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Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture

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COMMENT

CHANGED EMBRACES, CHANGES EMBRACED? RENOUNCING THE HETEROSEXIST MAJORITY IN FAVOR OF A RETURN TO TRADITIONAL TWO-SPIRIT CULTURE

*Trista Wilson**

I. Introduction

> *When you are born into this world, you reach for either a bow and quiver, which is blessed and protected by the Sun, our Grandfather, or you reach for an awl and sewing bag, which is blessed by the Moon, our Grandmother. From that time on you will follow that vision and be blessed.*
>
> — Traditional Native American belief and teaching[1]

Same-sex marriage rights are at the forefront of the American social and political consciousness, from the hotly contested California Proposition 8 decision[2] (along with a host of other states prohibiting same-sex marriage)[3] to

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1. WILL ROSCOE, LIVING THE SPIRIT 105 (1st ed. 1988) [hereinafter ROSCOE, LIVING].

2. In May of 2008, the California Supreme Court ruled in *In re Marriage Cases* that restrictions limiting marriages only to those between a man and a woman are unconstitutional under the California constitution. *See generally In re* Marriage Cases, 183 P.3d 384 (2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5, *as recognized in* Strauss v. Horton, 46 Cal. 4th 364 (Cal. 2009) (CAL. CONST. art. 1, § 7.5, *invalidated by* Perry v. Brown, 2012 WL 372713 (9th Cir. 2012)). This decision allowed same-sex couples in California legally to marry between June 2008 to November 2008. *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last updated July 6, 2011). On November 4, 2008, California voters passed Proposition 8, a measure that would again ban gay marriages in California, by a small majority of 52%. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, http://www.nytimes.com/2008/11/06/us/politics/06marriage.html?_r=1. In 2009, the California Supreme Court ruled that California voters have the right to overturn the court's *In re Marriage Cases* decision through the Proposition 8 measure. Maura Dolan, *California High Court Upholds Prop. 8*, L.A. TIMES, May 27, 2009, http://articles.latimes.com/2009/may/27/local/me-gay-marriage27. In February 2012, the Ninth Circuit

a public rhetoric that touts "family values" and moral destitution as defense to bigotry. Lesbian, gay, bisexual, and transgender (LGBT) individuals are waging a battle to promote, protect, and preserve their own relationships and families. While a handful of states have enacted legislation to protect the rights of citizens regardless of sexuality,[4] the conflict continues. This debate is taking place not only at the state and federal levels, but also in the tribal government setting.[5] The controversy over same-sex marriage in Indian Country features arguments mirroring those in the state and federal courts, with tribal governments often taking steps analogous to the actions undertaken at the state and federal levels.[6]

The same-sex marriage debate in the Native American community – both on reservations and outside Indian Country – is reverberating. A group of Native Americans in the LGBT community formed a movement to return to a traditional Native American view (once prevalent in many tribes)[7] regarding LGBT tribal members – a return to a culture that embraced and welcomed individuals collectively known as "two-spirits."[8] The term is used broadly to refer to LGBT Native Americans, but two-spirit culture has a complex and

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declared that Proposition 8 violates the Fourteenth Amendment's Equal Protection Clause and is therefore unconstitutional. Nancy Goldstein, *Proposition 8 is Unconstitutional. What Is Next for the Anti-Gay Law?*, NATION, Feb. 7, 2012, http://www.thenation.com/article/166127/proposition-8-unconstitutional-whats-next-anti-gay-law. The narrow ruling, however, will only be applicable in California. Maura Dolan, *Prop 8: Gay-Marriage Ban Unconstitutional, Court Rules*, L.A. TIMES, Feb. 7, 2012, http://latimesblogs.latimes.com/ lanow/2012/02/gay-marriage-prop-8s-ban-ruled-unconstitutional.html.

3. Forty-four states restrict marriages to those between one man and one woman. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16430 (last updated Feb. 24, 2012) [hereinafter *Defining Marriage*]. Twenty-eight of those states have constitutional amendments banning same-sex marriage. *Id.*

4. Only six states (Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and New York) and the District of Columbia currently recognize same-sex marriages. *Id.* Maryland, Washington, and California have legislation or judicial intervention recognizing same-sex marriages, but such recognition has yet to achieve legal effect. *Id.*

5. *See* discussion *infra* Part V.B.

6. *See* discussion *infra* Part V.C.

7. *See infra* Part IV.A.

8. Many Native American cultures recognized a "third gender" that could embody the characteristics of both males and females. These individuals are now generally referred to as "two-spirits." While the term "two-spirit" is not strictly used historically to define homosexuals within the Native American community (as the specific terminology varied from tribe to tribe), two-spirit is the most commonly used phrase, embraced by historians and modern LGBT Native Americans alike. *See infra* notes 63-64, 110-18 and accompanying text.

colorful history, with many tribes historically engaged in the two-spirit tradition.[9] Indeed, for many tribes, permitting same-sex marriage while promoting equal rights for their LGBT members would be a return to a traditional Native American practice that accepted all individuals, including those who do not fit neatly into modern conceptions of gender norms.[10]

Throughout the country, the continuing attack on the LGBT community takes its toll on two-spirits both inside and outside Indian Country.[11] Rebuking the view of the heterosexist majority would promote a more unified tribal culture and society, and avoid mere regurgitation of state-based marriage-policy arguments. Moreover, permitting same-sex marriage within Indian Country would also allow LGBT Native Americans to participate more actively and openly in traditional tribal life.

As distinct sovereigns with the power to depart from prejudicial state precedent,[12] this comment endorses tribal government recognition of same-sex marriage, with the goals of returning to traditional tribal values, promoting inclusivity within the tribal community, and suppressing negative social and political influences from outside Indian Country. Part II gives a brief overview of tribal sovereignty, focusing specifically on policy-making in regards to marriage and family. Part III focuses on the constitutional implications of restrictions on same-sex marriage. It begins with a discussion of the Full Faith and Credit Clause, followed by an assessment of federal law

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9. *See infra* Part IV.A.

10. *See infra* Part IV.A. Historically, two-spirit members were valued and often revered within their communities, and "[a] fluid, transitive conception of gender was thus integral to traditional Native American societies . . . ." Andrew Gilden, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 MICH. J. GENDER & L. 237, 246 (2007).

11. *See* BRIAN JOSEPH GILLEY, BECOMING TWO-SPIRIT: GAY IDENTITY AND SOCIAL ACCEPTANCE IN INDIAN COUNTRY 35, 53 (2006).

12. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1831), Chief Justice John Marshall defined Indian tribes' status within the American political structure. Marshall wrote, "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress." *Id.* at 561. In so characterizing the Cherokee Nation, Marshall defined tribes as distinct sovereigns, free from the reach of the surrounding states' laws. Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari Contra Adarand Constructors Inc., v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 AM. INDIAN L. REV. 275, 288 (2000-2001). With this in mind, tribes are able to enact laws and policies that differ from the surrounding states' laws. *See* Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 661 (2000).

and policy, specifically the Defense of Marriage Act (DOMA)[13] and its effect on tribal matters. Part III concludes with a review of the "mini-DOMA" legislation restricting same-sex marriage at the state and tribal levels. Next, Part IV examines the history of two-spirit individuals within tribal culture. It considers how Native American views toward two-spirit people have changed since European discovery of North America, as well as the resulting ostracism some young Native Americans feel from their tribal communities, despite their desire to be part of that community. By examining the recent social and political actions of tribes confronting the same-sex marriage issue, Part V first explores the current legal climate of same-sex marriage in Indian Country, and then considers why some tribes choose to allow or disallow marriage between people of the same sex, as well as the motivations behind those decisions. Last, Part VI discusses the value in permitting same-sex marriage among tribal members. It explores the importance of a more inclusive Native American community with respect to two-spirit members, promoting cohesiveness among tribes, as well as strength at both the social and political levels. This comment concludes in Part VII.

