

**DOMA AND DIFFUSION THEORY:  
ENDING ANIMUS LEGISLATION THROUGH A RATIONAL  
BASIS APPROACH**

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“The bravest are surely those who have the clearest vision of what is before them, glory and danger alike, and yet notwithstanding, go out to meet it.” Thucydides<sup>1</sup>

## I. INTRODUCTION

When social and legal commentators explore the topic of same-sex couples’ rights,<sup>2</sup> the media frames the discussion using the historical underpinnings of the arguments of each side. In what is an extremely gray area, there are black and white lines drawn. The inherent morality, intertwined into this discussion, creates a barrier for examining the underlying assumptions. The challenge to that morality, rather than the challenge to data, plays to the fundamental human desire to resist change.<sup>3</sup>

The current discussion is framed as follows. Those who support the establishment of laws preventing same-sex couples from marrying and adopting essentially base their argument on either religious justification (prohibited in *Leviticus*),<sup>4</sup> economic justification (the

1. THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR (Sir Richard Winn Livingstone ed., Oxford Univ. Press 1960).

2. For the purposes of this Article, there will not be a distinction between gay men, lesbians, bisexuals, transsexuals, or transgenders. The distinctions between the aforementioned classifications are unimportant for the discussion of the current legislation. For a thoughtful discussion of the distinctions between the categories, see GENDER NONCONFORMITY, RACE AND SEXUALITY (Toni Lester ed., 2002) [hereinafter LESTER]. The concept that all human beings are either male or female is also outside the scope the Article. For a detailed discussion of what it means to be female, see Christopher Clarey & Gina Kolata, *Gold Awarded Amid Dispute over Runner’s Sex*, N.Y. TIMES, Aug. 20, 2009, available at [www.nytimes.com/2009/08/21/sports/21runner.html?scp=1&sq=woman%20sports%20runner&st=c](http://www.nytimes.com/2009/08/21/sports/21runner.html?scp=1&sq=woman%20sports%20runner&st=c) ase (“Medical experts said assigning sex was hardly as easy as sizing someone up visually.”); Julie A. Greenberg, *Definitional Dilemmas, Male or Female? Black or White? The Law’s Failure to Recognize Intersexuals and Multiracials*, in LESTER, *supra*, at 102–24 (“Originally, legal classification systems based upon race and sex operated on the assumptions that (1) race and sex are binary, and (2) race and sex can be biologically determined.”).

3. EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 365 (5th ed. 2003) (“One of the greatest pains to human nature is the pain of a new idea. It . . . makes you think that after all, your favorite notions may be wrong, your firmest beliefs ill-founded . . . . Naturally, therefore, common men hate a new idea, and are disposed more or less to ill-treat the original man who brings it.” (quoting WALTER BAGEHOT, PHYSICS AND POLITICS (1873))).

4. See *Leviticus* 18:22 (King James) (“Thou shalt not lie with mankind, as with womankind: it is abomination.”). However, it is never brought to bear the other admonishments of *Leviticus*. For example, these other acts are banned: tattoos (*Leviticus* 19:28), eating pork or shell fish (*Leviticus* 11:3-8), and stoning blasphemers (*Leviticus* 24:10-23). Moreover, holidays, such as Yom Kippur (יום־כִּפּוּר), are required to be observed. *Leviticus* 16:29, 23:27. The topic over which laws in *Leviticus* to obey is a complicated discussion and far outside the scope of this Article. Due to the antinomianism of passages, such as Paul’s *I Corinthians* 10:23-26, most current Christians,

recognition will either cost the country money or will use my tax dollars for a nefarious purpose),<sup>5</sup> or on a lack of evidence regarding the choice element.<sup>6</sup> Those who support the establishment of laws requiring equal protection, or at least eliminating animus-based legislation, base their argument on the right to lead a life free from discrimination based on sexual orientation.<sup>7</sup> More specifically, regarding same sex-couple marriages, analogies are drawn between the elimination of anti-miscegenistic legislation and the current plight of same-sex couples.<sup>8</sup>

generally, divide *Leviticus* into two sections: the morality codes (e.g., do not send your daughter out for prostitution) and Mosaic Law (e.g., ritualistic circumcision). The discussion of the religious recognition of the right to marriage for same-sex couples is outside the scope of this Article, because the Article only addresses state marriage laws, which are not the same as religious marriage laws. For a thoughtful series of articles on the topic, see DOUGLAS LAYCOCK, ANTHONY R. PICARELLO, JR. & ROBIN FRETWELL WILSON, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, THE BECKET FUND FOR RELIGIOUS LIBERTY (2008); Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 MICH. J. GENDER & L. 41 (2008).

5. 1 U.S.C. § 7 (2010), commonly referred to as the Defense of Marriage Act (“DOMA”). In the House Report, purpose (4) states that DOMA will protect scarce government resources. Pub. L. No. 104-199, 110 Stat. 2419. See also Associated Press, *Steele: Gay Marriage Costs Small Business*, WASH. TIMES, May 17, 2009, available at <http://www.washingtontimes.com/news/2009/may/17/gay-marriage-called-burden-on-business/> (“Republicans can reach a broader base by recasting gay marriage as an issue that could dent pocketbooks as small businesses spend more on health care and other benefits, Republican National Committee Chairman Michael S. Steele said Saturday.”). For the full discussion, see *infra* Part IV.B.

6. See, e.g., Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997 (2007); cf. LESTER, *supra* note 2, at 102–24.

7. The question which will permeate this Article is: why marriage? Not all gay and lesbian rights advocates believe marriage is the answer. Some argue that marriage is contrary to main messages of the lesbian and gay movement of affirmation of gay identity and of many forms of relationships. Some argue that it signifies social acceptance. But to answer the question, why marriage, it is because as long as marriage is the basis for rights, equal access should be granted. See AMY D. RONNER, HOMOPHOBIA AND THE LAW 29–31 (2005). However, it is the aforementioned idea that there is some form of social acceptance or validation that is most troubling for the opposition. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 574–75 (1995) (“[A] contingent marching behind the organization’s banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . .”); John G. Culhane, *Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights*, 84 CHI.-KENT L. REV. 437 (2009). Cf. Marc Poirier, *Name Calling: Identifying Stigma in “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425 (2009) (focusing on the Connecticut marriage equality case and the concept that civil unions reinforce a preexisting sense of second class status, which violates the Equal Protection Clause).

8. See, e.g., Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2736 (2008) (“My contention is that both antimiscegenation statutes and bans against same-sex marriage have been used to construct and reify essentialized and dualistic understandings of race and sex/gender.”); Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV.

Rather than focusing on a dissertation between the two moralities (Judeo-Christian vs. anti-miscegenation), this Article will review the current law and try to forecast the direction in which the law is moving. This Article will instead focus on the topic of why the elimination of DOMA, examined through a sociological perspective, is inevitable.<sup>9</sup> The concept that any change occurs through a process of enlightenment of ignorance<sup>10</sup> followed by acceptance is the premise of this paper. The interests of the party accepting change are best served by the sociological principle that change is fundamental.<sup>11</sup>

In order to better frame the discussion, alternative approaches must be explored. The purpose of this Article is to expand the scope of the discussion from one of morality to include a sociological approach, called Diffusion Theory.<sup>12</sup> Diffusion Theory is most often applied to situations where a new idea or product is introduced to help determine

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1307, 1389 (2009); Holing Lau, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 HASTINGS L.J. 843 (2008); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Anti-Miscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008) (“Conversations about the constitutionality of prohibitions on marriage for same-sex couples invariably reduce to the question of whether a meaningful analogy can be drawn between restrictions on same-sex marriage and anti-miscegenation laws.”); Josephine Ross, *Riddle for Our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage*, 54 RUTGERS L. REV. 999, 1009-10 (2002) (“Same-sex marriage cases are a logical extension of the principles of *Loving v. Virginia*, for both its holdings: (1) Even though the statute effects [sic] African-Americans and whites, it still constitutes a racial classification which must be justified under a higher burden of proof; and (2) There is a fundamental right to marry.”).

9. Economic theory is utilized in various discriminatory applications of statutory schemes. However, it is often underutilized for “civil rights practitioners that can help predict how different causal theories (animus versus statistical discrimination) and different government remedies (affirmative actions quotas versus bidding credits) affect private behavior.” IAN AYRES, *PERVASIVE PREJUDICE?* 13 (2001).

10. For a thoughtful analysis of the myths that surround homophobia, see generally RONNER, *supra* note 7, at 4–7 (discussing the multiple stereotypes that can either stand alone or commingle including: (1) “emblem of a dangerous criminality” (*Bowers v. Hardwick*, 478 U.S. 186 (1986)); (2) equating “the homosexual with physical illness—not just any illness—but something especially vile and loathsome”; and (3) “a lifestyle antithetical to marriage and family.”). See also Nancy J. Knauer, *LGBT Elder Law: Toward Equity in Aging*, 32 HARV. J.L. & GENDER 1, 34-37 (2009); Dennis A. Golden, *The Policy Considerations Surrounding the United States’ Immigration Law as Applied to Bi-National Same-Sex Couples: Making the Case for the Uniting American Families Act*, 18 KAN. J.L. & PUB. POL’Y 301, 306-07 (2009) (discussing the myths that homosexuals are “pied pipers” who recruit others into the fold and as molesters of children); Michaelson, *supra* note 4.

11. See ROGERS, *supra* note 3, at 6 (noting that information reduces uncertainty about cause-effect relationship in problem solving: “When new ideas are invented, diffused and are adopted or rejected, leading to certain consequences social change occurs.”).

12. See generally *id.*; MALCOLM GLADWELL, *THE TIPPING POINT* (2000).

how or why people either choose to adapt or reject the proposed change.<sup>13</sup>

The premise of Diffusion Theory is that the adaptation of a new idea or product depends on the message, the messenger, and the ability to effectively reach the target audience, with the underlying assumption that people or societal groups resist change.<sup>14</sup> In order to have effective change the advocate change agents must have others empathize with their position. Whether challengers of DOMA have achieved this level of empathy is the question addressed in this paper.

Within one month, two major district court decisions were handed down upholding the first serious challenges to DOMA.<sup>15</sup> The courts struck down DOMA and a state marriage ban under a rational basis review.<sup>16</sup> In other words, there is no legitimate government interest regarding this type of legislation. Clearly both cases will be appealed, but do these cases indicate a successful change agent under Diffusion Theory?

The current legal challenges to the constitutionality of DOMA suggest that a heightened constitutional standard should be used in analyzing the statute.<sup>17</sup> The argument is if a disproportionate impact on a class of individuals, e.g., same-sex couples, exists, this creates a suspect classification. If a suspect classification is granted, DOMA or other state marriage statutes would be subject to strict scrutiny and, in all probability, would be held unconstitutional.<sup>18</sup> This would be a simple solution to the problematic enactment of DOMA.

A strict scrutiny approach appears unlikely to carry the day based on recent court trends.<sup>19</sup> It is not likely that the Court will add another

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13. ROGERS, *supra* note 3.

14. *Id.* at 365.

15. Commonwealth v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010); Perry v. City & Cnty. of S.F., 704 F. Supp. 2d 921 (N.D. Cal. 2010) (upholding a challenge to Proposition 8).

16. Commonwealth v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

17. Heightened standards under the Due Process Clause are reserved to rights "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986).

18. The three basic classifications of a suspect class are those classifications that reflect "deep-seated prejudice," Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982), those that discriminate against a group that has been "subjected to . . . a history of purposeful unequal treatment," San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), or those that inhibit a group that tends to be relegated to "a position of political powerlessness." *Id.* at 28.

19. In fact, the Supreme Court has already stated that the Due Process Clause does apply to homosexual sodomy. See generally Bowers v. Hardwick, 476 U.S. 186 (1986).

suspect class.<sup>20</sup> The overwhelming movement of the Court has been to reduce the applicability of the strict scrutiny standard to existing suspect classifications.

It seems rather naïve and pedantic for advocates to bank on a complete reversal of current Court trends. Clearly, same-sex couples have endured decades of prejudicial treatment. Further, in the author's opinion, only a failure of the fourth prong of political powerlessness would prevent same-sex couples for eligibility of heightened scrutiny.<sup>21</sup> If it is clear that the Court will not grant suspect classification or other heightened scrutiny to same-sex couples, the ruling on DOMA will be governed by the rational basis standard.

In order to have DOMA upheld using a rational basis standard, the government must prove that there is a rational correlation between the statute and the government's interest. What Diffusion Theory can show is that when the majority empathizes with the minority, there will no longer be a rational correlation between the statute and the interest. In order to effectuate change, a change agent must first communicate the idea that there is a group deserving of redress. That fundamental principle is what Diffusion Theory teaches. That same principle was the outline of the successful Florida attacks in the same-sex couple adoption cases.<sup>22</sup>

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20. Historically, the heightened review standard has been applied to classes that had no political voice. Gender classifications became subject to the intermediate standard in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Racial classifications became subject to the standard in *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967), and *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964). Religious classifications have become subject to the standard in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In 1990, the Supreme Court held in *Employment Division v. Smith* that a neutral, generally applicable law is entitled to deferential rational basis review, even if the law prohibits conduct central to an individual's religion. *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 885-87 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Cutter v. Wilkinson*, 544 U.S. 709 (2005). National origin became subject to the standard in *Oyama v. California*, 332 U.S. 633, 644-46 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Sexuality has not been held to this standard, except in *Romer v. Evans*, 517 U.S. 620 (1996). Further, groups like non-immigrant aliens are not afforded the heightened scrutiny. *See* *LULAC v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 417-19 (5th Cir. 2005); *see generally* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481 (2009); Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010); Tobias Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2246-47 (2005).

21. *Lyng v. Castillo*, 477 U.S. 635 (1986). Yoshino, *supra* note 20, at 1537 ("The gay tipping point raises the question whether gay individuals are still a politically powerless minority deserving of judicial protection in this country.")

22. *In re Adoption of John Doe*, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008); *In re Adoption of John and James Doe*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

Thus to determine the likely outcome in a diffusion approach, it is necessary to look at statistical trends, whether the message can be modified, and whether this modified message can be effectively delivered. Through message adoption, as evidenced by the Florida cases, DOMA can be equally attacked. Diffusion Theory allows us to examine how change was effectuated in Florida and how similar change can occur under DOMA.

Examining the topic through the aforementioned lens, an interesting conclusion begins to develop, demonstrating that the outcome of fundamental fairness seems to be settled. The current statistical trends, population age density, and voting tendencies on the issue indicate that a different result should soon appear.<sup>23</sup> This Article will draw on how age differences, adaptation of the messages, and technological changes indicate that, if left to its own devices, sexual discriminatory legislation is destined to fail.

It is important to look at the topic because there are collateral consequences.<sup>24</sup> The rights in question affect not only same-sex couples, but also their children.<sup>25</sup>

Section II of this Article explains Diffusion Theory. Section III explores the background of DOMA and the factual background in which DOMA is being challenged by the states and private citizens. Section IV discusses the fundamentals behind the Florida adoption ban and how the change in the message by the challengers has proven effective. The final part, Section V, analyzes whether the approach should center on the inevitability of the change, as reflected in the Justice Department's brief. The justification by the government, both at the state and national level,

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23. See also OVID, PUBLIUS OVIDIUS NASO ("There is nothing in the whole world which is permanent. Everything flows onward; all things are brought into being with a changing nature; the ages themselves glide by in constant movement.").

24. Not least among these consequences is the tax impact of having to pay extra income and payroll taxes and additional health insurance costs. See generally Cain, *supra* note 20. Further, in the event that there is an estate tax, under current rules, even if you are married for state law purposes, the marital deduction under I.R.C. § 2056 is unavailable for the surviving spouse. *Id.* at 499. See also Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 173 (1998) ("This option is not available to same-sex couples. Transfers between same-sex partners do not qualify for the unlimited marital deduction."). Moreover, from an income tax perspective, the failure of DOMA to recognize the valid state law marriage for tax purposes creates certain benefits not allowed to heterosexual couples. For example, same-sex couples would not fall under the anti-abuse rules for related persons. See Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

25. For example, under intestate laws, one inherits from his or her parents. If you are not a legal parent, then the child does not inherit for those purposes. See Wolff, *supra* note 20, at 2246-47 ("How, then, does it make sense to argue that it is in the best interest of children to deny any support or recognition to the relationships of their gay and lesbian parents?").

has been focused on resources. If that justification is proven incorrect, the message has to change. The conclusion being that if we have “tipped” as a country, then we should be reallocating our resources to other more socially profitable needs.

## II. PRIMER ON DIFFUSION THEORY

It is thought that social problems decline in a steady progression.<sup>26</sup> We are used to looking back through decades of history for our paradigms of the present. This condensation of time creates the false assumption that social progress occurs in a linear fashion.<sup>27</sup> “We are all, at heart, gradualists, our expectations set by the steady passage of time.”<sup>28</sup>

Sometimes, however, the decline is not slow and steady but happens all at once. This is the phenomenon commonly known as a tipping point.<sup>29</sup> This is when “the unexpected becomes expected, where radical change is more than possibility. It is—contrary to all our expectations—a certainty.”<sup>30</sup> Malcolm Gladwell did a marvelous job in his book, *The Tipping Point*, of summarizing Diffusion Theory.

### A. Basics

Diffusion Theory targets how ideas or products are either accepted or rejected.<sup>31</sup> “Diffusion is a special type of communication concerned

26. GLADWELL, *supra* note 12, at 13.

27. For example, a stock chart from 1928 to 2009 seems to show a steady linear increase in valuation (but for the crash in 1932). The longer the time line (history), the more linear and less volatile the movement appears.



