American Indian Law Review

Volume 35 | Number 2

1-1-2011

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I. Introduction

In an ideal world, one marries for love. In reality, however, marriage is often inspired by other motivations. The attractive young woman marrying the wealthy, established, older man is an image with which we are all too familiar. But an image not typically evoked by the mention of the word "gold-digger" is a non-Indian marrying an Indian to gain access to tribal assets. Perhaps this is the result of generalizations. Because many tribal peoples live in absolute poverty,[1] one may presume that tribal members generally lack sufficient assets to tempt others. Reality is not so seamless, and the possibility that a non-Indian would marry an Indian for money is a very real one, particularly considering the substantial communal assets that are distributed to members per capita.[2]

Since at least the nineteenth century, the federal government has tried to ensure that Native American tribal property stays with tribal members, even after their marriages end.[3] This desire to maintain the tribal character of property persists despite that, during periods in history, the federal government encouraged Native Americans to assimilate into the dominant culture, with the natural result that some intermarried with non-Indians.[4] History also shows that whites often tried to take the land of the Native Americans,[5] both

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1. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1404 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN] (recognizing "the extreme poverty in Indian country").

2. *E.g.*, Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006) (noting that "as a member of the Mdewakanton Community, wife 'receives monthly per capita payments of approximately $84,000.00'"). This comment will use the term "non-Indian" to refer to any spouse of a tribal member who is not also a member of that specific tribe, and therefore is also intended to include nonmember Indians.

3. 25 U.S.C. § 182 (2006). This statute was enacted in 1888.

4. *See* KATHERINE ELLINGHAUS, TAKING ASSIMILATION TO HEART: MARRIAGES OF WHITE WOMEN AND INDIGENOUS MEN IN THE UNITED STATES AND AUSTRALIA, 1887-1937, at ix (2006).

5. STUART BANNER, HOW THE INDIANS LOST THEIR LAND 257 (2005).

purposefully and inadvertently. The General Allotment Act, which divided Indian lands into plots of individual ownership much like the fee simple plots owned by whites, made it easier for non-Indians to take Indian land.[6] Later policies tried to reverse the devastating effects of the General Allotment Act by seeking to protect the holdings of the tribes and to keep the lands out of the hands of non-Indians.[7]

Several statutes touch on the right to Indian property held in trust by the United States.[8] One statute in particular expressly proclaims that the rights of "Indian women" to tribal property remain at marriage, and that a "white man" marrying an Indian woman receives no interest in her tribal property.[9] But the language of the statute fails fully to encompass the class of individuals eligible to marry (and subsequently divorce) Native Americans with interests in tribal property.

The various statutes address the "white men" prohibited from acquiring rights in the tribal property of "Indian women."[10] They neglect to address the tribal property rights of the male Native American, or, for that matter, of any men other than whites that may marry an Indian woman with tribal property.[11] A later statute generally describes the jurisdiction of the various courts with respect to tribal land,[12] but fails to provide any real guidance for how to treat the different facets of tribal property in specific circumstances, such as the dissolution of a marriage.

This comment will discuss property division in tribal divorce – particularly in state courts – involving interests in both real and personal tribal property by one of the parties to the marriage. Part II first explains the jurisdictional circumstances in which adjudication of tribal property may fall into the hands of the state courts. It then overviews the current statutes and case law governing property division in divorces between tribal members and non-

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6. *Id.* For a general history and discussion of Indian land policy and its effects, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595 (2000); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001).

7. *See* BANNER, *supra* note 5, at 288-89.

8. *See, e.g.*, 25 U.S.C. §§ 181-182; 28 U.S.C. § 1360(b) (2006). The status as trust land contemplates rigid restrictions on alienation. Underlying fee title is vested in the federal government, "limiting tribal ownership to use and occupancy." Guzman, *supra* note 6, at 651.

9. 25 U.S.C. § 181.

10. *See id.* §§ 181-182, 194.

11. *See id.* §§ 181-182, 194.

12. 28 U.S.C. § 1360(b).

Indians. Part III discusses the multitudinous shortcomings of the applicable statutes, in terms of both drafting and application by the courts. It examines the courts' confusion surrounding the definition of "tribal property," the narrow race and gender focus, and the split in authority among the states concerning how to treat improvements made to the property with marital effort. Part IV proposes that Congress write a new statute that fully encompasses both genders of Native Americans with interests in tribal property, as well as the rights of people of all races potentially marrying a Native American with tribal property rights. It then outlines how state courts should treat any tribal property that appears in a dissolution-of-marriage action. Part IV then advocates for a specific definition for "tribal property" so that courts will know the precise parameters of their jurisdiction, rather than allowing state courts to fashion their own definitions. Last, Part IV drafts a statute that encompasses all of the goals discussed, in hopes of prompting the legislature to revisit its anachronistic statutes to provide clear guidelines for the courts. With uniformity among the states in the law of tribal property distribution in divorce, state court judges will be less likely to exceed the bounds of their jurisdiction, reducing the adverse effects on the Native Americans to whom the federal government owes a protective obligation. This comment concludes in Part V.

II. Dissolution of Marriage Involving Native American Property

For most jurisdictional purposes, "Indian" usually indicates only that the person is a member of a federally recognized tribe of Native Americans.[13] Being an "Indian" can avail a person to a different set of laws than those to which non-Indians might be subject.[14] But membership in a tribe can also allow access to a number of benefits that are not available to the public at large.[15] For instance, Indians, through membership in a federally recognized tribe, may have access to certain tax exemptions, employment advantages, distributions from gaming or other economic endeavors, or may be "entitled to inherit certain trust or restricted lands."[16]

Congress strives especially to protect Indian trust lands. After the General Allotment Act, which "devastated Indian land wealth," tribes lost the majority of their land holdings.[17] The federal government has tried to erase some of the

13. *See* COHEN, *supra* note 1, at 171-72.
14. *Id.* at 172.
15. *Id.*
16. *Id.*
17. Kathleen A. Ward, *Before and After the White Man: Indian Women, Property,*

effects of the allotment era through various federal policies and programs.[18] Of the federal policies that extend privileges to Native Americans on account of their Indian status, some arise in divorce proceedings and create problems for courts trying to determine the distribution of tribal property among the parties to the marriage.

A. State Authority Over Tribal Members in Divorce Proceedings

As with all cases, one of the first questions to answer in a divorce proceeding is which court has jurisdiction to hear the dispute.[19] Divorce cases involving a Native American may fall solely within the jurisdiction of the state or the tribe, or there may be concurrent jurisdiction between the two.[20] The problems that attend state courts adjudicating tribal property division in Native American divorce cases thus will only arise in special circumstances.

Where both parties are Indian and are domiciled in Indian Country, the state court does not retain jurisdiction over the divorce.[21] The state court may, however, have jurisdiction where the parties are domiciled outside Indian Country, or where one party to the divorce is non-Indian.[22] The domicile

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Progress, and Power, 6 CONN. PUB. INT. L.J. 245, 264 (2007).

18. *See* Royster, *supra* note 6, at 5 ("At the repudiation of the allotment era, Congress ended all further depredations on the tribal land base and provided mechanisms for the return of unsold lands and the acquisition of 'new' additional lands. With the reversal of the termination policy came the restoration acts, generally providing the restored tribes with some land base."); Guzman, *supra* note 6, at 606 ("While remedial, the Indian Reorganization Act did little to halt the steady spread of land base erosion, as it neither reversed existing allotments by returning them to the tribe nor invalidated completed transactions to Anglo-American takers. It additionally proved ineffectual against the fractionation of existing allotments; such efforts were not undertaken until Congress passed the ill-fated ILCA a half-century later.").

19. Jeannette Cox, *Removed Cases & Uninvoked Jurisdictional Grounds*, 86 N.C. L. REV. 937, 938 (2008). *See generally* Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997).

20. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 214 (5th ed. 2009).

21. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."); CANBY, JR., *supra* note 20, at 214.

