A crowd gathers at the U.S. Supreme Court after its ruling legalizing same-sex marriage in all fifty states was delivered on June 26, 2015.

SAME-SEX MARRIAGE IN INDIAN COUNTRY AFTER *WINDSOR & OBERGEFELL*

By Mike McBride III

The controversy over gay, lesbian, bisexual and transgender rights continues to reverberate among state legislatures, state and federal courts. Recently, North Carolina enacted a law that eliminated local protections for gay and transgender people and restricted which bathrooms transgender people can use. The Georgia legislature passed a "religious freedom" bill that LGBT advocates say would have sanctioned discrimination against members of that community in the name of religious liberty. Under an intense backlash and commercial pressure from major companies like Disney, Dow Chemical, Coke, Intel, Paypal and Yelp, Georgia's Governor McCrory vowed to veto the bill. But what about Indian country?

The United States has 568 federally-recognized Indian tribal governments and Alaska native groups, and tribal casinos within the United States number in the hundreds. Indian gaming amounts to a $29 billion industry almost equal to all non-Indian gaming in the U.S. and this fact alone should make any major issue in Indian Country of interest to the gaming community.

While Indian tribes are mentioned in the U.S. Constitution only three times, the Supreme Court recognizes them as "domestic-dependent nations" that exercise their own sovereignty and self-determined rule. The recent gay marriage decisions raise questions about LGBT equality in Indian country and, in fact, same sex marriage has caused tribal divisions across the country.

On June 26, 2015, a divided United States Supreme Court issued a landmark opinion on same-sex marriage. In *Obergefell v. Hodges*[i], the Court found that marriage is a fundamental right, and therefore, prohibiting same-sex couples from marriage violates the Fourteenth Amendment due process and equal protection rights of the U.S. Constitution. Under the holding, married same-sex couples now enjoy the same legal rights and benefits as married heterosexual couples and will be recognized on official documents.

The *Obergefell* decision came two short years after *United States v. Windsor*[ii], where the Court held Section 3 of the federal Defense Of Marriage Act ("DOMA") unconstitutional. Congress

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enacted the federal DOMA in 1996,[iii] and Section 3 of that law established that individuals in same-sex marriages were ineligible for benefits from federal programs such as the Social Security pension system and some tax allowances if their partners died. In *Windsor*, the Supreme Court struck down Section 3 of the federal DOMA.[iv]

Neither *Windsor* nor *Obergefell* extend to sovereign Indian tribes. The Indian Commerce clause of the Constitution grants Congress, not the President or the Supreme Court, control over Indian Country. Unless Congress enacts legislation explicitly imposing equal marriage rights on Indian Nations, tribes are left to create and enforce their own laws governing marriage. Congressional action is unlikely.[v]

So, why should Indian Country care about *Windsor* and *Obergefell*? Indian Country is deeply divided over same-sex marriage. At least 12 federally recognized Indian tribes, including one[vi] in Oklahoma, are currently known to allow same-sex marriage. On the flip side, at least 10 tribes have enacted DOMAs, three[vii] of which are located in Oklahoma. Many of the remaining tribes have marriage laws with sex-specific language that may or may not have been intended to bar same-sex marriage. To date, tribal members have not challenged the issue as fervently as non-tribal citizens, but this may change in light of the U.S. Supreme Court's recent opinions on same-sex marriage.

For those tribes that have enacted DOMAs, tribal members may challenge the constitutionality of the DOMA under their tribes' constitutions. Although the tribal courts are not bound to follow the *Windsor* decision, the Supreme Court cases will undoubtedly be seen as strong persuasive authority among tribal court judges considering or evaluating existing tribal marriage laws. For those tribes without DOMAs, tribal members may challenge a same-sex marriage ban under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. § 1302(a)(8), Equal Protection clause or a similar provision in the tribe's constitution. The 14th Amendment and the ICRA Equal Protection clause are not coequals. However, since the U.S. Supreme Court found that the federal Equal Protection clause prohibits marriage discrimination, similar arguments can be made that ICRA Equal Protection likely does too. And, like *Windsor*, the tribal courts may find *Obergefell* to be strong persuasive authority if tasked to rule on same-sex marriage under tribal law. ❄

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[i] 135 S.Ct. 2584, 2604-2605 (2015).
[ii] 133 S.Ct. 2765, 2695-2696 (2013).
[iii] 28 U.S.C. § 1738C (allowing states and Indian tribes to refuse to recognize same-sex marriages performed under the laws of other states); 1 U.S.C. § 7 (providing a federal definition of marriage as between a man and a woman), invalidated by *Windsor*, 133 S. Ct. at 2696.
[iv] *Windsor*, 133 S. Ct. at 2696.
[v] In *United States v. Quiver*, the Supreme Court noted a well-established Congressional policy to "permit the personal and domestic relations of the Indians with each other to be regulated ... according to their tribal customs and laws." 241 U.S. 602, 604 (1916).
[vi] The Cheyenne & Arapaho Tribes.
[vii] Cherokee Nation; Chickasaw Nation; and Muscogee (Creek) Nation.