The previous chart is available at <http://finance.yahoo.com/echarts?s=%5EDJI#chart3:symbol=%5E^dji;range=19281103,20091103;charttype=line;crosshair=on;ohlcvvalues=0;logscale=on>.

28. GLADWELL, *supra* note 12, at 13.

29. *See generally id.*; ROGERS, *supra* note 3.

30. ROGERS, *supra* note 3, at 14.

31. *Id.* at 35.



with the spread of messages that are perceived as new ideas.”<sup>32</sup> There are four main elements of the diffusion of new ideas: (1) an innovation;<sup>33</sup> (2) that is communicated<sup>34</sup> through certain channels;<sup>35</sup> (3) over time;<sup>36</sup> (4) among the members of a social system.<sup>37</sup> Essentially, a new idea travels through decision trees in which members of the social system can reject, accept, or modify the idea.<sup>38</sup>

As sociologists would argue, the key to behavior modification is to get people to care about their neighbor in distress.<sup>39</sup> In Diffusion Theory, getting people to care is a five-step process: (1) knowledge;<sup>40</sup> (2) persuasion;<sup>41</sup> (3) decision;<sup>42</sup> (4) implementation;<sup>43</sup> and (5) confirmation.<sup>44</sup> So what changed in late 2009 regarding the advancement of equal treatment for the Lesbian, Gay, Bisexual,

32. *Id.*

33. “An innovation is an idea, practice, or object that is perceived as new by an individual or other unit of adoption.” ROGERS, *supra* note 3, at 12. Innovations are not all equivalent units of analysis. Certain characteristics as perceived by individuals, such as (1) relative advantages, e.g., better mouse-trap; (2) compatibility with existing values; and (3) complexity, e.g., how difficult it is to understand, among others, are factored into the equation. *Id.*

34. “Communication is a process in which participants create and share information with one another in order to reach a mutual understanding.” *Id.* at 5.

35. “A communication channel is the means by which messages get from one individual to another.” *Id.* at 36.

36. *Id.* at 22.

37. “A social system is defined as a set of interrelated units that are engaged in joint problem solving to accomplish a common goal.” *Id.* at 23. For example, the Peruvian village would be considered a social system. *See infra* notes 57-63 and accompanying text.

38. ROGERS, *supra* note 3, at 169.

39. *See, e.g.*, GLADWELL, *supra* note 12, at 29. *See also* Carl Hulse, *House Votes to Expand Hate Crimes Definition*, N.Y. TIMES, Oct. 9, 2009, at A1 (discussing the governmental response to the national outcry for the gruesome 1998 murder of Matthew Shepard). For more on the Shepard murder, see MATTHEW SHEPARD FOUNDATION, [www.matthewshepard.org](http://www.matthewshepard.org) (last visited Mar. 13, 2011); Barbara Isenberg, *Matthew Shepard’s Murder, 10 Years Later*, L.A. TIMES, Oct. 11, 2009, available at <http://www.latimes.com/entertainment/news/la-ca-laramie11-0-2733126.story>; *New Details Emerge in Matthew Shepard Murder*, ABC NEWS, (Nov. 26, 2004), <http://abcnews.go.com/2020/story?id=277685&page=1&page=1>.

40. “Knowledge occurs when an individual (or other decision-making unit) is exposed to an innovation’s existence and gains and understanding of how it functions.” ROGERS, *supra* note 3, at 169.

41. “Persuasion occurs when an individual (or other decision-making unit) forms a favorable or an unfavorable attitude towards the innovation.” *Id.*

42. “Decision takes place when an individual (or other decision-making unit) engages in activities that lead to a choice to adopt or reject the innovation.” *Id.*

43. “Implementation occurs when an individual (or other decision-making unit) puts a new idea into use.” *Id.*

44. “Implementation occurs when an individual seeks reinforcement of an innovation-decision already made, but he or she may reverse this previous decision if exposed to conflicting messages about the innovation.” *Id.*

Transgender, and Intersex (“LGBTI”) community? It is argued that “[h]uman behavior change is often motivated in part by a state of internal disequilibrium or dissonance, an uncomfortable state of mind that an individual seeks to reduce or eliminate.”<sup>45</sup> Generally speaking, sexual orientation discrimination is based on misrepresentation or misunderstanding of basic human interactions.<sup>46</sup>

### B. *Communication of the Idea*

Once an idea has been formulated and put through the initial diffusion stages, it must be communicated. There have been decades of research on the effectiveness of how ideas are communicated.<sup>47</sup> Communication is the method by which an idea moves through the stages of adaptation. Oftentimes it is not the idea itself that will cause the group to reject it, but rather, the manner in which, or the audience to whom, the concept is presented.<sup>48</sup>

In social science terms, it is not enough for those misrepresentations or misunderstandings to be corrected. The mere counter to those points will not result in empathy towards the discriminated group.<sup>49</sup> People must care about the individuals in distress.<sup>50</sup>

The misconception that the current equal rights movement makes is assuming that empathy is a one-way street. Empathy also runs in the other direction.<sup>51</sup> The person who is acting as the change agent<sup>52</sup> must empathize “with clients[, which] is especially difficult when the clients are extremely different from the change agents.”<sup>53</sup> Without being sympathetic to the individual’s beliefs, the change agent will not be

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45. *Id.* at 189.

46. *Id.* at 365-70.

47. *See generally* GLADWELL, *supra* note 12; ROGERS, *supra* note 3; GEOFFREY MOORE, *CROSSING THE CHASM: MARKETING AND SELLING HIGHTECH PRODUCTS TO MAINSTREAM CUSTOMERS* (2002) (applying Diffusion Theory to technology companies). According to Moore, the change agent should focus on one group of customers at a time, using each group as a base for marketing to the next group. *Id.* He essentially believes that the most difficult step is making the transition between early adopters and early majority. *Id.*

48. This is what is commonly referred to as an “innovation-oriented” approach versus a “client-oriented approach.” ROGERS, *supra* note 3, at 5.

49. *Id.* at 369.

50. *Id.* at 20-21.

51. *Id.* at 376-77.

52. The change agent is the person or persons who are the communication link between the resource system and the public. *Id.* at 368-73. People must accept the change agent before they will accept the innovations that he or she is promoting. *Id.*

53. ROGERS, *supra* note 3, at 376-77.

accepted and the message will not be heard.<sup>54</sup> This is especially true when there is heterophily<sup>55</sup> in the message group. If the change agent and the individuals do not speak the same language, then the communication process breaks down.<sup>56</sup>

One of the most used examples for the failure of an idea that was clearly beneficial is the water boiling study done in the 1950s in Peru.<sup>57</sup> During that time, Peruvian villagers did not understand the relationship between sanitation and illness.<sup>58</sup> Generally, the water that was consumed was subject to pollution and contamination.<sup>59</sup> The boiling of the water would alleviate waterborne diseases such as typhoid.<sup>60</sup> The change agent was sent, and, over a two-year period, she visited every home and spent a lot of time with fifteen to twenty-one families.<sup>61</sup> Yet she only convinced about 5% of the population to adopt the innovation.<sup>62</sup> The conclusion was that the change agent's use of an "innovation-oriented" rather than a "client-oriented" approach, combined with her role as an outsider who did not fully understanding the village norms, e.g., that hot water was only for the sick, caused the failure.<sup>63</sup>

### C. *Change and Diffusion Theory*

The underlying premise is that people do not want change.<sup>64</sup> If someone has a better approach to a social norm, then she has to do two things in order to effectuate her change. First, is to have society **empathize with her position**. Second, is not only to articulate the innovation, but also to **empathize with the group** she wants to adopt her message. In the field of equality of rights for same-sex couples, there has been a failure in the approach of the last stage of

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54. *Id.*

55. "Heterophily . . . is defined as the degree to which two or more individuals who interact are different in certain attributes." *Id.* at 19.

56. *Id.* at 19, 381-83.

57. ROGERS, *supra* note 3, at 1-4, citing Edward Wellin, *Water Boiling in a Peruvian Town*, in HEALTH, CULTURE AND COMMUNITY 71-103 (Benjamin D. Paul ed., 1955).

58. ROGERS, *supra* note 3, at 1-4.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 4.

63. *Id.* at 5.

64. *Id.* at 365.

communication. Like in Peru, they have failed to empathize with the older generation of Americans.<sup>65</sup>

The Iowa farmer's decision on the implementation of a new hybrid form of corn serves as the most fundamental example on the application of Diffusion Theory.<sup>66</sup> An idea proceeds through a social system within five adopter categories. The categories of adopters are: innovators,<sup>67</sup> early adopters,<sup>68</sup> early majority,<sup>69</sup> late majority,<sup>70</sup> and laggards.<sup>71</sup>

The study regarding the hybrid form of corn was initiated when the Iowa state administrators wondered why the farming community was not adopting a clearly better hybrid form of corn. Although the hybrid corn produced more and was more resistant to disease, it was expensive because it did not reproduce on its own. Essentially, someone had to try it first to see if it worked at all. These farmers were the Innovators. They would then tinker with the product to make it work better. The first group to follow them after the trial run would be the early adopters.

The early adopters were members of the community who had more trust and status in the community. So when they tried the hybrid corn, their action carried more weight. If the hybrid corn proved successful with this group, then the next step would be for the Early Majority to use the product. Whether the idea has enough legs to get the Late Majority

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65. For example, there was a recent failed ballot initiative for same-sex marriage in Maine in 2009. According to the U.S. Census Bureau, Maine has 15.1% of its population over the age of sixty-five with a median age of forty-two. This equates to Maine having the fourth oldest population in the country. See U.S. Census Bureau Chart GCT-T4-R, Percent of the Total Population Who Are 65, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-state=gct&-ds\\_name=PEP\\_2008\\_EST&-\\_box\\_head\\_nbr=GCT-T4-R&-mt\\_name=&-redoLog=true&-\\_caller=geoselect&-geo\\_id=&-format=U-40Sc&-\\_lang=en](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-state=gct&-ds_name=PEP_2008_EST&-_box_head_nbr=GCT-T4-R&-mt_name=&-redoLog=true&-_caller=geoselect&-geo_id=&-format=U-40Sc&-_lang=en). Similarly, there has been discussion concerning whether the marriage-only statutes are effectively communicating their position. In a recent study by Doctor Egan, it was shown that the campaigning both for and against the statutes did not change people's opinions. See Patrick J. Egan, *Findings from a Decade of Polling on Ballot Measures Regarding the Legal Status of Same-Sex Couples*, June 15, 2010, available at <http://www.haasjr.org/sites/default/files/Marriage%20Polling.pdf>.

66. In fact, both ROGERS, *supra* note 3, and GLADWELL, *supra* note 12, open their books with this example.

67. Innovators are the first individuals to adopt an innovation. ROGERS, *supra* note 3, at 282.

68. Early Adopters are typically younger in age, have a higher social status, have more financial lucidity, advanced education, and are more socially forward than late adopters. *Id.* at 185.

69. Early Majority tend to be slower in the adoption process, have above average social status, contact with early adopters, and show some opinion leadership. *Id.* at 150.

70. Late Majority are typically skeptical about an innovation, have below average social status, very little financial lucidity, contact with others in late majority and early majority, and very little opinion leadership. *Id.*

71. Laggards typically tend to be focused on "traditions," have the lowest social status, lowest financial fluidity, are the oldest of all other adopters, remain in contact with only family and close friends, and have very little to no opinion leadership. *Id.*

is often referred to as the “tipping point.” If it does, then it becomes a mainstream concept. The laggards may never adopt the concept despite its acceptance in the community.

The question becomes, from a social science point of view, whether the message of fairness for same-sex marriage is being effectively delivered. Is the message one that the Early and Late Majority can accept? Is the message targeting the right audience and in an effective manner? Up to this point, it appears it has not.

### III. A CASE STUDY ON CHANGE

As amazing as it may sound, there is still one state, Florida, in which “homosexuals” are prohibited from adopting.<sup>72</sup> Other states have prohibitions against non-married couples adopting or jointly adopting.<sup>73</sup> However, none specifically consider sexual preferences.

As is the situation with challenges to marriage cases, the stakes are high in the adoptive arena. There are the traditional areas of legal obligations, support during life, and the issue of inheritance rights at death. There is also the very real issue of what is in the best interest of the child. Yet some states seem focused on the notion of limiting adoptive rights without utilizing a rational approach to the underlying assumptions and reasons for the laws. The most indicative case to deal with same-sex couple adoption is the Florida case, *In the Matter of the Adoption of John and James Doe*.<sup>74</sup>

#### A. *The Florida Adoption Ban*

In 1977, Anita Bryant waged her famous “Save Our Children Campaign.” Part of this campaign was the codification of anti-gay statutes.<sup>75</sup> Florida took up her cause and prohibited adoption by any

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72. FLA. STAT. § 63.042(c)(3) (2008) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”).

73. Other than Florida, a variety of states have prohibitions against same-sex couples’ adopting. Some states, like Arkansas, Utah or Mississippi have a total ban, while others, such as Oklahoma and, Michigan, prohibit joint adoption. On November 4, 2008, Arkansas passed a constitutional amendment to the state constitution that prohibited non-married individuals from acting as an adoptive or foster parent. The ACLU is challenging the constitutionality of Act 1 in *Cole v. Arkansas*, No. CV2008-14284 (Ark. Cir. Ct. filed Dec. 30, 2008), available at [http://www.aclu.org/files/pdfs/lgbt/cole\\_v\\_arkansas\\_complaintv2.pdf](http://www.aclu.org/files/pdfs/lgbt/cole_v_arkansas_complaintv2.pdf). Utah prohibits unmarried persons from adopting. UTAH CODE ANN. § 78B-6-102 (West 2010). Mississippi prohibits “[a]doption by couples of the same gender.” MISS. CODE ANN. § 93-17-3(5) (West 2010).

74. 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008) [hereinafter *Doe II*].

75. The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of the

“homosexual” person.<sup>76</sup> The premise behind Ms. Bryant’s campaign was that children could not be properly raised or educated by same-sex couples.<sup>77</sup>

As with any statute drafted in haste with animus,<sup>78</sup> the statute spurred litigation. One would naturally think that the Florida courts would have defined the term “homosexual.”<sup>79</sup> However, until 1993, there were no reported cases that alleged that the term “homosexual” was unconstitutionally vague.<sup>80</sup> By 1993, America was entering into the first stage of grief: denial.<sup>81</sup> The old paradigm of “closeting” same-sex couples was changing, and the country was finally faced with confronting the old laws. DOMA was still three years away.

Dade County Metropolitan Commission that prohibited discrimination against homosexuals in the areas of housing, public accommodations, and employment. *See* *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1301-03 (Barkett, J., dissenting from denial of rehearing en banc). Bryant organized a drive that collected the 10,000 signatures needed to force a public referendum on the ordinance. *Id.*; *See also In re Adoption of John Doe*, 2008 WL 5070056, at \*12 (Fla. Cir. Ct. Aug. 29, 2008) [hereinafter *Doe I*].

76. *See Doe I*, 2008 WL 5070056.

77. *Id.* at \*13 (“Bryant . . . promoted the insidious myth that schoolchildren were vulnerable to molestation at the hands of homosexual schoolteachers who would rely on the ordinance to avoid being dismissed from their positions.”).

78. For a thorough discussion of the hateful rhetoric surrounding the passing of the statute, see generally *Doe I*, 2008 WL 5070056. An example of the speech is: “The chief sponsor of two bills to prohibit homosexuals from marrying or adopting children says that they will serve as a warning that Florida wants homosexuals to ‘go back in the closet.’” *Id.* at \*11. “Peterson ‘calls homosexuality ‘a moral issue that needs to be addressed by the Legislature,’ and says ‘Biblical teachings’ are at the base of his arguments. ‘What does regulating marriages and adoption have to do with human rights?’” *Id.* “The Florida legislature’s intention to stigmatize and demean homosexuals is further confirmed by the passage, on May 30, 1977, of a House amendment that allowed public disclosure of the reasons for a denial of an application for adoption.” *Id.* at \*14.

79. Despite Florida senator N. Curtis Peterson’s, the sponsor of SB 354 (1977) that became FLA. STAT. § 63.042(c)(3), assertion:

I have no problem with knowing what a homosexual is. I have no problem, I don’t need to look it up in the dictionary. The average person who every day is now reading in newspapers about the problem, turning on the television about the problem, they don’t have to look it up in a dictionary to find out. The judge or whoever makes the decision on adoptions will not have to look in the dictionary. They will know . . . .

Transcript of Senate Floor Debate on S.B. 354, May 11, 1977 (Sen. Peterson), at 21-22, *quoted in Doe I*, 2008 WL 5070056, at \*10.

80. *State v. Cox*, 627 So. 2d. 1210, 1213-14 (Fla. Dist. Ct. App. 1993).

