

# THE TIPPING POINT: LEGAL EPIDEMICS, CONSTITUTIONAL DOCTRINE, AND THE DEFENSE OF MARRIAGE ACT

Jackie Gardina <sup>\*†</sup>

## INTRODUCTION

Theodore Olson and David Boies made news when they joined forces to challenge California's Proposition 8, a constitutional amendment denying marriage to same-sex couples.<sup>1</sup> Observers questioned whether the lawsuit was premature, asking if it was the right time to seek such a groundbreaking Supreme Court decision on access to equal marriage and its benefits.<sup>2</sup> But even before Olson and Boies filed their suit, there were other suits in the courts that raised similar issues. *Smelt v. County of Orange*<sup>3</sup> and *Gill v. Potter*<sup>4</sup> both challenged the constitutionality of the Defense of Marriage Act (DOMA),<sup>5</sup> a federal law that limits the portability of valid same-sex marriages and that prohibits the federal government from recognizing these marriages for purposes of federal benefits.<sup>6</sup> While the three suits have different legal and factual predicates, they all ask the Supreme Court to enter the national debate regarding equal marriage, and they all raise the same issue—is the time right?

There is no surefire way to predict Supreme Court decision-making. Nonetheless, Malcolm Gladwell's book, *The Tipping Point: How Little Things Can Make a Big Difference*, provides a framework for discussing

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\* Jackie Gardina is an Associate Professor of Law at Vermont Law School. This essay is based on a presentation given at Dartmouth College's Law Day Program, *Same Sex Marriage in Law and Society*, on April 29, 2009.

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1. See, e.g., Jo Becker, *The Road to Championing Same-Sex Marriage*, N.Y. TIMES, Aug. 19, 2009, at A1; Maura Dolan, *Prop 8 Foes Clash over Federal Suit*, L.A. TIMES, Aug. 9, 2009, at A35.

2. See Postings of Eugene Volokh et al. to Room For Debate: A Running Commentary on the News, <http://roomfordebate.blogs.nytimes.com> (Aug. 18, 2009, 19:00 EST) (enter "Ted Olson's Supreme Court Adventure" into "search this blog," then follow the "Ted Olson's Supreme Court Adventure" hyperlink under "Results") (discussing whether it is sensible for gay rights advocates to ask the U.S. Supreme Court to recognize a constitutional right to gay marriage in the next few years).

3. *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *rev'd in part, remanded in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006). It is important to note that the Supreme Court declined to address the question raised in *Smelt*.

4. Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action, *Gill v. Potter*, No. 1:09-cv-0309 (D. Mass. Mar. 3, 2009), *available at* <http://www.mass.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf> [hereinafter *Gill* Complaint].

5. Pub. L. No. 104-199 § 7, 110 Stat. 2419-20 (1996) (codified at 28 U.S.C. § 1738 & 1 U.S.C. § 7).

6. See *Smelt*, 374 F. Supp. 2d at 870; *Gill* Complaint, *supra* note 4, ¶ 10.

whether the timing of these lawsuits is appropriate.<sup>7</sup> In his book Gladwell explores how a small push can move an idea from relative anonymity to a social epidemic.<sup>8</sup> He called his theory the “ipping point” and defined it as the “the moment of critical mass” when the unusual becomes the norm and “radical change [becomes] more than [a] possibility.”<sup>9</sup> According to Gladwell, social epidemics occur when there is a confluence of three factors: the right messenger with the right message in the right social context.<sup>10</sup>

While Gladwell’s theory is traditionally used to describe sociological phenomena, it is a starting point for talking about shifts in constitutional doctrine as well. What is considered “constitutional” changes with time. One need only look at the segregation cases to understand that constitutional language alone does not dictate the recognition of constitutional rights. In *Plessy v. Ferguson*, the Court held that separate but equal was constitutional,<sup>11</sup> but in *Brown v. Board of Education*, the Court held that separate but equal was unconstitutional.<sup>12</sup> More recently, the Court did a similar reversal on the issue of whether the state could criminalize private sexual relations between consenting adults. In *Bowers v. Hardwick*, the Court upheld a Georgia sodomy law,<sup>13</sup> 17 years later, in *Lawrence v. Texas*, the Court declared a similar law unconstitutional.<sup>14</sup> The language of the Constitution did not change between these cases—the Equal Protection and Due Process Clauses have remained static—so the shift can only be attributed to something external to the document. The Court reached a “tipping point” of sorts—something that altered the constitutional analysis. Conduct that was once perfectly acceptable (segregation of the races) became unconstitutional to continue. Conduct that the state once condemned as morally reprehensible (sodomy) became unconstitutional to criminalize. Using Gladwell’s theory, the Court heard the right message from the right messenger at the right time.

But Gladwell’s theory is incomplete in the context of constitutional decision-making. While most jurists would agree that a motivated plaintiff with a skilled lawyer (the right messenger) and a compelling issue coupled

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7. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000) [hereinafter *THE TIPPING POINT*].

8. *Id.*

9. *Id.* at 9, 12, 14.

10. *See id.* at 19 (describing the three agents of change as “the Law of the Few, the Stickiness Factor, and the Power of Context”).

11. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

12. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

13. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

14. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

with good facts (the right message) can influence the outcome of a case,<sup>15</sup> not all would concede that social context (the right time) can or should shift constitutional doctrine. Justice Scalia, a self-described “originalist,” would argue that only the language of the Constitution matters and that the courts should not be swayed by social mores.<sup>16</sup> For Justice Scalia, shifts in cultural norms result in changes in legislation, not the Constitution.<sup>17</sup> But Justice Thurgood Marshall recognized that constitutional doctrine is influenced by social factors when he observed:

Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a “natural” and “self-evident” ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.<sup>18</sup>

Unlike Justice Scalia, Justice Marshall believed the Court’s understanding of the Constitution’s meaning was enhanced by shifts in social norms.<sup>19</sup> The differing views of Justice Marshall and Justice Scalia require, perhaps, that Gladwell’s theory be amended to account for judicial philosophies—that there must be the right message at the right time to the right bench.

