

## Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People

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# CULTURE SHIFTING AT WARP SPEED: HOW THE LAW, PUBLIC ENGAGEMENT, AND *WILL & GRACE* LED TO SOCIAL CHANGE FOR LGBT PEOPLE

STACEY L. SOBEL<sup>†</sup>

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<sup>†</sup> Associate Professor of Law, Western State College of Law. This Article is dedicated to Tom Stoddard and Paula Etlebrick who took the time to encourage me as a young attorney. Thank you to Louis Rulli for reintroducing me to Tom Stoddard’s article, *Bleeding Heart: Reflections on Using the Law To Make Social Change*, 72 N.Y.U. L. REV. 967 (1997), and for inspiring me to write this Article. Thanks to Neil Gotanda for his unfailing encouragement and guidance, and Tony Varona, Carlos Ball, Todd Brower, Susan Keller, Paula Manning, David Groshoff, and Gwendolyn Leachman for their support. Finally, thank you to my research assistants, Michael Jeandron, Megan Chanda, and Laura Patterson, and Western State College of Law librarian, Lesley Chan, who provided invaluable research for this Article.

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## INTRODUCTION

Many people expect the wheels of justice to move slowly, but legal rights accorded to lesbian, gay, bisexual, and transgender (“LGBT”) individuals appear to be moving at legal warp speed. It seems like there are new court decisions and laws recognizing LGBT people and their rights on a regular basis. Changes over the last two decades stand in marked contrast to the past when there were few legal rights for LGBT people in this country, and LGBT individuals and families were often invisible to their larger families and communities.

Lawyers working for equality were naturally inclined to attempt court intervention to garner recognition of LGBT legal rights. Legal or rule changes without cultural change, however, do not make the type of dramatic transformation that many LGBT people seek. For social change to occur, a number of things must happen both legally and culturally. The laws need to reflect the rights and responsibilities required for LGBT people to be equal participants in the United States: from employment, housing, and public accommodations anti-discrimination protections to full familial rights accorded to heterosexual families. And a corresponding culture shift to make these laws more meaningful to LGBT people must also occur. This Article examines the interaction of culture shifting and rule shifting that has led to dramatic change on LGBT issues in the United States.<sup>1</sup>

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<sup>1</sup> This Article does not examine culture shifting internationally. Many countries have laws that are more protective of LGBT rights than the United States and other countries have recently promoted anti-LGBT laws. For example, the European Union prohibits sexual orientation discrimination. Charter of Fundamental Rights of the European Union art. 21, Dec. 18, 2000, 2000 O.J. (C 364) 13. Uganda, conversely, has introduced anti-LGBT legislation since 2009 with the proposed penalties including death and life in jail for “aggravated homosexuality.” See Faith Karimi, *Gays and Lesbians ‘Sick,’ Ugandan President Says in Blocking Anti-Gay Bill*, CNN (Jan. 17, 2014, 11:18 PM), <http://www.cnn.com/2014/01/17/world/africa/uganda-anti-gay-bill-rejected> (internal quotation marks omitted). Ugandan

Culture shifting relating to LGBT rights was originally addressed in a 1997 article, *Bleeding Heart: Reflections on Using the Law to Make Social Change*<sup>2</sup> (“*Bleeding Heart*”), by legal pioneer and advocate for LGBT<sup>3</sup> issues Thomas Stoddard,<sup>4</sup> who was inspired to write the article after he attended a legal conference in New Zealand. He expected New Zealand to be an LGBT “utopia” because New Zealand’s laws at that time were significantly more progressive regarding sexual orientation matters than laws in the United States.<sup>5</sup> New Zealand’s laws included one of the first national prohibitions on discrimination on the basis of sexual orientation,<sup>6</sup> while there were few

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legislation also included prison for anyone who counsels or provides services to LGBT people. *See id.* The Ugandan Parliament passed the legislation in December 2013, but the president refused to sign the proposed law for technical reasons. *See Uganda Planning New Anti-Gay Law Despite Opposition*, BBC NEWS (Nov. 10, 2014), <http://www.bbc.com/news/world-africa-29994678> (discussing the annulment of the legislation by the Constitutional Court in 2014).

<sup>2</sup> Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law To Make Social Change*, 72 N.Y.U. L. REV. 967 (1997).

<sup>3</sup> While Stoddard referred to “gay rights” in his article, this Article will more broadly discuss issues related to sexual orientation and gender identity and includes bisexual and transgender people. *See generally id.* The inclusion of bisexual and transgender individuals by advocates and scholars was not always typical at the time of Stoddard’s death, but is generally accepted by advocates today. *See* Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623, 627–28 (2000) (discussing LGBT organizational choice to restrict the federal Employment Non-Discrimination Act to sexual orientation in 1993 because transgender status was conceptually different from sexual orientation discrimination at the time).

<sup>4</sup> Tom Stoddard was a lecturer at New York University Law School from 1981 to 1996, where he taught one of the first law school courses focusing on sexual orientation and the law. He was also the executive director of the Lambda Legal Defense and Education Fund from 1986 to 1992 and previously, the legislative director of the New York Civil Liberties Union. *See* David W. Dunlap, *Thomas Stoddard, 48, Dies; An Advocate of Gay Rights*, N.Y. TIMES (Feb. 14, 1997), [www.nytimes.com/1997/02/14/nyregion/thomas-stoddard-48-dies-an-advocate-of-gay-rights.html?pagewanted=all&src=pm](http://www.nytimes.com/1997/02/14/nyregion/thomas-stoddard-48-dies-an-advocate-of-gay-rights.html?pagewanted=all&src=pm).

<sup>5</sup> Stoddard, *supra* note 2, at 968–69.

<sup>6</sup> New Zealand remains legally ahead of the United States. New Zealand’s Parliament passed a law granting marriage equality for same-sex couples in April 2013 becoming the thirteenth country to provide marriage equality for same-sex couples. *See* Associated Press, *New Zealand: Gay Marriage Bill Passes*, N.Y. TIMES, Apr. 17, 2013, [http://www.nytimes.com/2013/04/18/world/asia/new-zealand-gay-marriage-bill-passes.html?\\_r=1&](http://www.nytimes.com/2013/04/18/world/asia/new-zealand-gay-marriage-bill-passes.html?_r=1&). The first marriages under the new law occurred on August 19, 2013. *See* Amelia Wade et al., *Same-Sex Couples Celebrate Wedded Bliss*, N.Z. HERALD (Aug. 19, 2013, 2:12 PM), [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10914135](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10914135).

statutory legal protections for LGBT people in the United States.<sup>7</sup>

Stoddard was surprised, nevertheless, when he arrived in New Zealand to find that virtually all LGBT people he met were not open about their sexual orientation, despite New Zealand's nondiscrimination law.<sup>8</sup> He reflected upon his contrasting experience in the United States as an openly gay man without many legal protections.<sup>9</sup> Stoddard's article examined the LGBT culture shift that was occurring at the time in the United States without corresponding rule shifting.<sup>10</sup>

This Article examines how and why the combined legal and cultural change in the United States is moving so rapidly since Stoddard's visit to New Zealand by utilizing the framework Stoddard created in *Bleeding Heart*.<sup>11</sup> First, this Article discusses the framework Stoddard created to determine if rule changes have resulted in culture shifting on LGBT issues. Stoddard stated that four factors must be met to determine if rule shifting has become culture shifting: "(1) A change that is very broad or profound; (2) [p]ublic awareness of that change; (3) [a] general sense of the legitimacy (or validity) of the change; and (4) [o]verall, continuous enforcement of the change."<sup>12</sup> If all four factors are not met, he concluded that only rule shifting had occurred.<sup>13</sup>

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<sup>7</sup> See Stoddard, *supra* note 2, at 968 nn.1–2 (citing NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* 119–20, 148–75, 204–08 (3d ed. 1992)).

<sup>8</sup> See *id.* at 970.

<sup>9</sup> See *id.* at 971.

<sup>10</sup> See *id.* at 987–90.

<sup>11</sup> This Article focuses on the legal and cultural changes that have occurred since *Bleeding Heart*. It is important to understand, however, that the LGBT rights movement in the United States began in the 1940s. And in 1969, the Stonewall riots in New York City were the so-called birth of the contemporary gay rights movement when the "Hair Pin Drop Heard around the World" occurred. Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 569 (2009) (quoting TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 77 (1981)) (internal quotation marks omitted) (citing JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970* (2d ed. 1983); MARTIN DUBERMAN, *STONEWALL* (1993); MAROTTA, *supra*, at 11).

<sup>12</sup> Stoddard, *supra* note 2, at 978.

<sup>13</sup> *Id.*

This Article applies a fifth dimension: public engagement. While Stoddard's factors provide a framework to track changes, they do not explain the rapidity of the cultural shift since his article. Public engagement on LGBT issues is the key factor to explain the unusual speed of legal change. This additional factor is, in part, based on a Nan Hunter essay and commentary about *Bleeding Heart*,<sup>14</sup> and more recent social change scholarship by Lani Guinier and Gerald Torres, Robert Post, Jack Balkin and Reva Siegel, and others.<sup>15</sup>

Then, this Article reviews the legal rules that have shifted on LGBT issues since 1997 through court decisions, legislation, and ballot initiatives. Part III of this Article examines the interaction of culture shifting and rule shifting that has occurred since 1997. This Part looks at the discourse and reasoning of court decisions, public opinion, and television to demonstrate the cultural shift in the last seventeen years.

Finally, this Article employs the expanded culture-shifting framework to explore how culture shifting has occurred and concludes that it is the last component of public engagement that has caused culture shifting to move at warp speed. This Part also explores how rule-making strategy—litigation versus legislation—impacted rule shifting and culture shifting. It additionally discusses how initial rule and cultural changes including anti-LGBT related rule changes were necessary to enable the relatively quick pace of legal change for sexual minorities in the United States.

This Article concludes that in order for culture shifting to occur, there has to be active engagement in advocacy on multiple fronts.<sup>16</sup> The pace of cultural change would have been significantly slower if advocates had not pursued litigation,

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<sup>14</sup> Nan D. Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1019 (1997).

<sup>15</sup> See, e.g., Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1068 (2012) (discussing the concept of demosprudence).

<sup>16</sup> This conclusion is based in large part on the author's LGBT advocacy experiences. To the author's knowledge, the author is the only person in the country who has engaged in litigation, lobbying, and public education on LGBT issues on both a national and state level. Prior to teaching full time, the author was the executive director of Equality Advocates Pennsylvania—formerly the Center for Lesbian and Gay Civil Rights—the Servicemembers Legal Defense Network's legal director and a consultant to the National Gay and Lesbian Task Force.

legislation, and public engagement strategies.<sup>17</sup> Rule shifting and culture shifting would also have occurred more slowly but for the vigorous efforts of LGBT equality opponents. The competing advocacy efforts on both sides of LGBT issues have resulted in lawsuits and laws limiting the rights of the LGBT community in some instances and granting rights in others. These advocacy efforts created a national conversation which has resulted in a cultural sea change.

### I. THE FRAMEWORK FOR SOCIAL CHANGE

Since *Bleeding Heart* was published, a number of scholars have used the article as a launching pad to discuss the nexus of social movements and social change. This Part discusses Stoddard's formulation for analyzing social change as well as the more recent scholarly thought on the issue to create a framework to analyze if solely rule shifting or true culture shifting has occurred for LGBT people.

Due to his New Zealand visit, Stoddard concluded that social change and legal change do not always go hand-in-hand.<sup>18</sup> In *Bleeding Heart*, Stoddard noted that there was little scholarship on using the law to make social change and few public interest attorneys had attempted to dissect their views or experiences in public-interest law.<sup>19</sup> Stoddard's article addressed this issue by creating an analytical framework to study the processes by which changes in the law result in social change and to determine if rule shifting or culture shifting on a particular issue has resulted in genuine reform.

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<sup>17</sup> The mission of Equality Advocates Pennsylvania, for example, was to "advocate equality for lesbian, gay, bisexual and transgender Pennsylvanians through legislation, litigation and public education." Mission Statement, Equality Advocates Pennsylvania (on file with author). It was the belief of those involved with the organization that all three activities were necessary to achieve equality.

<sup>18</sup> Even though New Zealand's laws were some of the most advanced in the world, New Zealand lacked LGBT-focused publications and stores, and Stoddard noted that he could not find anyone who knew an LGBT attorney in the country who had come out. See Stoddard, *supra* note 2, at 970–72.

<sup>19</sup> *Id.* at 970.

Stoddard's article presented a "Paradigm of Reform" that included "five general goals" of lawmaking:

(1) To create new rights and remedies for victims; (2) [t]o alter the conduct of the government; (3) [t]o alter the conduct of citizens and private entities; (4) [t]o express a new moral ideal or standard; and (5) [t]o change cultural attitudes and patterns.

The first three goals comprise the traditional role of the law in expressing the formal rulemaking function for a society. The law sets and alters rules; if it is effective, it also enforces those rules. . . . [T]his [is] the law's "rule-shifting" capacity.<sup>20</sup>

Stoddard discussed how the lawyers of his generation were inspired by decisions such as *Brown v. Board of Education*<sup>21</sup> and *Roe v. Wade*,<sup>22</sup> and sought to do more than make rules.<sup>23</sup> They sought social change that transcended mere legal rulemaking by improving society in fundamental, extralegal ways, including advancing the rights and interests of individuals who were treated badly by the law and the culture, and promoting values they thought ought to be rights.<sup>24</sup> Stoddard called this concept "culture-shifting," which is represented by the last two lawmaking goals.<sup>25</sup> Stoddard's article attempted to determine when, how, or if the law can change society for the better and which methods are more successful at achieving cultural change.<sup>26</sup>

Stoddard noted that most changes in the law do not have a social or cultural resonance.<sup>27</sup> He believed that four factors must be met in order to determine if rule shifting has become culture shifting: "(1) A change that is very broad or profound; (2) [p]ublic awareness of that change; (3) [a] general sense of the legitimacy (or validity) of the change; and (4) [o]verall, continuous enforcement of the change."<sup>28</sup> If all four factors are not met, he concluded that only rule shifting occurred.<sup>29</sup>

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<sup>20</sup> *Id.* at 972–73.