81. *See* ELIZABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969). Her model describes the five stages of grief for how people deal with grief and tragedy. The five stages are: (1) denial (a temporary defense for the individual); (2) anger (the realization that denial cannot continue coupled with misplaced feelings of rage and envy); (3) bargaining (hope you can postpone or delay death); (4) depression (spending time crying and grieving); and (5) acceptance (peace and understanding of the inevitable). *Id.*

## B. Legal Challenges

### 1. *Cox v. State*

Under that spectrum, Mr. Cox challenged the Florida statute prohibiting “homosexual” adoption on a number of grounds, but, most importantly, on the vagueness of the term.<sup>82</sup> The court painstakingly upheld the statute, which defined the term “homosexual” as “limited to applicants who are known to engage in current, voluntary homosexual activity.”<sup>83</sup> Because you can choose to be “homosexual” in the court’s view, the state has a rational basis for claiming that homosexual parents will not know what to say to a heterosexual teenager.<sup>84</sup>

Yet, would the court have upheld a statute that said that only Jewish parents could adopt Jewish children because they are in the best position to answer religious questions?<sup>85</sup> The court did allow for the possibility that new research was being conducted that would cause the legislature to revisit the issue or allow the judiciary to override the legislature’s reasoning.<sup>86</sup> In 1993, there was not enough information for the court to rely on to change the majority view.

At that point, we were in the era of the Innovators.<sup>87</sup> These were the people like the Coxes who were beginning the discussion on the rights of same-sex couples. This discussion led to scientists and

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82. *Cox*, 627 So. 2d. at 1214-15.

83. *Id.* at 1215. The court continued to try to draw distinctions between homosexual activity and homosexual orientation. *Id.* There was confusion about the scientific arguments at that time. The court tried to state the difference between the commonly accepted biological and the religious (e.g., you can control your urges) approaches. *Id.* Because in 1993, the court believed this was an issue on which you could agree to disagree, it stated that “the legislature is constitutionally permitted to reach its own conclusions on the validity of the distinction between homosexual orientation and activity without any mandate from this court.” *Id.*

84. *Id.* at 1220. See also *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275, 1298 (11th Cir. 2004) (Barkett, J., dissenting from denial of rehearing en banc) (implying that apparently, “non-practicing homosexuals” are eligible to adopt).

85. The court went out of its way to say how it is ignoring other rationales, such as “possible injury the children might arguably sustain due to private biases or perceived prejudices against homosexuals. We are not overlooking the pressures and stresses that peer groups might place on an adopted child because of the adoptive parent’s homosexual activity.” *Cox*, 627 So. 2d. at 1220 n.10.

86. *Id.* at 1220. At the time of the trial, in the Appellate Court’s opinion there was very little scientific evidence to support the conclusion that “homosexuals have normal abilities to rear children.” *Id.* at 1213. The court continued that there was no expert testimony and only “law review articles and other reports in magazines and journals.” *Id.* As for scientific articles, there were only two. *Id.* In one article, the author discussed the need for further study, and the other article was based on an anonymous survey of twenty-three homosexual and sixteen heterosexual single parents. *Id.*

87. See GLADWELL, *supra* note 12, at 197.

academics taking charge to prove or disprove the theories presented by these Innovators.

2. *Lofton v. Secretary of Department of Children and Family Services*

By 2004, the challenge offered by the Innovators had been taken up, and a new challenge to the Florida statute had reached the Eleventh Circuit. In *Lofton*,<sup>88</sup> the challenge offered in *Cox* was renewed. The plaintiffs argued that the Florida statute violated the Equal Protection Clause. Although the plaintiffs lost, they laid the groundwork for the more successful actions five years later. The case also showed the shift to the “Early Majority” with the well thought out dissenting opinion by Judge Rosemary Barkett.

The majority opinion points out that from 1991 until 2004, only three legislative bills<sup>89</sup> and three legal challenges<sup>90</sup> were brought against Florida Statute Section 63.042(2).<sup>91</sup> Combining this information with the court in *Cox*, it would appear that from 1977 until 2004 only four cases, including the case at hand, challenged Florida Statute Section 63.042(2). However, this is the first time that the science requested by the *Cox* court was proving to be supportive of overturning the statute. The old theory proposed at inception of the statute and confirmed by the *Cox* court, that homosexuals would be lesser parents, was being refuted.

The State of Florida realized that ignoring the primary person of interest in an adoption, the child, was a bad idea. So the state revisited history and took the position that the statute was enacted in order to care for the best interests of the child.<sup>92</sup> Despite the legislative history and the state’s own arguments in *Cox* to the contrary, the Eleventh Circuit concluded that the “state’s overriding interest is not providing individuals the opportunity to become parents, but rather identifying those individuals whom it deems most capable of parenting adoptive children and providing them with a secure family environment.”<sup>93</sup>

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88. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, *reh’g en banc denied*, 377 F.3d 1275, 1301-03 (11th Cir. 2004), *cert denied*, 543 U.S. 1081 (2004).

89. S.B. 752, Reg. Sess. (Fla. 1995); H.B. 349, Reg. Sess. (Fla. 1995); H.B. 1461, Reg. Sess. (Fla. 1993).

90. *Cox*, 627 So. 2d at 1210; *Amer v. Johnson*, 4 Fla. L. Weekly Supp. 854b (Fla. Cir. Ct. 1997); *Seebol v. Farie*, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991).

91. *Lofton*, 358 F.3d at 807.

92. *Id.* at 809-11.

93. *Id.* at 811.



At this point in the evolution and acceptance of these rights, the court was not prepared to overturn the statute. Unlike *Cox*, the plaintiffs produced social science research supporting their opinion.<sup>94</sup> At the time *Lofton* was decided, there was still not the unanimous agreement that is present today, but there was finally evidence. Without cases like *Cox* the research might not have been done. The research in *Lofton* demonstrated “the opinion of mental health professionals and child welfare organizations as evidence that there is no child welfare basis for excluding homosexuals from adopting.”<sup>95</sup>

The court then evolved the argument from *Cox* to state that it was not enough that the evidence supported the decision.<sup>96</sup> Rather, the court stated that the “evidence [must be] so well established and so far beyond dispute that it would be irrational for the Florida legislature to believe that the interests of its children are best served by not permitting homosexual adoption.”<sup>97</sup> The court then gave the legislature the option to review the statute in light of the new information.<sup>98</sup>

For the first time, however, opinions on the matter were being changed.<sup>99</sup> In the well thought out dissent to the rehearing en banc, Judge Barkett pointed out the discriminatory nature of the statute. “Florida is the only state in the union to have such a categorical statutory prohibition targeted solely against homosexuals.”<sup>100</sup> It was then argued that neither “child molesters, drug addicts, nor domestic abusers are categorically barred by the statute from serving as adoptive parents.”<sup>101</sup> Finally, a court had begun the uncomfortable task of acknowledging the wrong.<sup>102</sup>

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94. *Id.* at 824-26.

95. *Id.* at 824 (citing the Amicus Brief filed by the Child Welfare League of America, Children’s Rights, Inc., the Evan B. Donaldson Adoption Institute, and the National Center for Youth Law).

96. *Lofton*, 358 F.3d at 825.

97. *Id.* at 825.

98. *Id.*

99. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275 (11th Cir. 2004).

100. *Id.* at 1290.

101. *Id.*

102. The fact that Florida places children for adoption with single parents directly and explicitly contradicts Florida’s post hoc assertion that the ban is justified by the state’s wish to place children for adoption only with “families with married mothers and fathers.” This contradiction alone is enough to prove that the state’s alleged reasons are “illogical to the point of irrationality.”

However, instead of acknowledging this glaring gap between the ban on homosexual adoption and the state’s purported justification, as did the Supreme Court in invalidating the statutes in *Eisenstadt*, *Moreno*, *Cleburne* and *Romer*, the *Lofton* panel stretches mightily to construct a hypothetical to bridge this gap.

The curious part of this reasoning by the court is that the rational basis stated by the legislature could really never be disputed by evidence.<sup>103</sup> How can one disprove hate (e.g., “[W]e are tired of you and wish you would go back in the closet”)?<sup>104</sup> The state effectively reconfigured its justification for the statute by stating that “homosexual” parents could not relate to heterosexual children, or that it wanted to limit adoption to married couples.<sup>105</sup> So what was needed was for the “Early Majority” to continue to tinker with the argument that was gaining ground (e.g., the dissenting opinion) and make it more acceptable for the “Late Majority”?

### 3. The 2008 Cases

By 2008, the message and the information had changed. Within thirty days there were two cases decided in Florida that held the Florida Statute Section 63.042(3) unconstitutional.<sup>106</sup> The arguments the courts made in striking down the statute were essentially the same that the plaintiffs made in 1993. The difference was that the arguments had been tweaked by the “Early Adaptors” and the “Early Majority” to make them more acceptable to the “Late Majority.” The hostile nature of the statute was finally addressed head on, and the lack of supporting scientific and other evidence in *Cox* and *Lofton* was overcome.

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*Lofton*, 377 F.3d at 1297 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 451 (1972)).

103. [M]oral disapproval of disfavored groups “is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.” *Lawrence v. Texas*, 123 S. Ct. 2472, 2486 (O’Connor, J., concurring). *Moreno* established that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.” 413 U.S. at 534, 93 S. Ct. 2821. As the *Lawrence* Court made clear, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.” 123 S. Ct. at 2480 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992)).

Nor may the state hide behind a suggestion that it is attempting to protect children from disapproval at large in society. Florida courts have specifically rejected moral disapprobation of homosexuality as a justification for granting custody of a child to one or another biological parent.

*Lofton*, 377 F.3d at 1300.

104. *Doe I*, 2008 WL 5070056, at \*11 (quoting State Sen. Peterson). See also *Lofton*, 377 F.3d at 1303 (“In short, the legislative history shows that anti-gay animus was the major factor—indeed the sole factor—behind the law’s promulgation . . .”).

105. However, Florida’s adoption statute expressly provides for single persons to adopt, and 25% of adoptions out of foster care are by single persons. See *Lofton*, 377 F.3d at 1290-91.

106. *Doe I*, 2008 WL 5070056 (Fla. Cir. Ct. Aug. 29, 2008); *Doe II*, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008).

In the first *Doe* case,<sup>107</sup> the court found that Florida Statute Section 63.042(3) was unconstitutional.<sup>108</sup> The court concluded that the law not only discriminated based on sexual conduct alone and was not concerned with the parental ability or the best interest of the child, but that it also lacked rational basis.<sup>109</sup> No longer was animus alone enough to support the statute.

In *Doe I*, the court provided a detailed history of the statute, echoing the approach advocated by Judge Barkett in *Lofton*. With the argument centered on the hate-based approach of 1977, the court clearly established that there was no other reason for the statute but to put homosexuals in their place. The court held that the “facts and circumstances surrounding enactment of Section 63.042(3) demonstrate that its singular purpose was to repress gay Floridians as a group, without any consideration being given to allowing even one gay Floridian an opportunity to establish his actual ability to parent.”<sup>110</sup>

More importantly, the pieces that seemed to be missing in *Cox* and *Lofton* were filled in. Even though there were more briefs and arguments in the second *Doe* case,<sup>111</sup> substantial evidence was presented that refuted the new state justification that it was in the best interest of children to be raised by heterosexual parents. “In view of Dr. Brodzinsky’s testimony that the categorical ban is irrational and scientifically inexplicable, the Court is unable to discern any coherent explanation for its enforcement in 2008, other than a willingness to passively leave intact the ban against this politically-disfavored group.”<sup>112</sup>

*Doe I* was not as highly publicized as *Doe II*. Not only did the *Doe II* decision make the national press, but it also started a dialogue within the Florida Bar previously unseen. The case finally transitioned the discussion to the “Late Majority.” The majority in *Doe II* had accepted what was started by the “Innovator” in *Cox* and adapted for the public by *Lofton*. The threat of appeal by the state should be of no concern for the plaintiffs in *Doe II*. At this point, all the research supports the position that this ban is not supported by a rational basis.<sup>113</sup>

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107. *Doe I*, 2008 WL 5070056.

108. *Id.* However, because neither the Department nor the Attorney General opposed the petition, the decision would not be binding on any other court.

109. *Id.* at \*16.

110. *Id.* at \*24.

111. *Doe II*, 2008 WL 5006172.

112. *Doe I*, 2008 WL 5070056, at \*17.

113. See, e.g., *Policy Statement of the National Association of Social Workers*, in *SOCIAL WORK SPEAKS* (6th ed. 2003) (“Legislation seeking to restrict foster care and adoption by gay,

In *Doe II*, Frank Gill wanted to adopt two foster children whom he has raised since 2004.<sup>114</sup> Mr. Gill was a licensed foster caregiver by the State of Florida.<sup>115</sup> Despite a positive preliminary home study by the Center for Family and Child Enrichment, his petition was denied because Mr. Gill is a homosexual.<sup>116</sup>

Like a Dickensian tale, on December 11, 2004, the two children, ages four years and four months, arrived literally in rags.<sup>117</sup> They had scalp ringworm and ear infections.<sup>118</sup> The four-year-old brother did not speak and only cared about taking care of his younger brother.<sup>119</sup> As unconscionable as it may sound, this four-year-old was apparently the baby's main caretaker.<sup>120</sup> Searching for an immediate placement so that the brothers could have a "good Christmas," the Social Services Agency contacted Mr. Gill.<sup>121</sup>

The children lived with Mr. Gill until 2006 when the parental rights of the biological mother and biological father were terminated.<sup>122</sup> After the termination of parental rights, Mr. Gill<sup>123</sup> petitioned for adoption of the children.<sup>124</sup> From the time the children were placed into foster care until Mr. Gill's petition there were no prospective adoptive parents for the children.<sup>125</sup>

Unlike the other adoption cases, the petitioners came prepared to present expert testimony. First, they presented Dr. David Brodzinsky, whom the court identified as an expert in clinical and developmental

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lesbian, bisexual or transgender people should be vigorously opposed."); Ellen C. Perrin, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339 (2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/339.pdf> ("The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development as can children whose parents are heterosexual.").

114. *Doe II*, 2008 WL 5006172, at \*1. See also Yolanne Almanzar, *Florida Gay Adoption Ban Is Ruled Unconstitutional*, N.Y. TIMES, Nov. 25, 2008, available at [www.nytimes.com/2008/11/26/us/26florida.html](http://www.nytimes.com/2008/11/26/us/26florida.html).

115. *Doe II*, 2008 WL 5006172, at \*1.

116. *Id.*

117. *Id.* at \*2 ("John the elder sibling, arrived with his four-month old brother wearing a dirty adult sized t-shirt and sneakers four sizes too small that seemed more like flip-flops than shoes.").

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at \*1.

122. *Id.*

123. Mr. Gill was forty-five years old and unmarried at the time of the adoption application. *Id.*

124. *Id.*

125. *Id.*

child psychology.<sup>126</sup> Over a two-day period, Dr. Brodzinsky evaluated the family.<sup>127</sup>

In general, Dr. Brodzinsky believes that the transition into an adoptive home is extremely difficult for children.

There is no way we can spare children from the emotional pain associated with adoption-related loss. Children must be allowed to experience the deep emotions associated with the loss in the context of a warm, loving, and supportive environment. They must be allowed to grieve the loss of birthparents; entering their family through the process of relinquishment; etc. Their feelings cannot be trivialized or discredited. By fully feeling the adoptee will resolve and integrate their loss.<sup>128</sup>

Dr. Brodzinsky sets out in his work the hardships of adjustments that children must undergo. In his opinion, in order for a child to become part of a functioning family unit, that child must be able to come to the individuals in the parental role and seek comfort and advice so the child can work through the feelings of loss associated with family transformation.<sup>129</sup> Simply stated, the adoptive child has to be able to generate trust in the adoptive parents.

Dr. Brodzinsky in his testimony concluded that,

For James Doe, it's the only home he's ever known. Not only are these his parents in every sense of the word . . . , he's very emotionally bonded, connected, attached to them. Disruptive attachments raise the risk, significantly, for all sorts of long-term problems.

For John Doe, he's a child who came into the family with a risky history already, previous disrupt[ed] placements. To remove him at this time, when he has stability in his life, residential stability and

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126. *Id.* at \*3. Dr. Brodzinsky is widely recognized as one of the leading psychologists on the issue of adoption, foster care, and same-sex couple adoption. He has over thirty years of experience in the field. Among other positions, he served for over thirty-two years, until his retirement, as Professor Emeritus of Developmental and Clinical Psychology at Rutgers University. He has testified in a number of nationally prominent cases, including the Baby M contested adoption case in New Jersey, the Baby Jessica contested adoption case in Michigan, the Woody Allen & Mia Farrow contested adoption and custody case in New York, and the gay marriage trial in Hawaii. He is the co-author or co-editor of five influential books on adoption, including BEING ADOPTED: THE LIFELONG SEARCH FOR SELF (1992); CHILDREN'S ADJUSTMENT TO ADOPTION: DEVELOPMENTAL AND CLINICAL ISSUES (1998); and PSYCHOLOGICAL ISSUES IN ADOPTION: RESEARCH AND PRACTICE (2005).

127. *Doe II*, 2008 WL 5006172, at \*3.

128. THE PSYCHOLOGY OF ADOPTION 126 (David M. Brodzinsky & Marshall D. Schecter eds., 1993).

129. *Id.*

emotional stability, would be devastating to him. In my opinion, it would cause long-term damage.<sup>130</sup>

He testified that a second separation for John and a first for James would cause, among other things, academic regression, separation anxiety, and sleeping problems.<sup>131</sup> Further, and most importantly, based on Dr. Brodzinsky's hypothesis, this would cause trust issues.<sup>132</sup>

Dr. Brodzinsky then concluded that Mr. Gill and his partner had a high quality of parenting, the parent-child relationships were strong and healthy, and the children were given the necessary resources to lead a healthy, happy life.<sup>133</sup> Most importantly, there would be severe trauma to the children if they were separated from Mr. Gill.<sup>134</sup> The sexual orientation of Mr. Gill was not a factor in his parenting abilities.<sup>135</sup>

The divergence of this case from the others happened with the proffering of six experts, in addition to Dr. Brodzinsky.<sup>136</sup> The state

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130. Transcript of Record at 773-74, *Doe II*, 2008 WL 5006172.

