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# Fraying the Knot

## MARITAL PROPERTY, PROBATE, AND PRACTICAL PROBLEMS WITH TRIBAL MARRIAGE BANS

*Suzianne D. Painter-Thorne*<sup>†</sup>

### INTRODUCTION

In the summer of 2015, marriage equality advocates celebrated the Supreme Court's decision in *Obergefell v. Hodges*, which struck down state prohibitions on same-sex marriage.<sup>1</sup> The Court found that “[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment.”<sup>2</sup> Two years earlier, the Court had struck down parts of the federal Defense of Marriage Act (DOMA), finding that the federal government could not discriminate against same-sex married partners.<sup>3</sup> With these two decisions, the Court ensured that the marriages of same-sex couples would be recognized by the federal government and in all fifty states.

Largely left out of the celebration, however, were the members of nearly a dozen Indian tribes that continue to prohibit same-sex marriage either expressly or by implication. For these couples, their tribe's ban on same-sex marriage remains untouched by the dictates of both *Obergefell* and *Windsor*.<sup>4</sup>

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>2</sup> *Id.* at 2602.

<sup>3</sup> *United States v. Windsor*, 570 U.S. 744, 775 (2013). DOMA had sought to define marriage under federal law as limited to “one man and one woman.” 1 U.S.C. § 7, *invalidated by United States v. Windsor*, 570 U.S. 744 (2013).

<sup>4</sup> For instance, neither case addressed DOMA's provision that expressly allows tribes to deny full faith and credit to same-sex marriages performed in other jurisdictions.

Instead, whether a tribe permits same-sex marriage rests on tribes' inherent authority to govern their own internal affairs.<sup>5</sup> Acting pursuant to their inherent authority, many tribes were leaders on the issue of marriage equality, legalizing same-sex marriage when most states prohibited such marriages.<sup>6</sup> Other tribes, however, like the Navajo Nation, instituted their own laws (tribal DOMAs) that, like the federal and some state laws, limited marriages to "one man and one woman."<sup>7</sup> As a consequence of tribal DOMAs, a married Indian couple may have their marriage recognized by their state government and by the federal government, but not by the government of perhaps their most important community—their tribe.

Perhaps the most profound effect of tribal DOMAs is their potential to separate native people from their communities.<sup>8</sup> As Diné marriage equality activist Alray Nelson has explained:

We can, yes, remove ourselves from our community and go get married . . . in San Francisco or in Albuquerque or let's say we go to a local border town like Farmington or Gallup . . . . But that's not our community. That's not where we're from. Our songs and those prayers we were both raised with as traditional young people is located here. The ceremonies are conducted here.<sup>9</sup>

Further, advocates view tribal DOMAs as a rejection of traditional tribal culture and values, which historically recognized more fluid notions of gender, multiple gender roles, and same-sex relationships.<sup>10</sup>

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See 28 U.S.C. § 1738C; Marcia Zug, *Traditional Problems: How Tribal Same-Sex Marriage Bans Threaten Tribal Sovereignty*, 43 MITCHELL HAMLINE L. REV. 761, 770 (2017); Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, COLUM. HUM. RTS. L. REV., Winter 2015, at 104, 132–33, 146–47; see also Michael J. Klarman, Windsor and Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 154 (2013) (noting that Windsor did not address provision in DOMA applicable to tribes).

<sup>5</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978).

<sup>6</sup> See Amanda J. Crawford, *Gay Indians Wed as More Tribes Give Blessings to Same-Sex Unions*, BANGOR DAILY NEWS (Nov. 17, 2013), <http://bangordailynews.com/2013/11/17/news/nation/gay-indians-wed-as-more-tribes-give-blessings-to-same-sex-unions/> [https://perma.cc/WH94-SDR6]. There is some question whether this was the first same-sex marriage for the tribe. See Steve Russell, *The Headlines Are Wrong! Same-Sex Marriage Not Banned Across Indian Country*, INDIAN COUNTRY TODAY (Apr. 23, 2015), <http://indiancountrytodaymedianetwork.com> [https://perma.cc/4CML-C9HX].

<sup>7</sup> 1 U.S.C. § 7, *invalidated by United States v. Windsor*, 570 U.S. 744 (2013); see Tweedy, *supra* note 4, at 108.

<sup>8</sup> See Jorge Rivas, *Gay Marriage Is Still Illegal for the Navajo. This Man Is Trying to Change That*, TULALIP NEWS (July 7, 2015), <http://www.tulalipnews.com/wp/tag/gay-marriage/> [https://perma.cc/45EQ-REDN].

<sup>9</sup> Laurel Morales, *Supreme Court Ruling on Same-Sex Marriage Doesn't Apply to Tribes*, FRONTERAS (July 31, 2015), <http://www.fronterasdesk.org/content/10087/supreme-court-ruling-same-sex-marriage-doesnt-apply-tribes> [https://perma.cc/TM5N-E8J2].

<sup>10</sup> Rivas, *supra* note 8. According to Alray Nelson, “[i]f they repeal the [Diné Marriage Act] it brings it back to what our traditional values used to be. They’re using the

This article focuses on the more mundane effects of tribal DOMAs, effects that are compounded by the unique overlapping sovereign issues encountered by tribal members. While most Americans are governed by federal and state laws, members of Indian tribes are subject to the laws of their tribe as well. When state, federal, and tribal laws diverge, as they do in tribes that prohibit same-sex marriage, these legal differences may implicate wide-ranging issues from child custody determinations to pension benefits to property rights.

With a focus on the latter—property rights—this article considers how a tribe, like the Navajo Nation, that denies marriage rights to same-sex couples would dispose of marital assets upon the death of a spouse who dies without a written will. Like most Americans, a majority of tribal members die intestate.<sup>11</sup> Thus, their marital assets will be subject to a probate code that typically allocates a priority share to the surviving spouse as a mechanism to ensure financial support for the surviving spouse and children of the deceased. Unlike most Americans, however, tribal members are subject to at least three separate jurisdictional probate codes: (1) the federal American Indian Probate Reform Act that determines the allocation of the deceased's real property held in trust; (2) their tribe's probate code; and (3) a state probate code for any property located outside the reservation such as bank accounts.<sup>12</sup> While the federal and state probate processes would require a recognition of the surviving same-sex spouse's intestate share, the tribe would deny the surviving spouse his share of his deceased spouse's estate. Thus, this article explores how a tribe's rejection of same-sex marriage may divest a surviving spouse of an

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white man's language, a foreign way of speaking, to redefine something that was already sacred and defined, we didn't need to redefine it at all." *Id.* (second alteration in original).

<sup>11</sup> Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 68 n.139 (2005) ("Many Indian people, like their non-Indian counterparts, die intestate."); see Brian Sawers, *Tribal Land Corporations: Using Incorporation to Combat Fractionation*, 88 NEB. L. REV. 385, 402 n.138 (2009) ("The majority of Indians die intestate, although those with greater assets are more likely to prepare a will."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012); Maggie Germano, *Despite Their Priorities, Nearly Half of Americans over 55 Still Don't Have a Will*, FORBES (Feb. 15, 2019), <https://www.forbes.com/sites/maggiegermano/2019/02/15/despite-their-priorities-nearly-half-of-americans-over-55-still-dont-have-a-will/#3c42e0315238> [<https://perma.cc/PX5A-NDGX>].

<sup>12</sup> See MARY E. GUSS, AMERICAN INDIAN PROBATE REFORM ACT: WRITING WILLS FOR TRIBAL CLIENTS 18–19 (2017), [nptao.arizona.edu/sites/nptao/files/aipra-writing\\_wills\\_for\\_tribal\\_clients.pdf](https://nptao.arizona.edu/sites/nptao/files/aipra-writing_wills_for_tribal_clients.pdf) [<https://perma.cc/9JHY-QM6H>]; 25 U.S.C. § 2206; Douglas R. Nash & Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 SEATTLE J. FOR SOC. JUST. 121, 121, 157 (2006); see also discussion of probate and marital property *infra* Part II.

intestacy share on account of sex and how that conflicts with federal and state law that prohibits such discrimination.

Because the Navajo Nation is the largest tribe, and because smaller tribes often follow its direction, this article focuses primarily on the Navajo Nation.<sup>13</sup> Part I of this article discusses the disparity between the three sovereigns—state, federal, and tribal—regarding marriage equality. Part II explains the federal, state, and tribal probate code that would most likely govern a Navajo member’s estate. Part III further considers the implications of the refusal to recognize same-sex marriage in intestacy proceedings. Part IV proposes that, consistent with tribal sovereignty, tribes should grant full faith and credit or comity to same-sex marriages performed outside the tribe’s jurisdiction. While a tribe may opt not to solemnize a marriage, refusing to recognize a marriage lawfully undertaken in another jurisdiction denies property rights to surviving spouses and undermines the ability of spouses to support each other and their offspring.

## I. MARRIAGE EQUALITY & TRIBAL LAW

The Supreme Court first addressed the issue of same-sex marriage in *United States v. Windsor*.<sup>14</sup> There, the State of New York had extended marriage rights to same-sex couples, recognizing the marriage of Edith Windsor and Thea Spyer, who had married in Ontario, Canada.<sup>15</sup> When Spyer died, Windsor attempted to employ the surviving spouse exemption from federal estate taxes.<sup>16</sup> However, her use of the exemption was denied under the federal Defense of Marriage Act, which defined marriage as between one man and one woman for the purposes of all federal statutes.<sup>17</sup> While New York opted to confer “a dignity and status of immense import” upon its citizens, DOMA acted “for the opposite purpose—to impose restrictions and

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<sup>13</sup> See Pauly Denetclaw, *A Native Embassy Row? Navajo Nation Is Looking for a DC Home*, INDIAN COUNTRY TODAY (Mar. 18, 2019), <https://newsmaven.io/indiancountrytoday/news/a-native-embassy-row-navajo-nation-is-looking-for-a-dc-home-mYTKMERKCUeHnWFnmrx9A/> [<https://perma.cc/LV4R-K8MF>] (describing Navajo Nation’s population and advocacy role as well as requests for support from other tribes).

<sup>14</sup> See *United States v. Windsor*, 570 U.S. 744, 751–52 (2013).

<sup>15</sup> *Id.* at 753.

<sup>16</sup> *Id.* at 750.

<sup>17</sup> See *Windsor*, 570 U.S. at 753. Section 3 of DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

disabilities.”<sup>18</sup> In striking down DOMA, the Court expressed its disapproval of the federal government’s refusal to recognize a lawful marriage officiated in Canada and accepted as legal in the petitioner’s home state. Ultimately, the Court concluded that, by seeking “to injure the very class New York seeks to protect,” DOMA “violates basic due process and equal protection principles applicable to the Federal Government.”<sup>19</sup>

In concluding that DOMA violated the equal protection and due process clauses of the Fifth Amendment, the *Windsor* Court was particularly troubled that DOMA created

two contradictory marriage regimes within the same State, . . . forc[ing] same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.<sup>20</sup>

Further, same-sex couples were forced into a second-tier of marriage, one that would be recognized by their state, but not the federal government.<sup>21</sup> For the Court, such a result serves to humiliate the children within these marriages and to undermine family integrity and closeness.<sup>22</sup> Moreover, the Court found that DOMA imposed burdens on same-sex couples that touch “many aspects of married and family life,” preventing couples from receiving federal benefits for which they would otherwise be eligible.<sup>23</sup> Finally, the Court was concerned that DOMA “divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force.”<sup>24</sup> These responsibilities include the duty of each spouse to support each other.<sup>25</sup> At a minimum, equal protection means that Congress could not justify disparate treatment of a politically unpopular group simply out of a desire to harm that group.<sup>26</sup>

For similar reasons, in *Obergefell v. Hodges*, the Court concluded that state prohibitions on same-sex marriage violated both the Fourteenth Amendment’s due process and equal protection clauses.<sup>27</sup> In considering due process, the Court noted

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<sup>18</sup> *Windsor*, 570 U.S. at 768 (“What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.”).

<sup>19</sup> *Id.* at 769–70 (citing U.S. CONST. amend. V).

<sup>20</sup> *Id.* at 772.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 773.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 770 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

<sup>27</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

that it had long held that marriage is a fundamental right protected by the Constitution.<sup>28</sup> As a fundamental right, the state could not deprive a citizen of the right to marry without due process. In addressing the due process question, the Court considered the myriad benefits couples receive from the state precisely because of their marriage, concluding that same-sex couples were unjustly deprived of these benefits by prohibiting them to marry.<sup>29</sup> In addition to depriving same-sex couples' material benefits, state prohibitions also deprived them of the stability opposite-sex couples enjoy.<sup>30</sup> Excluding same-sex couples from marriage communicated to the public that gays and lesbians were not equal and were not welcome to participate in one of the most building blocks of American society—marriage.<sup>31</sup>

While noting that marriage was an evolving institution, the Court emphasized the lifelong union of the married couple as a “[promise of] nobility and dignity to all persons, without regard to their station in life.”<sup>32</sup> Marriage matters now because it has always mattered. As the Court explained, that marriage was fundamental to human beings was demonstrated by its presence throughout much of human history and within a variety of human cultures.<sup>33</sup> In finding that bans on same-sex marriage violated due process, the Court concluded that the fundamental right of marriage recognized by the Constitution applied “with equal force to same-sex couples.”<sup>34</sup> Indeed, to exclude same-sex couples would conflict with the underlying basis for the right to marry itself.<sup>35</sup>

Next, the Court considered marriage prohibitions in light of the equal protection clause. Recognizing the often-“interlocking nature” of the equal protection and due process clauses, the Court leaned on its due process analysis to likewise conclude that the equal

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<sup>28</sup> *Id.* at 2598.

