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ABSTRACT

*Although twelve federally recognized Indian tribes are currently known to allow same-sex marriage, comprehensive information on the content of each of these laws and the processes by which they came to be adopted is not available from any single source. This lack of information is due in part to the fact that tribal same-sex marriage laws as we know them today are a relatively new phenomenon. Indeed, seven of the laws were adopted, or began to be interpreted to allow same-sex marriage, in 2013, 2014, or 2015—those of the Pokagon, Little Traverse, Colville, Leech Lake, Puyallup, Central Council of the Tlingit and Haida Indian Tribes, and the Eastern Shoshone and Northern Arapaho. Moreover, some tribal laws that allow same-sex marriage, such as Mashantucket Pequot's, apparently escaped public notice altogether. Tribal domestic partnership laws are even less well-known and their application to same-sex couples has not been examined by any legal scholar.*

*On the other side of the controversy, at least ten tribes have Defense of Marriage Acts (DOMAs), and many others have marriage laws with sex-specific language that may or may not have been intended to bar same-sex marriage. The content of these laws has not been examined in any comprehensive fashion. Finally, the precedential weight and likely practical effects of the Supreme Court's decision in*

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*United States v. Windsor*[1] *on tribal law have not yet been analyzed in legal scholarship.*

*This Article addresses all of these issues, making it a unique source of information on, and legal analysis of, tribal law and federal law relating to marriage equality. Based on original interviews and correspondence with tribal members, tribal employees, and members of same-sex couples who have married under tribal law, as well as other sources, this Article concludes that tribal laws allowing same-sex marriage appear to be largely the result of grassroots efforts by tribal members. This pathway to marriage rights contrasts sharply with the early methods for adopting such laws among U.S. states. The first states to adopt marriage equality legislation did so through judicial decision, with other states following later via legislative action.*[2]

*Tribal domestic partnership laws of varying scope are also examined, as are tribal DOMAs and other sex-specific marriage laws. The available information on tribal DOMAs suggests that tribes are often influenced by political developments at the state and federal levels in adopting DOMAs. Although, under federal law,* Windsor *has limited precedential effect on tribes, this difference in process and motivation between tribal laws allowing same-sex marriage and those banning it suggests that tribal courts should scrutinize tribal DOMAs carefully and that, when applying the Indian Civil Rights Act of 1968 (ICRA),*[3] *they should look for solid evidence of tribal custom and tradition to support a tribal DOMA. Another reason that tribal courts should view same-sex marriage bans with suspicion is that such bans reflect a heteronormative conception of the nuclear family that has been historically imposed on tribes by the U.S. government and other colonial forces and that continues to be imposed to some degree today.*

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1. United States v. Windsor, 133 S. Ct. 2675 (2013).

2. *See, e.g.*, Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. Rev. 1855, 1912 (2008) ("By judicial opinion or legislation, a few states have created some form or forms of gay family relations."); *History and Timeline of the Freedom to Marry in the United States*, Freedom to Marry, http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage (describing the history of the freedom to marry, including early judicial and legislative actions adopting marriage equality) (last updated Jan. 16, 2015).

3. 25 U.S.C. §§1301-04 (2014).

## I. INTRODUCTION

In 1996, Congress enacted the federal Defense of Marriage Act (DOMA)[4] and took the somewhat surprising step of explicitly including tribes within its purview.[5] The legislative history is silent as to the decision to explicitly include tribes, and, at the time of DOMA's passage, it does not appear that any tribe was seriously examining the issue of same-sex marriage.[6] Since 1996, however, there have been many developments among tribes on this issue, including the enactment of well over a dozen laws either permitting or prohibiting same-sex marriage. Generally speaking, however, the issue does not seem to be a priority among tribes to the same extent that it is a priority for states and the federal government.

In 2013, the Supreme Court struck down Section 3 of DOMA, which concerns the federal definition of marriage, as a violation of the equal protection guarantee.[7] In doing so, it left the constitutionality of Section 2, which pertains to tribes' and states' recognition of out-of-jurisdiction marriages, uncertain.[8]

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4. 28 U.S.C. § 1738C (allowing states and Indian tribes to refuse to recognize same-sex marriages performed under the laws of other states); 1 U.S.C. § 7 (providing a federal definition of marriage as between a man and a woman), *invalidated by Windsor*, 133 S. Ct. 2675.

5. 28 U.S.C. § 1738C. This inclusion is surprising given that, "[i]n national politics . . . forgetting the third sovereign is endemic." Matthew L. M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. Miami L. Rev. 53, 71 (2006).

6. *See, e.g.*, Fletcher, *supra* note 5, at 55 (noting that in 2006, only the Cherokee and Navajo Indian tribes had banned same-sex marriage and that "the issue of same-sex marriages is far from the forefront of tribal governmental issues compared to issues such as tribal economic development and tribal criminal jurisdiction . . ."); *see also infra* note 170 and associated text (discussing the legislative history of DOMA).

7. *Windsor*, 133 S. Ct. 2675; *see also* Douglas Nejaime, Windsor's *Right to Marry*, 123 Yale L.J. Online 219, 219 (2013) (noting that the Supreme Court's decision in Windsor "ultimately rests on equal protection grounds."). Although due process concerns were part of the Court's analysis, the issue explicitly raised and decided in *Windsor* was that of equal protection. *Id.* at 219.

8. *See, e.g.*, Michael J. Klarman, *The Supreme Court 2012 Term Comments:* Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 Harv. L. Rev. 127, 154 (2013) (stating that *Windsor* did not challenge the constitutionality of Section 2 of DOMA); Benjamin P. Edwards, *Welcoming a Post-DOMA World: Same-Sex Spousal Petitions and Other Post-Windsor Immigration Implications*, 47 Fam. L.Q. 173, 184 (2013) (stating that *Windsor* did not address DOMA's Section 2, which allows states to decline to recognize out-of-state same-sex marriages).

In Part II, this Article presents post-DOMA developments in tribal law as to same-sex marriage. It explains the different tribal approaches to the issue and examines the processes by which tribal laws on same-sex marriage, particularly those explicitly permitting same-sex marriage, have been enacted. Because comprehensive research of tribal laws is inherently difficult and legislative history is often unavailable,[9] I have conducted interviews with tribal officials, tribal members, and others to obtain information. Thus, this Article presents information, particularly about the process of enacting same-sex marriage laws, that is not available in written form elsewhere.

In Part III, this Article examines *United States v. Windsor*'s[10] limited precedential authority for tribes and its likely practical effects on tribal laws. It then argues, as a normative matter, that most tribal courts should invalidate tribal DOMAs under the ICRA. Finally, in Part IV, it discusses the reasons that laws on same-sex marriage may be less of a priority for tribes than for the other sovereigns in the United States.

## II. TRIBAL LAWS BEARING ON SAME-SEX MARRIAGE

Tribal laws that have some bearing on same-sex marriage take several forms. There are currently seven known tribes that have amended their laws to permit same-sex marriage. Two additional tribes, the Cheyenne and Arapaho Tribes[11] and the Leech Lake Band of Ojibwe,[12] have a policy of granting marriage licenses to same-sex couples under their sex-neutral marriage laws. Two other tribes have passed different types of policy support for same-sex marriage. Specifically, the Iipay Nation of Santa Ysabel passed a resolution in support of same-sex marriage, which is effectively a statement of policy (rather than law) because the Tribe does not have laws that

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9. Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 Wm. Mitchell L. Rev. 392, 401 (2010).

10. United States v. Windsor, 133 S. Ct. 2675 (2013).

11. *See, e.g.*, Hailey Branson-Potts, *Oklahoma Couple Draw Attention with Tribal Gay Marriage*, L.A. Times, Oct. 26, 2013, http://articles.latimes.com/2013/oct/26/nation/la-na-indian-gay-wedding-20131027 (stating that the tribal law doesn't specify gender in its marriage laws); Cheyenne & Arapaho Tribes of Oklahoma Law & Order Code §§ 1101-1102 (1988) (using the word "Indians" instead of a gendered noun).

12. Andrew Potts, *8th US Native American Tribe Allows Same-Sex Couples to Wed*, GayStarNews.com (Nov. 16, 2013), http://www.gaystarnews.com/article/8th-us-native-american-tribe-allows-same-sex-couples-wed161113.

govern marriage.[13] Additionally, members of the Keweenaw Bay Indian Community passed a referendum supporting same-sex marriage that will serve as policy guidance to the Tribal Council in considering the issue.[14] Finally, the Eastern Shoshone and Northern Arapaho Tribes, two separate tribes that share a reservation, tribal laws, and a tribal court, have begun to allow same-sex marriage under a tribal law that expressly incorporates state marriage law.[15]

On the other side of the coin, at least ten tribes have their own defense of marriage acts, or tribal DOMAs, in place, and at least ten other tribes have sex-specific marriage laws that do not evince a clear intent to target same-sex couples.[16] One tribe, the Sault Ste. Marie, explicitly ties its marriage laws to those of the State of Michigan, which has a marriage prohibition in place.[17] Finally, at least fourteen tribes have sex-neutral marriage laws, and several additional tribes have sex-neutral laws regarding tribal recognition of marriages performed elsewhere.[18]

### A. A Note on Researching Tribal Law

Obtaining a comprehensive picture of different tribes' laws on a given topic is a formidable undertaking.[19] One of the primary

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13. *California Native American Tribe Announces Support of Same Sex Marriage*, BusinessWire, June 24, 2013, http://www.businesswire.com/news/home/20130624005344/en/California-Native-American-Tribe-Announces-Support-Sex#.VODn-VPF9tI; Telephone Interview with Dave Vialpando (Jan. 7, 2014) (on file with author).

14. Res. KB-063-2014, Keweenaw Bay Indian Cmty. Tribal Council (2014) (undated Keweenaw Bay Indian Community Tribal Council resolution approving referendum language); Dan Roblee, *KBIC Votes Down New Casino; Okays Legal Pot, Same-Sex Marriage*, Daily Mining Gazette (Dec. 14, 2014), http://www.mininggazette.com/page/content.detail/id/539896/KBIC-votes-down-new-casino--okays-legal-pot--same-sex-marriage.html?nav=5006; E-mail from Dan MacNeil, Attorney for Keweenaw Bay Indian Community to author (Dec. 29, 2014, 11:34 PST) (on file with author).

15. *See Wind River Tribal Judge Presides Over First Same-Sex Marriage*, Indianz.com (Nov. 17, 2014), http://www.indianz.com/News/2014/015673.asp (describing the first Eastern Shoshone and Northern Arapaho same-sex marriage wedding) [hereinafter *Wind River Tribal Judge*]; *see also* Shoshone & Arapaho Law & Order Code tit. IX, § 9-5-2 (2004) (adopting the laws of Wyoming to apply to tribal marriages).

16. *See infra* Part II.F. and H.

17. *See infra* Part II.G.

18. *See infra* Part II.D. and E.

19. This is not to say that an individual litigant would have difficulty obtaining tribal laws pertaining to a case to which he or she was a party. Going in person to a specific tribal court tends to be the best way to obtain tribal laws in

reasons is the lack of an all-inclusive database combining different tribes' cases or codes searchable by specific terms. Westlaw has some tribes' cases and codes available in a premium database. Other sites, such as the Native American Rights Fund (NARF), provide access to many tribes' laws, but such sites generally require searching each tribe's code individually. Many tribes have their codes, and occasionally their case law, available on their own websites, but a substantial number of the 566 federally recognized tribes do not facilitate electronic access to their laws from any source. Even when electronic access is available, it is often difficult to know whether one has the latest version of a given code.[20]

Tribal codes tend to be easier to find and more ubiquitous than tribal case law.[21] Even so, I was surprised to find only one tribal case regarding same-sex marriage, which involved a same-sex Cherokee couple married under tribal law.[22] This suggests that tribal members are much less likely than other Americans to go to court to enforce marriage rights.

For this Article, I relied on tribes' own websites, NARF's website and similar websites, and Westlaw. In this subject area news articles also served as a useful starting point for obtaining further information, but they sometimes proved unreliable, especially as sources on the content of tribal law. In some cases, my research revealed that individual news and even law review articles contained

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such situations. *See, e.g.*, Robert D. Cooter & Wolfgang Fikentscher, *American Indian Law Codes: Pragmatic Law & Tribal Identity*, 56 Am. J. Comp. L. 29, 34 (2008) (noting that the usual way parties find relevant tribal code provisions is by going to tribal courts directly). It is also worth noting here the stylistic concern created by the difficulty of obtaining a comprehensive picture of tribal law, namely the need to repeatedly state that the tribal laws quoted may not represent a complete picture of the universe of tribal law. Rather than impose such a clunky limitation on large portions of this paper, I have decided instead to simply note the difficulty here and write the rest of paper as if the research was for the most part comprehensive. Thus a sentence like, "Only X number of tribes have done Y," should be read with the implied caveat "according to my research as explained in Part II.A."

20. *See, e.g.*, Tweedy, *supra* note 9, at 401 (describing the difficulty of being sure one has found the most recent and comprehensive set of tribal laws).

21. Cooter & Fikentscher, *supra* note 19, at 34 (stating that "[t]he code is easier to obtain than copies of court decisions interpreting it.").

22. In the Matter of Appeal of the Adverse Order of the District Court Against Kathy Reynolds and Dawn L. McKinley, JAT-04-15 (Judicial App. Tribunal of the Cherokee Nation Aug. 3, 2005).

inaccurate information on tribal law.[23] Accordingly, these sources were utilized only as preliminary research aids, rather than definitive guides.

To expand the scope of my research, I wrote a blog post requesting information on the topic and posted it on Turtle Talk, the blog of the Indigenous Law and Policy Center at Michigan State University College of Law.[24] I received many valuable responses to that request. To the extent possible, I followed up on news articles and emails responding to my blog post by speaking with tribal employees, tribal members, and others who had been involved in either initiating or utilizing tribal laws on same-sex marriage. In several cases, this approach allowed me to obtain copies of tribal laws that were not otherwise available.

## B. Tribal Laws Allowing Same-Sex Marriage

Twelve tribes are known to allow same-sex marriage, either due to amendments to tribal laws, interpretation of a pre-existing marriage law, or, in one case, the explicit incorporation of state marriage law. Five of these laws, those of the Coquille, Suquamish, Pokagon, Tlingit and Haida, and Puyallup, contain explicit language stating that marriage can be entered into "regardless of . . . sex" or specifically referencing same-sex marriage.[25] Three other laws, those of the Mashantucket Pequot, Colville, and Little Traverse, are textually

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23. For instance, the Iowa Tribe of Oklahoma was reported to have an enacted a tribal DOMA in several articles, but according to Lauren Truitt, who was then Court Administrator for the Iowa Tribe, the Tribe had never had a DOMA, and, moreover, its current law was (and is) sex-neutral. E-mail from Lauren Truitt, Iowa Tribe of Oklahoma to author (Apr. 1, 2013, 11:04 PST) (on file with author); Iowa Tribe Civil Procedure Code §§ 1101, 1102. For reports of Iowa Tribe's having a DOMA in place, *see, e.g.*, Trista Wilson, *Comment, Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 Am. Ind. L. Rev. 161, 177 (2012) (claiming that the Iowa Tribe was one of several tribes to limit marriages to those between a man and a woman); Sheila K. Stogsdill and Tony Thornton, *Tribes Mull Their Laws on Marriage*, Oklahoman, May 18, 2004, at 3A (stating that the Iowa Tribe law specifies that marriage is between a man and a woman). This discrepancy illustrates that relying on news articles for the content of tribal law can be perilous.

24. Ann E. Tweedy, *Information Request on Tribal Same-Sex Marriage Laws and Proposals*, Turtle Talk Blog (Feb. 4, 2013), http://turtletalk.wordpress.com/2013/02/04/information-request-on-tribal-same-sex-marriage-laws-and-proposals/.

25. *See infra* Part II.B.1.

sex-neutral but the legislative history (and, in the latter two cases, the publicity surrounding passage of the new laws) illustrates an intent to allow same-sex marriages.[26]

In addition to the above laws, both the Cheyenne and Arapaho Tribes, as of 2012, and the Leech Lake Band of Ojibwe, as of 2013, allow same-sex couples to marry under pre-existing sex-neutral laws.[27] Moreover, the Eastern Shoshone and Northern Arapaho Tribes, two separate tribes that share a reservation, tribal laws, and a tribal court, began, in November 2014, to allow same-sex marriage under a tribal law that explicitly incorporates Wyoming marriage law.[28] Finally, two tribes have enacted policies supporting same-sex marriage. The Iipay Nation of Santa Ysabel has passed a policy statement supporting same-sex marriage, but, because the Iipay Nation does not perform marriages under its jurisdiction, its policy statement is not legally binding.[29] Members of the Keweenaw Bay Indian Community passed a referendum supporting same-sex marriage that is intended to guide the Tribal Council in considering the issue.[30] Therefore, twelve tribes are currently known to permit same-sex marriages under their jurisdiction.

1. Tribal Laws that Explicitly Allow Same-Sex Marriage

a. The Coquille Indian Tribe

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26. *See infra* Part II.B.2.

27. *See infra* Part II.B.3.