131. *Doe II*, 2008 WL 5006172, at \*4.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Dr. Michael Lamb is a developmental psychologist with over thirty years of experience currently serving as the head of the department of psychology and head of the faculty of social sciences at Cambridge. Transcript of Record at 451-67, *Doe II*, 2008 WL 5006172. Even the state's expert recognized Dr. Lamb as a reputable researcher. Transcript of Record at 1241-42, *Doe II*, 2008 WL 5006172. He is an expert on the psychology and development of children, including those raised by gay parents. Transcript of Record at 467, *Doe II*, 2008 WL 5006172. He testified that sexual orientation did not predict healthy child adjustment. Dr. Frederick Berlin is a psychiatrist with over thirty years of experience, focused on human sexuality. He is an associate professor at Johns Hopkins University School of Medicine. Transcript of Record at 636-49, *Doe II*, 2008 WL 5006172. Dr. Berlin testified as to human sexuality, including homosexuality, pedophilia, and child sex abuse. Transcript of Record at 649, *Doe II*, 2008 WL 5006172. Dr. Berlin testified that homosexuality is not considered a mental disorder within the field of psychiatry, and there was no influence on a child's sexuality based on a parent's sexual orientation. Dr. Susan Cochran, a psychologist and epidemiologist at UCLA's Department of Public Health, has conducted many of the leading studies that examine the rate of health problems (including mental health problems) among gay people compared to heterosexuals. Transcript of Record at 128-39, *Doe II*, 2008 WL 5006172. The state experts cited to her research in their testimony. Transcript of Record at 857-66, 870, 877-79, 1197, *Doe II*, 2008 WL 5006172. She found that there was no health disparity. Dr. Margaret Fischl is a professor of medicine at the University of Miami School of Medicine specializing in AIDS and HIV research. Transcript of Record at 332-44, *Doe II*, 2008 WL 5006172. She testified that the risk of household transmission of HIV was low to nonexistent. *Doe II*, 2008 WL 5006172, at \*13. Dr. Letitia Anne Peplau is a professor of psychology at UCLA with over thirty-five years experience. She testified as to couple relationships, including violence in relationships and same-sex couples' relationships. Transcript of Record at 26-27, *Doe II*, 2008 WL 5006172. Patricia Lager has been a professor of social work at Florida State University for over twenty years and has authored two textbooks on child welfare practice. Transcript of Record at 266-73, *Doe II*, 2008 WL 5006172. She is an expert on child welfare policy and practice, adoption

offered two experts, only one of which was qualified.<sup>137</sup> Unlike past cases, where the court could have perceived a split of authority, here the message was clearly altered to reflect the change in the academic research and theory. There was no more clear distinction as to the quality and persuasiveness of the experts.

The state's position in defense of the statute was that "homosexual adoption restriction serves the legitimate state interest of promoting the well-being of minor children, as well as broader, societal morality interests."<sup>138</sup> In support of its position, the state offered the testimony of its two experts. With similar arguments and similarly unsubstantiated facts, the state's experts testified that it was not in the best interest of the children to be with homosexual individuals because it results in "(1) a lifetime prevalence of significantly increased psychiatric disorders; (2) higher levels of alcohol and substance abuse; (3) higher levels of major depression; (4) higher levels of affective disorder; (5) four times higher levels of suicide attempts; and (6) substantially increased rates of relationship instability and breakup."<sup>139</sup>

Given the historical underpinnings of the statute and the state's argument, only a well-argued, point-by-point demonstration of fallacious reasoning for the statute would suffice. The court systematically broke down the expert testimony into four categories: (1) psychological;<sup>140</sup> (2) medical;<sup>141</sup> (3) sexual disorders;<sup>142</sup> and (4) child welfare and policy.<sup>143</sup> In each category, through the use of esteemed experts, the petitioner and then the court established the flawed reasoning that supported the statute. As shameful as the exercise sounds, it was necessary to refute the state's reasoning.

As Dr. Peplau testified, "the research in the field suggests that the relationships of lesbians and gay men are similar in stability, quality,

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best practices, and the Florida child welfare system. Transcript of Record at 272-74, *Doe II*, 2008 WL 5006172. She testified that individualized evaluations, not blanket exclusions, undermine the interest of children by depriving them of permanency. *Id.*

137. The state offered Dr. George Rekers, a developmental and clinical psychologist, who retired from the University of South Carolina Medical School. Transcript of Record at 810-25, *Doe II*, 2008 WL 5006172. Dr. Walter Schumm, a professor of Family Studies at Kansas State University, was not accepted as an expert by the court because (1) he lacked qualifications to testify about most of the subjects he addressed at trial, and (2) his testimony was not credible. Transcript of Record at 1057-83, *Doe II*, 2008 WL 5006172.

138. *Doe II*, 2008 WL 5006172, at \*6.

139. *Id.*

140. *Id.* at \*5-6.

141. *Id.* at \*12-13.

142. *Id.* at \*13.

143. *Id.* at \*14.

satisfaction, shared experiences and conflict resolution, to that of heterosexual married and unmarried couples.”<sup>144</sup> More importantly, the research supports the conclusion that sexual orientation is no more of a significant predictor of breakup than age, income, religion, education, and race.<sup>145</sup> So the premise that this is an unstable home environment does not appear to be supported by any of the current science. Moreover, the inverse may be true. “[H]omosexually behaving individuals tend to be more highly educated and high income earners [and] sexual orientation is less correlated to break-up rates than race or income, for example.”<sup>146</sup> As the American Psychological Association concluded in 2004,

Same sex couples: (1) want to have primary and committed relationships and are successful in doing so; (2) are no more dysfunctional or less satisfying than heterosexual relationships; (3) are able to form committed, stable enduring relationships; and (4) are affected by the same internal and external processes as heterosexual couples.<sup>147</sup>

Dr. Cochran then testified to the effects of sexual orientation on mental health and the prevalence of psychiatric disorders.<sup>148</sup> Using a statistical analysis of social science research, Dr. Cochran concluded that although the average rates of psychiatric conditions, substance abuse, and smoking are slightly higher for homosexuals than heterosexuals, those statistical differences are insignificant.<sup>149</sup> “[M]embers of every demographic group suffer from these conditions at rates not significantly higher than for homosexuals.”<sup>150</sup> Taken to the extreme, Dr. Cochran pointed out that the only group eligible to adopt under the state’s rationale—lower rates of psychiatric disorders, substance abuse, and smoking than heterosexuals—would be Asian-American men.<sup>151</sup>

The court summarily dismissed the argument as to life expectancy because there have been no studies about life expectancies due to the lack of reporting of sexual orientation on death certificates.<sup>152</sup>

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144. *Id.* at \*6.

145. *Id.*

146. *Id.* at \*7.

147. *Id.* at \*7 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION RESOLUTION OF SEXUAL ORIENTATION, PARENTS AND CHILDREN (2004), available at <http://www.apa.org/pi/lgbq/policy/parents.html>).

148. *Doe II*, 2008 WL 5006172, at \*7.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at \*8.



Moreover, the various demographic characteristics make any broad-based conclusions invalid.<sup>153</sup> Sexual orientation does not alone stand as a predictor of life expectancy.<sup>154</sup>

Dr. Lamb then testified “with certainty that children raised by homosexual parents do not suffer an increased risk of behavioral problems, psychological problems, academic development, gender identity, sexual identity, maladjustment, or interpersonal relationship development.”<sup>155</sup>

He set the three important factors for healthy adjustment of children.<sup>156</sup> The predictors are: (1) relationship with the child’s parents; (2) the relationship between the adults in the child’s life; and (3) resources available to the child.<sup>157</sup> Dr. Lamb testified that the initial belief was that traditional families provided the best environment for children.<sup>158</sup> However, as the research developed, that notion proved to be flawed and the quality of the parenting was proven empirically to be the important factor.<sup>159</sup>

Further, Dr. Lamb testified that children raised by gay parents develop social relationships the same as those raised by heterosexual parents.<sup>160</sup> Sexual orientation is not a single predictor for bullying. “The research shows that children of gay parents are not ostracized and do not experience discrimination any more than children of heterosexual parents.”<sup>161</sup>

Finally, Dr. Lamb concluded by stating that there is no optimal gender combination of parents.<sup>162</sup> Men are no better than women.<sup>163</sup> Moreover, the “well established and generally accepted consensus in the field [is] that children do not need a parent of each gender to adjust healthily.”<sup>164</sup>

The only testimony to counter the petitioner’s arguments that the state’s position was based on either outdated or incorrect scientific

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153. *Id.* For example, women live five years longer than men. Within the class of women and within the class of white women, educated white women live five years longer than uneducated white women. *Id.*

154. *Id.*

155. *Id.* The court cited supporting studies for Dr. Lamb’s conclusions. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at \*9.

161. *Id.*

162. *Id.* at \*10.

163. *Id.*

164. *Id.*

theory was offered by Dr. Rekers.<sup>165</sup> The court was skeptical of Dr. Rekers' motivations.<sup>166</sup> Regardless, Dr. Rekers testified that he believed individuals had "two to four times the odds of having lifetime prevalence of major depression and affective disorders in general."<sup>167</sup>

Despite all evidence to the contrary,<sup>168</sup> Dr. Rekers suggested that since homosexual couples breakup more, children in these homes suffer more.<sup>169</sup> The court pointed out that his conclusions were based on both distorted and misrepresented information or from authors who are neither psychotherapists nor social scientists.<sup>170</sup> "Dr. Rekers astounded the Court when he testified that he favors removal of any child from a homosexual household, even after placement in that household for ten years, in favor of a heterosexual household."<sup>171</sup>

The court summarily dismissed the other state's expert witness, Dr. Schumm, because he was not a psychologist and his re-analysis was not published in respected peer review journals.<sup>172</sup> His lack of credentials, combined with his disagreement with Dr. Rekers' testimony, created doubt as to his veracity as a witness by the court. "Dr. Schumm admitted that he applies statistical standards that depart from conventions in the field."<sup>173</sup>

The court then moved on to the medical testimony. Dr. Fischl testified that the majority of HIV cases are transmitted by heterosexuals.<sup>174</sup> Despite the popular belief to the contrary, Dr. Fischl "affirms that HIV is clearly not only a gay disease."<sup>175</sup> Further, because the transmission of HIV is via blood or sexual transmission, the risk of "household transmission is low to nonexistent."<sup>176</sup>

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165. *Id.*

166. *Id.* The court cited that he is an ordained Baptist minister and the state has paid him for his services in advance. *Id.*

167. *Id.*

168. *Id.* at \*11 ("The Court finds this testimony to be contrary to science and decades of research in child development."). *See also id.* at \*12 ("Dr. Rekers' beliefs are motivated by his strong ideological and theological convictions that are not consistent with the science.").

169. *Id.* at \*11.

170. *Id.*

171. *Id.*

172. *Id.* at \*12.

173. *Id.*

174. *Id.* at \*13.

175. *Id.* Center for Disease Control Statistics show that 50% of HIV infections occur among homosexual men, 35% among heterosexual men and women, and the remainder among intravenous drug users. *Id.*

176. *Id.*

The court then reviewed the testimony of the experts on the third issue of sexual disorders.<sup>177</sup> Dr. Berlin testified that homosexuality was removed from the Diagnostic and Statistical Manual of Psychiatric Disorders in 1973 because it was not a disorder.<sup>178</sup> Moreover, he testified that sexual orientation is “not affected by one’s environment.”<sup>179</sup>

Dr. Berlin continued to dispel myths surrounding homosexuality by explaining that adult males attracted to male children is not homosexuality but rather pedophilia.<sup>180</sup> He had to reiterate that pedophilia and homosexuality are not analogous.<sup>181</sup> “[G]ay people are no more likely to abuse children, or be sexually attracted to children than heterosexual people.”<sup>182</sup>

The final and most important issue in the case had to do with what was in the best interest of the child.<sup>183</sup> Professor Lager testified that there is not one kind of family best for all children.<sup>184</sup> Actually, “there is a consensus in the child welfare field that any such categorical exclusion is not in the best interest of children . . . .”<sup>185</sup>

The evidence clearly established that there is no scientific reason for a blanket prohibition against homosexual adoption. First, the court established that Florida statutes require that all dependent children have a stable and permanent home.<sup>186</sup> Adoption is the preferred form of permanency as adoption serves the best interest of the children.<sup>187</sup> So the first conclusion the court made was that the statute “violates the Children’s rights by burdening liberty interests by unduly restraining them in State custody . . . and . . . deny[ing] them a permanent adoptive placement that is in their best interests . . . .”<sup>188</sup>

The court opined that the statute violated the Equal Protection Clause.<sup>189</sup> The court revisited the 1993 *Cox* decision,<sup>190</sup> where the court

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at \*14.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (“[T]he Child Welfare League of America and the National Association of Social Workers published position statements that homosexually behaving individuals should not be treated any differently than heterosexuals in terms of their ability to adopt.”).

186. *Id.* at \*21.

187. *Id.* at \*23 (citing *G.S. v. T.B.*, 985 So. 2d 978 (Fla. 2008)).

188. *Id.*, at \*25.

189. *Id.*

denied the application of the Equal Protection Clause. However, the court pointed out that in *Cox*, only “law review articles, reports, editorials and discussions appearing in magazines and journals”<sup>191</sup> were relied on by the court. The court then discussed *Lofton*, which called for more evidence.<sup>192</sup>

The evidence presented clearly demonstrated that, based on the developments in the fields of social science, psychology, human sexuality, social work and medicine, the existence of additional studies, the re-analysis and peer review of prior studies, the endorsements by the major psychological, psychiatry, child welfare and social work associations, and the now, consensus based on widely accepted results of respected studies by qualified experts, the presumptions from *Cox* and *Lofton* have been overcome.<sup>193</sup>

The matter did not involve a fundamental right or suspect class, so the rational basis test was applied.<sup>194</sup> Under the rational basis test, the court concluded that the state’s interest in providing a stable permanent home environment is not served by this blanket prohibition. Not one of the state’s arguments: (i) promoting the well being of the children;<sup>195</sup> (ii) the social stigmatization of the children;<sup>196</sup> or (iii) morality,<sup>197</sup> met the rational basis test.

The Miami-Dade County Court, affirmed by the Third District Court of Appeals,<sup>198</sup> articulated how the statute failed the rational basis test. The court was able to reach that conclusion through basic Diffusion Theory. The idea was presented in *Cox*. The communication listened to

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190. *State v. Cox*, 627 So. 2d. 1210 (Fla. Dist. Ct. App. 1993).

191. *Doe II*, 2008 WL 5006172, at \*26.

192. *Id.*

193. *Id.* at \*27.

194. *Id.*

195. *Id.* at \*28 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973)) (“[T]o be considered rationally related to a governmental interest, the distinctions between individuals may not be based on unsubstantiated assumptions.”); *Id.* at \*28 (quoting *Moreno*, 413 U.S. 528) (“[H]ere, the evidence proves quite the contrary; homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts.”).

196. *Id.* (“[T]here is no optimal gender combination of parents.”).

197. *Id.* at \*29 (“[P]ublic morality per se, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment”). The Department’s opinion that homosexuality alone is immoral is unable to be reconciled with the permission of homosexual foster parenting (“There is no ‘morality’ interest with regard to one group of individuals permitted to form the visage of a family in one context but prohibited in another”). *Id.*

198. In September 2010, the Third District Court of Appeals of Florida upheld the Miami-Dade County Court. *Fla. Dep’t of Children and Families v. In re Matter of Adoption of X.X.G. and N.R.G.*, No. 3D08-3044 (Fla. Dist. Ct. App. Sept. 22, 2010), available at <http://www.3dca.flcourts.org/opinions/3D08-3044.pdf>.

the other side and conducted additional research. Then the idea “tipped” as we moved to the Late Majority.

#### IV. ATTACK ON THE DEFENSE OF MARRIAGE ACT

DOMA is constantly coming under attack through legal challenges. Massachusetts Attorney General Martha Coakley announced in early July 2009 that the Commonwealth filed a lawsuit challenging the constitutionality of DOMA,<sup>199</sup> and the plaintiffs in *Gill v. Office of Personnel Management* amended their complaint, targeting the denial of certain federal rights and protections to married same-sex couples in Massachusetts.

In early August 2009, in the American Bar Association (“ABA”) Section of Individual Rights and Responsibilities, Section of Family Law and the Bar Associations of Beverly Hills, Massachusetts and San Francisco Report to the House of Delegates, they urge Congress to repeal the DOMA. Moreover, around the same time, the Third District Court of Appeals in Florida heard arguments for the appeal of the circuit court’s decision in 2008 that ruled that Florida’s ban on adoption by “homosexuals”<sup>200</sup> was unconstitutional.

In the span of six months DOMA faced its most formidable challenges. From the legal scholars to the states to the legislative branch to the current administration, DOMA was under legal, moral, and philosophical attack. Supporters of the Act could no longer rely on the statistics and public opinion polls to ensure the viability of the Act. But, to overcome the Act, opponents of the Act still need to effectively communicate their position.

##### A. *Historical Background of DOMA*

Prior to the adoption of the DOMA in 1996, the federal government of the United States recognized that the authority to create and regulate marital status was the exclusive prerogative of the states.<sup>201</sup> The federal

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199. The suit states that, “In enacting DOMA, Congress overstepped its authority, undermined states’ efforts to recognize marriages between same-sex couples, and codified an animus towards gay and lesbian people.” Complaint, Introduction, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2009 WL 1995808 [hereinafter Complaint].