22. CANBY, JR., *supra* note 20, at 214; *see also* United States *ex rel.* Cobell v. Cobell, 503 F.2d 790, 794-95 (9th Cir. 1974), *cert denied*, 421 U.S. 999 (1975). A South Dakota court recently held that a state court may not refuse to assume jurisdiction over divorce actions between Indians and non-Indians where the non-Indian party files in state court prior to the Indian party filing in tribal court. Langdeau v. Langdeau, 751 N.W.2d 722, 730-31 (S.D. 2008) (stating that, because the non-Indian party's complaint was filed first in state court and "was

requirements found in various state divorce statutes and in the Uniform Marriage and Divorce Act may also affect jurisdiction in cases involving Indian and non-Indian spouses.[23]

Jurisdictional problems with Indians arise because of the inherent sovereignty of Native American tribes.[24] But allowing a state court to dissolve a marriage "between an Indian and a non-Indian does not [inherently] infringe on the right of self-government of Indians residing on a reservation."[25] The converse is also true: those engaged in relations with Native Americans, especially within Indian Country, can become subject to tribal court jurisdiction despite that they are not tribal members. This exercise of tribal court jurisdiction, like the exercise of state court jurisdiction upon the Indian, does not amount to an equal protection violation on the non-Indian.[26]

Under the "divisible divorce" doctrine, a court may have jurisdiction to dissolve the marriage, but not to divide the incidents of the marriage. The jurisdiction for the two parts of the divorce may fall to separate courts.[27] A state court typically retains the authority to dissolve a marriage where one party is a resident of the state for the requisite time period.[28] But if the property to be divided lies outside the jurisdiction of the state court, it must allow the second portion of the "divisible divorce" – dividing the incidents of the marriage – to be adjudicated by a court with proper jurisdiction over that part of the case.[29]

While determining jurisdiction for the *divorce decree* may be as simple as looking to the residence of the parties and does not inherently infringe upon tribal sovereignty,[30] determining jurisdiction for *property division* can implicate issues of tribal sovereignty and the "right of the Indians to govern themselves."[31] Some courts choose to exercise jurisdiction over the second part of a divorce based on the location of the "incidents" of the marriage.[32]

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properly commenced, the circuit court may not refuse to hear the divorce proceeding").

23. *See, e.g.*, 43 OKLA. STAT. § 102 (2002); UNIF. MARRIAGE & DIVORCE ACT § 302 (amended 1973).

24. *See* 16B C.J.S. *Constitutional Law* § 1209 (2010).

25. 42 C.J.S. *Indians* § 153 (2010).

26. *See* 16B C.J.S. *Constitutional Law* § 1209 (2010).

27. Smith v. Smith, 459 N.W.2d 785, 787 (N.D. 1990) (quoting Hall v. Hall, 585 S.W.2d 384, 385 (Ky. 1979)).

28. *Id.* at 788; Byzewski v. Byzewski, 429 N.W.2d 394, 397 (N.D. 1988); *see also* Kelly v. Kelly, 759 N.W.2d 721, 723 (N.D. 2009).

29. *Smith*, 459 N.W.2d at 788.

30. *See supra* note 25 and accompanying text.

31. Williams v. Lee, 358 U.S. 217, 223 (1959).

32. *Kelly*, 759 N.W.2d at 726.

But due to strict federal restrictions, state courts, on their own authority, lack the necessary jurisdiction to divide Indian trust property held by the parties to the marriage.[33]

Unless the state has specifically assumed jurisdiction over civil matters under the authority of Public Law 280,[34] tribal courts have the authority to dissolve marriages among members, as well as to allocate property in that divorce action.[35] Despite that issues of jurisdiction for divorces between an Indian and a non-Indian are unsettled among the courts, state courts often assume jurisdiction to dissolve such marriages.[36] The state courts, however, are restricted from dividing or forcing sale of property held in trust by the federal government or property subject to restrictions due to its status as trust land.[37] Even Public Law 280 states are subject to the restrictions on trust lands, and though they may automatically have jurisdiction to grant the divorce,[38] the property division within that divorce may become much more complicated due to 28 U.S.C. § 1360(b), which prohibits state courts from determining "the ownership or right to possession of [tribal] property."[39]

B. The Statutes that Apply to Native American Property Division in State Court

The federal government retains authority to adjudicate title to lands held in trust for Native Americans.[40] Even individual Native Americans do not have the right to alienate tribal lands.[41] The Secretary of the Interior must consent

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33. *See* COHEN, *supra* note 1, at 1052 ("Involuntary transfers of trust or restricted allotments by state or federal action are void, unless specifically authorized by federal law.").

34. 28 U.S.C. § 1360 (2006); COHEN, *supra* note 1, at 544-45 (citations omitted). Public Law 280 allowed adopting states to assume civil and criminal adjudicatory jurisdiction over Indian Country within their state. *See id.* at 544 (citations omitted). Not all states have adopted Public Law 280. *See id.* (citations omitted). To correctly determine jurisdiction over a divorce action, one of the first questions should always be whether the state has assumed jurisdiction over Indian Country under Public Law 280.

35. 41 AM. JUR. 2d *Indians* § 115 (2010).

36. *See* CANBY, JR., *supra* note 20, at 214-15.

37. *See* Jacobs v. Jacobs, 405 N.W. 2d 668, 670 (Wis. Ct. App. 1987).

38. COHEN, *supra* note 1, at 559.

39. 28 U.S.C. § 1360(b) (2006).

40. *See* CANBY, JR., *supra* note 20, at 430.

41. *See* COHEN, *supra* note 1, at 1036-37 ("A tribal member's interest in tribal property is inchoate, unless federal or tribal law recognizes a more definite right. An individual has no vested right in tribal land or other property, unless some designated interest has been set aside for the individual.").

to any transfer of Indian trust property to someone outside the tribe.[42]

The federal government attempted to provide clarity regarding the rights of those marrying Native Americans through the statutes restricting non-Indians from acquiring rights in tribal property through marriage.[43] One statute attempts to prevent non-Indians from receiving any tribal rights, privileges, or property.[44] But the statute, as currently written, is in dire need of revision due to its antiquated language.[45]

There is also a more recent, as well as more generalized, statute that expressly prohibits state courts from adjudicating "the ownership or right to possession of [tribal] property or any interest therein."[46] The newer statute, however, only addresses trust property or other tribal property with federally imposed restrictions.[47] Nowhere does it address the different forms that tribal property may take.[48] Furthermore, there is no statute that directly addresses property division in a divorce where one party holds tribal property and the other claims an interest therein.

C. Classification of Property for Purposes of Equitable Distribution

Jurisdictions differ in the systems they use to classify property at the time of divorce. All states use some method of equitable distribution, allowing the courts to exercise discretion in dividing the property, rather than making distributional determinations solely based on the title of the property.[49] A small portion of states are referred to as "kitchen sink" states.[50] In kitchen sink states, the courts "may divide all property owned by either spouse at divorce, regardless of when or how it was acquired."[51] More frequently, however, states use the "marital property" system, whereby the courts divide all

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42. Tooahnippah v. Hickel, 397 U.S. 598, 609 (1970) ("The Indian's right to make inter vivos dispositions is limited and requires approval of the Secretary.").

43. *E.g.*, 25 U.S.C. § 182 (2006).

44. *Id.* § 181.

45. *Id.* ("No *white man*, not otherwise a member of any tribe of Indians, who . . . marr[ies] *an Indian woman* . . . shall by such marriage . . . acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.") (emphasis added).

46. 28 U.S.C. § 1360(b) (2006).

47. *Id.*

48. For a general discussion of the different forms that tribal property may take, see COHEN, *supra* note 1, at 965-66.

49. J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3.03[1] (2010).

50. *Id.* § 3.03[2].

51. *Id.* (emphasis omitted).

"marital" property, but do not divide the "separate" property of each party to the divorce.[52] "Community property" states are similar to "marital property" states in the overall division of assets, but differ in "the time at which the marital interest attaches."[53] In community property states, each spouse receives "a present, vested, one-half interest during marriage in all community property when it is acquired."[54] Other jurisdictions have developed "hybrid" systems, combining the "marital property system and [the] kitchen sink system."[55] Despite the varying classification-based permutations in the above-described systems, the Uniform Marital Property Act illustrates that there may be a strong presumption that property held jointly by the spouses is presumed to be marital, rather than separate, property.[56]

Once the court classifies the property, "[t]he fundamental principles of the division stage are almost identical in all jurisdictions."[57] The courts need not divide the property equally among the parties.[58] They are left to their own reasonable discretion, and the specific facts of the cases are extremely important in determining whether a distribution is equitable.[59] In determining whether the division is equitable, the courts generally consider the relative contributions of each party to the property and to the marriage, much like in the "dissolution of a partnership."[60]

When a court classifies property as either marital or separate, it can take several factors into consideration.[61] Separate property can be that which the party owns prior to marriage and the increase in its value (provided that the increase is not caused by a party to the marriage during the marriage), or it can be property inherited by the individual or received as a gift to that party individually.[62] Marital property is "typically defined to include all property acquired by either party during the marriage without regard to title."[63] It is

52. *Id.* § 3.03[3]. Separate property is usually that property acquired prior to the marriage or "accumulated during marriage by one spouse by gift or inheritance." *Id.*

53. *Id.* § 3.03[5].

54. *Id.* § 3.03[4].