28. *Wind River Tribal Judge*, *supra* note 15. *See also* Shoshone & Arapaho Law & Order Code tit. IX, § 9-5-2 (2004). However, the Northern Arapaho Tribe currently appears to be attempting to pull out of the joint governance structure. *See* Trevor Graff, *Eastern Shoshone reject Northern Arapaho dissolution*, Casper Star-Tribune Communications (Oct. 1, 2014), http://trib.com/news/state-and-regional/eastern-shoshone-reject-northern-arapaho-dissolution-of-joint-business-council/article_1e8a23ff-b86a-51c7-9530-a3ae5854a2b5.html. It is unknown what effect, if any, this would have on the allowance of same-sex marriage.

29. *California Native American Tribe Announces Support of Same Sex Marriage*, *supra* note 13; Vialpando, *supra* note 13.

30. *See* Res. KB-063-2014, Keweenaw Bay Indian Cmty. Res. (2014) (requesting and authorizing the election board to conduct a ballot proposal asking voters whether they support allowing the Keweenaw Bay Indian Community to issue licenses to same-sex couples); Roblee, *supra* note 14 (reporting that Keweena Bay Indian Community voters approved the referendum on tribal sanction for same-sex marriages); MacNeil, *supra* note 14 (noting that the referendum that was passed was intended to gauge public opinion regarding same-sex marriage).

The Coquille Indian Tribe in Oregon was the first known tribe to change its laws to permit same-sex marriage.[31] In 2008, in response to requests by tribal members—and after holding several workshops on the issue and taking comments from tribal members—the Tribe passed a law allowing same-sex marriage.[32] At the time Coquille passed its law in February 2008, Massachusetts was the only state that allowed same-sex marriage.[33] Before adopting the new marriage law, the Tribe, like many other small tribes, did not even issue marriage licenses or have laws in place governing marriage.[34]

Coquille member Kitzen Branting, who later used the law to marry her high school sweetheart, was the first to propose the same-sex marriage reform. The Coquille Tribal Council initially set aside the proposal until another tribal member raised the issue again sometime around 2007.[35] The Tribe enacted a comprehensive marriage law, which included a provision explicitly allowing same-sex marriage, in February 2008.[36] Although there was some controversy

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31. Wilson, *supra* note 23, at 181 (citing Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 Ariz. J. Int'l & Comp. L. 509, 530–31 (2009) (noting that, at the time of writing, the Coquille Tribe was the only tribe to take legislative action to allow same-sex marriage)).

32. Bushyhead, *supra* note 31, at 531 (noting that the Coquille Indian Tribe adopted a Marriage and Domestic Partnership ordinance on May 8, 2008); *see also* Sarah Netter, *Brides Look Forward to Marrying Under Tribal Same-Sex Marriage Law: Tribal Leaders Say Coquille Indian Tribe May Be the First to Legalize Same-Sex Marriage*, ABC News (Aug. 27, 2008), http://abcnews.go.com/TheLaw/print?id=5659821; Greg Guedel, *Coquille Tribe's Gay Marriage Policy Challenged*, Foster Pepper PLLC (Oct. 26, 2008), http://www.nativelegalupdate.com/2008/10/articles/tribal-law-and-justice/coquille-tribes-gay-marriage-policy-challenged/.

33. *Same Sex Marriage Fast Facts*, CNN Library, http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/ (last updated Jan. 30, 2015).

34. Netter, *supra* note 32. *See also supra* note 13 and accompanying text (describing the marriage policies of the Iipay Nation of Santa Ysabel).

35. Netter, *supra* note 32; *see also* Bill Graves, *Indian gay marriage law takes effect in Oregon*, Oregon Faith Report (May 27, 2009), http://archive.is/Y0Be (noting that Kirtzen Branting and Jeni Branting were the first same-sex couple to marry in Oregon).

36. Coquille Indian Tribal Code § 740.010(2) (2008) (defining "Marriages and Domestic Partners" as "[A] formal and express civil contract entered into between two persons, regardless of their sex . . . .").

about the law within the Tribe after it was enacted, the controversy eventually died down and the law remains in place.[37]

The language of section 740.010(2) of the Coquille Tribe's marriage ordinance implicitly evokes Supreme Court and federal appellate jurisprudence in the areas of fundamental rights, tribal civil jurisdiction under federal law, and the applicability of federal laws of general application to Indians within reservations.[38] Such nods to federal law indicate that the Coquille law was carefully drafted to avoid potential challenges to its validity. Specifically, the provision states that:

> The Tribal Council finds that Marriages and Domestic Partnerships involving tribal members are *fundamental rights* and fundamental institutions that preserve the Tribe's integrity, cohesiveness and continuity. The Tribe further finds that the formation, continuity and recognition [sic] domestic relationships are *essential to the political integrity, economic security and the health and welfare of the Tribe*. The Tribe further finds that this Ordinance deals with purely *intramural relationships* . . . .[39]

The "fundamental rights" language evokes Supreme Court decisions, such as *Zablocki v. Redhail*,[40] interpreting the due process of the United States Constitution to protect marriage as a fundamental right.[41] The language of "political integrity, economic security and . . . health and welfare" mirrors the Supreme Court's test for whether a tribe may exercise civil jurisdiction over non-members of the tribe.[42] Finally, the Coquille Tribe's use of the term

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37. Guedel, *supra* note 32 (describing a challenge to the marriage law brought by a Tribal member); E-mail from Brett Kenney, Attorney for Coquille Indian Tribe to author (Mar. 1, 2013, 14:15 PST) (on file with author) (confirming that the controversy dissipated and the law remains in place).

38. Coquille Indian Tribal Code 740.010 (2008). Additionally, the provisions require that at least one of the parties to the marriage be a Coquille tribal member. Coquille Indian Tribal Code § 740.100 (2008).

39. Coquille Indian Tribal Code § 740.010(2) (2008) (emphasis added).

40. Zablocki v. Redhail, 434 U.S. 374 (1978).

41. *Id.* at 383–84.

42. *See generally* Montana v. United States, 450 U.S. 544 (1981). Under that test, a tribe may regulate both those who enter consensual relationships with the tribe or its members and: "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

"intramural" echoes a test used by the Ninth Circuit and other courts to determine whether a federal statute of general application should be viewed to apply to Indians on reservations.[43] Thus, the reference to "intramural" likely reflects the Coquille Tribe's concern that its law might somehow be attacked as a violation of the federal DOMA.[44] As the first known tribe to enact a same-sex marriage law, the Coquille Tribe was attempting to make the law as challenge-proof as possible.

The statute's definitional section reflects a similar engagement with the dominant Western culture's rights discourse, particularly in the context of constitutional equal protection and statutes barring discrimination. The code defines "Marriages and Domestic Partners" as "a formal and express civil contract entered into between two persons *regardless of their sex* . . . at least one of whom is a member of the Coquille Indian Tribe."[45] The phrase "regardless of their sex," like the term "fundamental rights" used earlier in the provision, is common in Western rights discourse, especially in cases concerning the federal Equal Protection Clause or anti-discrimination statutes.[46]

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43. *See, e.g.*, United States v. Smith, 387 F.3d 826, 829 n.5 (9th Cir. 2004) (holding that federal crimes of general applicability apply with equal force in Indian country). In *Smith*, the court stated:

> The presumption that nationally applicable laws apply to Indians in Indian country may be rebutted in three ways: A federal statute of general applicability . . . will not apply to [an Indian in Indian Country] if: (1) the law touches exclusive rights of self-governance in *purely intramural matters*; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .

*Id.* (citation omitted).

44. *See, e.g.*, Netter, *supra* note 32 (quoting an attorney for Coquille Tribe as stating that "the tribe was in no way trying to pick a fight with the federal government" by enacting the law).

45. Coquille Indian Tribal Code § 740.010(3)(b) (2008) (emphasis added).

46. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in part and dissenting in part) (discussing in an equal protection case, the constitutional principle of "equal opportunity for all regardless of race or color"); Wheatley v. Wicomico County, Maryland, 390 F.3d 328, 334 (4th Cir. 2004) ("In passing the [Equal Pay Act], Congress embraced the principle of equal pay for equal work regardless of sex"); Byers v. City of Albuquerque, 150 F.3d 1271, 1277 (10th Cir. 1998) (noting, in a case raising equal protection, due process, and statutory civil rights claims, that "[p]laintiffs have not disputed that every officer who asked to participate in the Mock Assessment Center was allowed to participate, regardless of race, sex, or national origin").

### b. The Suquamish Tribe

While structured slightly differently, the Suquamish Tribe's ordinance uses language substantially similar to that in the Coquille law. The Suquamish ordinance describes marriage as a "fundamental right[]"[47] that is available to "two persons, regardless of their sex."[48] It similarly echoes the language of the Supreme Court's test for civil jurisdiction over non-members, although the Suquamish language is phrased a bit differently.[49] Finally, the Suquamish provision also describes the chapter involving marriage and divorce as "address[ing] purely intramural relationships . . . ."[50] As appears to be the case with most tribal marriage laws, Suquamish limits marriages under its jurisdiction to those involving at least one tribal member.[51]

The Suquamish law is also similar to the Coquille law in that an LGBT tribal member initially proposed the law (although, in the Suquamish case, the tribal member had no immediate plans to get married).[52] Unlike the Coquille Tribe, however, Suquamish had a marriage ordinance in place and merely amended its law to allow same-sex marriage.[53] When Suquamish passed its same-sex marriage law on August 1, 2011, seven states and the District of Columbia allowed same-sex marriage.[54]

### c. Pokagon Band of Potawatomi Indians

The Pokagon Band's code provisions allowing same-sex marriage were passed in March 2013. Like Coquille and Suquamish, Pokagon uses civil rights language in its code provisions, although the structure and content of the statute are somewhat different than those of the other two tribes. Pokagon's law defines "marriage" as "a

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47. Suquamish Tribal Code tit. 9, § 9.1.1 (2011).

48. *Id.* § 9.1.3(d).

49. *Id.* § 9.1.1 ("[M]arriages involving enrolled Suquamish Tribal members, different and same sex couples . . . preserve and protect the tribe's political integrity, economic security, social vitality, and the health and welfare of individual tribal members, their children, and the tribal community as a whole.").

50. *Id.* § 9.1.1.

51. *Id.* § 9.1.3(d).

52. *See, e.g.*, Susan Gilmore, *Kitsap County's Suquamish Tribe Makes Same-Sex Marriage Legal*, Seattle Times, Aug. 3, 2011, *available at* http://seattletimes.com/html/localnews/2015800174_samesex03m.html.

53. *Id.*

54. *See, e.g.*, Human Rights Campaign, *Map of State Laws & Policies: Marriage Equality and Other Relationship Recognition Laws*, http://www.hrc.org/state_maps (last updated Jan. 22, 2015); *Same Sex Marriage Fast Facts*, *supra* note 33; Suquamish Tribal Code tit. 9, ch. 9.1 (2011) (passed on Aug. 1, 2011).

civil contract between two (2) persons, regardless of their sex, creating a union to the exclusion of all others."[55] Like Suquamish and Coquille, Pokagon requires that at least one of the members of the couple who is marrying be a citizen of the Band in order to be married under its jurisdiction.[56] However, Pokagon's statute does not include explicit fundamental rights language nor does it recite the applicability of the requirements for tribal civil jurisdiction from *Montana v. United States*.[57] Nonetheless, the statute makes an implicit nod to *Montana*'s allowance of civil jurisdiction based on a consensual relationship when it states that the application is to require each applicant for a marriage license to "[e]xpressly consent to the personal jurisdiction of the Pokagon Band, the Tribal Court, and the Court of Appeals, and that the person waives all defenses available against such jurisdiction."[58]

As with Suquamish and Coquille, the proposal for Pokagon's law appears to have come initially from an LGBT tribal member, who was a member of the first couple to marry under the new law.[59] When Pokagon's law passed in March 2013, nine states and the District of Columbia had laws in effect allowing same-sex marriage.[60]

### d. Puyallup Tribe

The Puyallup Tribe in Western Washington passed a law allowing same-sex marriages in July 2014.[61] The law states simply that "[s]ame sex marriage may be validly contracted within the Puyallup Indian Reservation . . . ."[62] Like several other tribes' marriage laws, it requires one of the parties to the marriage to be a Puyallup member.[63] Additionally, the Council member who

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55. Pokagon Band of Potawatomi Indians Marriage Code ch. 1, § 1.06(j) (2013).
56. *Id.* § 1.05.
57. Montana v. United States, 450 U.S. 544 (1981).
58. Pokagon Band of Potawatomi Indians Marriage Code ch. 1, § 2.02(a)(8) (2013).
59. John Eby, *Same-Sex Couple Says, "I do*," Leader Pub (June 20, 2013), www.leaderpub.com/2013/06/20/same-sex-couple-says-i-do/.
60. Freedom to Marry, *supra* note 2; Human Rights Campaign, *supra* note 54.
61. Puyallup Tribal Code tit. 7, § 7.08.030 (2014).
62. *Id.*
63. *Id.* § 7.08.030(a).

co-authored it reported that she decided to do so after tribal members asked her why the Tribe did not allow same-sex marriage.[64]

#### e. Central Council of the Tlingit and Haida Indian Tribes of Alaska

As this article went to press, the Tlingit and Haida Tribes, which constitute a single tribal entity under federal law, also passed a same-sex marriage statute, providing that marriage may be entered into "regardless of gender."[65]

### 2. Facially-Neutral Tribal Marriage Laws Whose Legislative History Suggests an Intent to Allow Same-Sex Marriage

As detailed below, three tribes have facially-neutral marriage laws that appear to have been adopted so as to authorize same-sex marriage. In two of the cases, Little Traverse Bay Bands of Odawa Indians and the Mashantucket Pequot Tribal Nation, the sex-neutral laws replaced laws that limited marriage to one man and one woman. In the third case, that of the Confederated Tribes of the Colville Reservation, the text of the old law was not as obviously limited to opposite-sex couples. The publicity surrounding the Colville amendment, however, made it clear that the intent was to authorize same-sex marriage.

#### a. Mashantucket Pequot

It appears that Mashantucket Pequot is the first tribe to change from a sex-specific marriage law to a sex-neutral law in order to permit same-sex marriage. There was little or no publicity surrounding the move. However, the Tribe's website contains links to a 2008 code and a 2010-11 Pocket Part to the 2008 Tribal Laws.[66] The 2008 code includes a sex-specific marriage provision. Title 6, chapter 3, Section 3 stated that "[a] *man* and a *woman* may be joined

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64. Matt Nagle, *Puyallup Tribe Recognizes Same-Sex Marriages*, Tacoma Weekly, July 16, 2014, http://www.tacomaweekly.com/news/view/puyallup-tribe-recognizes-same-sex-marriages/.

65. Central Council of the Tlingit and Haida Indian Tribes of Alaska Statute Code, tit. 5, § 05.01.004(C) (2015).

66. *See* Mashantucket Pequot Tribal Laws tit. 6, ch. 3, § 3 (2008); Mashantucket Pequot Tribal Laws tit. 6 ch. 3, § 3 (2010–11 Pocket Part).

in marriage on the Mashantucket Pequot Reservation . . . ." [67] The 2010-11 Pocket Part for the same section states that "*[t]wo persons* may be joined in marriage on the Mashantucket Pequot Reservation . . . ."[68] Due in part to the lack of publicity surrounding the change, I was unable to definitively confirm that the purpose of this amendment was to codify marriage equality. In a phone conversation, an attorney for the Tribe stated that she too interpreted the amendment to allow same-sex marriage; also a recent news article reported that this was the intent of the amendment.[69] Indeed, it is difficult to imagine what other purpose a change like this might have served.

Interpreting the change in the Mashantucket Pequot marriage provision as codifying marriage equality is consistent with the Nation's past history of amending its own laws in response to developments in Connecticut law. [70] The Supreme Court of the State of Connecticut authorized same-sex marriage in 2008, and its decision was codified by the legislature in 2009.[71] It is therefore possible that the Tribe was motivated to make this change by Connecticut's recent authorization of same-sex marriage.[72]

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67. Mashantucket Pequot Trib. Laws tit. 6, ch. 3, § 3 (2008) (emphasis added).

68. Mashantucket Pequot Trib. Laws tit. 6, ch. 3, § 3 (2010–11 Pocket Part) (emphasis added).

69. Telephone Interview with Marietta Anderson, Attorney, Mashantucket Pequot Tribal Nation (Aug. 5, 2013); Connie Wu, *These Native-American Tribes Are Pioneering Marriage Equality*, Advocate.com (July 28, 2014) http://www.advocate.com/politics/marriage-equality/2014/07/28/these-native-american-tribes-are-pioneering-marriage-equality?page=full (stating that the change in the law occurred in June 2010).

70. My previous research on tribal laws regarding sex discrimination revealed that the Mashantucket Pequot Tribal Nation may be influenced, at least in some instances, by changes in Connecticut law. Tweedy, *supra* note 9, at 439.

71. *See* William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. Rev. 275, 304 (2013) (citing Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008), and An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Acts No. 09-13 (Reg. Sess.)).