200. FLA. STAT. ANN. § 63.042(3) (West 2008) (“No person eligible to adopt under this statute may adopt if that person is homosexual.”).

201. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”);

government consistently deferred to the states' definitions of marriage, for eligibility of a right, responsibility, or protection under the law.<sup>202</sup> The general rule gives way when states' marriage laws fail to conform to constitutional guarantees.<sup>203</sup>

States have been addressing what protections should be available to same-sex couples since at least 1971. In *Baker v. Nelson*, the first challenge by a same-sex couple to the marriage act was decided in Minnesota.<sup>204</sup> After the filing of *Baker*, there were a number of challenges across the country.<sup>205</sup> All were unsuccessful.

For almost 200 years, states have adjudicated their differences regarding their marriage laws. There have been significant policy differences between states in the arena of civil marriage laws.<sup>206</sup> A large body of case law exists that demonstrates the ability of states to decide whether to give effect to out of state marriages regarding "racially mixed

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United States v. Lopez, 514 U.S. 549, 564, 624 (1995) (Breyer, J., dissenting) (noting that the regulation of "marriage, divorce, and child custody" is an example of lawmaking powers beyond the constitutional authority of the federal government); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878) (noting that the state has the "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved"). See also *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." (Internal citations omitted)). For example, states can decide marriage age and familial relationships.

202. Complaint, *supra* note 199, ¶ 21. For example, in applying the 198 marriage provisions of the Internal Revenue Code of 1986, as amended, state or tribal recognition is the determining factor. See Rev. Rul. 83-183, 1983-2 C.B. 220 ("Tax payers who meet the requirements in their state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law."). *Id.* (citing *Ross v. Comm'r*, 31 T.C.M. (CCH) 488 (1972), and Rev. Rul. 58-66, 1958-1 C.B. 60); *Eccles v. Comm'r*, 19 T.C. 1049, 1051 (1953), *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953) (holding that for federal income tax purposes, the determination of marital status must be made in accordance with the law of the State of the marital domicile); *Robert Calhoun, Jr. v. Comm'r*, 63 T.C.M (CCH) 2875 (1992) (citing *Eccles, supra*, and *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (noting that domestic relations is an "area that has long been regarded as a virtually exclusive province of the States"). Cf. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2009). See also *Cain, supra* note 20 (discussing the constitutionality of DOMA as applied to the Internal Revenue Code).

203. *Turner v. Safley*, 482 U.S. 78 (1987) (striking state marriage restriction based on incarceration); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking state marriage restriction based on poverty); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking state law marriage restrictions based on race); *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (striking down the anti-miscegenation law on state constitutional grounds).

204. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

205. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974), *review den'd*, 84 Wash. 2d 1008 (1974).

206. See *Wolff, supra* note 20.

marriages, consanguineous or incestuous relationships, marriages involving minors, and other contentious relationship categories, . . .”<sup>207</sup>

In 1993, the pressing issue of same-sex marriage rose to national stature.<sup>208</sup> The Supreme Court of Hawaii, in a plurality opinion, narrowly ruled in *Baehr v. Lewin*<sup>209</sup> that refusing to grant marriage licenses to same-sex couples was sex-based discrimination.<sup>210</sup> The Court did not order the state to begin the issuance of marriage licenses but, rather, remanded the case to the circuit court to decide if the state had a compelling interest in maintaining its marriage laws.<sup>211</sup> Upon remand, the circuit court found no compelling state interest.<sup>212</sup> As a result of the circuit court’s holding on remand, no state recognized same-sex marriage at the time of the passing of DOMA. But the Hawaii courts’ decisions raised the national issue of the Full Faith and Credit Clause.<sup>213</sup> Essentially, the argument was that when Hawaii validates same-sex marriage, other states would then have to recognize those marriages.<sup>214</sup>

The decision in Hawaii caused a predictable backlash. Thirty-seven states,<sup>215</sup> including, ironically, Hawaii,<sup>216</sup> enacted legislation to define marriage as a union between a man and a woman. Acting under the second sentence of the Clause, commonly referred to as the Effects Clause, Congress enacted DOMA in 1996 to preempt the argument that

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207. *Id.* at 2216.

208. William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 915, 916 (2009).

209. 852 P.2d 44 (Haw. 1993).

210. *Id.* at 68.

211. *Id.* Duncan, *supra* note 208, at 916.

212. *Baehr v. Miike*, 1996 WL 694235, at \*21 (Haw. Cir. Ct. 1996), *aff’d* 950 P.2d 1234 (Haw. 1997).

213. Duncan, *supra* note 208, at 916-17. See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998).

214. The first sentence of the Clause mandated the result. Duncan, *supra* note 208, at 917; Whitten, *supra* note 213, at 255.

215. See, e.g., ALA. CODE § 30-1-19 (2005) (“Marriage, recognition thereof, between persons of the same sex prohibited.”); ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”); ALASKA STAT. § 25.05.013 (2002); ARIZ. REV. STAT. ANN. § 25-101(C) (2000) (“Marriage between persons of the same sex is void and prohibited.”); ARIZ. REV. STAT. ANN. § 25-112(A) (2000) (“Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by § 25-101.”).

216. HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

states would have to recognize same-sex unions from other states.<sup>217</sup> “Overwhelming margins in both the House (342 to 67) and the Senate (84 to 14) approved the [Defense of Marriage] Act,”<sup>218</sup> which was signed into law on September 21, 1996.<sup>219</sup>

DOMA provides two main concepts. First, it defines marriage, for federal purposes, as a union between a man and a woman. This provision prospectively invalidated marriages of same-sex couples for purposes of federal laws, regardless of whether those laws were enacted prior to or subsequent to DOMA. More specifically, it provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>220</sup>

The second purpose of DOMA was to provide that Congress has the authority to give parameters to the Full Faith and Credit Clause by permitting states to not recognize same-sex marriages valid in other states. Specifically:

No 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 or 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, or a right or claim arising from such relationship.<sup>221</sup>

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217. This is arguably the same power that they had prior to enacting DOMA. *See* Duncan, *supra* note 208, at 917; Whitten, *supra* note 213, at 255.

218. Duncan, *supra* note 208, at 917.

219. Although it may be convenient to think that such an overwhelming majority of Congress voted for the Act due to the election that year, which may be true, it should be noted that not all politicians running for reelection in 1996 voted for the Act. Senator John Kerry of Massachusetts voted against the Act, even though he was the only Senator running for reelection in 1996 who did. “In 1996, I voted against the so-called Defense of Marriage Act not just because I believed it was nothing more than a fundamentally political ploy to divide Americans, but because it was unconstitutional.” Press Release from Sen. John F. Kerry, Kerry Supports A.G. Coakley’s Lawsuit Filed Today Challenging DOMA (July 8, 2009), *available at* <http://kerry.senate.gov/press/release/?id=c2ea21e6-4e00-4726-9925-90fe9c24ff4c>.

220. Defense of Marriage Act § 3, 1 U.S.C. § 7 (2010).

221. *Id.* § 2. Congress relied on its “express grant of authority” under the second sentence of the Constitution’s Full Faith and Credit Clause “to prescribe the effect that public acts, records, and proceedings from one State shall have in sister States.” H.R. REP. NO. 104-664, at 25 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2930.



The enactment of DOMA did not eliminate the question of the Full Faith and Credit Clause on same-sex marriage.<sup>222</sup> It created additional questions about the constitutional validity of the Act. Several members of Congress, as well as most commentators, expressed doubts about the constitutionality of the Act for a litany of reasons,<sup>223</sup> including the failure of Congress to define marriage, and that, traditionally, the Full Faith and Credit Clause has been used to require enforcement of a mandate, not restrict one.<sup>224</sup>

Further, the passage of “DOMA . . . eviscerat[ed] more than 200 years of federal government deference to the states with respect to defining marriage.”<sup>225</sup> The determination of what constitutes marriage has traditionally been a power reserved by the states. Contrary to the long history of federalism in this area, the federal government decided that it was necessary to defend the “institution of traditional heterosexual marriage.”<sup>226</sup>

In addition to the question of constitutionality based on the Full Faith and Credit Clause, there was a second question of constitutionality based on the lack of a congressional definition of marriage.<sup>227</sup> The passing of DOMA prevents states from recognizing same-sex marriage. Even if Massachusetts were to have a law allowing same-sex marriage, the federal government would not recognize this marriage. As argued by the attorney general of Massachusetts, “DOMA was enacted to deny federal rights and protections to same-sex couples who are validly married under state law.”<sup>228</sup> Traditional federal benefits, which

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222. Whitten, *supra* note 213, at 256.

223. *See, e.g.*, Press Release from Sen. John F. Kerry, *supra* note 219. *Cf.* Whitten, *supra* note 213, at 391-92 (“The historical evidence examined above makes it clear that the first sentence of the Full Faith and Credit Clause should not be interpreted to contain broad choice of law commands to the states. Likewise, the evidence is compelling that Congress was intended to have broad power to create statutes like DOMA under the Effects Clause. Therefore, DOMA may be superfluous, or even unwise, but the history of the clause indicates that it should not be held unconstitutional.”).

224. *See, e.g.*, Press Release from Sen. John F. Kerry, *supra* note 219 (“But it seems to me that what Congress is doing is allowing a State to ignore another State’s acts, and every law that Congress has ever passed has invoked the full faith and credit of another State’s legislation. All of these laws share a basic common denominator. They all implement the full faith and credit mandate. They do not restrict it. Not once has it been restricted in that way. For example, the Parental Kidnapping Prevention Act of 1990 provided the States have to enforce child custody determinations made by other States . . . . It did not say you could not do it. It did not say you could avoid it. It did not diminish it. It said you have to enforce it.”).

225. Complaint, *supra* note 199, ¶ 23.

226. H.R. REP. NO. 104-664, at 2, 9.

227. 142 CONG. REC. H7446 (daily ed. July 11, 1996) (stating that DOMA “defines marriage in Federal Law”); Complaint, *supra* note 199, ¶ 27.

228. Complaint, *supra* note 199, ¶ 30 (citing H.R. REP. NO. 104-664, at 18).

normally would be available to same-sex married couples under applicable state law, would no longer qualify.<sup>229</sup>

*B. Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*

On July 8, 2009, Attorney General Martha Coakley of Massachusetts filed a lawsuit in United States District Court challenging Section 3 of DOMA.<sup>230</sup> The lawsuit alleges that more than 16,000 married same-sex couples in Massachusetts are denied important federal rights based on marital status.<sup>231</sup> However, this is not a challenge by any of those couples, but, rather, an action by the state itself.

The Commonwealth instituted the lawsuit to protect its sovereign interest by not desiring to implement federal policies that conflict with Massachusetts's law.<sup>232</sup> The United States is a defendant of the action. Essentially, the case is *Massachusetts v. United States* over the age-old question of federalism.

The complaint attacks DOMA with a multi-faceted approach. The complaint alleges: (1) that DOMA violates the Tenth Amendment by violating the state's right to regulate and define marriage for its citizens;<sup>233</sup> and (2) that DOMA violates Article I, § 8 of the United States Constitution, commonly referred to as the Spending Clause.<sup>234</sup>

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229. Complaint, *supra* note 199, ¶ 31.

230. *Id.* ¶ 1.

231. *Id.* at Introduction.

232. *Id.* at Introduction, ¶¶ 2, 3, 27, 28, 80-86.

233. *Id.* ¶¶ 80-86; Brief for Attorney General, Memorandum of Law in Opposition to Defendants' Motion to Dismiss Complaint and in Support of Commonwealth's Motion for Summary Judgment at 15, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2010 WL 1285463 ("The Tenth Amendment . . . operates to confine Congress to its constitutionality-conferred powers.") Since "domestic relations are the paradigmatic area of State . . . concern," then that definition belongs to the State. *Id.* at 16. Thus, the attorney general argues that DOMA violates the Tenth Amendment by interfering with the power to issue marriage licenses that qualify individuals as married for state and federal purposes. *Id.* at 15-22. DOMA should not be limited to federal funding programs. *Id.* at 20-21. *But see* Department of Justice Brief, Memorandum of Points and Authorities in Support of the Defendants' Motion to Dismiss, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2009 WL 3794375. The Department of Justice argues that DOMA does not violate the Tenth Amendment because it "does not present an 'unavoidable command' to state governments 'to implement legislation enacted by Congress.'" *Id.* at 11-12 (citing *New York v. United States*, 505 U.S. 144, 176, 185 (1992)). The argument is that states have a choice: "to use federal matching funds or grants for the purposes Congress has specified in authorizing such grants or to forgo those funds." *Id.* at 12. Further, Congress has the power to influence a State's policy choices. *Id.* (citing *Kansas v. United States*, 214 F.3d 1196, 1203-04 (10th Cir. 2000)) (rejecting Tenth Amendment challenge to conditions on the receipt of certain block grants that require States to pass particular legislation; holding that in the context of a

According to the complaint, at the time of the enactment of DOMA, no states officially recognized same-sex marriage.<sup>235</sup> In 2004, Massachusetts became the first state to recognize same-sex marriage.<sup>236</sup> In Massachusetts, since inception of the marriage statute, over 16,000 same-sex couples have married.<sup>237</sup>

Attorney General Coakley argues that DOMA causes two harms to the Commonwealth of Massachusetts. First, it interferes with the Commonwealth's regulation of the marital status of its citizens.<sup>238</sup> DOMA essentially creates two classes of married persons within the state because it denies rights and protections to married same-sex couples.<sup>239</sup> Second, DOMA imposes improper conditions on the Commonwealth's participation in certain federally funded programs.<sup>240</sup> DOMA requires the Commonwealth to treat married individuals in same-sex relationships as single, imposing improper conditions.<sup>241</sup>

In the complaint, the attorney general examines the historical context of DOMA.<sup>242</sup> She begins by attempting to lay the groundwork that the statute was adamantly flawed from the outset. She quotes numerous congressmen who, during discussion of the law, recognize that DOMA is imposing on the states' absolute sovereignty to define marriage.<sup>243</sup> However, in the attorney general's opinion, DOMA was

voluntary federal-state program, a State "is ultimately free to reject both the conditions and the funding no matter how hard that choice may be"); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999) (rejecting Massachusetts Burma Law, despite contentions that court decision interfered with purchasing decisions at the core of state sovereignty; noting "even if Massachusetts were being compelled to deal with firms that do business in Burma, such compulsion is not similar to the federal government compulsion of States found impermissible in *New York* and *Printz*"); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (rejecting claim that federal Medicaid requirement to provide emergency medical care to illegal aliens is example of federal "commandeering," and noting voluntary nature of State participation of the program); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981).

234. Complaint, *supra* note 199, ¶¶ 87-98.

235. *Id.* ¶ 22.

236. *Id.* ¶¶ 13-20 (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), and MASS GEN. LAWS ch. 207, §§ 11-12 (2010)).

237. Complaint, *supra* note 199, at Introduction.

238. *Id.* ¶ 33.

239. *Id.* ¶ 26.

240. *Id.* ¶¶ 46-79.

241. *Id.* ¶ 45.

242. *Id.* ¶¶ 21-31.

243. *Id.* ¶¶ 27-28 (quoting 142 CONG. REC. H7446 (daily ed. July 11, 1996)) ("[DOMA] defines marriage in Federal law for the first time and says to any State, 'No matter what you do, whether you do it by referendum or by public decision or by legislative action, the Federal Government won't recognize a marriage contracted in your state if we don't like the definition. We are going to trample the States' rights' . . . ." (statement of Rep. Jerrold Nadler)); *id.* (quoting 142 CONG. REC. at H7749 (daily ed. July 11, 1996)) ("[DOMA] is an unnecessary intrusion into the

“enacted to codify animus against gay and lesbian people.”<sup>244</sup> This argument is similar to the approach taken in *Doe II*, where the record behind the legislation was utilized to debunk the purpose of the legislation.

The codification of prejudice in DOMA results in the denial of federal rights and protections to same-sex couples who are married under state law.<sup>245</sup> This distinction is the crux of the attorney general’s argument. She argues that if you are validly married in Massachusetts, then you should be considered validly married for the purpose of obtaining federal benefits for married spouses.<sup>246</sup> Further, because of DOMA, Massachusetts becomes an agent in the implementation of the discriminatory federal plan.<sup>247</sup>

State domain of family law. It tears at the fabric of our Constitution. Historically, States have the primary authority to regulate marriage based upon the Tenth Amendment of the Constitution . . . . If there is any area of law to which States can lay a claim to exclusive authority, it is the field of family relations.” (statement of Rep. Neil Abercrombie); *id.* (quoting 142 CONG. REC. S10120 (daily ed. Sept. 10, 1996)) (“[I]t is not clear that this is even an appropriate area for Federal legislation. Historically, family law matters, including marriage, divorce, and child custody laws, have always been within the jurisdiction of State governments, not the Federal Government.” (statement of Sen. Russell Feingold)).