In the end, however, timing is everything. If an issue reaches the Court prematurely, the result will be the same regardless of judicial philosophy. Whether the Court has reached the tipping point is inextricably linked with whether society has as well. The Court acts cautiously when it is offered an opportunity to expand constitutional protections because, once it does so, it moves the decision-making from the democratically elected legislature to the unelected judiciary.<sup>20</sup> Justices are unwilling to enter the debate too early

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15. See *Norman v. Housing Auth.*, 836 F.2d 1292, 1301 (11th Cir. 1988) (recognizing that the skill of attorney can affect the outcome); Judge Randy Wilson, *What Do Jurors Say About Trial Lawyers?*, 68 TEX. B.J. 152, 155 (2005) (stating that juries respond favorably to well-prepared lawyers, but that facts, witness testimony, and documents ultimately win trials); see also *Lawrence*, 539 U.S. at 602–03 (Scalia, J., dissenting) (noting a trend of “anti-anti-homosexual culture” [within the legal profession] and suggesting that the so-called message influenced the Court’s decision).

16. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L REV. 849, 854 (1989).

17. *Id.*; see also *Lawrence*, 539 U.S. at 604 (stating that citizens may determine how strong their “disapprobation of homosexual conduct is[,] . . . and may legislate accordingly.”).

18. *City of Cleburne v. City of Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part, dissenting in part).

19. *Id.*

20. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and

and short-circuit what Justice Breyer calls the “national conversation.”<sup>21</sup> Justice Breyer describes the Court’s role in the conversation as a kind of constitutional mediator:

Ideally, in America, the lawmaking process does not involve legislators, administrators, or judges imposing law from above. Rather, it involves changes that bubble up from below. Serious complex legal change is often made in the context of a national conversation . . . . Courts participate later in the process, determining whether, say, the legal result reached through this “bubbling up” is consistent with basic constitutional norms.<sup>22</sup>

To determine whether the Court has reached the tipping point—and more specifically, whether the constitutional question has reached the Court at the right time—requires that one look beyond the Court’s precedent and examine the “national conversation.” As will be discussed in the next section, the Court’s tipping points have paralleled shifts in societal norms. The sexual revolution and feminist movement were occurring as the Court dismantled longstanding legal rules meant to encourage chastity and purity and to discourage premarital sex and pregnancies outside of marriage.<sup>23</sup> The civil rights movement was at its height when the Court declared anti-miscegenation laws unconstitutional.<sup>24</sup> In each instance, the Court allowed traditional constitutional principles to encompass new social norms.

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legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

*Id.* (internal citations omitted).

21. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 70–71 (2005).

22. *Id.*

23. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a state ban on birth control to unmarried persons unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a Connecticut law prohibiting the use of contraception as a violation of the individual’s right to marital privacy); Kris Franklin, Note, “*A Family Like Any Other Family*”: *Alternate Methods of Defining Family in Law*, 18 N.Y.U. REV. L. SOC. CHANGE 1027, 1042 (1990–1991) (discussing society’s changing perception of family structure and sexuality in the late 1960s to mid 1970s).

24. *Loving v. Virginia*, 388 U.S. 1 (1967); see DOCUMENTARY HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT 146 (Peter B. Levy ed., 1992) (describing the summer of 1966, through the microcosm of Mississippi, as the crossroads of an era when tensions were high, civil rights protesters were beginning to question the value of integration, civil rights activists were mobilizing influence around the Democratic National Conventions, and there was concern about more violent protests in this charged atmosphere); Rebecca Schoff, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627, 653–54 (2009) (explaining that even before the 1964 Civil Rights Act, many state legislatures began repealing anti-miscegenation laws, which may have contributed to the Court’s willingness to invalidate them).

The nation is talking about equal marriage and change is “bubbling up” through the legislative process. Five states now allow equal access to marriage and two other states will recognize same-sex marriages validly performed in another state.<sup>25</sup> On the federal level, President Obama has declared his support for repeal of DOMA and recently signed an executive order extending limited benefits to same-sex partners of federal employees.<sup>26</sup> The House of Representatives have two bills pending that would address some of the issues presented. On September 15, 2009, Representative Jerrold Nadler introduced the Respect Marriage Act of 2009, a bill designed to repeal DOMA.<sup>27</sup> Representative Tammy Baldwin introduced the Domestic Partners Benefits and Obligations Act of 2009,<sup>28</sup> which if passed, would provide benefits to the partners of all federal employees, a bill President Obama publicly supported.<sup>29</sup> Moreover, the Supreme Court’s recent decisions in *Romer v. Evans*,<sup>30</sup> a case invalidating as unconstitutional a Colorado constitutional amendment that would have prevented any state, city, or local law from providing protection from discrimination based on sexual orientation, and *Lawrence* provide advocates a constitutional stepping-stone for their arguments.<sup>31</sup>

At the same time, however, 40 states either have statutes or constitutional amendments that define marriage as between one man and one woman.<sup>32</sup> Moreover, in the 31 states where the issue has been put to a popular vote, most recently in California and Maine, proponents of equal marriage have lost.<sup>33</sup> Every federal court to consider the question has

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25. HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS (2009), [http://www.hrc.org/documents/relationship\\_recognition\\_laws\\_map.pdf](http://www.hrc.org/documents/relationship_recognition_laws_map.pdf) (noting that Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont issue marriage licenses to same-sex couples, while New York and Washington, D.C. recognize marriage by same-sex couples entered into in other jurisdictions).

26. Memorandum on Fed. Benefits and Non-Discrimination, Presidential Doc. 29393, 74 Reg. 118 (June 17, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-14737.pdf>.