II. Tribal Sovereignty

Indian tribes are regarded as distinct sovereign nations,[14] thereby retaining the right to self-govern on account of their occupation of the land at the time of European discovery.[15] They are responsible for making their own laws regarding domestic policy, including, importantly, the power to perform marriages and grant divorces.[16] The tribes may create their own judicial systems and legislative bodies, write their own constitutions, and exercise jurisdiction over their members and lands.[17]

Tribes' sovereign right to self-govern is an inherent power – that is, it has not been delegated to the tribes by the federal government, but instead stems

13. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)).

14. *See supra* note 12. Although the tribes have attributes of sovereignty, the scope of their sovereign status is unlike that of other sovereign nations. For a discussion of the federally imposed limits on tribal sovereignty, see Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 427-35 (1999-2000).

15. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 205 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

16. *Id.* at 215.

17. *See id.* at 205.

from their pre-discovery presence.[18] Because of their inherent sovereignty, the tribes are not required to implement and enforce the laws of the states in which they are located.[19] Unless the tribes release sovereign rights through treaty with the federal government[20] or federal legislation revokes them,[21] the tribes retain their sovereign rights.[22]

In some instances, Native Americans in Indian Country are subject to both state and federal laws, limiting the tribes' right to self-govern.[23] But although the federal government withdrew some of the tribes' sovereign powers in the areas of civil and criminal jurisdiction,[24] laws pertaining to marriage and

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18. *Id.* at 206.

19. *Id.* at 207; *supra* note 12.

20. U.S. CONST. art. II, § 2, cl. 2 (giving the federal government the power to make treaties with the Indian Tribes). A modern cession of rights by treaty is more theoretical than practical, as the federal government ended its practice of treaty-making with the tribes in 1871. Eric Eisenstadt, Comment, *Fish Out of Water: Setting a Single Standard for Allocation of Treaty Resources*, 17 AM. INDIAN L. REV. 209, 209 (1992) ("[The treaty] era ended in 1871 when the Congress declared that no tribe would thereafter be recognized as capable of making treaties with the United States, although existing treaties would be honored."); Douglas B. Cubberley, Note, *Criminal Jurisdiction over Nonmember Indians: The Legal Void After* Duro v. Reina, 16 AM. INDIAN L. REV. 213, 223 & n.59 (1991) (noting that "[t] he treaty period ended by enactment of the Appropriations Act of March 3, 1871"). The Appropriations Act of March 3, 1871 states, in pertinent part, "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended 25 U.S.C. § 71 (2006)).

21. Congress has "plenary" power, which provides the federal government the authority to legislate in Indian Country. *E.g.*, COHEN, *supra* note 15, at 398.

22. Congress does have the power to infringe upon some aspects of tribal sovereignty, but the Supreme Court maintains that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." COHEN, *supra* note 15, at 206 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)) (internal quotation marks omitted). Congress has exercised its power to infringe upon tribal sovereignty on a number of occasions. For example, some federal laws and treaties have rescinded some of the tribes' sovereign power. *See, e.g.*, Indian Country Crimes Act, 18 U.S.C. § 1152 (2006); Major Crimes Act, 18 U.S.C. § 1153 (2006); Public Law 280, 18 U.S.C. § 1162 (2006). Because tribes and the government enter into treaties on a one-on-one basis, individual tribes may have relinquished rights through treaties that other tribes retained. In the modern era, however, tribes no longer enter into treaties with the federal government. *See supra* note 20.

23. COHEN, *supra* note 15, at 499.

24. *See id.* at 226, 232-33.

family matters remain exclusively within tribal jurisdiction.[25] Therefore, regardless of federal or state legislation restricting same-sex couples' right to marry, tribes are able to create and enforce their own laws regarding marriage and family inside Indian Country without interference.

III. Same-Sex Marriage and the Constitution

There have been various challenges to the constitutionality of same-sex marriage bans,[26] but the Supreme Court has yet to declare these restrictions unconstitutional.[27] Because states have the right to apply their own marriage laws and policies within their borders, they are not forced to recognize marriages performed legally in other jurisdictions, regardless of the marriages' validity in that forum.[28] Along with this ability to deny recognition to out-of-state same-sex marriages on choice of law and full faith and credit grounds, DOMA bolsters the states' ability to do so. DOMA denies federal recognition to same-sex marriages and includes additional language that gives the states explicit permission to ignore same-sex marriages performed in other jurisdictions.[29]

A. Choice of Law and the Full Faith and Credit Clause

In the 1930s, the Supreme Court mandated balancing states' interests in full faith and credit challenges.[30] The balancing approach has since been

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25. Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 54 (2006) (quoting COHEN, *supra* note 15, at 215) (internal quotation marks omitted) ("It remains settled black-letter law . . . that Indian tribes retain plenary and exclusive inherent authority over domestic relations among tribal members.").

26. *See generally* SUSAN GLUCK MEZEY, GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS 116-42 (2009).

27. Although Congress rejected a constitutional amendment that would limit marriages to those between a man and a woman, the Supreme Court has not yet ruled on the constitutionality of same-sex marriage bans. *See id.* at 110, 143; Emily Bazelon, *The Supreme Court's Painful Season*, N.Y. TIMES, Aug. 5, 2011, http://www.nytimes.com/2011/08/07/magazine/the-supreme-courts-painful-season.html?pagewanted=all.

28. *See infra* notes 34-38.

29. *See infra* notes 41-42 and accompanying text.

30. Worker's compensation statutes, which became prevalent during the 1930s, stimulated court involvement in full-faith-and-credit issues. Developments in the Law – The Law of Marriage and Family, *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2030 (2003) [hereinafter *Constitutional Constraints*]. Worker's compensation claims highlighted the problems that arise when an accident or claim arises in one forum under an employment contract created in another. *Id.* In these cases, the Supreme Court adopted the balancing approach, which "allowed the Court to

abandoned in favor of an approach that requires sufficient substantial contacts to determine which forum's law to apply.[31] This "eliminate[s] any practical distinction between [the] full-faith-and-credit doctrine and the choice-of-law doctrine that was developing simultaneously under the Due Process Clause."[32] The modern application of due process, first articulated in *Allstate Insurance Co. v. Hague*,[33] encompasses the full faith and credit doctrine, requiring a state to have significant contacts to apply its own laws to a transaction.[34] A state therefore is not bound to recognize a marriage performed in another state on full faith and credit grounds if there are significant contacts that would permit the state to apply its own laws and public policy. Instead, the state is bound only by restrictions based on "fundamental fairness imposed by the Fourteenth Amendment's requirement of Due Process."[35]

The Constitution's Full Faith and Credit Clause mandates that each state shall recognize the "public [a]cts, [r]ecords, and judicial [p]roceedings of every other [s]tate."[36] But full faith and credit in reality creates very few impediments to states establishing their own choice of law provisions.[37] So long as a state's law does not constitute a due process violation – that is, so long as there is "a significant contact . . . such that [a state's] choice of its law is neither arbitrary nor fundamentally unfair" – the state need not recognize within its borders same-sex marriages performed in other jurisdictions.[38]

B. The Defense of Marriage Act and Mini-DOMAs

In 1996, Congress enacted DOMA,[39] with devastating consequences to same-sex marriage. DOMA included a definitional provision and a choice of

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overturn forum states' application of their own law when it perceived that the foreign state had more substantial contacts with the litigation or weightier interests in its outcome." *Id.*

31. *Id.* at 2030-35.

32. *Id.* at 2030-31.

33. 449 U.S. 302 (1981).

34. *Id.* at 320; *see also Constitutional Constraints*, *supra* note 30, at 2033-34.

35. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 131 (2002).

36. U.S. CONST. art. IV, § 1.

37. KOPPELMAN, *supra* note 35, at 91-92.

38. *Id.* at 131 (alteration in original) (citation omitted). While there is a general presumption in favor of recognizing marriages valid in the jurisdiction where performed, an exception to the presumption exists – where the subject marriage violates the legitimate public policy of a forum, that forum need not recognize the marriage. *Id.* at 95.