244. Complaint, *supra* note 199, ¶ 29 (quoting H.R. REP. NO. 104-664, at 15-16 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919-2920; 142 CONG. REC. H7444 (daily ed. July 11, 1996)) (“[N]o society that has lived through the transition to homosexuality and the perversion which it lives and what it brought forth.” (statement of Rep. Tom Coburn)); *id.* (quoting 142 CONG. REC. H7482 (daily ed. July 12, 1996)) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society. . . .” (statement of Rep. Bob Barr)); *id.* (quoting 142 CONG. REC. S10068 (daily ed. Sept. 9, 1996)) (DOMA “will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America’s moral fabric in the process.” (statement of Sen. Jesse Helms)); *see also* Brief for Attorney General, Memorandum of Law in Opposition to Defendants’ Motion to Dismiss Complaint and in Support of Commonwealth’s Motion for Summary Judgment at 7, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-cv-11156-JLT), 2010 WL 581804 (“Members of Congress repeatedly condemned homosexuality in the floor debates surrounding DOMA’s passage, calling it ‘immoral,’ ‘based on perversion,’ 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn), ‘unnatural,’ *id.* at H7494 (daily ed. July 12, 1996) (statement of Rep. Smith), ‘depraved,’ and ‘an attack upon God’s principles,’ *id.* at H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer)). *See also* Cain, *supra* note 20, at 488-90.

245. Complaint, *supra* note 199, ¶ 34. There are 1,138 statutory provisions for which marital status is a factor for determining entitlements. *See* U.S. GENERAL ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004).

246. Complaint, *supra* note 199, ¶¶ 30, 33. The attorney general uses the example that survivor benefits for veterans of the Armed Services would be available to same-sex marriages in Massachusetts but for the enactment of DOMA. *Id.* ¶ 30.

247. Complaint, *supra* note 199, ¶ 45. (“In making that choice, the Commonwealth is faced with an unconstitutional dilemma: maintain federal funding by disregarding marriages that are valid

Specifically, the attorney general argues, regarding MassHealth, that there are two classes of individuals.<sup>248</sup> MassHealth receives federal funding; therefore, MassHealth must disregard validly married same-sex couples in Massachusetts.<sup>249</sup> Because assets of married couples are counted jointly in calculating the qualifying assets, DOMA forces Massachusetts to treat married individuals differently depending on if they are married to a person of the same-sex.<sup>250</sup>

The attorney general argues that Massachusetts is presented with an unattainable choice—violate the Equal Protection Clause of the Fourteenth Amendment by applying DOMA’s definition of marriage in order to receive federal funds, or risk the loss of federal funding for non-compliance with Medicaid and Medicare rules.<sup>251</sup> Given this choice, the logical choice would be to accept the government funding. This action results in discriminatory enforcement by the Commonwealth.<sup>252</sup> However, Massachusetts merely argues in its pleadings that its choice is either follow the federal rules or lose funding.<sup>253</sup> Is not the stronger argument that they will not honor any federal programs in Massachusetts, because these programs do not equally protect all Massachusetts citizens?

Continuing with this line of reasoning, the rationale for the denial of these benefits at the time of the enactment of DOMA was purportedly for the preservation of federal resources.<sup>254</sup> It was argued at the time that the inclusion of a new class of individuals entitled to benefits would render the system incapable of sustaining its current level of service.<sup>255</sup> A follow-up study done by the Congressional Budget Office in 2004 determined that the recognition of same-sex couples’ marriages would actually save the federal budget between \$500 million and \$900 million annually.<sup>256</sup>

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under state law and discriminating against same-sex couples or risk losing federal funding by honoring marriages valid under state law and treating married couples equally.”).

248. Complaint, *supra* note 199, ¶ 51.

249. Complaint, *supra* note 199, ¶¶ 51, 54, 57, 59-62.

250. *Id.*

251. *See generally* Complaint, *supra* note 199.

252. *See* Defendants’ Motion to Dismiss at 12, *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), No. 1:09-cv-11156-JLT.

253. *Id.*

254. Complaint, *supra* note 199, ¶ 31.

255. *Id.*

256. *Id.* (citing CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <http://cbo.gov/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf>).

C. *Gill v. Office of Personnel Management*

*Gill* has been designated as the most compelling challenge to Section 3 of DOMA.<sup>257</sup> Within four months of the filing of *Gill*, some of the plaintiffs received relief.<sup>258</sup> The U.S. State Department announced a change in policy regarding the issuance of passports to people who had changed their names after marrying someone of the same-sex.<sup>259</sup> Further, opponents to the Respect of Marriage Act of 2009, including Representative Frank, believe the legal challenge filed against DOMA in *Gill* stands the best chance of overturning the law.<sup>260</sup>

On March 3, 2009, the *Gill* case was filed.<sup>261</sup> It was the first concerted, multi-plaintiff legal challenge to section 3 of DOMA. Each plaintiff in *Gill* was validly married in Massachusetts. The complaint alleged that, although the federal government does not license marriages, federal “programs take marital status into account in determining eligibility for federal protections, benefits and responsibilities.”<sup>262</sup> The complaint enumerated various federal programs where benefits have been denied to same-sex couples under section 3 of the DOMA, including spousal benefit programs such as survivor benefits, income tax return status, and the ability to recover social security benefits. Similar to the argument raised in *Massachusetts*, the Act required the responsible parties to make false statements on governmental forms by stating they are not married when they were in fact legally married in Massachusetts.

The plaintiffs in *Gill* argued that by 2004, there were 1138 federal laws that tied benefits, protections, or responsibilities to marital status.<sup>263</sup> In the absence of DOMA, the plaintiffs would be granted these rights. The complaint highlighted the rationales espoused at the time DOMA

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257. See generally Cain, *supra* note 20.

258. Denise Lavoie, *Gay Couples Can Use Married Names on Passports*, ASSOCIATED PRESS, June 19, 2009, available at <http://abcnews.go.com/US/wireStory?id=7882608>.

259. *Id.* See also *Same-Sex Couples Apply for Passport in Married Names*, GAY & LESBIAN ADVOC. & DEFENDERS (June 22, 2009), <http://www.glad.org/current/pr-detail/same-sex-couples-apply-for-passport-in-married-names/>. The Department of State amended the Foreign Affairs Manual to provide for issuance of passports in a new name based on a legal name change recognized under state law. U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1111 (2009), available at <http://www.state.gov/documents/organization/86755.pdf>.

260. Kerry Eleveld, *Respect for Marriage Act Debuts*, ADVOCATE.COM, Sept. 15, 2009, <http://www.advocate.com/printarticle.aspx?id=98544>.

261. Amended Complaint, *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309), 2009 WL 5803677 [hereinafter Amended Complaint].

262. *Id.* ¶ 3.

263. *Id.* ¶ 54.

was enacted.<sup>264</sup> In the Official House Report,<sup>265</sup> there are four reasons for the delineation of same-sex married couples and opposite-sex married couples: (1) House Bill 3396 advances the government's interest in defending and nurturing the institution of traditional heterosexual marriage; (2) House Bill 3396 advances the government's interest in defending the traditional notions of morality; (3) House Bill 3396 advances the government's interest in protecting state sovereignty and democratic self-governance; and (4) House Bill 3396 advances the government's interest in preserving scarce government resources.

As the plaintiffs articulated effectively, the first two rationales were not designed to protect any government interest, but, rather, are a codification of animus concepts. In fact, the statement that the government has a long-standing interest in defining marriage falls flat given the lack of any legislation prior to 1996 reflecting this interest. "Discrimination for its own sake is not a legitimate purpose upon which disadvantageous classifications may be imposed."<sup>266</sup>

Reflected in both *Massachusetts v. United States* and the case at hand, rationale three, the protection of state sovereignty, is actually subverted by DOMA. The state actually becomes an instrumentality of discrimination because of DOMA. This hits at the core of our concepts of federalism.

Rationale four fails pursuant to the follow-up study by the Congressional Budget Office in July 2004. In actuality, the recognition of same-sex couples will increase the federal revenues through 2014. Both Massachusetts cases point out this mistake-of-fact.

#### D. District Court Opinions

On July 8, 2010, the District Court of Massachusetts decided both *Gill* and *Commonwealth of Massachusetts*.<sup>267</sup> The court held that DOMA violated both the Tenth and Fifth Amendments of the Constitution.<sup>268</sup> In the *Commonwealth of Massachusetts* case, the court granted summary judgment after determining that DOMA fails the rational basis review.<sup>269</sup>

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264. See generally *id.*

265. 1 U.S.C. § 7 (2010), H.R. REP. NO. 104-664 (1996), reprinted in 1996 U.S.C.C.A.N. 2905.

266. Amended Complaint, *supra* note 261, ¶ 62.

267. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

268. *Massachusetts*, 698 F. Supp. 2d at 252.

269. *Id.* at 252.

First, the court addressed the Tenth Amendment claim that a determination of marital status is within the purview of the State.<sup>270</sup> In the court's opinion, the only permissible regulatory action the federal government may take related to family law is in an enumerated federal power.<sup>271</sup> Therefore, DOMA would need to have an express jurisdictional element. The government contended that the Spending Clause of the Constitution was such an element.<sup>272</sup>

The court agreed with the Commonwealth's counterargument that Spending Clause legislation must satisfy five elements, of which DOMA runs afoul.<sup>273</sup> The court focused on the fourth requirement, that the power must not be used to induce States to engage in unconstitutional activities, e.g., violation of the Equal Protection Clause.<sup>274</sup>

The Court then addressed the companion case, *Gill*,<sup>275</sup> in which it held that DOMA violates the Equal Protection Clause of the Fifth Amendment.<sup>276</sup> The court stated that DOMA "plainly conditions the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples."<sup>277</sup> The court went through the four factors of DOMA and determined that they fail the rational relationship.<sup>278</sup> The court pointed out that since the four stated legislative reasons failed and any current justifications were just as tenuous, DOMA violated the Equal Protection Clause.<sup>279</sup> Since DOMA imposes an unconstitutional condition on receipt of federal funding, it thus violates the Spending Power exception.<sup>280</sup>

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270. *Id.* at 245-46.

271. *Id.* at 246.

272. *Id.* at 246.

273. *Id.* at 247 (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); quoting *Neives-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003)) (stating that the five requirements are: (1) pursuit of the general welfare; "(2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation; (3) conditions must not be 'unrelated to the federal interest in particular national projects or programs' funded under the challenged legislation; (4) the legislation must not be barred by other constitutional provisions; and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.").

274. *Id.* at 248.

275. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

276. *Massachusetts*, 698 F. Supp. 2d at 248.

277. *Id.*

278. *Gill*, 699 F. Supp. 2d at 388. The four factors being: "(1) encouraging responsible procreation and child-bearing; (2) defending and nurturing the institution of traditional heterosexual marriage; (3) defending traditional notions of morality; and (4) preserving scarce resources." *Id.*

279. *Id.* at 390, 397.

280. *Massachusetts*, 698 F. Supp. 2d at 248-49.



## V. DIFFUSION THEORY AND DOMA

In Florida, the early majority has adopted the message regarding same-sex capacity for adoption. Through revisions in the innovation stage with the social research to support the conclusions, same-sex couples were able to successfully challenge the prohibition on “homosexual” adoption. Advocates were able to empathize with the counter position. They utilized statistics rather than theoretical attacks to undermine the position.

Examining the current legal challenges through the aforementioned lens, it appears that the current tactic taken in *Gill* and *Smelt* are still in the innovation stage. New arguments in current legal challenges are being set forth that are still in the early stages of refinement. However, there is an existing methodology for the successful equal protection challenge to DOMA.

The lesson learned from Diffusion Theory is that the most difficult portion of setting forth an argument is to have your message adopted. It is quite challenging to move from the innovation stage to the early adoption stage. Once in the adoption stage, the question will be how many people will adopt the message.

In examination of the recent Department of Justice (“DOJ”) positions for the *Gill* and *Smelt* cases, it becomes apparent that even the DOJ believes that DOMA will be decided under the rational basis test. If that is the case, then there is a clear road map to challenge DOMA from the Florida adoption cases. This road map has been tested and refined from the innovation stage. The question that remains is if it can be moved to the Late Majority.

### A. *Change and Empathy*

Why is the legal recognition of same-sex couples’ rights important? It is often argued that the sole reason for the necessity of this legal recognition is for social acceptance.<sup>281</sup> However, that portion of the issue is tangential to the core discussion, which is that, without formal recognition of relationship status, basic rights will be denied to same-sex couples.<sup>282</sup> For example, without this recognition, there is no right to

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281. Richard Stith, *On the Legal Validation of Sexual Relationships*, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 143-64 (Scott FitzGibbon, Lynn D. Wardle & A. Scott Loveless eds., 2009).

282. See, e.g., Ian Ayres, *Separate, Unequal: How Civil Unions Fall Short of Marriage*, *HARTFORD COURANT*, June 10, 2005, available at [www.law.yale.edu/news/2432.htm](http://www.law.yale.edu/news/2432.htm) (stating that there are at least five reasons why civil union rights are substantially different than equal marriage

inherit from a partner; there is no right to enter a partner's hospital room; and there is no right to continue to raise a partner's children.

One additional facet describing why recognition is needed, and to some degree inevitable, is the story of Janice Langbehn and Lisa Pond.<sup>283</sup> The following account is a summary from newspaper articles and court filings.

Janice Langbehn and Lisa Pond were about to depart from Miami on a family cruise with three of their four children to celebrate the couple's eighteen years together.<sup>284</sup> Before they could start this family celebration, Lisa suddenly collapsed after suffering a stroke.<sup>285</sup> She was taken to Jackson Memorial Hospital in Miami.<sup>286</sup>

As soon as they arrived at the hospital, things started to go awry. Hospital workers refused to let Janice into Lisa's hospital room.<sup>287</sup> They claimed that she was not related.<sup>288</sup>

Janice, undeterred, obtained her durable health care power of attorney.<sup>289</sup> Most likely, attorneys told her that in the event of such an emergency, this document would allow her to have access to her long-time partner. Yet, even after Janice produced a durable health care power of attorney, the hospital refused to accept information from Janice regarding Lisa.<sup>290</sup>

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rights, including recognition of the marriage/union by other states, the qualification of employer benefits, and the 1138 federal protections available to married couples).

283. *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326 (S.D. Fla. 2009). See generally Mike Clary & Bob LaMendola, *Lawsuit: Jackson Memorial Barred Lesbian from Seeing Dying Partner*, S. FLA. SUN-SENTINEL, June 26, 2008; John Dorschner, *Jackson Memorial Hospital Employees Deny Anti-Gay Bias in Janice Langbehn Case*, MIAMI HERALD, Nov. 24, 2009, available at <http://miamiherald.typepad.com/gaysouthflorida/2009/11/jackson-memorial-hospital-employees-deny-anti-gay-bias-in-janice-langbehn-case.html>; Tara Parker-Pope, *No Visiting Rights for Hospital Trauma Patients*, N.Y. TIMES, Sept. 30, 2009, available at <http://well.blogs.nytimes.com/tag/janice-langbehn>; Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, available at [http://www.nytimes.com/2009/05/19/health/19well.html?\\_r=1](http://www.nytimes.com/2009/05/19/health/19well.html?_r=1).

284. *Langbehn*, 661 F. Supp. 2d at 1331.

285. *Id.* at 1332.

286. *Id.* at 1331.

287. *Id.* at 1332.

288. *Id.* at 1331-32 ("The admitting clerk, who controlled family members' access to emergency personnel attending patients at Ryder, rejected Ms. Langbehn's offer to provide information about Ms. Pond. She also refused to provide Ms. Langbehn with information about Ms. Pond's condition, and over the next eight hours, denied the family the ability to see or be with Ms. Pond.").

289. *Id.* at 1332. About one hour after Ms. Pond arrived at the hospital, a faxed copy of the power of attorney arrived. *Id.*

290. *Id.*

Janice claimed that the hospital employee then told her that she was in an antigay city and that she would have to go to court on Monday to enforce her rights.<sup>291</sup> Lisa suffered the stroke on a Saturday, and it was not likely that she would survive to Monday.<sup>292</sup> According to Janice, she was only allowed to see Lisa for a few minutes when the priest gave Lisa her last rites.<sup>293</sup>

Hospital officials said that they followed state and federal laws on patient privacy.<sup>294</sup> They claimed that those laws forbid the release of health information to those outside the patient's immediate family.<sup>295</sup> The hospital added that, regardless of the patient privacy laws, there is no legal requirement to allow visitors.<sup>296</sup>

However, national standards for hospital accreditation allow visitation to family members; people not legally related are considered family members if they play a significant role in the patient's life.<sup>297</sup> Even if Janice and Lisa were legally married, Florida, under DOMA, would not have to recognize that union, and they would have been in the same position that they were in that tragic night.<sup>298</sup>

This type of uncertainty is not limited to Florida or to individuals who are unable to articulate their rights.<sup>299</sup> In the recent American Association of Law Schools ("AALS") annual meeting held in New Orleans, AALS thought it necessary to send an e-mail to the attendees of the conference. Who, one may ask, were the attendees? Law professors.

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291. *Id.* The hospital social worker told her that she was in an "anti-gay city and state." *Id.*

292. Ms. Langbehn passed away that day. *Id.* at 1333.

293. *Id.* at 1333.

294. *Id.* at 1336 ("Much of a patient's medical information is private and confidential under both state and federal law, and I do not believe that the Florida Supreme Court would impose a duty in tort on doctors or hospitals to provide medical updates on patient's condition or prognosis or treatment to third parties who would simply like to be kept informed."). See also Clary & LaMendola, *supra* note 283 ("The hospital follows state and federal laws on patient privacy that can forbid the releasing health information to those outside the patient's immediate family.").

295. *Langbehn*, 661 F. Supp. 2d. at 1336.

296. *Id.* at 1337-38 ("[D]ecisions as to visitation should be left to the medical personnel in charge of the patient, without second-guessing by juries and courts. A trauma unit is not like a regular hospital setting, and visitors may interfere with what medical personnel are trying to accomplish in a difficult environment . . ."). See also Clary & LaMendola, *supra* note 283; Parker-Pope, *supra* note 283.