<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> 410 U.S. 113 (1973).

<sup>23</sup> Stoddard, *supra* note 2, at 973.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* at 972.

<sup>27</sup> *Id.* at 977.

<sup>28</sup> *Id.* at 978.

<sup>29</sup> *Id.*

Stoddard then proceeded to discuss a number of laws in the framework of his factors to determine if the law merely shifted or if the culture did as well. For example, he first looked at the experience of New York City and other municipalities in enforcing antismoking ordinances and concluded that the change was broad because of the corresponding decrease in smoking since these ordinances began.<sup>30</sup>

He then discussed the impact public awareness has on ruleshifting and stated that legislative rule shifting typically entails greater public awareness than administrative or judicial changes.<sup>31</sup> His example of this factor was the fifteen-year effort to amend New York City's human-rights law to include nondiscrimination protections based on sexual orientation.<sup>32</sup> He believed that if the amendment had passed the first time it was considered by the city council, it would have had immediate political gratification for its proponents and rule shifting, but may not have resulted in the culture shifting that occurred as a result of many years of debate on the issue.<sup>33</sup>

Regarding the third factor, he looked at the public acceptance of the rule shifting as it related to smoking laws. Stoddard compared the general acceptance of antismoking provisions in the United States to the experience in Paris, where smokers chose to overwhelmingly disregard the law.<sup>34</sup> While the rules in Paris had shifted, the culture did not follow the rules because Parisians felt that the law lacked legitimacy.<sup>35</sup>

Stoddard also discussed how the timing of a rule shift and other related events can affect a law's legitimacy. For example, the fact that the Civil Rights Act<sup>36</sup> followed a decade of demonstrations and protests after the Supreme Court's *Brown* decision,<sup>37</sup> and that it was made through the legislative process rather than the judiciary, contributed to make Americans view the Civil Rights Act as legitimate.<sup>38</sup> Stoddard cited to 200 years

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<sup>30</sup> *Id.* at 979.

<sup>31</sup> *Id.* at 980.

<sup>32</sup> *Id.* at 981.

<sup>33</sup> *Id.* at 981–82.

<sup>34</sup> *Id.* at 982–83.

<sup>35</sup> *Id.* at 983.

<sup>36</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

<sup>37</sup> *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

<sup>38</sup> See Stoddard, *supra* note 2, at 983–85.

of commentators from John Locke to Robert Borke to support his position that legislative change is superior to judicial change.<sup>39</sup> In Stoddard's view, legislative change was preferred to litigation due to the greater likelihood that it will result in culture shifting.<sup>40</sup>

Lastly, he examined enforcing change and concluded that rules that are not enforced will simply be disregarded by some or all of the public. Enforcement is needed for both rule and culture shifting to occur.<sup>41</sup> He once again looked at New York City's Clean Air Act of 1988 and the fact that it put enforcement mechanisms in place to make the change genuine and universal.<sup>42</sup>

Nan Hunter, in her essay and commentary about *Bleeding Heart*, added a fifth dimension to cultural change: public engagement.<sup>43</sup> She defined public engagement as more than consciousness and passive support. Hunter stated that there needed to be significant public engagement "beyond a small cadre of litigators or lobbyists" for rule shifting to become culture shifting.<sup>44</sup> Her article then examined Stoddard's conclusions about the impact of judge-made laws versus legislation and said that the difference "is better captured by the distinction between an engaged constituency and a passive audience."<sup>45</sup> If the constituency is not engaged, then legislative made laws will also not result in culture shifting.<sup>46</sup> Hunter concluded that both

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<sup>39</sup> *Id.* at 985 nn.26–28 (citing ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117 (1996); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 183–90 (J.M. Dent & Sons 1975) (1690)).

<sup>40</sup> See Stoddard, *supra* note 2, at 985. *But see* Hunter, *supra* note 14, at 1012. Hunter stated that she believed that litigation is "the single most common and powerful activity within social change lawyering . . . to secure enforcement and expansive interpretation of statutes." *Id.* This Article concludes that it is the combination of litigation and legislation that has led to social change.

<sup>41</sup> See Stoddard, *supra* note 2, at 986–87.

<sup>42</sup> *Id.*

<sup>43</sup> Hunter, *supra* note 14.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1020.

<sup>46</sup> Hunter gives the example of the passage of a 1989 Massachusetts sexual orientation nondiscrimination bill that was purposely passed with minimal public awareness and no cultural impact. *Id.* (citing Peter M. Cicchino et al., Comment, *Sex, Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 621 (1991)).

legislation and litigation have the potential to mobilize and empower those seeking assistance or engagement in equality as a social result.<sup>47</sup>

Years after *Bleeding Heart* and its companion articles were published, Gerald Torres and Lani Guinier began writing about the relationship between social movements and legal change. Gerald Torres utilized Stoddard's article to support his basic premise that there needs to be a correlative cultural shift to turn rule shifting into lawmaking.<sup>48</sup> From this premise, Torres and Guinier developed the concept of demosprudence,<sup>49</sup> or the jurisprudence of social movements,<sup>50</sup> where "social movement activism is as much a source of law as are statutes and judicial decisions."<sup>51</sup>

Demosprudence builds on the concept of the collaborative enterprise between formal elites such as judges, legislators or lawyers, and ordinary people to effectuate change.<sup>52</sup> Culture shifting needs power shifting so that nonelites are able to inform both rule and culture shifts.<sup>53</sup> Torres argues that this participation of nonelites in the democratic process is necessary for true culture shifting to occur,<sup>54</sup> and Guinier adds that this participation would provide courts with a new source of democratic authority if it engaged "We the people" in

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<sup>47</sup> See *id.* at 1020–21.

<sup>48</sup> See Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 137–38 (2007) [hereinafter Torres, *Legal Change*]; Gerald Torres, *Some Observations on the Role of Social Change on the Courts*, 54 DRAKE L. REV. 895, 895–96 (2006).

<sup>49</sup> Torres defines demosprudence as "a philosophy, a methodology and a practice that systematically views lawmaking from the perspective of popular mobilizations, such as social movements and other sustained forms of collective action that serve to make formal institutions, including those that regulate legal culture, more representative and thus more democratic." Torres, *Legal Change*, *supra* note 48, at 135–36.

<sup>50</sup> Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 545 n.39 (2009) (citing Lani Guinier & Gerald Torres, *Changing the Wind: The Demosprudence of Law and Social Movements* (forthcoming 2010) (on file with the authors) (published in 123 YALE L. J. 2740 (2014))).

<sup>51</sup> Torres, *Legal Change*, *supra* note 48, at 136, 142.

<sup>52</sup> Guinier, *supra* note 50, at 545.

<sup>53</sup> Torres, *Legal Change*, *supra* note 48, at 142.

<sup>54</sup> See *id.*

lawmaking.<sup>55</sup> They envision demosprudence achieving its goal by engaging individuals “to consider, critique, and even take action in response to decisions with which they disagree.”<sup>56</sup>

Demosprudence is not about how social movements influence law; but, rather, it is a “philosophy, a methodology, and a practice that views lawmaking from the perspective of informal democratic mobilizations and disruptive social movements that serve to make formal institutions, including those that regulate legal culture, more democratic.”<sup>57</sup> Guinier and Torres explain that when they are speaking of social movements, they are not discussing interest groups or political organizations, but collective identity and public action.<sup>58</sup> According to Guinier and Torres, social movements are important because they change “the sense of what is practically possible and the sense of what it is possible to imagine.”<sup>59</sup>

Guinier and Torres are not alone in their view that “the people” should be part of democratic lawmaking.<sup>60</sup> Post and Siegel’s work on democratic constitutionalism is based on the idea that the Constitution’s legitimacy depends on its ability to inspire Americans to recognize it as their Constitution and lay claim to the Constitution’s meaning by engaging in a variety of activities.<sup>61</sup> Democratic constitutionalism affirms the roles of representative government and mobilizes citizens in enforcing, guiding, and legitimizing the Constitution and judicial decision making.<sup>62</sup> It also recognizes the essential role of the judiciary to

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<sup>55</sup> Guinier, *supra* note 50, at 545.

<sup>56</sup> Torres & Guinier, *supra* note 15, 1055 (quoting Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 115 (2008)) (internal quotation marks omitted). *But see* Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 564 (2009) (stating that judicial decisions do not educate, teach, or inspire action).

<sup>57</sup> Torres & Guinier, *supra* note 15 (citing Guinier, *supra* note 50).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1068–69 (quoting JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 11 (2011)) (internal quotation marks omitted).

<sup>60</sup> *See id.* at 1055 & nn.30–31; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 193–94 (2008).

<sup>61</sup> Post & Siegel, *supra* note 60, at 374.

<sup>62</sup> *See id.* at 380.

interpret the Constitution, which may inspire public engagement by individuals who feel that a judicial decision does not represent their views of the Constitution.<sup>63</sup>

Jack Balkin and Reva Siegel wrote that social movements challenging the application of longstanding constitutional principles can call into question the legitimacy of practices that are reliant on those principles such as racial profiling, racial segregation, or sexual harassment. Social movements can also instill constitutional value to lawfully prohibited practices and result in legal change as demonstrated in cases related to abortion, pornography, same-sex sodomy, or marriage for same-sex couples.<sup>64</sup> When movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate.<sup>65</sup>

Balkin and Siegel added that movements alone rarely change the meaning of constitutional principles: Movements need to avail themselves of broad-based social changes that unsettle conventional understandings about the limits of constitutional principles to make new claims about the proper application of those principles.<sup>66</sup>

Social movements, according to Balkin and Siegel, are important because they dare to disturb the legal order by continuously integrating law and civil society's institutions with differing constitutional meanings. The connection between the law and social movements makes legal change legitimate, effective, and enforceable.<sup>67</sup>

When *Bleeding Heart* was written, there were few people who participated in organized or individual political mobilization on LGBT issues.<sup>68</sup> LGBT organizations, however, did experience organizational growth beginning in the early 1990s.<sup>69</sup> Previously,

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<sup>63</sup> See *id.*

<sup>64</sup> Balkin & Siegel, *supra* note 15, at 929.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 946–47.

<sup>68</sup> See generally URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (Doubleday 1996) (1995); Elizabeth Sheyn, *The Shot Heard Around the LGBT World: Bowers v. Hardwick as a Mobilizing Force for the National Gay and Lesbian Task Force*, 4 J. RACE, GENDER & ETHNICITY 2 (2009).

<sup>69</sup> See JOHN D'EMILIO, *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE* 110 (2002).

most LGBT-related organizing in the 1980s and into the 1990s was linked to HIV/AIDS advocacy and there were fledgling mobilization efforts from state organizations on other legal issues as discussed below.<sup>70</sup> These endeavors were minimal in comparison to the money expended and the number of people activated by anti-LGBT organizations.<sup>71</sup> It is not surprising, therefore, that Stoddard would not include public engagement or social movements in his article, particularly because his work at Lambda Legal was focused on litigation.

Balkin, Guinier, Post, Siegel, Torres, and others' scholarship on social movements has coincided with increased activism on the part of LGBT individuals and their allies. The activism related to attempts to attain LGBT rights through local, state, and federal legislation, and the fight against anti-LGBT ballot initiatives, in conjunction with varied litigation efforts, has led to the rule shifting discussed in Part II of this Article.

The rule shifting that has been achieved thus far would not have occurred as quickly or with the same level of culture shifting without public engagement or the active efforts of social movements. This Article envisions public engagement more broadly than Nan Hunter, who defines it as "more than consciousness and . . . passive support."<sup>72</sup> Public engagement involves active individual or organizational participation in an issue including: discussion, voting, advocacy, education, and mobilization. Because public engagement is a critical component to social change, this Article, consequently, incorporates it as a fifth factor to explain the rapidity of the culture shift since Stoddard's article.

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<sup>70</sup> See DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 568 (1999).

<sup>71</sup> See DAVID RAYSIDE, *ON THE FRINGE: GAYS AND LESBIANS IN POLITICS* 242–47 (1998) (discussing the lack of activism related to lifting the ban on open LGBT members of the United States military).

<sup>72</sup> Hunter, *supra* note 14.

## II. EXAMINING RULE SHIFTING ON LGBT ISSUES

This Part examines how rules relating to LGBT people have shifted through statutes, popular votes, and judicial decisions.<sup>73</sup> Stoddard's hypothesis relies on the fact that rule shifting alone is insufficient. In 1997, few would have predicted how quickly marriage equality and other LGBT legal issues have moved forward in the United States. These legal advances for LGBT people have not come easily. Many a perceived victory has been followed by court losses or significant backlash legislation. And the state-by-state approach of law making has created a patchwork of rights that vary vastly depending on where an LGBT person lives or works.

### A. *Statutory Rule Shifting*

The statutory landscape has changed significantly since *Bleeding Heart* was published. In 1996, when Stoddard went to New Zealand, he noted that, in the United States, only nine states had sexual orientation inclusive nondiscrimination statutes,<sup>74</sup> and twenty-two states still criminalized consensual sodomy between same-sex individuals.<sup>75</sup> Currently, fifty-one percent of the American public is covered by statewide laws prohibiting discrimination on the basis of sexual orientation and thirty-nine percent of the public is covered by gender identity

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<sup>73</sup> This Part is not intended to be an exhaustive review of the legal changes since 1997, but a comparison of the LGBT legal issues Stoddard looked at in his article and the subsequent rule changes in those areas. While this Article focuses on the types of rule shifting that are examined in *Bleeding Heart*—legislation, popular votes, and judicial decisions—it is important to note that there are other venues for rule shifting to occur, including regulatory rulemaking and private rulemaking, such as employment nondiscrimination policies. There has been a great deal of ruleshifting in these areas. For example, ninety-nine out of one hundred firms on Fortune's "Best Companies to Work For" list prohibit discrimination on the basis of sexual orientation. James O'Toole, *Best Companies List Hits Gay Rights Milestone*, CNNMONEY (Jan. 20, 2012, 5:10 AM), [http://money.cnn.com/2012/01/20/pf/jobs/best\\_companies\\_gay\\_rights/](http://money.cnn.com/2012/01/20/pf/jobs/best_companies_gay_rights/). Overall, ninety-one percent of Fortune 500 companies prohibit sexual orientation discrimination in employment and sixty-one percent prohibit gender identity discrimination. *LGBT Equality at the Fortune 500*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500> (last visited Feb. 23, 2015).