39. *See generally* Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)).

law provision.[40] Section 3 defines marriage as a union between one man and one woman, limiting federal recognition to only heterosexual marriages.[41] DOMA's choice of law provision, found in section 2, states that:

> [n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe.[42]

Although a state need not recognize marriages performed in other jurisdictions if those marriages violate the state's public policy based on general choice of law grounds, this language allows states and Indian tribes to deny recognition to same-sex marriages validly performed in other states based on DOMA as well. As a result, although DOMA's choice of law provision may clarify existing law, it does nothing to change it.

DOMA's definitional provision, on the other hand, stripped away any possibility of federal recognition of same-sex marriages, denying same-sex spouses all federal benefits normally bestowed upon married couples, including filing of joint tax returns, federal health benefits, and family and medical leave.[43] As a result, regardless of a marriage's legality under applicable state law and despite any state-based benefits received therefrom, the federal government still denies any federal recognition to all marriages between individuals of the same gender.[44]

Following DOMA's passage, states began to enact state legislation mirroring the Act.[45] Some tribes followed suit, passing their own laws banning same-sex marriage and its recognition within the tribes' territory.[46] These state and tribal enactments are known as "mini-DOMA" laws.[47] Like DOMA, the state and tribal laws afford legal recognition only to marriages

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40. KOPPELMAN, *supra* note 35, at 127.

41. Pub. L. No. 104-199, § 3, 110 Stat. at 2419 (codified as amended at 1 U.S.C. § 7), *invalidated by* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Ma. 2010).

42. *Id.* § 2 (codified as amended at 28 U.S.C. § 1783C).

43. KOPPELMAN, *supra* note 35, at 127.

44. *See id.* at 122-23; 1 U.S.C. § 7.

45. Dominick Vetri, *The Gay Codes: Federal & State Laws Excluding Gay and Lesbian Families*, 41 WILLAMETTE L. REV. 881, 886-87 (2005).

46. *See infra* Part V.B.

47. Vetri, *supra* note 45, at 886-87.

between a man and a woman, and deny state or tribal benefits to members of same-sex partnerships.[48]

DOMA held steady for over a decade. But on February 23, 2011, President Barack Obama declared the legislation unconstitutional, stating that the United States Department of Justice would no longer defend it in court.[49] By July 2011, President Obama spoke in favor of the Respect for Marriage Act, a bill created to repeal DOMA and offer same-sex couples the same benefits and protections that are afforded to heterosexual couples,[50] remarking that DOMA is "unnecessary and unfair."[51] Despite these hopeful statements, DOMA remains in effect as of the date of this publication.[52]

IV. The History of Two-Spirit Culture

Historically, at least 155 Indian tribes embraced two-spirit individuals within their tribal communities. But two-spirit culture may have been even more widespread than current studies show.[53] While there is little to no information concerning a third gender in some Native American communities, this lack of direct evidence alone does not disprove that two-spirit culture existed within those tribes,[54] and documentation of a two-spirit tradition varies among tribes[55] for a variety of reasons.[56]

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48. *Id.* Although these mini-DOMAs deny recognition to any same-sex marriage in any state in which they are enacted, Indian tribes, because of their sovereign status, could still perform and recognize same-sex marriages within Indian Country, regardless of the laws of the surrounding state in which the tribes' lands are located. *See supra* Part II.

49. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all.

50. Colleen Curtis, *President Obama Supports the Respect for Marriage Act*, WHITE HOUSE BLOG (July 19, 2011, 6:43 PM EDT), http://www.whitehouse.gov/blog/2011/07/19/president-obama-supports-respect-marriage-act.

51. *Obama: Defense of Marriage Act Should Be Repealed*, HUFFINGTON POST (July 19, 2011, 02:48 PM), http://www.huffingtonpost.com/2011/07/19/obama-defense-of-marriage-gay-rights_n_903680.html (internal quotation marks omitted).

52. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)).

53. WILL ROSCOE, CHANGING ONES: THIRD AND FOURTH GENDERS IN NATIVE NORTH AMERICA 7 (1998) [hereinafter ROSCOE, CHANGING].

54. See Jeffery S. Jacobi, Note, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy*, 39 U. MICH. J.L. REFORM 823, 834-35 (2006).

55. *See, e.g.*, *id.* at 838-39 (stating that although there is no direct evidence that the Cherokee Tribe cultivated a two-spirit culture, there is nonetheless a belief that the Cherokee

Many Native American cultures historically recognized a "third gender" that was considered neither male nor female, and not confined to the "gender-binary, bodily-sex-equals-gender" belief that existed among European society at the time.[57] By the modern definition, third-gendered persons were not strictly heterosexual or homosexual.[58] These individuals often engaged in sexual encounters with both men and women,[59] and because they were considered to be of a third (or sometimes even a fourth) gender, they were not considered "homosexual" as the term is used today.[60] Though the third gender is not easily definable, historical evidence shows that these third-gendered individuals were well respected within their communities, and that their differences in gender or sexual orientation were communally accepted.[61] But like many other Native American practices, this trend changed with the arrival of European explorers and the concomitant Western influence.[62]

A. History of Two-Spirits in Tribal Communities

"Two-spirit" is the term generally used to refer to modern homosexual Native Americans and their third-gendered historical counterparts, but the precise terminology used to describe third-gendered individuals varies among tribes.[63] While in many tribal communities the "third-gender" often referred

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Tribe did indeed participate in the "two-spirit tradition," referring to two-spirit individuals as "*asegi*, meaning extraordinary").

56. *Id.* at 834-35.

57. GILLEY, *supra* note 11, at 8.

58. *Id.* at 12.

59. *Id.*

60. *See id.*

61. *See id.* at 13.

62. *See infra* Part IV.B; Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV.165, 166 (2000-2001) ("American Indian tribes and Alaskan and Hawaiian natives have long suffered under the cultural oppression of European and American societies. As a result many tribal traditions, cultures, and languages have disappeared from the North American continent and Hawaiian Islands."); Joel Brady, *"Land Is Itself a Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of* Bear Lodge, 25 AM. INDIAN L. REV. 153, 158 (2000) (noting "the deleterious long-term effects of the imposition of our legal, moral, and ethical tenets upon the Native American way of life").

63. For example, third-gendered persons are referred to as *heemaneh'* by the Cheyenne tribe, *nádleeh* by the Navajo, and *aya'kwa* by the Fox tribe. ROSCOE, LIVING, *supra* note 1, at 218-20. To avoid devoting a large portion of the text to the various terms used amongst the tribes, this comment will generally use the term "two-spirit" when referring both to historical and modern LGBT Native Americans. But when discussing a specific tribe, this comment will use the terminology originally employed by that tribe. Moreover, many academics use the European term introduced by the French, "berdache." *See* ROSCOE,

to male-bodied individuals, there were also individualized roles for female-bodied two-spirits.[64]

Almost all tribes had a sophisticated way of understanding sexuality and how it could shape an individual's identity.[65] Third-gendered individuals were usually identified as such by the tribal community when male children showed interest in traditional "women's work," or when female children showed interest in traditionally male activities.[66] Being of the third-gender "was less about an individual's sexuality and more about the ways their special qualities were incorporated into the social and religious life of their community."[67] Because they were not bound by the traditional roles of men and women, two-spirits filled a special niche within their tribal communities.[68] For example, in the Zuni Tribe, two-spirits, or *lhamana*, were considered to possess "the strongest character and [be] the most intelligent" members of the tribe.[69] Referring to the historic importance of two-spirits in tribal communities and the treatment of their modern day counterparts, a Crow tribal elder said, "We don't waste people the way white society does. Every person has their gift."[70]

Two-spirits often were believed to have special spiritual powers, and they played an important role in religious life.[71] Some tribes believed that "[t]he gender different were possessed of a special relationship with the Creator because they were seen as being able to bridge the personal and spiritual gap between men and women,"[72] and, as a result, they were "accepted and sometimes honored."[73]

CHANGING, *supra* note 53, at 17-18. Although "berdache" has long been used to describe third-gendered individuals, there is currently a movement to replace that term (which some Native Americans and scholars view as exclusively European) with terminology more specific to Native American culture, namely the term "two-spirit." *Id.*

64. ROSCOE, CHANGING, *supra* note 53, at 7. In some tribes, female two-spirits were referred to using the same terminology as used for their male counterparts, while in other tribes, female two-spirits had distinct names or were believed to be a "fourth-gender." *Id.*

65. GILLEY, *supra* note 11, at 12.

66. *See id.* at 8.