72. The change is also in accord with previous support that the Tribe, as an employer, was reported to have expressed for same-sex couples and LGBT employees. Patricia Daddona*, Foxwoods, MGM Grand Expand LGBT Policies*, Indian Country (Aug. 27, 2010), http://indiancountrytodaymedianetwork.com/2010/09/02/foxwoods-mgm-grand-expand-lgbt-policies-81667. However, the policy noted in this Article of allowing medical benefits for same-sex partners who are not legal spouses was not in place when I was doing my research on same-sex

Mashantucket Pequot does not appear to require that either party to the marriage be a tribal member or an Indian in order to be married under its jurisdiction.[73] Nor does the chapter that governs marriages allude to the *Montana* test for tribal civil jurisdiction or recite any findings with respect to the importance of marriage to the Tribe.

b. Little Traverse Bay Bands of Odawa Indians

The Little Traverse law changed in March 2013 from a 2007 law that had explicitly defined marriage as "the legal and voluntary union of one man and one woman, to the exclusion of all others."[74] The new, sex-neutral law states: "'Marriage' means the legal and voluntary union of two persons to the exclusion of all others."[75] Interestingly, under the old, discriminatory law, there was no requirement that either party to the marriage be a member of the Little Traverse Tribe,[76] whereas, in the new law, "[o]ne of the persons in the marriage must be an enrolled LTBB [Little Traverse] [c]itizen."[77] This exercise of caution is consistent with the approaches of Coquille, Suquamish, and Pokagon in authorizing same-sex marriage in a way that minimizes the potential for legal challenge.

Like the Suquamish's, Coquille's, and Pokagon's same-sex marriage laws, Little Traverse's was initiated by tribal members. Beginning in 2009, Denise Petoskey, a queer-identified tribal member (and the Tribe's Human Resources Director), and several of her friends began talking to members of the Tribal Council about

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marriage in 2013. *See* Eligibility and Enrolling, Mashantucket Pequot Tribal Nation Advantage, http://216.92.95.131/index.php?id=232 (last visited Feb. 16, 2015). While such benefits may conceivably have been eliminated due to the allowance of same-sex marriage, the Tribe's Human Resources Director stated that the policy had not changed since August 2010. Telephone Interview with Fay Carlson, Human Resources Director, Mashantucket Pequot Tribal Nation (Apr. 4. 2013). It is thus not entirely clear whether the information in the news article was correct at the time it was written.

73. *See* Mashantucket Pequot Tribal Laws tit. 6, ch. 3, § 3 (2008); Mashantucket Pequot Tribal Laws tit. 6 ch. 3, § 3 (2010–11 Pocket Part).

74. Waganakising Odawa Tribal Code of Law tit. VIII, ch. 1, § 13.102(D) (2007).

75. Waganakising Odawa Tribal Code of Law tit. VIII, ch. 1, § 13.102(C) (2013).

76. Waganakising Odawa Tribal Code of Law tit. VIII, ch. 1, § 13.103(B)(2) (2007) (requiring that a person seeking to be married be either a tribal member or "a person who consents to the civil jurisdiction of the Tribe.").

77. Waganakising Odawa Tribal Code of Law tit. VIII, ch. 1, § 13.102(D) (2013).

changing the law to permit same-sex marriage.[78] In 2012, the first attempt to pass same-sex marriage at Little Traverse failed.[79] During that process, one Tribal Council member expressed concern about the fact that there was no requirement that either party to a marriage be a Little Traverse member.[80] After the proposed amendment failed to pass, a Council member brought forth evidence that recognizing same-sex relationships was consistent with the Tribe's oral history.[81]

The amendment passed narrowly on March 3, 2013, but there was concern that the Tribal Chairman, Dexter McNamara, would veto it.[82] However, Tim LaCroix, a LGBT tribal member who had previously worked with Chairman McNamara, called him and asked what he would do.[83] That call appears to have been pivotal to the Chairman's decision to sign the legislation.[84] The Chairman officiated the wedding of Mr. LaCroix and his longtime partner, Gene Barfield, on March 15, 2013, the very day he signed the bill.[85] In explaining his decision to sign the legislation, Chairman McNamara cited the due process and equal protection clauses of the tribal constitution and explained that "[t]his is about people being happy . . . . There should not be a dividing line and we should all be able to seek a good life."[86] Although one member of the Tribal Council attempted to initiate a repeal of the law in early 2014, she was unable to garner other Tribal Council members' votes in support of these efforts.[87]

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78 . E-mail from Denise Petoskey, Human Resources Director, Little Traverse to author (Mar. 7, 2013, 21:04 PST) (on file with author).

79. *Id.*; E-mail from John Bott, Tribal Council Treasurer (Feb. 5, 2013, 15:38 PST) (on file with author); Levi Rickert, *Mar 7, Odawa Indians Tribal Council Passes Gay Marriage Statute*, Adam Beach Foundation (Mar. 7, 2013), http://adambeachfoundation.org/mar-7-odawa-indians-tribal-council-passes-gay-marriage-statute-nativenewsnetwork/.

80. Petoskey, *supra* note 78; *accord* Rickert, *supra* note 79.

81. Petoskey, *supra* note 78.

82. *Id.*; Brandon Hubbard, *Little Traverse Bay Bands could become 3rd tribe in nation to allow gay marriage*, PetsoskeyNews.com (Mar. 5, 2013), http://articles.petoskeynews.com/2013-03-05/belinda-bardwell_37478324.

83. John Flesher, *American Indian tribe OKs same-sex marriage, lets gay couple wed*, NBC News (Mar. 15, 2013), http://usnews.nbcnews.com/_news/2013/03/15/17325923-american-indian-tribe-oks-same-sex-marriage-lets-gay-couple-wed?lite.

84. *Id.*

85. *Id.*

86. E-mail from Dexter McNamara, Chairman of the Little Traverse Bay Bands of Odawa Indians to numerous recipients including Denise Petoskey (Mar. 7, 2013, 21:00 PST) (on file with author).

87. Brandon Hubbard, *Odawa Tribal Council rejects same-sex marriage repeal*, Petoskey News.com (Jan. 7, 2014), http://www.petoskeynews.com/featured-

### c. The Confederated Tribes of the Colville Reservation

Unlike Mashantucket Pequot and Little Traverse, the Colville Tribe did not have an explicit bar on same-sex marriage in place prior to amending its laws to authorize same-sex marriage in September 2013. Rather, Colville's laws on "Persons Who May Marry" and the "Marriage License" were sex-neutral, with the only implicitly sex-specific language contained in the provision regarding the "Marriage Ceremony," which stated that "the persons to be married must declare . . . that they each take each other as husband and wife, and he or she must thereafter declare them to be husband and wife."[88] Accordingly, the only change made in the law to authorize same-sex marriage was in the "Marriage Ceremony" provision, which now requires "that the persons to be married must declare in the presence of the person performing the ceremony, that they take each other as a married couple, and he or she must thereafter declare them to be married."[89]

The slightness of the wording change required to authorize same-sex marriage at Colville mirrors the relative lack of controversy surrounding the issue. No Council members voted against the provision at Colville.[90] Colville Chairman Michael Finley is also reported to have commented that tribes have always known that gay people "have a special place in . . . society" and that "[t]hey've always been accepted."[91] Although the available information is conflicting, it appears that a tribal citizen initially requested the amendment.[92]

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pnr/odawa-tribal-council-rejects-same-sex-marriage-repeal/article_651e4862-77ac-11e3-9af3-001a4bcf6878.html.

88. Confederated Tribes of the Colville Reservation Tribal Code tit. 5, §§ 5-1-30, 5-1-32, 5-1-34 (2009).

89. Confederated Tribes of the Colville Reservation Tribal Code tit. 5, § 5-1-34 (2013); E-mail from Anna Vargas, Code Reviser/OJJDP Grant Coordinator, Confederated Tribes of the Colville Reservation to author (Jan. 10, 2014, 10:10 PST) (on file with author).

90. *Compare* K.C. Mehaffey, *Colvilles recognize same sex marriage*, The Wenatchee World (Sept. 7, 2013), http://www.wenatcheeworld.com/news/2013/sep/07/colvilles-recognize-same-sex-marriage/, *with* Guedel, *supra* note 32 (discussing the yearlong process by which the Coquille Indian Tribe Tribal Council eventually voted 4–2 in favor of allowing same-sex marriage), *and* Hubbard, *supra* note 82 (discussing the repeated attempts and eventual narrow vote by which the Little Traverse Bay Bands Tribal Council passed a same-sex marriage amendment).

91. Mehaffey, *supra* note 90. While it is unclear whether the Colville Chairman was speaking of Colville culture in particular or of tribal cultures in general, such statements about tribal cultures in general, while common, are

### 3. Tribes that Allow Same-Sex Couples to Marry Under Facially-Neutral Laws that Lack Clear Legislative History Supporting Same-Sex Marriage

Two tribes have decided to allow same-sex couples to marry under pre-existing sex-neutral laws: the Cheyenne and Arapaho Tribes and the Leech Lake Band of Ojibwe.

#### a. Cheyenne and Arapaho

The Cheyenne and Arapaho began to quietly issue marriage licenses to same-sex couples under their pre-existing, sex-neutral marriage law in late 2012.[93] The Tribes' marriage law, which incidentally is identical to the law of the Iowa Tribe, simply states that "[a]ll marriages and divorces to which an Indian person is a party, whether consummated in accordance with the State law or in accordance with Tribal law or custom, shall be recorded in writing executed by both parties thereto . . . ."[94]

Jason Pickel and Darren Black Bear, who married on October 31, 2013 after nine years together, were the third same-sex couple to be married under the law.[95] They had inquired with the tribal court

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almost certainly over-generalizations. *See, e.g.*, Daniel Heath Justice, *Notes Toward a Theory of Anomaly*, 16 GLQ: A Journal of Lesbian and Gay Stud. 208, 214–15 (2010).

92. *Compare* Mehaffey, *supra* note 90 (describing the amendment as having been "initiated" by tribal council members) *with* E-mail from Anna M. Vargas to author (Mar. 13, 2014, 12:17 PST) (on file with author) (stating a belief that a tribal member employee initiated the change).

93. *See, e.g.*, Branson-Potts, *supra* note 11; Interview with Jason Black Bear neé Pickel (Jan. 10, 2014). Unfortunately, I was not able to confirm this information with the tribal government. I called several different tribal offices and was able to obtain a copy of the marriage law from the Court Clerk's Office. The only employee of the Tribe whom I contacted who was willing to speak to me about the law was the Attorney General, Albert Ghezzi, but he unfortunately could not confirm or deny information regarding the Tribes' policy or practice with respect to same-sex marriage, having had no involvement with the issue. Interview with Albert Ghezzi, Attorney General for Cheyenne and Arapaho Tribes (Mar. 11, 2014); E-mail from Edwina Whiteman to author (Jan. 8, 2014, 15:14 PST) (on file with author) (with current code provision attached).

94. Cheyenne-Arapaho Tribes of Okla. tit. II, § 1101 (1988); E-mail from Edwina Whiteman to author (Jan. 8, 2014, 15:14 PST) (on file with author) (with current code provision attached); *see also* Iowa Tribe of Okla. Civ. Proc. Code ch. 11, § 1101.

95. Interview with Jason Black Bear neé Pickel (Jan. 10, 2014); Heide Brandes, *Oklahoma Couple Marry under Native American Law*, Reuters (Nov. 1,

roughly five and a half years prior about the possibility of marrying but were told it was impossible due to Oklahoma's ban on same-sex marriage.[96] Jason Black Bear neé Pickel explained that he "didn't push it" at that point, although he knew that Oklahoma's ban would not apply to the Tribes' actions.[97]

Mr. Black Bear further stated that, after all the publicity surrounding his marriage, the vast majority of tribal members and other people he met in the area were very supportive and that the only continuing controversy regarding the tribal marriage provision was as to whether it should be amended to require that one member of the couple be a member of the Cheyenne and Arapaho Tribes, rather than simply being an Indian.[98] Indeed, although one vocal opponent blocked his and his fiancé's use of a tribal building for their wedding and the funding for their meal, which is usually provided by the Tribes, private donors stepped in and covered costs for the catering, the cake, and the reception hall.[99]

The Cheyenne and Arapaho Tribes' interpretation of their marriage law is consistent with the Tribes' constitution, which bars discrimination based on sexual orientation.[100] However, the interpretation is nonetheless quite remarkable in light of the fact that Oklahoma, where the Tribes are located, has a DOMA (which was recently invalidated by the Tenth Circuit),[101] as does the Cherokee Nation.[102]

### b. Leech Lake Band of Ojibwe

Leech Lake defines marriage "as a personal relationship arising out of a civil contract requiring the consent of the parties . . . ."[103] The tribal court began performing same-sex marriages

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2013), http://www.reuters.com/article/2013/11/01/us-usa-gaymarriage-oklahoma-idUSBRE9A00JW20131101.

96. Interview with Jason Black Bear neé Pickel (Jan. 10, 2014).

97. *Id.*

98. *Id.*

99. *Id.*

100. Const. of the Cheyenne & Arapaho Tribes, Art. 1I, sec. 1(o) (amended 2006) ("The government of the Tribes shall not make or enforce any law which . . . discriminates against any Person based on . . . sexual orientation . . . .").

101. *See* Bishop v. Smith, 760 F.3d 1070, 1079–82 (10th Cir. 2014).

102. 43 Okl. St. Ann. § 3.1 (2014), *invalidated by* Bishop v. Smith, 760 F.3d 1070; Cherokee Nation Marriage and Family Protection Act of 2004, Leg. Act 26-04 (2004) (codified as amended at Cherokee Code Ann. tit. 43).

103. Leech Lake Band of Ojibwe Jud. Code tit. 6, ch. 2, § B (2014).

under tribal law in November 2013.[104] The court interpreted the allowance of same-sex marriages under the Tribe's marriage laws as an open question. Thus, after giving the Tribal Council notice that the court would likely begin issuing marriage licenses to same-sex couples, the court applied Minnesota law allowing such marriages as a gap filler, a practice that Leech Lake tribal law specifically authorizes.[105] In other words, since Minnesota permits same-sex marriages, the Tribe elected to do so as well.[106] Long-time partners Arnold Dahl, a Leech Lake member, and Matthew Wooley, who advocated for two years for the law to be interpreted in a sex-neutral manner, were the first same-sex couple to marry under the law.[107]

Additionally, under Leech Lake's marriage law, tribal jurisdiction extends to "all marriages licensed and performed within its exterior reservation boundaries," and thus there does not appear to be any tribal membership or Indian blood requirement for a marriage under tribal law.[108]

### 4. Incorporation of State Law into Tribal Law

Two separate tribes that currently share a governance structure, including tribal laws and a tribal court,[109] have explicitly incorporated state law as to the validity of a marriage into tribal law. The tribal court of the Eastern Cheyenne Tribe and the Northern Arapaho Tribe officiated a marriage between two women in November 2014 pursuant to a law stating that, "[t]o the extent they are not inconsistent with this act, the laws of the State of Wyoming shall apply to all matters concerning the creation of marriage, marital rights and obligations, annulments and marriages which are void or

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104. Potts, *supra* note 12.

105. Email from Judge Paul Day to Lenny Fineday, In-House Attorney, Leech Lake Band of Ojibwe (Jan. 21, 2014, 2:47 PM), forwarded by Lenny Fineday to author (Jan. 28, 2014, 4:14 PM) (on file with author); *see also* Leech Lake Band of Ojibwe Jud. Code, tit. 1, pt. VII, § 6(C) (2014).

106. Email from Judge Paul Day, *supra* note 105; *see also* Minn. Stat. Ann. § 517.01 (2013).

107. Wu, *supra* note 69.

108. Leech Lake Band of Ojibwe Jud. Code, tit. 6, ch. 2, § A (2014).

109. *See* Shoshone & Arapaho Tribal Court (Jan. 2, 2015), http://shoshone-arapaho-tribal-court.org/ (containing a link to the tribal code). Although the Northern Arapaho Tribe currently appears to be attempting to pull out of the joint governance structure, Graff, *supra* note 28, it is unknown whether such a withdrawal would have any effect on the allowance of same-sex marriage by both tribes.

voidable."[110] The previous month, Wyoming had begun to allow same-sex marriage as the result of a federal district court decision striking down Wyoming's statutory prohibition on same-sex marriage.[111] As explained below, the Sault Ste. Marie Tribe in Michigan also explicitly incorporates state law as to marriage validity, but Michigan does not currently allow same-sex marriage.

### 5. Policy Support for Same-Sex Marriage: The Iipay Nation of Santa Ysabel and the Keweenaw Bay Indian Community

Two tribes have expressed differing forms of policy support for same-sex marriage. The first, the Iipay Nation, is a tribe located in the San Diego area of California. The Iipay Nation does not conduct any marriages under its jurisdiction. Rather than enacting marriage legislation that would change that status quo, in June 2013, it elected to adopt a resolution supporting same-sex marriage.[112] The resolution carries no legal force, however, as those who marry on the Iipay Nation's reservation must have a California marriage license.[113]

The resolution was passed before the Supreme Court's decision in *Hollingsworth v. Perry*,[114] in which the Supreme Court indirectly legalized same-sex marriage in California by leaving in place the federal district court decision in that case based on its determination that appellants lacked standing at the Court of Appeals and Supreme Court levels.[115] Thus, the Iipay Nation elected to voice its support for same-sex marriage at a time when such marriages were not yet sanctioned in California.

In late 2014, members of the Keweenaw Bay Indian Community in Michigan passed a referendum supporting same-sex

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110. Shoshone & Arapaho Law & Order Code tit. IX, § 9-5-2 (2015); *Wind River Tribal Judge*, *supra* note 15.

111. Guzzo v. Mead, No. 14–CV–200–SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); *Order Lifting Temporary Stay*, Guzzo v. Mead, No. 14–CV–200–SWS (D. Wyo. Oct. 21, 2014), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/10/Wyoming-marriage-DCt-lifts-stay-10-21-14.pdf.