55. *Id.*

56. UNIF. MARITAL PROPERTY ACT § 4(b) (1983).

57. BRETT R. TURNER, 2 EQUIT. DISTRIB. OF PROPERTY § 8:1 (3d ed. 2010), *available at* Westlaw, EQDP § 8:1.

58. *Id.* ("[A]n equitable distribution need not necessarily be an equal one.").

59. *Id.*

60. *Id.*

61. Stephanie Barkholz Casteel, *Planning and Drafting Premarital Agreements*, SR042 A.L.I.-A.B.A. 531, 536 (2010).

62. *Id.*

63. *Id.* at 535.

"the result of labor and investment during marriage."[64] Property that is clearly separate, however, may become marital "either because of the management of those assets by either spouse, thus causing the appreciation in those assets to be attributable to the marital unit, or by the commingling of separate property with marital property."[65] A court will try to divide the property between the spouses in accordance with principles of fairness.[66] Courts "typically cannot divide separate property in a divorce action," but courts often will take the value and "extent of the separate property" into consideration when determining what is an "equitable division of the marital property."[67]

The same principles of classification and division of property arise in state court cases involving Native Americans and their property, because if they are in the state court, they are subject to the state's laws.[68] The question then becomes what property of the Native American, acquired by inheritance or birthright, qualifies as separate property and thus not subject to division by the state court.

III. The Problems in Drafting and Application of the Tribal Divorce Statutes

In a typical dissolution-of-marriage case – one where the court need not consider tribal property – the court has discretion when dividing the property between the parties.[69] The "court determines the contents of the divisible estate and values all of the parties' assets," and then determines how to "allocate the divisible assets between the parties."[70] But in cases concerning one or more tribal parties, the courts must take other factors into consideration, most notably with respect to the division of tribal property. The complexity of such division is exacerbated by anachronistic statutes. These statutes engender a host of complications, in terms of both their drafting and application.

64. *Id.* at 536.
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* CANBY, JR., *supra* note 20, at 214-16.
69. TURNER, *supra* note 57, § 8:1.
70. *Id.*

A. Problems in Drafting

1. Gender Inequality

Congress passed 25 U.S.C. § 181 in 1888 to protect the property of the native woman that marries outside her tribe.[71] The statute was designed to protect the property holdings of the Indians because the government previously "did not recognize Indian women as property owners" – her husband "could use . . . or even dispose of her share of tribal property."[72] That Indian women were unable to maintain their property upon marriage to non-Indians "had a devastating effect . . . on tribal cultures,"[73] despite that, under tribal law, Indian women were capable of owning property.[74]

The relevant statutes address the "Indian woman" and the "white man,"[75] while failing to address the rights of the Indian men and their spouses. One court stated that this statute stands on "questionable" constitutional grounds due to its obvious gender bias, but made no actual determinations as to its constitutionality because the statute was "inapplicable to the case."[76] If courts are to uphold the spirit of statutes, Congress should ensure that the statutes encompass the rights of both genders. The current version of the law of tribal property division upon divorce contains antiquated language that unfortunately may cause courts to overlook its utility.

2. Racial Inequality

The title of one of the federal property statutes, "Rights of white men marrying Indian women; tribal property,"[77] expressly contemplates a "white man's" inability to take property from his Indian wife.[78] By naming "white men" rather than other, more inclusive language – such as no person "not otherwise a member of any tribe of Indians"[79] – the title renders the statute parochial and incomprehensive. Although there is language in the statute addressing men "not otherwise [] member[s] of any tribe of Indians,"

71. 25 U.S.C. § 181 (2006).
72. Ward, *supra* note 17, at 265.
73. *Id.*
74. *Id.* at 257 ("Indian women . . . held the property rights in the land and in their homes under tribal custom.").
75. 25 U.S.C. § 181.
76. Sheppard v. Sheppard, 655 P.2d 895, 904 (Idaho 1982).
77. 25 U.S.C. § 181.
78. *Id.*
79. *Id.*

providing a fleeting notion that the statute in fact might not be quite so insular, those "men" must nonetheless be "white" for the statute to apply.[80]

Another statute that may come into play in property disputes between an Indian and a "white person" is 25 U.S.C. § 194, which places the burden of proof in establishing title on the non-Indian.[81] This statute similarly places an unnecessary race-based constraint on the statute's application. In one case, a man contested the constitutionality of the statute, but the court failed to rule on the issue because the man had in fact satisfied its requirements.[82]

Without clarity and more comprehensive language, such statutes will be challenged *ad nauseum* by non-Indians wanting a share of their ex-spouse's tribal property. The statutes' antiquated language, as well as the distraction of the constitutional race- and gender-based challenges, may cause courts to overlook the spirit of the law – protecting the assets of the Native American in the marriage.

3. Accusations of Unconstitutionality

One perceived, but ultimately benign, problem in drafting must be addressed – statutes favoring Indian rights are not unconstitutional violations of the equal protection clause. Though the statutes directed toward protecting the tribal property of the Native American may seem to have an unconstitutional race-based bias against the rights of non-Indians, Supreme Court cases focusing on similar wording in statutes discredit that theory.

In *Morton v. Mancari*,[83] the Court determined that the classification of "Indian" was a "political" rather than a "racial" one.[84] Accordingly, statutes directed toward "Indians" need only satisfy the rational basis test and not the strict scrutiny required for classification of a race-based suspect class.[85] As in cases such as *Mancari*, Congress seeks to protect the rights of Indians, including land and property holdings, pursuant to its trust obligations.[86] The

80. *Id.*

81. 25 U.S.C. § 194.

82. Sheppard v. Sheppard, 655 P.2d 895, 905 (Idaho 1982).

83. Morton v. Mancari, 417 U.S. 535 (1974).

84. *Id.* at 554 n.24.

85. *See* CANBY, JR., *supra* note 20, at 373-77.

86. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 126 (1997) (quoting Cherokee Nation v. Hitchcock, 187 U.S. 294, 302 (1902)) ("While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.").

courts therefore should not find statutes unconstitutional based on perceived inequality resulting from the statutory protection of Native Americans as a political class that the federal government has expressly pledged to protect.

B. Problems in Application

State courts do not have the requisite jurisdiction to determine title to trust lands.[87] Despite this lack of jurisdiction to adjudicate ownership rights to tribal property, judges have found other ways to allocate the rights of former spouses.[88] That a state court lacks jurisdiction to divide Indian trust property thus does not mean that the courts will completely disregard it when allocating property during a divorce.[89]

The tribal property considered in property division may extend further than the normally contemplated "Indian trust" lands. It may include tribal leases, or even per-capita income distributions from tribal economic investments.[90] Cohen's Handbook of Federal Indian Law defines "tribal property" as that "in which an Indian tribe has a legally enforceable interest."[91] According to Cohen, tribal property "must be distinguished . . . from property of individual Indians" held in fee simple, even if it happens to be located on the Indian reservation.[92] Tribes collectively have held legally enforceable interests in several forms of land tenure.[93] These interests include fee simple absolute, leases, easements, and even subsurface rights.[94] All of these rights and interests must be considered in divorce.

1. Courts Offsetting Tribal Property

State courts have acknowledged that they lack the authority to divide or determine the title to Indian trust property in any proceeding, including a divorce, due to federal restrictions.[95] But many courts nonetheless are willing

87. Landauer v. Landauer, 975 P.2d 577, 580 (Wash. Ct. App. 1999); *see* Ducheneaux v. Sec'y of Interior, 837 F.2d 340, 342-43 (8th Cir. 1988), *cert. denied*, 486 U.S. 1055 (1988).

88. *E.g.*, *Landauer*, 975 P.2d at 579 (viewing the property as community property, rather than the separate property of the individual, and thus dividing it between the spouses). That there was a community property agreement executed between the parties to the marriage that one party tried to use in the dissolution may have made the situation more confusing. *See id.* at 582.

89. *Id.* at 582-83.

90. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006).

91. COHEN, *supra* note 1, at 966.

92. *See id.*

93. *Id.*

94. *Id.*

95. *E.g.*, Foster v. Foster, 883 P.2d 397, 401 (Alaska 1994) (citing *In re* Marriage of

to consider the value of that property to determine the economic standing of each party to the divorce.[96] Considering the value of the trust property in determining the equitable distribution of the property is akin to considering the value of separate property, and is thus ostensibly an erroneous application of established principles of property division upon divorce.[97] In relation to considering the value of the trust property to determine economic standing, some state courts require the tribal member to compensate the non-Indian with non-tribal assets to offset the value of the tribal property.[98]

Some states contend that where the non-Indian spouse somehow acquires an interest in the tribal property due to improvements caused by marital efforts, the tribal member spouse should award the non-Indian spouse offsetting assets to compensate for the inability of the court to distribute the tribal property.[99] In one instance, a state court determined that a home built on tribal land could be personal rather than real property.[100] As a result, the court considered the market value of the improvements in devising an equitable distribution, as the improvements could not be severed absent tribal consent, and therefore could not be given directly to the other spouse.[101]

One method state courts have employed to limit protection of Native American property is to assert that there is no federal preemption preventing state courts from reimbursing non-Indian spouses with other property from the marriage.[102] Granting the non-Indian spouse non-tribal property in lieu of the tribal property is the court's way of trying to make an equitable division by

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Wellman, 852 P.2d 559, 563 (Mont. 1993)).