297. See generally THE JOINT COMMISSION, THE PHYSICIAN'S GUIDE TO THE JOINT COMMISSION'S HOSPITAL STANDARDS AND ACCREDITATION PROCESS, available at <http://www.jointcommission.org/assets/1/18/Physicians%20guide%20WEB1.PDF>.

298. See Dorschner, *supra* note 283 ("Jackson officials note that state law not only doesn't recognize same-sex relationships, but also has no provisions for unmarried heterosexual couples without powers of attorney.").

299. See also *Reed v. ANM Health Care*, 147 Wash. App. 1044 (Wash. Ct. App. 2008) (involving a hospital that required same-sex partner to leave partner's room).

AALS thought it necessary to tell law professors at their annual convention that, should an “attendee experience a hospital refusing access (to the patient) to the patient’s partner, or refusing the partner access to the patient’s hospital doctors, or if hospital personnel are reluctant to recognize a power of attorney, we are providing the following list of individuals who are available to assist you.”<sup>300</sup> If law professors are unable to enforce legal rights, how could Ms. Langbehn and Ms. Pond? The next logical question is why should there be a difference?

The acceleration and dynamic change in the manner in which information is disseminated, found, read, and weighed in on by experts has dramatically changed in the last twenty years. To better understand DOMA and the other animus-styled legislation and how different society is today from 1977 or 1997, we need to return to the late 1970s first, and then to the late 1990s. Once there, one is better able to appreciate the tone of the discussion regarding fundamental fairness and same-sex couples. Moreover, it can demonstrate far the country has tipped.

### 1. The Ellen Effect

Polls show that over 67% of Americans say same-sex couples should be allowed to marry or have a civil union.<sup>301</sup> In Washington, 73% of voters support legal recognition of same-sex unions.<sup>302</sup> More to the point, there is a large generational divide on the polls—many more young people support same-sex marriage.<sup>303</sup> This generational gap can best be explained by briefly exploring the career of Ellen DeGeneres.

If an average American can begin to relate to a person of the LGBTI community, the cultural bias disappears. No longer are they “theys,” but rather someone whom we invite into our home every day. The career of Ellen DeGeneres seems to mirror the rise and, in my opinion, fall of statutory discriminatory legislation against the LGBTI

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300. Email from Susan Weterberg Prager to attendees of AALS annual meeting (Dec. 28, 2009) (on file with author).

301. Brian Montopoli, *Poll: Support for Same Sex Marriage Grows*, CBS NEWS, Apr. 27, 2009, available at [http://www.cbsnews.com/8301-503544\\_162-4972643-503544.html](http://www.cbsnews.com/8301-503544_162-4972643-503544.html).

302. The Washington Poll, *Public Policy Attitudes: Iraq, Immigration, Same-Sex Marriage . . .*, (Nov. 10, 2007), <http://www.washingtonpoll.org/results.html>. Admittedly, this poll only utilizes a sample of 700 registered voters. *Id.*

303. Paul Steinhauser, *CNN Poll: Generations Disagree on Same-Sex Marriage*, CNN.COM, May 4 2009, available at, <http://www.cnn.com/2009/US/05/04/samesex.marriage.poll/>. But among those 18 to 34 years old, 58% said same-sex marriages should be legal. *Id.* That number drops to 42% among respondents aged 35 to 49, and to 41% for those aged 50 to 64. *Id.* Only 24% of Americans 65 and older support recognizing same-sex marriages, according to the poll. *Id.*

community. Her career has mirrored the economic diffusion model theory.<sup>304</sup> first she was an Innovator,<sup>305</sup> then she was an Early Adaptor,<sup>306</sup> then the Early and Late Majority followed her,<sup>307</sup> concluding with the Laggards.<sup>308</sup>

Ellen DeGeneres has had an incredible career by any measurement. She made it to the top of the stand-up comedy circuit, appearing on the *Tonight Show* in 1986.<sup>309</sup> She was so successful that she became the first female comedian that Johnny “called over” after her set to talk on screen.<sup>310</sup>

By 1994, as was the case with many comics at that time, a prime time television show was developed based on her stand-up material.<sup>311</sup> The sitcom *Ellen* launched on ABC in 1994.<sup>312</sup> Then in 1997, Ellen DeGeneres did the unthinkable at the time, and, along with the character on the show, made her homosexuality public.<sup>313</sup>

Ellen appeared on the cover of *Time* magazine on April 14, 1997,<sup>314</sup> and then on *The Oprah Winfrey Show* in February 1997, and announced that she was a homosexual.<sup>315</sup> A couple of weeks later,<sup>316</sup> on the *Ellen*

304. See GLADWELL, *supra* note 12, at 196.

305. She was adventurous—her coming out on her ABC sitcom. See *infra* notes 313-321 and accompanying text.

306. Dreamworks cast her in *Finding Nemo* and a daytime talk show. See *infra* notes 327-328 and accompanying text.

307. Her show became a success. See *infra* note 329 and accompanying text.

308. No one even mentioned she was gay when she was hired to be the fourth judge on American Idol. See *infra* note 332 and accompanying text.

309. See Ellen DeGeneres Bio, THE ELLEN DEGENERES SHOW, <http://ellen.warnerbros.com/about/bio.php> (last visited Mar. 17, 2010); Ellen DeGeneres: Snapshot, PEOPLE.COM, [http://www.people.com/people/ellen\\_degeneres](http://www.people.com/people/ellen_degeneres) (last visited Jan. 29, 2011).

310. *Id.* See also Proust Questionnaire, Ellen DeGeneres, VANITY FAIR, Mar. 2007, available at [http://www.vanityfair.com/culture/features/2007/03/proust\\_degeneres200703](http://www.vanityfair.com/culture/features/2007/03/proust_degeneres200703).

311. See generally *Seinfeld: TV Series 1990-1998*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0098904/> (last visited Jan. 29, 2011); *Rosanne: TV Series 1988-1997*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0094540/> (last visited Jan. 29, 2011).

312. See *Ellen: TV Series 1994-1998*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0108761/> (last visited Jan. 29, 2011).

313. *Ellen: The Puppy Episode Part 1*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0570077/> (last visited Jan. 29, 2011).

314. See Bruce Handy, Elizabeth Bland, William Tynan & Jeffrey Ressler, *Television: Roll Over, Ward Cleaver*, TIME, Apr. 14, 1997, available at <http://www.time.com/time/magazine/article/0,9171,986188,00.html>. See also Time Magazine Cover, TIME, Apr. 14, 1997, available at <http://www.time.com/time/covers/0,16641,19970414,00.html>.

315. See Ellen DeGeneres Bio, *supra* note 309; see Ellen DeGeneres, Facebook Profile, [http://www.facebook.com/note.php?note\\_id=137914105150#!/pages/Ellen-Degeneres/36772172240](http://www.facebook.com/note.php?note_id=137914105150#!/pages/Ellen-Degeneres/36772172240) (last visited Jan. 29, 2011).

316. Ellen DeGeneres Bio, *supra* note 309.

show, her character came out in the famous “Puppy Episode.”<sup>317</sup> The episode was the highest rated episode of *Ellen* ever, drawing some 46 million viewers,<sup>318</sup> garnering an Emmy for Best Comedy writing,<sup>319</sup> a Peabody Award,<sup>320</sup> and a ranking of 46 in *T.V. Guide’s* “TV’s Top 100 Episodes of All Time.”<sup>321</sup>

However, not all was roses for Ellen. There was predictable backlash in 1997 America. The Reverend Jerry Falwell came out publicly against the airing of the episode.<sup>322</sup> Affiliates refused to air the program.<sup>323</sup> Advertisers like Wendy’s stopped running ads on the *Ellen* show.<sup>324</sup> Then, in the final season of 1998, ABC ran each episode with a parental advisory warning.<sup>325</sup> Shows that had so-called “gay” actions did not have the same label because they were heterosexuals poking fun.<sup>326</sup> Compare this to the 1996 enactment of DOMA, and the mores of society come into greater focus.

Ellen’s career moved forward slowly until 2003, when everything started to hit for her. First, she starred in the widely successful animated feature, *Finding Nemo*.<sup>327</sup> Then, she launched a daytime talk show, *The*

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317. See *The Puppy Episode*, *supra* note 313.

318. See Ellen DeGeneres Bio, *supra* note 309 .

319. *Id.*

320. *Id.*

321. *TV Guide’s Top 100 Episodes of All Time*, TV GUIDE, June 15, 2009.

322. Handy et al., *supra* note 314; Jess Cagle, *As Gay As It Gets?*, ENT. WKLY., May 8, 1998, available at <http://www.ew.com/ew/article/0,,282999,00.html>.

323. Bob Lapham, *Petition Being Circulated Against Showing of “Ellen” Episode*, ABILENE REP.-NEWS, Nov. 18, 2008, available at <http://www.texnews.com/local97/ellen041597.html>. ABC affiliate WBMA-LP in Birmingham, Alabama, citing “family values,” first sought ABC’s permission to move the episode out of prime-time to a late-night slot. *Id.* When ABC declined the request, the affiliate refused to air the episode at all. *Id.*

324. KATHLEEN TRACY, ELLEN: THE REAL STORY OF ELLEN DEGENERES 251-52 (2005).

325. Cagle, *supra* note 322; James Collins, *Television: Ellen DeGeneres: Yep, She’s Still Gay*, TIME, Oct. 27, 1997, available at <http://www.time.com/time/printout/0,8816,987260,00.html>.

326. DAVID EHRENSTEIN, OPEN SECRET (GAY HOLLYWOOD 1928–1998) 315 (1998). DeGeneres further noted what she believed to be hypocrisy on the part of ABC, citing episodes of ABC series *The Drew Carey Show* and *Spin City* that included two men kissing (the Carey episode was even promoted using the kiss). “There’s no disclaimer on [the Carey show] at all, because it’s two heterosexual men, and they’re making fun of heterosexuality . . . [Spin City aired without a disclaimer] ‘because neither (Michael J. Fox nor Michael Boatman) is really gay in real life.’” *Id.* See also Cagle, *supra* note 322.

327. *Finding Nemo* (2003), THE INTERNET MOVIE DATABASE, available at <http://www.imdb.com/title/tt0266543/> (last visited Jan. 29, 2011).

*Ellen DeGeneres Show*.<sup>328</sup> In its first season, the show was nominated for eleven Emmy Awards and won four, including Best Talk Show.<sup>329</sup>

By 2003, the comedian whose show was cancelled for being “too gay” was now the darling of Middle America. We never hear of protests of her show because she is gay, nor do we hear of parental advisory warnings or of affiliates failing to air the show. Is it a surprise then that in 2003, the proposed constitutional amendment to make DOMA permanent never got anywhere?

By 2006, Ellen was hosting the Oscars<sup>330</sup> and appearing in American Express commercials.<sup>331</sup> The biggest news may have been her appearance as the new judge on American Idol. She replaced Paula Abdul in the number one show on television.<sup>332</sup> Should it be a surprise that in 2009 same-sex marriage was recognized in twelve states?

## 2. Department of Justice Actions

During the summer of 2009, the DOJ, in making motions to dismiss the various cases challenging DOMA, made a radical turn of policy. The Obama administration<sup>333</sup> was forced into filing a usual brief in federal court defending the DOMA.<sup>334</sup> The DOJ stated that it must defend laws under legal challenges even though the Department “disagrees with a particular statute as a policy matter, as it does here.”

328. *Ellen: The Ellen DeGeneres Show (2003-???)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0379623/> (last visited Jan. 29, 2011).

329. *Ellen: The Ellen DeGeneres Show Awards*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0379623/awards> (last visited Jan. 29, 2011).

330. Lloyd de Vries, *Producer Says Comedian “Was Born to Host the Academy Awards,”* CBSNEWS.COM (Sept. 8, 2006), <http://www.cbsnews.com/stories/2006/09/08/entertainment/main1984991.shtml>.

331. Ellen DeGeneres Bio, *supra* note 309.

332. *Id.*; see also *Ellen DeGeneres Joins American Idol as Fourth Judge*, AMERICAN IDOL (Sept. 9, 2009), <http://www.americandidol.com/news/view/pid/1841/>.

333. The administration is on record advocating the repeal of DOMA. See Press Release, Office of the Press Secretary, 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/the\\_press\\_office/Statement-by-the-President-on-the-Presidential-Memorandum-on-Federal-Benefits-and-Non-Discrimination-and-Support-of-the-Lieberman-Baldwin-Benefits-Legislation/](http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Presidential-Memorandum-on-Federal-Benefits-and-Non-Discrimination-and-Support-of-the-Lieberman-Baldwin-Benefits-Legislation/) (“I stand by my long-standing commitment to work with Congress to repeal the so-called Defense of Marriage Act. It’s discriminatory, it interferes with States’ rights, and it’s time we overturned it.”).

334. See John Schwartz, *National Briefing/Washington; U.S. Defends Marriage Law*, N.Y. TIMES, Sept. 19, 2009, available at [http://query.nytimes.com/gst/fullpage.html?res=9C05E2D61539F93AA2575AC0A96F9C8B63&ref=john\\_schwartz](http://query.nytimes.com/gst/fullpage.html?res=9C05E2D61539F93AA2575AC0A96F9C8B63&ref=john_schwartz).

According to Robert Raben,<sup>335</sup> the brief was “a really startling political and policy statement.”

a. June 2009—*Smelt v. United States*

The first brief filed by the DOJ under the Obama administration was in the case of *Smelt v. United States*.<sup>336</sup> It was much anticipated because, during the prior election, then-Senator Obama said he thought that DOMA should be repealed. However, that was not the approach the DOJ took in the brief.

In *Smelt*, the plaintiffs were validly married in California.<sup>337</sup> They were seeking redress in court to be treated equally with respect to federal benefits and protections.<sup>338</sup> In response to the case, the DOJ followed the Bush administration’s “play book,” despite most of the arguments being rejected by many state supreme courts as legally unsound and discriminatory.<sup>339</sup> The DOJ won the motion to dismiss on the easy ground of lack of standing.<sup>340</sup> The married couple had not alleged any specific harm suffered related to DOMA.

However, what was disturbing about the brief was the addition of a new argument suggesting that the federal government should maintain neutrality in the treatment of same-sex couples.<sup>341</sup> The government argued that neutrality would ensure that federal tax money collected from states that do not recognize same-sex couples will not be utilized to assist same-sex couples in the states that recognize the unions.<sup>342</sup> Moreover, the DOJ promoted arguments regarding the preservation of scarce resources that had been clearly demonstrated as inaccurate by prior study.<sup>343</sup> The merits of the argument, or lack thereof,<sup>344</sup> are not as

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335. Schwartz, *supra* note 334. Robert Rafen was a legislative consultant who worked at the Justice Department under President Clinton. *Id.*

336. *Smelt v. United States*, SACV-09-00286 (C.D. Cal. Sept. 24, 2009), available at <http://www.scribd.com/doc/19078745/Order-Granting-Defendants-Motion-to-Dismiss-in-Defense-of-Marriage-Act-Lawsuit>.

337. *Id.* at 1.

338. *Id.* at 2.

339. See generally Defendant’s Motion to Dismiss, *Smelt*, SACV-09-00286 (C.D. Cal. Sept. 24, 2009), available at <http://www.scribd.com/doc/16355867/Obamas-Motion-to-Dismiss-Marriage-case>.

340. *Smelt*, SACV-09-00286, at 3.

341. See Defendant’s Motion to Dismiss at 33, *Smelt*, SACV-09-00286.

342. *Id.* at 45.

343. CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <http://cbo.gov/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf>.



important as the fact that the DOJ was attempting to further the cause of DOMA, rather than recognize the faults therein.

b. September 2009—*Gill v. Office of Personnel Management*

What a difference three months make. As expected in the case of *Gill v. Office of Personnel Management*,<sup>345</sup> the DOJ filed a motion to dismiss. Reading the *Gill* brief compared to the *Smelt* brief, one would not have known they were prepared and filed within three months of each other, let alone within the same year.

This time around in *Gill*, the DOJ first acknowledged that the Obama Administration does not support DOMA as a matter of policy and believes that it is discriminatory and supports its repeal.<sup>346</sup> Only then did the DOJ make specific standing arguments as to some of the plaintiffs and the general constitutional defenses. The DOJ put forth the argument that LGBT discrimination should be scrutinized under the “rational basis” test as a result of *Romer v. Evans*, and, thus, there was a rational basis for Congress to pass the DOMA.<sup>347</sup> Further, in the “don’t ask don’t tell” case in Massachusetts,<sup>348</sup> the Supreme Court did not adopt a higher standard. Obviously, the crux of that appeal will be on whether or not *Romer* should be limited to the anti-gay legislation in Amendment 2 from Colorado and a higher standard of review applied.

More interesting than the future contest to be played out in the *Gill* appeal, there has been another degradation of the four underpinnings of DOMA. In footnote ten<sup>349</sup> of its brief, the DOJ did not justify DOMA on the “responsible procreation and child-rearing” theory.<sup>350</sup> This was the theory most heavily relied on in recent same-sex marriage cases.<sup>351</sup> The DOJ recognized that this theory is no longer valid.

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344. The government does not address the fact that same-sex couples also contribute to the tax base yet they are denied the benefits that corresponding heterosexuals receive. It is difficult to reconcile an argument about public expenditures when everyone is contributing to that base.