112. Vialpando, *supra* note 13; *accord California Native American Tribe Announces Support of Same Sex Marriage*, *supra* note 13.

113. Vialpando, *supra* note 13.

114. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

115. *See id.* at 2667; *California Native American Tribe Announces Support of Same Sex Marriage*, *supra* note 13.

marriage.[116] The referendum, which came about through a Tribal Council resolution, is advisory and is meant to guide the Tribal Council in making decisions about the issue.[117] Nonetheless, it demonstrates that a majority of Keweenaw Bay Indian Community members support same-sex marriage, and it may well presage a change in tribal law to allow same-sex marriage.

### C. Tribal Laws Allowing for Same-Sex Domestic Partnerships

In addition to tribal laws allowing same-sex marriage, my research revealed a few tribal laws and policies providing for same-sex domestic partnerships. One of the most important examples in this category was the comprehensive domestic partnership law enacted by the Confederated Tribes of the Umatilla Indian Reservation.[118] Specifically, the Umatilla law defines domestic partnership as "a civil contract entered into . . . between two individuals of the same sex . . . ,"[119] and it provides that:

> *Any privilege, immunity, right, or benefit* granted by statute, administrative or court rule, policy, common law or any other law to any individual because the individual is or was married, or because the individual is or was an in-law . . . *is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership* . . . .[120]

This law was passed in 2007, as part of the adoption of the Tribe's first comprehensive family law code.[121] The possibility of passing same-sex marriage was discussed by a working group for the Family Law Code, but some individuals were not comfortable adopting same-sex marriage, so a domestic partnership statute that provided for all the benefits of marriage was adopted instead.[122] The

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116. Res. KB-063-2014, Keweenaw Bay Indian Cmty. Tribal Council (undated Keweenaw Bay Indian Community Tribal Council resolution approving referendum language); Roblee, *supra* note 14; MacNeil, *supra* note 14.

117. Roblee, *supra* note 14; MacNeil, *supra* note 14.

118. Confederated Tribes of the Umatilla Indian Reservation, Family Law Code ch. 13 (2010).

119. *Id.* § 13.02.

120. *Id.* § 13.07(A) (emphasis added).

121. Confederated Tribes of the Umatilla Indian Reservation, Family Law Code, App. A, Legislative History (2010); E-mail from Brent Leonhard, Attorney for the Confederated Tribes of the Umatilla Indian Reservation to author, (Feb. 7, 2013, 10:31 PST) (on file with author).

122. Leonhard, *supra* note 121.

language used was similar to that of a civil union statute that was being debated in Oregon at that time and which ultimately became the law in Oregon.[123]

Umatilla's was the only comprehensive domestic partnership law identified in my research that *explicitly* applies to same-sex couples. However, in 2013, the Tulalip Tribes enacted a similar, very comprehensive law that is interpreted to apply to same-sex relationships despite the lack of explicit textual evidence.[124]

Another, much more limited domestic partnership provision of interest is that of Ponca Tribe of Nebraska. Ponca Tribe of Nebraska defines a "domestic partner" as being "a partner of the same sex or opposite sex relationships . . . ."[125] The Tribe provides death benefits to a domestic partner when a Ponca employee dies from workplace injuries, [126] and it grants employees sick and bereavement leave to care for or grieve domestic partners. [127] To qualify for these benefits, a domestic partnership affidavit must be on file with the Tribe.[128] Although limited, the Ponca Tribe's provision is notable because the Tribe is located in Nebraska, a state with an explicit constitutional provision banning not only same-sex marriage but also same-sex civil unions and domestic partnerships.[129] Indeed, Nebraska's ban, which was passed by a full 70% of its voters, has been described as "the most far-reaching ban on same-sex relationships in the United States."[130]

The Snoqualmie Tribe also has a limited domestic partnership provision for same-sex couples. Similar to the Ponca Tribe's provision, the Snoqualmie Tribe recognizes same-sex and

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123. *Id.*; Or. Rev. Stat. § 106.340(1) (2008).

124. Tulalip Tribal Codes, Tit. 4, Art. VII, § 4-20-630 (2012) (listing the requirements for a domestic partnership); *see also* Tulalip Tribes of Washington Domestic Partnership Affidavit (indicating that the sex of the couple is not relevant when filling out this affidavit); E-mail from Tim Brewer, Attorney for Tulalip Tribes to author (Jan. 17, 2014, 11:53 PST) (on file with author).

125. Ponca Tribe of Nebraska Law & Order Code tit. VII, § 7-1-4(13) (2009).

126. *Id.* § 7-1-23(2)(a).

127. Ponca Tribe of Nebraska Domestic Partnership Affidavit, § 1.

128. *Id.*

129. Neb. Const. Art. I, § 29; *see also* Citizens for Equal Protection v. Bruning, 455 F.3d 859, 870–71 (8th Cir. 2008) (holding that the Nebraska Constitutional provision banning same-sex marriage was not a violation of the Equal Protection Clause of the United States Constitution).

130. Christopher Rizzo, *Banning State Recognition of Same-sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & Pol'y 1, 2 (2002).

opposite-sex domestic partners for purposes of obtaining funeral assistance for deceased tribal members.[131]

### D. Sex-Neutral Tribal Laws that May or May Not Be Interpreted to Allow Same-Sex Marriage

Several tribes have untested marriage laws that are sex-neutral or substantially sex-neutral. Numerous tribes interpret their laws based on culture and tradition, and tribal cultures vary widely from each other. This makes it impossible to generalize about whether a tribe with a sex-neutral marriage law would actually permit same-sex marriage.[132] In one prominent example, the Cherokee Nation had a sex-neutral law in place, but an uproar ensued when a same-sex couple married under it, and the law was swiftly amended.[133] On the other hand, as discussed above, Cheyenne and Arapaho and Leech Lake both elected to permit same-sex marriage under their sex-neutral laws when the issue arose in those tribes. Thus, without legislative history, reports on the law's application, or extensive knowledge of a tribe's cultural views on same-sex relationships, scholars cannot make accurate predictions about whether a particular tribe's sex-neutral marriage law would be interpreted to permit same-sex marriage.

At least fourteen tribes have marriage laws that are generally sex-neutral and, based on the information available, that have not yet been applied to same-sex couples: Yurok;[134] Hoopa Valley;[135]

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131. Snoqualmie Tribal Code tit. 13, ch. 3, § 5 (2012).

132. *See, e.g.*, Tweedy, *supra* note 9, at 407–08 (illustrating how research of tribal laws is inherently difficult and legislative history is often unavailable); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 Mich. J. Race & L. 57, 61 (2007) (emphasizing the importance of customs and traditions in tribal law).

133. *See, e.g.*, Christopher L. Kannady, Note, *The State, Cherokee Nation, and Same-Sex Unions: In Re: Marriage License of McKinley & Reynolds*, 29 Am. Indian L. Rev. 363, 366–69 (2004/2005) (describing the events following the marriage of two women under the original sex-neutral Cherokee law, and the resulting legislation and litigation); An Act Amending Title 44 of the Cherokee Nation Marriage and Family Act, Providing for Severability and Declaring Emergency, Leg. Act 26-04 (2004) (codified as amended at Cherokee Code Ann. tit. 43) (amending the Cherokee Code to define marriage as "between one man and one woman"); *see also* Mark Vezzola, *Speak Now or Forever Hold Your Peace: Same-Sex Marriages in Native American Culture* 196–98, *in* 3 Defending Same-Sex Marriage (Mark Strasser ed. 2007).

134. Yurok Tribal Code, Family Code §§ 3.1, 3.4.

135. Hoopa Valley Tribe Code tit. 14A, § 14A.2.10. Note that, as with Tulalip, Ute, and Yankton Sioux, the Hoopa Valley provision on who may marry,

Coushatta Tribe; [136] Tohono O'odham; [137] Iowa Tribe; [138] White Mountain Apache;[139] Poarch Band of Creek;[140] St. Regis Mohawk;[141] Tulalip; [142] Ute; [143] Rosebud Sioux; [144] Winnebago; [145] Ponca Tribe of Nebraska;[146] and Yankton Sioux.[147] Although all of these laws contain sex-neutral provisions pertaining to core questions, such as who may marry and what marriages are prohibited, five of the codes refer to "husband" and "wife" in the section regarding the form of the ceremony or solemnization.[148]

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§ 14A.2.10, is sex-neutral, whereas its provision on the marriage ceremony, § 14A.2.40, requires the parties to the marriage to take each other as "husband and wife." *Id*. § 14A.2.40.

136. Coushatta Tribe of Louisiana Judicial Codes tit. VIII, § 4. *See also* Coushatta Tribe of Louisiana Judicial Codes tit. VIII, § 3 (requiring marriages to be in accord with tribal custom for the Tribe to have jurisdiction).

137. Tohono O'odham Code tit. 9, ch. 1, § 7 (2005) (providing a list of "Prohibited and Void Marriages").

138. Iowa Tribe Civil Proc. Code ch. 11, § 1102.

139. White Mountain Apache Domestic Relations Code ch. 1, §§ 1.3, 1.5, 1.6.

140. Poarch Band of Creek Indians Tribal Code § 15-1-7 (2004) (providing a list of Void Marriages).

141. St. Regis Mohawk Tribe Code, St. Regis Tribal Marriage Act of 1995 § 4.

142. Tulalip Tribal Codes tit. 4, art. II, § 4.20.040. Note that § 4.20.050, which governs who may marry, is sex-neutral but that § 4.20.060, which governs the marriage ceremony, requires the participants to affirm that they take each other "as husband and wife." *Id.* § 4.20.060.

143. The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation tit. V, ch. 1, § 5-1-3. As with Tulalip and Hoopa, the Ute Tribe's section on who may marry, § 5-1-3, is sex-neutral, whereas the provision on solemnization requires the participants to declare that they take each other as "husband and wife." *Id.* § 5-1-5.

144. Law and Order Code of the Rosebud Sioux Tribe tit. II, ch. 4, § 2-4-2 (providing for marriage according to tribal custom).

145. Winnebago Tribal Code tit. 2, art. 2, § 2-1202(1) ("Indians who desire to become married or divorced by the custom and common law of the Tribe shall conform to the custom and common law of the Tribe.").

146. Ponca Tribe of Nebraska Law & Order Code tit. VII, §§ 4-1-4, 4-1-7 (2009).

147. Yankton Sioux Tribal Code tit. VII, ch. 1, §§ 7-1-3 (entitled "Persons Who May Marry"), 7-1-6 (entitled "Void and Voidable Marriages"). Note that, as with the codes of Tulalip, Ute, and Hoopa Valley, the section on the marriage ceremony requires each member of the couple to take each other as "husband and wife." *Id*. § 7-1-5.

148. Yankton Sioux Tribal Code tit. VII, ch. 1, § 7-1-5; The Law and Order Code of the Ute Indian Tribe of the Uintah and Ouray Reservation tit. V, ch. 1, § 5-1-5; Tulalip Tribal Codes tit. 4, art. I, § 4.20.060; Hoopa Valley Tribe Code tit. 14A, § 14A.2.40; Ponca Tribe of Nebraska Law & Order Code tit. IV, ch. 1, § 4-1-6.

While use of the terms "husband" and "wife" suggests a sex-based conception of marriage, a requirement that the couple take each other as husband and wife during the ceremony is not an unequivocal disapproval of same-sex marriage. Therefore, I have included those five tribes (Ute, Tulalip, Hoopa Valley, Ponca, and Yankton Sioux) in this list, although I excluded several tribes from this list on the basis that the terms "husband" and "wife" were either more prevalent or appeared to occupy a more central place in the tribes' marriage provisions.

### E. Tribes that May Recognize Same-Sex Marriages Performed Elsewhere

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

The language of Chitimacha's marriage recognition provision is fairly typical of sex-neutral marriage recognition laws: "A marriage duly licensed and performed under the laws of the United States, any tribe, state, or foreign nation shall be recognized as valid by the Chitimacha Tribal Court for all purposes."[149] Examples of other tribes with similar, broad provisions concerning recognition of foreign marriages include Tulalip, Ponca Tribe of Nebraska, Eastern Band of Cherokee, Hoopa Valley, and Yurok.[150] Tulalip's provision in particular is interpreted by one of the Tribes' in-house attorneys as encompassing recognition of same-sex marriages, although there is not known to be any situation, as of this writing, where the issue has come up.[151]

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149. Chitimacha Comprehensive Codes of Justice tit. VI, § 211.

150. Tulalip Tribal Codes tit. 4, art. I, § 4.20.030(1); Ponca Tribe of Nebraska Law & Order Code tit. IV, ch. 1, § 4-1-3; Eastern Band of the Cherokee Indians Tribal Code ch. 50, § 50-2; Hoopa Valley Tribe Code tit. 14A, § 14A.2.70; Yurok Tribal Code, Family Code § 3.7.

151. Brewer, *supra* note 124; Brief of 278 Emp'rs & Orgs. Representing Emp'rs as Amici Curiae in Support of Respondent Edith Schlain Windsor (Merits Brief), United States v. Windsor, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 823227, at *12 n.6 (discussing Tulalip's recognition of same-sex marriages performed elsewhere).

The only tribe identified in my research that had a marriage recognition provision explicitly including same-sex marriages was Squaxin Island Tribe, whose written policies explicitly recognize same-sex marriages (as well as different-sex marriages) for tribal housing purposes: "'Marriage' shall mean a marriage acknowledged in any state or tribal jurisdiction, same sex and common law marriages."[152]

## F. Tribes with Defense of Marriage Acts

Several tribes have their own DOMAs. Many others have laws mentioning the sex of the parties to the marriage that do not include clear language indicating an intent to bar same-sex marriage.[153]

There are ten confirmed tribes (and likely many more) with laws that either appear —or have been interpreted—to bar same-sex marriage: the Cherokee Nation,[154] Navajo Nation,[155] Blue Lake Rancheria,[156] Chickasaw Nation,[157] Confederated Tribes of the Coos, Lower Umqua, and Siuslaw Indians,[158] Grand Traverse Band of Chippewa Indians,[159] Nez Perce Tribe,[160] the Oneida Indian Nation,[161]

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152. Squaxin Island Tribe Policies & Proc., Housing Policies: Eligibility, Admission and Occupancy Policy Part II.A (2010).

153. For an example of a sex-specific law that is not clearly a DOMA, *see* Code of the Eastern Band of the Cherokee Nation Part II Code of Ordinances, ch. 50, § 50-1 ("The institution of marriage between a man and a woman is recognized in the territory of the Eastern Band and shall be officially solemnized by any ordained minister or any judicial official of the Cherokee court.").

154. The Cherokee Nation Marriage & Family Protection Act of 2004, Cherokee Code Ann. tit. 43 §§ 1, 3 (2004).

155. Navajo Nation Code Ann. tit. 9, § 2(C) ("Marriage between persons of the same sex is void and prohibited.").

156. Blue Lake Rancheria Ordinances, Ord. 01-01, § 6(c) ("No parties [sic] shall be contracted between parties of the same sex."), *available at* http://www.bluelakerancheria-nsn.gov/BLR_Marriage_Ordinance_01-01.pdf.

157. Chickasaw Nation Code tit. 6, § 6-101.9(b) ("No Marriage will be recognized between persons of the same sex; however, nothing in this title prohibits members of the same sex from entering written contracts one with the other.").

158. Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians Tribal Code tit. 4, § 4-7-6(c) ("No marriage shall be contracted between parties of the same gender.").

159. Grand Traverse Band Code tit. 10, § 501(e) ("'Marriage' means the legal union of one (1) man and one (1) woman as husband and wife for life or until divorced.").

the Sac & Fox Tribe of the Mississippi in Iowa,[162] and the Muscogee (Creek) Nation.[163] It was erroneously reported in news and law review articles that the Iowa Tribe of Oklahoma had such a ban.[164] Similarly, the Osage Nation is reported in a recent news article as having a DOMA in place,[165] but this information could not be confirmed with tribal staff, and the Nation's publicly available laws do not reflect such a ban.[166]

With respect to most of these tribal DOMAs, my research did not uncover information on their legislative history or the reasons for their adoption, although, as explained below, information is available about the Cherokee Nation's process and its reasons for adopting a DOMA, as well as, to a lesser extent, the Navajo Nation's process and reasoning. Before getting into this specific information, however, below is some background on the federal DOMA, which is relevant to the Navajo Nation's decision to adopt a DOMA.

The Federal Defense of Marriage Act[167] was adopted in 1996.[168] The section that remains in place after *Windsor* explicitly includes tribes, stating that:

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160. Nez Perce Code tit. 4, § 4-5-1(o) ("'Marriage' means the civil status, condition or relation of a man and woman considered united in law as husband and wife.").

161. Oneida Code of Laws ch. 71, § 71.4 ("A marriage may be contracted under this law between two (2) adults who: . . . are of the opposite sex . . . .") (2010), *available at* http://www.oneidanation.org/government/lawsandpolicies/oneidacodeoflaws.aspx. Interestingly, however, same-sex marriages are not specifically prohibited under the section entitled "Who May Not Marry." *See id.* at § 71.4-2.

162. Code of the Sac & Fox Tribe of the Mississippi in Iowa tit. 6, art. I, ch. 2, § 6-1203(c) (2011) ("Only persons of the opposite gender may marry.").

163. Muscogee Code Ann. tit. 6, § 2-104(A) ("Any unmarried person . . . is capable of contracting and consenting to marriage with a person of the opposite sex."); *see also id*. at § 2-104(G) (prohibiting recognition of same-sex marriages performed in other jurisdictions).