<sup>74</sup> Stoddard, *supra* note 2, at 968 & n.1 (citing HUNTER ET AL., *supra* note 8, at 204–08).

<sup>75</sup> *Id.* at 968 n.2 (citing HUNTER ET AL., *supra* note 8, at 119–20, 148–75).

statutes.<sup>76</sup> Seventeen states and the District of Columbia ban discrimination based on sexual orientation and gender identity or expression and another four states prohibit sexual orientation discrimination.<sup>77</sup> Additionally, more than two hundred United States cities and counties have nondiscrimination laws including both sexual orientation and gender identity, and many other local jurisdictions have laws prohibiting discrimination against sexual orientation but not including gender identity.<sup>78</sup>

Since the Supreme Court's 2003 decision in *Lawrence v. Texas*,<sup>79</sup> sodomy statutes, for the most part, are a thing of the past<sup>80</sup> and Congress has repealed the ban on the open service of gay men and lesbians in the military.<sup>81</sup>

Hate crime legislation was also not a priority issue in 1997 for the LGBT community. Yet today, out of the forty-five states with hate crime statutes, thirty include sexual orientation and

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<sup>76</sup> See JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 5 (2012), available at [http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf).

<sup>77</sup> The following states prohibit discrimination on the bases of sexual orientation and gender identity. Those states listed below with more than one date passed laws prohibiting sexual orientation in the first date listed and later amended their laws to prohibit gender identity or expression discrimination in the subsequent years. Minnesota (1993); Rhode Island (1995, 2001); New Mexico (2003); California (1992, 2003); District of Columbia (1977, 2005); Illinois (2005); Maine (2005); Hawaii (1991, 2005, 2006, 2011); New Jersey (1992, 2006); Washington (2006); Iowa (2007); Oregon (2007); Vermont (1992, 2007); Colorado (2007); Connecticut (1991, 2011); Nevada (1999, 2011); Massachusetts (1989, 2011); and Delaware (2009, 2013). Wisconsin (1982); New Hampshire (1997); Maryland (2001); and New York (2002) prohibit discrimination based on sexual orientation. *State Nondiscrimination Laws in the U.S.: Issue Map*, NAT'L GAY & LESBIAN TASKFORCE, [http://thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_6\\_13\\_color.pdf](http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf) (last updated June 21, 2013).

<sup>78</sup> *Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Feb. 23, 2015).

<sup>79</sup> 539 U.S. 558, 578–79 (2003) (holding Due Process clauses of Fifth and Fourteenth Amendments protect private consensual sexual activity between adults and invalidating Texas sodomy law), *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>80</sup> See *Macdonald v. Moose*, 710 F.3d 154, 166 (4th Cir. 2013) (holding Virginia's use of anti-sodomy statute post-*Lawrence* unconstitutional), *cert denied*, 134 S. Ct. 200 (2013).

<sup>81</sup> Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (repealed 2010).

fifteen of those laws also include gender identity.<sup>82</sup> Parenting rights have also grown significantly through adoption, second-parent adoption, civil union, and marriage laws protecting the rights of LGBT parents in many states.<sup>83</sup>

The area that has had the most pronounced changes, both advances and restrictions, is governmental relationship recognition for same-sex couples.<sup>84</sup> Stoddard saw Congress's passage of the federal Defense of Marriage Act<sup>85</sup> ("DOMA") in 1996, which limited federal recognition of marriages to one man and one woman. He also witnessed the beginning of the state or mini-DOMA laws limiting civil marriages when Utah passed the first state statute limiting marriage to heterosexual couples in 1995.<sup>86</sup> Another fourteen states passed similar legislation in the following year. This trend of state mini-DOMA laws continued for more than a decade. By 2008, thirty-two states had statutes prohibiting same-sex couples from marrying with seven of these statutes containing broader relationship-recognition prohibitions including domestic partnerships and civil unions, among other relationships.<sup>87</sup>

The legal momentum, however, swung back towards marriage equality. In 2014, more than two-thirds of all Americans lived in jurisdictions with marriage equality or a marriage equality decision that was stayed pending an appeal.<sup>88</sup>

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<sup>82</sup> *Hate Crime Laws in the U.S.: Issue Map*, NAT'L GAY & LESBIAN TASKFORCE, [http://thetaskforce.org/downloads/reports/issue\\_maps/hate\\_crimes\\_06\\_13\\_color.pdf](http://thetaskforce.org/downloads/reports/issue_maps/hate_crimes_06_13_color.pdf) (last updated June 21, 2013).

<sup>83</sup> *See Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/wp-content/uploads/2013/07/adptn0204.pdf> (last updated Nov. 2014).

<sup>84</sup> In a 1989 article, Stoddard predicted that same-sex couples would earn marriage rights sooner than most imagine. Thomas Stoddard, *Why Gay People Should Seek the Right To Marry*, OUT/LOOK: NAT'L LESBIAN & GAY QUARTERLY, Fall 1989, at 9, reprinted in WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 795, 800 (5th ed. 2014).

<sup>85</sup> Pub L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

<sup>86</sup> UTAH CODE ANN. § 30-1-4.1 (West 2014).

<sup>87</sup> *State Laws Prohibiting Recognition of Same-Sex Relationships: Issue Map*, NAT'L GAY & LESBIAN TASKFORCE, [http://thetaskforce.org/downloads/reports/issue\\_maps/samesex\\_relationships\\_5\\_15\\_13.pdf](http://thetaskforce.org/downloads/reports/issue_maps/samesex_relationships_5_15_13.pdf) (last updated May 15, 2013).

<sup>88</sup> These jurisdictions include (in chronological order of marriage equality decision): Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, District of Columbia, New York, Maine, Maryland, Washington, Rhode Island, Minnesota, Delaware, California, New Jersey, Hawaii, New Mexico, Oregon, Pennsylvania, Illinois, Utah, Oklahoma, Virginia, Indiana, Wisconsin, North Carolina, Nevada,

Eight of the thirty-six marriage equality states granted full marital rights through legislation.<sup>89</sup> Other states passed a variety of relationship recognition statutes other than marriage in their respective state legislatures without court intervention. In Oregon and Washington, the state legislatures took no action until after their respective courts refused to grant relationship recognition for same-sex couples.<sup>90</sup> Other states passed relationship recognition legislation due to state supreme court mandates, such as New Jersey<sup>91</sup> and Vermont,<sup>92</sup> and subsequently, passed marriage legislation without court intervention.<sup>93</sup>

Additionally, in 2013, the Supreme Court declared unconstitutional the part of DOMA limiting federal recognition of marriages to heterosexual couples in *United States v. Windsor*,<sup>94</sup> which required the federal government to recognize all legal marriages granted by a state.<sup>95</sup> Consequently, valid marriages of same-sex couples are now recognized by the federal government.<sup>96</sup> State mini-DOMA statutes have also been affected by this decision. Federal district and circuit courts post-*Windsor*, have relied on the Supreme Court's reasoning to strike down state statutory prohibitions in many states, including

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Colorado, West Virginia, Idaho, Arizona, Alaska, Wyoming, Kansas, Montana, South Carolina, and Florida. See *Facts at a Glance*, MARRIAGE EQUALITY USA, [http://www.marriageequality.org/facts\\_at\\_a\\_glance](http://www.marriageequality.org/facts_at_a_glance) (last updated Jan. 2014). The population figure does not include Kentucky, Ohio, Michigan, or Tennessee, where the Sixth Circuit upheld the Ohio and Michigan state laws and constitutional provisions and held that Kentucky and Tennessee do not have to recognize valid out-of-state marriages of same-sex couples. See *DeBoer v. Snyder*, 772 F.3d 388, 420–21 (6th Cir. 2014), *cert. granted sub nom. Bourke v. Beshear*, No. 14-574, 2015 WL 213650 (U.S. Jan. 16, 2015).

<sup>89</sup> *Relationship Recognition for Same-Sex Couples in the U.S: Issue Map*, NAT'L GAY & LESBIAN TASKFORCE, [http://www.thetaskforce.org/static\\_html/downloads/reports/issue\\_maps/rel\\_recog\\_10\\_7\\_14\\_color.pdf](http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/rel_recog_10_7_14_color.pdf) (last updated Oct. 7, 2014).

<sup>90</sup> See Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 170 (2009). Both these states now have marriage equality for same-sex couples.

<sup>91</sup> See *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

<sup>92</sup> See *Baker v. State*, 744 A.2d 864, 869 (Vt. 1999).

<sup>93</sup> VT. STAT. ANN. tit. 15, § 8 (West 2009).

<sup>94</sup> 133 S. Ct. 2675 (2013).

<sup>95</sup> See *id.* at 2696.

<sup>96</sup> Attorney General Eric Holder announced that same-sex spouses will have the same rights as heterosexual spouses in the federal court system and in receiving benefits from federal programs. See Evan Perez, *U.S. Expands Legal Benefits, Services for Same-Sex Marriages*, CNN (Feb. 10, 2014, 3:15 PM), <http://www.cnn.com/2014/02/08/politics/holder-same-sex-marriage-rights/>.

states that have not typically been at the forefront of LGBT legal issues.<sup>97</sup> Finally, the Court's recent decision, *Obergefell v. Hodges*,<sup>98</sup> discussed in more detail below, declared that marital bans for same-sex couples violate the Constitution.

### B. Voter Rule Shifting

A new tactic to limit relationship recognition began in 1998,<sup>99</sup> in part as a response to state supreme court cases such as *Baehr v. Lewin* recognizing marital rights for same-sex couples.<sup>100</sup> This tactic utilized state "voter approved" ballot initiatives to amend state Constitutions to prohibit relationship recognition for same-sex couples. Alaska was the first state post-*Baehr* with a constitutional amendment prohibiting legal recognition of marriages by same-sex couples in 1999 and it was followed by Nebraska in 2000 and Nevada in 2002. Real momentum for these types of amendments began in 2004, which was the first election cycle after the first state supreme court decision granted full marital rights to same-sex couples<sup>101</sup> and the Supreme Court's decision in *Lawrence v. Texas*,<sup>102</sup> which provided due process privacy rights for LGBT people by invalidating the remaining state sodomy laws as they related to adult, consensual, private sexual activities.<sup>103</sup>

Thirteen states passed constitutional amendments in 2004 limiting marriage to a man and a woman, with nine of those states including even more extensive bans on relationship

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<sup>97</sup> See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (invalidating Idaho and Nevada marital prohibitions); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (invalidating marriage limitations for same-sex couples in Indiana and Wisconsin); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (invalidating Virginia's marriage ban); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (invalidating Oklahoma constitutional amendment); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (invalidating Utah marriage prohibitions). *But see* *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (upholding Kentucky, Michigan, Ohio and Tennessee marriage limitations), *rev'd*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>98</sup> 135 S. Ct. 2584.

<sup>99</sup> See, e.g., ALASKA CONST. art. I, § 25.

<sup>100</sup> See John G. Culhane & Stacey L. Sobel, *The Gay Marriage Backlash and Its Spillover Effects: Lessons from a (Slightly) "Blue State"*, 40 TULSA L. REV. 443, 449 & n.38 (2005) (discussing the negative impact of cases such as *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)). The cases related to voter rule shifting are discussed in more detail *infra* in Part III.A.

<sup>101</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

<sup>102</sup> 539 U.S. 558 (2003).

<sup>103</sup> *Id.* at 578.

recognition for same-sex couples.<sup>104</sup> In all, twenty-nine states, most of which already had legislative prohibitions on the books, passed state constitutional amendments limiting relationship recognition for same-sex couples.<sup>105</sup> While these constitutional amendments usually did not result in taking away pre-existing rights for same-sex couples, they did place an additional hurdle in the way for marriage equality advocates. Prior to 2012, every state constitutional amendment banning legal recognition of same-sex couples that was placed on the ballot was passed by voters, often by significant majorities.<sup>106</sup>

Public engagement in the form of voter ballot initiatives primarily resulted in rule shifting that limited LGBT peoples' rights in contrast to the mix of legislative gains and losses discussed above. In 2012, a significant change occurred when Maine, Maryland, and Washington voters approved marital rights for same-sex couples, and Minnesota voters defeated an attempt to pass a constitutional amendment limiting marriage to a man and a woman. These votes marked the first time relationship recognition for same-sex couples won at the ballot box.<sup>107</sup> These votes are not surprising because they corresponded to the trends in polling numbers on LGBT issues in the United States.<sup>108</sup> In 2010, the first polling data was conducted that found that a narrow majority of Americans supported marriage equality.<sup>109</sup>

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<sup>104</sup> See NAT'L GAY & LESBIAN TASKFORCE, *supra* note 89.

<sup>105</sup> Masuma Ahuja et al., *How the Supreme Court Ruled on Same-Sex Marriage*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/how-supreme-court-could-rule-on-gay-marriage/> (last updated June 26, 2013).

<sup>106</sup> Ashley Fetters, *Same-Sex Marriage Wins on the Ballot for the First Time in American History*, ATLANTIC (Nov. 7, 2012, 8:37 AM), <http://www.theatlantic.com/sexes/archive/2012/11/same-sex-marriage-wins-on-the-ballot-for-the-first-time-in-american-history/264704/>.

<sup>107</sup> *Id.*

<sup>108</sup> Polling data on LGBT issues is discussed more fully in Part III of this Article.

<sup>109</sup> See Michael D. Sant'Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 740 (2011) (citing *Americans Split Evenly on Gay Marriage*, CNN (Aug. 11, 2010, 12:34 PM), <http://politicalticker.blogs.cnn.com/2010/08/11/americans-split-evenly-on-gay-marriage/>).

