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Masking the Reemergence of Immutability with “Outcomes for Children”

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The 2014 Michigan trial DeBoer v. Snyder involved a challenge to a 2004 voter initiative amending the state’s constitution to ban same-sex marriage. DeBoer was one of four consolidated cases from the Sixth Circuit granted certiorari to the Supreme Court in January 2015, known collectively as Obergefell v. Hodges. On June 26, 2015, the Supreme Court handed down its historic decision in Obergefell, requiring states to license marriages between two people of the same sex and to recognize marriages between two people of the same sex when their marriage was lawfully licensed out of state. Obergefell has thus left open the opportunity for litigation over whether sexual orientation-based classifications warrant heightened scrutiny. Same-sex-marriage-ban defenders in DeBoer had argued that because marriage often involves children and children learn from their parents, same-sex parents provide a less than ideal environment for children based on the impact of the parents’ sexual orientation on their children. The defenders argue that this impact leads to poorer “outcomes for children.” The debate over marriage equality therefore became a question of whether same-sex parents reproduce their own gender and sexual orientation identities onto their children; in other words, the debate becomes a question of the immutability of such traits. This debate is characterized as a “distraction” because courts no longer recognize immutability as a dispositive factor in an Equal Protection level-of-scrutiny analysis. This Note argues that children are the unique condition that allows the debate about immutability to resurface in the context of purported governmental interests. This Note then concludes with a warning for advocates to be aware of this

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trap and redirect the debate to normative questions about gender, sexuality, and sexual orientation.

Introduction	684
I. The Immutability Factor in Assessing Heightened Scrutiny.....	687
II. <i>DeBoer v. Snyder</i> —A Challenge to Michigan’s Ban on Same-Sex Marriage and Second-Parent Adoption Laws	693
A. “Outcomes for Children” as a Mask for Immutability Arguments	695
B. The “No Difference Consensus”	697
C. Convenience Sampling	702
III. Shifting from Objective to Normative Questions About Sexual Orientation	704
A. The Child as Proxy for Anxieties About Divergent Identities	704
B. Drawing on Lessons from the Heightened Scrutiny Debate.....	706
Conclusion.....	709

INTRODUCTION

Now, your Honor, I’m sure you’re thinking, counsel, what about the recent decisions in Utah and Virginia and Oklahoma, why shouldn’t this case turn out any different? My response to you, your Honor, is unfortunately those courts lost sight of the proper standard. They forgot who should define marriage.

....

But even more notable is that none of these three decisions challenged the premise that it’s beneficial for a child to have both a mom and a dad. Instead, in those cases the courts claim that point would not justify excluding same sex couples.¹

Equal protection challenges to laws distinguishing a class of persons defined by their sexual orientation have become increasingly common over the last two decades. Courts’ understanding of sexual orientation in this context has evolved to a point of settlement: sexual orientation is viewed as so integral to a person’s identity that it is not appropriate to require an individual to change his or her orientation in order to avoid discriminatory treatment.² The immutability of sexual orientation is therefore relevant but not dispositive in an Equal Protection level-of-scrutiny analysis. Although diverging on the level of protection warranted by sexual orientation-based classifications, courts have generally agreed that they need not

1. Transcript of Record, vol. 1, pt. 1, at 48, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

2. See *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008).

decide whether a person’s sexual orientation is immutable in order to afford protections to sexual orientation-based classes.³

The debate over immutability, however, has reemerged in the context of LGB⁴ parenting. Ironically, the debate has reemerged in the very same cases in which immutability is sidelined in regard to whether sexual orientation deserves heightened scrutiny. The focus has shifted to the strength of the government’s purported interest in discriminatory marriage laws rather than the level of scrutiny for the classification. Whether LGB identity can or should be transmitted from parent to child—a question that ultimately pertains to the immutability of such an identity—is framed as a debate over the impact of parents’ sexual orientation on “outcomes for children.”⁵ On one side of the debate, gay-rights advocates argue that social scientists and organizations specializing in the psychiatric and emotional well-being of children generally agree on the “No Difference Consensus”—the notion that there is no difference between outcomes for children of same-sex parents and children of opposite-sex parents.⁶ On the other side, traditional-marriage defenders and opponents of same-sex parenting argue that the social science on outcomes for children is too new and unsettled to create a dispositive answer to the debate, and that studies repeatedly show that an intact marital family with a mother and a father provides the ideal environment for children.⁷ Although not made in explicit terms, the arguments offered for and against LGB parental rights allow the debate over immutability to resurface. This has occurred through the abstraction of “outcomes,” which are measured in part by a child’s gender expression,⁸ gender identity,⁹ and understanding of his or her own sexuality.

3. For example, in 2012, a federal district court in Nevada granted a defendant’s motion to dismiss a complaint challenging Nevada’s prohibition of same-sex marriage in its constitution and statutory law. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1021 (D. Nev. 2012), *rev’d sub nom.* *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). The decisions in *In re Marriage Cases* and *Kerrigan* fell on the opposite side of the fight for LGB rights than the court in *Sevcik*, yet all courts agreed that they did not need to issue a final ruling on the mutability of sexual orientation identity. *In re Marriage Cases*, 183 P.3d 384; *Kerrigan*, 957 A.2d 407.

4. In this Note, I will use “LGB” to describe the sexual orientation of lesbian, gay, and bisexual parents. While gender nonconforming and trans identities are certainly relevant to the topic of parenting, I limit my analysis in this Note to the impact of sexual orientation identity on outcomes for children.

5. There have been numerous amicus briefs submitted on behalf of pro-gay plaintiffs. *See, e.g.*, Brief for American Psychological Association, et al. Supporting Plaintiff-Appellees at 33–34, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

6. *See, e.g.*, Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 159, 163 (2001) (arguing that most research in psychology concludes that there are no differences in developmental outcomes between children raised by lesbian and gay parents and children raised by straight parents).

7. *See, e.g.*, Brief of Social Science Professors as Amici Curiae Supporting Petitioners at 13–28, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

8. Gender expression is “how a person outwardly expresses their gender.” *An Ally’s Guide to Terminology*, GLAAD & MOVEMENT ADVANCEMENT PROJECT (2012), available at www.glaad.org/sites/default/files/allys-guide-to-terminology_1.pdf [<http://perma.cc/H7FT-XLH6>].