164. *See supra* note 23 and accompanying text.

165. Branson-Potts, *supra* note 11 (reporting that the Osage Tribe has a law banning same-sex marriages).

166. E-mail from Benjamin Ranallo to author (Mar. 5, 2014 17:02 PST) (recounting attempts to get further information by phone from the Osage Nation about its marriage laws); Osage Nation Code tit. 9 (2012) (Title 9 contains the Domestic Relations Code in its entirety). However, some references to marriage in other parts of the Nation's code are sex-specific. *See, e.g.*, Osage Nation Code tit 2, § 7-111(A) (2012) (providing that a husband and wife are eligible to adopt under Osage law).

167. 28 U.S.C. § 1738C (2014); 1 U.S.C. § 7 (2014), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[169]

The legislative history is silent on the decision to include tribes.[170] The inclusion is somewhat curious because, under federal law, tribal laws and judgments are not generally entitled to full faith and credit in state courts under either the Full Faith and Credit Clause or its implementing statute.[171] Thus, the statutory language explicitly abrogating the full faith and credit requirement between tribes and states in the marriage context is superfluous.

After George W. Bush's election to the presidency of the United States, Bush and members of Congress began campaigning for an amendment to the United States Constitution that would ban same-sex marriage. The idea was that such an amendment would

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168. Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 2419.

169. 28 U.S.C. § 1738C (2014).

170. I searched DOMA's legislative history on Westlaw, including such databases as Legislative History - U.S. Code, 1948 to present (or LH) and Congressional Record (or CR). Using either the Public Law number for DOMA (Pub.L. 104-199), the phrase "Defense of Marriage Act," or the acronym DOMA, I then searched for documents that included "tribe," "tribal," or "Indian," excluding those referencing only "Laurence Tribe" or "Professor Tribe." None of the documents that came up in these searches shed any light on the decision to explicitly include tribes in the DOMA. *See, e.g.*, H.R. Rep. 104-664, H.R. Rep. No. 664, 104th Cong., (2d Sess. 1996), 1996 WL 391835, 1996 U.S.C.C.A.N. 2905 (July 9, 1996) (reaffirming powers reserved to the states pursuant to Section 2 of DOMA as well as reaffirming that the terms "marriage" and "spouse" refer exclusively to members of the opposite sex); 142 Cong. Rec. H7441-03, 1996 WL 388606 (July 11, 1996) (reaffirming that States "shall not be required" to recognize same sex marriage licenses by other States); 142 Cong. Rec. S4851-02, 1996 WL 233584 (May 8, 1996) (reaffirming the obligations of the United States under the Chemical Weapons Convention. Similarly, I searched HeinOnline's Legislative History Database for DOMA, using "Indian tribe" as the search term. Again, the results shed no light on Congress' decision to include tribes within DOMA's purview.

171. *See generally* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); U.S. Const., Art. IV, § 1 (2014); 28 U.S.C.A. § 1738 (2014). Some states have nonetheless decided to give tribal court judgments full faith and credit in certain circumstances. *See, e.g.*, Teague v. Bad River Band of the Lake Superior Tribe of Chippewa Indians, 236 Wis.2d 384, 400–01 (2000) (interpreting and applying Wis. Stat. § 806.245 (2013)).

remedy the possible constitutional infirmities of DOMA.[172] Given that tribes are almost always left out of discussions of federalism but are included in DOMA, at least one scholar saw the ultimately unsuccessful campaign for a constitutional amendment as presenting an opportunity (although a potentially perilous one) for Indian tribes to clarify their often-ignored position in the federal system.[173] In addition to supporting the federal DOMA and seeking to enshrine its principles in a constitutional amendment, Bush also supported passage of state DOMAs.[174]

In enacting the federal DOMA, Congress saw itself as expressing "a collective moral judgment . . . [of] disapproval of homosexuality" and as reaffirming "the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony; the sure foundation of all that is stable and noble in our civilization . . . ."[175] As we can see from this quote of the House Report, Congress made its religious motivations for the law explicit, albeit without specifically relying on Christianity as such. For example, in addition to the reference to "the *holy* state of matrimony" cited above and a reference to "Judeo-Christian" morality,[176] the House Report states that, "[f]or many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities."[177] In a footnote, the House Report quotes then-President Bill Clinton's more direct invocation of Christian values, in which he hinted at their perceived opposition to same-sex marriage: "families are ordained by God as a way of giving children and their parents the chance to live up to the fullest of their God-given capacities."[178] It appears that the Navajo Nation, in adopting its own same-sex marriage ban in 2005,

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172. *See, e.g.*, Fletcher, *supra* note 5, at 70–71 (discussing Congress and President Bush's desire to enact a constitutional amendment that would ban same-sex marriage completely); *accord* Ann Thomas, *Utah's Prohibition of Same-Sex Marriages—Will the Statute Stand or Evolve?*, 6 J. L. & Fam. Stud. 419, 424 (2004) (discussing President Bush's comments against same-sex marriage).

173. Fletcher, *supra* note 5, at 85.

174. *See e.g.,* June Carbone, *It Became Necessary to Destroy Marriage in Order to Defend It*, 91 Denv. U. L. Rev. Online 35, 35 n.2 (2013).

175. H.R. Rep. No. 104-664, at 12, 15–16 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 1996 WL 391835 (quoting Murphy v. Ramsey, 114 U.S. 15, 45 (1885)).

176. *Id.* at 12, 16 (emphasis added).

177. *Id.* at 15.

178. *Id.* at 16 n.55.

was influenced by Bush's push for states to adopt such measures.[179] Although Navajo's President vetoed the ban based on its "discriminatory" character and his perception that same-sex marriage was "a non-issue on Navajoland" and that it constituted a less pressing concern than issues like child abuse and drug abuse,[180] the Council overrode the veto and enacted the ban into law.[181] While opponents of Navajo's DOMA have advocated for its repeal and stated an intent to challenge the law in tribal court, no such challenges have yet been initiated.[182]

Similar to what we see in the federal DOMA's legislative history, echoes of family values rhetoric, although in somewhat muted form, can be found in the legislative history of Navajo's ban, the Diné Marriage Act. In a memorandum responding to the veto, Council Delegate Larry Anderson, Sr. stated that the legislation would bring the Navajo Nation "a step closer to addressing crimes, child abuse[], drug abuse" and other issues by "promot[ing] stable family units and preserv[ing] and strengthen[ing] family values."[183] Similarly, the notion that the traditional family is the building block of civilization is reflected in an explanatory statement that was attached to the Diné Marriage bill before it was enacted:

> The clan system and the Navajo marriage ceremony built our Nation, as we know it today . . . . [A]ny marriage not based on our marriage ceremony and clan system will only destroy us as a Nation."[184] And the Act itself states that its purposes "are to promote strong families and strengthen family values.[185]

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179. Massoud Hayoun, *Gay Navajo Demand Respect of Tribe*, Al Jazeera America, Jan 29, 2014, *available at* http://america.aljazeera.com/articles/2014/1/29/gay-navajo-demandtribalgovernmentsrespect.html.

180. Memorandum from Joe Shirley, Jr., President, The Navajo Nation, to Hon. Lawrence T. Morgan, Speaker, Navajo Nation Council (May 1, 2005) (on file with author).

181. Navajo Nation Council Res. CJN-34-05, 20th Navajo Nation Council, 3d yr. (2005) (on file with author).

182. *See* Hayoun, *supra* note 179; E-mail from Paul Spruhan, Assistant Attorney General, Navajo Nation Dep't of Justice, to author (Dec. 2, 2014, 06:57 PST) (on file with author) (noting "there was some buzz . . . about rescinding [the statute], as well as . . . several activists who were threatening a lawsuit over it").

183. Memorandum from Larry Anderson, Sr., Council Delegate, Fort Defiance Chapter, to Raymond Etcitty, Chief Legislative Counsel, Office of Legislative Counsel (May 4, 2005) (on file with author).

184. Diné Marriage Act at 3, attached to Navajo Nation Council Res. CAP-29-05, 20th Navajo Nation Council, 3d yr. (2005) (on file with author).

185. Navajo Nation Code Ann. tit. 9 Domestic Relations, § 3 (2005).

Thus, while the tone of Navajo's legislative history has less of a condemnatory quality than does the federal legislative history and while Navajo's legislative history does not invoke Christian values as clearly, there are definite similarities between the proffered reasoning for adopting the federal and tribal legislation. The notion of traditional marriage as the building block of civilization is present in the legislative histories of both laws, and family values are explicitly relied upon in each legislative history. Coupled with the fact that proponents of the Diné Marriage Act reportedly suggested that they were motivated by then-President Bush's support for such measures,[186] these common themes are strong evidence that national sentiment against same-sex marriage played a key role in the Navajo Nation's decision to enact its own ban.

The Cherokee Nation adopted its ban in direct response to a marriage between two Cherokee women, Dawn McKinley and Kathy Reynolds, who had obtained a tribal marriage license in May 2004.[187] A Cherokee citizen who served as the Nation's attorney asked the Cherokee District Court to enjoin the couple from registering their marriage license and to hold same-sex marriages to be impermissible under Cherokee law.[188] Although the couple ultimately won the court case brought by the Nation's attorney[189] as well as a subsequent battle brought by members of the Tribal Council, uncertainties continue due to the fact that a third challenge, brought by the Court Administrator in January 2006, remains pending.[190] Moreover, the Cherokee Nation swiftly put a DOMA in place to prevent any more same-sex marriages from occurring.[191]

Like the federal DOMA, Cherokee's explicitly invokes notions of morality: "The purpose of this Act is to define Marriage as one man and one woman to protect the traditional definition of Marriage in the

186. Hayoun, *supra* note 179.

187. Vezzola, *supra* note 133, at 196–98.

188. *Id.* at 197.

189. In the Matter of Appeal of the Adverse Order of the District Court Against Kathy Reynolds and Dawn L. McKinley, JAT-04-15 (Judicial App. Tribunal of the Cherokee Nation Aug. 3, 2005).

190. Email from Cathy Sakimura, Family Law Director and Supervising Attorney, National Center for Lesbian Rights, to author (Sept. 23, 2014, 15:39 PST) (on file with author).

191. Vezzola, *supra* note 133, at 197–98; *see also* An Act Amending Title 44 of the Cherokee Nation Marriage and Family Act, Providing for Severability and Declaring Emergency §2 (2004).

Cherokee Nation and define other crimes of moral character."[192] In enacting the DOMA, the Cherokee Nation was worried about external perceptions. The bill's sponsor feared that a failure to pass it would have been a "black eye on the Cherokee Nation."[193] More specifically, there is evidence that one of the reasons for the Cherokee Nation's opposition to the McKinley-Reynolds marriage was that it did not want to take a stand on same-sex marriage that contravened Oklahoma's position on the issue.[194]

When Ms. McKinley and Ms. Reynolds married under Cherokee Nation's jurisdiction on May 13, 2004, the fervor surrounding Oklahoma's proposed constitutional ban on same-sex marriage was in full swing.[195] Oklahoma had a statute in place banning same-sex marriage when the Cherokee Nation passed its own ban in June 2004. By late 2004 the State had passed a constitutional amendment banning such marriages and making it a crime to knowingly issue a marriage license to a same-sex couple.[196]

Both the Oklahoma constitutional amendment and the Cherokee same-sex marriage law suggest that same-sex marriage is criminal. Oklahoma's amendment is explicit in this regard, defining the issuance of a marriage license to a same-sex couple as a misdemeanor.[197] While the Cherokee legislation does not define same-sex marriage itself as a crime, the stated purpose of the law, "to protect the traditional definition of Marriage . . . and *define other crimes* of moral character," suggests that same-sex marriage is a criminal endeavor.[198] Painting same-sex marriage as criminal, either

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192. An Act Amending Title 44 of the Cherokee Nation Marriage and Family Act, Providing for Severability and Declaring Emergency § 2 (2004).

193. Vezzola, *supra* note 133, at 198.

194. *See* Justice, *supra* note 91, at 234 n.6.

195. *See e.g.*, Nancy Hollingshead, *Gay Rights Ad Warns Firms about Oklahoma*, Tulsa World, May 12, 2004.

196. Okla. Const. Art. 2, § 35, *invalidated by* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); 43 Okla. Stat. Ann. tit. 43, § 3.1 (West 2014), *invalidated by* Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage."); 43 Okla. Stat. Ann. tit.43, § 3(A) (2014) ("Any unmarried person of the age of eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage *with a person of the opposite sex*.") (emphasis added); *see also* Wilson, *supra* note 23, at 182 (discussing Oklahoma's constitutional amendment).

197. Okla. Const. Art. 2, § 35(C).

198. An Act Amending Title 44 of the Cherokee Nation Marriage and Family Act, Providing for Severability and Declaring Emergency § 2 (2004); *see*

literally as with Oklahoma's law or symbolically in the case of the Cherokee law, demonstrates a strong denigration of LGBT persons and increases the stigmatization of their experience.[199] Indeed, such framings suggest that the laws at issue were motivated by virulence against LGBT persons, a motivation that the Supreme Court in *Windsor* held to be inconsistent with the Equal Protection clause of the United States Constitution.[200]

Thus both the Cherokee and Navajo DOMAs appear to have been inspired, at least in significant part, by legal and political developments in the dominant culture, specifically by developments in the state, in the case of the Cherokee DOMA, and in the federal government, with respect to the Navajo DOMA.[201]

### G. Tying Tribal Marriage Laws to State Laws Barring Same-Sex Marriage

Like the Eastern Shoshone and the Northern Arapaho, the Sault Ste. Marie Tribe, located in Michigan's Upper Peninsula, has taken the interesting approach of tying its own marriage law to that of the state, explicitly stating that the linkage between tribal and state law pertains to the sex of those who may marry:

> All requirements of the State of Michigan with respect to the qualifications entitling persons to marry within that State's borders, whether now in existence or to become effective in the future, are hereby adopted, both presently and prospectively, *in terms of the sex of*

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*also* Vezzola, *supra* note 133, at 198 (noting that the amendment restricting marriage to one man and one woman likened same sex-marriage to bigamy and adultery, which were also criminalized under the statute).

199. *Accord* Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

200. The Supreme Court held that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (citation omitted). It also noted that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence." *Id.*

201. *See* Wilson, *supra* note 23, at 182 (stating that tribes with legislation forbidding same-sex marriage often reflect the social and political ideologies of surrounding states).

> *the parties to the proposed marriage*, and the age of the parties.[202]

Michigan has a constitutional amendment banning same-sex marriage.[203] The law was struck down by a federal district court in March 2014,[204] and the Sixth Circuit initially stayed the decision[205] but then reversed it by a divided vote.[206] The result is that, as of this writing, same-sex marriage remains illegal in the Sault Ste. Marie Tribe. However, the Supreme Court has granted certiorari with respect to the Sixth Circuit decision, and it may well decide that same-sex marriage must be allowed in Michigan and elsewhere in the United States.[207]

While several other tribes have ceded jurisdiction over marriages to the states in which they are located, [208] with the consequence that they no longer perform marriages under their jurisdiction at all, Sault Ste. Marie appears to be one of a small handful that has expressly linked its own marriage laws to those of a state. Interestingly, in the case of the Sault Ste. Marie as well as the Eastern Shoshone and Northern Arapaho, the linkage applies to prospective state law changes as well as to the state law in place at the time of the tribal law's enactment. Thus, the tribes that have adopted this approach have elected, for the time being at least, to effectively cede their sovereign control over marriage to the state.

It is not known why the Sault Ste. Marie Tribe took this approach, but there are several possible reasons. For instance, the Tribe may have wanted to foster or maintain a harmonious

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202. Sault Ste. Marie Tribe of Chippewa Indians Tribal Code ch. 31, § 31.104 (1995) (emphasis added).

203. Mich. Const. art. I, § 25.

204. DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich 2014).

205. DeBoer v. Snyder, No. 14-1341, Doc. 22-1 (6th Cir. Mar. 25, 2014); Paul Egan & Tresa Baldas, *Appellate court reverses course, issues temporary stay on same-sex marriages until Wednesday*, Detroit Free Press (Mar. 22, 2014) http://archive.freep.com/article/20140322/NEWS06/303220063/6th-Circuit-Court-of-Appeals-same-sex-gay-marriage-stay-Schuette.

206. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

207. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, Bourke v. Beshar, No. 14-574, 135 S.Ct. 1041 (Jan. 16, 2015).

208. *See, e.g.*, Blackfeet Tribal Law and Order Code ch. 3, § 1 (1999) (stating that members of the tribe would be governed by state law with respect to marriage); Law and Order Code of the Fort McDowell Yavapai Community, Arizona ch. 10. art. II, § 10-11(a) (2000) (providing that all marriages in the future shall be according to state law); Salt River Pima-Maricopa Indian Community Code of Ordinances ch. 10, art. II, div. 1, § 10-30 (2012) (providing that all marriages in the future shall be made in accordance with the state law).

relationship with the State, it may have wanted to avoid appearing to take a stand on what it perceived as a controversial issue, or it may have been concerned about solemnizing marriages that would not be recognized outside of its reservation, in the State of Michigan.