<sup>29</sup> *Id.* at 2601. The Court cited the following as examples of the benefits and responsibilities attached to marital status:

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

*Id.*

<sup>30</sup> *Id.* at 2601–02.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2593–94.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2599.

<sup>35</sup> *Id.* at 2600 (“Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry.”).

protection clause required the right of same-sex couples to marry.<sup>36</sup> For the Court, same-sex marriage bans were by their very nature unequal because they denied same-sex couples the opportunity to enjoy the benefits marriage conferred on opposite-sex couples.<sup>37</sup> Given the “long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm[] . . . [and] serves to disrespect and subordinate them.”<sup>38</sup> Moreover, the bans denied same-sex couples the equal ability to exercise the fundamental right to marry as that afforded to opposite-sex couples.<sup>39</sup> Thus, the Court concluded, the Equal Protection Clause likewise prohibited states from denying same-sex couples the fundamental right to marriage.<sup>40</sup>

While its invocation of the universality of marriage and dignity is compelling, *Obergefell* does not apply to tribal same-sex marriage prohibitions because the constitutional restrictions only extend to limit state and federal authority, not the authority of tribal governments.<sup>41</sup> Instead, tribal government power is restricted by tribal constitutions and by the Indian Civil Rights Act (ICRA).<sup>42</sup> While certain protections within the Bill of Rights are incorporated into ICRA, that statute does not embody all of the individual rights guaranteed by the federal Constitution.<sup>43</sup> Of importance here, ICRA requires that tribes ensure equal protection and due process to every person within their jurisdiction.<sup>44</sup> The applicability of equal protection and due process might suggest that *Obergefell*'s reliance on these two clauses would therefore

<sup>36</sup> *Id.* at 2603–06 (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>37</sup> *Id.* at 2604.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Zug, *supra* note 4, at 770 (“Indian tribes . . . [are in] ‘a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided.’” (quoting *Talton v. Mayes*, 163 U.S. 376, 384 (1896))); *see also* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(1)(a) (Nell Jessup Newton ed., 2017) [hereinafter COHEN’S HANDBOOK] (“Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice.”).

<sup>42</sup> *See* 25 U.S.C. §§ 1301–03.

<sup>43</sup> *See* *Talton v. Mayes*, 163 U.S. 376, 383 (1896) (concluding Fifth Amendment did not apply to tribal government because Indian tribes are “distinct, independent political communities, retaining their original natural rights” that predate Constitution (citation omitted)); *see also* *United States v. Doherty*, 126 F.3d 769, 777 (6th Cir. 1997) (noting that individual constitutional rights did not apply to Indian tribal governments), *abrogated on other grounds by* *Texas v. Cobb*, 532 U.S. 162 (2001); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1348 (1969).

<sup>44</sup> 25 U.S.C. § 1302 (a)(8) (“No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law . . .”).

apply to tribal governments. However, as the Court explained in *Santa Clara Pueblo v. Martinez*, tribes are not bound by the federal courts' interpretation of equal protection or due process.<sup>45</sup>

In *Santa Clara Pueblo*, the Court concluded that while ICRA contained protections for tribal citizens, those protections were not the same as those contained in the federal Constitution.<sup>46</sup> Rather, because ICRA is designed both to protect individual Indians' civil rights vis-à-vis their tribal government and to protect the tribes' sovereignty and right of self-determination, tribal courts were not bound by federal court decisions interpreting an equivalent constitutional right.<sup>47</sup> Instead, tribal courts should interpret equal protection challenges brought under ICRA in light of tribal sovereignty and tribal values.<sup>48</sup> Indeed, tribal courts were not obliged to follow Anglo-American standards of equal protection that would conflict with tribal values or "harm the 'cultural identity' of Indian tribes."<sup>49</sup> According to the Court, ICRA itself demanded this result, an interpretation demonstrated by ICRA's selective extension of constitutional rights to tribal governments to account for different social, cultural, and economic needs of the tribe and its government.<sup>50</sup> Pursuant to *Santa Clara*, tribal courts were principally responsible for interpreting tribal government's obligations under ICRA.<sup>51</sup> In so doing, tribal courts were "free to consider tribal customs and traditions in their decisions" regarding equal treatment.<sup>52</sup>

In short, tribal governments ultimately decide how ICRA is applied.<sup>53</sup> Further, while their authority is subject to Congress's plenary power, with the exception of ICRA,<sup>54</sup> "tribes have generally had the unfettered discretion to enact whatever laws and procedures they chose to govern themselves."<sup>55</sup> Internal tribal

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<sup>45</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60–72 (1978); see also Zug, *supra* note 4, at 772–73.

<sup>46</sup> *Santa Clara Pueblo*, 436 U.S. at 57; see Zug, *supra* note 4, at 770.

<sup>47</sup> Zug, *supra* note 4, at 770.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 772–73 (quoting *Santa Clara Pueblo*, 436 U.S. at 54).

<sup>50</sup> *Santa Clara Pueblo*, 436 U.S. at 62–63 (“[R]ather than providing in wholesale fashion for the extension of constitutional requirements to tribal governments, . . . [ICRA] selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments.”).

<sup>51</sup> Zug, *supra* note 4, at 772–73.

<sup>52</sup> *Id.* at 773.

<sup>53</sup> *Id.* at 773 (citing *Santa Clara Pueblo*, 436 U.S. at 71).

<sup>54</sup> See 25 U.S.C. §§ 1301–03.

<sup>55</sup> B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. REV. 689, 690 (1992); see also COHEN'S HANDBOOK, *supra* note 41, § 4.01(1)(a) (“The right of tribes to govern their members and territories flows from a preexisting

governance, including marriage and inheritance, is largely left to tribal government jurisdiction.<sup>56</sup> For same-sex married couples, this means tribes may ignore *Obergefell* and its discussion of the historical and cultural treatment of marriage in favor of their own tribal custom and tradition.<sup>57</sup> *Obergefell*'s reasoning might be persuasive to an Indian court, but it is not binding authority.<sup>58</sup>

Before *Obergefell*, the issue of tribal recognition of marriage was typically driven in the other direction. That is, while state same-sex marriage prohibitions were in effect, tribes were in the position of recognizing same-sex marriage within states that did not.<sup>59</sup> For instance, in 2013, Darren Black Bear, a tribal member, and Jason Pickel became the first same-sex couple to legally wed in Oklahoma.<sup>60</sup> Rather than marry out of their home state, the couple opted to marry on the Cheyenne and Arapaho reservations after the tribes agreed to grant the couple a marriage license.<sup>61</sup> At the time of their marriage, Black Bear and Pickel's marriage was not recognized in their home state of Oklahoma.<sup>62</sup> Nine years

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sovereignty limited, but not abolished, by their inclusion within the territorial bounds of the United States.”).

<sup>56</sup> See *Montana v. United States*, 450 U.S. 544, 564 (1981); *Santa Clara Pueblo*, 436 U.S. at 65, 71; *United States v. Jarvison*, 409 F.3d 1221, 1224–25 (10th Cir. 2005); see also Jones, *supra* note 55, at 690 (noting Indian Reorganization Act authorized tribes “to enact their own laws and to be governed by them”); COHEN’S HANDBOOK, *supra* note 41, § 4.01(1)(a) (“Indian tribes consistently have been recognized . . . as ‘distinct, independent political communities,’ qualified to exercise the powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.” (footnote omitted) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832))).

<sup>57</sup> Zug, *supra* note 4, at 773 (citing *Santa Clara Pueblo*, 436 U.S. 49).

<sup>58</sup> See *Montana*, 450 U.S. at 564 (“Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.”).

<sup>59</sup> Zug, *supra* note 4, at 769, 769 n.44.

<sup>60</sup> Crawford, *supra* note 6. Although Pickel was not a member of the tribe, the tribe’s code requires only one member of the couple be a tribal member. Lisa De Bode, *Native American Tribes Challenge Oklahoma Gay Marriage Ban*, AL JAZEERA AM. (Oct. 22, 2013), <http://america.aljazeera.com/articles/2013/10/22/native-american-tribeschallengeoklahoma-gaymarriageban.html> [https://perma.cc/5KPZ-6QH2]. There is some question on whether this was the first same-sex marriage for the tribe. See Russell, *supra* note 6.

<sup>61</sup> De Bode, *supra* note 60.

<sup>62</sup> Mark Joseph Stern, *How Did a Gay Couple Legally Marry in Oklahoma?*, SLATE (Oct. 25, 2013), [http://www.slate.com/blogs/outward/2013/10/25/native\\_american\\_gay\\_marriage\\_is\\_legal\\_in\\_oklahoma\\_how\\_does\\_that\\_work.html](http://www.slate.com/blogs/outward/2013/10/25/native_american_gay_marriage_is_legal_in_oklahoma_how_does_that_work.html) [https://perma.cc/4299-JKCF]. The two men were married under a license issued by the Cheyenne and Arapaho Tribes. *Id.* According to the tribes’ law, the marriage must occur on tribal land and one of the couple must be a tribal member. However, the tribes’ marriage license did not specify the sex of the couple. De Bode, *supra* note 60. Three months after Black Bear and Pickel married, a federal district court struck down Oklahoma’s ban on same-sex marriage. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014), *aff’d on other grounds*, *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014). Following the reasoning of *Windsor*, the court held that the ban violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1296. According to the court, the ban on same-sex marriage constituted an “arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit.” *Id.* More specifically, the court noted

earlier, Oklahomans had voted to amend the state constitution to limit marriage to one man and one woman.<sup>63</sup> While their home state would not recognize their marriage, what mattered to Black Bear was that his tribe—and the federal government—would recognize the legality of his marriage.<sup>64</sup>

The same reasoning that made Black Bear and Pickel's marriage valid, also means that tribes may refuse to recognize the marriages of tribal citizens married under state law that now must recognize same-sex marriage. As sovereign nations, tribal governments have the inherent authority to define marriage under tribal law. How a tribe regulates marriage depends upon the tribe. Some tribes, such as the Blackfeet, rely on state law for defining marriage.<sup>65</sup> For those tribes that rely on state law for their marriage law, the rules may have become more consistent after the *Obergefell* decision because those tribes would, like all states, permit same-sex marriage.

However, many tribes follow their own tribal law with respect to marriage.<sup>66</sup> This is true “even where a tribe adopts a definition of marriage contrary to the federal or state definitions, [thus] the tribe will prevail in defining marriage as it pertains to the tribe's members.”<sup>67</sup> When *Obergefell* was decided, twelve tribes currently allowed same-sex marriage either as a matter of tribal law or expressed tribal policy.<sup>68</sup> Still others have marriage laws that use gender-neutral language that have been interpreted to encompass marriage equality.<sup>69</sup> And finally, two tribes permit

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that the state constitutional measure “purposefully [drew a line] between two groups of Oklahoma citizens—same-sex couples desiring an Oklahoma marriage license and opposite-sex couples desiring an Oklahoma marriage license.” *Id.* at 1285. Finding no rational basis for this discriminatory treatment, the court found the prohibition violated the U.S. Constitution. *Id.* at 1296.

<sup>63</sup> Sean Murphy & Tim Talley, *US Appeals Court Says Oklahoma Must Allow Gay Marriage; Governor Says Court Tramples on Voters*, U.S. NEWS & WORLD REP. (July 18, 2014), <http://www.usnews.com/news/us/articles/2014/07/18/court-rules-for-gay-marriage-in-oklahoma-case> [<https://perma.cc/NTW2-U8KG>] (noting that the constitutional amendment was approved by seventy-six percent of Oklahoma voters in 2004).

<sup>64</sup> Crawford, *supra* note 6. According to Black Bear, “[m]y tribe recognizes it and what matters is that the federal government recognizes it.” *Id.*

<sup>65</sup> For instance, Blackfeet Tribal Law declares that “[a]ll members of the Blackfeet Indian Tribe shall hereafter be governed by State Law and subject to State Jurisdiction with respect to marriage hereafter consummated. Common-law marriages and Indian Customs marriage shall not be recognized within the Blackfeet Reservation.” BLACKFEET TRIBAL LAW AND ORDER CODE, ch. 3 § 1 (Marriage).

<sup>66</sup> Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509, 530 (2009) (“[T]he United States Supreme Court recognizes tribal authority to grant valid marriage licenses and similarly dissolve tribal marriages.” (citing COHEN'S HANDBOOK, *supra* note 41, § 4.01(2))).

<sup>67</sup> *Id.*

<sup>68</sup> Tweedy, *supra* note 4, at 110.

<sup>69</sup> *Id.* at 110–11.

same-sex marriage by incorporating state law into tribal marriage law.<sup>70</sup> Most tribes require that at least one member of the couple be a tribal member for the marriage to take place under tribal authority.<sup>71</sup>

In contrast, at least eleven tribes have tribal laws prohibiting same-sex marriage either expressly or by implication.<sup>72</sup> Tribes have expressly forbidden it through “tribal DOMAs” that, like the now defunct state restrictions, limit marriage to “one man and one woman.”<sup>73</sup> Other tribal marriage statutes employ “sex-specific language that may or may not have been intended to bar same-sex marriage.”<sup>74</sup> Consequently, more than half a million tribal citizens are affected by tribal DOMAs.<sup>75</sup>

One of those tribes to enact a tribal DOMA is the Navajo Nation. The Navajo Nation is the largest Indian nation within the United States.<sup>76</sup> With more than 250,000 citizens, its reservation spans three states—New Mexico, Utah, and Arizona.<sup>77</sup> The Navajo Nation Council passed the Diné Marriage Act in 2005.<sup>78</sup> The Act limits marriage to relationships between a woman and a man and declares that same-sex marriages are “void and prohibited.”<sup>79</sup> Marriage is of great importance in traditional Navajo society. “A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the ‘Holy People.’ This blessing ensures that the marriage will be stable, in harmony, and perpetual.”<sup>80</sup> Because of the Diné Marriage Act, same-sex couples are placed outside this important tradition and blessing. Despite vigorous challenges by tribal activists, the Nation continues to prohibit same-sex marriage.<sup>81</sup>

<sup>70</sup> *Id.* at 111.