67. *Id.* at 11.

68. *Id.* at 8-12 (stating that the niche included, among other things, using their talents in sewing, hunting, and cooking to better society, bridging the spiritual gap between men and women, and directing spiritual ceremonies).

69. ROSCOE, LIVING, *supra* note 1, at 55 (citation omitted).

70. ROSCOE, CHANGING, *supra* note 53, at 4.

71. GILLEY, *supra* note 11, at 10-11.

72. *Id.*

73. Jacobi, *supra* note 54, at 835 (citation omitted).

Male-bodied two-spirits were considered to have superior talents in "sewing, potting, weaving, cooking, caring for children, and other kinds of women's work,"[74] and by not bearing the burdens of menstruation or child rearing, they were able to choose among various cultural and social activities to hone those skills.[75] In some tribes, such as the Navajo (which had taboos regarding food-preparation surrounding menstruation), male-bodied two-spirits were able to contribute in the preparation of ceremonial meals.[76]

The types of relationships into which two-spirits entered varied among the tribes. In some tribal communities, two-spirits were permitted to enter into long-term relationships or marriages with other tribal members to develop their own social bonds.[77] In these tribes, male two-spirits were considered "wives" and entered into long-term commitments, whereas in other tribes, two-spirits might have had a series of shorter relationships throughout their lives.[78] The long-term relationships were sometimes monogamous,[79] while other times, a man might have two-spirit "wives," along with traditional female wives.[80] Moreover, many tribal communities performed traditional weddings for two-spirits and also permitted them to adopt children.[81]

B. Western Influence on Two-Spirit Cultures

The arrival of European explorers had a palpable impact on Native American culture. European discoverers viewed homosexuality as evidence of Native Americans' moral inequity, and as a justification for the conquest of North America.[82] The Europeans were appalled by what they considered savage and sinful debauchery by the tribes.[83] Consequently, the Europeans imposed their own religion and social norms upon the tribes, resulting in

74. GILLEY, *supra* note 11, at 158.

75. *Id.* at 159.

76. *Id.* at 10.

77. ROSCOE, LIVING, *supra* note 1, at 55. Most third-gendered individuals had highly active sex lives, which led tribes to believe two-spirits were lucky in love and sex. *See* ROSCOE, CHANGING, *supra* note 53, at 9.

78. GILLEY, *supra* note 11, at 12.

79. *See, e.g.*, Jacobi, *supra* note 54, at 841-43 (discussing how the Zuni Tribe's two-spirits, or *lhamana*, entered into long-term, monogamous marriages).

80. *See* GILLEY, *supra* note 11, at 12 (stating that regardless of the amount of traditional female wives a male had in polygamous relationships, the male-bodied two-spirit wives played the same female roles within the household).

81. Jacobi, *supra* note 54, at 836.

82. GILLEY, *supra* note 11, at 13.

83. *See id.*

"religious condemnation and violence,"[84] as well as the demise of two-spirit aspects of traditional Native American culture.[85]

The imposition of European religious and cultural values upon the Native American population persisted for centuries. Reservations were used to "civilize" and "Christianize" Indian tribes.[86] The government appointed Indian agents to oversee reservations, with the overarching goal of encouraging the Native Americans to adopt non-Indian culture and ideals.[87] By the early 1880s, Christian missionaries and Indian agents were using the Religious Crimes Code "to aggressively attack Native sexual and marriage practices," and to pressure tribal communities to adopt the Euro-American ideals on family and sexuality.[88] Christian missionaries tried to eradicate the existence of any "third-gendered" individuals in Native American culture, forcing male-bodied two-spirits to don the dress and style of heterosexual males.[89]

"Little is known about the fate of gender diversity" and the practice of two-spirit culture between the time of European discovery and the publication of anthropological documents acknowledging two-spirit practice in the Native American community.[90] Native Americans likely responded to the "Euro-American condemnation of the gender different" by hiding that part of their culture.[91] The "acculturation and assimilation . . . dissuaded Native Americans from talking about two-spirits," and many tribes ceased (at least publicly) to embrace the different gender roles they once had.[92] As this trend continued, two-spirit culture became increasingly suppressed until, in many cases, it was altogether hidden or eliminated.[93]

V. Modern Tribal Views on Two-Spirit Individuals

There is a struggle between the modern attitude toward same-sex marriage and the two-spirit tradition within Indian culture, provoked perhaps by the

84. *Id.*

85. *See* Jacobi, *supra* note 54, at 834.

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

87. *Id.*

88. *See id.*; GILLEY, *supra* note 11, at 14.

89. GILLEY, *supra* note 11, at 14.

90. *See id.* at 13.

91. *Id.*

92. *See* Jacobi, *supra* note 54, at 835; GILLEY, *supra* note 11, at 13 (stating the Caucasian attitude was repugnant to the institution, which was "communicated to the Indians and made subsequent personality inquiry difficult," causing those bedraches to lead "repressed or disguised lives").

93. GILLEY, *supra* note 11, at 15.

"Christianization" of many Native Americans. In 2001, approximately 159,000,000 Americans claimed to follow Christianity in various denominations.[94] Furthermore, only 103,000 people self-identified as following a Native American religion,[95] despite that 4.1 million people defined themselves as American Indian or Alaska Native.[96] Though the difference in number between the individuals practicing Christianity and Native American religions does not easily match or account for the 4.1 million self-identified Native Americans, the staggering figures nonetheless illustrate the prevalence of Christianity throughout all communities and ethnicities, as well as the small percentage of self-identified Native Americans practicing Native American religion.

While some Native American Christians struggle with the contradictions between traditional tribal religion and Christianity,[97] many two-spirit individuals pinpoint the change in attitude toward third-gendered individuals within the Indian community to the time of "the wholesale acceptance of Christian values."[98] Modern two-spirits struggle to embrace their culture at a time when their own tribes are reluctant to embrace two-spirit aspects of their history.[99] They hear elderly tribal members speak about the past and "how realignment with the old ways would cure the ills of Indian people,"[100] while at the same time recognizing that other members of the Indian community do not wish to revive the old culture.[101] Despite the Christian leanings of some tribal members, others promote a rhetoric that rebukes both the station and situation of the Indian tribes today, the Europeans role in that plight, and their tribal peers' imposition of "Western value judgments" on homosexuals in the

94. Barry A. Kosmin, Egon Mayer & Ariela Keysar, *American Religious Identification Survey 2001*, GRADUATE CTR. CITY UNIV. N.Y., 12 (Dec. 19, 2001), http://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/ARIS/ARIS-PDF-version.pdf?ext=.pdf.

95. *Id.*

96. Stella U. Ogunwole, U.S. Census Bureau, *The American Indian and Alaska Native Population: 2000*, CENSUS 2000 BRIEF, Feb. 2002, at 1, *available at* http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf.

97. *See generally* JAMES TREAT, *Introduction: Native Christian Narrative Discourse, in* NATIVE AND CHRISTIAN 1-22 (James Treat ed., 1996) (discussing how many Native Americans struggle to find common ground between their tribal religion and Christianity, how there is not a complete dichotomy between followers of native religions and those who hold Christian viewpoints, and how many Native Americans are followers of both religions and at times struggle to reconcile the two).

98. GILLEY, *supra* note 11, at 58.

99. *See id.* at 57.

100. *Id.*

101. *Id.* at 58.

Native American community.[102] Because of the clash of European and Native American cultures, the two-spirit tradition has suffocated under the weight of the Christian majority.

But there is hope. Two-spirit organizations across the country are engaged in an effort to promote two-spirit culture, both inside and outside Indian Country. And although some tribes have legislated against same-sex marriage, others have affirmatively legislated in its favor. By exploring the socio-political climate of the surrounding states in which these enactments have occurred, it becomes clear that there is a correlation between the tribes' marriage policy choices and the religious and political leanings of the surrounding states in which the tribes are located.