96. *See, e.g., id.*

97. Trust property is derived from a membership/birthright, and not from any marital effort. Separate property, such as a gift or inheritance, similarly involves no marital effort. Because the value of separate property does not factor into equitable distribution and because trust property is substantively analogous to separate property, the value of trust property similarly should be excluded from such determinations.

98. *E.g.*, Sheppard v. Sheppard, 655 P.2d 895, 899-900 (Idaho 1982).

99. 1 JUDITH S. CRITTENDEN & CHARLES P. KINDREGAN, ALABAMA FAMILY LAW § 7:5 (2010), *available at* Westlaw, ALPRAC-FAM § 7:5.

100. Jacobs v. Jacobs, 405 N.W.2d 668, 669 (Wis. Ct. App. 1987).

101. *Id.* The court determined that the location of the property in a divorce is irrelevant, treating a divorce involving one tribal member the same as a divorce involving no tribal members. *Id.* at 670. Although the court in this case did not limit its ruling that courts should treat improvements as personal property to cases where both parties are Indians, one should not that both parties were enrolled tribal members and that the tribe granted the land in question to the wife for "use and occupancy." *Id.* at 669. The court may have decided that this classification of improvements as personal property was fair because the property would stay with a member of the tribe regardless of which party received it in the divorce.

102. *See* Fisher v. Fisher, 656 P.2d 129, 132 (Idaho 1982).

considering the value of the property in its determination, despite that it lacked the authority to make a distribution thereof.

Despite the abridgement of Indian property rights in some ways, courts may protect them in others, such as by finding that clearly expressed intent to convert tribal property into martial property through a legal document does not affect the ownership of the land.[103] The same courts, however, simultaneously may functionally limit those property rights by considering the relative worth of the property to determine the future income of the parties.[104] Nevertheless, when determining the value of the property in martial dissolution, the courts must (despite that they often do not) consider the limitations that the federal government places on the trust property's use and future alienation, making it worth substantially less than comparable property without restrictions.[105]

Despite that such actions are prohibited by the antiquated tribal divorce statutes, courts have fashioned these elusive methods of property classification, distribution, and valuation to circumvent the statutory prohibitions against adjudicating tribal property and interests therein.

2. Division of the Property as if it Did Not Come from Tribal Sources

Courts do more than merely adjudicate interests with respect to tribal trust property. For example, one court determined that where personal property is purchased with tribal resources, the court may order a sale of the property and a division of its proceeds.[106] Restrictions on real property arise in state courts where the tribal property is in trust or subject to restrictions on alienation by the federal government.[107] Personal property purchased with tribal resources, however, does not carry the same explicit restrictions as trust property, and

103. Landauer v. Landauer, 975 P.2d 577, 580-81 (Wash. Ct. App. 1999).

104. *Id.* at 583.

105. *Id.* The transfer restrictions placed on trust land greatly reduce its worth. Courts that consider trust land in property distribution but fail to consider these transfer restrictions in valuation place a substantial burden on the tribal party. *See* Angelique EagleWoman, *Tribal Nations and Tribalist Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 819-20 (2010) ("Land as the basis of capital asset creation is of primary importance to the foundation of economic prosperity in the nineteenth and twentieth century. Trust land is inalienable and cannot be sold, taxed, mortgaged, or used for collateral. However, trust-land restrictions effectively limit a tribe's revenue base and limit the ability for either a tribe or an individual to utilize the primary asset – land and resources derived from the land. These restrictions on federal trust land have had several negative economic impacts on Tribal Nations and individual Native Americans.").

106. *Fisher*, 656 P.2d at 131.

107. *Id.*

courts therefore sometimes erroneously order the property sold or make determinations of its ownership.[108]

One state court found that per-capita income awarded to tribal members because of their tribal status is marital income if received during the pendency of the marriage.[109] Even a tribal code declaring per-capita payments the separate property of a specific tribal member was insufficient to prevent the court from declaring the payments as marital income and subsequently dividing them between the former spouses.[110] For the court, that the per-capita funds distributed to the wife from the tribe were due to a birthright and not the effort of either spouse during the marriage was irrelevant.[111]

Such outcomes are harmful because they remove tribal assets from tribal members, and could potentially even compel non-Indians to marry Indians solely for their per-capita distributions, which in some cases are extraordinarily high in value.[112] Moreover, despite that the purpose in dividing the per-capita payments is to effect an equitable distribution, their division actually leads to an *inequitable* distribution, affording assets to the non-Indian partner that involve no marital effort.

3. Refusal to Adjudicate Any Portion of the Interest if it Is Tribal

Conversely, other states are less enthusiastic to make determinations regarding the ownership of tribal property. Due to the inability of state courts to adjudicate title to tribal lands held in trust by the federal government,[113] courts conclude that they are similarly unable to determine rights related to any tribal property.[114] To these courts, even simple valuation of tribal property for the purpose of determining the economic standing of the parties is outside their jurisdiction.[115] The position in these jurisdictions doubtless better respects the rights of tribal parties and the nature of trust property; the problem lies not in the present outcome, but in the inconsistency among the courts occasioned by the ambiguous and antiquated Indian divorce statutes.

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108. *Id.*

109. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006).

110. *Id.* at 369-70.

111. For an explanation of why this characterization is egregiously misguided, see *supra* note 97 and accompanying text.

112. *E.g.*, *Zander*, 720 N.W.2d at 369 (noting that "as a member of the Mdewakanton Community, wife 'receives monthly per capita payments of approximately $84,000.00'").

113. *See* Ducheneaux v. Sec'y of Interior, 837 F.2d 340, 342-43 (8th Cir. 1988).

114. *In re* Marriage of Wellman, 852 P.2d 559, 563 (Mont. 1993).

115. *Id.*

An advocate of this position, the Montana courts do not assume jurisdiction to adjudicate trust property matters "in any way whatsoever."[116] The Supreme Court of Montana in one case even denied the district court's request for a tribal property appraisal to determine its value for the purpose of making an equitable distribution of the marital property.[117] If the only assets the parties to the marriage have are tribal property, a state court in Montana may not have jurisdiction to determine *any* property division.[118] Montana does not even allow its courts to value leases of trust land held by one of the parties.[119]

Some courts thus conclude that the equitable way to handle the property of the tribal member spouse is to completely disregard it, perhaps because it is unfair to consider the value of relatively inalienable property when determining distributions. This is a more favorable standpoint than other courts have taken, and better reflects the idea that state courts should not be able to adjudicate interests in Indian property. By completely disregarding the value of improvements, trust land, leases, per-capita distributions, and other property that derives from tribal assets, the courts recognize the "separate" character of interests in tribal property that should be protected because of the unique way in which they are acquired.

4. Public Law 280 States

Public Law 280[120] may be the impetus for some of the differences between the various state courts' treatment of jurisdiction over tribal property matters in divorce. Through Public Law 280, Congress allowed state governments the option to assume civil adjudicatory jurisdiction over tribes and their members, and a few states in fact chose to assume such jurisdiction.[121]

Minnesota and Wisconsin, for example, assumed jurisdiction over civil matters "between Indians or to which Indians are parties which arise in the areas of Indian country."[122] After assuming such jurisdiction, these courts freely (though nonetheless erroneously)[123] adjudicated tribal property matters in divorce.[124] Alternatively, Montana, a state that seems more reluctant to

116. *E.g.*, Sheppard v. Sheppard, 655 P.2d 895, 921 (Idaho 1982) (Bistline, J., dissenting).

117. Smith v. McKeon, 946 P.2d 117 (Mont. 1997).

118. *E.g.*, *id.* at 118.

119. *E.g.*, *In re* Marriage of Baker, 234 P.3d 70, 75 (Mont. 2010). Despite that one party to the marriage received benefits from the lease, she did not hold the underlying title. *Id.* at 76.

120. 28 U.S.C. § 1360 (2006).

121. *Id.*

122. *Id.* § 1360(a).

123. *See supra* notes 38-39 and accompanying text.