### H. Other Tribes with Sex-Specific Marriage Laws

Many other tribes have marriage laws that use sex-specific language but lack the limiting language found in tribal DOMAs. It is therefore unclear whether these laws were drafted with the purpose of banning same-sex marriages. Examples include the Chitimacha Tribe of Louisiana,[209] Colorado River Indian Tribes,[210] the Eastern Band of Cherokee Indians,[211] the Ely Shoshone Tribe,[212] Lummi Nation,[213] Pit River Tribe,[214] Oglala Sioux Tribe,[215] Pueblo of San Ildefonso,[216] Stockbridge-Munsee Community Band of Mohican

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209. Chitimacha Comprehensive Codes of Just. tit. VI, ch. 2, § 201 (2010) (imposing age and consent requirements "[f]or a man and a woman to be married under this chapter . . . .").

210. Colorado River Tribal Code, Domestic Relations Code art. 2, ch. 1, § 2-102(B) (2008) ("A marriage between a man and a woman licensed, solemnized, and registered as provided in this Chapter is valid."). Note that same-sex marriages are not listed under the section entitled Prohibited Marriages as a type thereof. *Id.* § 2-108.

211. The Cherokee Code part II ch. 50, art. I, § 50-1 (2010) ("The institution of marriage between a man and a woman is recognized in the territory of the Eastern Band . . . .").

212. Ely Shoshone Tribal Code tit. VII, § 122.020 (2011) ("A *male and a female person*, at least 18 years of age, not nearer of kin than second cousins or cousins of the half blood, and not having a husband or wife living, may be joined in marriage.") (emphasis added).

213. Lummi Nation Code of Laws tit. 11, § 11.01.010 (2008) ("Marriage is a civil contract which may be entered into by persons of the opposite sex . . . ."). Like the Colorado River Tribal Code, the Lummi Nation Code appears to restrict marriage to opposite-sex couples but does not list same-sex marriages as a type of prohibited marriage. *Id.* § 11.01.020; *supra* note 206.

214. Statutes of the Pit River Tribe of California Code tit. 8, ch. 3, art. II, § 202(A) (2005) ("For a man and a woman to be married under this chapter each must . . . ."); "A man and a woman may be joined in marriage within the exterior boundaries of the Pit River Tribe . . . ." *Id.* art. III § 301(A). Interestingly, same-sex marriages are listed under neither the section entitled Void Marriages, not the section entitled Voidable Marriages. *Id*. art. II, §§ 203, 204.

215. Oglala Sioux Tribe Law & Order Code ch. 3, § 30 (2002) ("Any unmarried male of the age of eighteen (18) years or upwards and any unmarried female of the age of fifteen (15) years or upward and not otherwise disqualified are capable of consenting to and consummating a marriage.").

216. San Ildefonso Pueblo Code, tit. X, § 23.4 (1996).

Indians,[217] and the Turtle Mountain Band of Chippewa Indians.[218] It is possible that several or most of these laws were designed to prohibit same-sex marriage but, without detailed information about their legislative histories, it is impossible to tell.

The laws in this section generally lack the limiting language that we see in the tribal DOMAs discussed above in Part II.F., but there is nonetheless considerable variation in the language of the tribal laws in this section, with Lummi's law, for example, being closer to a tribal DOMA in terms of wording[219] and other laws, such as San Ildefonso Pueblo's, being closer to the laws with neutral language listed in Part II.D.[220] The Lummi Tribe's law refers to the parties to the marriage being of the "opposite sex" in the definition of marriage, intimating through this structure that the sex of the parties may be a core issue for the Tribe.[221] In contrast, San Ildefonso Pueblo's law on when a marriage license may be issued mentions the sex of the parties more casually and thus seems to imbue sex with only incidental importance: "[a] marriage license shall be issued by the Clerk of the Court in the absence of any showing that the

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> A marriage license shall be issued by the Clerk of the Court in the absence of any showing that the proposed marriage would be invalid under any provision of this Code or Pueblo custom and tradition and: (1) Upon written application of an unmarried male and unmarried female, both of whom must be eighteen (18) years or older . . . .

217. Stockbridge-Munsee Community Band of Mohican Indians Tribal Ordinances § 61.6 (1997) ("A marriage license shall be issued by the Clerk of Court upon receiving a completed application form from an unmarried male and an unmarried female . . . ."); *see also id.* § 61.2 ("Marriage under this law is a civil contract . . . which creates the legal status of husband and wife."). Notably, despite the sex-specific language in these two sections, the sections entitled "Who may Contract," "Who may not Contract," and "Identification of the Parties" make no mention of same-sex marriage. *Id.* at §§ 61.3, 61.4, 61.5.

218. Turtle Mountain Band of Chippewa Indians Tribal Code tit. 9, § 9.0701 (2012) ("A marriage between a man and woman licensed, solemnized, and registered as proved in this Act is valid within the Turtle Mountain jurisdiction . . . .").

219. "Marriage is a civil contract which may be entered into by persons of the opposite sex . . . ." Lummi Nation Code of Laws tit. 11, § 11.01.010 (2008).

220. "A marriage license shall be issued by the Clerk of the Court in the absence of any showing that the proposed marriage would be invalid . . . and: (1) Upon written application of an unmarried male and unmarried female. . . ." San Ildefonso Pueblo Code tit. X, § 23.4 (1996).

221. Lummi Nation Code of Laws tit. 11, § 11.01.010 (2008).

proposed marriage would be invalid . . . and: (1) Upon written application of an unmarried male and unmarried female . . . ."[222]

I. Conclusion on Tribal Laws

At the risk of overgeneralizing, it seems that tribal laws permitting same-sex marriage are more likely than tribal laws prohibiting same-sex marriage to arise from a grassroots effort among tribal members. Indeed, even Leech Lake's interpretation of its pre-existing sex-neutral marriage law as permitting same-sex marriage appears to be partially the result of a campaign launched by an individual tribal member and his long-time partner.[223] By contrast, tribal DOMAs seem to be more commonly initiated by tribal councils (or their trusted advisors, in the case of Cherokee Nation) and to be influenced by external forces, such as political developments at the state or federal level.[224]

The fact that tribal laws codifying marriage equality almost uniformly appear to be the result of tribal members' grassroots efforts accords with quantitative evidence demonstrating that knowing many LGBT persons or having close friends or relatives who are LGBT increases the likelihood that an individual will support same-sex marriage.[225] Additionally, this path to marriage equality is cause for hope for tribal members who are considering advocating for same-sex marriage within their own tribes. Such advocacy may be particularly effective for those who are members of small tribes.[226]

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222. San Ildefonso Pueblo Code tit. X, § 23.4 (1996).

223. Wu, *supra* note 69.

224. Nonetheless, individual tribal members have been reported to be behind efforts to repeal tribal laws permitting same–sex marriage. Hubbard, *supra* note 87; Guedel, *supra* note 32.

225. *See, e.g.*, Bruce Drake, Pew Research Center, As More Americans Have Contact with Gays and Lesbians, Social Acceptance Rises, (2013) (finding a correlation between those who know many gay and lesbian people and those who support same-sex marriage).

226. Most of the tribes who have passed marriage equality legislation are on the smaller side, with Colville, which has over 9,000 members, being by far the largest. *See, e.g.*, *Map of Washington's Tribes*, Washington Tribes, http://www.washingtontribes.org/default.aspx?ID=48 (last visited Feb. 8, 2015) (containing a clickable map of Washington tribes that lists their populations and other information); Barry Emondston, Population Research Center, Coquille Indian Tribe: Tribal Population Study 2 (2004) (stating that the Coquille Tribe had a population of just over 800 members in 2003); *A Tribal History Of The Little Traverse Bay Bands Of Odawa Indians*, Little Traverse Bay Bands of Odawa Indians, http://www.ltbbodawa-nsn.gov/TribalHistory.html (last visited Feb. 8, 2015) (reporting that the Tribe has over 4,000 members).

For tribes with DOMAs, given that the available information suggests that tribal DOMAs are often motivated by tribal elected officials' concerns about intergovernmental relations, it is quite possible that tribal legislatures will begin to repeal their DOMAs on their own initiatives, in response to the changing sentiments about marriage equality nationwide.

## III. THE POSSIBLE EFFECTS OF *UNITED STATES V. WINDSOR* ON TRIBAL LAW

### A. *United States v. Windsor*

In June 2013, the U.S. Supreme Court decided *United States v. Windsor*, a watershed case on same-sex marriage. The case arose when, under Section 3 of the federal DOMA, Edith Windsor was charged over $350,000 in estate taxes as a result of having been devised her late wife's estate, despite the fact that a member of an different-sex married couple would have qualified for a tax exemption for such a devise.[227] Although Edith Windsor brought the case based solely on equal protection grounds,[228] Justice Kennedy, in authoring the majority opinion that invalidated Section 3 of DOMA, refrained from articulating a clear, uncomplicated rationale for the Court's holding—such as equal protection, due process, or federalism—and instead elected to incorporate elements of all three.[229]

For example, Justice Kennedy spent several paragraphs of the majority opinion discussing the traditional primacy of state authority over domestic relations *vis a vis* the federal government only to somewhat surprisingly conclude that "it is unnecessary to conclude whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."[230] Instead, the Court's federalism analysis was used to demonstrate the unusualness of the federal government's decision to broadly intrude on the domestic relations arena through the DOMA.[231] The unusualness of the discrimination is important because, under *Romer v. Evans*,[232] it raises the possibility of a constitutional violation.[233]

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227. United States v. Windsor, 133 S. Ct. 2675, 2683 (2013).

228. *See, e.g.*, Nejaime, *supra* note 7, at 219.

229. *See* Marc Poirier, *"Whiffs of Federalism" in* United States v. Windsor: *Power, Localism, and Kulturkampf*, 85 U. Colo. L. Rev. 935, 941 (2014).

230. *Windsor*, 133 S. Ct. at 2692.

231. *Id.*

232. Romer v. Evans, 517 U.S. 620 (1996).

233. *Windsor*, 133 S. Ct. at 2692.

While *Romer* is an equal protection case,[234] the *Windsor* Court curiously did not mention this in relying on *Romer*. Moreover, in discussing the right at issue in *Windsor*, the Court pointed alternately to the "liberty protected by the Fifth Amendment," "the Constitution's guarantee of equality," "due process," and "equal protection,"[235] thus tending to suggest that both due process and equal protection were at issue. The Court also significantly relied on *Lawrence v. Texas*, an important due process case regarding the right to engage in sexual relations with a partner of the same sex free from the threat of criminal sanctions.[236] At the end of the opinion, however, the Court's appeared to emphasize equal protection principles.[237] The result is that the rationale of *Windsor*, like the rationales of other Kennedy-authored opinions such as *Romer* and *Lawrence*, appears somewhat unique and difficult to pinpoint.[238] Nonetheless, given that the sole constitutional claim asserted was a violation of equal protection and that the opinion emphasizes equal protection at the end, it is most conservatively viewed as an equal protection case.[239]

*Windsor* invalidated only Section 3 of the federal DOMA, which excluded same-sex couples from marriage for the purposes of federal statutes and regulations.[240] The case did not address Section 2 of the federal DOMA, which purports to exclude same-sex marriages from Full Faith and Credit obligations. Thus, Section 2 technically remains intact, [241] although there are grave questions about its

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234. *Romer,* 517 U.S. at 623.

235. *Windsor*, 133 S. Ct. at 2692–93.

236. *Id.* at 2692 (citing Lawrence v. Texas, 539 U.S. 558 (2003) ("Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring.'")).

237. *Id.* at 2695.

238. *See* Cary Franklin, *Marrying Liberty & Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 871–72 (2014) (discussing varying lower court interpretations of *Windsor*'s equal protection analysis); *see also* Clifford J. Rosky*, No Promo Hetero: Children's Right to Be Queer*, 35 Cardozo L. Rev. 425, 456 (2013) (stating that "the Court's ruling was explicitly based on 'due process' as well as 'equal protection' principles").

239. *See, e.g.,* Nejaime, *supra* note 7, at 219 (arguing that despite the *Windsor* Court's inclusion of federalism and due process elements, the ultimate decision was based on equal protection).

240. *Windsor*, 133 S. Ct. at 2683, 2694.

241. *See, e.g.*, *In re* Matson, 509 B.R. 860, 862 (Bankr. E.D.Wis. 2014) ("[S]ection 2 of DOMA remains intact under *Windsor*."); Poirier, *supra* note 229, at 941 (explaining that the Court refrained from articulating a clear rationale "that would resolve the marriage equality question once and for all."); Jackie Gardina, *The Questions that* United States v. Windsor *Didn't Answer*, 33-MAR Am. Bankr.

constitutionality.[242] While, as noted above, the Court did begin its analysis by focusing on the unusualness of such a sweeping federal regulation of marriage, a facet of its opinion that would not be applicable to a state DOMA or to a discriminatory marriage recognition law, much of the *Windsor* Court's analysis would be applicable to such provisions. For example, its concerns about "equal dignity," using "moral disapproval of homosexuality" as a basis for a law, the financial harms inflicted on children of same-sex couples by discriminatory marriage laws, and the illegitimacy of a "bare [legislative] . . . desire to harm a politically unpopular group" as a motivation for a law[243] would all appear to be equally applicable to state (and possibly tribal) DOMAs and to other types of discriminatory marriage laws.

### B. Lower Federal and State Courts' Application of *Windsor* to State DOMAs and to States' Non-Recognition of Out-of-Jurisdiction Same-Sex Marriages

One clue as to what *Windsor* may mean for tribal DOMAs and other sex-based tribal marriage laws is how courts have interpreted *Windsor* in relation to state DOMAs and state laws that deny recognition of same-sex marriages performed elsewhere. A substantial majority of the federal appellate and federal district courts that have examined these questions have struck down state same-sex marriage bans and discriminatory marriage recognition laws under *Windsor*.[244] However, there have been some outliers,

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Inst. J. 38, 38 (2014) (stating that "[s]ection 2 remains intact"); Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality after* Windsor, 23 Tul. J.L. & Sexuality 17, 59 (2014) ("*Windsor*'s holding on its face is limited to same-sex couples in marriages 'made lawful by the State' . . . ").

242. *See, e.g.*, Latta v. Otter, 19 F. Supp. 3d 1054, 1066 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014) *stay*, 135 S. Ct. 344 (2014), *vacated* 135 S. Ct. 345 (2014) (noting that sexual orientation classifications are subject to heightened scrutiny and holding "that Idaho's Marriage Laws do not survive any applicable level of constitutional scrutiny and therefore violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution"); Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. Haw. L. Rev. 185, 215–17 (2000) (arguing that section 2 of DOMA is unconstitutional under the Full Faith and Credit Clause).

243. *Windsor*, 133 S. Ct. at 2693, 2695.

244. *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014); Henry v. Himes, 14 F. Supp. 3d 1036 (S.D.

including, as of this writing, one case at the federal appellate level and two federal district court cases.[245] Thus, although the body of cases striking down state DOMAs and discriminatory marriage recognition laws thus evinces some disagreement among courts as to the precise contours of *Windsor*'s equal protection analysis, including differing views as to what level of scrutiny the *Windsor* Court applied, the vast majority of lower court decisions "reflect[] an emerging consensus that, in the context of sexual orientation, '[t]he Constitution cannot countenance state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.'"[246]

### C. Tribal Courts' Likely Application of *Windsor*

Despite the determination of numerous courts that *Windsor* spells the demise of discriminatory state marriage laws, its effect on tribal DOMAs and discriminatory tribal marriage recognition laws is less certain (and the same analysis will almost certainly apply to the Supreme Court's forthcoming decision in *Obergefell v. Hodges*).[247] There are two primary reasons for this: the first relates to the structure of the United States Constitution and the second concerns the contours of the Indian Civil Rights Act. Turning to the

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Ohio 2014), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (Jan. 16, 2015); Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (Jan. 16, 2015); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Bishop v. U.S. ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); Guzzo v. Mead, No. 14–CV–200–SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); Hamby v. Parnell, No. 3:14–cv–00089, 2014 WL 5089399 (D. Alaska 2014); DeBoer v. Snyder, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (Jan. 16, 2015); Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, No. 14-574, 2015 WL 213651 (Jan. 16, 2015).

245. DeBoer v. Snyder, 772 F.3d 388, (6th Cir. 2014); Conde-Vidal v. Garcia-Padilla, No. 14-1253, 2014 WL 5361987 (D. P.R. Oct. 21, 2014); Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014); *In re* Holmes, 496 B.R. 765, 773 (Bankr. M.D. Pa. 2013); Stankevich v. Milliron, No. 310710, 2013 WL 5663227, at *3 (Mich. Ct. App. Oct. 17, 2013), *applic. for leave to app. held in abeyance by* 844 N.W.2d 724 (Mich. 2014).

246. Franklin, *supra* note 238, at 872–73 (quoting Smithkline Beechum Corp. v. Abbot Labs., 740 F.3d 471 (9th Cir. 2014) (internal quotation marks omitted)).

247. Obergefell v. Hodges, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (U.S. Jan. 16, 2015) (No. 14-556) (order granting certiorari and consolidating case with Tanco v. Haslam, No. 14-562, DeBoer v. Snyder, No. 14-571, and Bourke v. Beshear, No. 14-574).

constitutional reason first, the Constitution primarily concerns the relationship between the federal and state governments, and the Bill of Rights amendments in particular bind either or both of those entities depending on the provision at issue.[248] Thus, tribes, being distinct from both states and the federal government, are not generally subject to the constitutional obligations in the Bill of Rights.[249] It follows that neither the Fourteenth Amendment[250] nor the Fifth Amendment, [251] the constitutional sources of the equal protection and due process rights addressed in *Windsor*, applies to tribes.