A. Efforts to Promote Two-Spirit Culture

Because of the hostility many gay tribal members faced owing to their sexual-orientation, they often resorted to hiding their sexuality from their fellow tribal members, or were instead forced to live two different lives: one as a Native American and another as a gay American.[103] During the 1970s, the gay movement was at a fever pitch. But many homosexual Native Americans felt that they did not quite fit into the larger gay movement, which was mostly white.[104] At the same time, they also did not feel that they fit in within their tribal communities because of their homosexuality.[105] This feeling was "exacerbated by their knowledge that, historically, men who shared their differences were publicly inducted into Native societies, as well as given positions of prestige."[106] As a result, homosexual Native Americans viewed themselves as a double minority, racially within the gay movement and sexually within their tribes.[107]

Currently, there is a sociopolitical tug-of-war, with some tribal governments pulling to protect the rights of their same-sex couples, while

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102. *Id.* at 57-58.

103. *See id.* at 26-27. This struggle is not a new one and not one exclusive to Native Americans. Many homosexuals, regardless of their ethnicity or religion, lead double lives. *See* Katheleen R. Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1537 (1995) ("[T]he homosexual exists as a curiously split creature, one relegated to the privacy of a closet and yet required to traverse public spaces in order to live in the world; a creature not quite fully a citizen of the polis. . . . They must play different roles depending on the situation, lead dual lives, and constantly fear discovery.") (alteration in original) (internal quotation marks omitted).

104. GILLEY, *supra* note 11, at 26.

105. *Id.* at 27, 54.

106. *Id.* at 54.

107. *Id.*

others are pulling in the opposite direction by passing legislation banning same-sex marriage. The majority of tribes have yet to confront the gay marriage issue on a legislative level. But of the tribes that have addressed the gay marriage issue, the trend is to limit marriages to those between a man and woman.[108]

Despite this trend, which effectively denies the tradition of gender and sexual-orientation acceptance in Indian culture, many gay Native Americans have rallied to revive the traditional Indian view regarding two-spirits – that not all people fit precisely into either a male or female category.[109] During the 1990s, the LGBT Native American community began emphasizing their unique place within the gay community by focusing on the rich history of two-spirit culture and the value tribes traditionally placed on those individuals.[110] "Armed with the knowledge that gender-different persons historically were respected in their communities,"[111] the two-spirit community came together to create a group-based support system, where members were able to connect with other gay Native Americans facing the same struggle – the struggle to be both Indian and gay.[112] "Two-spirit" became a social identity for homosexual Native Americans that was all their own – they did not have to share it with the gay community or the heterosexual Indian community.[113] Currently, two-spirit organizations exist across the United States and are a place where two-spirits can go to "feel Indian," but without judgment from the heterosexist majority.[114]

Modern two-spirits focus strongly on their traditional tribal culture.[115] They work to promote and participate in traditional Native American culture, while campaigning to return to a time where gender and sexual-orientation differences were more greatly accepted within Indian Country.[116] Today's two-spirit individuals believe that "anti-homosexual attitudes only divide already fractured tribal communities and that the recognition of traditional values relating to two-spirits provides validation and 'a heritage to Indian

108. *See* discussion *infra* Part V.B.

109. GILLEY, *supra* note 11, at 29.

110. *Id.*

111. *Id.*

112. *Id.* at 34, 53.

113. Two-spirits are still a part of the greater gay community and participate in marches and awareness-raising activities. They use these opportunities as a forum to provide education on two-spirits and to recruit new members. *Id.* at 31.

114. *Id.* at 34.

115. *See id.* at 95-96.

116. *Id.*

gays.'"[117] Rather than abandon their Native American identity and simply join the greater gay-rights movement, two-spirits actively promote acceptance and understanding inside and outside the Indian community. Many no longer feel they must sacrifice one identity for the other.[118]

B. The Debate over Same-Sex Marriage in Indian County

The battle over same-sex marriage at the tribal level mirrors the battle waged at the state and federal levels. The two largest Native American tribes, the Cherokees and the Navajos,[119] both passed legislation prohibiting same-sex marriage.[120] Unfortunately, these two tribes are not alone. Four other tribes passed legislation limiting marriages to those between a man and a woman: the Sault Tribe of Chippewa Indians, located in Michigan;[121] and the Muscogee (Creek) Nation, Iowa Tribe, and Chickasaw Nation, all located in Oklahoma.[122]

While most tribes without explicit same-sex marriage bans have been silent on the issue, two Pacific Northwest tribes passed legislation granting same-sex couples full marital rights. In 2008, the Coquille Tribe of Oregon became what is believed to be the first tribe to extend marriage rights to same-sex couples, so long as one of the partners is a tribal member.[123] In

117. Jacobi, *supra* note 54, at 846 (citation omitted).

118. *See* GILLEY, *supra* note 11, at 34.

119. Ogunwole, *supra* note 96, at 10.

120. Fletcher, *supra* note 25, at 55; *Same-Sex Marriage Ban Becomes Law*, INDIAN COUNTRY TODAY, http://www.msnbc.msn.com/id/8206025/ns/us_news-life/t/same-sex-marriage-ban-becomes-law/#.T2gGIF1x4h8 (last updated June 13, 2005).

121. SAULT TRIBAL CODE § 31.102 (1995) (recognition of marriage ordinance); *About Us, Service Area*, SAULT TRIBES OF CHIPPEWA INDIANS, http://www.saulttribe.com/about-us/service-area (last visited Apr. 23, 2012).

122. Sheila K. Stogsdill & Tony Thornton, *Tribes Mull Their Laws on Marriage*, OKLAHOMAN, May 18, 2004, *available at* 2004 WLNR 21124987; CHICKASAW NATION CODE § 6-101.9 (amended as of Mar. 25, 2011).

123. *See* Bill Graves, *Gay Marriage in Oregon? Tribe Says Yes*, OREGONIAN, Aug. 20, 2008, http://www.oregonlive.com/news/index.ssf/2008/08/coquille_tribe_will_sanction_s.html. This comment discusses the Cherokee and Navajo same-sex marriage bans because the Cherokees and Navajos are the two largest Native American tribes. Ogunwole, *supra* note 96, at 10. There is also a focus on the Coquille and Suquamish tribes because of their unique status as the only tribes to permit same-sex marriages. William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES, Aug. 11, 2011, http://www.nytimes.com/2011/08/12/us/12tribe.html.

August 2011, the Suquamish Tribe, located in Washington, also extended full marital rights to same-sex couples.[124]

1. The Cherokees

The Cherokee tribe enacted legislation prohibiting same-sex marriage only after a lesbian couple attempted to file a marriage application in the Cherokee Nation Tribal Court.[125] On May 13, 2004, the Cherokee Nation gave Dawn McKinley and Kathy Reynolds a marriage license application without issue. But when they attempted to file the application, it was refused.[126]

Prior to McKinley and Reynolds' attempt to file their marriage license, the Cherokee marriage statute used ambiguous, non-gender-specific language, stating that any "person who shall have attained the age of eighteen years shall be capable in law of contracting marriage."[127] Nonetheless, Cherokee tribal leadership quickly responded to the couple's application, asserting that they would only recognize "traditional" marriages – those between one man and one woman – regardless of the language in the Cherokee marriage statute.[128] After learning of the marriage license application's issuance, Cherokee Judicial Appeals Tribunal Justice Darrell Dowty, Chief Judge of the Cherokee Nation's highest court, issued a 30-day moratorium prohibiting the filing of all marriage licenses, making McKinley and Reynolds unable legally to wed under Cherokee law.[129]

On June 11, 2004, Todd Hembree, lawyer for the Cherokee Tribal Council, requested that both the Cherokee District Court and the Cherokee Nation legislature deny recognition to Reynolds and McKinley's marriage, claiming that their marriage license application was invalid because the couple failed to qualify for marriage under Cherokee law.[130] Hembree

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124. Diane Anderson-Minshall, *Same-Sex Marriage Becomes Legal in Washington (at Least One Part)*, ADVOCATE.COM (Aug. 4, 2011, 04:00:00 PM), http://www.advocate.com/News/Daily_News/2011/08/04/SameSex_Marriage_Becomes_Legal_in_Washington_at_Least_One_Part/.