345. Amended Complaint, *supra* note 261.

346. DOJ Memorandum in Support of Defendants’ Motion to Dismiss at 1, *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2009) (No. 1:09-cv-10309), 2009 WL 5803678.

347. *Id.* at 16.

348. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006).

349. DOJ Memorandum, *supra* note 346, n.10.

350. In the legislative history of DOMA, the “purported interests in ‘responsible procreation and child-rearing’—that is, the assertions that (1) the government’s interest in ‘responsible procreation’ justifies limiting marriage to a union between one man and one woman, and (2) that the government has an interest in promoting the raising of children by both of their biological parents.” *Id.* at 19 (citing H.R. REP. NO. 104-664, at 12-13, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916-17).

351. *See, e.g., Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459 (Cal. 2004); *Lewis v. Alfaro*, No. S122865, 2004 WL 473258 (Cal. 2004); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d

Citing the American Academy of Pediatrics, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, and the American Medical Association, among others, the DOJ concluded that the underpinnings of one of the tenets of the DOMA are incorrect.

[M]any leading medical, psychological, and social welfare organizations have issued policies opposing restrictions on lesbian and gay parenting upon concluding, based on numerous studies, that children raised by gay and lesbian parents are as likely to be well-adjusted as children raised by heterosexual parents.<sup>352</sup>

Further, the footnote finds support for this conclusion with Justice Scalia in the dissent in *Lawrence v. Texas*.<sup>353</sup> In *Lawrence*, Justice Scalia pointed out that encouraging procreation would not be a rational basis for limiting same-sex couples' marriage because the "sterile and elderly are allowed to marry."<sup>354</sup>

#### B. *Four Parts of DOMA*

DOMA has two substantive parts. Section 2 allows states to ignore laws or policies from other states, the reverse of the full faith and credit concept. Section 3 defines marriage for federal purposes as a union between a man and a woman. In the Official House Report, there are four reasons for the delineation of same-sex married couples and opposite-sex married couples: (1) House Bill 3396 advances the government's interest in "defending and nurturing the institution of traditional, heterosexual marriage"; (2) House Bill 3396 advances the government's interest in "defending the traditional notions of morality"; (3) House Bill 3396 advances the governments interest in "protecting state sovereignty and democratic self governance"; and (4) House Bill 3396 advances the government's interest in "preserving scarce government resources."<sup>355</sup> Using the Florida adoption cases and Diffusion Theory as our guide, can DOMA withstand rational basis scrutiny?<sup>356</sup>

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374 (D. Mass. 2009); *Commonwealth v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

352. DOJ Memorandum, *supra* note 346, at 19.

353. 539 U.S. 558 (2003).

354. *Id.* at 605.

355. 1 U.S.C. § 7 (2010), H.R. REP. NO. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905.

356. After the article was completed the District Court in *Gill* was decided. The *Gill* court agreed with the following analysis. However, the *Gill* case has yet to be appealed and is only one

### 1. Government's Interest in Defining Marriage

The argument that, through DOMA, the government is promoting some form of traditional marriage seems straightforward and, to some degree, has a superficial appeal.<sup>357</sup> “A specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes, however, when the tradition is nothing more than the historical classification currently expressed in the statute being challenged.”<sup>358</sup> In other words, the argument would exist as a marry-go-round, that the discriminatory concept is both the *basis for* legislation and the *purpose of* the legislation.<sup>359</sup>

Essentially, Congress, through DOMA, is saying that marriage is limited to opposite-sex couples. This type of analysis is hollow, especially because not all Judeo-Christian cultures prohibit same-sex marriage.<sup>360</sup> In fact, within our own country, five states allow marriage of same-sex couples. This argument allows the classification to be made for its own sake.<sup>361</sup> Traditional discriminatory principles should not be permitted under the rational basis test. So, can the first two classifications be justified by any other plausible legislative reasons?

In the Florida cases, the adoption standard was based on similar principles displaying animus. In order to overcome this portion of the statute, the challengers to the Florida cases presented the legislative record to demonstrate that the underlying principle was animus-like in nature. The Florida record was full of animus-based statements,<sup>362</sup> including such classics as “let them go back into the closet.”<sup>363</sup>

By 1997, congressmen had learned how to couch the animus-based statements in political rhetoric.<sup>364</sup> Regardless, the record still demonstrates the misguided reliance on the farce of the sanctity of marriage.<sup>365</sup> After all, how can civil (not religious) marriage suffer if

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federal district court decision. Nonetheless, this discussion demonstrates that the applied theory appears to be correct.

357. *See also* *Varnum v. Brien*, 763 N.W.2d 862, 898 (Iowa 2009).

358. *Id.*

359. *Id.*

360. Same-sex marriage currently is legal in Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal and Iceland. In 1997, none of these countries allowed same-sex unions.

361. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

362. *See supra* Part III.A.

363. *See supra* Part III.A.

364. *See supra* Part III.A.

365. But even from a religious prospective, not all religions prohibit same-sex marriage. One part of the Lutheran church permits same-sex unions. *See* Christopher Quinn, *Same-Sex Unions*

same-sex marriage were allowed? Actually, there can be a counterpoint made. There is an approach that challenges the very ethics of marriage.<sup>366</sup> One does not drink from a whites-only water fountain, so why do individuals engage in marriage when it has the same discriminatory effects?<sup>367</sup> The likelihood that people will no longer marry is slight. The likelihood that a majority of the voting populates will demand equality appears much higher.

This is where the concept of the government's object to protect the religious institution of marriage appears. What morality would the government be protecting other than a religious definition of marriage? After all, if we are speaking of just marriage, how is the marriage of two atheists different from that of a same-sex couple? The wording is just an end-around from a direct statement of religious marriage.

It may be argued that there are other moral rationales for marriage restrictions, such as procreation or child rearing. The issue for a rational basis analysis is whether there is any legitimate state interest for the legislation. If there are basically three ways that the first two sections could meet a rational basis standard: (1) procreation; (2) child-rearing; and (3) religion, then we should review how these similar justifications were attacked under the rational basis standard.

In the DOJ brief in *Gill*, the government conceded that procreation and child rearing are not justifications that would survive rational basis scrutiny as applied to DOMA. Nonetheless, it is important to briefly analyze why this is true, and why Diffusion Theory can show us how to apply the successful argument to the morality principle. Finally, although the issue has been conceded in a brief, this is not conclusive as a matter of law.

In Justice Scalia's dissent in *Lawrence*,<sup>368</sup> he pointed out that encouraging procreation was not a rational basis for limiting same-sex couples' marriage. He clearly articulated that this rationale would fail

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Accepted by *Evangelical Lutherans*, ATLANTA J.-CONST., Aug. 21, 2009, available at <http://www.ajc.com/news/same-sex-unions-accepted-120999.html>.

366. IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 162 (2005).

367. *Id.* The question being posited—is it moral

To join the Boy Scouts when they refuse to appoint gay scout masters

To join the military when they refuse to allow openly gay soldiers

To attend a church that refuses to ordain gay priests

To take a job from an employer that refuses to give equal employment benefits

To adopt a child from a state that bars same-sex parents from adopting, or

To join a club that refuses to admit gay members?

*Id.*

368. 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

because “the sterile and the elderly are allowed to marry.”<sup>369</sup> Therefore, procreation seems unlikely to survive a rational basis attack.

Could child rearing survive the rational basis attack? Let’s look to Diffusion Theory. Diffusion Theory tells us that the most effective way to communicate an idea is to see if similar ideas have been adopted. Here, we have a parallel between the first two justifications of the DOMA and the Florida adoption laws. In Florida, the courts found persuasive the use of the legislative record to attack the circular reasoning of rational basis.

In *Doe II*, the court concluded that the state’s interest in providing a stable permanent home environment was not served by a blanket prohibition. Not one of the state’s arguments: (i) promoting the well being of the children,<sup>370</sup> (ii) the social stigmatization of the children,<sup>371</sup> or (iii) morality,<sup>372</sup> met the rational basis test according to the Florida court. In order to reach that conclusion, the medical and social research had to catch up to the argument proffered by the advocates for same-sex couple adoption.

The Florida court concluded that child rearing failed under all medical and social science research. The evidence was overwhelming in the Florida adoption cases. It would be hard to imagine that the research of the AMA, the American Psychological Association, the American Psychiatric Association, ad nauseum, would fail here. Thus, child rearing should also fail a rational basis attack. As the Iowa Supreme Court noted, “[t]he ban on same-sex civil marriage can only logically be justified as a means to ensure the asserted optimal environment for raising children if fewer children will be raised within same-sex relationships or more children will be raised in dual-gender marriages.”<sup>373</sup>

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369. *Id.*

370. *Doe II*, 2008 WL 5006172, at \*28 (Fla. Cir. Ct. Nov. 25, 2008) (“[T]o be considered rationally related to a governmental interest, the distinctions between individuals may not be based on unsubstantiated assumptions.”); *id.* (quoting U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973)) (“[H]ere, the evidence proves quite the contrary; homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts.”).

371. *Id.* (“[T]here is no optimal gender combination of parents.”).

372. *Id.* at \*29 (“[P]ublic morality per se, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment.”). The Department’s opinion that homosexuality alone is immoral is unable to be reconciled with the permission of homosexual foster parenting. *Id.* (“[T]here is no ‘morality’ interest with regard to one group of individuals permitted to form the visage of a family in one context but prohibited in another.”).

373. *Varnum v. Brien*, 763 N.W.2d 862, 901 (Iowa 2009).

## 2. Government's Interest in Defining Morality.

Although there is intended to be a separation of church and state, in the Judeo-Christian framework of our legislative system, it is evident that we often create laws that define our social values and norms. Can morality then, alone, be enough to survive the rational basis test?

Two Supreme Court cases have addressed this issue. In *Bowers*, Justice Stevens' dissent stated that neither a majority's moral opinion nor tradition could protect a law from constitutional attack.<sup>374</sup> Moreover, as Justice O'Connor demonstrated, morality alone as a justification encourages circular reasoning. "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law."<sup>375</sup>

In *Lawrence*, the Supreme Court adopted Justice Stevens' dissent in *Bowers*, turning it into controlling authority.<sup>376</sup> *Lawrence* demonstrated that a solely moral-based justification would not survive rational basis. "[C]ourts cannot rely simply on reference to morality alone to ensure that government action is nonarbitrary and free of impermissible bias."<sup>377</sup>

Under the *Lawrence* framework, morality alone cannot be justification for the DOMA statute. How can a religious concept of marriage be a moral justification? These same rationales were used in the past for interracial marriages. At one point, states were promoting morality. However, the morality promoted had no rational basis to the law that was established. Likewise here, morality is no justification. If morality alone could be a justification, without more, then any type of legislative initiative would be permissible.

Under Diffusion Theory principles, we can then look to how the morality issue has been successfully attacked in the Florida adoption cases and elsewhere. In *Lofton*, the innovation stage of the Florida adoption cases, morality alone was held to be a sufficient justification.

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374. *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J., dissenting)).

375. *Lawrence*, 539 U.S. at 583, 585 (O'Connor, J., concurring) ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.")

376. Jamie Iguchi, *Satisfying Lawrence: The Fifth Circuit Strikes Ban on Sex Toy Sales*, 43 U.C. DAVIS L. REV. 655, 664 (2009).

377. For a discussion of scholarship on how morality and the law should be given effect, see Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1239 n.19 (2004).

However, as the theory moved from the innovation stage to the early adoption stage, the animus demonstrated in the legislative history played a key role.

In Florida, the legislative history, plus the additional medical and sociological evidence, proved decisive in preventing the state from relying on morality alone. “[T]here is no ‘morality’ interest with regard to one group of individuals permitted to form the visage or a family in one context but prohibited in another.”<sup>378</sup> Clearly the animus in the legislative history, plus the current medical science would seem to also defeat DOMA on the rational basis ground on this rationale.

### 3. Government’s Interest in Protecting State Sovereignty.

“We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”<sup>379</sup> The Constitution protects the concept of dual sovereignty through the Tenth Amendment. The Tenth Amendment articulates that powers not delegated to the federal government by the Constitution are reserved to the states.<sup>380</sup> The states thus retain substantial sovereign authority under our constitutional system.<sup>381</sup>

In dealing with a constitutional issue implicating state sovereignty, the Court generally will look to the powers delegated to Congress in Article I. “If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”<sup>382</sup> Essentially, the Tenth Amendment “states but a truism that all is retained which has not been surrendered.”<sup>383</sup>

378. *Doe II*, 2008 WL 5006172, at \*29 (Fla. Cir. Ct. Nov. 25, 2008)

379. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

380. U.S. CONST. amend. X.

381. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–58 (1991) (“As James Madison put it: The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 292-93 (C. Rossiter ed. 1961).”).

382. *New York v. United States*, 505 U.S. 144, 156 (1991) (citing *United States v. Oregon*, 366 U.S. 643, 649 (1961)); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

383. *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

As for DOMA, the question regarding state sovereignty is whether marriage is the purview of the federal government or the states. Family law is traditionally a matter for the states.<sup>384</sup> “This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.”<sup>385</sup> Congress is thus infringing on state sovereignty when a federal statute refuses to recognize a valid state marriage unless it conforms to the federal statute’s definition. DOMA does just this.

Because DOMA does appear to override state marriage law, will it survive scrutiny and under what test? In an earlier case, state sovereignty may be held to a higher standard than mere rational basis.

Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.<sup>386</sup>

Based on the evidence surrounding DOMA, it would appear that this higher standard should apply. Marriage is a family law issue traditionally reserved for the states. By enacting DOMA, the federal government is not protecting state sovereignty.

The purpose of this section of DOMA was to protect states from the Full Faith and Credit Clause after *Baehr*. Professors Laurence Tribe and Stanley Cox both argue that DOMA violates the Tenth Amendment.<sup>387</sup> “Tribe suggests that Congress does not have the power to ‘exempt’ a narrow ‘category of judgments’ from the requirements of full faith and credit.”<sup>388</sup>

#### 4. Government’s Interest in Protecting Scarce Resources.

In 1997, when DOMA was passed, no states had a law permitting same-sex marriage. Further, there were no actual studies done to

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384. See generally Wolff, *supra* note 25.

385. *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

386. *United States v. Yazell*, 382 U.S. 341, 352 (1966).

387. See Letter from Laurence H. Tribe, Professor, Harvard Law School, to Sen. Edward M. Kennedy (May 24, 1996), in 142 CONG. REC. S5931-01, S5932-33 (daily ed. June 6, 1996) [hereinafter Tribe Letter].

388. See 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, 939–40 (2006). Professor Rosen believes that Tribe and Cox assume that DOMA violates the “Effects Clause” erroneously. *Id.*



determine the economic impact of DOMA.<sup>389</sup> Thus, at its inception, there could be, by definition, no rational basis for considering this economic factor. Moreover, when there was research on the impact done by the Congressional Budget Office, the research was inapposite in supporting this factor.

In 2004, the Congressional Budget Office (“CBO”)<sup>390</sup> concluded that

[t]he potential effects on the federal budget of recognizing same-sex marriages are numerous. [ . . . ] In some cases, recognizing same sex marriages would increase outlays and revenues; in other cases, it would have the opposite effect. The Congressional Budget Office estimates that on net, *those impacts would improve the budget's bottom line to a small extent*: by less than \$1 billion in each of the next 10 years (CBO's usual estimating period). That result assumes that same-sex marriages are legalized in all 50 states and recognized by the federal government.<sup>391</sup>

The CBO looked at all the impact to income tax revenues, estate tax revenues, and effects on outlays. There was no discernable impact. Therefore, protecting scarce government resources should fail the rational basis test.

## VI. CONCLUSION

This is not the first time DOMA has been challenged.<sup>392</sup> So what has changed that resulted in these decisions? Diffusion Theory teaches

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389. What was done was speculation.

I urge my colleagues to think of the potential cost involved here. How much is it going to cost the Federal Government if the definition of “spouse” is changed? It is not a matter of irrelevancy at all. It is not a matter of attacking anyone's personal beliefs or personal activity. That is not my purpose here. What is the added cost in Medicare and Medicaid benefits if a new meaning is suddenly given to these terms? I know I do not have any reliable estimates of what such a change would mean, but then, I do not know of anyone who does. That is the point—nobody knows for sure. I do not think, though, that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions—if not billions—of Federal taxpayer dollars.

142 CONG. REC. S1011 (1996) (statement of Sen. Byrd).

390. Conor Clarke, *Gay Marriage and the Budget: Does DOMA Preserve “Scarce Government Resources”?* (No.), THE ATLANTIC, June 13, 2009, available at <http://www.theatlantic.com/politics/archive/2009/06/gay-marriage-and-the-budget-does-doma-preserve-scarce-government-resources-no/19312/>.

391. CBO report, *supra* note 343, at 1 (emphasis added).

392. See, e.g., *Varnum v. Brien*, 763 N.W.2d. 862 (Iowa 2009); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2009).

us that change happened in society and the late majority has adopted the idea of same-sex marriage.<sup>393</sup> This same sequencing of change was demonstrated by the Florida adoption cases. Diffusion Theory allows us to demonstrate that social mores have moved. The majority has empathized with the minority and adopted its position. This framing becomes crucial for the continuing debate and legal challenges.

Over time, if the message is effectively communicated, the causal connection between the statute and the purpose becomes tenuous. That appears to be where we are with DOMA currently. The final question seems to be whether there is enough empathy with the group seeking redress to break the causal connection from a rational basis standard. Have we tipped? Maybe so.

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393. ROGERS, *supra* note 3, at 150.