt state laws.¹⁴⁵ Therefore, a treaty requiring that Native American polygamous families be recognized in light of tribal law requires states to recognize such families even if the states could have refused to recognize foreign polygamous families not covered by a similar treaty.

If the United States entered into a multilateral treaty specifying that polygamous marriages which were valid where celebrated would be recognized here, then states would have to recognize foreign polygamous marriages even if those unions violated an important public policy of the state. The existence of a treaty validating Native American marital unions (at least for purposes of inheritance laws) meant that states had to recognize those marriages, while the absence of a treaty requiring that foreign polygamous unions be recognized left the states free to decide whether to recognize those marriages.

III. APPLICATION OF THE TRIBAL MARRIAGE RECOGNITION PRACTICES TO INTERSTATE RECOGNITION OF SAME-SEX UNIONS

Commentators sometimes suggest that the recognition of same-sex unions will lead to a parade of horrors including the recognition of polygamous unions.¹⁴⁶ Although the unions are distinguishable, Native American polygamy cases provide some important lessons for those interested in securing marriage equality.¹⁴⁷

¹⁴⁵ See U.S. CONST. art VI, § 2. The Constitution states:

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 State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

¹⁴⁶ See Kelly Elizabeth Phipps, Note, *Marriage and Redemption: Mormon Polygamy in the Congressional Imagination, 1862–1887*, 95 VA. L. REV. 435, 437–38 (2009) (“Contemporary critics of same-sex marriage invoke legalized polygamy as the inexorable result of expanding marriage rights.”).

¹⁴⁷ Cf. *In re Marriage Cases*, 183 P.3d 384, 434 n.52 (Cal. 2008), *superseded by constitutional amendment*, CAL CONST. art. I, § 7.5. The court commented that “[a]lthough 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.” *Id.*

A. *The Danger of Recognizing Same-Sex Unions*

Opponents of marriage equality for same-sex couples have offered a variety of public policy arguments to justify their position.¹⁴⁸ Some commentators imply that same-sex marriage is too novel and contentious to permit.¹⁴⁹ Others argue that recognition of such unions would be dangerous and might lead to the recognition of a whole host of currently prohibited relationships.¹⁵⁰

Same-sex marriage, however, is becoming much less novel. Further, jurisdictions recognizing same-sex marriage and civil unions have not experienced any of the dire consequences predicted by same-sex marriage opponents.¹⁵¹ Many other arguments offered against same-sex marriage have been similarly unpersuasive because they were based either on errors in logic or on wildly implausible empirical claims. For example, the New York Court of Appeals justified its state ban on same-sex marriage on three grounds.¹⁵² First, it found that “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.”¹⁵³ Second, the court reasoned that “[h]eterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not.”¹⁵⁴ Third, the court found that “[t]he

¹⁴⁸ See Phipps, *supra* note 146, at 437–38.

¹⁴⁹ See, e.g., Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1919–20 (discussing “contemporary same-sex marriage and similar contentious novel forms of family relationships”).

¹⁵⁰ See, e.g., Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 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 horrors, such as bestiality, incest, and polygamy.”); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1316 (2008) (“[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.”); Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1378 (2007) (“[T]he 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.”).

¹⁵¹ Staszewski, *supra* note 150, at 1317 (“[T]he slippery-slope argument is not supported by the experience of a single jurisdiction that has legally recognized same-sex marriage or registered partnerships.”).

¹⁵² *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”¹⁵⁵

These justifications, however, are specious. The first rationale presents a false dichotomy and then suggests that the Legislature acted reasonably when choosing one option over 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.”¹⁵⁶

Suppose that a legislature banned marriages between the elderly because their sexual relations were less likely to be procreative.¹⁵⁷ Even if such a law did not offend due process guarantees, one would wonder why it would be necessary to choose between permitting the elderly and permitting the non-elderly to marry.¹⁵⁸ Permitting the elderly to marry would in no way undermine the ability or desire of the non-elderly to marry, just as permitting same-sex marriage would in no way undermine the ability or desire of opposite-sex couples to marry. Such a policy is a specious attempt to justify a policy that had been adopted for other reasons.

The second rationale was no more persuasive than the first. After all, many same-sex and opposite-sex couples marry but have no interest in raising children. Marriage provides benefits both to society and the individuals themselves that are unrelated to the having or raising of children.¹⁵⁹ Consequently, the fact that a couple—be they elderly or of the same-sex—will not have children should not be a bar to their being able to marry.

Even if the third justification were true and it would be better for children to grow up with a mother and a father rather than two mothers or two fathers, that would not be an adequate reason to prevent same-sex couples from marrying.¹⁶⁰ No state precludes all but the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 30 (Kaye, C.J., dissenting).

¹⁵⁷ *Cf. Hernandez*, 855 N.E.2d at 30 (“Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry.”).

¹⁵⁸ *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”).

¹⁵⁹ *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting) (“Marriage is about much more than producing children.”).

