



Focus on Indian Law

by Ann E. Tweedy

Tribes, Same-Sex Marriage, and *Obergefell v. Hodges*

Now that the U.S. Supreme Court has confirmed that the

Constitution protects the right of same-sex couples to marry under the due process and equal protection clauses of the 14th Amendment, Indian tribes are suddenly the only governmental entities in the United States that have the option not to allow same-sex couples to marry within their jurisdictions. After having been largely left out of conversations about the right to marry, tribes, and particularly those tribes with Defense of Marriage Acts (DOMAs), have overnight become the last frontiers in the fight for marriage equality. And yet, outside of the Indian law bar, little is known about the relationship of federal law to tribal law and about the diverse approaches that tribes take to marriage equality. This article summarizes tribal approaches to same-sex marriage and ends with recommendations to tribal courts examining challenges to tribal DOMAs.

Summary of Tribal Approaches to Marriage

In fact, tribes take widely divergent approaches to marriage in general and to same-sex marriage in particular. Many tribes do not issue marriage certificates at all.¹ These tribes are unlikely to have laws relating to same-sex marriage, although at least one, the Iipay Nation of Santa Ysabel, passed a resolution of governmental policy supporting same-sex marriage.² Located near San Diego, California, the Iipay Nation enacted its resolution, before same-sex marriage became legal in California, as a result of the Supreme Court's decision in *Hollingsworth v. Perry*.³ The Nation therefore was choosing to participate in the ongoing debate about same-sex marriage in a very visible way.

Tribes that do have laws governing marriages may explicitly allow same-sex marriage, have laws that tie the requirements for marriage to those under the law of the state in which the reservation is located, have laws that are ambiguous as to same-sex marriage, or explicitly disallow same-sex marriage. Besides three tribes that have tied their marriage laws to state law (and which now allow same-sex marriage because states must), at least 13 tribes are known to allow same-sex marriages under tribal law.⁴ Beginning with Coquille

in 2008, most of these tribes changed their laws either to explicitly permit same-sex marriage or to make their laws gender-neutral. The tribes that affirmatively passed marriage equality include: Coquille, Colville, Keweenaw Bay, Little Traverse, Mashantucket Pequot, Oneida Tribe of Wisconsin, Pokagon, Puyallup, Siletz, Suquamish, and Tlingit and Haida.⁵ Leech Lake (in Minnesota) and Cheyenne and Arapaho (in Oklahoma) allow same-sex marriage under pre-existing, gender-neutral marriage laws.⁶

Interestingly, most of these laws (and interpretations) were the products of advocacy by lesbian, gay, bisexual, and transgender (LGBT) tribal members who either wanted to marry their partners under tribal law or who simply wanted their tribes to have equitable marriage laws.⁷ In some cases, such as those of Little Traverse and Mashantucket Pequot, the new marriage laws replaced tribal DOMAs. In others, such as Colville, the new law replaced a tribal law that was ambiguous as to whether same-sex marriage was permitted. The fact that advocacy has made such a difference is cause for hope for citizens of tribes that do have DOMAs, especially for those who are members of smaller tribes (given that most tribes that have passed marriage equality have been on the smaller side). Tribal members like Kitzen Branting of Coquille, Heather Purser of Suquamish, Danny Perez (né Hossler) of Pokagon, and Denise Petoskey of Little Traverse, among many others, have definitively shown that advocacy and organizing for marriage equality can be very effective in Indian country.

The second approach—tying tribal law on marriage to state law—has been espoused by at least three tribes: the Sault Ste. Marie tribe on Michigan's Upper Peninsula and the Eastern Shoshone and Northern Arapaho tribes on the Wind River Reservation in Wyoming. This approach may appear to have at least the virtue of simplicity—tribal law and state law mirror one another, and all marriages performed under tribal law will presumably be recognized in the state. In fact, in Sault Ste. Marie's case, when same-sex marriage was of uncertain legality in Michigan due to court decisions and stays on favorable rulings, tribal law, too, became uncertain.⁸ As a result of

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Wyoming's decision not to defend its marriage ban after a federal district court invalidated it,⁹ the Eastern Shoshone and Northern Arapaho tribes' path to marriage equality was more straightforward. The tribes began issuing marriage licenses to same-sex couples once same-sex marriage became legal in Wyoming.¹⁰

In addition to tribes that legally allow same-sex marriage, there are tribes with marriage laws that are ambiguous as to same-sex marriage, including tribes with largely gender-neutral laws and tribes with sex-specific marriage laws that don't necessarily evince an intent to preclude same-sex marriage. Additionally, some tribes in both of those groups have laws similar to state laws providing for recognition of all marriages performed elsewhere that are valid in the jurisdiction in which they were celebrated.¹¹ All of these laws are ambiguous in that it is not known how any of these tribes would respond to a request by a same-sex couple to either marry under tribal law or to receive recognition for their same-sex marriage performed elsewhere.