27. Respect Marriage Act of 2009, H.R. 3567, 111th Cong. (1st Sess. 2009).

28. Domestic Partners Benefits and Obligations Act of 2009, H.R. 2517, 111th Cong. (1st Sess. 2009).

29. Press Release, White House, Statement by the President on the Presidential Memorandum on Federal Benefits and Non-Discrimination, and Support of the Lieberman-Baldwin Benefits Legislation (June 17, 2009), *available at* [http://www.whitehouse.gov/briefing\\_room/pressreleases/?categoryid=17](http://www.whitehouse.gov/briefing_room/pressreleases/?categoryid=17) (find link to title in the list, organized by date).

30. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

31. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

32. See HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITION (2009), [http://www.hrc.org/documents/marriage\\_prohibitions\\_2009.pdf](http://www.hrc.org/documents/marriage_prohibitions_2009.pdf) (stating that 29 States have constitutional amendments and 11 states have laws restricting the definition of marriage).

33. See Mimi Hall, *Gay Rights Advocates Look Past Maine’s Repeal of Marriage Law*, USA TODAY, Nov. 5, 2009, *available at* [http://www.usatoday.com/news/nation/2009-11-04-gay-marriage-maine\\_N.htm](http://www.usatoday.com/news/nation/2009-11-04-gay-marriage-maine_N.htm).

rejected the argument that DOMA violates the federal constitution.<sup>34</sup> The fact that opponents have successfully labeled equal marriage a “morals” issue further hampers success in the courts.<sup>35</sup> The Supreme Court has traditionally been hesitant to intercede in so-called “morals legislation,” providing the government wide latitude in this area.<sup>36</sup> As a result, even if the current suits have the right messenger delivering the right message, it is unlikely to be the right time.

### I. MARRIAGE, SEX & OTHER TIPPING POINTS

Throughout history, the government has used marriage as a mechanism to channel sexual behavior.<sup>37</sup> Marriage is a conduit for reducing promiscuity, encouraging monogamy, and ensuring procreation occurs within a legislatively defined family unit.<sup>38</sup> Sexual behavior that interferes with these goals, such as fornication, adultery, sodomy, or even the use of sex toys, is subject to regulation and often criminalized.<sup>39</sup> Because marriage and childbearing within its confines have been deemed the cornerstone of our nation, the state has a recognized interest in its survival and thus the authority to regulate acceptable and unacceptable sexual expression.<sup>40</sup>

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34. See, e.g., *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005), *rev'd in part, remanded in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004). *But see In re Levenson*, 560 F.3d 1145, 1151 (9th Cir. 2009). In *Levenson*, one Ninth Circuit Court of Appeals Judge, sitting as an arbiter of a federal employee benefit dispute, declared § 3 of DOMA unconstitutional as it applied to the spouse of a federal employee. Because the case involved an internal Ninth Circuit benefits issue, it has no precedential value, and it has not been cited by any other court.

35. See *infra* notes 95–100 and accompanying text (discussing DOMA legislative history).

36. Courts have long viewed the state’s regulation of public morality as a legitimate use of its police powers. See, e.g., *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 567–69 (1991) (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 61 (1973)); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

37. Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 273–277 (2008).

38. LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* 110 (1995).

39. *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (“[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.”); *Bowers*, 478 U.S. at 196; see *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972) (discussing the use of contraceptives by unmarried persons); *Williams v. Morgan*, 478 F.3d 1316, 1324 (11th Cir. 2007) (finding the state’s interest in morality provided a sufficient basis to uphold a law banning the sale of sex toys); Brief for the Appellant at 16, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (No.70-17), 1970 WL 122529 (“If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional.”); see also WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 145–282 (2nd ed. 1997) (discussing the use of sodomy laws as means to control homosexual behavior).

40. H.R.REP. No. 104-664 at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 9605, 2916.

These legislative decisions are often described as moral judgments and courts have hesitated to invalidate them, recognizing that such decisions properly lay with the electorate.<sup>41</sup>

But the state's power to use marriage to channel what it deemed to be morally acceptable sexual behavior has eroded.<sup>42</sup> At the height of the civil rights and feminist movements and with the advent of the sexual revolution, the courts began to place limits on the ability of states to criminalize certain sexual conduct or deny benefits based on the absence of a marital relationship.<sup>43</sup> The state's authority to enforce a sexual majoritarian morality, once nearly absolute, became vulnerable. Courts, once reluctant to second-guess legislative moral judgments, became more willing to intercede.

As a result of these social movements, the Court has become more comfortable limiting the government's authority to criminalize certain sexual activities or to block access to benefits in an effort to encourage or discourage certain sexual conduct. The government's moral judgments about premarital sex, access to contraception, and even sodomy have been trumped by constitutional rights grounded in the Due Process and Equal Protection Clauses.<sup>44</sup> The Court's decisions in *Romer* and *Lawrence* point to the Court's growing comfort with including gay men and lesbians within constitutional protections previously afforded only to their heterosexual counterparts.<sup>45</sup> These constitutional shifts can be tied, in part, to a growing societal comfort with this conduct as evidenced by shifts in legislative enactments.<sup>46</sup>

The state's attempt to discourage premarital sex was among the first prohibitions to fall. In 1972, the Court rejected Massachusetts's efforts to

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41. See, e.g., *Cope v. Cope*, 137 U.S. 682, 685 (1891) (holding a Utah inheritance statute to be beyond the control of the Court); *Brewer's Lessee v. Blougher*, 39 U.S. 178, 198 (1840) (holding that a Maryland inheritance statute is a question for the legislature); see also *Barnes*, 501 U.S. at 569 (holding that police power authorizes states to pass legislation regulating morality).

42. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 21–22 (2008) (describing a general change of sexual mores).

43. *Id.* at 23–33.

44. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding a statute criminalizing sodomy unconstitutional); *Eisenstadt*, 405 U.S. at 442 (regarding access to contraception); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (regarding invidious discrimination based on illegitimacy at birth); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (regarding marital right of privacy).