<sup>71</sup> *See id.* at 116.

<sup>72</sup> *See Zug, supra* note 4, at 769 n.45.

<sup>73</sup> Tweedy, *supra* note 4, at 108, 136.

<sup>74</sup> *Id.* at 104; *see also* Julie Turkewitz, *Among the Navajos, a Renewed Debate About Gay Marriage*, N.Y. TIMES (Feb. 21, 2015), <http://nyti.ms/1zWzPZf> [<https://perma.cc/VU22-R4YM>] (describing varied tribal approaches to same-sex marriage). Tribes that prohibit same-sex marriage include “Navajo Nation, Blue Lake Rancheria, Chickasaw Nation, Confederated Tribes of the Coos, Lower Umqua, and Siuslaw Indians, Grand Traverse Band of Chippewa Indians, Nez Perce Tribe, the Oneida Indian Nation, the Sac & Fox Tribe of the Mississippi in Iowa, and the Muscogee (Creek) Nation.” Tweedy, *supra* note 4, at 131–32 (footnotes omitted).

<sup>75</sup> *See Zug, supra* note 4, at 769.

<sup>76</sup> *See* U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 (2012).

<sup>77</sup> *See Official Site of the Navajo Nation: History*, NAVAJO NATION, <http://www.navajo-nsn.gov/history.htm> [<https://perma.cc/FS3S-6BX5>].

<sup>78</sup> NAVAJO NATION CODE ANN. tit. 9 § 2(c).

<sup>79</sup> *Id.*

<sup>80</sup> *Navajo Nation v. Murphy*, 6 Navajo Rptr. 10, 13 (Navajo 1988).

<sup>81</sup> Given that their sovereign status permits tribes to define marriage, it is perhaps perplexing that Congress nonetheless included a provision in DOMA directly implicating tribal governments. *See* 28 U.S.C. § 1738C; Tweedy, *supra* note 4, at 133. Specifically, under DOMA,

Consequently, a tribal member seeking to marry his same-sex partner may have his marriage recognized by his state and the federal government, but not by his tribe. Because of the intertwining of tribal and federal governments with respect to participation in tribal life, this conflict over recognition could be profound for the individual tribal member. In short, tribal citizens seeking same-sex marriage rights could end up caught between competing sovereigns over the recognition of their marriage. Of particular interest here, in the event one spouse dies intestate, the lack of recognition can divest the surviving spouse of her share of her spouse's estate.

## II. PROBATE & MARTIAL PROPERTY

Just as tribes may define marriage for their members, tribal governments also exercise jurisdiction over tribal members' property.<sup>82</sup> This includes the disposition of marital property when a married person dies intestate.<sup>83</sup> For those tribes that prohibit same-sex marriage, that decision comes into conflict during probate, where a deceased's estate may be subject to federal, state, and tribal law.<sup>84</sup> While the state and federal government would respect the couple's rights in marital property, the tribe would not. In this way, the tribe's refusal to recognize same-sex marriage can divest a surviving spouse of property obtained during an otherwise lawful marriage.<sup>85</sup> Moreover, tribal DOMAs can also unnecessarily complicate an already complex Indian probate process. This section will explain the complexities of the probate process for Indians who die intestate.

Probate in Indian Country is divided between nontrust and trust property, and there is a potential for multiple

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Indian tribes are not required to give full faith and credit 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." 28 U.S.C. § 1738C. By this provision, tribal governments would not be required to recognize the same-sex marriages of couples married in another state or tribal jurisdiction. This portion of DOMA was not changed by *Obergefell* or *Windsor*. *Id.*

<sup>82</sup> See *Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."); Bushyhead, *supra* note 66, at 529.

<sup>83</sup> *Montana*, 450 U.S. at 564; Bushyhead, *supra* note 66, at 529.

<sup>84</sup> See Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 412 (2006) ("[T]he application of different rules of intestate succession to each interest of a decedent in or to trust or restricted land if that land is located within the boundaries of more than 1 State . . . makes probate planning unnecessarily difficult" (quoting American Indian Probate Reform Act., Pub. L. No. 108-374, 118 Stat. 1773 (2004))).

<sup>85</sup> See Bushyhead, *supra* note 66, at 529.

jurisdictions to be implicated in the probate process.<sup>86</sup> Under the trust relationship between Indians and the federal government, Indians hold property as beneficiaries with the U.S. government acting as trustee.<sup>87</sup> Consequently, probate proceedings for real property in Indian Country largely concern title to individual allotments held in trust or as restricted land.<sup>88</sup> Because the federal government holds those lands in trust, individual owners are unable to fully alienate their trust or restricted property during their lives or to devise their trust or restricted property upon their death.<sup>89</sup> The trust relationship also impinges on the tribes' ability to distribute property according to its own customs and probate laws.<sup>90</sup> In contrast, probate of nontrust property is dependent upon the place of domicile, and thus governed by either tribal or state law.<sup>91</sup>

A. *Trust Property Under the American Indian Probate Reform Act*

For most Americans, disposition of their assets depends upon the jurisdiction of the state in which the property is located. For Indian families, the issue is more complex. Property owned by Indians is potentially subject to federal probate law in addition to state and tribal laws depending upon the type of property owned and its location.<sup>92</sup> Federal jurisdiction applies to "trust property," the real property that is held by the federal government as part of its trust relationship with Indian people.<sup>93</sup> Under this scheme, Indians hold property as beneficiaries, with the U.S. government acting as trustee.<sup>94</sup> The disposition of trust,

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<sup>86</sup> See Nash & Burke, *supra* note 12, at 133 (discussing intestate succession and noting that "[f]or Indians, at least two, and potentially three, sets of jurisdictional laws can apply: federal law for trust assets only, tribal law for all non-trust assets located within the jurisdiction of the tribe, and state law for non-trust assets located off reservation and under state jurisdiction"); McCulley, *supra* note 84, at 410, 412 (describing problems of multiple states having jurisdiction over trust property).

<sup>87</sup> McCulley, *supra* note 84, at 404.

<sup>88</sup> *Id.* at 406. "Allotments" are individual parcels of land, "typically [one hundred sixty] acres, that either the federal government holds in trust for individual tribal members or tribal members hold in fee, subject to certain federal restrictions on alienation." *Id.* at 407 (footnote omitted). "[T]rust land" refers to the arrangement by which the United States holds title to land for the benefit of an individual Indian. *Id.* "Restricted land" is land for which an individual Indian holds title but can only alienate or encumber the land with the approval of the Secretary of the Interior. *Id.* (citing 25 C.F.R. § 15.2 (2005)).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Nash & Burke, *supra* note 12, at 133.

<sup>92</sup> See Nash & Burke, *supra* note 12, at 133; McCulley, *supra* note 84, at 412.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

or “restricted,” property held by Indians is controlled by the American Indian Probate Reform Act of 2004 (AIPRA).<sup>95</sup>

Congress passed AIPRA in an effort to stop the increasing fractionalization of undivided interests in trust and restricted lands and to instill some coherence to the distribution of Indian property.<sup>96</sup> Fractionalization resulted from the federal government’s efforts to break up Indian communal ownership of lands and to spur Indian assimilation.<sup>97</sup> Its primary mechanism was the General Allotment Act of 1887, also known as the Dawes Act.<sup>98</sup> Under the Dawes Act, Indian land was divided into individual allotments that were granted to individual Indian allottees.<sup>99</sup> Allottees would occupy the land as beneficiaries with the U.S. government holding title as trustee.<sup>100</sup> Allottees were expected to work the land for a certain period of time under the temporary tutelage of the U.S. government, which doubted the allottees’ abilities to tend to their land independently.<sup>101</sup> More important for this article’s purpose, federal law provided no guidance on intestate succession of allotted parcels.<sup>102</sup> For their part, tribes were not permitted to follow tribal law or custom in disposing of trust property upon the death of the allottee.<sup>103</sup> Instead, intestacy statutes of the state in which the allotment was located controlled its distribution.<sup>104</sup> Consequently, allotted parcels were often divided up amongst several heirs, increasing fractionalization as Indian trust property came to be held by an increasing number of beneficiaries.<sup>105</sup> Compounding this was the restriction on allottees from alienating their land, which prevented any consolidation of beneficiary ownership.<sup>106</sup>

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<sup>95</sup> American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified as amended in scattered sections of 25 U.S.C. (2006)). AIPRA’s provisions governing intestate succession became effective on June 20, 2006. *In re Estate of Anita Adakai*, 61 IBIA 2, 3 n.3 (2015). AIPRA applies to trust and allotted land, which is located primarily in the west where the Navajo Nation is. GUSS, *supra* note 12, at 1. While AIPRA contains exemptions or specific provisions for some states, this article will focus on the general provisions.

<sup>96</sup> American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified as amended in scattered sections of 25 U.S.C. (2006)).

<sup>97</sup> Anthony J. Franken, *Dealing with the Whip End of Someone Else’s Crazy: Individual-Based Approaches to Indian Land Fractionation*, 57 S.D. L. REV. 345, 349 (2012).

<sup>98</sup> *Id.* at 348.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 350.

<sup>103</sup> *Id.*

<sup>104</sup> Franken, *supra* note 97, at 350; *see also* McCulley, *supra* note 84, at 408; Nash & Burke, *supra* note 12, at 127.

<sup>105</sup> Franken, *supra* note 97, at 350.

<sup>106</sup> *Id.*

By 1910, federal law permitted property to be devised by will and defined the probate process for trust assets.<sup>107</sup> The concept of a will, however, was unfamiliar to most Indians at that time and the requirement that the Bureau of Indian Affairs (BIA) approve every will was burdensome.<sup>108</sup> Ultimately, most allottees died intestate.<sup>109</sup> Consequently, until AIPRA's passage, a combination of state and federal law continued to govern the inheritance of trust and restricted property.<sup>110</sup>

AIPRA is the result of Congress's conclusion that reliance on state intestacy statutes had created an unworkable and needlessly complex probate planning process.<sup>111</sup> Specifically, Congress concluded that reliance on state law had resulted in an "increasingly fractionated ownership of trust and restricted land as that land is inherited by successive generations of owners as tenants in common."<sup>112</sup> This fractionated ownership was further complicated when trust property was located in more than one state.<sup>113</sup> Further, Congress was concerned with "the absence of a uniform general probate code for trust and restricted land, which made it difficult for Indian tribes to work cooperatively to develop tribal probate codes."<sup>114</sup>

Through AIPRA, Congress sought to create a uniform probate code to govern interests in trust or restricted parcels and to facilitate and incentivize probate planning assistance and estate planning.<sup>115</sup> Further, Congress encouraged tribal governments to develop their own tribal probate codes consistent with the Indian

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<sup>107</sup> Franken, *supra* note 97, at 352; *see also* McCulley, *supra* note 84, at 407 (noting that trust system prevented Indian people from devising their property by will); Nash & Burke, *supra* note 12, at 129.

<sup>108</sup> Franken, *supra* note 97, at 352.

<sup>109</sup> *Id.*

<sup>110</sup> Nash & Burke, *supra* note 12, at 131.

<sup>111</sup> *See* American Indian Probate Reform Act of 2004, Pub. L. No. 108-374, § 2(3)(A)–(D), 118 Stat. 1773, 1773–74 (codified as amended in scattered sections of 25 U.S.C. (2006)); Nash & Burke, *supra* note 12, at 122.

<sup>112</sup> American Indian Probate Reform Act § 2(3)(A), 118 Stat. at 1773.

<sup>113</sup> *Id.* § 2(3)(B).

<sup>114</sup> *Id.* § 2(3)(C). Indeed, Congress encouraged the implementation of tribal law, particularly in the probate arena, with the Indian Land Consolidation Act. *See* S. Rep. No. 98-632, at 1 (1984), *as reprinted in* 1984 U.S.C.A.N. 5470, 5471.

<sup>115</sup> American Indian Probate Reform Act § 2(3)(A)-(D), 118 Stat. at 1773–74. Under the AIPRA, "trust or restricted lands" includes:

[L]ands, title to which is held by the United States in trust for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation; and . . . "trust or restricted interest in land" or "trust or restricted interest in a parcel of land" means an interest in land, the title to which interest is held in trust by the United States for an Indian tribe or individual, or which is held by an Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 2201(4)(i)–(ii).