9. Gender identity is “one’s internal sense of gender.” *Id.*

This Note analyzes the recent Michigan trial *DeBoer v. Snyder*,¹⁰ which highlights the reemergence of the debate over the immutability of sexual orientation. *DeBoer* involved a challenge to a 2004 voter initiative amending Michigan's Constitution to ban same-sex marriage.¹¹ The opening epigraph of this Note, taken from opening statements by counsel for State Defendants, signals the unique focus of this trial on expert testimony as a means to determine whether the ban on same-sex marriage is justified by differences in outcomes for children. This Note examines the arguments made in *DeBoer* concerning the legitimacy of the available social science on LGB parenting and outcomes for children. It situates these arguments within the larger frameworks of same-sex marriage, LGB parenting, and sexual orientation identity.

Part I details the development of Equal Protection jurisprudence surrounding sexual-orientation-based classifications and the settlement of immutability as a nondispositive factor. This background serves as a point of comparison for the argument that the reemergence of the immutability debate is a red herring, distracting us from the legal, social, and political debate over normative questions about sexual variation.

Part II summarizes the substantive arguments made in *DeBoer*. This Part involves a close reading of the expert testimony put forth by each side. It lays out state rationales for same-sex marriage prohibitions and the opposing expert opinions on the relative importance of scientific consensus for these rationales. This Part uncovers how vague arguments about "outcomes for children" mask fears about the transmission of sexual orientation identity. Moreover, it borrows from noted gay-rights scholars to reveal how the stated government interest in dual-gender, biological parents is, at its core, a desire for parents to be straight role models.

Part III analyzes why the reemergence of the immutability debate is significant. It argues that where the immutability of sexual orientation is otherwise settled for level-of-scrutiny analysis, the introduction of children to the debate allows opponents of gay rights to use outcomes for children as a proxy for their anxieties about the production and reproduction of divergent sexual orientation and gender identities, or what Professor Clifford J. Rosky calls "fear of the queer

10. *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* *Obergefell v. Hodges*, No. 14-1556, 2015 WL 2473451 (June 26, 2015). In its historic ruling, the Court held that the Fourteenth Amendment requires states to license marriages between two people of the same sex and to recognize marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. *Obergefell v. Hodges*, No. 14-1556, slip op. at 22–23, 27–28 (June 26, 2015). Notably, the Court did not take up the issue of "outcomes for children," which was a unique focus in the *DeBoer* trial. The Court also declined to address the level-of-scrutiny that should be afforded to laws that employ sexual orientation-based classifications. In its wake, *Obergefell* leaves ripe for litigation the possibility that classifications based on sexual orientation warrant heightened scrutiny.

11. *DeBoer*, 973 F. Supp. 2d at 757.

child.”¹² Part III then suggests advocates and courts should instead focus on more important normative questions about the state’s interest in producing gender-conforming, heterosexual children.

I. THE IMMUTABILITY FACTOR IN ASSESSING HEIGHTENED SCRUTINY

A review of the doctrinal framework in which adult sexual orientation claims are made under the equal protection clause provides a point of comparison for the following sections on “outcomes for children.” This Part demonstrates how the immutability of adult sexual orientation is not dispositive of whether the orientation-based class deserves heightened scrutiny.¹³ Specifically, this section explores the evolution of the heightened scrutiny doctrine in case law and provides a brief overview of why the immutability of sexual orientation was a controversial factor in litigation. It concludes by showing that in recent Equal Protection decisions, immutability has become less contentious and courts have begun to privilege a narrative vision of sexual orientation identity over abstruse scientific consensus.

The “tiers of scrutiny” approach to Equal Protection first emerged in *United States v. Carolene Products Co.*, a case involving interstate commerce in skimmed milk.¹⁴ The Supreme Court held that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional” unless there is a reason to “preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”¹⁵ However, in its famous Footnote Four, the Court recognized that “prejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [therefore] may call for a correspondingly more searching judicial inquiry.”¹⁶ In the years following *Carolene*

12. Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 608 (2012) (arguing government has no legitimate interest in “encouraging children to be straight”).

13. Among the factors in evaluating which level of scrutiny a class is afforded under the Equal Protection clause, courts consider approximately four factors: (1) whether the class has a history of discrimination against it; (2) whether the classification is related to the class’s ability to contribute to society; (3) whether the class is sufficiently politically powerless; and (4) whether the classification is immutable. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011) (noting, however, that “[d]ifferent courts emphasize different factors without any real explanation why some are more important than others”). *Id.* at 138–39. I use “approximately” because courts describe and apply these factors in different ways; for example, Strauss also identifies a fifth factor: the relevancy of the trait. *Id.* at 146. Strauss also pointed out the following:

[I]t is not clear whether a suspect class must meet all of [the factors], most of them, or just some of them. After over fifty years of employing these factors, significant questions still remain about the meaning of the factors for determining one of the most important questions in constitutional law: whether and when a legislative judgment involving equal protection of the law should be rigorously scrutinized by a court.

Id. at 147.

14. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

15. *Id.*

16. *Id.* at 152 n.4.

Products, the Court developed a framework for evaluating which classes deserved heightened scrutiny under the equal protection clause.¹⁷

Immutability as a factor precipitating heightened scrutiny first emerged in a plurality decision in *Frontiero v. Richardson*.¹⁸ The Court, in finding that discrimination based on sex warranted heightened scrutiny under the equal protection clause, stated a number of reasons for its decision: laws have historically been based on “gross, stereotyped distinctions between the sexes . . . comparable to that of blacks under the pre-Civil War slave codes”;¹⁹ “women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena”;²⁰ “sex, like race and national origin, is *an immutable characteristic determined solely by the accident of birth*”;²¹ “the sex characteristic frequently bears no relation to ability to perform or contribute to society”;²² and finally, “Congress has itself manifested an increasing sensitivity to sex-based classifications.”²³

Nearly a decade later, the Court considered the constitutionality of Georgia’s sodomy statute in *Bowers v. Hardwick*²⁴ and whether the Constitution “confers a fundamental right upon homosexuals to engage in sodomy.”²⁵ Although the Court relied upon the substantive due process clause to uphold the sodomy statute,²⁶ the Court’s reasoning is nonetheless applicable to the alleged mutability of sexual orientation identity. The Court’s framing of the issue as the “right of homosexuals to engage in acts of sodomy,” or “a fundamental right to engage in homosexual sodomy,”²⁷ emphasizes its perception of conduct, rather than identity, as definitive of the class. The Court found the Georgia law was supported by a rational basis—the moralistic view that “homosexual sodomy is immoral and unacceptable.”²⁸ Interestingly, the *Bowers* Court found that there was “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other.”²⁹

17. Strauss, *supra* note 13, at 144 (identifying *Korematsu v. United States*, 323 U.S. 214, 216 (1944), as the first instance in which the Court first referred to race as a suspect class).

18. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

19. *Id.* at 685.

20. *Id.* at 686.

21. *Id.* (emphasis added).

22. *Id.*

23. *Id.* at 687 (providing the example of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin).

24. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. *Id.* at 190.

26. The Court applies heightened scrutiny to those rights deemed to be fundamental under the substantive due process clause. *See* *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535, 536, 541 (1942) (striking down a law involving the forced sterilization of convicts because marriage and procreation are basic civil rights, and thus strict scrutiny of the law is required).

27. *Bowers*, 478 U.S. at 191.

28. *Id.* at 196.

29. *Id.* at 191.

Following the adverse decision in *Bowers*, the pro-gay rights movement began to embrace immutability, arguing that scientific experiments proved that human sexual orientation is biological.³⁰ Advocates reasoned that if gay and lesbian identity were biologically determined, it could be distinguished from the Court’s treatment of homosexual sodomy as voluntary conduct in *Bowers*.³¹ As Janet Halley points out in her critique of the immutability factor, this essentialist view of sexual orientation

entirely fails to represent those pro-gay constituencies that deny the centrality of a particularized homosexual orientation to their psychic makeup, whether because they identify as bisexual, because they seek to de-emphasize the gender parameters of sexuality, because they are experimental about sexuality, or because they experience sexuality not as serious self-expressiveness but as play, drag, and ironic self-reflexivity.³²

The pro-gay essentialist legal argument relying on biological causation thus leaves out the voices of many LGB-identified individuals who are critical of the view that they are a minority defined by a “natural” identity.³³ Simultaneously, opponents of gay rights likewise argue homosexual orientation is biologically fixed—that discrimination toward the group should be tailored “to express normative judgments, deter manifestations of homosexual orientation, or to cure homosexuals of their illness”—or alternatively, if homosexual orientation is mutable, discrimination should be designed to convert gay and lesbian desire into heterosexuality³⁴

In 1996, pro-gay advocates successfully challenged the validity of an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination in *Romer v. Evans*.³⁵ The Court, without asking whether a more searching inquiry would be appropriate, held that the law failed to meet even rational basis review.³⁶ The Court found the amendment “impos[es] a broad and undifferentiated disability on a single named group,” and “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”³⁷ Careful to avoid a ruling on the scrutiny warranted by the classification, the Court stated in broad terms that Amendment 2 is unconstitutional because it “identifies persons by a single trait and then denies them protection across the board.”³⁸

30. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 504–05 (1994).

31. *Id.* at 512–14.

32. *Id.* at 520.

33. *Id.* at 504–05.

34. *Id.* at 517.

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

36. *Id.* at 632.

37. *Id.*

38. *Id.* at 633.

Seven years later, the Court overruled *Bowers* in *Lawrence v. Texas*.³⁹ In a 6–3 decision, the Court struck down Texas’s law criminalizing sodomy, finding the liberty interest protected by substantive due process under the due process clause extended to intimate sexual conduct between consenting adults.⁴⁰ The Court did not address whether sexual orientation warranted heightened scrutiny under the equal protection clause, nor did it explicitly address any of the factors relevant to such an inquiry.⁴¹ Cases in the context of sexual-orientation-based classifications subsequent to *Lawrence* have focused on the political powerlessness factor,⁴² and the fight over the immutability of sexual orientation under the equal protection clause in the last decade has been relatively quiet.

The gay rights movement then began to utilize state litigation. In 2008, the California Supreme Court considered a case consolidating six separate challenges to the state’s Family Code, which defined marriage as between a man and a woman.⁴³ The Court distinguished the challenge from other state challenges to same-sex marriage bans because California had created a domestic partnership scheme under which same-sex couples received virtually all of the same legal benefits and privileges that married couples were afforded.⁴⁴ The California Supreme Court subjected the statute to strict scrutiny on two grounds: first because sexual orientation is a suspect classification under the California Constitution,⁴⁵ and second because the differential treatment accorded to same-sex couples impinged upon same-sex couples’ fundamental privacy interest in having an official family relationship accorded with equal respect and dignity as that of an opposite-sex couple.⁴⁶ Concluding sexual orientation is a suspect classification, the Court

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

40. *Id.*

41. *See* Strauss, *supra* note 13, at 146 (listing the basic factors for determining suspect class status).

42. *See, e.g., Romer*, 517 U.S. at 645–46 (“[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities . . . and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.”); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1009–10 (D. Nev. 2012) (“In the present case, it simply cannot be disputed that there have historically been sufficient pro-homosexual legislators (or anti-homosexual and indifferent legislators who can be democratically bargained with) in the state of Nevada to protect homosexuals from oppression as a general matter.”), *rev’d sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 446–48 (Conn. 2008) (focusing on the lack of gay representatives in the federal judiciary, the U.S. Senate, business, academia, statewide office, and the state judiciary). *See generally* Darren Lenard Hutchinson, “*Not Without Political Power*”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975 (2014) (analyzing the political powerlessness factor in Equal Protection cases brought by gay and lesbian plaintiffs).

43. *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008).

44. *Id.* at 379–98.

45. This issue was one of first impression in California. *Id.* at 840–41. The equal protection clause of the California Constitution mirrors the language of the Fourteenth Amendment to the United States Constitution, but is not “confined to [the doctrine] of Fourteenth Amendment jurisprudence.” *Strauss v. Horton*, 207 P.3d 48, 129–30 (Cal. 2009).

46. *In re Marriage Cases*, 183 P.3d at 400–02. On the latter point regarding the fundamental right to marriage, the California Supreme Court found the public had a significant interest in marriage.

reasoned that “[b]ecause a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”⁴⁷ The Court also implicitly referred to immutability, stating:

[O]ur state now recognizes that an individual’s capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend on the individual’s orientation, and, more generally, that an individual’s sexual orientation—*like a person’s race or gender*—does not constitute a legitimate basis upon which to deny or withhold legal rights.⁴⁸

The California Supreme Court ultimately found the designation of marriage as a union “between a man and a woman” unconstitutional.