124. A Minnesota court divided per-capita distributions of one spouse between both spouses

adjudicate matters of tribal property,[125] did not assume jurisdiction for civil causes of action in Indian Country through Public Law 280.[126] Nevertheless, there are outlier states, such as Washington, that did not adopt Public Law 280 but still treat tribal property in divorce similarly to those states that have assumed jurisdiction over civil causes of action.[127]

IV. Suggested Approaches

A. Tribal Property Defined

The title of 25 U.S.C. § 181, "Rights of white men marrying Indian women; tribal property," prohibits the "white man" marrying the "Indian woman" from acquiring any "tribal property, privilege, or interest."[128] Nowhere does it define, however, what those interests might be. In the statute, Congress addresses the treatment of tribal property, but fails fully to define "tribal property" and its parameters. State courts therefore must blindly interpret Congress's intent in statutes protecting "tribal property."

With little direction, courts have determined that tribal property includes only that property in which the tribe as an entity, as opposed to its individual members, retains an interest.[129] Tribal property is defined as that which is owned by the tribe and is not an individual right.[130] It is a right to use but not transfer the property, based on membership in the specific tribe.[131] If state courts continue to interpret "tribal property" through the same narrow lens that the courts currently use, tribal property will receive little judicial protection, and the protections implemented by Congress to secure tribal property upon divorce will remain ineffective.

Property generated by the tribe (such as revenue from gaming or other economic ventures) that it chooses to distribute to its members is not

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because they were deemed "income and therefore [] marital property subject to division upon dissolution." Zander v. Zander, 720 N.W.2d 360, 370 (2006). In Wisconsin, a court determined that improvements made on tribal property were personal property and thus subject to division by a state court. Jacobs v. Jacobs, 405 N.W.2d 668, 669 (1987).

125. *See supra* notes 113-19 and accompanying text.

126. *See* 28 U.S.C. § 1360(a).

127. Washington has considered the value of trust property when dividing the property of the parties in divorce. Landauer v. Landauer, 975 P.2d 577, 584 (1999).

128. 25 U.S.C. § 181 (2006).

129. *See* COHEN, *supra* note 1, at 966.

130. 42 C.J.S. *Indians* § 36 (2010).

131. *Id.*

necessarily protected under the current definition of "tribal property."[132] Moreover, property previously allotted to a tribal member and now held in fee simple is not fully protected under 25 U.S.C. § 181 because it does not fall under the common definition of "tribal property," and the statute provides no definition of its own.[133] Under the canons of construction, courts must read statutes and treaties dealing with Indians in the light most favorable to the Indians and in the way the Indians themselves would have interpreted them.[134] Doubts or ambiguities in the language of the treaties and statutes affecting Indians "are to be resolved in favor of" the Indians.[135] Accordingly, such a narrow reading of "tribal property" is in direct conflict with one of the most basic precepts of federal Indian law.

Congress also provides no definition in 25 U.S.C. § 181 for what exactly are the "privileges" and "interests" that the members of the tribes receive on account of their tribal membership, but that their spouses may not acquire.[136] If read in light of the canons of construction and interpreted as the Indians would have interpreted it at the time it was written,[137] "privileges" and "interests" would probably mean anything received on account of tribal membership. Congress definitively should provide examples of what qualifies as "tribal property." It should include all the privileges that attend tribal membership, and should preclude their non-Indian spouses from acquiring rights therein upon divorce.

Public Law 280 states that state courts do not have the authority to "authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe" when the property at issue is subject to restrictions by the federal government.[138] The statute also prohibits states from adjudicating "the ownership or right to possession of such property or any interest therein . . . in probate proceedings or otherwise."[139] It is clear from the language of this statute that Congress intended states to have no authority over trust lands. The language obstructing the states from determining "any interest therein"[140]

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132. COHEN, *supra* note 1, at 966.

133. *See supra* notes 128-29 and accompanying text; 25 U.S.C. § 181.

134. David M. Blurton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 42-43 (1999).

135. *Id.* at 42.

136. 25 U.S.C. § 181.

137. *See supra* notes 134-35 and accompanying text.

138. 28 U.S.C. § 1360(b) (2006).

139. *Id.*

140. *Id.*

implies that the federal government intended to prevent the states from even considering Indian trust property. If the state considers the value of the tribal property in determining an equitable distribution, that consideration alone could be perceived as distributing tribal property.

Though indirect, considering and determining the value of tribal property could cause courts to offset that value by giving the other spouse substitutionary property. Such an action does not directly grant an interest in the tribal property, but perhaps affords the non-Indian spouse the equivalent value. At bottom, the tribal member is in economically the same position as if the court had affirmatively distributed the tribal property. If courts always consider the value of the property and subsequently offset that property, it could leave the "owner" of the tribal property in a much more dire financial situation than the non-Indian ex-spouse. The tribal member is unable to sell his or her tribal property to fulfill a court's demand to offset the tribal property with other assets. Where the tribal property is the tribal member's only asset, how might he or she compensate the non-Indian ex-spouse if the tribal property is considered in equitable distribution? Moreover, funds necessary for the upkeep of the tribal property may be granted to the non-Indian spouse as offsetting assets, rendering proper maintenance impracticable. Whenever courts consider the value of trust property or property with restrictions on alienation, they should be especially cognizant to take all such restrictions into consideration, thus noting that the tribal lands are worth significantly less than similar parcels with no restrictions.[141]

Courts do not always apply the canons of construction to treaties and statutes affecting Native Americans, but they are especially useful with older statutes and treaties.[142] Treaties and statutes are to be interpreted liberally in favor of the Indians due to past unequal bargaining power between the United States and the tribes, and because Indians may not then have fully appreciated the implications of the government's actions.[143] The statutes governing the distribution of tribal property in divorce were written in the nineteenth century.[144] Despite the mandates of the canons of construction, state courts do not read 25 U.S.C. § 181 in the light most favorable to the Indians. If they did, the courts' definition of "tribal property" would be more broad and inclusive. The statute was originally written to keep "white men" from marrying "Indian

141. Landauer v. Landauer, 975 P.2d 577, 583-84 (Wash. Ct. App. 1999).

142. *See generally* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) (using canons of construction to interpret the Pueblo Lands Act of 1924).

143. *See* CANBY, JR., *supra* note 20, at 122.

144. 25 U.S.C. §§ 181-182 (2006) (codified in 1888).

women" solely for their property.[145] Yet, because state courts narrowly read the words "tribal property," and because of the statute's race-based limitations, it is a very real possibility that what Congress endeavored to prevent in the late 1800s occurs today in a different form and is overlooked by the courts. Also, the statute referring to "white men" marrying "Indian women" does not confine itself to "tribal property," but also discusses "privileges" that accompany tribal membership[146] – language either ignored or severely misinterpreted by the courts today.

If the statutes are interpreted as the Indians would have understood them at the time they were written, one would suppose that the Indians probably would have understood "privileges" to mean anything afforded to the tribal member on account of his or her tribal membership. Some tribes distribute significant amounts of revenue from casinos and other enterprises to their members per capita.[147] If state courts take those distributions from the tribe and declare them non-tribal property and thus income subject to distribution, the non-Indian spouse might receive a value equivalent to half of the distributions received during the time the parties were married,[148] in addition to possibly receiving the value of half of any actual income accrued thereon.[149] It is highly unlikely that Congress envisioned Native American casinos when writing the statute protecting the property rights of Indian women, but it similarly seems improbable that it intended money from the tribe to end up in the hands of a non-Indian due to a divorce proceeding conducted in state court.

Moreover, by narrowly reading the statute only to protect "tribal property," courts disregard the subsequent language in the statute that mandates that the "white man" not "acquire any right[,] . . . privilege, or interest [] to which any member of such tribe is entitled."[150] Read in a light favorable to the Indians – or even in light of the plain meaning of the text – the modern courts' interpretation and application of the divorce statutes is erroneous. Property held by an individual tribal member, such as money received from the tribe from per-capita distributions, is a privilege to which members of the tribe are

145. *See id.* § 181.

146. *Id.*

147. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006) (stating that the tribe distributed $84,000 monthly to the members of the tribe from the revenue of the gambling institutions).

148. Courts have wide discretion to make distributions that they think are equitable. *See supra* Part II.C.

149. *See supra* note 97 and accompanying text.

150. 25 U.S.C. § 181.

entitled.[151] Allowing courts to reclassify those distributions merely as income of the individual and thus to distribute the funds at divorce goes against the language of the statute by granting a non-Indian privileges associated with tribal membership. Not only are per-capita distributions from the tribe a privilege of membership, but it is usually left to the tribal government, within certain federal parameters,[152] to determine how and whether to distribute the profits among its members.[153] If the funds come directly from the tribe and the tribe is the authority that determines the distribution of the funds, it follows that the tribe has an interest in the property, even if no longer a monetary one.