125. Christopher L. Kannady, Note, *The State, Cherokee Nation, and Same-Sex Unions: In Re* Marriage License of McKinley & Reynolds, 29 AM. INDIAN L. REV. 363, 366-67 (2004-2005); Judy Gibbs Robinson, *Tribal Officials Refuse to Accept Same-Sex Marriage Application*, OKLAHOMAN, May 19, 2004, *available at* 2004 WLNR 21125278.

126. Robinson, *supra* note 125.

127. CHEROKEE NATION CODE § 43-2 (1993).

128. *See* S.E. Ruckman, *Tribal Marriage Certificate Due Court Review*, TULSA WORLD, June 12, 2004, http://www.tulsaworld.com/news/article.aspx?subjectid=12&articleid=040612_Ne_A17_Triba49325.

129. Kannady, *supra* note 125, at 366.

130. Jacobi, *supra* note 54, at 828; Kannady, *supra* note 125, at 367.

assisted in developing an amendment to the Cherokee marriage statute explicitly limiting marriages to those between one man and one woman.[131] The Cherokee Tribal Council voted unanimously in favor of the amendment on June 14, 2004.[132]

The buzz generated by the decision in *In re Marriage License of McKinley & Reynolds*[133] led to a broader debate over "traditional" marriage in the Cherokee Nation.[134] Hembree and others argued that the "Cherokees have a strong traditional sense of marriage" and that same-sex unions were not recognized in Cherokee history.[135] Other Cherokees argued, however, that there was a historical presence and acceptance of different gender roles within the Tribe.[136] Penrose, the Community of Hope Church of Christ pastor who officiated the wedding between Reynolds and McKinley, said that she was "honoring the traditional Cherokee spirituality" and "acting as a representative of the Cherokee Nation, not a denomination."[137] Penrose's belief is supported by research indicating that the Cherokee Tribe historically accepted alternative gender roles.[138] At its most basic level, the debate over same-sex marriage within the Cherokee Nation is spurred by disagreements over what is true Cherokee "tradition."[139]

2. The Navajos

Unlike the Cherokee Tribe, whose documented history of two-spirit culture is limited, there is a wealth of information regarding Navajo two-spirits and their roles within the Tribe.[140] *Nádleehé* – the Navajo word for third-gendered or two-spirit individuals – means "he changes" in the Navajo language.[141] The *Nádleehés* were well respected among their peers, and their

131. Jacobi, *supra* note 54, at 828.

132. *Id.*

133. No. CV-04-36 (Cherokee Dist. Ct. 2004).

134. Jacobi, *supra* note 54, at 828-29.

135. *Id.*

136. *Id.* at 838-39. While there is limited direct evidence regarding two-spirit culture within the Cherokee Tribe, there is research supporting its existence and that the culture "embraced what has come to be known as a two-spirit tradition." *Id.* at 838 (citation omitted).

137. Robinson, *supra* note 125.

138. ROSCOE, CHANGING, *supra* note 53, at 12.

139. *See generally* Robinson, *supra* note 125 (discussing the beliefs of some citizens and the beliefs of tribal officials).

140. Jacobi, *supra* note 54, at 839-40.

141. *Id.* at 839.

importance in tribal society as spiritual leaders, cooks, and craftsmen is well documented.[142]

Despite the documented history of *Nádleehés*, the Navajos, like the Cherokees, only permit marriages between heterosexual couples.[143] Following the debate within the Cherokee Nation, the Navajo Nation voted to adopt the Dine Marriage Act of 2005, which added language banning same-sex marriage to the Navajo Code.[144] The Navajo Nation Tribal Council unanimously voted in favor of the Act, with a vote of 67-0-0.[145] Navajo Nation president, Joe Shirley, Jr., vetoed the Dine Marriage Act, asserting that same-sex marriage was not an issue for the Navajos, and that the Act "veiled a discriminatory aspect in the guise of family values, which goes against the Navajo teaching of non-discrimination and doing no psychological or physical harm."[146] The Navajo Tribal Council did not share Shirley's view.[147] The Council voted to override president Shirley's veto with a vote of 62-14, with 12 council members abstaining.[148]

Mirroring the controversy surrounding the Cherokee marriage case, the Dine Marriage Act provoked public pandemonium both supporting and condemning the Act. While some supporters believed that the Act reflected the values of the Navajo Tribe, there was also strong support promoting a traditionalist view of Navajo culture that embraced two-spirits and was not influenced by Christian ideology.[149] The Native American Cultural Center of San Francisco voiced its disapproval of the Act, issuing a statement addressing the clash of Indian culture with majoritarian Christian views.[150] The Cultural Center stated, "To pass such divisive legislation for the defense

142. *Id.* at 839-40.

143. Resolution of the Navajo Nation Council, CAP-29-05, at 2 (Apr. 22, 2005), *available at* http://www.navajocourts.org/Resolutions/29-05%20Marriage%20Act.pdf.

144. *Id.* at 1. The Dine Marriage Act of 2005 amended Title 9 of the Navajo Code to include section 2(c), which states that "[m]arriage between persons of the same sex is void and prohibited." *Id.* at 2.

145. Resolution of the Navajo Nation Council, *supra* note 143, at 2.

146. Press Release, Navajo Nation, Navajo Nation President Joe Shirley, Jr., Vetoes Diné Marriage Act (May 1, 2005), http://www.nativeout.com/index.php?option=com_docman&task=cat_view&gid=60&Itemid=51 (follow "05-01-05 Navajo Nation President Press Release on Veto DMA05" hyperlink) [hereinafter Navajo Nation].

147. *See id.*

148. *See* Press Release, Dine Coalition for Cultural Preservation, Navajo Nation Council Overrode President's Veto (June 3, 2005), http://www.nativeout.com/digital-library/article-archive/63-samesex-marriage/39-navajo-nation-council-overrode-presidents-veto.html.

149. *Id.*; Brenda Norrell, *2005 Dine' Marriage Act Denounced*, INDIAN COUNTRY TODAY (Oneida, N.Y.), May 18, 2005, at B1.

150. Norrell, *supra* note 149, at B1.

of 'tradition,' 'values' and 'society' confuses our own indigenous traditions with newer Christian political rhetoric."[151] As with the Cherokee case, the Navajo debate blossomed from a disagreement over the "tradition" of tribal cultures, with some Native Americans focusing on the modern ideology of mainstream Christianity, and others (such as the Native American Cultural Center) promoting the Native American history of inclusiveness and acceptance of two-spirit culture.

3. The Coquille and Suquamish Tribes

The Coquille Tribe moved in the opposite direction of the Cherokees and Navajos, becoming the first tribe to allow same-sex marriage.[152] The Coquilles passed legislation legalizing gay marriage in 2008, with the law expected to take effect in May 2009.[153] The first same-sex couple to wed under the new law married just days after it came into effect.[154]

The Coquille law bestows all tribal marriage benefits on same-sex couples, so long as one spouse is a Coquille tribal member.[155] These benefits include tribal health insurance.[156] At the time of the legislation's enactment, Ken Tanner, Coquille Indian Tribe Chief, said, "Native Americans, more than anyone, know about discrimination," and "[o]ur directive is to provide recognition and respect to all members of our tribe."[157]

In August 2011, the Suquamish followed suit with the Suquamish Tribal Council voting to extend marriage rights to same-sex couples.[158] The Council unanimously approved the change in law, and there was no public dissent to change.[159] Like the Coquille Tribe, the only marriage-based

151. *Id.*

152. Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509, 509 (2009).

153. Sarah Netter, *Brides Look Forward to Marrying Under Tribal Same-Sex Marriage Law*, ABC NEWS, Aug. 27, 2008, http://abcnews.go.com/TheLaw/story?id=5659821&page=1 (stating that the law passed that year and that the couple expected to be married the following May).