The same year, the Connecticut Supreme Court considered whether same-sex couples were subject to discrimination because of their sexual orientation in violation of the Connecticut Constitution.⁴⁹ Integral to this decision was the recognition that sexual orientation constitutes a quasisuspect classification for purposes of the equal protection provisions of the Connecticut Constitution.⁵⁰ Looking to federal constitutional law, the Court determined immutability to be a relevant but not required factor for heightened scrutiny.⁵¹ Additionally, it declined to consider whether sexual orientation is immutable in the same way that race, national origin, and gender are immutable because the Court agreed with the plaintiffs’ contention “that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining . . . heightened protection.”⁵² The Court held that it is “indisputable that sexual orientation ‘forms a significant part of a person’s identity,’”⁵³ and that “[i]t is equally apparent that, ‘because a person’s sexual orientation is so integral an

Chief Justice George stated the following:

Society, of course, has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of children and society. In addition, the role of the family in educating and socializing children serves society’s interest by perpetuating the social and political culture and providing continuing support for society over generations. It is these features that the California authorities have in mind in describing marriage as the “basic unit” or “building block” of society.

Id. at 423 (citation omitted).

47. *Id.* at 442–43.

48. *Id.* at 400 (emphasis added). Later, however, the Court notes, “the constitutional right to marry has never been viewed as the sole preserve of individuals who are physically capable of having children.” *Id.* at 430.

49. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 438 (Conn. 2008).

50. *Id.* at 412. The Connecticut Constitution’s equal protection provisions mirror the United States Constitution’s. *Id.*

51. *Id.* at 426.

52. *Id.* at 436–38.

53. *Id.* at 437 (citing *Able v. United States*, 968 F. Supp. 850, 863 (E.D.N.Y. 1997)).

aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."⁵⁴

As challenges to state bans on same-sex marriage became more prevalent,⁵⁵ federal recognition of same-sex marriages could not be ignored. Attorney General Eric H. Holder, Jr. submitted a letter to House Speaker John A. Boehner outlining the Executive Branch's decision not to defend Section 3 of the Defense of Marriage Act (DOMA).⁵⁶ The Department of Justice (DOJ) took the position that Section 3 violated the equal protection guarantee of the Constitution.⁵⁷ Although the letter ultimately concluded that the law failed to withstand rational basis scrutiny, the DOJ memorandum analyzed the variables weighing in favor of heightened scrutiny protection for sexual orientation.⁵⁸ Regarding immutability, the DOJ stated, "while sexual orientation carries no visible badge, a growing scientific consensus accepts that sexual orientation is immutable; it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination."⁵⁹

DOMA was subsequently struck down on June 26, 2013, in *United States v. Windsor*.⁶⁰ The Court defined the class protected by Equal Protection not based on sexual orientation, but as "those persons who are joined in same-sex marriages made lawful by the State."⁶¹ In striking down the law, the Court noted that DOMA "humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in

54. *Id.* at 438 (citing *In re Marriage Cases*, 183 P.3d 384, 442–43 (Cal. 2008)).

55. Not all challenges to same-sex marriage laws have been successful. A Nevada federal District Court in 2012 considered whether Nevada's constitutional prohibition of same-sex marriages and refusal to recognize such marriages from other jurisdictions violated same-sex couples' equal protection rights. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 997 (D. Nev. 2013), *rev'd sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). The District Court answered no. In a brief paragraph, the Court avoided the question of immutability, since the Supreme Court had not yet ruled on the immutability of homosexuality. *Id.* at 1008.

56. Section 3 of DOMA stated:

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

1 U.S.C. § 7 (2012), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

57. Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker of the House of Representatives (Feb. 23, 2011) (on file with author).

58. *Id.*

59. *Id.*

60. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Because the DOJ had decided not to defend DOMA, a congressional group, the Bipartisan Legal Advisory Group ("BLAG"), intervened to defend the statute's constitutionality. On the same day, the Court issued its opinion in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The Court considered whether California's Proposition 8, a voter-enacted ballot initiative amending California's Constitution to ban same-sex marriage, violated the rights of same-sex couples under the United States Constitution. *Id.* at 2659. Before reaching the merits, the Court held that the proponents of Proposition 8 did not have standing for the appeal. *Id.* at 2668.

61. *Hollingsworth*, 133 S. Ct. at 2695.

their community and in their daily lives.”⁶² Since *Windsor*, state and federal judges have issued over sixty decisions relating to same-sex marriage.⁶³

These cases demonstrate that, while immutability is relevant, it is neither dispositive nor highly contested at the present moment in gay rights litigation. Some courts, like in *Kerrigan* and *In re Marriage Cases*, found that sexual orientation warrants heightened scrutiny. Others, including *Romer* and *Windsor*, did not even address what level of scrutiny sexual-orientation-based classifications received because laws that discriminate against sexual-orientation-based classes fail to meet rational basis review. Generally, courts do not ask whether an identity is biologically determined, but whether it is central to a person’s identity such that it would be abhorrent for the government to penalize a person for refusing to change it. Thus, the immutability of sexual orientation identity is effectively settled.

II. DEBOER V. SNYDER—A CHALLENGE TO MICHIGAN’S BAN ON SAME-SEX MARRIAGE AND SECOND-PARENT ADOPTION LAWS

April DeBoer and Jayne Rowse live in Oakland County, Michigan. They are domestic partners and parents to minors N., R., and J.⁶⁴ April is a nurse in a neonatal intensive care unit at a hospital in Detroit, and at another Detroit hospital, Jayne is an emergency room nurse.⁶⁵ April and Jayne had volunteered to care for and adopt each of their three children, who were neglected by their biological parents and in poor medical condition after tragic circumstances surrounding their births.⁶⁶ Together, April and Jayne raise N., R., and J., and eventually hope to adopt all three children as coparents through second-parent adoption.⁶⁷

When April and Jayne filed their complaint, Michigan law prohibited all unmarried couples from jointly adopting children and thus prevented April and Jayne from both being legal parents to their three children on the basis of their marital status.⁶⁸ Michigan law also prevented same-sex couples from getting married.⁶⁹ Together, these laws operated to ban all same-sex couples from jointly adopting children. Laws like these, which do not explicitly ban LGB parents from adopting but operate instead as informal barriers to adoption, existed in a majority of states before the Supreme Court’s decision in *Obergefell*.⁷⁰

62. *Id.* at 2694.

63. *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation> [<http://perma.cc/7RXV-ZRXE>] (last visited July 2, 2015). As of August 6, 2014, the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits had cases pending on appeal. *Id.*

64. Amended Complaint ¶¶ 1, 8, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285). The minors were named by their initials in the complaint to protect their identities.

65. *Id.* ¶ 9.

66. Complaint ¶¶ 10–12, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

67. *Id.* ¶ 15.