Land Consolidation Act.<sup>116</sup> In doing so they provided a basic framework for general probate law that tribes could follow in developing their own codes.<sup>117</sup> Through AIPRA, Congress brought uniformity to the probate process “by giving one overarching law to follow, instead of the amalgamation of state laws previously used to determine the distribution of property.”<sup>118</sup>

Under AIPRA, trust and restricted property can be devised to the owner’s heirs through a will, or it can pass according to either AIPRA’s intestacy provision or a tribe’s probate code that has been approved by the BIA.<sup>119</sup> Probate heirs may include the deceased’s spouse, children, relatives, or the tribe that has jurisdiction over the trust or restricted property.<sup>120</sup>

For the property to remain “in trust,” it must be devised to a person who meets AIPRA’s definition of “Indian” or someone who is within two degrees of consanguinity to an Indian as defined by AIPRA.<sup>121</sup> AIPRA defines “Indian” more broadly than other statutes by including any person who is—or is eligible to become—a member of an Indian tribe<sup>122</sup> or who is an owner of a trust or restricted interest in land as AIPRA’s enactment.<sup>123</sup> It also includes anyone deemed “Indian” under the Indian Reorganization Act<sup>124</sup> (IRA).<sup>125</sup> Eligible heirs take the property in “the same trust or restricted status as such interest was held immediately prior to the decedent’s death.”<sup>126</sup>

<sup>116</sup> See 25 U.S.C. § 2205.

<sup>117</sup> See American Indian Probate Reform Act § 2(3)(A)–(D), 118 Stat. at 1773–74.

<sup>118</sup> Franken, *supra* note 97, at 355–56.

<sup>119</sup> 25 U.S.C. § 2206.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* §§ 2201(9)(b), 2206(a)(2).

<sup>122</sup> An “Indian tribe” is “any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust.” *Id.* § 2201(1).

<sup>123</sup> *Id.* § 2201(2). AIPRA was enacted on October 27, 2004. *Id.* Specifically, under AIPRA, an “Indian” is:

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that that State.

*Id.*

<sup>124</sup> See Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–129 (2012)).

<sup>125</sup> See 25 U.S.C. § 2201(2)(B).

<sup>126</sup> *Id.* § 2206(a)(5).

However, there is no requirement that the property must pass to an Indian or tribal member.<sup>127</sup> Rather, a testator may devise the property to anyone through their will and the tribe's BIA-approved intestacy provision may designate non-Indians or nontribal members as potential successors.<sup>128</sup> If trust property is devised to a nontribal member, it will no longer be held in trust, although the tribe will have the option to purchase the property for fair market value.<sup>129</sup>

If a trust owner dies intestate, and there is no tribal probate code, the trust or restricted property will pass under AIPRA or an approved tribal intestacy provision.<sup>130</sup> Under the AIPRA, the property will pass to the deceased's surviving immediate family only "if they either a) meet the definition of 'Indian,' b) are the decedent's descendants within two generations of an Indian, or c) they are already co-owners of the same parcel of land."<sup>131</sup>

Under AIPRA's intestacy provision, the surviving spouse receives one-third of the deceased spouse's individual Indian money (IIM) account<sup>132</sup> and a life estate in the trust- or restricted-property if there are other surviving heirs.<sup>133</sup> If there are no other heirs, the surviving spouse receives the entire IIM account balance as well as a life estate in the trust- or restricted-land.<sup>134</sup> However, when the decedent's interest in the trust property is less than 5 percent, a surviving spouse retains a life estate in the trust or restricted property if the spouse resides on the property.<sup>135</sup>

The remaining interests are passed to the deceased's "single heir."<sup>136</sup> Under the "single heir rule," if there is no life estate created for a surviving spouse who remains on the property or if there is a remainder interest from the life estate, the decedent's interest descends first to their eldest child if the child is an eligible heir.<sup>137</sup> If there is no eligible child heir, the

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<sup>127</sup> *See id.* § 2206.

<sup>128</sup> *Id.* § 2206(b)(1)(A).

<sup>129</sup> *See id.* § 2205(c)(1)(A).

<sup>130</sup> *See id.* §§ 2205(a), 2206(a).

<sup>131</sup> McCulley, *supra* note 84, at 413 (emphasis omitted).

<sup>132</sup> 25 U.S.C. § 2206(b)(3)(A) ("The term 'trust personality' as used in this section includes all funds and securities of any kind which are held in trust in an individual Indian money account or otherwise supervised by the Secretary.")

<sup>133</sup> *Id.* § 2206(a)(2)(A).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 2206(a)(2)(D).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* For purposes of section 2206, "eligible heirs" includes:

[A]ny of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents who are—

(A) Indian; or

interest descends to the eldest eligible grandchild or the eldest eligible great-grandchild.<sup>138</sup> If the deceased left no eligible descendants, the remaining interest reverts to the tribe.<sup>139</sup> If there is no tribe to inherit the property, the interest is “divided equally among co-owners of trust or restricted interests in the parcel.”<sup>140</sup> Finally, if there are no co-owners, the property reverts to the United States to be sold.<sup>141</sup>

AIPRA’s restriction of intestacy heirs to those who are Indian, within two degrees of Indian heritage, or already co-owners may conflict with tribal custom or law.<sup>142</sup> For instance, a surviving spouse who meets a particular tribe’s definition of “Indian,” but does not meet AIPRA’s definition of “Indian” may be divested of an interest she may have been entitled to under tribal law.<sup>143</sup> However, because AIPRA defines Indian to include any member of a tribe or holder of trust property, it is also possible the opposite would happen in that the tribe might not consider the person entitled to inherit, but the AIPRA would.<sup>144</sup> Further, while AIPRA permits property to be devised to a non-Indian or to pass via a tribal probate code, such a devise also gives rise to a tribal right to purchase the property from the surviving non-Indian heir.<sup>145</sup> This provision may effectively deny a devisee the ability to pass her property to a surviving non-Indian spouse. This issue is particularly problematic when either resources or religious beliefs preclude the drafting of wills.<sup>146</sup>

AIPRA also permits tribal governments to adopt probate codes to govern the disposition of trust or restricted property that is located on the tribe’s reservation or otherwise subject to tribal jurisdiction.<sup>147</sup> Such codes may include rules of intestate succession and other rules “that are consistent with Federal law and that promote the policies set forth in section 102 of the

(B) lineal descendants within [two] degrees of consanguinity of an Indian;  
or

(C) owners of a trust or restricted interest in a parcel of land for purposes of inheriting by descent, renunciation, or consolidation agreement under section 2206 of this title, another trust or restricted interest in such parcel from the decedent[.]

*Id.* § 2201(9).

<sup>138</sup> *Id.* § 2206(a)(2)(D).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See McCulley, *supra* note 84, at 417.

<sup>143</sup> *Id.*

<sup>144</sup> See *id.* at 414, 416–17.

<sup>145</sup> 25 U.S.C. §§ 2205(c)(1)(A), 2206(b)(1)(A), (b)(2)(A)(ii).

<sup>146</sup> See McCulley, *supra* note 84, at 418.

<sup>147</sup> 25 U.S.C. § 2205(a)(1).

Indian Land Consolidation Act Amendments of 2000.”<sup>148</sup> Tribal probate codes are, however, subject to the approval of the BIA.<sup>149</sup> It is an open question whether a tribal probate code can deny a surviving same-sex spouse an intestacy share while remaining “consistent with Federal law,” which, under *Windsor*, requires federal recognition of same-sex marriage.<sup>150</sup>

Generally, approval will not be granted to a code that prohibits the succession to a lineal descendent of the original Indian allottee or to someone who is not a member of the tribe that holds jurisdiction over that interest.<sup>151</sup> To include such restrictions, the tribal code must also allow for eligible devisees to renounce their interests, for spouses or lineal descendants to reserve a life estate, and for the payment of fair market value.<sup>152</sup> As of 2015, the BIA has approved three tribal probate codes—those belonging to the Fond du Lac Band, the Northern Cheyenne Tribe in Montana, and the Confederated Tribes of the Umatilla Indian Reservation in Oregon.<sup>153</sup> Consequently, AIPRA governs the vast majority of trust and restricted property.

On its face, AIPRA does not provide a definition of “spouse” nor does it appear to prohibit a surviving same-sex spouse from inheriting under its provisions.<sup>154</sup> Indeed, until DOMA there was no federal definition of marriage.<sup>155</sup> Nor was it defined within the context of probate. However, the definition does not appear to depend upon the tribal definition as it does not recognize customary marriages that a tribe might.<sup>156</sup> Thus, during the pendency of DOMA, its definition would have likely prevailed in the probate of Indian trust property and would have prevented a spouse from inheriting trust property, even if married by a tribal

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<sup>148</sup> *Id.* § 2205(a)(2).

<sup>149</sup> *Id.* § 2205(b)(1).

<sup>150</sup> *Id.* § 2205(a)(2); see *United States v. Windsor*, 570 U.S. 744, 769–70 (2013) (citing U.S. CONST. amend. V).

<sup>151</sup> 25 U.S.C. § 2205 (a)(3).

<sup>152</sup> *Id.*

<sup>153</sup> Press Release, Indian Affairs, Dep’t of the Interior, Assistant Secretary Washburn Announces Approval of Fond du Lac Band of Lake Superior Chippewa’s Probate Code (Aug. 4, 2015), <https://www.bia.gov/as-ia/opa/online-press-release/assistant-secretary-washburn-announces-approval-fond-du-lac-band-lake> [<https://perma.cc/UAJ6-TVA8>].

<sup>154</sup> GUSS, *supra* note 12, at 18–19; see 25 U.S.C. § 2206. It is an open question whether a tribal probate code could deny a surviving same-sex spouse an intestacy share while remaining “consistent with Federal law,” which, under *Windsor*, requires federal recognition of same-sex marriage. 25 U.S.C. § 2205(a)(2); see *Windsor*, 570 U.S. at 769–70. Presently, only three tribes have had probate codes accepted by BIA for disposition of trust/restricted property, so this question is unlikely to be addressed any time soon. See Press Release, *supra* note 153.

<sup>155</sup> See Tweedy, *supra* note 4, at 132–33.

<sup>156</sup> GUSS, *supra* note 12, at 18–19.

government that recognized same-sex marriage.<sup>157</sup> However, since *Windsor* required federal recognition of lawfully-conducted same-sex marriages, *Windsor*'s definition of marriage should now be the operative one for the purposes of probating property subject to AIPRA.<sup>158</sup> Similarly, *Obergefell* would appear to require that states include same-sex spouses in their intestacy distributions for surviving spouses. As the Court explained, marriage includes many state-recognized material benefits including rules of intestate succession.<sup>159</sup> Excluding same-sex couples from marriage deprives them of the benefits that derive from marriage, causing their relationships to suffer an instability opposite-sex couples would find intolerable.<sup>160</sup>

### B. *Personal & Nontrust Property*

In addition to trust property governed by AIPRA,<sup>161</sup> a couple's marital property may include personal property (such as bank accounts, motor vehicles, or jewelry) and nontrust real property. Disposition of this property will be governed either by tribal or by state law depending upon the deceased's domicile and the location of the property.<sup>162</sup>

If a tribal member dies while domiciled on tribal land, then, assuming the tribe has a probate code, that code would determine who inherits any nontrust property located within the reservation.<sup>163</sup> Property outside the tribe's land would be subject

<sup>157</sup> Bushyhead, *supra* note 66, at 542–43 (“[T]he AIPRA may find its way into the analysis of same-sex couple spousal rights when other tribes, whose members own ‘trust and restricted lands,’ pass laws allowing same-sex marriage. In these cases, the AIPRA, as an Act of Congress, discriminates against same-sex spouses by employing the federal definition of spouse for intestate succession.” (footnotes omitted)).

<sup>158</sup> Nor is it likely that a tribe's definition would control given AIPRA's rejection of customary marriages that are recognized by tribes. *See* GUSS, *supra* note 12, at 18. The Uniform Law Commission is currently drafting a Uniform Tribal Probate Code, in the hopes that it will merge the gaps between state probate codes and AIPRA. *See* MODEL TRIBAL PROB. CODE § 3-504 (UNIF. LAW COMM'N, Committee Meeting Draft 2019), <https://www.uniformlaws.org/viewdocument/march-2019-committee-meeting-draf-3?CommunityKey=8a2f2343-6723-41e9-a4cf-d824ef951ed9&tab=librarydocuments> [<https://perma.cc/W8QL-9KGD>]. The current draft defers to tribes to “determine[] spousal status based upon Tribal Nation law or custom, and determine[] the extent to which abuse, abandonment, or other similar conduct disqualifies a spouse from succeeding to a property interest.” *Id.* It is uncertain whether such a provision would actually permit states or the federal government to ignore same-sex marriages given the dictates of *Windsor* and *Obergefell*.

<sup>159</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

<sup>160</sup> *Id.*

<sup>161</sup> *See* 25 U.S.C. § 2206.

<sup>162</sup> GUSS, *supra* note 12, at 18–19. Rather than address all fifty states where a tribal member's property may be located, this article will only discuss those states that encompass the Navajo Nation—i.e., Arizona, New Mexico, and Utah. However, any state would be equally bound by *Obergefell*.

<sup>163</sup> If the tribe does not have a probate code, the state court would determine who inherits. *Id.*

to the state probate code where that property is located.<sup>164</sup> If a tribal member dies while domiciled outside Indian Country, then the law of the state of domicile would control disposition of property located within that state and tribal law would determine who inherits any property on tribal land.<sup>165</sup>

For instance, the estates of the more than three hundred thousand members of the Navajo Nation<sup>166</sup> could be affected by five different sets of probate codes. In addition to AIPRA, the Navajo Nation has its own probate code that governs the estates of tribal members domiciled on the reservation and whose property is within its jurisdiction.<sup>167</sup> Similarly, rights to marital property acquired by Navajo while within the Navajo Nation's jurisdiction is governed by Navajo law.<sup>168</sup> Further, members' estates may be subject to the laws of any of the three states its reservation spans—New Mexico, Utah, and Arizona.<sup>169</sup>

### 1. Navajo Nation

Under Navajo probate code, property acquired during the course of the marriage is deemed community property.<sup>170</sup> When one spouse dies, one-half of the community property passes to the surviving spouse.<sup>171</sup> Community property is not part of the probate estate and is not devisable by will.<sup>172</sup> The remaining half of the nonrestricted community property, as well as any separate property,<sup>173</sup> passes by will, or absent a will, according to the tribe's intestacy provision.<sup>174</sup> Under that provision, the decedent's father, mother, brothers, and sisters are each entitled to one personal

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<sup>164</sup> *Id.* at 19.