45. *Lawrence*, 539 U.S. at 578 (2003) (holding unconstitutional a state statute criminalizing sodomy); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating Colorado's Amendment 2 because it was based on animus toward homosexuals).

46. In *Lawrence*, the Court observed that only 13 states had sodomy statutes. 538 U.S. at 573. In *Romer*, Colorado's Amendment 2 was also in stark contrast to the number of local government entities prohibiting discrimination based on sexual orientation. 517 U.S. at 624. See generally *Workplace Discrimination on Sexual Orientation*, [http://www.mypersonnelfile.com/di\\_sexual.php](http://www.mypersonnelfile.com/di_sexual.php) (last visited Sept. 11, 2009) (providing statistics on anti-discrimination laws).

regulate premarital sex and encourage chastity by prohibiting access to contraceptives based on marital status.<sup>47</sup> A few years earlier, in *Griswold v. Connecticut*, the Court had declared unconstitutional a Connecticut statute that denied contraceptives to married couples, reasoning that it violated their right to privacy.<sup>48</sup> In *Eisenstadt v. Baird*, the Court applied the same reasoning to single persons, holding that a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy, but prohibiting distribution of contraceptives to single persons for that purpose violated the Equal Protection Clause.<sup>49</sup> Even though the statute was designed to protect public morals,<sup>50</sup> the Court declared that there was no rational reason to treat married and unmarried persons differently when it came to access to contraceptives.<sup>51</sup> While the case involved the distribution of contraceptives, it was perceived to have implications beyond the prevention of pregnancy, bringing into doubt other legislation founded on traditional views of sexual morality such as prohibitions against fornication and adultery.<sup>52</sup>

Anti-miscegenation laws also fell during this time. While the Court had deftly avoided a challenge to the Virginia anti-miscegenation statute in 1955, in 1967 it dealt with the issue directly.<sup>53</sup> In *Loving v. Virginia*, the Supreme Court struck down the statute that criminalized marriages between white persons and “colored” persons as patently unconstitutional.<sup>54</sup> The statute was cloaked in the language of “morals,” as evidenced when the lower court opined that it was God’s will that the races remain separate.<sup>55</sup> Without dissent, the Court declared the law unconstitutional, finding that it violated both the Equal Protection and Due Process Clauses.<sup>56</sup>

What is important to note in these cases is the Court’s recognition of the changing social norms around these issues. The “national conversation” had been percolating for years, if not decades, before these questions

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47. *Eisenstadt*, 405 U.S. at 443.

48. *Griswold*, 381 U.S. at 485–86.

49. *Eisenstadt*, 405 U.S. at 443.

50. Brief for the Appellant at 16, *Eisenstadt*, 405 U.S. 438 (No. 70-17), 1970 WL 122529 (“If such right exists, then our laws punishing fornication and adultery are necessarily unconstitutional.”).

51. *Eisenstadt*, 405 U.S. at 453 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

52. Brief for the Appellant at 15, *Eisenstadt*, 405 U.S. 438 (No. 70-17), 1970 WL 122529 (“What radical change has occurred in the society in which we live to make such a law now unconstitutional? Have people acquired rights to extra-marital relations free of any public and criminal responsibility? If so, what becomes of our laws against fornication and adultery?”).

53. *Naim v. Naim*, 350 U.S. 891 (1955).

54. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

55. *Id.* at 3.

56. *Id.* at 12.



reached the Court. Race relations had been a source of conflict since the nation's founding, and laws segregating the races had been abandoned or declared invalid before *Loving* reached the Court.<sup>57</sup> On the federal level, Congress had just passed the Civil Rights Act of 1964 and the Voting Rights Act, placing racial equality at the forefront of the national agenda.<sup>58</sup> And as the Court noted, Virginia was just one of 16 states with anti-miscegenation laws, thus explicitly recognizing that a vast majority of society had already rejected such prohibitions.<sup>59</sup>

Likewise, the Court's 1972 decision in *Baird* was only one decision in a long line reflecting the battle for gender equality.<sup>60</sup> From Abigail Adams's oft-cited letters to her husband,<sup>61</sup> to the first women's rights convention in 1848,<sup>62</sup> to the suffrage movement,<sup>63</sup> women's rights have been part of the national consciousness since the nation's founding. Margaret Sanger first raised the issue of women's access to contraceptives in the 1930s, earning criminal sanctions as a result.<sup>64</sup> By the time *Griswold* and *Baird* reached the Court, social taboos surrounding sex were being lifted. Indeed, the Court observed the futility of Massachusetts's efforts to preserve purity<sup>65</sup> and implicitly acknowledged the changing sexual mores when it provided

57. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006) (prohibiting discrimination based on race); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (resulting in the integration of the public school system); Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) (integrating the armed forces).

58. 42 U.S.C. § 2000a; Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

59. *Loving*, 388 U.S. at 6.

60. See, e.g., *United States v. Dege*, 364 U.S. 51 (1960) (determining that women may be held liable for conspiring with their husbands under 18 U.S.C. §371); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutionality of a minimum wage law that differentiated between sexes); *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) (permitting a state to encourage steam laundries and discourage hand laundries on grounds of sex discrimination).

61. Letter from Abigail Adams to John Adams, (Mar. 31, 1776), in *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 2-4* (Miriam Schnier ed., 1972).

62. 6 IDA HUSTED HARPER, *HISTORY OF WOMAN SUFFRAGE, 1900-1920*, 440 (1985). See generally Dana Neacsu, *The Red Booklet on Feminist Equality, Instead of a Manifesto*, 30 *WOMEN'S RTS. L. RPT.* 106, 140 (2008) (discussing partial history of the women's rights movement in the nineteenth century).

63. Women secured the right to vote in 1920 with the ratification of U.S. Constitution's 19th Amendment. U.S. CONST. amend XIX; see also Timeline from: *A History of the American Suffragist Movement*, <http://www.suffragist.com/timeline.htm> (last visited Sept. 10, 2009) (plotting a timeline of the major events of the women's rights movement, including women's suffrage).

64. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 *UCLA L. REV.* 99, 125, 125 n.144 (2007); Gloria Steinem, *Margaret Sanger: Her Crusade to Legalize Birth Control Spurred the Movement for Women's Liberation*, *TIME*, Apr. 13, 1998, at 93, available at <http://www.time.com/time/time100/leaders/profile/sanger.html>.

65. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972).

constitutional protection regarding the decision to have a child, whether married or single.<sup>66</sup>

The Court was much slower to extend constitutional protections to sexual conduct between consenting adults of the same sex. Unlike issues of race, sex, and sexuality generally, “gay rights” were not an overt part of the national conversation. The 1969 Stonewall Riots mark the advent of the modern gay liberation movement.<sup>67</sup> Legislation prohibiting discrimination based on sexual orientation would not be passed for several more years, and a majority of states have yet to do so.<sup>68</sup> Moreover, the momentum gained by the nascent movement was interrupted by the AIDS epidemic, initially referred to as the “gay plague.”<sup>69</sup> While the AIDS epidemic spurred a new gay activism, it also provided fuel for an anti-gay message and stunted social acceptance of the lesbian and gay community.<sup>70</sup> So it is perhaps not surprising that in 1986, when the AIDS epidemic was still widely believed to be a disease suffered by gay men, that in *Bowers v. Hardwick*, the Court affirmed the state’s authority to criminalize sodomy, declaring that the Constitution does not confer “a fundamental right to engage in homosexual sodomy.”<sup>71</sup> In contrast to the cases described above, the Court found that the “presumed belief of a majority of the electorate in Georgia that homosexual sodomy [was] immoral” provided a rational basis for the law.<sup>72</sup>

But 17 years later, the Court, in a rather dramatic turnabout, overturned *Bowers* by prohibiting Texas from criminalizing sodomy between consenting adults.<sup>73</sup> In *Lawrence v. Texas*, the Court relied on *Griswold* and

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66. *Id.* at 454.

67. On June 28, 1969, police in New York City raided the Stonewall Inn in Greenwich Village, a popular gay bar. The raid, considered to be an unprovoked and brutal attack on the homosexual community, sparked three days of riots in Sheridan Square, which are considered the beginning of the gay rights movement. See *Police Again Rout ‘Village’ Youths: Outbreak by 400 Follows a Near-Riot over Raid*, N.Y. TIMES, June 30, 1969, at 22.

68. Maireka Klawitter & Brian Hammer, *Spacial and Temporal Diffusion of Local Antidiscrimination Policies for Sexual Orientation*, in GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION 22 (Ellen D. B. Riggle & Barry L. Tadlock eds., 1999). Since East Lansing, Michigan became the first municipality to pass an anti-discrimination law based on sexual orientation in 1972, hundreds of cities and counties and a few states have passed similar legislation. *Id.*; see also JAMES W. BUTTON, BARBARA A. RIENZO, & KENNETH D. WALD, PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES 65–68 (1997) (discussing the significance of East Lansing, Michigan’s adoption of a law banning discrimination on the basis of sexual orientation in 1972).

69. In the early 1980s, Jerry Falwell referred to AIDS as the “gay plague,” and as “God’s punishment” for homosexuals. Mary McGrory, *The Spread of Fear*, WASH. POST, Sept. 17, 1985, at A2.

70. DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 27–28, 62–63 (1995).

71. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

72. *Id.* at 196.

73. *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

*Baird* for the proposition that the Constitution protects the right of adults to make certain decisions about sexual conduct free from government intrusion.<sup>74</sup> The Court's decision in *Lawrence* was striking not just for its constitutional pronouncement, but for its reasoning. The Court explicitly cited the shift in cultural attitudes toward homosexuality, both here and abroad, as a basis for overturning *Bowers*.<sup>75</sup> After citing to a European Court of Human Rights opinion contrary to *Bowers*, the Court stated:

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.<sup>76</sup>

The majority further acknowledged that the Due Process Clause protections were affected by what the Court called “an emerging awareness” about liberty and decisions about sex.<sup>77</sup> As in *Baird* and *Loving*, the Court's change in constitutional doctrine paralleled a perceived change in societal norms.

But these decisions were not unanimous.<sup>78</sup> The dissents often reflected the Court's internal struggle to define the proper role of the judiciary when reviewing legislation framed as moral prohibitions, as well as the differing judicial philosophies of the Justices.<sup>79</sup> In his dissent in *Griswold*, Justice Stewart opined that the Court's role was neither to impose the Justices' personal beliefs (he believed the law “asinine”), nor to reject laws that fail to “conform to current community standards” (as the Court was informed this law did).<sup>80</sup> Justice Scalia echoed Justice Stewart's reasoning in his *Lawrence* dissent. There, Justice Scalia observed that judgments about

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74. *Id.* at 565.

75. *Id.* at 573.

76. *Id.*

77. *Id.* at 572.

78. *Id.* (6-3 decision) (Rhenquist, C.J., Scalia & Thomas, JJ., dissenting); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (6-1 decision) (Burger, C.J., dissenting); *Griswold v. Connecticut*, 381 U.S. 429 (1965) (Black & Stewart, JJ., dissenting).

79. *See, e.g., Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting) (arguing that a legislature's finding “that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation” and is therefore constitutional) (citation omitted).

80. *Griswold*, 381 U.S. at 527, 530.

legislation defining appropriate sexual conduct should be reserved to the people and not imposed by the judiciary.<sup>81</sup> Justice Scalia conceded that perceptions about sexual morality change over time but he concluded, as did Justice Stewart before him, that “it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”<sup>82</sup>

Despite the vociferous dissents in *Griswold* and *Lawrence*, these cases succeeded in shifting constitutional doctrine because they provided the right message at the right time to the right bench. The national conversation—reflected in legislative changes—had evolved over time and pushed the Court to expand constitutional principles to encompass societal changes. The Court was populated with a majority of Justices who believed, like Justice Marshall in *Cleburne*,<sup>83</sup> that courts and the Constitution must recognize this evolution. In the words of Gladwell, a tipping point had been reached.