However, there are at least a dozen tribes that have their own DOMAs—laws specifically designed to preclude same-sex marriage. These tribes—including Blue Lake Rancheria, Cherokee Nation, Chickasaw Nation, Navajo, Oneida Indian Nation (in New York state), Osage, and several others—have chosen to send a direct message to tribal citizens and their partners that their relationships are not legitimate in the eyes of their tribes. The big question after *Obergefell v. Hodges*¹² is what the case means for such tribes. The short answer is that tribes are not bound as a matter of federal law to follow *Obergefell*, and so tribal responses are likely to vary widely by tribe. However, if faced with a tribal court challenge to a tribal DOMA, it does appear likely, at least if tribal approaches to other Indian Civil Rights Act (ICRA) claims are any guide, that many tribes would choose to follow *Obergefell* as persuasive authority.¹³ Nonetheless, whether tribal members will bring such cases at all is uncertain because, to date, my research has not uncovered any tribal member who has sued to invalidate a tribal DOMA, although Navajo citizens have expressed the intent to initiate such a lawsuit.¹⁴

Tribal Courts and Tribal DOMAs

Why are tribes not bound by *Obergefell*? The first part of the answer is that the provisions in the Bill of Rights bind states or the federal government—and sometimes both—but do not bind tribes. We know this from a Supreme Court case in the 1800s called *Talton v. Mayes*, but the principle has been reaffirmed repeatedly since then.¹⁵ Thus, tribes are not required to adhere to the 14th Amendment or the Fifth Amendment—the sources of equal protection and due process rights under the Constitution. The second part of the answer is that, although tribes are required to abide by a federal statute that contains equal protection and due process rights, namely the ICRA, tribes are empowered to interpret those rights according to their own cultures and traditions and need not follow the federal courts' interpretations of what those rights mean.

This is because ICRA reflects a compromise between protecting tribes' rights to self-determination and protecting the rights of individual tribal citizens and others who are subject to tribal jurisdiction. If tribes were required to interpret ICRA rights in the same manner federal courts interpret constitutional rights, this would have an assimilating effect on tribes. Many Indian cultures in the United States have been nearly destroyed in the past by federal policies aimed at assimilating Indians into mainstream, Western culture. Often these

efforts were stark and unapologetic, even genocidal, such as Capt. Richard H. Pratt's 1892 call, in the course of his advocacy of assimilative boarding schools, to "kill the Indian ... and save the man."¹⁶ ICRA is intended to moderate the imposition of a requirement that tribes protect certain individual rights with a recognition that tribes need to interpret these rights in a way that is consonant with their cultures and traditions. The potential assimilative force of ICRA is also held in check by the fact that the statute is only enforceable in federal court via a habeas corpus petition, a procedure for the most part available only in criminal cases.¹⁷

If faced with a lawsuit challenging a tribal DOMA under the ICRA, however, it appears that many tribes would apply *Obergefell* as persuasive authority and strike down the tribal DOMA. This is because many tribes do tend to rely on federal constitutional decisions to interpret the rights available under the ICRA (as well as tribal constitutional rights to equal protection and due process), especially in the absence of direct precedent and information on tribal culture and tradition with respect to a particular issue. Historical information about tribes' support for gender nonconformity and same-sex relationships is available for only a very few tribes.¹⁸ For the vast majority, there is little or no information available. If faced with a lack of information as to tribal culture and tradition, as most tribal courts would be, many would likely apply *Obergefell*. Also, given the dearth of tribal cases on same-sex marriage, there is likely to be a corresponding lack of tribal case law addressing related issues, such as sexual-orientation discrimination, that could provide precedent relevant to a DOMA challenge.

Nonetheless, some tribal courts may be reluctant to apply *Obergefell*. For instance, when same-sex marriage became legal in North Carolina as the result of two federal district court decisions applying *United States v. Windsor* (the predecessor to *Obergefell*), the Eastern Band of Cherokee's response was to enact a DOMA.¹⁹ There are compelling reasons that tribal courts should carefully scrutinize DOMAs, however, whether using the tools of federal or tribal law. One is that DOMA is a heteronormative construct designed to enshrine the traditional nuclear family as the building block of civilization and the singular path to social legitimacy. But tribes have been persecuted because of their perceived lack of adherence to such norms, including historical attacks on tribes for permitting plural marriages and promiscuity, for espousing gender roles that were seen as contrary to nature (such as women being farmers), and both currently and historically for being invested in the extended—rather than the nuclear—family.²⁰ In light of this continuing history of oppression, tribes should be wary of enforcing closely related norms on their own members. The DOMA, which is a law designed to broadcast the illegitimacy of a certain class of relationships and of those involved in such relationships, is a Western construct. As Joe Medicine Crow, a Crow elder, once explained, "We don't waste people like the white world does; everyone has their gift."²¹ More particularly, it appears that the Cherokee Nation's DOMA and Navajo's DOMA were adopted in response to developments at the state and federal levels, respectively, and thus largely out of a concern for intergovernmental relations.²²

Finally, lest there be any doubt, DOMAs cause real harm. As public health Professor Mark L. Hatzenbuehler and his colleagues have found, LGBT persons living in jurisdictions that have DOMAs have higher rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder; further, living in a highly homophobic

community takes 12 years on average off of an LGBT person's life.²³ Colonialism has already wrought immeasurable harms on tribal cultures. In this situation, tribes have the choice whether to import an oppressive colonial law with real potential to harm their own citizens into their communities.