<sup>165</sup> *Id.*

<sup>166</sup> See NAVAJO DIV. OF HEALTH & NAVAJO EPIDEMIOLOGY CTR., NAVAJO POPULATION PROFILE: 2010 U.S. CENSUS, at 5 (Dec. 2013), <https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf> [<https://perma.cc/PYS5-VR8M>].

<sup>167</sup> See NAVAJO R. PROBATE P., <http://www.navajocourts.org/Rules/probatepro.htm> [<https://perma.cc/UU5J-EA36>].

<sup>168</sup> NAVAJO NATION CODE ANN. tit. 9, § 212 (“Marital rights in property acquired in Navajo Indian Country during marriage by Navajo Indians shall be controlled by the laws of the Navajo Nation.”).

<sup>169</sup> See *Official Site of the Navajo Nation*, *supra* note 77.

<sup>170</sup> Community property includes all goods, money, livestock, grazing permits, and other real and personal property. NAVAJO R. PROBATE P. 5.

<sup>171</sup> *Id.* Any property acquired by either spouse during the marriage is community property. NAVAJO NATION CODE ANN. tit. 9, §§ 205–09. Only the man, however, can unilaterally dispose of community property. NAVAJO NATION CODE ANN. tit. 9, §§ 205–09.

<sup>172</sup> NAVAJO R. PROBATE P. 5.

<sup>173</sup> Property acquired by either husband or wife prior to marriage is the separate property of whomever acquired it, without regard to membership or enrollment status in Navajo Nation. NAVAJO NATION CODE ANN. tit. 9, § 202.

<sup>174</sup> NAVAJO R. PROBATE P. 6.

item as selected by the family.<sup>175</sup> If the deceased has a surviving spouse and issue,<sup>176</sup> distribution of the remaining property depends on whether the property is on Navajo land in Arizona or New Mexico.<sup>177</sup> The code does not contain any special provision for property in Utah.<sup>178</sup>

For those tribal members residing on reservation land within Arizona, if all the surviving children are those of both the deceased and the surviving spouse, the surviving spouse is entitled to the entire remaining share.<sup>179</sup> If, however, the surviving spouse is not the parent of one or more of the deceased's surviving children, then the surviving spouse takes one-half of the deceased's separate property and the surviving children receive the rest of the deceased's separate property and the remaining half of the community property.<sup>180</sup>

In New Mexico, the surviving spouse receives the deceased's community property as well as one-quarter of the separate property, regardless of any surviving issue or the issue's parentage.<sup>181</sup> Any surviving issue receives the remaining three-quarters of the separate property.<sup>182</sup> If, however, there is no surviving issue, the surviving spouse receives the entirety of the decedent's property.<sup>183</sup> If the decedent leaves no surviving relatives as identified by the code, the estate passes to the closest surviving relative of the surviving spouse.<sup>184</sup>

Under Navajo law, "[m]arital rights in property acquired in Navajo Indian Country during marriage by Navajo Indians shall be controlled by the laws of the Navajo Nation."<sup>185</sup> When paired with the tribe's DOMA, this provision would preclude same-sex Navajo couples from having their marital property rights recognized by their tribal government.<sup>186</sup>

Finally, the Navajo Probate Code provides that Navajo custom regarding property distribution overrides the code

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<sup>175</sup> *Id.* 6(2). These provisions apply after the decedent's final costs and outstanding debts have been paid. Further, if the deceased was a medicine man, his official paraphernalia is to be given to a medicine man of the family's choosing. *Id.* 6(1).

<sup>176</sup> "Issue" includes children, grandchildren, and great grandchildren. *Id.* 6(3).

<sup>177</sup> *See id.* 6(3)(a)–(c). The code does not mention property located in Utah.

<sup>178</sup> *See id.*

<sup>179</sup> *Id.* 6(3)(a); *see In re Bigthumb*, 6 Navajo Rptr. 453, 455–45 (Navajo D. Ct. 1989).

<sup>180</sup> NAVAJO R. PROBATE P. 6(3)(b).

<sup>181</sup> *Id.* 6(3)(c); *see Benally v. Denetclaw*, 5 Navajo Rptr. 174, 177 (Navajo 1987).

<sup>182</sup> NAVAJO R. PROBATE P. 6(3)(c).

<sup>183</sup> *Id.* 6(5).

<sup>184</sup> *Id.* 6(9).

<sup>185</sup> NAVAJO NATION CODE ANN. tit. 9, § 212.

<sup>186</sup> *Compare* NAVAJO NATION CODE ANN. tit. 9, § 1 (noting marriages performed outside Nation are recognized if valid in the jurisdiction where performed unless specifically "void and prohibited by Section 2 of this title"), *and* § 2(C) (prohibiting same-sex marriage), *with* NAVAJO R. PROBATE P. 6 (specifying order of intestacy succession).

itself.<sup>187</sup> According to the code, “[i]f there is shown to be a Navajo custom concerning the distribution of the property, the property will descend according to that custom, even if the custom is in conflict with any other provision of this rule.”<sup>188</sup>

For those tribal members who are domiciled off the reservation, their nontrust and personal property would be governed by the law of the state of domicile.<sup>189</sup> Tribal members domiciled on the reservation could still be subject to state probate law if they own property, such as bank accounts, that are located outside the reservation and within that state’s jurisdiction.<sup>190</sup> While those assets may be located in any of the fifty states, this article discusses the probate rules in effect for the three states that encompass the Navajo reservation—Arizona, New Mexico, and Utah.

## 2. Arizona

Under Arizona’s intestacy statute, the entirety of the decedent’s half of the couple’s community property as well as her separate property passes to the surviving spouse if there are no surviving issue<sup>191</sup> or if all surviving issue are also those of the surviving spouse.<sup>192</sup> If any surviving issue is not also those of the surviving spouse, then the surviving spouse receives one-half of the decedent’s separate property, but none of the decedent’s share of the couple’s community property.<sup>193</sup>

## 3. New Mexico

In New Mexico, the decedent’s one-half share of the couple’s community property passes to the surviving spouse.<sup>194</sup> As for separate property, when the decedent dies without issue,<sup>195</sup> the

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<sup>187</sup> See *In re Estate of Kindle*, 6 Am. Tribal Law 750, 755 (Navajo 2006) (finding lower court did not err by applying custom rather than state intestacy statute because tribal Probate Code provision requiring application of state probate law if “custom” was unproven was inconsistent with tribe’s Fundamental Law requiring application of custom).

<sup>188</sup> NAVAJO R. PROBATE P. 6(10).

<sup>189</sup> GUSS, *supra* note 12, at 19.

<sup>190</sup> *Id.* at 18–19.

<sup>191</sup> Arizona defines issue to mean “descendent,” which includes “all of the decedent’s descendants of all generations, with the relationship of parent and child at each generation.” ARIZ. REV. STAT. ANN. § 14-1201(13), (34).

<sup>192</sup> *Id.* § 14-2102.

<sup>193</sup> *Id.*

<sup>194</sup> N.M. STAT. ANN. § 45-2-102.

<sup>195</sup> New Mexico defines “issue” to mean “descendent[.]” which is defined to include “all of the individual’s descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in the Uniform Probate Code.” *Id.* § 45-1-201(27), (9).

surviving spouse receives the entirety of the decedent's separate property.<sup>196</sup> If there is a surviving issue, the surviving spouse receives one-fourth of the decedent's separate property.<sup>197</sup>

#### 4. Utah

Utah's probate code provides that the surviving spouse receives the decedent's entire estate if there are no surviving descendants or if all the surviving descendants are also those of the surviving spouse.<sup>198</sup> If any of the surviving descendants are not those of the surviving spouse, the spouse receives the first \$75,000 and one-half of the decedent's estate.<sup>199</sup> When the surviving spouse will share the estate with others, Utah reduces the surviving spouse's share by the value of any nonprobated transfers.<sup>200</sup> Nonprobated transfers are counted as an "advancement," and include property that automatically transfers to the surviving spouse upon death.<sup>201</sup> If the advancement totals more than the spouse's share under the probate code the surviving spouse receives nothing more from the decedent's estate.<sup>202</sup>

### III. PROBATE & NONRECOGNITION OF SAME-SEX MARRIAGE

*I grew up traditional, my grandparents taught me about love, they taught me about respect, as well as the sacredness of having a family. So . . . let's say that my partner and I decide to get married in California, or let's say we go to Albuquerque . . . the state recognizes it, and so I can come back here home . . . and the Navajo government will not recognize the rights and the benefits I deserve. They will not recognize the rights and the benefits my partner deserves.*

*~ Diné marriage equality activist Alray Nelson<sup>203</sup>*

Imagine a tribal member who dies intestate while domiciled on reservation lands within the state of Arizona. She is a citizen of the United States, the Navajo Nation, and Arizona. She holds trust property in her name, has personal property in

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<sup>196</sup> *Id.* § 45-2-102.

<sup>197</sup> *Id.*

<sup>198</sup> UTAH CODE ANN. § 75-2-102.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* §§ 75-2-102, -206.

<sup>202</sup> *See id.* § 75-2-102.

<sup>203</sup> Tell Me More Staff, *States May Recognize Same-Sex Marriage, but Navajo Nation Won't*, NPR: CODE SWITCH (Jan. 9, 2014, 1:46 PM), <https://www.npr.org/sections/codeswitch/2014/01/09/261048308/states-may-recognize-same-sex-marriages-but-navajo-nation-wont> [<https://perma.cc/K72W-ABAQ>].

her home on the reservation, and a parcel of real estate outside the reservation within the confines of Arizona. She and her wife have raised and provided for three teenaged children, who are biologically the surviving spouse's offspring. Ideally, the couple would protect their assets with a will, thus avoiding intestacy proceedings altogether. Like most Americans, however, Indians are likely to die intestate.<sup>204</sup>

As a consequence of overlapping probate jurisdictions, our tribal member's estate would be subject to three different intestacy proceedings—one by the BIA, one by the state of Arizona, and one pursuant to the laws of the Navajo Nation.<sup>205</sup> In the first two jurisdictions, her surviving spouse would receive her full share under the applicable intestacy provision.<sup>206</sup> But under the third, her spouse would be completely denied her intestate share of property accumulated during the life of her marriage.<sup>207</sup> Because the determination of succession for the tribal portion of her estate would be dependent not only upon the domicile of the deceased and the location of the property, but upon the sexual orientation of the married individuals, the surviving spouse of a tribal member could have rights to marital property denied because of the sex of her spouse.<sup>208</sup>

While differences between intestacy proceeds are likely in a divided system,<sup>209</sup> both the domicile and location of nontrust property are within the control of the tribal member. Sexual orientation—who one loves—is not. Nevertheless, the surviving spouse may lose her share of assets accumulated over the life of the marriage simply because of her sex. This circumstance leaves the couple with two choices<sup>210</sup>—remain on the reservation and risk a surviving spouse losing property accumulated with her spouse over the course of the marriage or leave what is possibly the only place they have ever called home to save their estate. The latter choice can be devastating for tribal members, who can lose their cultural and social community and their ability to participate in tribal life. Further their children will then grow up

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<sup>204</sup> See sources cited *supra* note 11.

<sup>205</sup> See discussion *supra* Part II.

<sup>206</sup> See discussion *supra* Sections II.A, II.B.2.

<sup>207</sup> See discussion *supra* Section II.B.1.

<sup>208</sup> See discussion *supra* Section II.B.1.

<sup>209</sup> See Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129, 130 (2014) (describing differential disposition of property resulting from jurisdictional differences in allocation of estate assets).

<sup>210</sup> Of course, there is a third choice—drafting a will designating the disposition of assets. However, as already noted, most people in the United States die without a will. See Weisbord, *supra* note 11, at 878. This reality is one reason intestacy provisions exist at all. Denying someone property on the theory that they could have created a will increases a burden on a same-sex couple that is not there for opposite sex couples.

disconnected from their native heritage. For the tribe, the loss of its members risks a permanent loss to its community as members flee, often with their children, who may then never return.<sup>211</sup>

In the hypothetical above, if the couple were to remain within the reservation, it could be that their most essential property—their personal belongings, such as photo albums, souvenirs, wedding gifts—may be lost. That property would be dispersed pursuant to a tribal probate code that does not recognize their marriage. For the same reason, the couple's financial assets may pass to another relative, depriving the surviving spouse of assets necessary to support the couple's children. This is especially true if the children are not the biological kin of the deceased spouse. To avoid this possibility, members would be wise to remove their nontrust assets from the reservation simply to ensure the bulk of their assets is ultimately conveyed to their surviving spouse.