### C. *Judicial Rule Shifting*

There has been substantial litigation on LGBT legal issues since 1997.<sup>110</sup> One of the most notable decisions after *Bleeding Heart* was *Lawrence v. Texas*.<sup>111</sup> By overturning *Bowers v. Hardwick*<sup>112</sup> and invalidating the remaining state sodomy laws relating to adult, private, consensual sexual activities, the *Lawrence* Court made a massive rule shift. Prior to *Lawrence*, courts and legislatures throughout the country relied on *Bowers* and state sodomy laws to uphold laws limiting the rights of LGBT people.<sup>113</sup>

The *Lawrence* decision's language signaled a significant change in its approach to LGBT people<sup>114</sup>:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case . . . . Its continuance as precedent demeans the lives of homosexual persons.<sup>115</sup>

Advocates and courts then began relying on *Lawrence* in their analyses of LGBT issues in cases arising in state courts, resulting in marriage equality victories at the state level such as *Goodridge v. Department of Public Health*<sup>116</sup> and *Varnum v. Brien*,<sup>117</sup> and losses in *Hernandez v. Robles*<sup>118</sup> and *Andersen v. King County*.<sup>119</sup> The pro-marriage equality decisions declared that state marriage prohibitions were unconstitutional under

<sup>110</sup> This Section does not account for all of the litigation presented to the courts since *Bleeding Heart*, but focuses on a handful of cases that most significantly demonstrate rule shifting since the article was published. Some of these cases are examined in more detail in Parts III and IV of this Article, which look at the courts' language, analysis, and the impact of these decisions.

<sup>111</sup> 539 U.S. 558 (2003).

<sup>112</sup> 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

<sup>113</sup> *See, e.g.*, *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (relying in part on case law that lesbian mothers are per se unfit parents because they violate the state sodomy laws, punishable as a felony).

<sup>114</sup> *See* discourse discussion *infra* Part III.A.1.

<sup>115</sup> *Lawrence*, 539 U.S. at 575.

<sup>116</sup> 798 N.E.2d 941, 948–49 (Mass. 2003).

<sup>117</sup> 763 N.W.2d 862, 889 (Iowa 2009).

<sup>118</sup> 7 N.Y.3d 338, 362–63, 855 N.E.2d 1, 9–10, 821 N.Y.S.2d 770, 778–79 (2006).

<sup>119</sup> 138 P.3d 963, 975–76 (Wash. 2006).

their respective state constitutions and fulfilled Justice Scalia's prediction that same-sex marriage laws would be called into question due to the *Lawrence* decision.<sup>120</sup>

The Court signaled another major move by invalidating the federal DOMA law in the *Windsor* decision. Justice Kennedy, writing for the Court, stated that the differentiation of same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify,"<sup>121</sup> and that it is an unconstitutional deprivation of liberty protected by the Fifth Amendment.<sup>122</sup>

This decision provides language that other courts may rely on in the future to extend rights to LGBT individuals, just as *Lawrence* was utilized in the last ten years. The *Windsor* decision has already been cited to in court decisions upholding the rights of same-sex couples.<sup>123</sup> The use of *Windsor* is particularly noteworthy in the recent federal court cases mentioned above. Many of these cases, relying on *Windsor*, have further held that same-sex couples were being denied the fundamental right to marriage under the Due Process Clause or that their respective state constitutional limitations on marriage equality violated the Fourteenth Amendment's Equal Protection Clause.<sup>124</sup>

The Court addressed these issues in *Obergefell v. Hodges*,<sup>125</sup> where Justice Kennedy once again wrote the majority opinion and continued his analytical progression from his prior cases

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<sup>120</sup> See *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

<sup>121</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (citing *Lawrence*, 539 U.S. 588).

<sup>122</sup> *Id.* at 2695.

<sup>123</sup> See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 724 F.3d 1048, 1050 (9th Cir. 2013); *Cooper-Harris v. United States*, 965 F. Supp. 2d 1139, 1139–40 (C.D. Cal. 2013); *Cozen O'Connor, P.C. v. Tobits*, No. 11-0045, 2013 WL 3878688, at \*4 (E.D. Pa. July 29, 2013) (ordering ERISA-related benefits to be paid to same-sex spouse of decedent post-*Windsor*); *Obergefell v. Kasich*, No. 1:13-CV-501, 2013 WL 3814262, at \*6–7 (S.D. Ohio July 22, 2013) (ordering death certificate to reflect marriage of same-sex couple who married out of state); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 958–59, 969 (E.D. Mich. 2013).

<sup>124</sup> See *supra* text accompanying note 97. A fuller examination of the Court's due process and equal protection analyses related to sexual orientation issues is conducted in a separate article. Stacey L. Sobel, *When Windsor Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493 (2015) [hereinafter Sobel, *When Windsor Isn't Enough*].

<sup>125</sup> 135 S. Ct. 2584 (2015).

related to sexual orientation. The *Obergefell* Court held that the Constitution does not permit states to bar same-sex couples from marriage on the same terms as opposite-sex couples.<sup>126</sup> The Court found that marital prohibitions for same-sex couples violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that same-sex couples may not be deprived of the fundamental right to marry that is “inherent in the liberty of the person.”<sup>127</sup>

The majority decision dismissed the arguments by some to move cautiously on this issue.<sup>128</sup> Justice Kennedy stated that even though “*Bowers* was eventually repudiated in *Lawrence*, men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen.”<sup>129</sup> While the Court may not have healed the wounds of marital prohibitions, its decision did result in momentous rule shifting for same-sex couples and their families.

The rules related to LGBT people in the United States have shown marked advancement since *Bleeding Heart*, but whether a person's rights are protected is still reliant on the venue of their home, job, or location where a law may be enforced. Although there are extremely limited national laws protecting or granting rights to LGBT individuals, significant rule shifting has occurred on the state level as well as the federal level after *Obergefell*.

This Article next examines how rule shifting and culture shifting interact through judicial decisions, public opinion, and television.

### III. THE INTERACTION OF RULE SHIFTING AND CULTURE SHIFTING

When Stoddard wrote *Bleeding Heart*, he examined LGBT efforts to achieve social change and saw a limited amount of culture shifting or rule shifting. He looked at culture shifting in the absence of rule shifting and concluded that the passage of federal and state Defense of Marriage Laws (DOMA or mini-DOMAs, respectively) and other backlash related efforts by

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<sup>126</sup> *Id.* at 2604–05.

<sup>127</sup> *Id.* at 2604.

<sup>128</sup> *Id.* at 2605–06.

<sup>129</sup> *Id.* at 2606.

equality opponents may have appeared to be defeats, but their debate began the process of culture shifting and laid the ground work for favorable rule shifting in the future.<sup>130</sup>

While Stoddard examined culture shifting in the absence of rule shifting on LGBT issues, the remainder of this Part looks at the interaction of rule shifting and culture shifting. The interactive approach is appropriate because of the significant amount of rule shifting that has occurred since *Bleeding Heart* as discussed in Part II. This Part examines the intersection of rules and culture through court decisions, public opinion, and the impact of television.

#### A. *Evidence of Interactive Change on LGBT Issues*

Stoddard applied his thesis to social change on LGBT issues in *Bleeding Heart*. His professional experiences led him to believe that rule shifting was not necessarily a prerequisite to culture shifting. He examined the 1993 Hawaii Supreme Court case, *Baehr v. Lewin*,<sup>131</sup> which ruled that its state constitution's equal protection clause appeared to require the state to issue marriage licenses to same-sex couples.<sup>132</sup> While the case was being considered on remand to the lower court, legislatures around the country began to enact mini-DOMAs<sup>133</sup> prohibiting marriage for same-sex couples and the federal DOMA,<sup>134</sup> which defined marriage as between a man and a woman. Stoddard noted that the *Baehr* decision may have triggered a "political and legal avalanche with horrifying consequences for gay people," but he also acknowledged the "profound 'culture-shifting' potential" created by the federal and mini-DOMAs.<sup>135</sup>

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<sup>130</sup> Stoddard, *supra* note 2, at 987–90. This Article further discusses the concept of backlash related to LGBT legal issues in Parts IV.B.5.a–b *infra*.

<sup>131</sup> 852 P.2d 44 (Haw. 1993).

<sup>132</sup> Stoddard, *supra* note 2, at 987 (citing *Baehr*, 852 P.2d 44).

<sup>133</sup> See Stacey L. Sobel, *The Mythology of a Human Rights Leader: How the United States Has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197, 202 (2008).

<sup>134</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

<sup>135</sup> Stoddard, *supra* note 2, at 988–89; see also Culhane & Sobel, *supra* note 100, at 449. *But see* Sant'Ambrogio & Law, *supra* note 109, at 722 (examination of legislative and political history suggests DOMA promoted as wedge issue for 1996 presidential election and not as a response to *Baehr*).

Prior to the *Baehr* case, marital rights for same-sex couples was “no more than a political curiosity, except to advocates and troublemakers like [Stoddard].”<sup>136</sup> The combination of litigation and state legislative efforts to prohibit marriage for same-sex couples helped legitimize the issue and brought it into general public discussions.<sup>137</sup> It also brought about attempts for positive legal reforms for the LGBT community through state and local litigation and legislative efforts primarily related to nondiscrimination laws and relationship recognition.<sup>138</sup>

The efforts of advocates on both sides of the issue created a legal pushmi-pullyu<sup>139</sup> where the law appeared to be moving in two different directions. This continuous back-and-forth resulted in public engagement and ultimately caused legal and social change to move so quickly for LGBT people. The resulting cultural change can be seen through: (1) judicial decisions; (2) public opinion; and (3) popular media.

### 1. Cultural Change Reflected in Judicial Decisions

Since 1997, courts have heard many cases related to LGBT individuals and some of the most highly publicized have been those related to marriage equality.<sup>140</sup> The language these courts used in their decisions is evidence of a culture shift.

The courts, through written decisions, have become a critical part of the expansion of public discourse on LGBT issues.<sup>141</sup> The courts' connection to language reflects linguistic paths for public

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<sup>136</sup> Stoddard, *supra* note 2, at 989.

<sup>137</sup> *Id.*

<sup>138</sup> For example, advocates attempted to amend the federal DOMA with language prohibiting employment discrimination based upon sexual orientation. *Id.* (citing Eric Schmitt, *Senators Reject Both Job-Bias Ban and Gay Marriage*, N.Y. Times, Sept. 11, 1996, at A1).

<sup>139</sup> The pushmi-pullyu is a fictional animal that is a cross between a gazelle and a unicorn with a head on opposite ends of its body. Each head attempts to move in the opposite direction when the animal moves. See HUGH LOFTING, *THE STORY OF DOCTOR DOOLITTLE*, 81 (1920).

<sup>140</sup> The United States Supreme Court heard two cases in the 2012 to 2013 term, *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and the *Windsor* decision has been the impetus for marriage equality lawsuits throughout the country.

<sup>141</sup> See Mae Kuykendall, *Gay Marriages and Civil Unions: Democracy, the Judiciary and Discursive Space in the Liberal Society*, 52 MERCER L. REV. 1003, 1008–09 (2001).

conversation on marriage rights for same-sex couples with the potential to energize or freshen the language used by the public.<sup>142</sup>

The Court's decision in *Bowers* was "shocking to many gay and lesbian individuals not only because of its outcome, but also because of the homophobic language that the Court used."<sup>143</sup> The *Bowers* Court stated that it did not believe that the right to privacy extended to "homosexual sodomy."<sup>144</sup> The Court's decision explained that none of the previously recognized privacy rights related to family relationships or marriage, among other things, bore any resemblance to homosexual sodomy.<sup>145</sup> This language demonstrates the Court's limited scope of vision of LGBT people and their relationships by implicitly stating that same-sex couples did not have family or intimate relationships worthy of constitutional protections. In fact, the Court stated that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."<sup>146</sup>

After *Bowers*, the rhetoric of LGBT advocacy needed to change to claim the legitimacy of same-sex relationships. This rhetoric would also provide a discursive roadmap for judges to use in their opinions, and consequently, change the moral discourse surrounding LGBT issues.<sup>147</sup> Storytelling through litigation is a way to change that rhetoric and a pathway for courts to engage in the intersection of rule shifting and culture shifting by "engaging and challenging the dominant narrative of social life."<sup>148</sup> The positive public portrayal of LGBT people, or

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<sup>142</sup> See *id.* at 1011.

<sup>143</sup> Sheyn, *supra* note 68, at 16 (citing e-mail from Jeff Levi, Executive Director, Trust for America's Health, to author (Apr. 4, 2008, 10:25:12 EST)). Levi was the former executive director of NGLTF when *Bowers* was decided.

<sup>144</sup> *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>145</sup> *Id.* at 190–91.

<sup>146</sup> *Id.* at 191.

<sup>147</sup> Chai R. Feldblum, Response, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 994 (1997).

<sup>148</sup> Torres, *Legal Change*, *supra* note 48, at 141–42 (citing Gerald Torres & Kathryn Milun, *Translating Yonnonodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990)).

mainstreaming, through litigation and marriage-related advocacy has helped to achieve the legal goals of the LGBT rights movement.<sup>149</sup>

*Bowers* exemplifies the concept of language “making the category visible and contested when it was previously hidden.”<sup>150</sup> As discussed in the polling section below, many people reported not knowing any LGBT people at the time of the *Bowers* decision, and it is highly likely that the public generally did not discuss LGBT people. But the very fact that the Court addressed the issue made LGBT people visible in a way they may not have been before.

The *Bowers* decision may have been a legal “loss” for LGBT advocates, but it also instigated public discussion and began the framing of the language for later decisions through Justice Stevens’s dissent. Justice Stevens’s reasoning is quoted by the *Lawrence* majority, stating:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.<sup>151</sup>

The *Lawrence* Court then concluded that Stevens’s analysis should have been controlling in *Bowers* and that it should control in *Lawrence*.<sup>152</sup>

The *Lawrence* Court’s reliance on Stevens’s *Bowers* dissent indicated how far the Court had moved in a relatively short period of time. The Court’s framing of the issue in these two cases also demonstrated the cultural shift from *Bower*’s discussion of “homosexual sodomy” to *Lawrence*’s language regarding people who are “entitled to respect for their private

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<sup>149</sup> See Stein, *supra* note 11, at 579.

<sup>150</sup> Kuykendall, *supra* note 141, at 1012.

<sup>151</sup> *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (footnotes and citations omitted)) (internal quotation marks omitted).