Current distributions to tribal members usually are not subject to any type of restriction once in the individual's possession.[154] The lack of federal or tribal regulation of the funds after receipt does not negate the interest of the tribe or even the federal government. The governments have an interest in ensuring that the funds are not subsequently acquired in a wrongful manner by a non-Indian simply because he was fortunate enough to marry an Indian receiving tribal distributions in the form of funds that the state courts will erroneously call income.

Tribes have an interest in the financial stability of their members, as well as in their members' ability to contribute to the community and to society. When the money the tribe distributes to its members easily is acquired in divorce, it circumvents the interest of the tribe in allocating money or property to its members on a per-capita basis. For example, within certain parameters, the Indian Gaming Regulatory Act allows the tribes to determine their own methods for the use and distribution of the funds to tribal members.[155] If tribes contemplated that half of the per-capita gaming distributions for the length of a marriage could be allocated to a non-Indian, it follows that the tribes logically would place more up-front restrictions on the distributions made to their members.

Moreover, there is a statute that prohibits outside creditors from foreclosing upon the money that a tribal member receives "from the sale or lease of allotments."[156] It seems counterintuitive that Congress would go to such

151. *See Zander*, 720 N.W.2d at 369; Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 324, 326 (2010).

152. COHEN, *supra* note 1, at 1058 n.225 (citing 25 U.S.C. § 2710 (2006); 25 C.F.R. §§ 522.4(b), 522.6(b) (2011)).

153. *Id.* at 1058.

154. *Id.*

155. Painter-Thorne, *supra* note 151, at 326.

156. COHEN, *supra* note 1, at 1060 (citing 25 U.S.C. § 410 (2006)).

lengths to prevent creditors from reaching money from the sale of allotments, but would be amenable to non-Indian ex-spouses acquiring money from distributions or a portion of the proceeds from the sale or lease of tribal property.

Congress passed several statutes dealing with protection of Native American property.[157] The statutes may not all protect the same types of property,[158] but it is apparent that there is a general desire for the preservation of tribal property. There is a definite limit on states' ability to determine ownership of tribal property with restrictions on alienation,[159] but that by no means implies that only trust property subject to explicit federal restrictions is to be protected.

To ensure that its intent to protect tribal property is effectuated, Congress should define tribal property in the context of marriage and divorce proceedings involving tribal members to include more property than just that subject to federal restrictions or in which the tribe has an interest. Tribal property, especially in the context of dissolution of marriage, should include per-capita distributions. The definition of tribal property should encompass real property owned in fee simple by tribal members that originally was held in trust, or property that was purchased in whole or in part with funds from the tribe.

To fully protect the property of Native Americans from being acquired or divided in divorce, Congress must not only rewrite the statute addressing marriage to a tribal member, but also must include a comprehensive definition of "tribal property," the ownership of which may not then be adjudicated by state courts. In expanding the definition of "tribal property," Congress must make explicit that tribal property does not encompass any property owned by any tribal member to avoid being overinclusive. Instead, "tribal property" must be related to the tribe in some way, whether by its location on the reservation, former status as trust land, or the origination of funds with which the property was purchased. Expanding the definition of "tribal property" to include "privileges" and "interests" of membership should help courts to consider the purpose behind the statutes – protecting the privileges and interests that attend tribal membership.

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157. *See generally* 25 U.S.C. §§ 181-182, 194 (2006); 28 U.S.C. § 1360 (2006).

158. *Compare* 25 U.S.C. § 181 ("[A]ny right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled."), *with* 28 U.S.C. § 1360(b) ("[H]eld in trust by the United States or subject to a restriction against alienation imposed by the United States.").

159. 28 U.S.C. § 1360(b).

B. Treatment of Property from a Tribe Within a Divorce

The first section of Public Law 280 in effect provides that state courts do not have jurisdiction over certain tribal civil matters unless the state in question has assumed jurisdiction under the statute.[160] But the federal statutory language has not prevented some state courts from determining that non-Indians have certain monetary interests in tribal property, and subsequently awarding those non-Indian ex-spouses other property in lieu of the tribal property.[161] The absence of a statute directly addressing how state courts should treat tribal property division in divorce creates confusion that causes the various courts to adopt inconsistent approaches.[162] The disagreement among state courts on how to adjudicate tribal property matters is in need of resolution, preferably through a federal statute that addresses the panoply of potential problems that state courts face in tribal property division upon divorce. Ideally, problems involving trust property should be resolved by tribal courts (where they exist), promoting uniformity among the property rights of the specific tribes.

The lack of statutory authority explicitly restricting jurisdiction over tribal property not held in trust or subject to federal restrictions allows state courts to determine tribal property matters in divorces involving other tribal resources. Accordingly, the determination of whether per-capita distributions to tribal members constitute marital income,[163] rather than simply dividends from separate property, may at first blush seem within the courts' legal parameters. Although 28 U.S.C. § 1360(b) does not remove jurisdiction from state courts for tribal property not classified as trust or restricted property, 25 U.S.C. § 181 restricts a "white man" from "acquir[ing] any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled."[164] Viewing the statutes together with an emphasis on the "privilege" language of 25 U.S.C. § 181, state courts should not be able to make even the small determination that tribal distribution funds may be offset or split with the non-Indian spouse in a divorce action. The statutes read together suggest that Congress intended tribal property to stay with tribal members, and that those

160. *See* 28 U.S.C. § 1360(a).

161. *E.g.*, Fisher v. Fisher, 656 P.2d 129, 132 (Idaho 1982); Jacobs v. Jacobs, 405 N.W.2d 668, 669 (Wis. Ct. App. 1987).

162. *See* Part III.B.

163. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006).

164. 25 U.S.C. § 181.

marrying into a tribal family should not thereupon be able to take the tribe's property.

If the federal government is interested in protecting tribal property, Congress should write a new, comprehensive statute to govern tribal property division upon divorce. A new statute would solve the problems that attend the uncertain parameters of state courts in dividing property where one party is a tribal member in possession of tribal property. The prevalence of divorce in today's society heightens the need for a more felicitous statute to protect the tribal property rights of tribal members divorcing in state courts.

The new statute for tribal property division should include the more inclusive language of 25 U.S.C. § 181 that bars a non-Indian from "acquir[ing] any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled."[165] Congress should use this language instead of the more restrictive language in 28 U.S.C. § 1360(b), which states that state courts lack jurisdiction to determine "the ownership or right to possession of such property or any interest therein."[166] The less inclusive language of 28 U.S.C. § 1360(b) may create a diminished ability to protect tribal property not held in trust or subject to restrictions. The more inclusive language of 25 U.S.C. § 181 is more likely to protect interests in tribal personal property that perhaps are more prevalent today with the increase in tribal-owned businesses.

1. Classification of Property for a Divorce Proceeding

Tribal property, such as per-capita distributions, is given to tribal members because of a birthright/membership right. The members receive the property because they pass the membership requirements of the respective tribe,[167] and not because of the effort put forth by one of the spouses during the marriage.[168] Accordingly, it makes sense that the government and the tribes would seek to protect the tribal property of tribal members in divorce proceedings. It is possible that a non-Indian could marry a tribal member in hopes of acquiring some interest in tribal property. The cases may be rare, but one reported

165. *Id.*

166. 28 U.S.C. § 1360(b).

167. *See* Painter-Thorne, *supra* note 151, at 318-19, 324, 326.

168. "Equitable distribution classifies as marital any property produced by the efforts of either of the marital partners." Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 150 (1997). Because no marital effort is involved in per-capita distributions, they should be classified as separate property, and thus not subject to distribution.

divorce case involving an Indian and a non-Indian included monthly per-capita payments from the tribe of $84,000.[169]

During marriage, if the tribal member spouse wants to share her tribal property with her non-Indian spouse, she may do so,[170] but such sharing does not give her ex-spouse an interest in the property. With the potential for such large per-capita distributions, one easily could imagine a situation where a non-Indian marries a tribal member to take advantage of her monthly distributions. Later, when the non-Indian tires of the marriage, he files for divorce in state court to avoid the application of any tribal laws that may prevent him from receiving one-half of the distributions received by the Indian spouse over the course of the marriage.

Courts should treat tribal property similar to separate property in an ordinary divorce action. Property acquired solely by one spouse is separate property. The acquisition may have occurred prior to marriage, but could also include property attained through gift or inheritance during the marriage.[171] Trust property, the most protected of the types of Indian property, generally descends from one member of the family to others,[172] and is therefore akin to "separate" inheritance.