68. MICH. COMP. LAWS ANN. § 710.24 (West, Westlaw through 2015 Reg. Sess.).

69. MICH. CONST. of 1963, art. I, § 25 (2004).

70. For a chart comparing the laws on joint adoption, second-parent adoption, and step-parent adoption as they apply to LGBT parents, see *50 States of Adoption*, FAMILY EQUALITY COUNCIL,

Arguments used to justify these informal bans on LGB parenting formed the basis for an Eleventh Circuit decision in 2004 upholding a Florida law prohibiting LGB parents from adopting.⁷¹ *Lofton* involved an equal protection challenge by foster parents who had been denied their applications to adopt based on their sexual orientation.⁷² Florida's adoption law prohibited adoption by "homosexual" persons, defined as "applicants who are known to engage in current, voluntary homosexual activity."⁷³ The Eleventh Circuit first denied that the plaintiffs had any fundamental right to family integrity or private sexual intimacy, which meant that the statute needed to survive only rational basis review.⁷⁴ The court then recognized the special circumstances involved in parenting and reasoned that "[b]ecause of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas."⁷⁵ The court identified Florida's interest in encouraging a stable and nurturing environment for the education and socialization of its adopted children as a "clearly . . . legitimate interest."⁷⁶ As support for its finding, the court stated,

It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character, and personality for years to come. In time, children grow up to become full members of society, which they in turn influence, whether for good or ill. The adage that "the hand that rocks the cradle rules the world" hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children. It is hard to conceive an interest

http://www.familyequality.org/get_informed/families_for_all/50_states_of_adoption [http://perma.cc/CB2H-7PZR] (last visited July 11, 2015). As of July 11, 2015, fifteen states and D.C. allow second-parent adoption by LGBT couples. Relatedly, only seven states support fostering by LGBT parents by restricting discrimination, forty-two states and D.C. are silent on fostering by LGBT parents, and only Nebraska restricts fostering by LGBT parents. Mississippi is the only state in which same-sex couples face legal restrictions when petitioning for adoption. Some states, including North Dakota, Michigan, and Virginia permit state-licensed child welfare agencies to refuse to place and provide services to children and families, including LGBT people and same-sex couples, if doing so conflicts with their religious beliefs. *Second-Parent Adoption Laws*, FAMILY EQUALITY COUNCIL, http://www.familyequality.org/get_informed/equality_maps/second-parent_adoption_laws [http://perma.cc/SUC5-LYFU] (last visited July 11, 2015). An earlier version of this site indicated that on September 21, 2014, the majority of states had barriers restricting the ability of LGBT people and same-sex couples from adopting. See *50 States of Adoption*, FAMILY EQUALITY COUNCIL, http://www.familyequality.org/get_informed/families_for_all/50_states_of_adoption [http://web.archive.org/web/20140921060330/http://www.familyequality.org/get_informed/families_for_all/50_states_of_adoption] (visited Sept. 21, 2014). Only nineteen states and D.C. permitted joint adoption by same-sex couples; only thirteen states and D.C. permitted second-parent adoption by same-sex couples; and only six states explicitly banned discrimination based on sexual orientation in foster care.

71. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

72. *Id.*

73. *Id.* at 806–07 (quoting *Fla. Dep't of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1215 (Fla. Dist. Ct. App. 1993), *aff'd in part*, 656 So. 2d 902, 903 (Fla. 1995)).

74. *Id.* at 811–17.

75. *Id.* at 810 (citing statutory preferences for certain factors in parents and placements).

76. *Id.* at 819.

more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.⁷⁷

Florida claimed that its “preference for adoptive marital families was based on the premise that the marital family structure is more stable than household arrangements and that children benefit from the presence of both a father and mother in the home.”⁷⁸ The court relied on no social science evidence—nor did it require that the Florida legislature base its premise in social science evidence—to support its finding that the ban on LGB parents was rationally related to the state’s interest in encouraging stable and nurturing environments for children. Instead, the court stated, “Given that appellants have offered no competent evidence to the contrary, we find this premise to be one of those ‘unprovable assumptions’ that nevertheless can provide a legitimate basis for legislative action.”⁷⁹

Six years after *Lofton* was decided, Florida was the last state to overturn its ban on LGB adoption.⁸⁰ Yet *Lofton* has never been formally overruled. Moreover, the same assumptions about the benefits of the marital form, the need for both male and female role models,⁸¹ and the inadequacy of same-sex couples’ parenting persist in states that informally prohibit same-sex couples from adopting.

A. “Outcomes for Children” as a Mask for Immutability Arguments

What began in Michigan as a case about the legal right for April and Jayne to parent each other’s legally adopted child or children evolved into a constitutional challenge to the voter-initiative that amended the Michigan Constitution to prohibit same-sex couples from marrying. Nine months after their initial complaint was filed, April and Jayne filed an amended complaint, in which they sought a declaratory judgment invalidating the “Michigan Marriage Amendment” under the Fourteenth Amendment’s equal protection clause.⁸²

Despite the change in legal strategy, children remained at the center of the debate. In opening statements at trial, Plaintiffs’ counsel framed the case around children: “This case is about marriage equality, and it’s also about the well being of

77. *Id.*

78. *Id.*

79. *Id.* at 819–20 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62–63 (1973)).

80. See CNN Wire Staff, *Florida Ends Ban on Gay, Lesbian Adoptions*, CNN (Oct. 22, 2010, 5:21 PM), <http://www.cnn.com/2010/US/10/22/florida.gay.adoptions/index.html> [<http://perma.cc/9FDD-495M>].

81. See Rosky, *Fear of the Queer Child*, *supra* note 12, at 651 (“In the ensuing decades, the role modeling fear has served as the primary justification for laws that target LGBT parents, such as statutes prohibiting lesbian and gay people from adopting.”).

82. Amended Complaint ¶ 26, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

children.”⁸³ Likewise, Defendants⁸⁴ opened their case by stating: “This case is about one thing, your Honor, the will of the people. The people of the State of Michigan have decided to retain the definition of marriage that encourages what’s best of [sic] children being raised by both a mom and dad.”⁸⁵

DeBoer is significant because it signaled—during a tidal wave of federal marriage litigation—a distraction from what should be the determinative issue: whether a person’s sexual orientation should be relevant to their ability to get legally married and be recognized by each state as such. The same-sex marriage ban defenders in *DeBoer* narrowed in on a peripheral issue, arguing that because marriage often involves children and children learn from their parents, there might be something less than ideal about an environment constructed by parents who are not of different sexes. But what separates same-sex parents from opposite-sex parents? The parents’ gender and sexuality. And to the extent that a parent’s gender or sexuality is relevant to a child’s upbringing, the defenders of the ban suggested that learning about or reproducing divergent gender identities and sexual identities as acceptable or even glorified creates an inferior environment to raise children.⁸⁶ On this ground, same-sex couples should not marry or raise children. The debate therefore transitioned into a question of whether same-sex parents do or do not reproduce or teach their children about gender and sexual orientation identities (i.e., the immutability of such traits). This debate is characterized as a “distraction” because, as previously discussed in Part I, courts no longer recognize immutability as a decisive factor in the level-of-scrutiny analysis.