While individual Indian families may protect their own assets, community-wide changes resulting in more predictability and stability would require more fundamental challenges to existing tribal DOMAs. For instance, the Diné Marriage Act's prohibition against same-sex marriages can only be undone by the Navajo Nation's Council or a tribal court.<sup>212</sup> That, however, does not necessarily mean that lawful same-sex marriages performed outside the tribe should not be given full effect, at least for purposes of intestacy rights, within a tribe's jurisdiction. Instead, a tribe might consider that there are perhaps “fundamental difference[s] between creating a marriage and recognizing a marriage” that was lawfully performed in another jurisdiction.<sup>213</sup> Tribes could protect marital assets by recognizing marriages performed in other jurisdictions, even while refusing to perform such marriages. In short, tribes such as the Navajo that prohibit same-sex marriage may, nonetheless, be convinced to recognize

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<sup>211</sup> See Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)Imposes Anglo American Legal Values on Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 358–60 (2009) (discussing Congressional testimony and findings regarding importance of Indian children and families to stability of Indian communities).

<sup>212</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60–72 (1978) (finding tribes not bound by federal courts' interpretation of due process or equal protection); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (recognizing tribes' sovereign right to determine and regulate internal affairs); COHEN'S HANDBOOK, *supra* note 41, § 4.01(A)(1) (noting tribal powers of self-government); see also Zug, *supra* note 4, at 772–73.

<sup>213</sup> Rebecca Aviel, *Faithful Unions*, 69 HASTINGS L.J. 721, 736 (2018) (quoting Transcript of Oral Argument at 32, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556)).

such marriages from other jurisdictions to ease the administration of an estate in probate.<sup>214</sup>

In addition to romantic ideals of love and family devotion, marriage as an institution invests married spouses with certain obligations and duties to care and provide for each other and for any minor children. As Justice Kennedy explained in *Obergefell*, along with a married couple's vows, society also supports the couple both through formal recognition of their relationship and through a series of material benefits designed to encourage and nurture marriage itself.<sup>215</sup> These material benefits have generally included an ever-expanding list of government rights and benefits, including property rights embodied in rules of intestate succession.<sup>216</sup> By conferring this panoply of rights, "[s]tates have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order."<sup>217</sup> Finding no reason to differentiate between same-sex and opposite-sex marriages on this point, Justice Kennedy concluded that denying these rights to same-sex couples materially burdens same-sex couples.<sup>218</sup> In effect, it deprives them of the community support for their marriage, but more to the point of this article, it deprives them of the spousal support intestacy provisions provide to opposite-sex couples.<sup>219</sup>

Indeed, marriage can be viewed as "a distributive mechanism for 'social goods of an immense variety of kinds: material resources like money, jobs, nutrition; symbolic resources like prestige and degradation; psychic resources like affectional ties, erotic attraction and repulsion.'"<sup>220</sup> A government's interest in protecting marriage—and the distribution of marital assets—is attributed, at least in part, to a desire to "privatize[] dependency," such that spouses are incentivized "to privately address the dependencies that often arise when adults care for children and for one another."<sup>221</sup> While more modern notions of romance and compatibility are often viewed as the most compelling reasons for marriage, privatized dependency remains a central component of

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<sup>214</sup> See Jones, *supra* note 55, at 689 ("Many tribes have enacted legislation which requires their court systems to recognize state court judgments, especially in the area of domestic relations.").

<sup>215</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 2601–02.

<sup>219</sup> See *id.*

<sup>220</sup> Aviel, *supra* note 213, at 760 (quoting Janet Halley, *What Is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5–6 (2011)).

<sup>221</sup> *Id.* at 761 (quoting Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866–67 (2014)).

its legal recognition.<sup>222</sup> As a consequence of this recognition and the benefits bestowed by marriage, families act as “private welfare,” lessening the need for overt government assistance.<sup>223</sup>

However, for marriage to serve this private welfare function, marriage must be stable. Stability is what gives credence to the state’s preference for marriage over other intimate relationships, just as that stability justifies the special state-sanctioned benefits on the basis of the couple’s lifelong commitment to mutually support each other. In short, the assumption is that, in exchange for ensuring a stable foundation for marriage, society can reasonably expect that a couple’s “exclusive and enduring” commitment to each other will ensure they, rather than the state, will support each other.<sup>224</sup>

It is this expectation that creates the foundation upon which a “system of privatized dependence” is built.<sup>225</sup> Within that system, couples pool their resources and share their labor to support a “family enterprise” instead of individual ventures.<sup>226</sup> While much of the social pressure deriving from marriage is focused on shaping the behavior of the spouses, government behavior also has a role.<sup>227</sup> For instance, states’ willingness to recognize lawful marriages from other jurisdictions provides stability that a marriage will endure regardless of locale.<sup>228</sup> In doing so, states foster expectations of permanence, which are essential for a marriage to endure.<sup>229</sup>

Maintaining the expectations of stability and permanence are equally important when considering how best to dispose of a deceased spouse’s assets. When one spouse dies, the assets the couple built together should continue to support the family. Indeed, by giving priority to surviving spouses and children, intestacy provisions<sup>230</sup> make clear that at least one goal of probate is to ensure family support after the death of a family member.

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<sup>222</sup> *See id.*

<sup>223</sup> *Id.* (quoting Halley, *supra* note 220, at 1866–67).

<sup>224</sup> *Id.* at 762.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Generally, intestate provisions give priority to a surviving spouse over other descendants or heirs. *See, e.g.*, 25 U.S.C. § 2206 (a)(2)(A)(i) (providing surviving spouse receives one-third of deceased spouse’s IIM account); NAVAJO R. PROBATE P. 5 (allocating half of marital property to surviving spouse); ARIZ. REV. STAT. ANN. § 14-2101 (providing that deceased’s community and separate property pass to his surviving spouse); N.M. STAT. ANN. § 45-2-102 (providing that half of decedent’s community property passes to the surviving spouse); UTAH CODE ANN. § 75-2-102 (designating that surviving spouse receives deceased’s entire estate when there are no other surviving descendants or if all the surviving descendants are also those of the surviving spouse).

For instance, the Navajo Nation's probate deems all of a couple's property acquired during the marriage community property that must pass to the surviving spouse.<sup>231</sup> It is not part of the probate estate and may not be devised by will.<sup>232</sup>

Tribal DOMAs interfere with the support-system that marriage is, at least in part, designed to foster by refusing to recognize the marriage that creates the priority of intestacy succession. In short, the refusal to recognize same-sex marriages means that marital assets necessary to support the family may be lost, undermining marital stability at least for same-sex couples. This result may be exactly what advocates against same-sex marriage desire. Nevertheless, given that states and the federal government recognize same-sex marriage and that the division of probate assets is already needlessly complex, it seems far more practical to follow one scheme at least when it comes to protecting marital assets. Granted, uniformity could be established by either rejecting or embracing same-sex marriage. However, because *Windsor* and *Obergefell* mandate federal and state recognition of marriage, tribal governments should consider recognizing same-sex marriages for the limited purpose of probating estates of those who die intestate.

Thus, a couple who is legally married in the state of Arizona—and whose marriage is recognized by that and every other state and the federal government—will then begin to function with the expectations and responsibilities of marriage. While a government may wish to deem certain marriages ineligible for state sanction, once the couple has married, it would seem there is no reason to refuse recognition other than to communicate moral disapproval.<sup>233</sup> However, by the time recognition becomes an issue—at the death of a same-sex spouse—the couple will have lived with the same expectations and responsibilities of other legally married couples. They will have accumulated assets, taken on parental responsibilities, and assumed responsibility for each other's well-being. "Faced with an existing marriage from another state, a state is simply not in the position to achieve the objectives it seeks to pursue when deciding whether to initiate a marriage in the first place."<sup>234</sup> It is not preventing a marriage it believes unwise or contrary to its view; it is simply punishing a couple by depriving it of marital assets the couple's work accumulated. An interest in expressing

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<sup>231</sup> NAVAJO R. PROBATE P. 5.

<sup>232</sup> *Id.*

<sup>233</sup> Aviel, *supra* note 213, at 762–63.

<sup>234</sup> *Id.* at 762.

moral disapproval “should rank beneath . . . the perpetual reinforcement of the permanence norms that are essential to the entire regime.”<sup>235</sup> As Justice Sotomayor explained, “states had typically not determined that any deviation from their own ‘prerequisites’ for marriage constituted a violation of public policy.”<sup>236</sup>

Of course, it can be argued that it is not reasonable for any Indian couple to live with an expectation that their marriage will be recognized when they reside on a reservation that has expressly rejected same-sex marriage. However, like Edith Windsor and Thea Spyer, same-sex couples residing on the reservation would live as married for the purpose of state and federal law, but would be viewed as unmarried only for the purpose of Navajo law.<sup>237</sup> Tribal DOMAs “divest[] married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force.”<sup>238</sup> Just as in *Windsor*, the stability and predictability of these important personal relations are diminished by a refusal to recognize the couples’ marriages.<sup>239</sup>

#### IV. PATHS TOWARDS RECOGNITION

Two mechanisms by which tribes could recognize same-sex marriage would be under the Full Faith and Credit Clause or by applying the principle of comity. While federal DOMA prohibits requiring tribes to grant full faith and credit,<sup>240</sup> it does not by its terms preclude tribal recognition of marriage. As sovereigns, tribes are free to incorporate either notion into their law to recognize lawful marriages performed by other tribal or state governments.

##### A. *Full Faith & Credit*

Full faith and credit is typically understood as a constitutional doctrine that applies between the federal

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<sup>235</sup> *Id.* at 763.

<sup>236</sup> *Id.* at 736 (citing Transcript of Oral Argument, *supra* note 213, at 32).

<sup>237</sup> *Cf.* United States v. Windsor, 570 U.S. 744, 771 (2013).

<sup>238</sup> *Id.* at 773. Of course, *Windsor* was a challenge to federal recognition of marriage and thus, did nothing to require tribal recognition of same-sex marriages performed in jurisdictions permitting such unions. Nevertheless, many of the reasons to recognize marriage apply equally to Indian couples and to tribal governments.

<sup>239</sup> *Cf. id.*

<sup>240</sup> 28 U.S.C. § 1738C.

government and the states.<sup>241</sup> It is the federal Constitution that requires “[f]ull 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.”<sup>242</sup> On its face, the Full Faith and Credit Clause does not apply to tribal governments as its text refers only to “State[s]”<sup>243</sup> and tribes are not deemed states under any federal or state law.<sup>244</sup> While the Clause’s implementing legislation, the Full Faith and Credit Act, extended the obligations to courts within U.S. “[t]erritories,”<sup>245</sup> that act was enacted in 1790, “before any tribal courts of record existed.”<sup>246</sup> The Supreme Court has yet to address whether tribes are territories within constitutional full faith and credit,<sup>247</sup> although it has at times found tribes to be “territories”<sup>248</sup> and at other times not.<sup>249</sup> Lower federal courts and state courts have reached varied conclusions on the question whether tribes are “territories” within the meaning of the Full Faith and Credit Act.<sup>250</sup>

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<sup>241</sup> See Robert N. Clinton, *Comity & Colonialism: The Federal Courts’ Frustration of Tribal—→Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 42 (2004) [hereinafter *Comity & Colonialism*].

<sup>242</sup> U.S. CONST. art. IV, § 1.

<sup>243</sup> *Id.*; see *Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997).

<sup>244</sup> Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 300 (2004).

<sup>245</sup> 28 U.S.C. § 1738 (“Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

<sup>246</sup> *Comity & Colonialism*, *supra* note 241, at 42.

<sup>247</sup> *Wilson*, 127 F.3d at 808.

<sup>248</sup> See, e.g., *United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103–04, (1855) (finding Cherokee Nation “a territory” within the meaning of a federal letters of administration statute); see also *Standley v. Roberts*, 59 F. 836, 845 (8th Cir. 1894); *Cornells v. Shannon*, 63 F. 305, 306 (8th Cir. 1894); *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893).

<sup>249</sup> See, e.g., *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883) (concluding Cherokee Nation was not a “territory” within meaning of federal extradition statute).

<sup>250</sup> Gunn, *supra* note 244, at 301–03 (stating some courts have concluded that tribes’ status as sovereign nations rather than states exempted them from full faith and credit). For instance, courts rejecting full faith and credit have employed various rationales for so doing. See, e.g., *Wilson*, 127 F.3d at 809 (holding that neither Full Faith and Credit Clause nor section 1738 applies to tribal judgments); see also *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (concluding Navajo reservation is not a “territory” within text of Full Faith and Credit Act); see also *In re Red Fox v. Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975) (concluding that quasi-sovereign nature of tribes meant tribal court judgments were entitled to comity, but not full faith and credit); cf. *John v. Baker*, 982 P.2d 738, 762 (Alaska 1999) (noting that “federal legislation implementing the Constitution’s Full Faith and Credit Clause has extended its application only to United States territories and possessions”). In contrast, other courts have applied full faith and credit after concluding tribes were “territories.” See, e.g., *Mehlin*, 56 F. at 19 (applying earlier full faith and credit statute and concluding “proceedings and judgments of the courts of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith

For their part, tribal courts have largely rejected the inclusion of tribes in the definition of “territories.”<sup>251</sup> For instance, the Navajo Nation Court of Appeals has concluded that full faith and credit does not govern the relationship between tribes and states or between tribes themselves.<sup>252</sup> According to that court, “[t]he practice of according full faith and credit to foreign orders is inconsistent with the Navajo Nation’s conception of its own sovereignty and that of other tribes, which sovereignty contemplates ‘the exclusive jurisdiction of each Indian court over certain matters.’”<sup>253</sup>

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and credit”); *see also* Tracy v. Superior Court of Maricopa Cty., 810 P.2d 1030, 1040 (Ariz. 1991) (“A majority of courts has deemed Indian tribes to be territories for purposes of the federal statute extending the application of the full faith and credit clause to the territories and possessions of the United States, 28 U.S.C. 1738.”); *Standley*, 59 F. at 845 (“[T]his court has held that the judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit.”); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982) (deeming tribes’ territories under Full Faith and Credit Act), *overruled by* Coeur d’Alene Tribe v. Johnson, 405 P.3d 13 (Idaho 2014); *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088, 1090 (N.M. 1997); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975) (recognizing that New Mexico courts must grant full faith and credit to laws of Navajo Tribe because tribe is “a territory” within meaning of 28 U.S.C. § 1738); *Chischilly v. General Motors Acceptance Corp.*, 629 P.2d 340, 344 (N.M. Ct. App. 1980), *rev’d*, 629 P.2d 340 (N.M. 1981) (finding Navajo Code prohibition against self-help repossessions entitled to full faith and credit under Full Faith and Credit Act); *Gunn*, *supra* note 244, at 301–03. Still others have taken a third approach, making full faith and credit contingent on tribal reciprocity. *See Turner v. McGee*, 681 F.3d 1215, 1219 (10th Cir. 2012) (“Oklahoma state courts grant full faith and credit to tribal judgments only ‘where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma.’” (quoting *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994))).