Jurisdictions differ in the precise treatment of different property in dissolution-of-marriage cases. The jurisdiction could be an all-property or a dual-classification jurisdiction.[173] In an all-property jurisdiction, courts have authority over all property, regardless of when it was acquired, but nonetheless considering the source of the property and the date acquired.[174] In a dual-classification jurisdiction, the court classifies the property as either marital or separate before determining how to divide the assets in the divorce.[175] Courts should clearly treat tribal property (per-capita payments, tribal leases, trust property, etc.) exclusively as separate property. Tribal property is analogous to separate property because it reaches the member through means similar to an inheritance or gift – the same ways in which separate property can be acquired.[176]

Interest/income earned due to an increase in the value of separate property is also separate property, even if the interest/income is earned over the course

169. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006).
170. *See* Painter-Thorne, *supra* note 151, at 317.
171. TURNER, *supra* note 57, § 8:7.
172. *See* Landauer v. Landauer, 975 P.2d 577, 579 (Wash. Ct. App. 1999).
173. TURNER, *supra* note 57, § 8:7.
174. *Id.*
175. *Id.*
176. *Id.*

of the marriage.[177] The parties may commingle the property to such a degree that the separate property can no longer be traced back to its original source and must therefore be classified as marital property.[178] Per-capita payments from the tribe's business revenue are similar to interest/income because the payments flow from property held before the marriage (through birthright/tribal membership). Accordingly, the per-capita distributions should not be treated as marital income subject to division by the courts, unless there appears to be a deliberate commingling, the burden of proof for which should rest on the non-Indian ex-spouse. The presumption by some courts that all property of the spouses is marital unless otherwise proven[179] should not apply to Indians divorcing in state court because the presumption may cause undue hardship on the Indian, who must then trace the property to prove its separate quality.

Courts should perhaps take it one step further than they do with separate property and not even consider the value of the tribal property in determining an equitable distribution. Congress has shown a strong interest in protecting the property of Native Americans,[180] and that interest would be better protected if the property were simply disregarded by the courts in the dissolution of marriage. If the state courts are allowed to consider tribal property when making an equitable distribution of assets, their unfamiliarity with valuing tribal assets could cause them to inflate the distribution to the non-Indian, not to mention that such consideration ignores the source of the property as functionally "separate." Congress should clearly specify that property coming from a tribe is separate property not to be considered in equitable distribution. State court judges with little to no experience dealing with tribal property then will make consistent and straightforward determinations on account of clearly defined guidelines.

All courts consider the origin of the property in divorce cases because of the notion that marriage is an economic partnership, and property acquired during the marriage thus should be divided fairly between the former spouses.[181] Courts also recognize, however, that "[t]he policy behind equitable distribution does not support sharing of property acquired outside the marriage."[182] Classifying property as "separate" in a traditional divorce allows for an

177. AM. JUR. *Proof of Facts* 3d 705 § 14 (1993).
178. *Id.* § 14.5.
179. *Id.* § 13.
180. *See generally* 25 U.S.C. §§ 181-82, 194 (2006).
181. TURNER, *supra* note 57, § 8:7.
182. *Id.*

unequal but perhaps more equitable distribution of property. This is because the court does not "count" the separate property, and the marital estate is divided without regard to that property.[183] Expressly classifying tribal property as separate and creating an affirmative duty for the courts to disregard its acquisition time would put it in a category all its own, making judges less likely to confuse the interest (or lack thereof) of the non-Indian in that property when dissolving the marriage. Jurisdictions frequently allow unequal property distributions when it includes property procured by one party prior to the inception of the marriage.[184] Moreover, courts often give unequal property to spouses in a divorce action where the separate property includes a gift or inheritance to one of the spouses.[185] Because property afforded to tribal members on account of their membership is analogous to separate property, the courts should disregard such property when fashioning an equitable distribution in divorce.

2. Income

Congress should clarify that tribal property, such as per-capita payments, is not income of the tribal member spouse because there is no marital effort expended in relation to the payments.[186] Marital property includes income from the labor of either spouse earned during the marriage.[187] If the appreciation in value results from the effort of the spouse, the payments thus could be considered marital income.[188] Alternatively, states may classify property as separate if it appreciates in value during the pendency of the marriage where neither spouse expends effort to stimulate the appreciation in value.[189] Per-capita payments from the tribes involve no marital effort and therefore should be classified as separate property. They are analogous to gifts or inheritances (which themselves are classified as "separate") because tribal members receive them due to a birthright or membership status rather than through effort. Per-capita payments are akin to dividends from stock or interest from a trust, subject to the market and external factors for calculation

183. *Id.*
184. *Id.*
185. *Id.*
186. *Contra* I.R.C. § 61 (2006) (listing, for tax purposes, the computation of gross income to include royalties, dividends, interest, and income from trusts, among others).
187. Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1631 (2008).
188. UNIF. MARITAL PROPERTY ACT § 14(b), 9A U.L.A. 141 (1983).
189. *See id.*

of the amount received: they are not subject in any way to actions of the spouses.[190]

Payments from tribes to members because of tribal business revenues should fall under the language of 25 U.S.C. § 181 as an interest in tribal property. Accordingly, the courts should determine that non-Indian spouses are unable to acquire any interest in that property. In some ways, a non-Indian still may actually have more property protections than state courts are allowing tribal members for their per-capita distributions. An ordinary couple divorcing in state court need not, in most cases, sacrifice their separate property, such as royalties or dividends from interests owned prior to the marriage, to the other party in the divorce.[191] Some state courts, on the other hand, force tribal members to give their non-Indian ex-spouses half of their per-capita distributions received by the tribal member over the course of the marriage,[192] despite that the distributions began before the marriage and are an incident of tribal membership. To ensure that Indians are not placed at a comparative disadvantage, Congress should clarify that per-capita distributions are separate property, even if received by the party during the pendency of the marriage, and should be entirely disregarded by the courts in property division.

3. Trust Property

One state supreme court found 25 U.S.C. § 181 inapplicable to trust property because it is not, technically speaking, "tribal property," as it belongs to an individual in trust, rather than to the tribe.[193] Not only does this holding blatantly mischaracterize the nature of trust land, but it also removes from the definition of "tribal property" the very type of property that one would most intuitively believe to qualify as such. Such judicial flagrancy could be avoided with more explicit statutory provisions, and Congress should be clear that trust property is tribal property.

Courts should apply 25 U.S.C. § 181 to individual trust property, despite that state courts currently may not always apply the statute. The Native

190. Some states treat appreciation in value of separate property as non-marital property, even if the increase in value occurs during the pendency of the marriage. This applies to several different types of property, including stocks, because the increase in value is not attributable to the effort of the spouses. Emily Osborn, Comment, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 929.

191. *Id.* § 4(g), 9A U.L.A. 116-17.

192. Zander v. Zander, 720 N.W.2d 360, 369 (Minn. Ct. App. 2006).

193. Sheppard v. Sheppard, 655 P.2d 895, 904-05 (Idaho 1982). The same court then determined that property purchased with tribal funds is not tribal property, and thus falls under the jurisdiction of the state court for purposes of property distribution upon divorce. *Id.* at 905.

American, because of his tribal status, holds trust property,[194] and his tribe has an affirmative interest therein. Trust land is a privilege "to which any member of such tribe is entitled,"[195] and state courts should recognize that privilege as an interest falling under the protection of 25 U.S.C. § 181.

If, in the case of property purchased with tribal funds but not held in trust, the couple is able to compensate the tribe for its contribution with marital assets, the tribe presumably would no longer retain an interest in the property. Alternatively, if the property is bought with tribal funds and the tribe is not reimbursed, the state court should leave any adjudication of the rights of that property to the tribal court because the tribe clearly retains an interest in any property in which it has invested its funds.

a) Trust Property – Investments by Non-Indian Spouses

Non-tribal property owned by Indians can be converted into trust property with the approval of the Secretary of the Interior.[196] The land-into-trust statute allows the Secretary, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands."[197] Once these lands are acquired, title vests in the federal government as trustee, with the tribes or their members retaining beneficial enjoyment.[198]

A variety of factors may compel a tribal member to request that his or her private land be placed into trust, but the most commonsense reasons include ensuring that the land stays with the tribe through successive generations, as well as the obvious economic benefits that flow from the tax-exempt status of trust lands.[199] Once an individual tribal member's lands are placed into trust, the lands become subject to all of the restrictions that attend trust status, including inalienability.[200]

Under a theory akin to assumption of the risk, a non-tribal spouse who consents to have marital property placed into trust should be unable to claim an interest in the lands upon divorce. The decision to place land into trust necessitates that the parties weigh the relative risks and benefits, making the decision to do so a considered one, which should effectively prevent the non-tribal spouse from legitimately claiming that he was unaware that his individual interest would be swallowed by the tribal interest.