## II. DOMA’S TIPPING POINT?

Whether the cases challenging DOMA offer the right message at the right time to the right bench is uncertain. Some perceive the Court’s decisions in *Lawrence* and *Romer* as a signal that the Court has reached a tipping point with regards to equal access to marriage and its benefits.<sup>84</sup> Others are less convinced, noting that the *Lawrence* Court went out of its way to declare that they were not laying the constitutional groundwork for equal marriage.<sup>85</sup> The uncertainty rests not just on whether constitutional principles encompass such protections (certainly the relevant cases can be read to support such claims) but in whether the national conversation has reached the necessary pitch. And as noted earlier, timing is everything; the makeup of the bench becomes irrelevant if the issue reaches the Court prematurely.<sup>86</sup>

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81. *Lawrence*, 539 U.S. at 604.

82. *Id.* at 603–04.

83. See text accompanying note 18.

84. See, e.g., Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 320 (1997) (discussing the *Romer* decision).

85. See, e.g., Mark D. Rosen, *Why the Defense of Marriage Act is Not (Yet) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 920, 932 (2006); Charles E. Mauney, Jr., *Landmark Decision or Limited Precedent: Does Lawrence v. Texas Require Recognition of a Fundamental Right to Same-Sex Marriage*, 35 CUMB. L. REV. 147, 161 (2004–2005) (arguing that exclusion of same sex couples from the institution of marriage is not analogous to anti-miscegenation statutes).

86. The right bench question is a difficult one to answer with the Court currently in flux, and predictions on an undeveloped case so far from the Court’s docket (assuming certiorari is granted) are

Obviously the *Gill* plaintiffs believe the Court has reached the tipping point or will by the time their case reaches it. The plaintiffs, 19 Massachusetts gay and lesbian citizens contend that section three of DOMA violates the Equal Protection Clause.<sup>87</sup> Specifically, the plaintiffs contend that the federal government is improperly classifying married couples differently without a rationale that promotes a legitimate federal interest.<sup>88</sup> *Smelt v. County of Orange*, which also contended that section three violates the Equal Protection Clause, preceded the *Gill* filing by several years, but because of some procedural delays the merits were just recently addressed.<sup>89</sup> The *Smelt* case has since been dismissed in the lower courts and the Supreme Court denied the *writ of certiorari*.<sup>90</sup>

The plaintiffs' equal protection claims have surface appeal. The federal government has largely left domestic relations legislation to the states, recognizing any marriage valid in the state where it was performed.<sup>91</sup> This was true even if other states refused to acknowledge the union.<sup>92</sup> Based on

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always dangerous. But based on past cases, Justice Scalia is certain to reject any challenges to DOMA, and it would appear Chief Justice Roberts and Justices Alito and Thomas would join him. Justice Thomas joined Justice Scalia in his dissents in both *Lawrence* and *Romer*. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); Justice Alito is widely perceived to be socially conservative although he has a mixed record when it comes to LGBT issues. See Lou Chibbaro, Jr. & Chris Crain, *Alito's Record Mixed on Gay Issues*, WASHINGTON BLADE, Nov. 4, 2005, <http://www.washblade.com/2005/11-4/news/national/alito.cfm> (pointing to Alito's inconsistency when ruling on issues of gay civil rights). Chief Justice Roberts is perceived to be hostile to LGBT issues and his nomination was opposed by Lambda Legal, a national advocacy organization. See *Who is John Roberts? America Needs to Know*, LAMBDA LEGAL'S QUESTIONS TO THE SENATORS (Lambda Legal), <http://www.lambdalegal.org/take-action/campaigns/courting-justice/lambda-legals-questions-to.html> (last visited Sept. 13, 2009) (opposing Robert's nomination). Justice Kennedy, the current swing vote on the Court, authored the opinions in both *Lawrence* and *Romer* and was joined by current Justices Stevens, Breyer, and Ginsburg, suggesting that these four Justices would at least be amenable to any challenge to the statute. See *Lawrence*, 539 U.S. at 561 (listing the justices joining in the decision); *Romer*, 517 U.S. at 621 (listing the justices joining in the decision). Justice Sotomayor is a true unknown. While her nomination was supported by national gay and lesbian organizations, her judicial record on such issues is relatively sparse. Lou Chibbaro, *Praise for Sotomayor*, WASHINGTON BLADE Mar. 26, 2009, [http://www.washblade.com/thelatest/thelatest.cfm?blog\\_id=25527](http://www.washblade.com/thelatest/thelatest.cfm?blog_id=25527).

87. *Gill* Complaint, *supra* note 4.

88. *Id.* ¶ 10.

89. Although the case was originally filed in 2005, the federal court abstained from deciding certain issues while the state courts addressed the matter. *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 870 (C.D. Cal. 2005). In addition, because the plaintiffs were not married at the time they brought the action, the court questioned whether they had standing to challenge the constitutionality of § 2 of DOMA. *Id.* at 871.

90. *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *rev'd in part, remanded in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006).

91. See H.R. Rep. No. 104-664, at 10, *reprinted in* 1996 U.S.C.C.A.N. at 2914 (recognizing that federal government had always relied on state law to define marriage).