154. Bill Graves, *Coquille Same-Sex Marriage Law Takes Effect*, OREGONIAN, May 21, 2009, http://www.oregonlive.com/news/index.ssf/2009/05/coquille_samesex_marriage_law.html.

155. *Id.*

156. Netter, *supra* note 153.

157. *Id.*

158. Anderson-Minshall, *supra* note 124.

159. Manuel Valdes, *Suquamish Tribe's New Law Recognizes Gay Marriage*, ASSOCIATED PRESS, 1 (Aug. 8, 2011, 2:23 PM), http://www.nativetimes.com/news/tribal/5809-suquamish-tribes-new-law-recognizes-gay-marriage?type=raw&format=pdf.

restriction under Suquamish law is that one spouse must be a tribal member.[160]

C. Correlation Between Tribe and Surrounding State

To understand why some tribal governments choose to prohibit same-sex marriage on their reservations, one must consider the policy choices and demographics of the states where these reservations are located. Of the tribes with legislation forbidding same-sex marriage within their communities, their policies often reflect the social, political, and religious ideology of the surrounding states – at least to some degree.[161]

1. Oklahoma

In 2004, 75.6% of Oklahoma voters voted in favor of State Question 711, which banned same-sex marriage through a state constitutional amendment.[162] The Tribal Council's decision in *In re Marriage License of McKinley & Reynolds*, which was issued the same year Oklahomans voted in favor of the constitutional amendment, can largely be attributed to the political and social climate in Oklahoma at the time. The state passed an anti-same-sex marriage statute in 1996, followed by a constitutional amendment in 2004.[163] Along with banning same-sex marriage, Oklahoma does not recognize domestic partnerships or confer any state benefits on same-sex couples.[164]

160. *Id.*

161. *See* discussion *infra* Parts V.C.1-3. It is interesting to note that both the Cherokee and Navajo tribes passed legislation banning same-sex marriage *before* the states in which they are located did so. *See id.* It is important to recognize that the surrounding political climate was already tumultuous. The actions by the tribes thus need not be seen as preemptive, but rather as a reaction to the political storm that was already brewing around them. While the tribal legislation was in fact passed before the states confronted the issue in their own courts or on their own ballots, all the states wherein the tribes have banned same-sex marriage also ultimately banned same-sex marriage. *See id.*

162. Randy Ellis et al., *Voters Favoring Lottery Questions Here's a Look at the Results from the Nine State Questions on Tuesday's Ballot*, OKLAHOMAN, Nov. 3, 2004, at 7A, *available at* 2004 WLNR 21115021.

163. Barbar Hoberock, *Marriage Limit in Constitution*, TULSA WORLD, Nov. 3, 2004, at A7, *available at* 2004 WLNR 21132631.

164. *See Civil Unions and Domestic Partnership Statues*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (last updated Feb. 2012).

A Pew study shows that the majority of Protestants oppose same-sex marriage.[165] According to another study, at least 70% of Oklahomans self-identify as Protestants (or other non-Catholic Christians).[166] Because of Oklahoma's largely Christian population, these beliefs permeate the culture both inside and outside Indian Country.[167] It comes as no surprise that four of the six tribes that have affirmatively banned same-sex marriage are located in Oklahoma, both because of its large Protestant population and because many Native Americans identify with Christian beliefs.[168] The Cherokee Council, when deciding to amend the Cherokee constitution to prohibit same-sex marriages, was undoubtedly religiously motivated.

2. Arizona

The Navajo Nation, located in Arizona, passed the Diné Marriage Act in 2005.[169] Though Arizona proposed a constitutional amendment to voters in 2006 that ultimately failed, Arizona voters later passed a 2008 proposal to amend the state constitution to ban same-sex marriage.[170] Arizona, like Oklahoma, does not offer any benefits or protections in the form of domestic partnerships.[171]

While Arizona does not boast the large Protestant population that Oklahoma does, it still contains one of the few tribes that affirmatively

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165. *Public Opinion on Gay Marriage: Opponents Consistently Outnumber Supporters*, PEW FORUM ON RELIGION & PUB. LIFE, http://pewforum.org/Gay-Marriage-and-Homosexuality/Public-Opinion-on-Gay-Marriage-Opponents-Consistently-Outnumber-Supporters.aspx (last visited Apr. 23, 2012).

166. Frank Newport, *Religious Identity: States Differ Widely*, GALLUP (Aug. 7, 2009), http://www.gallup.com/poll/122075/Religious-Identity-States-Differ-Widely.aspx.

167. It is a common misconception that Oklahoma is the state with the greatest number of Indian tribes. California, for example, has approximately three times as many tribes as Oklahoma. *See generally Federally Recognized Indian Tribes*, NAT'L CONG. AM. INDIANS, http://www.ncai.org/Tribal-Directory.3.0.html (last visited Apr. 23, 2012) (providing a geographically sorted list of federally recognized tribes). Four of the six tribes that have banned same-sex marriage are located in Oklahoma – a disproportionately high number when one considers that only a very small percentage of federally recognized tribes are located in Oklahoma. These figures support the correlation between statewide political climate and tribal bans on same-sex marriage.

168. *See* GILLEY, *supra* note 11, at 57; *supra* notes 119-21, 167 and accompanying text.

169. Resolution of the Navajo Nation Council, *supra* note 143, at 2.

170. ARIZ. REV. STAT. ANN. § 25-101 (2011) (stating that "[m]arriage between persons of the same sex is void and prohibited").

171. *State to Defend Benefit Cuts for Gay Partners*, ARIZONA REPUBLIC, Feb. 14, 2011, at B1, *available at* 2011 WLNR 2898976.

banned same-sex marriage.[172] But, in contrast to the effortless passage of the Cherokees' same-sex marriage ban, the Dine Marriage Act faced more opposition within the Navajo community, which could correlate with the smaller Protestant population within the surrounding state.[173] Though the Navajo Tribal Council easily passed the Dine Marriage Act, Navajo president Shirley initially vetoed the legislation.[174] Moreover, both Navajo tribal members and Native American advocacy groups spoke out against the Act's hypocrisy, asserting that it was in direct contrast to the Navajo Tribe's cultural norms and values.[175]

3. Oregon and Washington

In contrast to Oklahoma and Arizona, when one considers the social and political climate surrounding Oregon's Coquille Tribe, it is clear that there is a correlation between state politics and the tribal same-sex marriage legislation. Oregon, like the majority of the states, does not permit same-sex marriage; the state's constitution was amended in 2004 to limit marriage to unions between one man and one woman.[176] But Oregon still affords more rights to homosexual couples than do Oklahoma and Arizona, which may shed light on the Coquille's decision to allow same-sex marriage. In 2007, the Oregon legislature passed a bill allowing state recognition of same-sex partnerships – something not done in any of the states with tribes that have anti-same-sex marriage legislation.[177] Because Oregon gives some rights to same-sex couples, it is not entirely surprising that the first tribe in the country affirmatively to legislate in favor of same-sex marriage is located within the state.

In February 2012, Washington, home of the Suquamish, passed legislation legalizing marriage between same-sex couples.[178] This legislation came close on the heels of the Suquamish's Tribe's summer 2011 decision to permit same-sex marriage. Washington's consecutive passage of pro-same-sex-marriage legislation at the tribal and state levels indicates a location-based climate of tolerance. For the Oklahoma tribes, the reverse is true. But

172. Resolution of the Navajo Nation Council, *supra* note 143, at 2; Newport, *supra* note 166.

173. *See* Newport, *supra* note 166.

174. Navajo Nation, *supra* note 146.

175. *See supra* notes 140-42, 146 and accompanying text.

176. Bill Graves, *Oregonians Vote Against Land Rules, Gay Marriage*, OREGONIAN, Nov. 3, 2004, *available at* 2004 WLNR 20389630.

177. Jeff Engelhardt, *Debate Over Same-Sex Rights Continues Nationwide*, DAILY HERALD (Arlington Heights, Ill.), Feb. 1, 2011, at 9.