194. *See* COHEN, *supra* note 1, at 1068.
195. 25 U.S.C. § 181 (2006).
196. 25 U.S.C. § 465 (2006).
197. *Id.*
198. *Id.*
199. *See id.* ("[S]uch lands or rights shall be exempt from State and local taxation.").
200. *See id.*

Where the land is purchased primarily – or even entirely – with the funds of the non-tribal spouse, it is presumably more difficult for a judge to disregard the interest of the non-tribal spouse in the tribal land because part of the property was purchased either from the tribe or the government with non-tribal funds. The language of the divorce statute, however, is clear that a non-Indian cannot acquire an interest in that tribal property,[201] which indicates that even if the funds derive from the non-tribal spouse, he should retain no interest.

A spouse using separate or marital funds to purchase Indian trust property with restrictions on alienation should be aware of that fact. If the non-tribal spouse voluntarily invests his money into tribal property that he knows he cannot "own" because of government restrictions, why should he, upon divorce, be able to claim an interest and receive part of its value? Moreover, the burden of proof in such an instance falls upon the non-Indian claiming an interest because of statutory protections put in place by Congress for the benefit of the Indians.[202] If the non-Indian truly believed he owned a piece of the tribal property, his only means of recovery should be through the Secretary of Interior, who must approve all transfers of trust property.[203] The state courts should be afforded no discretion to adjudicate rights in trust property.

b) Improvements Made to Tribal Land

Courts could apply the same theory to improvements made on tribal property as mentioned above for investments in tribal land. Improvements to tribal land include a variety of things, such as building a barn or a house that increases the value of the tribal land. Immovable improvements to the land are as much a part of the land as the soil upon which they rest.[204] State courts thus do not have the right to adjudicate the interests in those improvements because they are part of the property.[205] Along with improvements to the property, the non-Indian also may have made improvements to the land through effort, making it more valuable. Any types of improvements due to non-Indian spouses create difficulties for courts trying to divide marital estates in a divorce. Courts have handled improvements inconsistently, evidencing the need for clear guidance from Congress.[206]

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201. 28 U.S.C. § 1360(b) (2006).

202. *See* 25 U.S.C. § 194 (2006).

203. 25 U.S.C. § 392 (2006).

204. *See* L. S. Tellier, *Sprinkler System as Fixture,* 19 A.L.R.2d 1300, at *1.

205. *See* 28 U.S.C. § 1360(b).

206. *E.g.*, Fisher v. Fisher, 656 P.2d 129, 132 (Idaho 1982) (allowing reimbursement to nonmember spouse for what would have been his equitable interest in the property or improvements made thereto in lieu of an actual interest in the property, which would not be

Improvements made upon the land by a non-Indian with no right, privilege, or interest in the property could be treated the same as improvements made to lease property. If the courts consider the interest of the non-Indian as a leasehold interest, one can argue that they have no interest in the improvements at all. In leased property, where the tenant voluntarily makes improvements to the land and there is no specific agreement between the parties that the landlord must reimburse the tenant, the tenant forfeits the value of the improvements.[207] In cases where a non-Indian spouse makes improvements to tribal property, the improvements presumably are made with the knowledge that the land does not belong to him, and any improvements thus would be left behind absent a prior arrangement. The tribal member spouse is similar to the landlord. Any voluntary improvements made by her non-Indian spouse would be akin to improvements made by a tenant on leased property, and thus not subject to reimbursement by the courts.

Courts should be able to exercise discretion when making equitable distributions of property in divorce, even when one party is a tribal member in possession of tribal property. Because divorces between Indians and non-Indians regularly take place in state court, the judges should be able to use principles with which they are familiar when making determinations. Where the courts ordinarily do so, they should consider the marital efforts of each spouse during the pendency of the marriage, as well as the respective and relevant needs, to make a fair distribution of the marital estate. But anytime Indian property arises within the context of the case, the judges should exercise the utmost care to ensure that they do not exceed the bounds of their authority.[208] Courts should also be cognizant that property a tribal member spouse receives from the tribe is akin to an inheritance or a gift, and thus should be classified as separate in states that recognize separate property. Tribal leases, trust property, per-capita payments, and any other property received by the tribal member from the tribe should be handled by the courts with caution to ensure the interests are not mischaracterized to the detriment of the tribal member.

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allowed under state court jurisdiction); Jacobs v. Jacobs, 405 N.W. 2d 668, 669 (Wis. Ct. App. 1987) (allowing a home and improvements made thereon to be subject to property division upon divorce, despite that tribal permission was needed to remove the improvement).

207. 52A C.J.S. *Landlord and Tenant* § 870 (2010).

208. *See, e.g.*, Landauer v. Landauer, 975 P.2d 577, 579 (Wash. Ct. App. 1999).

C. Gender and Race

Giving 25 U.S.C. § 181 its literal meaning would mean that only "white men" marrying "Indian women" are restricted from acquiring any interest in tribal property and privileges.[209] No statute exists with the inverse rule, restricting white (or any non-tribal) women from receiving some interest or right to any tribal property held or owned by their tribal husbands. The literal meaning of the statute, with its identification of a certain race and gender that cannot take under the statute, could cause a plethora of problems. Indians, at the time the statutes were written, probably would have read the "white man" language simply to mean a person that was not a member of their tribe.

To protect the property rights of tribal members, Congress should replace 25 U.S.C. § 181 with a more modern statute that reflects the contemporary needs of Native Americans and their spouses during divorce. Of the relevant statutes, 25 U.S.C. § 181 most closely relates to dissolution-of-marriage cases by directly addressing a non-Indian marrying an Indian. Congress should rewrite the statute, however, to eliminate the language that limits its scope to the "white man." Native Americans, like all races, presumably could intermarry among any race or nationality. Naming the "white man" gives the statute less perceived force in protecting property because it is incomprehensive and underinclusive. Someone reading the statute today may erroneously assume that it no longer applies because of its antiquated and narrow wording. Similarly, courts considering the statute may ignore its spirit in any case where the parties are not a "white man" and an "Indian woman," despite that its underlying principles remain exceptionally relevant.

Moreover, the statute should be rewritten to eliminate the gender bias. Currently, the statute restricts the "white man" from acquiring the property of the "Indian woman" after their marriage, but fails to contemplate a non-Indian woman marrying an Indian man.[210] Women in today's culture hold property on equal footing with men, and the statute therefore should reflect this gender equality by similarly protecting the tribal property rights of male tribal members.

Another statute in need of revision is 25 U.S.C. § 194, which places the burden of proof on the "white person" in property disputes.[211] A new statute for tribal property disputes should reflect the policy behind 25 U.S.C. § 194 – that Congress wished to protect tribal property from acquisition by non-

209. 25 U.S.C. § 181 (2006).
210. *Id.*
211. 25 U.S.C. § 194.

Indians. The new statute should clarify that it is not limited by race or gender, encompassing all modern possibilities for tribal marriage and divorce.

D. Proposed Statute

Considering all of the problems discussed above, the following is a humble attempt to draft a comprehensive statute to govern tribal property distribution upon divorce.

Dissolution of Marriage Between Tribal Member and Non-Indian or Nonmember

(a) In a dissolution of marriage involving a tribal member, state courts do not have the authority or jurisdiction to adjudicate any rights, interests, or privileges in any tribal property.

(b) The state courts may not consider the value of tribal property for purposes of equitable distribution.

(c) Within the meaning of this section, tribal property includes any right that flows from membership in the tribe, including but not limited to: trust land and improvements made thereon, per-capita distributions and property purchased therefrom, and tribal leases and income derived therefrom.

V. Conclusion

In divorces involving a tribal member, difficulties arise where state courts may grant a divorce, but may not fully distribute the property between the parties. In that circumstance, another court must adjudicate the rights of the parties in conjunction with any tribal property. State courts, however, may be unsympathetic to tribal members with large holdings acquired during the pendency of the marriage who do not wish to share that wealth with the non-Indian spouse.

Several other difficulties may arise in cases involving tribal members and their property, including how to classify property, income, and improvements. To protect the rights of the Indians, Congress specifically should address these issues to simplify any future disputes over the law in the area of property division in divorce among couples with tribal property. If Congress does not provide guidance to state courts dividing the property of tribal members, state courts will continue to assume unauthorized jurisdiction, and will erroneously divide property received by the tribal member exclusively from tribal sources.

Congress should write a new statute to govern tribal property division upon divorce. The statute should clearly delineate the property that Congress intends to protect so that the state courts are not left to determine what qualifies as "tribal property." Tribal property should encompass real and

personal property received by tribal members based on membership status. Courts should be extremely careful when considering improvements and investments made to tribal property with marital funds, remembering that restricted property generally is less valuable. Congress should also ensure that the new statute applies equally, regardless of race and gender.

The multiple statutes that apply to protecting tribal property demonstrate that Congress is concerned with the issue. With modern-day marriages dissolving at unprecedented rates, Congress must ensure that its statutes protect tribal property in the event of divorce. To afford comprehensive protection, Congress must update its statutes.