<sup>152</sup> *Id.* at 578.

lives.”<sup>153</sup> The Court’s language shifted from criminalizing specific sexual conduct to discussing that same-sex relationships deserved respect. In contrast to the *Bowers* decision, the *Lawrence* decision appeared to be “influenced by the knowledge that same-sex couples have enduring personal relationships that sometimes involve intimate interpersonal conduct, knowledge that the quest for same-sex marriage has helped to disseminate.”<sup>154</sup> After the dismissive language regarding LGBT individuals in *Bowers*, *Lawrence*’s language was invigorating to advocates, LGBT people, and their allies.<sup>155</sup>

In the *Windsor* case, there is a continued evolution of language related to same-sex relationships. The different legal issues presented in the respective cases gave the Court an opportunity to engage in different types of discussion about LGBT people.

The majority decision in *Windsor* repeatedly used LGBT supportive language to discuss state granted marriage equality and the rights of same-sex couples. For instance, Justice Kennedy wrote that New York and other states deemed the heterosexual limitation to marriage “as an unjust exclusion,”<sup>156</sup> and that “same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.”<sup>157</sup> The Court repeatedly discussed the “dignity”<sup>158</sup> that states have conferred upon same same-sex couples and the states’ decision to grant marriage equality “enhanced the recognition, dignity, and protection of the class in their own community.”<sup>159</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> Stein, *supra* note 11, at 582.

<sup>155</sup> Similarly, *Baehr* and *Goodridge* stirred the aspirations and heightened the expectations of LGBT people for relationship recognition throughout the country. See Keck, *supra* note 90, at 158 (quoting WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 3 (2002); DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 190–93 (2006)).

<sup>156</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2692, 2694; see also *In re Marriage Cases*, 183 P.3d 384, 434–35 (Cal. 2008) (discussing dignity and respect as it relates to same-sex couples and marriage).

<sup>159</sup> *Windsor*, 133 S. Ct. at 2692.

Unlike *Bowers's* focus on criminal activity, *Windsor* spoke of states giving same-sex couples a lawful status for their lawful conduct.<sup>160</sup> This language demonstrates the Court's movement to greater acknowledgement of same-sex relationships in *Windsor* and beyond *Lawrence's* discussion of respect.

The majority decision's language condemning DOMA in *Windsor* contrasts starkly with the decision's language regarding state recognition of marriage equality. The Court in *Windsor* stated that DOMA's deprivations are strong evidence of a law having the purpose and effect of disapproval with the purpose and practical effect of imposing "a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."<sup>161</sup> The Court then added that DOMA interfered with the "dignity" conferred by the states, and that DOMA's "demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law."<sup>162</sup> Justice Kennedy also noted that the DOMA in practice confirms its purpose to devalue marriages of same-sex couples.<sup>163</sup> The differentiation of same-sex couples "demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify."<sup>164</sup> The Court then

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 2693. The decision cited to the House Report which stated, among other things, that "DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality,'" and that DOMA promoted "an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" *Id.* (quoting H.R. REP. NO 104-664, at 16 (1996)). This language mirrors the Court's discussion in *Romer v. Evans*, 517 U.S. 620 (1996) (holding state constitutional amendment prohibiting any state laws that provided antidiscrimination protections on the basis of sexual orientation and preventing future laws to occur without a state constitutional amendment unconstitutional under the Equal Protection Clause). The use of the *Romer* language in the House Report is notable because prior cases addressing impermissible stigmas, including *Romer*, were engaging in equal protection analysis. It is unclear if the *Windsor* Court was applying equal protection, due process, or both analyses in its decision. *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting); *see Sobel, When Windsor Isn't Enough*, *supra* note 124.

<sup>162</sup> *Windsor*, 133 S. Ct. at 2693-94 (footnote omitted). *But see Sant'Ambrogio & Law, supra* note 109, at 722 (examination of legislative and political history suggests DOMA was promoted as a wedge issue for 1996 presidential election and not as a response to *Baehr*).

<sup>163</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>164</sup> *Id.* (citing *Lawrence v. Texas*, 539 U.S. 588 (2003)).

concluded that the DOMA's purpose and effect requires the Court to hold that it is an unconstitutional deprivation of liberty under the Fifth Amendment.<sup>165</sup>

The use of the word dignity by the Court has received attention in recent scholarship related to constitutional analysis on LGBT issues. Tiffany Graham, for example, states that the *Lawrence* Court in rejecting *Bowers's* demeaning approach restored dignity to the class.<sup>166</sup> Kenji Yoshino posits that the Court will continue to utilize Due Process instead of Equal Protection analysis because of "liberty-based dignity claim[s]."<sup>167</sup>

Justice Kennedy expanded his use of the words liberty and dignity in the *Obergefell* case and discussed at length the connection between liberty and equality.<sup>168</sup> The decision ends by stating that the petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right."<sup>169</sup> The Court also acknowledged the impact of culture shifting when it stated that "[w]hen new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."<sup>170</sup> Similarly, the Court stated that its equal protection cases have recognized that "new insights and societal understandings can reveal unjustified

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<sup>165</sup> The Court was unclear in its analysis regarding the standard of review it applied in *Windsor*. Issues related to equal protection and due process standards of review used for LGBT and other classifications are explored further in a separate article by the author. See Sobel, *When Windsor Isn't Enough*, *supra* note 124. The *Windsor* Court invalidated DOMA because there was no legitimate purpose that overcame the purpose and effect of disparaging and injuring those people impacted by the legislation. *Windsor*, 133 S. Ct. at 2693, 2695. *Windsor's* reasoning is also similar to Justice Kennedy's decision in *Romer v. Evans*, where he stated that laws that are motivated by improper animus or purpose "especially require careful consideration." *Id.* at 2692 (citing *Romer*, 517 U.S. at 633). Moral disapproval alone is not a sufficient legitimate interest to overcome legislation "drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. *Windsor* also stated that the constitutional guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting U.S. Dept of Agric. v. *Moreno*, 413 U.S. 528, 534-35 (1973)).

<sup>166</sup> Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 VA. J. SOC. POL'Y & L. 169, 202 (2011).

<sup>167</sup> Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748-50 (2011) (citing the fear of pluralism as the reason the Court has limited equal protection analysis to already protected groups).

<sup>168</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-05 (2015).

<sup>169</sup> *Id.* at 2608.

<sup>170</sup> *Id.* at 2598.

inequality within fundamental institutions that once passed unnoticed and unchallenged.”<sup>171</sup> These last statements relating to new insights demonstrate that the Court incorporated culture shifting in its Fourteenth Amendment analysis.

Not only have the Court's words changed in this string of decisions, the Court's view on the history and tradition of laws criminalizing same-sex sexual activities shifted as well. The *Lawrence* Court's decision relied in part on unconventional legal sources to support its conclusions. The Court was forced to utilize international sources to disprove *Bowers*'s assertion that there was a history and tradition of criminalizing “homosexual sodomy,” possibly because the culture had not sufficiently shifted in the United States at the time of the decision. Michael Klarman compared *Lawrence*'s use of a European Court of Human Rights decision<sup>172</sup> to *Brown*'s use of social science evidence and inferred that the Court used this type of evidence because conventional sources of United States constitutional law did not sufficiently support the Court's result.<sup>173</sup>

Lower court judges have also demonstrated culture shifting in their decisions when they discuss the merits of the plaintiff couples in these cases and thereby humanize the issue. These judges may have felt that it was necessary to create a detailed picture of the relationships of these couples because granting relationship recognition was so rare at the time. For example, in the Washington state marriage case, *Andersen v. King County*,<sup>174</sup> the lower court decision stated:

[T]hese plaintiffs . . . serve as suitable standard bearers for the cause of same-sex marriage. Their lives reflect hard work, professional achievement, religious faith and a willingness to stand up for their beliefs. They are law-abiding, taxpaying model citizens. They include exemplary parents, adoptive parents, foster parents and grandparents. They well know what it means to make a commitment and to honor it. There is not one among them that any of us should not be proud to call a

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<sup>171</sup> *Id.* at 2603.

<sup>172</sup> *Lawrence*, 539 U.S. at 573, 576 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), and other cases).

<sup>173</sup> Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 439–40 (2005).

<sup>174</sup> No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

friend or neighbor or to sit with at small desks on back-to-school night. There is no worthwhile institution that they would dishonor, much less destroy.

. . . The characteristics embodied by these plaintiffs are ones that our society and the institution of marriage need more of, not less. Let the plaintiffs stand as inspirations for all those citizens, homosexual and heterosexual, who may follow their path.<sup>175</sup>

Similarly, in *Hernandez v. Robles*,<sup>176</sup> the New York case regarding marriage equality, the lower court judge, wrote at length about the backgrounds of the five plaintiff couples and their families including their jobs, the length of their relationships, and their children.<sup>177</sup> The storytelling of these decisions creates a very different picture of same-sex couples than was created, for example, in *Bowers*. The extensive discussion of the plaintiffs' lives and relationships exemplifies the cultural shift in the courts since *Bleeding Heart*.

The language of the Court's decisions indicates a shift in analysis in the twenty-nine years since *Bowers*. Some scholars have noted the impact of public opinion on the Court's decisions and concluded that it is understandable that the Court's judgments would be shaped by popular judgments.<sup>178</sup> There are no indicators pointing to reasons for this dramatic legal change in a relatively short period of time other than culture-shifting's impact on the courts. In fact, the *Lawrence* decision points to the changes in the United States and the world post-*Bowers* in its analysis of why *Bowers* must be overturned.<sup>179</sup>

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<sup>175</sup> *Id.* at \*12.

<sup>176</sup> 794 N.Y.S.2d 579, 7 Misc. 3d. 459 (Sup. Ct. 2005).

<sup>177</sup> *Id.* at 462–66.

<sup>178</sup> See Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765, 783 (citing BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 367–68 (2009); Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961 (2006); Klarman, *supra* note 173, at 443–44; Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 163–64 (2012); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, *The Supreme Court 2002 Term*, 117 HARV. L. REV. 4, 98 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1348 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 238 (2008)).

<sup>179</sup> See *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (noting that to the extent *Bowers* relied on values we share with a wider civilization, those values have since been rejected elsewhere).

In *Windsor*, Justice Scalia stated that it is one thing for a society to elect change, but it is another for a court of law to impose change.<sup>180</sup> Justice Scalia also discussed how other courts would use *Windsor's* analysis in the future and concluded, "How easy it is, indeed inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to . . . substitut[e] . . . passage[s] from today's opinion [to state related provisions prohibiting recognition of same-sex marriage] . . ." <sup>181</sup> While Justice Scalia wrote a dissenting opinion, his predictions related to how the decision would be used have, in fact, transpired.<sup>182</sup>

In overturning *Bowers*, *Lawrence* reflected the progress of the LGBT movement and culture shifting and removed a significant barrier to the achievement of other rights for LGBT people. And courts have acknowledged that many people view *Lawrence* as reflecting changing societal attitudes toward LGBT people.<sup>183</sup> While *Bowers* focused on the narrow issue of homosexual sodomy, *Lawrence* became a "universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes."<sup>184</sup> And *Windsor's* use of the word dignity for the marital rights of same-sex couples made the liberty-based claim even more explicit to the group.<sup>185</sup>

Post-*Windsor* courts have continued to engage in culture-shifting dialogue. In *De Leon v. Perry*, the court stated that "[w]ithout a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution."<sup>186</sup> Similarly, the court, in *Kitchen v. Herbert*, stated that "it is not the Constitution that has changed,

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<sup>180</sup> United States v. Windsor, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting).

<sup>181</sup> *Id.*

<sup>182</sup> See discussion regarding post-*Windsor* litigation, *supra* Part II.C.

<sup>183</sup> See Andersen v. King Cnty., 138 P.3d 963, 976 (Wash. 2006).

<sup>184</sup> Yoshino, *supra* note 167, at 778.

<sup>185</sup> Doctrinally, *Lawrence* and *Windsor's* text provide credible bases for the courts and LGBT advocates to argue for continued use of a more stringent form of scrutiny than traditional rational basis review of sexual-orientation-based classifications. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 684 (2012); see also Sobel, *When Windsor Isn't Enough*, *supra* note 124.

<sup>186</sup> 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014).

but the knowledge of what it means to be gay or lesbian.”<sup>187</sup> The court in *Whitewood v. Wolf* closed its decision by stating, “[I]n future generations the label *same-sex marriage* will be abandoned, to be replaced simply by *marriage*. We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.”<sup>188</sup>

These decisions do not exist in a vacuum, as discussed above. They are reflections of cultural change and can effect cultural change. If a court’s decision is too radically divergent, it may not have a significant social impact. Litigation related to LGBT issues, however, has produced some favorable and temporary unfavorable culture shifting.<sup>189</sup> Further evidence of the cultural change since *Bleeding Heart* can be seen through polling, and representation of LGBT people and legal issues on television as discussed in the next two Subsections.

## 2. Public Opinion

When it comes to legal issues, courts are often called upon to make decisions that may not garner majority public support.<sup>190</sup> The judicial branch, with many unelected judges, is uniquely placed to make these types of unpopular decisions. For example, the Supreme Court ruled in support of interracial marriage in *Loving v. Virginia*,<sup>191</sup> at a time when only four percent of Americans said that they approved of marriages between blacks and whites.<sup>192</sup>

Supreme Court opinions, however, can also evolve as public opinion evolves on an issue.<sup>193</sup> Polling has shown a dramatic increase in support of LGBT issues over the last forty years. Until the 1970s, most LGBT people were not open about their

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<sup>187</sup> 755 F.3d 1193, 1218 (10th Cir. 2014) (quoting *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013)) (internal quotation marks omitted).

<sup>188</sup> 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014).

<sup>189</sup> See ELLEN ANN ANDERSEN, *OUT OF THE CLOSET & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 216–18 (2005).

<sup>190</sup> See Klarman, *supra* note 173, at 444–45.

<sup>191</sup> 388 U.S. 1, 12 (1967).

<sup>192</sup> Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), <http://www.gallup.com/poll/28417/most-americans-approve-interracial-marriages.aspx>.