<sup>251</sup> *Gunn*, *supra* note 244, at 305–07.

<sup>252</sup> *Id.* at 304. The three states that include Navajo territory have split in their acceptance of full faith and credit. New Mexico has consistently applied full faith and credit to recognize tribal court judgments and tribal laws in state court. *See CIT Fin. Servs. Corp.*, 533 P.2d at 752 (recognizing that New Mexico courts must grant full faith and credit to the laws of Navajo Nation because the nation is a “territory” within meaning of 28 U.S.C. § 1738); *Halwood*, 946 P.2d at 1090, 1093 (enforcing Navajo Court’s imposition of damages under full faith and credit because the tribe was a “territory” pursuant to 28 U.S.C. § 1738); *Chischilly*, 629 P.2d at 341–42, 344 (finding Navajo Code prohibition against self-help repossessions entitled to full faith and credit under Full Faith and Credit Clause). Arizona, on the other hand, has largely ignored full faith and credit, instead recognizing tribal court judgments under the doctrine of comity. *See In re Estate of Lynch*, 377 P.2d 199, 200–01 (Ariz. 1962) (concluding that a will probated in Navajo Tribal Court of Indian Offenses should be recognized under comity); *Begay v. Miller*, 222 P.2d 624, 628 (Ariz. 1950) (ignoring the Full Faith and Credit Act and finding the Clause applied to states only); *Leon v. Numkena*, 689 P.2d 566, 569–70 (Ariz. Ct. App. 1984) (rejecting full faith and credit and holding instead the divorce and custody decree was recognizable under comity); *Babbitt Ford, Inc.*, 571 P.2d at 694–95 (rejecting the argument that the Navajo Tribe constituted a “territory” within meaning of the Full Faith and Credit Act). Similar to Arizona, Utah has said “Indian tribes and nations are not states whose judgments are entitled per se to full faith and credit.” *Searle v. Searle*, 38 P.3d 307, 314–15, 320 (Utah Ct. App. 2001) (finding, nonetheless, tribal court custody determination valid and final, and thus, enforceable pursuant to the Foreign Judgement Act and ICWA’s full faith and credit provision).

<sup>253</sup> *Gunn*, *supra* note 244, at 304 (citations omitted). On the other hand, the Cheyenne River Sioux Tribe Court of Appeals found Indian tribes were covered by full faith and credit provisions of the Parental Kidnapping Prevention Act (PKPA). *Id.* at

Furthermore, full faith and credit does not typically apply to marriage.<sup>254</sup> Its inapplicability is somewhat confounding given the Clause's reference to "public [a]cts" and "[r]ecords."<sup>255</sup> Just from the text alone, it could be easily assumed that a marriage license—or the state sanctioning of a marriage ceremony—would constitute a "public [a]ct."<sup>256</sup> Or that the public records of marriages maintained by a jurisdiction would fit the plain meaning of "a [r]ecord."<sup>257</sup> Nevertheless, full faith and credit has generally not been the basis on which to recognize cross-jurisdictional marriage by lower federal or state courts.<sup>258</sup>

Instead, the Clause has typically been reserved for judicial judgments rather than marriages, which "no matter how intricate the procedures used to formalize the union, simply cannot be categorized as judgments."<sup>259</sup> The distinction between judgments and law with respect to full faith and credit means that states are "otherwise free, for the most part, to apply their own choice of law principles to any given dispute, with the result of choosing their

304–05 (citing *Eberhard v. Eberhard*, 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Tribal Ct. App. 1997)). Under the statute, states must enforce valid child custody determinations reached by a sister state and no other state may exercise concurrent jurisdiction once another state has reached a determination. See *Thompson v. Thompson*, 484 U.S. 174, 183, 187 (1988). "The purpose of the act was to remedy the inapplicability of full faith and credit requirements to custody determinations and to deter parents from kidnapping their children to relitigate custody in another state." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 513 n.3 (8th Cir. 1989).

<sup>254</sup> Aviel, *supra* note 213, at 728–30.

<sup>255</sup> U. S. CONST. art. IV, § 1; see Aviel, *supra* note 213, at 728.

<sup>256</sup> Aviel, *supra* note 213, at 728.

<sup>257</sup> *Id.* Indeed, one assumption commentators made in the early fight for marriage equality was that states would be obliged to recognize same-sex marriages performed in other jurisdictions under the Full Faith and Credit Clause. *Id.* Opponents of same-sex marriage also appeared to believe the plain language of the Clause would control. *Id.* at 735. Indeed, that Congress opted to include language in DOMA limiting full faith and credit in the realm of same-sex marriage suggests Congress also viewed the Clause as at least potentially applicable to marriage. See 28 U.S.C. § 1738C (providing that neither states, territories, nor Indian tribes may be required to recognize same-sex marriages performed in other jurisdictions); Lynn D. Wardle, *Non-Recognition of Same-Sex Marriage Judgments Under DOMA and the Constitution*, 38 CREIGHTON L. REV. 365, 371 (2005) (discussing DOMA's full faith and credit provisions); Tweedy, *supra* note 4, at 133. Furthermore, during *Obergefell* oral argument, Justice Scalia assumed that the act of marrying couples would constitute a "public act[.]" Aviel, *supra* note 213, at 735 ("Public acts? It would include the act of marrying people, I assume." (quoting Transcript of Oral Argument, *supra* note 213, at 27)). Nevertheless, despite the justices' interest in the topic during oral arguments, the Court's final opinion did not reach the issue. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015). Instead, the Court resolved the case on the basis of the Fourteenth Amendment, holding that "same-sex couples may exercise [this] fundamental right to marry in all States." *Id.* at 2607.

<sup>258</sup> See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (finding DOMA was valid exercise of congressional authority under Full Faith and Credit Clause); see also Aviel, *supra* note 213, at 729. ("[T]here is not a single judicial decision that holds that full faith and credit requires states to recognize marriages that violate their own public policies concerning who may marry." (citations omitted)).

<sup>259</sup> Aviel, *supra* note 213, at 730.

own state's substantive law."<sup>260</sup> This result is somewhat odd, as it renders two of the three terms listed in the Clause superfluous.<sup>261</sup> One justification is avoiding "requiring a state to give effect to all '[a]cts' of a sister state [that] would eviscerate its authority to regulate in divergent ways."<sup>262</sup> That is fine on its face, but marriage raises special problems as couples do not always remain within one jurisdiction throughout the life of the marriage. Couples marry. They acquire property. They have children. They may separate. They may divorce. They may move. And when one dies, they leave behind a spouse and possibly children. If the couple has changed residences during the marriage, the move raises concerning questions of interstate recognition that affects property and parental rights. Full faith and credit would provide some basis of stability for married couples and their children. It would also provide more predictability and security for marital assets in the event one spouse dies intestate.

While full faith and credit has not been applied to marriage or consistently to tribes, Congress has included full faith provisions in laws affecting families, in particular to cover child custody and support judgments and domestic violence orders.<sup>263</sup> The inclusion of provisions in assorted legislation does

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 724–26 ("It bears some emphasis in a constitutional culture such as ours, where textualism still has such purchase, that this rewriting of the clause is particularly heavy-handed, rendering null two of the enumerated items in a list of three.")

<sup>262</sup> *Id.* at 725.

<sup>263</sup> *See, e.g.*, Indian Child Welfare Act, 25 U.S.C. § 1911(d) ("The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."); 18 U.S.C. § 2265(a) (including tribal courts protection orders as entitled to acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings full faith and credit); 25 U.S.C. § 2207 (requiring full faith and credit for "any tribal actions taken pursuant to" tribal probate codes on descent and distribution of trust or restricted lands); 25 U.S.C. § 3106(c) ("Tribal court judgments regarding forest trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section."); 25 U.S.C. § 3713(c) ("Tribal court judgments regarding agricultural trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section."); 28 U.S.C. § 1738B (providing for full and credit to tribal court child support orders and defining "State" to include "Indian country"); *see also* Kaltag Tribal Council v. Jackson, 344 F. App'x 324 (9th Cir. 2009) (finding tribal court custody determination entitled to full faith and credit under ICWA); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991) ("If the native villages of Venetie and Fort Yukon are sovereign entities which may exercise dominion over their members' domestic relations, Alaska must give full faith and credit to any child-custody determinations made by the villages' governing bodies in accordance with the full faith and credit clause of the Indian Child Welfare Act."); *Kinlichee v. United States*, 929 F. Supp. 2d 951, 962 (D. Ariz. 2013) (finding Navajo court's order validating Navajo father's posthumous adoption of Navajo daughter was entitled to full faith and credit).

suggest, at least tacitly, that Congress may accept full faith and credit as the appropriate model for state-tribal or inter-tribal cooperation<sup>264</sup> and that full faith and credit may be required of tribal governments.<sup>265</sup> Further, that Congress opted to include language in DOMA limiting full faith and credit in the realm of same-sex marriage suggests Congress also views the Clause as at least potentially applicable to marriage.<sup>266</sup>

Indeed, the purposes of full faith and credit would seem to apply to tribal governments situated in a system of other sovereigns. In incorporating a Full Faith and Credit Clause into the Constitution, the framers sought to ensure interstate cooperation and the integration necessary for a functional federal system.<sup>267</sup> As the Supreme Court has explained, before the Clause, “all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits reexaminable in another Colony.”<sup>268</sup> Indeed, absent the Clause, states would have had to enter into individual agreements between each other, risking wasteful and confusing tangle of lawsuits relitigating already-resolved matters.<sup>269</sup> Accordingly, the framers included the Full Faith and Credit Clause as a mechanism to unify the several states into an integrated federal system premised on intergovernmental cooperation.<sup>270</sup>

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<sup>264</sup> See *Comity & Colonialism*, *supra* note 241, at 24 (“[W]hen Congress has directly considered the question, it has consistently chosen the Full Faith and Credit model as a vehicle for mandating recognition . . .” (emphasis omitted)).

<sup>265</sup> Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 907 (1990) (“Congressional policy also suggests that full faith and credit, rather than comity, forms the appropriate model for intergovernmental cooperation between tribal governments and the remainder of the federal union.”) [hereinafter *Tribal Courts*].

<sup>266</sup> It remains curious, however, that Congress included this provision in DOMA if it viewed tribes as not bound by constitutional full faith and credit. See Tweedy, *supra* note 4, at 133. It is even more curious given that interstate recognition of marriage has not depended upon the Full Faith and Credit Clause. *Id.*

<sup>267</sup> *Hilton v. Guyot*, 159 U.S. 113, 181 (1895).

<sup>268</sup> *Id.*

<sup>269</sup> Diana B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 724 (1996).

<sup>270</sup> See *Gunn*, *supra* note 244, at 300; see also *Hilton*, 159 U.S. at 181 (“[B]efore the American Revolution, all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits reexaminable in another Colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be reexaminable in England. . . . It was because of that condition of the law, as between the American Colonies and States, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States.”); *Tribal Courts*, *supra* note 265, at 897–98.

A full faith and credit requirement was necessary, the Court explained, because of the failure of the common law “to impose any binding legal obligation to recognize and enforce the judgments of another jurisdiction.”<sup>271</sup> Filling this void, full faith and credit imposed a legal obligation on states, territories, and possessions to recognize and enforce judgments from other states, territories, or possessions.<sup>272</sup> Generally speaking, there is no exception to this obligation. Thus, even when enforcement of a particular judgment violates the enforcing jurisdiction’s public policy, it is still required to enforce the judgment in compliance with its full faith and credit obligations.<sup>273</sup>

Although the purpose of the Clause was the integration of state governments into a union, the underlying rationale—intergovernmental cooperation and agreement—applies today to tribal governments. Tribal governments are separate sovereigns and entitled to self-determination. Because tribal citizens are also state and federal citizens, however, tribal government decisions are similarly bound to the legal fabric that stretches across America. While it may be correct that the lack of tribal courts meant the founders did not intend the Clause to apply to tribal governments, today there are tribal courts of record. Tribal courts are reaching decisions regarding the disposition of marital property that affect not only tribal citizens, but the same people who are also citizens of the United States and their respective state governments. Surely marriage—and the potential for tribal citizens to marry outside Indian Country while residing on a reservation—would prompt concerns for more consistency between state, federal, and tribal probate determinations.