The second reason relates to the intent and interpretation of the ICRA.[252] Although the bill that became the ICRA was originally conceived of as a check on tribal courts' violations of individual Indians' civil rights, Congress ultimately sought to balance two competing purposes in enacting the ICRA: "[i]n addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" [253] Two particular aspects of the balance that Congress struck in enacting the ICRA shape the statute's possible ramifications for discriminatory tribal marriage laws.

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248. *Accord* Brent W. Stricker, *Gun Control 2000: Reducing the Firepower*, 31 McGeorge L. Rev. 293, 295 (2000).

249. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by . . . constitutional provisions framed specifically as limitations on federal or state authority."); Talton v. Mayes, 163 U.S. 376, 384–85 (1896) (holding that the requirement of indictment by grand jury under the Fifth Amendment does not apply to tribes); *see also* Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, Am. Indian L. Rev. (forthcoming 2015) (manuscript at 40–41), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425354 (discussing *Talton v. Mayes*); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara: *Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. Mich. J.L. Reform 651, 693 (2009) (discussing the inapplicability of the Bill of Rights to tribes).

250. U.S. Const. amend. XIV, § 1 (governing state action).

251. U.S. Const. amend. V (governing federal action).

252. Indian Civil Rights Act of 1968, 25 U.S.C.A. §§ 1301–04 (West 2014).

253. *Martinez*, 436 U.S. at 62 (quoting Morton v. Mancari, 417 U.S. 535 (1974)); *see also* Angela R. Riley, *Indians and Guns*, 100 Geo. L.J. 1675, 1704–08 (2012) (discussing the legislative history and intent of ICRA); Tweedy, *supra* note 9, at 394–95 (discussing differences between the initial motivation for ICRA and the intent of its final version).

The first is that, based on Supreme Court case law, the only federal hearing available under the ICRA is through a writ of habeas corpus.[254] In other words, a person must be in custody to seek federal review, although a complainant generally has the ability to seek at least injunctive relief for ICRA violations in tribal court.[255]

In *Santa Clara Pueblo v. Martinez*, the Court determined, based on (1) the fact that the only explicit federal remedy in the ICRA was habeas corpus, (2) the structure of ICRA's statutory scheme, and (3) its legislative history, that Congress had made a deliberate decision that tribal courts would be the primary adjudicators of ICRA disputes.[256] The Court explained that Congress settled on this enforcement scheme to "avoid[] unnecessary intrusions on tribal governments."[257] Therefore, because same-sex marriage is a civil issue, it is highly unlikely that a plaintiff challenging a discriminatory tribal marriage law could ever seek federal review for an alleged ICRA violation. One possible exception would be if a tribe were to adopt a DOMA like Oklahoma's[258] that carried criminal sanctions. If the sanctions included jail time—for example, for performing a same-sex marriage—an offender who was convicted and jailed could conceivably seek habeas relief under the ICRA. However, it is probably extremely unlikely that a tribe would enact such a law, so any review of tribal DOMAs under the ICRA will almost certainly occur in tribal court.

The second aspect of the balance struck by ICRA that is important for our purposes is that, although the wording of the equal protection and due process rights included in the ICRA is identical to that in the Fourteenth Amendment of the United States Constitution, tribes are not required under federal law to interpret the rights included in the ICRA in the same ways as the corresponding constitutional rights are interpreted.[259] Instead, to preserve tribal

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254. *Martinez*, 436 U.S. at 61, 66.

255. *See Martinez*, 436 U.S. at 59; Tweedy, *supra* note 9, at 443.

256. *Martinez*, 436 U.S. at 61.

257. *Martinez*, 436 U.S. at 67.

258. Okla. Const. art. 2, § 35(C).

259. *See, e.g.*, Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974) (holding that "the meaning and application of 25 U.S.C. § 1302 to Indian tribes must necessarily be somewhat different than the established Anglo-American legal meaning and application of the Bill of Rights on federal and state governments."); McCurdy v. Steele, 353 F. Supp. 629, 634 (D. Utah 1973) (explaining that the federal constitutional meaning of equal protection and due process may be modified as applied to Indian tribes); Tweedy, *supra* note 9, at 407–08 (explaining that ICRA provisions analogous to federal Bill of Rights

sovereignty and tribal cultures, tribes are empowered to interpret the rights based on their own cultures and traditions.[260] In a sense, then, the ICRA incorporates a fair degree of cultural relativism; the balance it strikes can be seen as one between its initial assimilationist impulse on the one hand and, on the other, respect for the uniqueness and diversity of tribal cultures and an acknowledgement of the federal government's trust responsibility to support tribal self-determination. Because many of the unique aspects of tribal cultures are manifest in tribal law, a requirement that tribal courts protect due process and equal protection (or any of the other rights included in the ICRA) in exactly the same way that the states and federal government do would have an assimilating effect on tribal culture. For example, one can imagine that a tribe in the Pacific Northwest whose culture is closely aligned with salmon fishing might view fishing as a fundamental right and thus might protect it as such under the due process clause of the ICRA. A requirement that such a tribe interpret the due process clause of the ICRA based solely on Supreme Court precedent would eliminate one mechanism for the tribe to protect the cultural value of fishing and, as a consequence, one would expect that value to lessen over time. Instead, each tribe has the discretion under the ICRA to come to a fair accommodation between the largely alien rights included in the ICRA and the tribe's own customs and traditions. Thus, because

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provisions may legitimately be interpreted differently by the various tribes); *see also Martinez*, 436 U.S. at 71 ("Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."); Wendy A. Church, *Hon. Theresa M. Pouley Chief Judge, Tulalip Tribal Court Tulalip Indian Reservation, Tulalip, Wash.*, 61-APR Fed. Law. 20 (Apr. 2014) (quoting Hon. Theresa Pouley as stating that "tribal courts know how to do due process, but we have the luxury of doing it in a way that reflects the values, history, and culture of the communities we serve.").

260. *See, e.g.*, *Janis*, 385 F. Supp. at 1150 (determining that ICRA's legislative history indicates an intent to "protect the tribal interest in maintaining traditional practices that conflict with constitutional concepts of personal freedom developed in a different social context."); *McCurdy*, 353 F. Supp. at 634 (explaining the necessity of modifying constitutional concepts "in light of the federal concern for tribal cultural and governmental autonomy."); *accord* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 Fordham L. Rev. 479, 487 (2000); *cf.* Angela R. Riley, *(Tribal) Sovereignty & Illiberalism*, 95 Cal. L. Rev. 799 (2007) (arguing that expansion of federal civil rights laws into tribal communities runs counter to and risks eviscerating recognized traditions of tribal sovereignty and autonomy).

tribes are empowered to interpret due process and equal protection rights under ICRA based on tribal culture and tradition, *Windsor* should not be assumed to be binding under the ICRA as a matter of federal law.

While an outsider might jump to the conclusion that individual Indians are at a disadvantage because of the ICRA—they can only sue the tribe in federal court if they are in custody and the tribal court deciding the case need not follow federal constitutional precedent in interpreting the ICRA—in fact, many tribal members disagree and have voiced support for tribal sovereignty despite such risks to individual rights.[261] This view is not unanimous by any means. One obvious example of a contrary view is undoubtedly that of Julia Martinez, who brought the ICRA case against her tribe that became *Martinez v. Santa Clara Pueblo*.[262]

How tribal courts will approach challenges to tribal DOMAs or similar laws under the ICRA is uncertain, and there is likely to be considerable variance among tribes. For example, when I examined tribal equal protection cases in the sex discrimination context a few years ago, I found that some tribes, such as the Winnebago Tribe of Nebraska, took unique approaches to the question while at the same time incorporating elements of federal law, such as class-based standards of scrutiny.[263] Other tribes, like the Hopi Tribe, have looked to the federal test for equal protection in conjunction with tests developed by other tribes.[264] There does seem to be some inclination among a few tribes (both in the equal protection context and under statutory anti-discrimination law) to more broadly allow for

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261. *See, e.g.*, Gloria Valencia-Weber, Rina Swentzell & Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, *in* The Indian Civil Rights Act at Forty 39, 46, 49 (Kristen A. Carpenter et al. eds., 2012); *accord* Bethany R. Berger, United States v. Lara *as a Story of Native Agency*, 40 Tulsa L. Rev. 5, 16 (2004) (describing testimony by tribal members in support of a bill that allowed tribes to criminally prosecute non-member Indians who were present on a tribe's reservation). For a proposal for intertribal resolution of alleged human rights violations by tribes, *see generally* Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 San Diego L. Rev. 567 (2012).

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

263. Tweedy, *supra* note 9, at 410–15. Notably, the equal protection challenge at issue was brought under the Tribe's Constitution rather than under the ICRA. *Id.* at 413.

264. Nevayaktewa v. Hopi Tribe, 1998.NAHT.0000003, Nos. 97CR000931 and 97CR000932 ¶¶ 29–32 (App. Ct. of the Hopi Tribe, Mar. 20, 1998).

discrimination claims without requiring a showing that the discrimination was based on suspect-class membership.[265]

On the other hand, however, a significant number of tribes look to federal constitutional cases when construing ICRA-based rights in the absence of tribal precedent or readily available information on tribal tradition and custom, and other tribes simply apply federal constitutional cases and the tests derived from such cases in ICRA cases without an analysis of whether they are required to do so.[266]

Finally, it appears that a limited number of tribes are turning away from ICRA in favor of applying tribal law that is more protective of civil rights and more in consonance with tribal culture.[267]

This array of tribal approaches to equal protection issues and ICRA cases is likely to result in a similar diversity of approaches to the application of *Windsor* in any same-sex marriage cases that arise. Clearly, it appears that many tribes would apply *Windsor* either reflexively or due to an absence of available information on tribal custom and tradition either in the context of same-sex relationships or as to equal protection and due process generally. Such tribes would, if federal lower courts are any guide, have a strong likelihood of striking down discriminatory marriage laws. It is possible, however, that because same-sex marriage cases involve questions as to the nature of marriage that are tied more to local community norms than many other issues, reliance on federal cases may turn out to be somewhat less common in tribal marriage cases than in equal protection and substantive due process cases in other contexts.[268]

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265. Tweedy, *supra* note 9, at 444–45 & 445 n.194; *accord* Nevayaktewa, 1998.NAHT.0000003, Nos. 97CR000931 and 97CR000932 ¶ 31 (citing Burns Paiute Tribe v. Dick, 22 Indian L. Rep. 6016 (1994), as allowing an equal protection claim if the plaintiff could show *either* bad faith *or* suspect class status and citing Skokomish Indian Tribe v. Saylor. 5 Indian L. Rep. L-4 (1978), as requiring courts to look for a proper justification for alleged discrimination).

266. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 77–80 (2013) (discussing tribal due process cases); Tweedy, *supra* note 9, at 415–16 (discussing tribal equal protection cases).

267. Fletcher, *supra* note 266, at 81–91.

268. Fletcher, *supra* note 266, at 85 (arguing that tribal custom and tradition is of paramount importance in the context of tribal court sentencing). One indication of the importance of tribal custom and tradition in the marriage arena is the fact that the issue of tribal culture with respect to same-sex relationships is frequently raised in the course of considering tribal laws or cases pertaining to same-sex marriage. *See, e.g.*, Part II.B.2.b., *supra* (stating that a Little Traverse "Council member brought forth evidence that recognizing

One tribal law framework in which *Windsor* is especially likely to carry controlling weight is in the case of a tribe that has expressly incorporated federal constitutional rights into its own laws. In such cases, tribal courts may be more likely to hold that federal cases interpreting the constitutional right at issue are binding in tribal court.[269]

Courts that utilize unique equal protection or due process tests may reject the application of *Windsor*, although it does not necessarily follow that these courts would uphold discriminatory marriage laws. Tribal courts that more broadly construe equal protection without regard to showings of discrimination based on membership in a suspect class may be more likely to strike down discriminatory marriage laws, whether or not *Windsor* is applied. At a minimum, such frameworks should reduce the burdens on plaintiffs in proving their cases. The tribes that tend to look to more protective tribal laws in lieu of the ICRA would have little reason to apply *Windsor*. And rather than relying on the ICRA, some same-sex couples may choose to challenge tribal DOMAs and other sex-specific marriage laws directly under tribal law, such as tribal constitutional provisions, tribal codes (or statutory laws), and even tribal common law.[270] For instance, the Cheyenne and Arapaho Tribes' constitution prohibits the tribal government from making or enforcing any law that "discriminates against any Person based on age, gender, religion, disability, familial status, sexual orientation, or social or economic

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same-sex relationships was consistent with the Tribe's oral history" after the Tribe's marriage equality bill failed to pass and noting that the law passed on the next consideration); Vezzola, *supra* note 133, at 198 (discussing McKinley and Reynolds' arguments about the Cherokee Nation's traditional response to same-sex marriage). Another indication is the amount of scholarship exploring and documenting the cultures and traditions of various tribes with respect to same-sex marriage. *See generally* Vezzola, *supra* note 133; Wilson, *supra* note 23; Jeffery S. Jacobi, *Note: Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy*, 36 U. Mich. J.L. Reform 823 (2006); *see also* Justice, *supra* note 91, at 214–15 (discussing the prevalence of arguments relating to tribal traditions as to same-sex relationships and the overbroad character of many of those arguments, given the scarcity of evidence on this issue in the case of most tribes).

269. *See, e.g.*, Hudson v. Hoh Tribal Bus. Comm., No. HOH-CIV-4/91-015, 2 Tribal Appellate Court Opinions of the Northwest Intertribal Ct. Sys. 160, 163–64 (Hoh Tribal Ct. of App., May 28, 1992) (construing the right to petition for redress of grievances provided for in the Hoh Tribal Constitution according to federal constitutional principles because the tribal Constitution explicitly incorporated federal constitutional rights).

270. *See, e.g.*, Tweedy, *supra* note 9, at 403–09 (discussing equal protection guarantees of various types under tribal law and discussing tribal common law).

status."[271] In the seemingly unlikely event that the Cheyenne and Arapaho Tribes began to discriminate against same-sex marriage, this provision could potentially provide a remedy for those aggrieved. Similarly, discrimination against same-sex marriage has in the past been successfully challenged as sex discrimination,[272] and thus tribal DOMAs could be interpreted to run afoul of tribal sex discrimination laws, especially among tribes like Navajo that have strong protections in this area.[273] In cases proceeding under tribal statutes, constitutions, or common law, however, there would be little reason for *Windsor* to be considered binding authority, although, in this instance also, tribal courts may decide that it is persuasive authority or may, at a minimum, analyze it in the course of their opinions.

Thus, although tribes vary widely in their laws and methods of interpretation and *Windsor* should not be assumed to be binding under federal law, it is likely to be seen as at least persuasive authority in most cases brought under ICRA. Nonetheless, a significant minority of tribes is likely to reject application of *Windsor*. The reasons for doing so may vary but could include the perception that it is inconsistent with tribal custom or tradition or the conclusion that the tribal test for equal protection or due process is too divergent from the federal test to warrant application of federal case law.

### D. Suggestions for Tribal Courts as to Application of *Windsor*

Given this widely variable landscape, the application of *Windsor* in tribal courts has an uncertain future. How then should tribal courts approach the question? Specifically, in the context of ICRA, it seems clear that tribes should apply *Windsor* as persuasive authority unless there is clear evidence of tribal custom and tradition that points to a different approach with respect to same-sex relationships. As described above, tribal courts sometimes consider federal approaches and cases in conjunction with approaches from other tribes, and, in such situations (and similar ones), it makes sense for *Windsor* to play a significant role in a multi-faceted analysis, rather than playing the starring role. However, tribal courts that are urged by government defendants to jettison *Windsor* as inconsistent with tribal custom or tradition should not do so in the

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271. Const. of the Cheyenne & Arapaho Tribes, art. I, sec. 1(o).

272. *See generally* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

273. Navajo Nation Code Ann. tit. 1, § 3 ("Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex . . . ."); *see also* Tweedy, *supra* note 9, at 418–22 (discussing Navajo Nation Code Ann. tit. 1, § 3).

absence of persuasive evidence as to that tribe's (or related tribes') custom and tradition in the area of same-sex relationships. There are two important reasons for this. The first is that assertions of tribal tradition are often made in the context of controversial issues like same-sex marriage with little to back them up, and tribal courts should require solid evidence to avoid allowing contemporary prejudice to masquerade as tribal tradition. Secondly, DOMAs are generally a product of a larger framework of heteronormativity in the United States, and this framework has been used to harm tribes and suppress tribal cultures on numerous occasions. Enforcing a DOMA that derives from this framework (rather than from a tribe's own culture and tradition) amounts to a tribe's becoming an instrument of its own oppression.

### 1. The Importance of Obtaining Substantive Evidence Regarding Tribal Custom and Tradition

Sweeping generalizations about tribal traditions are made on both sides of the same-sex marriage controversy. Perhaps most familiarly, tribal customs and traditions across different tribes are often monolithically described as friendly to LGBT persons, although, in fact, there is a lack of historical evidence on these issues among many tribes to support such assertions.[274] Thus, for example, it appears that there is little historical evidence as to the Cherokee Nation's historical approach to LGBT issues,[275] while Navajo Nation and a few other tribes, including Lakota, Zuni, Mohave, Cheyenne, and some Algonquian peoples, have well-documented histories of support for same-sex relationships or gender nonconformity.[276] A more specific example is that of the Cherokee marriage case, where both the couple who sought to preserve their marriage and the tribal government that sought to invalidate it emphatically claimed to have tradition on their sides.[277] As scholar Daniel Heath Justice has cautioned, tradition is a slippery concept that can be "devoid of intelligible meaning, though incredibly powerful as a speech act."[278]

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274. Justice, *supra* note 91, at 214–15.