<sup>193</sup> See *generally* FRIEDMAN, *supra* note 178.

sexual orientation. As people came out, public opinion began to change.<sup>194</sup> Today, approximately 3.8 percent of the population self-identifies as LGBT.<sup>195</sup>

This increase in LGBT people being open about their sexual orientation has coincided with significantly more Americans stating that they know an LGBT person. In 1983, approximately seventy-five percent of people reported that they did not know any LGBT people.<sup>196</sup> This data not only reflected Americans generally, but also members of the Supreme Court. For example, in 1986, Justice Powell, who cast the deciding vote in *Bowers*, stated that he did not know any gay people.<sup>197</sup> Polling in 2013, reflected a vastly different picture, finding that eighty-seven percent of people report knowing a person who is gay or lesbian.<sup>198</sup> This shift is also seen in current members of the Court, including Chief Justice Roberts, whose lesbian cousin attended his confirmation hearing and sat in the section reserved for friends and family of the justices for the oral arguments in *Windsor*.<sup>199</sup>

Early polling data related to same-sex relationships demonstrated that most Americans were not supportive of LGBT relationships with seventy percent reporting in 1974 that they thought sexual relations between same-sex people was always

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<sup>194</sup> See Sant'Ambrogio & Law, *supra* note 109, at 706.

<sup>195</sup> See Gary J. Gates, *LGBT Identity: A Demographer's Perspective*, 45 LOY. L.A. L. REV. 693, 698 (2012).

<sup>196</sup> Sant'Ambrogio & Law, *supra* note 109, at 706; see also Gregory M. Hereck, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, in BASHERS, BAITERS & BIGOTS: HOMOPHOBIA IN AMERICAN SOCIETY 1, 8 (John P. De Cecco ed., Harrington Park Press 1985) (1984); Kenneth L. Nyberg & John P. Alston, *Analysis of Public Attitudes Toward Homosexual Behavior*, 2 J. HOMOSEXUALITY 99, 106 (1976).

<sup>197</sup> Justice Powell did not know it at the time, but one of his clerks that term was gay. See Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES, June 8, 2013, <http://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html?pagewanted=all&r=0>.

<sup>198</sup> Cathy Payne, *Report: Most Foresee Legal Recognition of Gay Marriage*, USA TODAY (June 7, 2013, 10:40 AM), <http://www.usatoday.com/story/news/nation/2013/06/06/same-sex-marriage-views/2393151/>.

<sup>199</sup> See *Chief Justice's Lesbian Cousin Will Attend Landmark Gay-Marriage Argument*, NBC NEWS (Mar. 25, 2013, 5:08 AM), [http://usnews.nbcnews.com/\\_news/2013/03/25/17454488-chief-justices-lesbian-cousin-will-attend-landmark-gay-marriage-argument?lite](http://usnews.nbcnews.com/_news/2013/03/25/17454488-chief-justices-lesbian-cousin-will-attend-landmark-gay-marriage-argument?lite); Justin Sink, *Chief Justice Roberts's Lesbian Cousin To Attend Gay Marriage Hearing*, THE HILL (Mar. 25, 2013, 2:57 PM), <http://thehill.com/blogs/blog-briefing-room/news/290099-john-robertss-lesbian-cousin-will-attend-gay-marriage-hearing#ixzz2uwpubv6z>.

wrong.<sup>200</sup> As increasing numbers of Americans reported knowing an LGBT person, a corresponding change was seen in the support of LGBT issues. This evolution in public support also mirrors the Courts' decisions related to LGBT people. In 1986, when the Court held that there was no right to homosexual sodomy in *Bowers*, only thirty-two percent of Americans thought that "homosexual relations between consenting adults" should be legal.<sup>201</sup> When the Court reversed that decision in 2003, sixty percent of Americans supported the concept that "homosexual relations between consenting adults" should be legal.<sup>202</sup>

Polling conducted by Gallup between 1996, when DOMA was passed, and 2010 shows a significant increase in public support for marriage equality with support increasing from twenty-seven percent to forty-four percent.<sup>203</sup> In 2010, the first poll was conducted that found that a narrow majority of Americans supported marriage equality<sup>204</sup> and other polling showed less than fifty percent of participants opposed marriage equality, with fifty-three percent of people born after 1980 supporting marriage equality compared to only twenty-nine percent of people born before 1945.<sup>205</sup>

In 2004, no state had a majority of its citizens supporting marriage equality. Three states had majority support for marriage equality in 2008 and this number increased to seventeen states in 2011.<sup>206</sup>

While polling numbers reflect growing support for LGBT issues, it is important to note that public support related to same-sex couples decreased briefly after *Bowers* and *Lawrence*. Scholars have empirically concluded that these decisions

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<sup>200</sup> DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 489 (paperback ed. 2005) (2004).

<sup>201</sup> Frank Newport, *Public Shifts to More Conservative Stance on Gay Rights*, GALLUP (July 30, 2003), <http://www.gallup.com/poll/8956/public-shifts-more-conservative-stance-gay-rights.aspx> (noting a ten percent drop in support post *Lawrence v. Texas*).

<sup>202</sup> *Id.*

<sup>203</sup> Sant'Ambrogio & Law, *supra* note 109 (citing Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP (May 24, 2010), <http://www.gallup.com/poll/12829/americans-opposition-gay-marriage-eases-slightly.aspx>).

<sup>204</sup> *But see id.* (citing *Americans Split Evenly on Gay Marriage*, *supra* note 109).

<sup>205</sup> *Id.* (citing *Support for Same-Sex Marriage Edges Upward*, PEW RESEARCH CTR. (Oct. 6, 2010), <http://people-press.org/report/662/same-sex-marriage>).

<sup>206</sup> *But see id.*

significantly influenced support levels for same-sex relationship recognition due to wide media coverage and the fact that the cases were related to same-sex relations.<sup>207</sup> Marriage litigation has also resulted in the mainstreaming of the issue and most likely contributed to the significant increases in public support for marriage equality as seen in polling over the last two decades.<sup>208</sup>

The overall increased level of support for marriage equality has impacted Americans' legal expectations. Just prior to the Court's *Windsor* and *Perry* decisions, a Pew Research Center survey found that seventy-two percent of people polled stated that marriage equality is inevitable, including fifty-nine percent of marriage equality opponents.<sup>209</sup> In 2014, support for marriage equality reached an all-time polling high of fifty-five percent including nearly eight out of ten young adults.<sup>210</sup> This dramatic change in public opinion demonstrates the warp speed of culture shifting in marriage equality.

### 3. LGBT People and Television

Other evidence of culture shifting is apparent from changes in the portrayal of LGBT people on television.<sup>211</sup> In addition to reflecting cultural shifts, television has been utilized as a mechanism for shifting the culture on LGBT issues.

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<sup>207</sup> See James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 430 (2006) (discussing theoretical and empirical analysis of impact of LGBT related Supreme Court decisions on public opinion).

<sup>208</sup> See NeJaime, *supra* note 185, at 677.

<sup>209</sup> Payne, *supra* note 188.

<sup>210</sup> Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP (May 21, 2014), <http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx>.

<sup>211</sup> See generally STEPHEN TROPANO, *THE PRIME TIME CLOSET: A HISTORY OF GAYS AND LESBIANS ON TV* (2002) (discussing the history of LGBT people on television).

Considering that the average American watches approximately forty-one hours of broadcast or cable content per week,<sup>212</sup> the representation of LGBT people on television has a potential significant cultural impact. This impact was noted by Vice President Joe Biden when he stated on *Meet the Press* that:

[W]hen things really begin to change is when the social culture changes.

I think “Will and Grace” probably did more to educate the American public [about LGBT people] than almost anything anybody’s ever done so far. . . . And I think people fear that which is different. Now they’re beginning to understand.<sup>213</sup>

In *Bleeding Heart*, Stoddard noted that there were “black and brown faces” everywhere on American television in 1996, including comedies, dramas, talk shows, sports programs, news desks, and advertisements.<sup>214</sup> He compared the then current state of television to his 1966 high school recollections where integrated television programming was exceedingly rare.<sup>215</sup> The article stated that there are many reasons for these demographic changes, including, at least in part, the cultural signals the Civil Rights Act sent to Americans about living in an integrated world.<sup>216</sup>

While Stoddard’s article focused on television, depictions or stories regarding LGBT people in other media were also exceedingly rare. According to data provided by GLAAD,<sup>217</sup>

<sup>212</sup> NIELSEN, THE MARCH 2013 CROSS-PLATFORM REPORT: FREE TO MOVE BETWEEN SCREENS 3 (2013), available at <http://www.nielsen.com/us/en/reports/2013/the-nielsen-march-2013-cross-platform-report--free-to-move-betwe.html> (follow “Request Report Download” hyperlink; then enter form criteria; then follow “Submit” hyperlink).

<sup>213</sup> Felicia Sonmez, *Biden: I’m ‘Absolutely Comfortable’ with Gay Couples Having Same Rights as Straight Couples*, WASH. POST (May 6, 2012, 10:14 AM), [http://www.washingtonpost.com/blogs/post-politics/post/biden-im-absolutely-comfortable-with-gay-couples-having-same-rights-as-straight-couples/2012/05/06/gIQA59Wg5T\\_blog.html](http://www.washingtonpost.com/blogs/post-politics/post/biden-im-absolutely-comfortable-with-gay-couples-having-same-rights-as-straight-couples/2012/05/06/gIQA59Wg5T_blog.html) (internal quotation marks omitted). *Will & Grace* was an award winning and ground-breaking television show that had the first gay male lead on U.S. broadcast television. See Kathleen Battles & Wendy Hilton-Morrow, *Gay Characters in Conventional Spaces: Will and Grace and the Situation Comedy Genre*, 19 CRITICAL STUD. MEDIA COMM. 87, 87 (2002).

<sup>214</sup> Stoddard, *supra* note 2, at 974.

<sup>215</sup> *Id.* at 974–75.

<sup>216</sup> *Id.* at 975.

<sup>217</sup> GLAAD—the Gay and Lesbian Alliance Against Defamation—is the principal organization that works directly with news media, entertainment media, cultural institutions, and social media on LGBT issues. See GLAAD, <http://www.glaad.org> (last visited Feb. 24, 2015).

there was one LGBT lead character, twelve supporting characters, and thirty-four total characters on cable and broadcast shows in the 1996 to 1997 television season, which represented a television high and twenty-three percent increase from the previous year.<sup>218</sup> This number of characters still represented a relatively minor amount of roles. For example, in 1999 there were twenty-nine LGBT characters on television, which comprised less than two percent of the 540 characters.<sup>219</sup> Despite the growing acceptance of LGBT people generally, television numbers dipped to only seven LGBT characters in primetime in 2002.<sup>220</sup> Today, GLAAD reports that 3.9 percent of primetime broadcast scripted series regulars are LGBT with a total of 148 regular or recurring characters on broadcast primetime and cable scripted television shows.<sup>221</sup>

One can similarly look at the integration of LGBT actors on television. For example, in 1997, Ellen DeGeneres became the first openly LGBT television actor. Her Time magazine cover declaring “Yep, I’m Gay,” was a major story.<sup>222</sup> Conversely, more recent declarations by actors such as Neil Patrick Harris, Zachary Quinto, and Jim Parsons are greeted with little, if any, reaction. And some of these actors and television celebrities are open about their relationships and families, including the children they are raising.<sup>223</sup>

The power of television was also demonstrated when President Barack Obama announced that he now supported marriage equality for same-sex couples.<sup>224</sup> The president could have chosen any one of a variety of media to make this

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<sup>218</sup> Press Release, GLAAD, '97 Television Lineup Includes Record Number of “Out” Characters (Aug. 13, 1997) (on file with author).

<sup>219</sup> Press Release, GLAAD, Gay & Lesbian Alliance Against Defamation (GLAAD) Says 1999-2000 Primetime TV Lineup “Barely Realistic” (Aug. 23, 1999) (on file with author).

<sup>220</sup> Press Release, GLAAD, Where Have All the Gay Characters Gone? (Sept. 16, 2002) (on file with author).

<sup>221</sup> GLAAD, 2014 WHERE WE ARE ON TV 3 (2014), available at <http://www.glaad.org/files/GLAAD-2014-WWAT.pdf>.

<sup>222</sup> See Bruce Handy, *He Called Me Ellen Degenerate?*, TIME (Apr. 14, 1997), <http://time.com/3484943/he-called-me-ellen-degenerate/>.

<sup>223</sup> See Mark Harris et al., *By the Way, We’re Gay*, ENT. WKLY., June 29, 2012, at 30–38.

<sup>224</sup> See Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES, May 9, 2012, [http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all&_r=0) (discussing interview with Robin Roberts of ABC News).

statement. By selecting television as the medium for his message, he was speaking directly to the people who could hear his words and see his face and body language. While some people may not have been surprised that the president supported equal marital rights for same-sex couples, it still had historical significance to see him explaining why and how his views on this issue evolved on national television.

Some scholars have pointed out that the marriage equality effort itself has been a great public relations strategy. The media attention generated by marriage litigation raised awareness about LGBT rights generally and showed the lives of LGBT people in the most favorable light.<sup>225</sup> Edward Stein stated that marriage litigation gave an opportunity to LGBT advocates to “put forward the most seemingly stable, appealing, and upstanding members of its community.”<sup>226</sup>

The marriage litigation plaintiffs became the faces of marriage equality on television news. Interviews telling the stories of LGBT people who challenged state laws and constitutional amendments prohibiting them from marrying someone of the same sex not only explained the legal claims for marriage equality, but also humanized same-sex couples through the media. This notably occurred when broadcast and cable television stations carried interviews with Edith Windsor after the Supreme Court’s decision in her case.<sup>227</sup> These interviews

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<sup>225</sup> Stein, *supra* note 11, at 581.