The following sections summarize the testimony introduced by each side’s experts over the course of eight days of testimony related to the question of whether the Michigan statute survived rational basis review.⁸⁷ The parties were directed to focus their testimony on the rationales offered by State defendants: “(1) providing children with ‘biologically connected’ role models of both genders that are necessary to foster healthy psychological development; (2) avoiding the unintended consequences that might result from redefining marriage; (3) upholding tradition and morality; and (4) promoting the transition of ‘naturally procreated relationships into stable unions.’”⁸⁸ The first subsection summarizes the testimony about the justification itself, the existence or absence of the “No Difference Consensus.” The

83. Transcript of Record, *supra* note 1, vol. 1, pt. 1, at 3.

84. For clarity, “Defendants” will refer to the state defendants, Governor Richard Snyder and Attorney General Bill Schuette, who were represented by the same trial counsel. Defendant Lisa Brown, Oakland County Clerk, was represented separately. Brown took the position that she was “ready to move forward with the issuance of licenses to same sex couples.” *Id.* at 55.

85. *Id.* at 40.

86. *Id.* at 64–65 (discussing poorer outcomes among children raised by same-sex parents compared to children raised by opposite-sex parents, and including “[m]ore female sex partners among women [and m]ore male sex partners among men.”).

87. The Sixth Circuit precedent does not consider sexual orientation a suspect or quasisuspect classification. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006).

88. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014).

second subsection lays out a related issue—whether the “convenience studies” used to form the “No Difference Consensus” are reliable and an adequate basis to justify a finding that the Michigan law does not satisfy rational basis.

This summary should be read with two purposes in mind. First, although the explicit focus in *DeBoer* is on “outcomes for children,” the implicit focus was the immutability of sexual orientation. In short, Defendant’s argument is that the best environment to raise a child is one in which it is raised by a biologically related, married, mother and father. Claims about the benefits of biological parenting are code for dual-gender parenting, in which sex-differentiated gender roles are key, rather than a biological relationship to the child.⁸⁹ And, as Part III demonstrates, the desire for sex-differentiated gender role modeling is ultimately about the desire for straight role models for children. Second, the disagreement between experts about “outcomes for children” is a rabbit hole, distracting us from more pressing discussions of normative questions about the state’s interest in heterosexual children.

B. The “No Difference Consensus”

At trial, Plaintiffs primarily sought to prove the “No Difference Consensus”—the conclusion that there is no difference between outcomes for children of same-sex parents and children of opposite-sex parents.⁹⁰ Supported by professional organizations,⁹¹ Plaintiffs claimed the following:

There’s no scientific basis for concluding that lesbian mothers and gay fathers are unfit parents on the basis of their sexual orientation. Overall, the results of the research suggest that development, adjustment, and well being of children with lesbian and gay parents do not differ markedly than that of children raised by heterosexual parents.⁹²

Plaintiffs’ counsel responded to the possibility that the court would find the competing studies inconclusive, arguing that “[a]nother generation of Michigan’s children should not have to await the perfect longitudinal study before they have rights, before they can enjoy stability, before they can really count on that second parent.”⁹³

Defendants, on the other hand, sought to prove that children fare worse when raised by LBG parents, and that the social research science on LBG parenting does not reach such a consensus.⁹⁴ Regarding the first point, Defendants stated the following in their Opening Statement:

89. Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 92 (2013).

90. Transcript of Record, *supra* note 1, vol. 1, pt. 1, at 18.

91. *Id.* The organizations supporting same-sex parenting are the American Psychological Association, the American Academy of Pediatrics, the American Psychiatric Association, the American Medical Association, the American Academy of Child and Adolescence Psychiatry, the National Association of Social Workers, and the Child Welfare League of America.

92. *Id.* (citing language from the American Psychological Association).

93. *Id.* at 36.

94. One of Defendants’ experts was disqualified from testifying because he was not deemed to

Our experts are going to tell you that there are reasons for defining marriage as between one man and one woman that have nothing to do with animus. Our experts are going to explain to you why the “No Difference Consensus” that plaintiffs rely on is flawed. They will tell you that the studies relied on to come to this so-called “No Difference Consensus” suffer from three major deficiencies.⁹⁵

On the latter point, Defendants’ counsel stated, “we’re dealing with . . . a new and emerging area of social science. Same sex marriage has only been in existence in the United States since 2004. A decade, your Honor, is not enough time to determine with any certainty the affects that same sex marriage will have.”⁹⁶

Psychologist David Brodzinsky was Plaintiffs’ first witness and testified that there are no “discernable differences” between children who were raised by same-sex couples from those raised by opposite-sex couples.⁹⁷ Brodzinsky’s opinion was based on a number of studies that measured “child outcomes” based on long-term adjustment difficulties, which are predicted by a number of measures, including psychological adjustment, gender role behavior, peer relationships, school functioning, school progress, behavior and symptomatology, victimization, and conduct problems like illicit substance abuse and delinquency.⁹⁸ He testified that positive child adjustment was correlated with factors including the quality of parent-child relationship, the quality of the relationship between the parents, the characteristics and styles of parenting that parents adopt, the types of educational opportunities that children are afforded, the resources within the family, the resources outside of the family, and the mental health of the parents.⁹⁹

When asked whether there was any evidence that children need a male and female parent for positive child development, Brodzinsky replied, “The answer is no. It’s not the gender of the parent that’s the key. It’s the quality of parenting that’s being offered by whoever is there, husband or wife, two women, two men, a single

be an expert. Ed White, *Michigan’s Witness in Gay Marriage Trial Barred*, YAHOO! NEWS (Mar. 3, 2014, 12:11 PM), <http://news.yahoo.com/michigans-witness-gay-marriage-trial-barred-171156615.html> [<https://perma.cc/4RKX-TU93?type=image>].

95. Transcript of Record, *supra* note 1, vol. 1, pt. 1, at 43–44.

96. *Id.* at 42–43.