92. The federal government relied on the "place of celebration" rule. If the marriage was valid in the state in which it was celebrated, then it was valid for federal law purposes as well. See, e.g., 8

this tradition, when Massachusetts decided to allow same-sex couples to marry, it would follow that the federal government would recognize the union as well.<sup>93</sup>

Congress altered this longstanding tradition when it passed DOMA in 1996.<sup>94</sup> Congress acted swiftly after a Hawaii state court decision held that denying same-sex couples marriage licenses *may* violate the Hawaii state constitution.<sup>95</sup> In section three of DOMA, Congress defined “marriage” for purposes of federal law to mean “only a legal union between one man and one woman as husband and wife” and defined “spouse” to mean “only to a person of the opposite sex who is a husband or a wife.”<sup>96</sup> As a result, same-sex couples legally married under state law are denied access to the more than one thousand federal benefits associated with marriage.<sup>97</sup> These include everything from tax benefits to social security and pension payments, to the immigration status of a non-citizen spouse.<sup>98</sup> Section three clearly categorizes couples differently and bestows on some citizens benefits unavailable to other similarly situated citizens.<sup>99</sup>

But equal protection claims require more than the identification of a distinct categorization.<sup>100</sup> The government is allowed to draw lines as long as they bear some relationship to a legitimate state interest and are not based solely on animus toward a particular group.<sup>101</sup> DOMA will be presumed valid unless the plaintiffs can establish that it is not rationally related to a legitimate state interest—a notoriously hard standard to meet.<sup>102</sup> But there is precedent for such a conclusion. The majority in *Romer*

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U.S.C. § 1186a(d)(1)(A)(i)(I) (2000) (identifying the place of celebration as the relevant state for determining validity of marriage); 5 C.F.R. § 831.603 (2006) (defining “marriage,” in the context of regulating survivor annuities for civil servants, by reference to the “law of the jurisdiction with the most significant interest in the marital status of the employee”); 20 C.F.R. § 404.345 (2005) (looking to state law to define marital relationship in the context of regulating social security benefits).

93. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (emphasizing that domestic relations are the subject of state law); *Battiler v. INS*, No. 94-70665, 1996 WL 384872, at \*3 (9th Cir. July 9, 1996) (applying place of celebration rule); see also *Gee Chee On v. Brownell*, 253 F.2d 814, 817 (5th Cir. 1958) (applying place of celebration rule).

94. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

95. H.R. REP. NO. 104-664, at 2; see *In re Kandu*, 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004) (explaining the actions taken by Congress).

96. *In re Kandu*, 315 B.R. at 132.

97. U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT GAO04-353R (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

98. *Id.* at app. I.

99. 1 U.S.C. § 7 (2006).

100. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (asserting that equal protection claims also require the determination of the presence of invidious discrimination).

101. *Id.*; see also *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that state legislation based on animus towards a particular group violates the Equal Protection Clause).

102. *Romer*, 517 U.S. at 632.

invalidated Colorado's Amendment 2 under this test because it "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else."<sup>103</sup>

So what is the state's interest in treating legally married same-sex couples differently from legally married opposite-sex couples? The state is, in part, attempting to regulate the sexual conduct of the citizenry. During the legislative hearings, the bill's sponsors justified the law based on the federal government's interest in protecting the institution of heterosexual marriage and in promoting heterosexuality.<sup>104</sup> Specifically, the statute's proponents argued that:

Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.<sup>105</sup>

As the legislative history shows, the phrase "defense of marriage" is nothing more than a euphemism for "defense of heterosexuality." In essence, a marriage license is a license for state approved sex and the benefits associated with marriage an incentive to enter into the government-approved union.<sup>106</sup>

The question becomes whether a moral judgment about sexual conduct represents a legitimate state interest that justifies treating similarly situated couples differently. While the *Lawrence* majority focused their discussion on whether the state could enforce a majoritarian morality on society by criminalizing certain sexual conduct, it fell shy of declaring that moral judgments could never be a legitimate state interest.<sup>107</sup> In contrast, in her concurrence, Justice O'Connor declared that moral disapproval of a group is never a justification for disadvantaging that group.<sup>108</sup> Reading broadly, Justice Scalia perceived the *Lawrence* majority decision as laying the foundation to invalidate DOMA and the myriad of state prohibitions of same-sex marriage.<sup>109</sup> But even before *Lawrence* was decided, the Court

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103. *Id.* at 635.

104. H.R. REP. No. 104-664, at 2916, 2920.

105. *Id.* at 2919-20 (footnote omitted).

106. *Id.* at 2918 ("Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children.") (citation omitted).

107. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.").

108. *Id.* at 583 (O'Connor, J., concurring) (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

109. *See id.* at 604-05 (Scalia, J., dissenting) (suggesting that state approval of intimacy

had recognized limits to the state's ability to categorize people differently based on moral judgments.<sup>110</sup> The statutes at stake in *Eisenstadt* and *Loving* were both couched in terms of moral determinations; yet, the Court eventually struck each of them down as constitutionally deficient.<sup>111</sup> So is the Court prepared to do the same here, and more importantly, now?

*Gill* will not be the first opportunity for the Court to address this issue. Thirty-seven years ago in *Baker v. Nelson*, the Supreme Court did not even deem the equal marriage question as worthy of serious discussion.<sup>112</sup> In 1972, two men claimed a Minnesota clerk's refusal to grant them a marriage license violated the federal constitution.<sup>113</sup> While the Minnesota statute did not explicitly prohibit marriage between same-sex couples, the Minnesota state court reasoned that the term "marriage" is one of "common usage, meaning the state of union between persons of the opposite sex."<sup>114</sup> In rejecting the plaintiffs' arguments, the state court declared that it was unwilling to restructure the historic institution to fit "the asserted contemporary concept of marriage."<sup>115</sup> Using the mandatory review provision then in place, the plaintiffs appealed to the Supreme Court where their claim was summarily dismissed "for want of a substantial federal question."<sup>116</sup>

The three lower federal courts that have considered the constitutionality of DOMA are divided about *Baker*'s applicability. One court cited it as binding precedent, unmoved by the argument that it was over 30 years old and had been decided before the "current civil rights revolution."<sup>117</sup> Two other courts held the narrow finding inapplicable to the validity of DOMA.<sup>118</sup> In so doing, one court observed that the Supreme Court was unlikely to consider the questions raised by DOMA as "unsubstantial" today given how constitutional doctrine involving

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between same-sex couples paves the way for equal marriage benefit).

110. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that these types of moral determinations are "beyond the competency of the state"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring anti-miscegenation statute unconstitutional).

111. *Eisenstadt*, 405 U.S. at 453 (refusing to address the moral issues associated with the legislation); *Loving*, 388 U.S. at 12 (striking down state anti-miscegenation statute with minimal discussion of legislative and judicial moral judgment).

112. *Baker v. Nelson*, 191 N.W. 2d 185, 186 (Minn. 1971).

113. *Id.* 186.

114. *Id.* at 185–86.

115. *Id.* at 186.

116. *Baker v. Nelson*, 409 U.S. 810 (1971) (mem.).

117. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2003).

118. See *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *rev'd in part, remanded in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006), *cert. denied*, 549 U.S. 959 (2006) (distinguishing *Baker* as merely allocating benefits as opposed to defining who receives the "federal rights and responsibilities of marriage"); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004).



homosexuality had evolved in the intervening years.<sup>119</sup>

Regardless of the courts' varying views on *Baker's* applicability, each court found that judicial intervention regarding DOMA's validity was premature. The court in *Wilson* was willing to recognize "the importance of a heterosexual or homosexual individual's choice of a partner," and even acknowledged that the Supreme Court could expand the *Lawrence* precedent, but it was unwilling to "preemptively" take that step.<sup>120</sup> The *Kandu* court agreed, concluding that despite increasing social acceptance there was no basis for finding a fundamental right to marry "at this time."<sup>121</sup> The court in *Smelt* explicitly referenced the national debate, noting the lack of universal acceptance of marriage between same-sex couples in deciding that DOMA was constitutional:

The history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex. Until 2003, when Massachusetts became the first state to recognize a right to same-sex marriages, marriage in the United States uniformly had been a union of two people of the opposite sex. A definition of marriage only recognized in Massachusetts and for less than two years cannot be said to be "deeply rooted in this Nation's history and tradition" of the last half century.<sup>122</sup>

In its defense of DOMA in the courts, the federal government also argued that court intervention would be premature and would interfere with the ongoing public debate about equal marriage. To support its motion to dismiss the complaint in *Smelt*, the government relied on the nascent public discussions regarding equal access to marriage.<sup>123</sup> The government claimed that "DOMA reflects a cautiously limited response to society's still-evolving understanding of the institution of marriage."<sup>124</sup> It references this argument frequently throughout the brief, urging the court not to intervene in what it presented as a new social experiment.<sup>125</sup> Additionally, the brief highlights the number of states that have refused to recognize same-sex

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119. *Smelt*, 374 F. Supp. 2d at 873 (citing *Hicks v. Miranda*, 422 U.S. 332 (1975)).

120. *Wilson*, 354 F. Supp. 2d at 1306–07.

121. *In re Kandu*, 315 B.R. at 140.

122. *Smelt*, 374 F. Supp. 2d at 878 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

123. Defendant United States of America's Notice to Dismiss; Memorandum of Points and Authorities In Support Thereof, *Smelt v. United States*, No. SACV09-00286 (C.D. Cal. Aug. 4, 2009).

124. *Id.* at 1.

125. The brief uses the term "evolving" or "still-evolving" nine times when referring to the equal marriage debate. *Id.* at 1, 23, 25, 33–37.

marriage, emphasizing that the national conversation has not yet been reflected in legislative change.<sup>126</sup>

The lower courts' and government's arguments echo Justice Breyer's sentiments that the judiciary should enter such national debates "later in the process."<sup>127</sup> The "national conversation" about marriage equality is in its infancy when compared to race and gender issues. Equal marriage remains a deeply divisive issue. A recent poll shows that a majority of Americans are still resistant to extending marriage rights to same-sex couples.<sup>128</sup> A vast majority of states either have constitutional amendments or statutes that explicitly define marriage as between one man and one woman.<sup>129</sup> If the Justices are looking for evidence of a societal tipping point through legislative changes, as they did in *Lawrence* and *Loving*, they will not find it yet.

There are glimmers of hope, however. The plaintiffs are not seeking the right to marry—they are legally married in the states in which they currently live. They are simply seeking the federal benefits associated with marriage. A vast majority of Americans do believe that gay men and lesbians should have access to the benefits associated with marriage, such as employment benefits and inheritance rights.<sup>130</sup> As noted earlier, President Obama signed an Executive Order providing available benefits to federal employees in the Executive Branch and supported Representative Baldwin's bill to extend those same benefits to the partners of all federal employees.<sup>131</sup> Moreover, a lot can happen before any case reaches the Supreme Court.

But if the Court were to consider the issue today, it is highly unlikely that the plaintiffs would succeed. Even those Justices willing to expand constitutional principles to encompass changing social norms are unlikely to invalidate DOMA now. Despite the *Gill* plaintiffs' attempts to narrowly define the issue, a decision that the federal government violated the Equal Protection Clause by limiting homosexual couples' access to federal benefits would certainly have far-reaching implications beyond DOMA. Proponents of equal marriage would quickly use any Supreme Court

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126. *Id.* at 1.

127. BREYER, *supra* note 21, at 70–71.

128. A recent Gallup poll found that a majority of Americans opposed equal marriage rights for gay men and lesbians. Jeffery M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, (May 27, 2009), <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx>. [hereinafter Jones].

129. *See supra* note 32 and accompanying text.

130. A recent Gallup poll found that over two thirds of self-identified liberals believe gay men and lesbians should be granted the benefits associated with marriage. Jones, *supra* note 124.

131. *See supra* notes 26–28 and accompanying text.

decision declaring DOMA unconstitutional as a basis for challenging the myriad of state laws that also define marriage as between one man and one woman. While the inherent unfairness of treating similarly situated married couples differently may be the right message, it is simply not the right time. Neither society nor the Court has reached the tipping point when comes to equal access to marriage and its benefits.