<sup>226</sup> *Id.*

<sup>227</sup> See Greg Botelho, *Victory for Lesbian, Years After Her Longtime Partner’s Death*, CNN, <http://www.cnn.com/2012/10/18/us/new-york-doma-windsor/index.html> (last updated June 26, 2013, 12:53 PM); David Ford, *Edie Windsor, DOMA Challenger, Talks Victory*, CBS NEWS (June 27, 2013, 7:04 AM), <http://www.cbsnews.com/video/watch/?id=50149767n>; *Edie Windsor Sits down for an Interview with Diane Sawyer After DOMA Ruling from Supreme Court, Airs Tonight on “ABC World News”*, ABC NEWS (June 26, 2013, 4:08 PM), <http://abcnews.go.com/blogs/headlines/2013/06/edie-windsor-sits-down-for-an-interview-with-diane-sawyer-after-doma-ruling-from-supreme-court-air-tonsight-on-abc-world-news/>; *Gay Rights Advocates Score Supreme Court Victories on Same-Sex Marriage*, PBS NEWSHOUR (June 26, 2013, 12:00 AM), [http://www.pbs.org/newshour/bb/law/jan-june13/scotus\\_06-26.html?print](http://www.pbs.org/newshour/bb/law/jan-june13/scotus_06-26.html?print); Bill Mears, *Supreme Court Strikes Down Federal Provision on Same-Sex Marriage Benefits*, CNN, <http://www.cnn.com/2013/06/26/politics/scotus-same-sex-doma/index.html> (last updated June 27, 2013, 8:26 AM); Nina Totenberg, *Meet the 83-Year-Old Taking on the U.S. over Same-Sex Marriage*, NPR (Mar. 21, 2013, 4:36 PM), <http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over-same-sex-marriage>; *US Supreme Court in Historic Rulings on Gay Marriage*, BBC NEWS, <http://www.bbc.co.uk/news/world-us-canada-23068454> (last updated June 26, 2013, 9:53 PM).

demonstrate the linkage between rule changes and culture shifting and imbue these legal decisions with cultural significance.

#### IV. THE FRAMEWORK APPLIED

Stoddard applied his thesis that rule shifting alone did not result in culture shifting to a number of different legal issues. This Part applies Stoddard's framework as well as the additional more recent theoretical analysis on public engagement to determine whether rule shifting on LGBT issues is accompanied by culture shifting to be considered genuine reform. This Part then examines the rapidity of the cultural change.

##### A. *Stoddard's Framework Applied to the Civil Rights Act of 1964*

To demonstrate how rule shifting and culture shifting interacted in the past, Stoddard focused on the African-American civil rights movement.<sup>228</sup> *Bleeding Heart* examined the Civil Rights Act of 1964 ("Act")<sup>229</sup> and found that the law did not merely prohibit discrimination or recraft the rules or remedies in particular areas of the law, but it "constituted a formal, national rebuke of this detestable, but time-honored concept" of white privilege.<sup>230</sup> Stoddard concluded that the Act, in its historical context, constituted culture shifting as well as rule shifting by utilizing all five of his stated lawmaking goals.<sup>231</sup> Stoddard stated that the Act also expressed a new moral standard and while he could not document this change, he believed it changed cultural attitudes.<sup>232</sup> He continued that there is no true way to measure social change; his premise of post-1964 change is based

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<sup>228</sup> See Stoddard, *supra* note 2, at 973–77. A comparative approach of race and sexual orientation may lead to marginalizing or excluding the experiences of LGBT people of color, who some believe are not included in essentialist queer theories and politics. See Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse, 85 CORNELL L. REV. 1358, 1360, 1368 (2000) (citing Mary Eaton, *Homosexual Unmodified: Speculation on Law's Discourse, Race, and the Construction of Sexual Identity*, in LEGAL INVERSIONS: LESBIANS, GAY MEN AND THE POLITICS OF LAW 46, 62 (Didi Herman & Carl Stychin eds., 1995)).

<sup>229</sup> Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.).

<sup>230</sup> Stoddard, *supra* note 2, at 973–74.

<sup>231</sup> *Id.* at 974.

<sup>232</sup> *Id.*

on his “own sense of things.”<sup>233</sup> He further noted that the Act did not eliminate discrimination, but since its passage, the government and Americans “have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race.”<sup>234</sup>

Stoddard further explained that the Act’s impact was not created solely by its passage but because it came into being as a product of “passionate and informal national debate” beginning around the time of the United States Supreme Court’s decision in *Brown v. Board of Education*.<sup>235</sup> He opined that the change occurred not because Congress debated this issue, but because there was a continuous national conversation about race by ordinary citizens.<sup>236</sup>

He also discussed the concept that the arena of the legal change may have influenced the scope and power of the cultural change. Stoddard believed that the cultural change might have occurred differently if, for example, the Supreme Court handed down a decision resulting in the same legal changes as the Act.<sup>237</sup> He stated, “If the new rules had come down from on high from the Supreme Court, many Americans would have probably considered the . . . law illegitimate, high-handed, and undemocratic—another act of arrogance by the nine philosopher-kings sitting on the Court.”<sup>238</sup> He concluded that because the legal change was brought through the democratic process of Congress it had greater legitimacy, it represented sound policy making, and it would improve life for the country’s citizens.<sup>239</sup>

## B. *The Framework Applied to LGBT Issues*

### 1. Broad and Profound Change

The change in relationship recognition laws over the last seventeen years has been profound. Prior to *Obergefell*, more than sixty-six percent of Americans lived in states that had marriage equality or a decision granting marriage equality on

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 975.

<sup>235</sup> *Id.* at 975–76 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>236</sup> *Id.* at 976.

<sup>237</sup> *Id.* at 976–77.

<sup>238</sup> *Id.* at 977.

<sup>239</sup> *Id.*

appeal,<sup>240</sup> now the entire country has marriage equality. It is difficult to say that the rule shifting has not been profound since *Bleeding Heart* and the demise of *Bowers*.<sup>241</sup> This is also true of the culture shifting on this issue as demonstrated by the polling numbers discussed above.<sup>242</sup> One reason why the Supreme Court may be lagging behind the public on these issues is the fact that older people are less likely to support marriage equality as previously addressed in the public opinion section.<sup>243</sup>

The difficulty with this prong is the broadness of the change. While rule shifting has occurred, a bare majority of Americans support marriage equality and only seventeen states have majority support for the issue.<sup>244</sup>

The trend, however, is obvious: Fewer than two years after *Windsor* was decided, thirty-six states recognized marriage equality and now the Supreme Court has stated that the Constitution requires it.<sup>245</sup>

The rule-shifting movement to prohibit sexual orientation discrimination was effectively engaged in earlier than the marriage equality movement and a significant number of people are covered by these nondiscrimination laws. A much larger percentage of people support LGBT inclusive nondiscrimination laws with sixty-three percent of Americans supporting laws that would make it illegal to discriminate in the workplace on the basis of sexual orientation or gender identity.<sup>246</sup> The trend in LGBT legal issues is moving so quickly that a broad and profound change has already begun.

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<sup>240</sup> See *supra* note 97 and accompanying text.

<sup>241</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>242</sup> See *supra* Part II.B.

<sup>243</sup> See Klarman, *supra* note 173, at 445.

<sup>244</sup> See *supra* text accompanying notes 190–92.

<sup>245</sup> See MARRIAGE EQUALITY USA, *supra* note 88.

<sup>246</sup> Frank Newport, *Senate Vote on ENDA Remarkably Close to Public Sentiment*, GALLUP (Nov. 13, 2013, 6:17 PM), <http://pollingmatters.gallup.com/2013/11/senate-vote-on-enda-remarkably-close-to.html>. Additionally, a majority of Americans in every Congressional district support the Employment Non-Discrimination Act. Andrew Gelman, *Polls Say ENDA Has Majority Support in Every Congressional District*, WASH. POST (Nov. 20, 2013), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/20/polls-say-enda-has-majority-support-in-every-congressional-district/>.

## 2. Public Awareness of the Change

The repeated court cases, legislative battles, and ballot initiatives have resulted in long-term public exposure to LGBT legal issues. Like Stoddard's comparison to the New York City Council's repeated consideration of nondiscrimination legislation, these multiple efforts have led to significant public awareness of LGBT issues.

Rule shifting related to LGBT rights has become mainstream news and conversation. In fact, seventy-five percent of Americans already believe that there is a federal law prohibiting employment discrimination based on sexual orientation when no such protection exists.<sup>247</sup> This misinformed belief demonstrates that the culture has shifted to the point that Americans think that the laws have already changed. The polling numbers also indicate public awareness of the change as seen by the large number of people that believe that marriage equality is inevitable.<sup>248</sup>

## 3. Validity of the Change

Even though rule shifting toward equality is not embraced by all, it is recognized as a valid part of the new legal landscape. Stoddard looked at the process of rule shifting as it applied to this prong. He examined the timing and venue of the change—legislation versus litigation—as impacting the legitimacy of the legal change.

LGBT advocates availed themselves of the judicial system because of the long-held belief that the courts are the best option when disadvantaged groups seek to protect their rights.<sup>249</sup> Some scholars have also acknowledged that litigation is an attractive option for disadvantaged groups in the political process because courts are generally obligated to consider legal claims when

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<sup>247</sup> ROBERT P. JONES ET AL., PUB. RELIGION RES. INST., A SHIFTING LANDSCAPE: A DECADE OF CHANGE IN AMERICAN ATTITUDES ABOUT SAME-SEX MARRIAGE AND LGBT ISSUES 3, 35 (2014), available at [http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT\\_REPORT.pdf](http://publicreligion.org/site/wp-content/uploads/2014/02/2014.LGBT_REPORT.pdf).

<sup>248</sup> See polling discussion *supra* Part III.A.2.

<sup>249</sup> See *Chambers v. State*, 309 U.S. 227, 241 (1940) (stating courts are havens of refuge for disadvantaged minorities).

lawmakers are not inclined to address a group's concerns.<sup>250</sup> Others have criticized the role of the Court as a savior or its ability to play the role of the "countermajoritarian [hero]."<sup>251</sup>

In many legislatures, it is difficult to get legislators to address LGBT concerns. Even legislators who are supportive of LGBT equality are more likely to attempt to avoid the issues than to introduce or move legislation.<sup>252</sup> Consequently, litigation became the primary focus of efforts on LGBT issues and advocates engaged in a purposeful legal strategy enacted by LGBT organizations.<sup>253</sup>

Some of the LGBT litigation cases that have been filed without approval from movement lawyers have had the most impact. The *Baehr* case was brought by a few same-sex couples that were represented by a single, private-practice lawyer, not one of the LGBT organizations. This litigation "substantially altered the course of the LGBT movement and single-handedly changed the national conversation on LGBT rights."<sup>254</sup>

Marriage-equality litigation after *Baehr* was primarily pursued in a planned strategic manner with buy-in from most of the national and state organizations.<sup>255</sup> While some organizations felt that the LGBT community would be better served by other types of litigation, the marriage litigation took priority.<sup>256</sup> The strategy was to first cherry pick those states that had state constitutional provisions and judicial personnel that were likely to rule in favor of marriage equality. The *Perry* case,<sup>257</sup> recently heard by the United States Supreme Court, was another exception to planned organizational strategy. The *Perry*

<sup>250</sup> See NeJaime, *supra* note 185, at 665 (citing JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 22 (1978)).

<sup>251</sup> See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 VA. L. REV. 1, 2 (1996).

<sup>252</sup> See Culhane & Sobel, *supra* note 100, at 453.

<sup>253</sup> See NeJaime, *supra* note 185, at 677–80.

<sup>254</sup> *Id.* at 695 (citing Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1250–52 (2010)).

<sup>255</sup> The author, as executive director of Equality Advocates Pennsylvania, formerly the Center for Lesbian and Gay Civil Rights, took part in many strategy meetings with national and state LGBT organizations from 2001 to 2008. See also NeJaime, *supra* note 185, at 677–80.

<sup>256</sup> See CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 157–60, 164 (2010).

<sup>257</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

litigation effort was not supported by the other LGBT organizations because those organizations believed that pursuing a federal lawsuit was too risky.<sup>258</sup>

One of the biggest differences in the location of successes between efforts to gain recognition of legal rights for LGBT people versus other equality movements has been the vertical rather than horizontal nature of the activity.<sup>259</sup> There has been much greater activity at the state level than at the federal level on LGBT issues, whether one examines either legislation or litigation. For example, in criminal law, the Supreme Court's *Bowers*<sup>260</sup> decision sent lesbian and gay rights advocates to state courts. Similarly, the breakthroughs on marriage, functional family recognition, and domestic partner benefits occurred first at the state or local level. And virtually all employment and public accommodations successes have occurred at the state level.<sup>261</sup>

Many state related advances followed the path of incremental change by pursuing rights in a predetermined sequence of legislation that: decriminalized sodomy; punished hate crimes against LGBT people; created nondiscrimination laws in employment, housing, and public accommodations; provided limited relationship recognition for same-sex couples; to full marriage equality.<sup>262</sup> These legislative efforts were often engaged in at the same time that litigation was pending on the same issues in state courts.

As discussed in Part I, some people perceive social change that occurs through litigation to not be as valid as legislatively derived change.<sup>263</sup> The validity of the change on LGBT issues is based not in a litigation versus legislation debate, but in the fact that LGBT advocates utilized all forms of change. The use of

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<sup>258</sup> The *Perry* case was brought by a new organization, AFER, that was founded to initiate a federal lawsuit. AFER was not part of the overall strategizing efforts of the other LGBT organizations. NeJaime, *supra* note 185, at 698–99.

<sup>259</sup> Hunter, *supra* note 14, at 1016.

<sup>260</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>261</sup> Hunter, *supra* note 14, at 1016–17.

<sup>262</sup> See Keck, *supra* note 90, at 171 (citing William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000)).

<sup>263</sup> The *Obergefell v. Hodges* dissenting opinions all discussed that the issue should be addressed through the legislative process and not by the Court. See 135 S. Ct. 2584 (2015) (Roberts, C.J., dissenting).

litigation, legislation, and public engagement has led to social recognition of the change regardless of whether a person agrees or disagrees with LGBT equality.