¹⁶⁰ *See Michael S. Wald, Adults’ Sexual Orientation and State Determinations Regarding Placement of Children*, 40 *FAM. L.Q.* 381, 386 (2006) (“[T]he claim that children raised with two heterosexual parents do 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.”).

most optimal parents from marrying, and with good reason. If the state were to do that, many children would be denied the opportunity of being in a good—even if not optimal—home. By allowing the state to ban same-sex marriage, the state would be 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 abstain from raising children if not permitted to marry. But that has not been the experience in New York, where a growing number of unmarried same-sex couples are having and raising children.¹⁶¹ Indeed, New York permits each member of a same-sex couple to be recognized as the legal parent of the same child.¹⁶² Consequently, this rationale for denying same-sex couples the right to marry makes even less sense. In the end, the New York court justifies the state's same-sex marriage ban by appealing to the interests of children, even though unmarried same-sex couples are having and raising children and even though prohibiting same-sex marriages will deprive children of the benefits that permitting their parents to marry might offer.¹⁶³

As this case illustrates, many of the purported public policy reasons cited to support same-sex marriage bans, like similar policies against interracial marriage, are specious. Arguably, the right to marry a same-sex partner, like the right to marry a different-sex partner, is protected by the Federal Constitution.¹⁶⁴ This article's focus, however, 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.

¹⁶¹ See *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting) (discussing the “tens of thousands of children . . . currently being raised by same-sex couples in New York”).

¹⁶² See *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995) (recognizing second-parent adoptions).

¹⁶³ 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”)

¹⁶⁴ See Matthew Coles, *Lawrence v. Texas and 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.”).

B. *The Defense of Marriage Act*

As a general matter, tribes no longer recognize polygamous marriages.¹⁶⁵ Recently, however, two same-sex tribal marriages have been celebrated.¹⁶⁶ It might seem that these marriages, like tribal polygamous marriages, would have to be recognized in all states.

If states were required to recognize tribal same-sex marriages, the jurisprudence suggests that states would be bound to recognize such unions only if they were (1) contracted on Native lands, (2) in accord with tribal custom or law, and (3) by at least one tribal member.¹⁶⁷ Such interjurisdictional recognition is, however, not required because the Federal Defense of Marriage Act (“DOMA” or “the Act”) specifically authorizes the non-recognition of same-sex marriages celebrated elsewhere.¹⁶⁸ The 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 treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁶⁹

If DOMA were repealed, then, subject to the limitations mentioned above, some same-sex marriages would be entitled to recognition as long as such marriages were still permitted by tribal law.¹⁷⁰ Although

¹⁶⁵ See Fletcher, *supra* note 17, 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.” (citations omitted)).

¹⁶⁶ 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, 824–27 (2006) (discussing two Cherokee women who obtained a marriage license in Oklahoma and subsequently wed in a ceremony presided over by a Cherokee nation certified minister); see also Bill Graves, *Coquille Tribe Allows Same-Sex Marriage*, PORTLAND OREGONIAN, May 22, 2009, at B3. (“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.”).

¹⁶⁷ See *supra* text accompanying notes 32–33 (specifying these limitations).

¹⁶⁸ Fletcher, *supra* note 17, 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].” (citing Federal Defense of Marriage Act, 28 U.S.C. § 1738C (2006))).

¹⁶⁹ 28 U.S.C. § 1738C.

¹⁷⁰ See Fletcher, *supra* note 17, at 55 (“[T]here remains the distinct possibility that one or more of the 560-plus federally recognized Indian tribes will take action to recognize

such interjurisdictional recognition might have symbolic value, very few same-sex marriages would meet the relevant criteria. As such, the issue of interjurisdictional recognition of same-sex tribal marriages would rarely, if ever, arise.¹⁷¹ Nonetheless, it would be worthwhile to consider some of the possible effects of a repeal of DOMA.

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

Although President Obama said he would support DOMA's repeal, the United States Department of Justice recently filed a brief in support of DOMA's constitutionality.¹⁷² Further, there has been little or no effort in Congress to repeal DOMA.¹⁷³ Given this, it seems quite unlikely that Congress will either repeal DOMA or affirmatively act to protect same-sex relationships.¹⁷⁴

Even if Congress did repeal DOMA, it is unclear whether Congress could require states to recognize same-sex marriages validly celebrated elsewhere.¹⁷⁵ Opponents of such a measure might argue that Congress cannot force states to recognize marriages valid in other states without violating a principle of federalism. It should be noted, however, that DOMA may violate principles of federalism.¹⁷⁶

same-sex marriage in their jurisdictions.”). *But see id.* at 70 (suggesting that the tribes might decide not to recognize such unions).

¹⁷¹ See Jacobi, *supra* note 166, 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.” (citing Sheila K. Stogsdiill, *Tribe Mulls Their Laws on Marriage*, DAILY OKLAHOMAN, May 18, 2004, at 3A)).