275. Vezzola, *supra* note 133, at 198-200.

276. Justice, *supra* note 91, at 215; Vezzola, *supra* note 133, at 201 (discussing traditional Navajo culture); Richard White, The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650–1815 60 (2006); Two Spirits (PBS 2010); *see generally* Will Roscoe, The Zuni Man-Woman (1st ed. 1991).

277. Vezzola, *supra* note 133, at 197–98.

278. Justice, *supra* note 91, at 213.

As a result of the power an invocation of tradition can wield and the intense emotions surrounding the controversy about same-sex marriage, even judges run the risk of unreflectively accepting parties' bare assertions as to tribal custom and tradition.[279]

To minimize these dangers, tribal courts adjudicating marriage equality cases should research, or ask the parties to brief, the traditional and customary approaches to same-sex relationships or LGBT identities within that particular tribe.[280] If evidence as to that tribe's approach is non-existent or scarce, then it is possible to expand the search to closely related tribes (especially if that is an accepted practice in the tribe's judicial system). However, tribal courts should require some clear evidence of a tradition or custom of lack of openness to same-sex relationships or LGBT identities as a justification for not applying either *Windsor* or tribally-derived protections against discrimination in a marriage equality case under the ICRA. While strong evidence of tradition on these issues may be difficult or even impossible to come by in many tribes, tribal courts should take the approach that lack of such evidence favors marriage equality.

For better or worse, the ICRA has been imposed on tribes. Its language on equal protection and due process is identical to that in the United States Constitution. While tribes are rightfully empowered to interpret the ICRA rights differently based on custom and tradition, in the absence of guidance from those sources, federal case law should play a significant role in the analysis. In such situations, the central justification for deviating from federal law is itself absent. Although scholars have raised concerns that

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279. Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[T]imes can blind us to certain truths . . . .").

280. Tribal elders are a common source of evidence of tribal custom and tradition in tribal courts. *See, e.g.*, Smith v. Colville Confederated Tribes, No. AP97-008, 25 Indian Law Reports 6156, 2 CTCR 67, 4 CCAR 58, 1998.NACC.0000013 ¶32 (Colville Confed. Tribes Ct. of App. 1998). Stating that:

> [t]he person asserting custom and tradition should have an initial burden of producing some evidence that may support the claim, i.e., affidavits, articles, etc., so the trial judge could base his decision to call a panel of Tribal elders or members on something more credible than just someone's assumption that it should be a tradition or custom.

The Mohegan Tribe of Indians of Connecticut v. The Mohegan Tribal Court, No. COE-1-2009, 1 M.C.O.E. 1, 2009.NAMT.0000005 ¶105 n. 12 (Mohegan Tribal Ct. of App. 2009) (quoting a court rule as providing that "the Court may refer any matter or question related to the custom and tradition of the Mohegan Tribe to the Council of Elders").

federal courts applying federal law under the ICRA will "compel [tribal] . . . courts to dismantle indigenous justice systems or practices inconsistent with mainstream constitutional law,"[281] this danger is greatly minimized in the context of a conscientious tribal judge deciding an ICRA case in tribal court. The tribal judge, whether Indian or non-Indian, can be expected to understand her role as requiring careful attention to the customs and tradition of the tribe that she serves. Moreover, in a marriage equality case, if evidence of tribal custom and tradition relating to same-sex relationships is available, the tribal judge should understand the avenues for obtaining it. Finally, just as federal judges are part of the federal justice system and are therefore inherently invested in its survival,[282] tribal judges can be expected to be invested in the preservation of the tribal justice system of which they are a part.

### 2. DOMAs, Heteronormativity, and Colonialism

A second reason that supports application of *Windsor* by tribal judges in the context of ICRA is that, in a DOMA case, as explained below, the choice does not appear to be between mainstream and tribal values but rather, for those tribes to whom this solution would apply, between two different, competing mainstream values. Relatedly, from the information we have about Cherokee and Navajo, we know that adoption of tribal DOMAs is inspired at least in some instances by political developments in the dominant culture, rather than by tribal customs and traditions.

Although there is wide variability among tribal cultures and although evidence as to tribal approaches to same-sex relationships is often unavailable for specific tribes, it is clear that the homophobic values represented by the federal DOMA and state DOMAs are part of a larger cultural outlook that has historically been used, and continues to be used to some degree, against tribes. In other words, viewing heteronormativity broadly, we can see it as "a particular kind of ideological and institutional matrix in which the nuclear family serves as the regulatory ideal through which racially and imperially

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281. Angela R. Riley, *(Tribal) Sovereignty & Illiberalism*, 95 Cal. L. Rev. 799, 840 (2007) (footnote omitted).

282. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny . . . .").

dominated populations are disciplined in ways that seek to marginalize, pathologize, and/or dismantle their social formations."[283]

Historically, the cultures of Native peoples were attacked by prominent European settlers, such as Catholic priests, and by the federal government itself on the basis that their cultures did not adhere to the Christian ideal of the nuclear family.[284] Among the many criticisms (which were usually coupled with efforts to forcibly change tribal cultures and Native individuals) were disapproval of promiscuousness among some tribal peoples and of plural marriages among many others.[285] Additionally, native cultures have tended to be viewed as—and disciplined by the dominant American culture for—being illegitimately focused on extended family relationships[286] and for having improper and (according to the understanding of the mainstream culture) reversed gender roles.[287] Even today it can be said that, through the distorted lens of the dominant culture, "to be native is to have improper forms of affect, home, and family."[288]

DOMAs and similar laws, such as the now abandoned proposed constitutional amendment to ban same-sex marriage, are part of a larger attempt to enforce heteronormativity as a

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283. Mark Rifkin, When Did Indians Become Straight? Kinship, the History of Sexuality, and Native Sovereignty 236 (2011).

284. White, *supra* note 276, at 60–66 (describing Jesuit efforts to enforce Christian morality on Algonquian women in the Old Northwest and to squelch promiscuousness among them); Robert T. Anderson et al., American Indian Law: Cases and Commentary 102–03 (2d ed. 2010) (describing criminal penalties imposed by the federal government under an 1892 law against Indians who entered into polygamous or plural marriages).

285. *See* Anderson *et al., supra* note 284, at 102–03.

286. *See, e.g.*, Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. Rev. 637, 684 (1999) (describing replacement of the Native kinship and extended family structure with the nuclear family as being one of the primary projects of the federal government's allotment of Indian land); *accord* Barbara Ann Atwood, *Tribal Jurisprudence and Contemporary Meanings of Family*, 79 Neb. L. Rev. 577, 634–646 (2000) (contrasting tribal emphasis on extended family relationships with respect to children with the mainstream nuclear family model in child custody jurisprudence).

287. *See* Bethany R. Berger, *Indian Policy & the Imagined Indian Woman*, 14-Fall Kan. J.L. & Pub. Pol'y 103, 106 (2004) (stating that early European Americans viewed "[t]he fact that women farmed while men hunted . . . [as] evidence that Indian men were lazy and despised honest work[] and [that] Indian women were abused slaves").

288. Rifkin, *supra* note 283, at 282.

requirement for individual and cultural legitimacy.[289] Even the notion of sexual orientation as we know it today in mainstream culture "is rooted in the late 1800s, when, as regulation of sexuality increased, those who practiced sodomy began to be imputed with certain essential (and societally undesirable) characteristics," including—for the males who were stigmatized by these efforts—having female gender traits.[290]

Viewed in isolation, then, a tribe's decision to enact a DOMA may appear to be relatively innocuous and may seem to be the sort of decision that a tribal government should be entitled to make, even if mistaken. While I would not argue that federal courts should be able to interfere with such a decision, I would argue that generally, in the absence of a federal law requiring that they do so, tribal governments and tribal justice systems should pause before enforcing external norms internally.[291] In a context like this one, where those external norms are part of a broader framework that has been used to both inflict serious harm on tribal cultures and Native individuals and to delegitimize tribal cultures, it is especially urgent for tribal courts to carefully scrutinize claims that such laws are rooted in tribal custom and tradition. The fact that DOMAs have been tied to psychological harm among LGBT persons living in jurisdictions that have enacted them is all the more reason for tribal courts to engage in such scrutiny.[292]

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289. *See, e.g.*, Rifkin, *supra* note 283, at 3–5; Linda C. McClain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. Pub. L. 313, 315 (2006). McClain states that Federal Marriage Amendment

> proponents do share a view that same-sex marriage threatens gender complementarity. On this view, gender complementarity—the union of the two opposite, and different, sexes—is fundamental to marriage, to children's healthy development, to a healthy society, and to the family carrying out its critical function of transmitting values and sustaining democracy.

290. Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. Cin. L. Rev. 1461, 1466–67 (2011) (citing Michel Foucault, The History of Sexuality: An Introduction 37, 42–43 (1990)).

291. *Cf.* Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. Mich. J.L. Reform 273, 273 (2005) (urging tribes, in the context of procedural due process claims arising from employment separation, to construct alternative mechanisms for dealing with such claims that "accommodate[] the particular needs of Tribal communities").

292. Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual*

## IV. SOME THOUGHTS ON THE RELATIVE SCARCITY OF TRIBAL LAWS ON SAME-SEX MARRIAGE

All in all, although I was by no means able to obtain a comprehensive picture of all 566 federally recognized tribes' laws and policies with respect to same-sex marriage, same-sex marriage seems to be a less pressing concern for most tribes than it does for U.S. states. For example, thirty-seven states and Washington, D.C. now allow same-sex marriage, and they have arrived at this result through a variety of means, including legislative action, ballot initiatives, and judicial decisions.[293] Currently, the remaining thirteen states still have DOMAs, and, at one point in the United States, forty-four state DOMAs were in place.[294] By contrast, my research only uncovered twenty-seven tribes that are known to have laws governing same-sex marriage *or* domestic partnerships and ten additional tribes with sex-specific marriage laws the intent of which is unknown. Although this picture of tribal laws is undoubtedly incomplete, the contrast appears striking.

What accounts for this difference? One possibility is that tribes are simply facing more pressing issues, as Navajo Nation President Joe Shirley indicated in attempting to veto Navajo's DOMA.[295] Discrimination is unquestionably an important issue that can have serious health and mental health effects on its victims, including significantly shortening a victim's life.[296] On the other hand,

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*Populations: A Prospective Study*, [vol. 100 no. 3] Am. J. Pub. Health, 452, 452 (Mar. 2010) (reporting increased rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder, among LGBT respondents living in states that passed anti-marriage equality constitutional amendments).

293. Human Rights Campaign, *Map of Marriage Equality and Other Relationship Recognition Laws*, http://www.hrc.org/campaigns/marriage-center (last visited Feb. 6, 2015); *Same Sex Marriage Fast Facts*, *supra* note 33.

294. Human Rights Campaign *supra* note 293; Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 Loy. U Chi. L.J. 265, 265 (2007) ("Forty-four states now have statutes barring same-sex marriage.").

295. *See supra* note 176 and accompanying text.

296. *See generally* Mark L. Hatzenbuehler et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 Soc. Sci. & Med. 33 (2014) (reporting that the life expectancy of sexual minorities living in communities with high levels of anti-gay prejudice is twelve years shorter than for those living in low-prejudice communities); Hatzenbuehler et al., *supra* note 292; Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study* at 8–9 & n.25, forthcoming in William & Mary J. of Women & L. (2015) (citing Lori E. Ross et al., *Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination*, [vol. 100 no. 3] Am. J. Pub. Health 496, 497 (Mar. 2010) (detailing bisexual participants' perception that

it does not tend to cause immediate death or physical injury in the same way that domestic violence and drug abuse do. Since many tribes face epidemic levels of these social ills,[297] tribal governments may be putting same-sex marriage on the backburner in order to focus on extremely urgent problems. Additionally, although more research needs to be done in this area, there is some evidence suggesting that marriage in general is less of a priority among Native Americans than it is for other groups in the United States,[298] and, insofar as marriage itself is an accession to heteronormativity,[299] a decreased interest in contemporary marriage may be consonant with historical tribal custom and tradition. This possibility also tracks recent information suggesting that people of color, and specifically African-Americans, in the United States are less likely to marry and that poverty negatively correlates with marriage rates.[300]

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biphobia and monosexism played "critical roles" in their mental health experiences).

297. *See, e.g.*, Rebecca Zimmerman, Comment, *The Use of Uncounseled Tribal Court Convictions in Federal Court under the Habitual Offender Provision of the Violence Against Women Act: A Violation of the Sixth Amendment Right to Counsel or an Extension of Comity?*, 61 Cath. U. L. Rev. 1157, 1165, 1177 (2012) (referring to the "unacceptable and sobering crime rates witnessed in Indian Country" and "the domestic violence epidemic in Indian country") (internal quotation marks omitted); Tweedy, *supra* note 249, at 689–90; *see generally* Theodore W. McDonald & Mary E. Pritchard, *Mental Health and Substance Abuse Issues among Native Americans Living on a Remote Reservation: Results from a Community Survey*, E13 J. of Rural Community Psych. (2010), *available at* http://www.marshall.edu/jrcp/VE13%20N1/jrcp%2013%201%20McDONALD%20ready.pdf (finding that mental health and substance abuse issues were prevalent among Native Americans living on one reservation).

298. Sydney Stone Brown, Psy. D., *Tribal Marriage Systems: Research Brief* 3–4, Nat'l Healthy Marriage Resource Center, www.healthymarriageinfo.org/download.aspx?id=349 (last visited Feb. 6, 2015).

299. *See, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 Colum. L. Rev. 1, 6–7, 34–35 (2012) (describing how marriage in the 19th Century required adherence to prescribed gender roles and arguing that contemporary marriage retains its disciplinary function).

300. *See, e.g.*, Paula Y. Goodwin et al., Nat'l Ctr. for Health Statistics, Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth at 1–2 (Vital Health Stat. Series 23, No. 28, 2010) (reporting data showing that people of color are less likely to marry than whites); June Carbone & Naomi R. Cahn, *The Triple System of Family Law*, 2013 Mich. St. L. Rev. 1185, 1199 (2013) (discussing race and class in relation to marriage rates and childbearing); *id.* at 1206–07 (discussing the relation of class to marriage rates and childbearing).

Thus, it is possible that tribal governments are addressing same-sex marriage at lower rates than state governments because they are dealing with more immediate crises. Additionally, given that Indianness is partly a racial construct, which is tied to cultural subordination,[301] and that Native Americans suffer from extremely high rates of poverty,[302] both of which appear to be tied to lower rates of marriage among the larger population, it is possible that the lower rates of tribal laws bearing on same-sex marriage reflect a lower level of interest in marriage generally among tribal citizens. Finally, it is possible that Native persons as a group may be less interested in contemporary marriage, which generally cements the nuclear family, because the ideal of the nuclear family was not historically part of tribal cultures.

## V. CONCLUSION

Twelve tribes are currently known to allow same-sex marriages within their jurisdictions, and at least fourteen other tribes have marriage laws that are generally sex-neutral and thus that may or may not be interpreted to allow same-sex marriage. On the other side of the coin, at least ten tribes have tribal DOMAs in place, and ten additional tribes have sex-specific marriage laws with unclear intent.

Turning to *Windsor*, its practical effect on tribal DOMAs (and potentially other sex-specific tribal marriage laws) under the ICRA remains uncertain. However, to avoid enforcing a set of norms that has been used to harm tribes and Native individuals and to protect contemporary tribal members from harmful discrimination, tribal courts should apply *Windsor* in ICRA cases in the absence of

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301. *Accord* Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. Rev. 958, 962 (2011) (arguing that "racial subordination is a critical factor in understanding anti-Indianism today"). In addition to its racial aspect, Indian identity also has a very important political aspect, which has tended to predominate for legal purposes. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535 (1974) (finding that law giving preference to Native Americans in the Bureau of Indian Affairs employment was "reasonably designed to further the cause of Indian self-government").

302. *See, e.g.*, Frank R. Lawrence, *Reflections on Tribal Sovereignty and Sovereign Immunity in Navigating Tribal Law: Leading Lawyers on Understanding the Unique Procedures, Intricacies, and Challenges with Tribal Cases* 6 (2012), *available at* 2012 WL 5898574 (noting that "in 2010, the poverty rate for Indians was 28.4 percent, approximately double the rate for the US population as a whole" and that "between 30 to 43 percent of Indian children are living in poverty").

significant evidence as to tribal customs and traditions that demonstrate a lack of openness to same-sex relationships or LGBT identities or practices.

Finally, it appears that same-sex marriage issues are somewhat less of a priority among tribes collectively than among states. More research needs to be done on why this is the case, but one possible explanation is that marriage in general is less of a priority among Native Americans. This is consistent with other data to the effect that people of color and poor people are less likely to marry and with the fact that tribes historically were persecuted for falling outside of the heteronormative ideal of the nuclear family.

However, much can be learned from the laws that tribes have enacted on same-sex marriage, and these laws to date have been under-researched and under-theorized. We do know that, for advocates of marriage equality, grassroots efforts appear to be more effective within tribes than within other governmental systems in the United States. Whether and how tribal DOMAs will be overturned remains to be seen, but it can be hoped that tribal courts will carefully scrutinize them when the issue is raised.