#### 4. Enforcement

The enforcement prong of Stoddard's test does not appear to be at issue. All of the states that have passed legislation or had a court decision granting relationship recognition to same-sex couples have enforced the law. Even though there may be people who were displeased with the results, it appears that compliance with the new laws and court decisions have been commonplace.<sup>264</sup> There are a limited number of instances where local clerks have refused to issue marriage licenses<sup>265</sup> and conversely, there are a number of instances where state attorney generals have refused to defend state bans on marriage equality.<sup>266</sup>

In the limited instances where government officials have not followed rule changes or when the reach of a case was not clear, the courts have forced compliance with new rules. This has been seen in some post-*Lawrence* cases such as *State v. Limon*,<sup>267</sup> where the Kansas Supreme Court invalidated a state law that more severely punished convictions for same-sex sodomy with a minor than opposite-sex statutory rape. More recently in

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<sup>264</sup> See Keck, *supra* note 90, at 157.

<sup>265</sup> See, e.g., Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 27, 2011, <http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html>; Donald W. Meyers, *Utah County Refuses to Issue Same-Sex Marriage Licenses*, SALT LAKE TRIB. (Dec. 23, 2013, 3:14 PM), <http://www.sltrib.com/sltrib/news/57302479-78/county-licenses-marriage-sex.html.csp>; Anna M. Phillips, *As Gay Marriage Approaches, Several Counties' Clerks Opt Out of Wedding Ceremonies*, TAMPA BAY TIMES, <http://www.tampabay.com/news/courts/in-north-florida-a-views-collide-over-gay-weddings-as-many-clerks-opt-out/2212297> (last modified Jan. 3, 2015, 10:49 PM); Sandhya Somashekar, *Civil Rights Groups File Lawsuit Over Gay Marriage Denials in Alabama*, WASH. POST (Mar. 6, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/03/06/civil-rights-groups-file-lawsuit-over-gay-marriage-denials-in-alabama/> (groups seeking court order forcing state probate judges to issue marriage licenses after state supreme court ruled they are bound by state law prohibiting marriage equality, not federal district court decision granting marriage equality).

<sup>266</sup> See, e.g., Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST (July 11, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban/>.

<sup>267</sup> 122 P.3d 22, 24 (Kan. 2005).

*MacDonald v. Moose*,<sup>268</sup> the Fourth Circuit held that Virginia's "Crimes Against Nature" statute, which criminalizes all acts of oral and anal sex, was unconstitutional under *Lawrence*.<sup>269</sup>

## 5. Public Engagement

This Article's supplemental prong to Stoddard's culture-shifting analysis helps to explain the speed of change on LGBT issues. The driving force in making cultural change has been the engagement of the public on LGBT equality issues. Public engagement activities including legislative outreach, protests and voter education and mobilization reflect the concepts of demosprudence and democratic constitutionalism discussed in Part I above. The Constitution does not contain language about LGBT people in its text, but according to polling data, the majority of the populace now extends the concept of legal equality to same-sex couples and LGBT issues.

Social change would not likely have occurred so quickly if LGBT advocacy organizations alone directed the pace of rule shifting. The efforts of LGBT rights opponents actually prompted the rapidity of change by enacting backlash—related legislation and ballot initiatives. These efforts brought public engagement into what had mostly been a litigation-driven and organization-dominated strategy. By asking people to weigh in on the issue of marriage equality, ordinary citizens were confronted with the issue and many of them likely engaged in a dialogue that would never have occurred without the impetus of a ballot initiative or legislative action.

Scholars disagree about the impact backlash had on LGBT equality efforts.<sup>270</sup> Some believe that what may have appeared to be legal victories for LGBT people in reality made the situation worse for LGBT people through backlash legislation and ballot initiatives.<sup>271</sup> One even stated that the efforts to win marriage equality in the courts had created a vast body of new anti-gay

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<sup>268</sup> 710 F.3d 154, 165–66 (4th Cir. 2013) (holding Virginia's use of anti-sodomy statute post-*Lawrence* unconstitutional), *cert. denied*, 134 S. Ct. 200 (2013).

<sup>269</sup> *Id.*

<sup>270</sup> See Keck, *supra* note 90, at 151.

<sup>271</sup> See, e.g., GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 415–16 (2d ed. 2008).

law.<sup>272</sup> This Article concludes that the anti-LGBT backlash encouraged public engagement which, in turn, hastened the speed of social change.

*a. Litigation and Public Engagement*

Litigation can awaken a sense of entitlement, provide activists with rhetorical tools, and spark grassroots mobilization and protest.<sup>273</sup> While litigation has often been the catalyst for rule shifting on marriage equality,<sup>274</sup> the associated decisions have also led to legislative and voter initiated backlash. This legal pushmi-pullyu started with the Hawai'i litigation in *Baehr*,<sup>275</sup> and continued after the first state court recognized equal relationship rights in *Baker*<sup>276</sup> and after Massachusetts's highest court granted full marriage equality in *Goodridge*.<sup>277</sup> Even in cases where courts do not grant relationship recognition to same-sex couples, the litigation produced publicity, public education, and public policy opportunities for advocates.<sup>278</sup>

Favorable judicial decisions recognizing legal rights and benefits for movement constituents may also produce indirect effects to mobilize and empower constituents, aid fundraising, gain publicity, obtain leverage with government officials, and move the public and elites on an issue.<sup>279</sup> Conversely, a loss before the Supreme Court, such as in *Bowers*, may provoke individuals to seek social change and turn to other venues for legal change, such as legislatures or state courts.<sup>280</sup>

<sup>272</sup> John D'Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV., Nov.–Dec. 2006, at 10.

<sup>273</sup> See Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1672 (2014).

<sup>274</sup> See Sant'Ambrogio & Law, *supra* note 109, at 705 (stating that the *Baehr* litigation in Hawai'i opened a dialogue that continues to this day).

<sup>275</sup> *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993).

<sup>276</sup> *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999).

<sup>277</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

<sup>278</sup> NeJaime, *supra* note 185, at 676 (citing Cummings & NeJaime, *supra* note 245, at 1312).

<sup>279</sup> *Id.* at 667–68; see, e.g., Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506, 508 (Austin Sarat ed., 2004); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 5–12 (1994).

<sup>280</sup> Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier's Demosprudence Through Dissent*, 89 B.U. L. REV. 589, 589 (2009).

Some believe that the scholarly examination and rejection of the Court's reasoning and conclusion in *Bowers v. Hardwick*<sup>281</sup> directly led to favorable attention of the gay rights movement and ultimately, the Court's decision to overturn *Bowers* in *Lawrence v. Texas*.<sup>282</sup> Others, however, believe that "[b]road societal change, not just additional scholarly research and legal commentary, was vital to bringing about the *Lawrence* decision," and that grassroots organizations like the National Gay and Lesbian Task Force ("NGLTF") helped produce the change by using *Bowers* as a galvanizing force to help repeal remaining sodomy laws and ultimately, *Lawrence*.<sup>283</sup>

Similarly, the *Goodridge* decision resulted in both backlash and opportunity for LGBT advocates. In Pennsylvania, for example, there were few protections for LGBT people when *Goodridge* was decided in 2003. The *Goodridge* decision resulted in a backlash from state legislators when they introduced fifty-one separate anti-LGBT amendments to a piece of legislation in 2004.<sup>284</sup> As a result of the anti-LGBT legislation, activists in the state formed the largest and most diverse coalition to work on behalf of the LGBT community in Pennsylvania.<sup>285</sup> After the legislation was defeated, the

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<sup>281</sup> 478 U.S. 186, 196 (1986) (upholding Georgia's sodomy law and ruling that there is no constitutional right to homosexual sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>282</sup> Sheyn, *supra* note 68, at 8–9 (citing Telephone Interview with John D'Emilio, Professor, Univ. of Ill. At Chi., in Philadelphia., Pa (parentheticals omitted)). The author was a public policy consultant to NGLTF from 1994 to 1995 and lobbied on the Employment Non-Discrimination Act ("ENDA") and lesbian health care issues.

<sup>283</sup> *Id.* at 12–13, 27 (citing Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 32–35 (2005); Balkin & Siegel, *supra* note 15, at 948). *But see* Sheyn, *supra* note 68, at 27 n.148 (citing Telephone Interview with John D'Emilio, Professor, Univ. of Ill. at Chi., in Philadelphia, Pa.) (D'Emilio, a historian and former NGLTF Board member and consultant, believes that it was lawyers that eliminated state sodomy laws and that NGLTF "had anything but the most indirect impact on *Lawrence*"). From 1986 to 1991, NGLTF's Privacy Project worked to repeal state sodomy laws; while its efforts did not result in any laws being repealed, the Project's director believes that the state-level organizing work awakened activists to potential legal and public policy changes in their states. *Id.* at 25 (citing Telephone Interview with Sue Hyde, Director of Creating Change Conference, in Philadelphia, Pa. (Apr. 4, 2008)).

<sup>284</sup> See Culhane & Sobel, *supra* note 100, at 458.

<sup>285</sup> The Value All Families Coalition ("VAFC") was comprised of LGBT organizations, children's advocates, labor unions, and religious organizations, among others. *Id.* at 458 & n.98 (list of coalition members).

legislature unsuccessfully attempted to pass constitutional amendments in the next two legislative sessions to limit relationship recognition to married opposite-sex couples.<sup>286</sup>

In 2007, a number of legislators, both Democrats and Republicans, approached the author to see if a limited reciprocal beneficiaries bill could be introduced because they believed it would defeat the proposed amendment and get rights for same-sex couples. A relationship recognition bill was not introduced, but this proposal would never have occurred without the battles that were being waged in Pennsylvania and elsewhere. Similar legislative opportunities to introduce what was seen as more moderate relationship recognition laws were met with both more and less success in many states.<sup>287</sup>

*b. Voting Related Public Engagement*

In the 1990s, anti-marriage equality ballot initiative efforts and pro-equality state legislative efforts began to build significant momentum. It was not unusual at that time for legislators to state that they did not have any LGBT constituents or to state that they never heard from constituents who supported LGBT issues.<sup>288</sup>

As LGBT advocates engaged in more legislative activities, they incorporated grassroots efforts to affect legislative outcomes. In Pennsylvania, more than 10,000 postcards and letters were sent to legislators from constituents who supported LGBT inclusive hate-crime legislation<sup>289</sup> and many more legislative contacts were made in a much shorter period of time related to the proposed constitutional amendments, including tens of thousands of emails.<sup>290</sup>

New Internet-related technologies have been utilized by both state and national LGBT organizations as an effort to create public engagement on LGBT legislation.<sup>291</sup> The Human Rights

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<sup>286</sup> See Associated Press, *Gay Marriage is Still Banned in Pennsylvania, Despite Supreme Court Decision*, PENNLIVE.COM, [http://www.pennlive.com/midstate/index.ssf/2013/06/gay\\_marriage\\_is\\_still\\_banned\\_i.html](http://www.pennlive.com/midstate/index.ssf/2013/06/gay_marriage_is_still_banned_i.html) (last updated June 26, 2013, 4:31 PM).

<sup>287</sup> See Keck, *supra* note 90, at 158–59.

<sup>288</sup> See Culhane & Sobel, *supra* note 100, at 454 & n.62.

<sup>289</sup> *Id.*

<sup>290</sup> See *id.* at 459.

<sup>291</sup> See Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 COLUM. J. GENDER & L. 805,

Campaign, for example, reports that users of its Online Action Center have sent more than one million emails and faxes to elected officials related to a variety of LGBT equality issues.<sup>292</sup> And grassroots activists have used social media to stage protests and celebrations related to LGBT litigation victories.<sup>293</sup>

LGBT advocates and opponents also engaged in grassroots campaigns related to ballot initiatives. Many scholars criticize the direct democracy utilized in ballot initiative efforts.<sup>294</sup> Some scholars view the initiative process as discriminatory and that they have been used to oppress and marginalize minority communities<sup>295</sup> as was demonstrated by all of the ballot losses for the LGBT community prior to 2012.<sup>296</sup>

Even though the initiative battles were all lost until 2012, the tide has turned. The ballot initiative process forced private individuals to confront the issues and engage in a conversation on LGBT issues and marriage in particular. The media campaign against California's Proposition 8 has been vigorously criticized by scholars and advocates,<sup>297</sup> yet the 2008 initiative ultimately forced the public to consider marriage equality when many people would not have otherwise been exposed to the issue. These conversations had an impact on public opinion and ultimately lead to victories in other states in 2012.

## CONCLUSION

As the United States witnesses rapid development on LGBT legal issues, Tom Stoddard's framework withstands the test of time and is amplified by adding this Article's public engagement

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866 (2010). See generally Ed Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159 (2003) (discussing the regulation and use of cyberspace by the LGBT community).

<sup>292</sup> Phillip C. Aka, *Technology Use and the Gay Movement for Equality in America*, 35 CAP. U. L. REV. 665, 724 (2007).

<sup>293</sup> See Bil Browning, *Politics at Lightning Speed*, GAY & LESBIAN REV., May-June 2009, at 20, 20-21.

<sup>294</sup> Varona, *supra* note 291, at 871-72; see also David Butler & Austin Ranney, *Theory, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 34 (David Butler & Austin Ranney eds., 1978).

<sup>295</sup> Varona, *supra* note 291, at 873 (citing Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14-15 (1978); Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (2007)).

<sup>296</sup> See discussion of voter-related rule shifting, *supra* Part II.B.

<sup>297</sup> See Varona, *supra* note 291, at 816-24.

factor to his test. The framework now reveals not only whether social change has occurred, but it also provides insight into why it has moved at warp speed.

In one generation, recognition of LGBT rights has moved significantly forward. In 2002, I was having dinner with LGBT rights pioneer Barbara Gittings<sup>298</sup> and she spoke about the early New York City pride parades. She told me that she never thought anyone would follow her and the others leading the parade route and how surprised she was when she saw thousands of people behind her. I told her I remembered seeing one of those marches on the evening news when I was five years old and that I had had a conversation about it with my mother. Barbara said she had never thought about children who would see those television images and their impact on young viewers.

Those first brave souls who began the efforts of public engagement and education on LGBT issues a mere fifty years ago could not have imagined how quickly the culture has shifted. Yet the combination of rule shifting, public engagement, and media has propelled public opinion and social change in favor of LGBT equality.

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<sup>298</sup> Barbara Gittings organized some of the first LGBT protests in the United States including a protest in front of the White House in Washington, D.C. and Independence Hall in Philadelphia in 1965 and 1966. See VAID, *supra* note 68, at 50.