¹⁷² See Stephen Dinan & Christina Bellantoni, *Gay Man Eyed for Pentagon Post: Obama Still Criticized for Slow Action on Pledge*, WASH. TIMES, June 18, 2009, at A1 (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”); Editorial, *A Bad Call on Gay Rights*, N.Y. TIMES, June 16, 2009, at A20 (criticizing the Department of Justice’s brief in support of DOMA).

¹⁷³ See Carolyn Lochhead, *Activists Shrug at Obama’s Action*, S.F. CHRON., June 18, 2009, at A1 (stating that “there is no effort to repeal DOMA”).

¹⁷⁴ David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 448 (1996).

¹⁷⁵ Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 489 (2002) (“Congress could repeal DOMA.”).

¹⁷⁶ See Mark P. Strasser, *“Defending” Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence*, 38 CREIGHTON L. REV. 421, 430 (2005). States are completely left out of the DOMA scheme:

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

After all, DOMA did not give states the power to refuse to recognize any marriage that violates public policy.¹⁷⁷ Instead, it picks out only one kind of marriage and subjects that union to unique treatment.¹⁷⁸ 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 statute promoting states' rights but is really designed to impose undeserved burdens on a disfavored minority. Similarly, the proposed Federal Marriage Amendment is argued to strengthen state power in terms of federalism, even though it strips states of the power to require the recognition of same-sex marriage valid in the domicile at the time of celebration.¹⁷⁹

Similar arguments that Congress's requiring the recognition of same-sex unions celebrated elsewhere would somehow violate the Tenth Amendment are also erroneous.¹⁸⁰ The Tenth Amendment has been construed as not limiting the powers of Congress expressly conferred by the Constitution.¹⁸¹ Here, Congress's exclusive power to make treaties and fashion choice of law rules grant it, and not the states, the power to require the recognition of same-sex marriages.¹⁸²

Federalism does not bar Congress from requiring recognition of same-sex unions if it desires to do so. First, the Native American polygamy cases suggest that the federal government could enter into a treaty with another country, e.g., Canada, that included a provision specifying that same-sex marriages validly celebrated there would be

the forum state. Rather, it picks out one kind of marriage, namely, same-sex marriages, and imposes this unique disability on them.

Id.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Jeffrey L. Rensberger, *Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate*, 2008 BYU L. REV. 1703, 1796 (“[T]he proposed federal marriage amendment, which would constitutionalize the legitimacy of only traditional marriages, is . . . objectionable as a matter of federalism.”); Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439, 442 (2006) (“[A] clear, textual federal constitutional amendment is the best way to simultaneously protect marriage and to preserve federalism in family law.”).

¹⁸⁰ 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.”).

¹⁸¹ See *New York v. United States*, 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”)

¹⁸² See *supra* notes 172–177 and accompanying text.

recognized here.¹⁸³ 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.¹⁸⁴ But if Congress has plenary powers with respect to such rules, then it could require recognition of same-sex unions validly celebrated in another state without violating constitutional guarantees.

Perhaps Congress may not have plenary power under the Full Faith and Credit clause to modify the faith and credit to be given to marriages. Even so, it might be noted that the statute hypothesized here would be less subject to constitutional attack than is DOMA which seems to violate equal protection guarantees.¹⁸⁵ 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 a statute requiring recognition of same-sex unions validly celebrated elsewhere would not violate constitutional guarantees.¹⁸⁶ Thus, it would seem that Congress has the power to require states to recognize same-sex unions validly celebrated in other states. Further, the Native American polygamous marriage jurisprudence suggests that it

¹⁸³ See generally *Missouri v. Holland*, 252 U.S. 416, 422 (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 (“[T]reaties 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.”).

¹⁸⁴ See, e.g., 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) (“[E]vidence 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.”); 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.”); 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.”).

¹⁸⁵ See U.S. CONST. art IV, § 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.”); Strasser, *supra* note 176, at 436 (suggesting that DOMA is unconstitutional because it is motivated by animus); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 279 (1997) (suggesting that DOMA is unconstitutional for a variety of reasons).

¹⁸⁶ See Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 44 (2005) (“There is no question that Congress can increase the Full Faith and Credit due to state laws and judgments.”).

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.

CONCLUSION

Past cases 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. Moreover, 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.

Same-sex marriages are sufficiently different from polygamous marriages that the recognition of one will hardly require the recognition of the other. For example, states recognizing same-sex unions do not also recognize polygamous unions. Nonetheless, Native American polygamy cases illustrate that Congress not only can but has required states to recognize marriages even in states with a public policy prohibiting such marriages.

While Congress may not require states to recognize same-sex marriage in the foreseeable future, good policy reasons would 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. Similarly, one should not be forced to sacrifice one's marriage for a new job to support one's family. The current system puts interests at risk that are simply too important to be left to the wishes, whims, or prejudices of individual legislatures. It can only be hoped that Congress will sometime soon repeal DOMA and secure for same-sex couples and their families some of the benefits and security that most other people simply take for granted.