97. Transcript of Record, *supra* note 1, vol. 1, pt. 3, at 30. In his direct examination, Brodzinsky specifically stated the following:

My conclusions about the outcomes for children, based upon this research, is that children of gay and lesbian individuals show no discernable differences in outcomes and in general characteristics, developmental characteristics, compared to children of heterosexuals.

And the other conclusion that I reach is that the parenting qualities of gays and lesbians are no different than the parenting qualities of heterosexual individuals. And the couple relationships of those who are parenting children are no different in heterosexual families and gay and lesbian families.

Id. Brodzinsky is a developmental clinical and forensic psychologist, specializing in adoption and foster care, child development, nontraditional family life, parenting by same-sex couples, and parenting by gay and lesbian individuals. *Id.* at 1–5.

98. *Id.* at 26–27.

99. *Id.* at 10. Brodzinsky also testified extensively about the increased risk of maladjustment for adopted children, based on factors not related to biological ties. *Id.* at 40.

parent, as long as the factors that we listed up there [correlated with positive child adjustment] are present.”¹⁰⁰ Brodzinsky testified that, in his opinion, there are also no differences in outcomes when comparing donor-conceived children to children raised by their biological parents.¹⁰¹

Plaintiffs’ second expert sociologist Michael Rosenfeld likewise focused on the scholarly consensus within the discipline of sociology. He concluded, “children raised by same sex couples are at no disadvantage.”¹⁰² Based on his cross-sectional study of approximately seven hundred thousand primary school children from the 2000 Census data, Rosenfeld found the following:

[P]rogress through school for children raised by same sex couples is just as good as the progress through school for children raised by any other kind of family when you compare similarly situated families, that is, families with the same incomes, families with the same parental education and so on.¹⁰³

Rosenfeld’s research controlled for factors like parental income, parental education, the child’s relationship to the head of the household, race, and whether the child lives in a suburb or city.¹⁰⁴ Other studies that attempted to replicate his own study of children’s progress in school based on Census data came up with different conclusions because Rosenfeld’s study excluded children “whose family [situations] through school we didn’t know,” thus excluding, for example, nonbiological children of the head of household and children who had not been living with the same parents for the five years prior to the Census.¹⁰⁵ On cross-examination, Rosenfeld admitted that his study was limited by the imprecision of the Census in identifying same-sex couples, in identifying relationships between family members, and in measuring outcomes for children based only on progress through school.¹⁰⁶

Economist Douglas Allen, expert for the Defendants, identified Rosenfeld’s study using data collected from the U.S. Census as the first study that utilized a large random sample, calling it a “watershed paper.”¹⁰⁷ Allen and two others replicated Rosenfeld’s study.¹⁰⁸ Based on his replication of Rosenfeld’s study, Allen testified that he did not agree with the Rosenfeld results, criticizing Rosenfeld’s

100. *Id.* at 19.

101. *Id.* at 61.

102. Transcript of Record, *supra* note 1, vol. 1, pt. 4, at 51. Rosenfeld further testified that the consensus in the field of sociology was expressed through an Amicus Brief submitted by the American Sociological Association for *Perry* and *Windsor*. Michael Rosenfeld is an Associate Professor of Sociology at Stanford University, and he concentrates his work in family and marriage, children and child development, and marriage and divorce. *Id.* at 48.

103. *Id.* at 61.

104. *Id.* at 66–68.

105. Transcript of Record, *supra* note 1, vol. 2, pt. 1, at 35–37.

106. *Id.* at 39.

107. Transcript of Record, *supra* note 1, vol. 8, at 32.

108. *Id.*

interpretations of the statistical differences,¹⁰⁹ his sample restrictions,¹¹⁰ and his control methodology in the regression.¹¹¹ The only other large random sample study that Allen could identify was his own, using the Canada Census, which had an advantage over the U.S. Census because couples could self-identify as a same-sex couple.¹¹² Allen's analysis of the Canada census data showed that girls raised in gay or lesbian households have a decreased likelihood of graduating high school, but Allen found no statistically significant difference for boys raised in gay or lesbian households.¹¹³ Allen testified that the U.S. Census results and the Canada Census results were the only two large studies available that provide a reliable measure of actual difference in outcomes of children in same-sex households and children in opposite-sex households.¹¹⁴

Rosenfeld's conclusions were also criticized by Defense expert witness Joseph Price, an economist who testified that when he analyzed the data Rosenfeld used, he came to the conclusion that there is a difference in progress in school between children raised by same-sex couples versus children raised by opposite-sex parents.¹¹⁵ Price and Rosenfeld used different omitted groups when analyzing the same data set.¹¹⁶ Price found that there was a statistically significant level of difference in the data, indicating that a child raised by a same-sex couple is less likely to make normal progress in school and ultimately that the child is more likely to be held back.¹¹⁷ Price also testified that "the odds of a child in a heterosexual married household is about 15 percent higher that [sic] will be making normal progress

109. Allen's criticism was that Rosenfeld concluded that there was no difference between normal progression in children raised by same-sex households and children raised in opposite-sex households, when Allen instead suggested that there was no *statistical* difference. *Id.* at 44.

110. The "own child" restriction was a way in which Rosenfeld compared biological children of same-sex parents to biological children of opposite-sex parents, leaving out, for example, children who were not related to the head of the household and adopted children. *Id.* at 45–46. When Dr. Allen took into account the problems he found with Dr. Rosenfeld's sample restrictions, Dr. Allen found statistically significant differences. *Id.* at 49.

111. *Id.* at 34, 40–41. The last aspect of the study Allen criticized was the five-year residency restriction, which Rosenfeld employed as a "proxy variable" for a previous transition in the family, like divorce or separation. *Id.* at 47, 50. Allen opined that the five-year period was overinclusive—that families that happened to move would be excluded from the results. *Id.* at 47–48. To address this problem, Allen testified that his study took into consideration whether the family had moved in the last five years. *Id.* at 52.

112. *Id.* at 32, 56. The study based on the Canada Census, unlike Rosenfeld's study based on the U.S. Census, could only measure whether a child graduated from high school, not the child's progress through school. *Id.* at 59–60.

113. *Id.* at 61.

114. *Id.* at 39.

115. Transcript of Record, *supra* note 1, vol. 6, pt. 3, at 55–56.

116. *Id.* at 59. For example, Rosenfeld applied the "stability restriction," which asked each person in the household whether they were in the same household five years ago, whereas Price did not impose the same restriction. *Id.* at 80. Price criticized this restriction on the grounds that it dramatically reduced the precision of the estimates and also cut off two of the channels through which family structure affects child outcomes—relatedness and stability. *Id.* at 88.