178. *Defining Marriage*, *supra* note 3.

regardless of whether the relevant tribal and state policy stance recognizes or denies recognition to same-sex marriage, one thing is clear: geography (and thereby local politics) plays a central role in marriage-based policy-making, while the involved political actors (i.e., tribes vs. states) appear to make little difference.

D. Good News for Same-Sex Couples and Two-Spirit Individuals in Indian Country

Despite some tribes banning same-sex marriages, there is good news for two-spirit individuals regarding same-sex relationships in Indian Country. Of what might be the greatest importance, only six federally recognized tribes have actually passed legislation prohibiting same-sex marriage, amounting to less than 5% of tribes federally recognized by the Bureau of Indian Affairs.[179] In contrast, about 88% of states do not permit same-sex marriages.[180] Furthermore, the Coquille and Suquamish tribes' decision to legalize same-sex marriage provides hope that other tribes will follow suit.

Two-spirit organizations are awakening the sleeping two-spirit tradition, creating a place for a people who were once suspended between cultures. These groups advocate acceptance and understanding of a piece of Native American history that has long been ignored and even forgotten. A proud culture that European discoverers tried to eradicate is re-emerging with new faces and a newfound energy.

Although the Coquille and Suquamish tribes are currently alone in their explicit recognition of same-sex marriages, they are not alone in their respect for and protection of LGBT individuals. There are other positive developments occurring within Indian Country. The Pequot Tribe has implemented policies that benefit same-sex couples and LGBT individuals.[181] The Tribe offers equal employment opportunities for its LGBT members

179. *Who We Are*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/index.htm (last visited Apr. 23, 2012). There are 566 federally recognized tribes. *Id.* Because only six of these tribes ban same-sex marriage and two allow it, that means there are still over 98% of recognized tribes that have yet to take action in either direction.

180. *Defining Marriage*, *supra* note 3. Only six states and the District of Columbia allow same-sex marriage. *Id.* Both Maryland and Washington passed legislation in February 2012 permitting same-sex marriage, but these laws have not yet taken effect. *Id.* Additionally, California had a recent court ruling allowing same-sex marriage, but that ruling has not come into effect. *Id.*

181. *See* MASHANTUCKET PEQUOT CODE ANN. tit. 6, ch. 3, §§ 1-7 (2008), *available at* http://www.narf.org/nill/Codes/mpcode/title_6.pdf (lacking any gender requirement for marriage).

working at the Pequot-owned Foxwoods and MGM Grand casinos,[182] medical benefits to same-sex couples, and sensitivity training to benefit LGBT peoples.[183] Lori Potter, tribal member and spokeswoman for the Mashantucket Pequot Gaming Enterprises, stated that the Tribe, because of the discrimination and difficulties it has faced in the past, "understand[s] the importance of being able to embrace all the freedoms [that Americans value]."[184] While it may be disheartening that a handful of tribes have affirmatively denied equal rights to their members, it is important to note that other tribes have made equally influential and positive changes for two-spirits, recognizing the value of tribal history.

VI. The Next Step: Promote Traditional Acceptance of Two-Spirit Culture

Within Indian Country, the biggest flaw in the argument that marriages between one man and one woman promote traditional family values is this: historical Native American religious and cultural tradition is vastly different from majoritarian Euro-Christian religious and cultural tradition. The conversion to Christianity, along with the acceptance of the "sinfulness of same-sex relations," resulted in "the history of gender diversity in Native North America [going] largely unnoticed by contemporary Native peoples,"[185] leaving many modern Native Americans unaware that many tribes historically accepted and celebrated gender differences, respected and revered their homosexual tribe members, and allowed those members to embrace their sexuality without prejudice.[186]

The "tradition" that permeates the modern rhetoric is one that chastises and denies rights to many individuals. DOMA was passed to "protect" marriage. But when tribes embrace what DOMA stands for and pass their own similar legislation, they alienate one of their most important resources – tribal members who respect, honor, and value Native American traditions.

The resurgence of the two-spirit culture, as well as the movement for homosexual Native Americans to merge their identities as homosexuals and as Indians, illustrates the importance of Native American culture and history to these individuals. By treating two-spirits as outsiders, anti-same-sex

182. Patricia Daddona, *Foxwoods, MGM Grand Expand Their LGBT Policies*, DAY (New London, Conn.), Aug. 27, 2010, *available at* 2010 WLNR 17092456.

183. *Id.*

184. *Id.*

185. GILLEY, *supra* note 11, at 15.

186. *See supra* Part IV.A.

marriage laws sever tribal connections and wound camaraderie among LGBT Native Americans who value their tribal roots and culture.

While the transition to a society more accepting of two-spirit traditions will not be simple or easily accomplished, it is possible. This possibility, once a reality, will create an environment where Native Americans who participate in two-spirit organizations – currently relegated to being only Indian at home and expressing their sexuality only in the mainstream gay culture – can finally reconcile all aspects of their personality, lifestyle, and beliefs. And for those tribes without a documented history of two-spirit culture that may question why they should accept a tradition in which they may not historically have engaged, focus should be on the value of their LGBT members who are now part of the two-spirit culture and the importance these members play in expanding and promoting Native American culture and values.

At a time when mainstream Christian values about marriage and family are crushing the rights of LGBT individuals both inside and outside Indian Country, to ostracize two-spirit tribal members is to stifle a Native American demographic that values its heritage and seeks acceptance among its peers.[187] The two-spirit movement actively works to unite Native Americans who struggle to find and face their identities, and to negotiate between tribal and popular culture.[188] And, as two-spirits work to promote Native American history, tribes should begin to embrace their past to protect their future.

In electing to permit same-sex marriage, tribal governments can exercise their sovereignty. Although the federal government has encroached upon many areas of tribal sovereignty,[189] tribes still have the power to create their own policies on marriage and family. While tribes may adopt surrounding state policy as their own if they so choose, state laws do not bind them.[190] As a result, the Cherokee and Navajo nations, along with the other tribes that have passed legislation banning same-sex marriage, could rescind their restrictive marriage policy without any state interference. Moreover, even in

187. While tribes should not focus on doing what they feel is wrong for their members, it could be empowering for the tribes to reevaluate two-spirit history and the beliefs underlying that history. Furthermore, the inclusion of individuals who value tribal history would almost certainly be positive for the tribes.

188. GILLEY, *supra* note 11, at 135.

189. *See, e.g.*, Indian Country Crimes Act, 18 U.S.C. § 1152 (2006); Major Crimes Act, 18 U.S.C. § 1153 (2006); Public Law 280, 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321-1326 (2006); 28 U.S.C. § 1360 (2006).

190. *See supra* Part II.

states that ban same-sex marriage, tribes may elect to legislate in its favor despite the state bans.

Though DOMA gives states the power to deny recognition to same-sex marriages legally performed in Indian Country, allowing same-sex marriage within Indian Country could give two-spirits a safe-haven within which they can shelter themselves from the cruel and restrictive state policies regarding same-sex marriage and LGBT rights. Sovereignty gives tribes the power to protect their own people, including two-spirits, and is a shield of invaluable importance.

VII. Conclusion

Now is an important and difficult time for tribes – a time where they have to navigate between their beliefs about marriage, family, and religious values, and the history of two-spirits and traditional Native American culture. But by asserting that two-spirits are not welcome to enter into the same legal relationships as all other tribe members, tribal governments suggest to these individuals that their value and commitment to the Native American community is less important than that of their heterosexual counterparts, which leads to an erosion, rather than protection, of Indian culture.

It is important to note that some tribes are creating policies to protect and promote the rights of two-spirit members. And while some tribes passed legislation prohibiting same-sex marriage, that most tribes are still silent on the issue or are proactively creating a welcoming environment for their two-spirit members lends hope to the idea that other tribes will not follow in the Cherokees and Navajos' footsteps.

Two-spirits deserve the rights afforded to all tribal members. It is important to appreciate all members who have for so long felt they were neither gay nor Indian, but lost somewhere in the middle. As Coquille Chief Tanner said after passing legislation allowing same-sex couples to wed, "We only ask that people respect differences and all the Creator's creations."[191]

191. Netter, *supra* note 153.