Indeed, perhaps recognizing the need for inter-government recognition and cooperation, tribal governments have occasionally enacted their own full faith and credit requirements.<sup>274</sup> While some federal statutes impose full faith and credit requirements, some tribes accord full faith and credit to all valid orders by tribal or other state governments.<sup>275</sup> Others, however, do so only with respect to certain areas, “such as marriage, divorce, family relations, and secured transactions.”<sup>276</sup>

One downside to full faith and credit is that it is typically viewed as mandatory and, consequently, considered an intrusion into tribal sovereignty. Although such an intrusion is viewed

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<sup>271</sup> *Comity & Colonialism*, *supra* note 241, at 17.

<sup>272</sup> *Id.* at 15.

<sup>273</sup> *Id.* at 16.

<sup>274</sup> *See* Gunn, *supra* note 244, at 313.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (footnotes omitted).

negatively by tribal governments, the rule's rigidity does enhance the stability of marriages by ensuring recognition rather than leaving couples subject to ad hoc comity determinations. Furthermore, a tribe's choice to enact a full faith and credit provision for marriage or for intestacy purposes would be an exercise of tribal sovereignty, not a narrowing of it.<sup>277</sup>

### B. Comity

In contrast to full faith and credit, the doctrine of comity has generally supported the enforcement of tribal court judgments and cross-jurisdictional recognition of marriage. Unlike full faith and credit, which originated in the need for federal integration of states, comity rests on a jurisdiction's voluntary recognition of and respect for the legal acts of another jurisdiction.<sup>278</sup> Thus, a jurisdiction is not obliged to enforce an extra-jurisdictional decision, but can opt to do so if it chooses.<sup>279</sup> The Supreme Court has recognized comity as an accommodation to foreign legal decisions reached after a full and fair trial by a court of competent jurisdiction with sufficient process to secure an impartial administration of justice.<sup>280</sup>

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<sup>277</sup> In contrast, were Congress to use its plenary power to impose the requirement on tribes, that would rightfully be viewed as an intrusion on the tribe's right to self-governance. See Zug, *supra* note 4, at 772–73.

<sup>278</sup> *Comity & Colonialism*, *supra* note 241, at 16; *Tribal Courts*, *supra* note 265, at 905 (“While the comity doctrine reflects notions of international accommodation, the *Hilton* case clearly points out that the doctrine represents a *voluntary* sovereign accommodation, rather than a binding legal obligation judicially enforceable by a body superior of the enforcing sovereign.”); see also *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”); *Mexican v. Circle Bear*, 370 N.W.2d 737, 742 (N.D. 1985) (Henderson, J., concurring) (“We must live in mutual respect with our Indian brothers who serve on the trial courts of the various Indian reservations in South Dakota. They, in return, should likewise extend unto our courts reciprocating courtesy and respect.”).

<sup>279</sup> *Tribal Courts*, *supra* note 265, at 905 (“[T]he *Hilton* case clearly points out that the doctrine represents a voluntary sovereign accommodation, rather than a binding legal obligation judicially enforceable by a body superior of the enforcing sovereign.”).

<sup>280</sup> *Hilton*, 159 U.S. at 158. According to the Court,

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Despite its origins in international law, when determining the enforceability of tribal court judgments, the majority of courts have turned to comity.<sup>281</sup> This makes sense considering the constitutional basis for full faith and credit that is absent with comity. One rationale to reject full faith and credit with respect to tribal judgments is precisely because tribal governments are viewed as sovereigns separate from the United States.<sup>282</sup> Indeed, courts that rely on comity “analogize tribal courts to foreign governments.”<sup>283</sup> When tribes are viewed as equivalent to foreign nations, comity becomes the correct basis on which to uphold tribal court decisions.<sup>284</sup>

Comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>285</sup> In considering whether to recognize a foreign act, the reviewing court does not consider whether the judgment is substantively correct or incorrect. Nor does it weigh the wisdom of the analysis underlying the judgment. Review is limited to reflect respect for the sovereignty of the deciding nation’s court.<sup>286</sup> Instead, the question is whether the judgment is entitled to enforcement.<sup>287</sup>

Typically, a marriage will be recognized as long as it was legal in the “place of celebration.”<sup>288</sup> Consequently, a jurisdiction

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<sup>281</sup> See Alicia K. Crawford, Comment, *The Evolution of the Applicability of ERISA to Indian Tribes: We May Finally Have Congressional Intent, but It’s Still Flawed*, 34 AM. INDIAN L. REV. 259, 272 (2010) (“Due to the importance of tribal sovereignty, U.S. courts have adhered to comity toward Indian tribes.”); *Wilson v. Marchington*, 127 F.3d 805, 807–10 (9th Cir. 1997) (finding Congress did not intend to include tribes within the meaning of “territories and possessions” and thus, Indian court judgments were not entitled to full faith and credit but only to comity); *In Re Marriage of Red Fox*, 542 P.2d 918, 920 (Or. Ct. App. 1975) (“While the decisions of tribal courts are not . . . entitled to the same ‘full faith and credit’ accorded decrees rendered in sister states, the quasi-sovereign nature of the tribe does suggest that judgments rendered by tribal courts are entitled to the same deference shown decisions of foreign nations as a matter of comity.” (footnote omitted)).

<sup>282</sup> Garonzik, *supra* note 269, at 726–27 (“According to tribal sovereignty advocates, because tribal courts constitute sovereign entities, there is no more obligation to enforce their judgments than there is to enforce the judgments of the courts of Mexico.”).

<sup>283</sup> *Tribal Courts*, *supra* note 265, at 905. It is notable that this analogy was rejected by the Supreme Court in *Mackey*. *Id.*

<sup>284</sup> Garonzik, *supra* note 269, at 726–27.

<sup>285</sup> *Hilton*, 159 U.S. at 164; see also *Aleem v. Aleem*, 947 A.2d 489, 499 (Md. Ct. App. 2008) (“[M]ore than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation’s expression of understanding which demonstrates due regard both to the international duty and convenience and to the rights of persons protected by its own laws.” (internal quotation marks and citation omitted)).

<sup>286</sup> *Tribal Courts*, *supra* note 265, at 869.

<sup>287</sup> *Id.*

<sup>288</sup> Aviel, *supra* note 213, at 731; see *Hilton*, 159 U.S. at 167 (“A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law.”).

may recognize a marriage that would be illegal under its own marriage laws if it was legal at the place of marriage. This issue typically arises with respect to different rules regarding the age at which someone may legally wed. Under notions of comity, a state that prohibits a fifteen-year-old from marrying may nonetheless recognize that marriage as valid so long as it was legal in the place of celebration. And so long as it does not violate “strong public policy.”<sup>289</sup>

Comity is particularly appealing because it allows for a public policy exception to the enforcement of an otherwise valid judgment.<sup>290</sup> It is perhaps important to stress that comity is voluntary.<sup>291</sup> Thus, while comity may be expected, no jurisdiction is actually obliged to enforce any foreign act.<sup>292</sup> Under the public policy exception, courts will refuse comity for a foreign act if granting it would be fundamentally at odds with the goals of comity or its own public policy.<sup>293</sup>

Indeed, the Navajo Code already embodies a form of comity by recognizing marriages performed outside the reservation if the marriage is valid by the laws of the place of

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<sup>289</sup> Aviel, *supra* note 213, at 731, 736 (“Justice Ginsburg reintroduced the distinction between judgments and choice of law, noting that under the Full Faith and Credit Clause there was no allowance to ‘reject a judgment from a sister State because you find it offensive to your policy,’ but that ‘full faith and credit has never been interpreted to apply to choice of law.’” (quoting Transcript of Oral Argument, *supra* note 213, at 31–32)). Note that the Supreme Court differentiates between a state’s laws and a state’s judgments. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (“A court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy. But [this Court’s] decisions support no roving ‘public policy exception’ to the full faith and credit due judgments.” (emphasis and citations omitted)).

<sup>290</sup> *Aleem*, 947 A.2d at 497 (“The comity of nations, we are told . . . is derived altogether from the voluntary consent of the latter, (the State, within whose territory it is attempted to make the law of another State obligatory,) and it is inadmissible, when it is contrary to its known policy, or injurious to its interests; and it is only in the silence of any positive rule, affirming, or denying, or restraining the operation of any foreign laws, the Courts of justice presume the tacit adoption of them, by their own government; unless they are repugnant to its policy or prejudicial to its interests. This also, he assures us: A nation will not suffer its own subjects to evade the operation of its fundamental policy, or laws; or to commit fraud in violation of them, by any acts or contracts made with that design, in a foreign country; and it will judge for itself, how far it will adopt, and how far it will reject, any such acts or contracts.” (internal quotation marks and citation omitted)).

<sup>291</sup> *Id.* at 499.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*; see *Tribal Courts*, *supra* note 265, at 872 (“[T]he acts, laws, and policies of foreign sovereign nations are enforced in American courts without significant consideration of the propriety, wisdom, or domestic legal compliance of such sovereign acts. Limitations, of course, exist where the act of the foreign state is radically inconsistent with domestic policy or where the procedures by which a judgment was secured do not provide the rudiments of fairness. Nevertheless, the substantial deference owed to the acts and judgments of sovereign states generally precludes American courts from inquiring into the compliance of that judgment with domestic policies, procedures, or even constitutional values.” (footnotes omitted)).

celebration.<sup>294</sup> Navajo law also recognizes marriages performed pursuant to the Navajo Code, which recognizes both traditional and common law marriages.<sup>295</sup> Nevertheless, the Code excludes those marriages prohibited by § 2, which deems “[m]arriage between persons of the same sex is void and prohibited.”<sup>296</sup>

The policy exception that makes comity so appealing to jurisdictions also undercuts the reliance interests of a couple seeking to have their marriages recognized.<sup>297</sup> For that type of stability, full faith and credit—which permits no such exception, would be a better option. The stumbling block remains the pervasive view that full faith and credit does not apply to marriages.<sup>298</sup>

## CONCLUSION

After *Obergefell* and *Windsor*, the governments the majority of same-sex married couples encounter in their daily lives are required to recognize their marital status. Consequently, they are entitled to the same benefits and are bound by the same obligations of marriage as opposite-sex married couples under state and federal law. This uniformity is mandated by the U.S. Constitution, which requires that states must permit same-sex couples to wed and that the federal government and all fifty state governments recognize their marriages.<sup>299</sup> For same-sex couples who are also citizens of an American Indian nation, however, the

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<sup>294</sup> See NAVAJO NATION CODE ANN. tit. 9, §§ 1(A), 3, 4 (“Marriages contracted outside of Navajo Indian Country are valid within the Navajo Nation if valid by the laws of the place where contracted.”); *United States v. Jarvison*, 409 F.3d 1221, 1225 (10th Cir. 2005).

<sup>295</sup> See NAVAJO NATION CODE ANN. tit. 9, §§ 1(B), 3, 4 (“Marriages may be validly contracted within Navajo Indian Country by meeting the requirements of 9 N.N.C. §§ 4 and 5.”); *Jarvison*, 409 F.3d at 1225.

<sup>296</sup> NAVAJO NATION CODE ANN. tit. 9, § 2(C).

<sup>297</sup> On the other hand, when it comes to marriage recognition, comity’s exception for “strong public policy” is rather narrow. Aviel, *supra* note 213, at 731. While views on marriage are often politically fraught and contentious, it is rare for a state to refuse to recognize a marriage legally performed in another jurisdiction. *Id.* at 737–38 (“Chief Justice Roberts . . . [noted that] it apparently is quite rare for a State not to recognize an out-of-state marriage.”). At times, states have recognized marriages prohibited as incestuous or criminal under that state’s laws. *Id.* at 737. Some states have done away with the exception entirely. *Id.* at 732. The Restatement would allow “only the state with the most significant connection to the spouses, typically the couple’s domicile at the time of the marriage” to invoke the exception. *Id.* (emphasis omitted). The Uniform Marriage and Divorce Act makes no public policy exception, recognizing as valid any marriage performed outside the jurisdiction that was “valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties.” *Id.* at 732–33.

<sup>298</sup> In cases where a state has refused to recognize an out of state marriage on public policy grounds, those decisions were not reversed on account of the Full Faith and Credit Clause, which suggests the Court does not view full faith and credit as applicable to marriage. *Id.* at 733.

<sup>299</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015); *United States v. Windsor*, 570 U.S. 744, 775 (2013).

presence of a third sovereign—the tribal government—introduces a potential inconsistency with respect to their marriages. For those couples, this third sovereign may or may not permit their marriage and may or may not recognize their lawful marriage from another jurisdiction. This is because, while federal and state defense of marriage acts have been declared unconstitutional, tribal DOMAs persist unimpeded by the federal Constitution.

Same-sex couples living under a tribal DOMA may avoid forfeiture of their marital assets by residing off the reservation, placing their assets outside of their tribe's jurisdiction, or by drafting a will to allocate their assets according to their specific wishes. Beyond that individual protection, tribal solutions should be consistent with the tribes' sovereign right to govern and to legislate on behalf of its citizens. Within that framework, however, tribes that currently prohibit same-sex marriage should consider recognizing these marriages outright so that all tribal members are afforded equal dignity. Stopping short of that, tribal recognition of marriages through full faith and credit or comity would permit marital assets to be used to ensure spousal and family support continues in the event a tribal member dies intestate. Tribes opting to recognize lawful marriages performed in other jurisdictions would not signify an abdication of sovereignty, but an exercise of it that is consistent with the basis upon which governments recognize the lawful acts of other jurisdictions.