Tribal courts that are presented with DOMA challenges under ICRA will have the difficult task of weighing tribal sovereignty against the health and individual rights of tribal citizens, with thorny questions thrown into the mix about how tribal a Western-style law becomes as a result of adoption by the tribal government. Each tribe must make this determination for itself. From the standpoint of individual justice, however, DOMAs have little to recommend them. ☉

Endnotes

¹See, e.g., Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage, Theory, Process, & Content*, 46 COLUM. HUM. RTS. L. REV. 104, 139 & n.208 (2015), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2377817.

²*Id.* at 125.

³133 S. Ct. 2652 (2013); see also Tweedy, *supra* note 1, at 125.

⁴Many reports cite a larger number of tribes that permit same-sex marriage. This appears to be because the articles erroneously view tribes that lack marriage laws but that express favorable sentiments toward same-sex marriage or are in states that allowed same-sex marriage (before the *Obergefell* decision) as authorizing same-sex marriage as a legal matter. See, e.g., "Same-sex marriage under United States tribal jurisdictions," Wikipedia.org. However, tribes that choose not to govern marriages should not be viewed as legally authorizing same-sex marriage.

⁵Tweedy, *supra* note 1, at 110-11; Oneida Code of Laws, ch. 71, §§ 71.3-1(d), 71.5-4(f); *Confederated Tribes of Siletz Indians Officially Recognize Same-Sex Marriage*, LINCOLN COUNTY DISPATCH (June 5, 2015); Dan Roblee, *KBIC legalizes tribally sanctioned same-sex marriage*, MiningJournal.net (June 10, 2015).

⁶See, e.g., Tweedy, *supra* note 1, at 122-24.

⁷*Id.* at 142.

⁸Sault Ste. Marie Tribe of Chippewa Indians Tribal Code ch. 31, § 31.104 (1995); see, e.g., Ann Tweedy, *Same-Sex Marriage Quandaries*, Turtle Talk Blog (March 28, 2014); see also *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *DeBoer v. Snyder*, No. 14-1341, Doc. 22-1 (6th Cir. Mar. 25, 2014); *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). It is not known whether the uncertainty of Sault Ste. Marie's laws had a practical effect on same-sex couples wishing to marry.

⁹Shoshone & Arapaho Law & Order Code tit. IX, § 9-5-2 (2015); *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).

¹⁰*Wind River Tribal Judge Presides Over First Same-Sex Marriage*, Indianz.com (Nov. 17, 2014), www.indianz.com/News/2014/015673.asp.

¹¹Tweedy, *supra* note 1, at 128-131, 140-42.

¹²___ S. Ct. ___, 2015 WL 2473451 (June 26, 2015).

¹³See Tweedy, *supra* note 1, at 146-153 (examining the closely related question of tribal courts' likely application of *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013)); see also Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. COLO. L. REV. 59, 77-80

(2013); Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV., 392, 415-16 (2010).

¹⁴Tweedy, *supra* note 1, at 109, 135 & n.182; John Wright, Navajo LGBT Advocates Consider Lawsuit, Bill to Legalize Gay Marriage, Towelroad.com (Aug. 1, 2015) The one known tribal court case involves a same-sex Cherokee couple who married before Cherokee Nation had a DOMA. Tweedy, *supra* note 1, at 109 (citing 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)).

¹⁵*Talton v. Mayes*, 163 U.S. 376, 384-85 (1896); Tweedy, *supra* note 1, at 147.

¹⁶See, e.g., Troy A. Eid & Carrie Covington Doyle, *Separate But Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. COLO. L. REV. 1067, 1078 & n.50 (2010).

¹⁷Tweedy, *supra* note 1, at 147-153 (discussing ICRA, 25 U.S.C. §§1301-04 (2014)).

¹⁸Tweedy, *supra* note 1, at 150-54.

¹⁹Eastern Band of Cherokee Indians, Ordinance No. 381 (Dec. 11, 2014); see Jonathan Drew, *Tribes Dig In on Same-Sex Union: Some Forbid It on Reservations*, BOSTON GLOBE (April 7, 2015).

²⁰Tweedy, *supra* note 1, at 154-58.

²¹Wilhelm Murg, *Momentum Mounts to Again Embrace Two Spirits*, INDIAN COUNTRY TODAY (June 6, 2011).

²²Tweedy, *supra* note 1, at 134-38, 143.

²³Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, [vol. 100 no. 3] AM. J. PUB. HEALTH 452, 452 (Mar. 2010); Mark L. Hatzenbuehler et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOC. SCI. & MED. 33 (2014).

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