117. *Id.* at 56.

through school than a child raised by a same sex couples [sic].”¹¹⁸ Responding to Price’s criticism, Rosenfeld testified that Price’s replication of Rosenfeld’s study exaggerated the results by at least fifty times.¹¹⁹

To justify the Michigan law, Defendants called on sociologist Mark Regnerus. Regnerus based much of his testimony on the results of his New Family Structure Study (NFSS), a large population-based study that called into question the “No Differences Consensus” with respect to the intact biological family, based on data collected from young adults between the ages of eighteen and thirty-nine.¹²⁰ The NFSS concluded that there are twenty-four differences out of forty chosen outcomes¹²¹ between children who grew up in intact, biological families, and children whose mothers had a same-sex relationship at some point during their childhood.¹²² There were fewer differences for children whose fathers had a same-sex relationship.¹²³ The majority of these respondents were children of failed heterosexual unions.¹²⁴ Some of the outcomes in which children whose parents had a same-sex relationship fared worse than children with parents with an intact, opposite-sex marriage were the increased likelihoods of being on public assistance or unemployment; having an affair while married or cohabiting; having a sexually transmitted infection; using marijuana; smoking tobacco; being arrested or pleading guilty to a nonminor offense; having a female sexual partner if the participant was a woman; and having a male sexual partner if the participant was a man.¹²⁵ Children whose parents had a same-sex relationship were identified as having a decreased likelihood of full-time employment, educational attainment, and safety or security.¹²⁶ Taking all of the studies done on outcomes for children and the limitations of these studies into consideration, Regnerus testified that no conclusions, and particularly not a “no difference” conclusion, should be drawn.¹²⁷ Regnerus testified that it “seems premature to say that something that involves a

118. *Id.* at 64–65.

119. Transcript of Record, *supra* note 1, vol. 1, pt. 4, at 87.

120. Transcript of Record, *supra* note 1, vol. 5, pt. 2, at 38–39.

121. *Id.* at 49. The forty outcomes were chosen out of between eighty and one hundred possible distinctive outcomes. These forty were chosen to be a broad representation of the child’s formative years. *Id.*

122. *Id.* at 40. Notably, Regnerus testified that the NFSS participants were asked “Did your mother ever have a romantic relationship with a member of the same sex?” and “Did your father ever have a romantic relationship with a member of the same sex?” *Id.* at 41.

123. *Id.* at 40.

124. *Id.* at 52.

125. *Id.* at 64–65.

126. *Id.*

127. *Id.* at 86–87.

reduced kinship,¹²⁸ meaning somebody is not a biological parent to the child, to claim there are no differences.”¹²⁹

Regnerus recognized the limitations of the NFSS, primarily that it was not a longitudinal study but was cross-sectional.¹³⁰ The study did not focus on parental same-sex orientation or sexual orientation identity.¹³¹ The NFSS did not ask about the child’s origins, meaning that it did not take into account whether the child was conceived using assistive reproductive technology.¹³² In summation, Regnerus testified that the ideal environment for children would be one in which a biological child is raised by their married mother and father, and that other environments are necessary concessions.¹³³

Regnerus was surprised by the severe and swift criticism of his study upon its release.¹³⁴ Earlier in the trial, Brodzinsky had criticized Regnerus’ study on the grounds that the adult children selected for the study were born into families with heterosexual parents, were not raised by same-sex parents, and generally had not lived with the parent and their same-sex partner.¹³⁵ The study compared the experiences of young adults of intact marital families to families involving “diminished kinship,” which Brodzinsky also criticized.¹³⁶ Similarly, Rosenfeld criticized Regnerus’ study on the basis that “[Regnerus] wasn’t actually analyzing the data for children who are really raised by same sex couples.”¹³⁷ Analyzing Regnerus’ data, Rosenfeld concluded that “what predicts the negative outcomes in these subjects is the number of transitions they went through as children.”¹³⁸

C. Convenience Sampling

Experts for both Plaintiffs and Defendants agreed that the majority of studies on LGB parenting used convenience sampling.¹³⁹ This type of sampling is often

128. The term “reduced kinship” refers to families that are not in the ideal situation in which a married mother and father in a stable relationship reside with their child, which includes adoptive and foster families, as well as an otherwise intact family where a parent is absent due to, for example, military service. *Id.* at 33–34.

129. *Id.* at 29.

130. *Id.* at 67. Put simply, a cross-sectional study is “a snapshot at one point in time,” and is not adequate for addressing causal claims. *Id.*

131. *Id.* The purpose of the study, according to Regnerus, was to study children’s parents’ relationship behavior rather than the parent’s self-identification of their sexual orientation. *Id.* at 72.

132. *Id.* at 69.

133. *Id.* at 113–14.

134. *Id.* at 94.

135. Transcript of Record, *supra* note 1, vol. 1, pt. 3, at 64.

136. *Id.* at 64–65.

137. Transcript of Record, *supra* note 1, vol. 1, pt. 4, at 98. Rosenfeld explained that Regnerus “was building into his comparison of family type a comparison between children who had not had any family transitions,” in which the mother and father were married to each other and stayed married for the duration of the child’s minority life, to “children who had many.” *Id.* at 101.

138. *Id.* at 100.

139. Transcript of Record, *supra* note 1, vol. 1 pt. 3, at 31–32 (testifying for Plaintiffs); Transcript of Record, *supra* note 1, vol. 6, pt. 3, at 46–47 (testifying for Defendants).

criticized because it is based on small sample sizes of self-selecting populations, which can mean that the results of the study are not representative of a larger population. If, as Defendants argued, the studies are only representative of a certain population (generally wealthy, white lesbians), then the results of the studies cannot be extrapolated to make claims about the outcomes for children raised by LGB parents in the general population.¹⁴⁰ Therefore, Defendants claimed, it was rational for the people of Michigan to provide the best environment for children, one in which they are raised by a biologically-related and married mother and father, achieved in part by excluding same-sex couples from marriage.¹⁴¹

Addressing this criticism, Brodzinsky testified that the methodology of convenience sampling is the “bread and butter” of psychology.¹⁴² Convenience studies allow researchers to look “inside the family”; they allow researchers to take into consideration the resources of parents, the style of parenting, the relationships parents have to children, and the relationship between the parents.¹⁴³

All four of Defendants’ experts criticized the use of convenience sampling. Regnerus suggested that random, nationally representative, longitudinal, and replicable studies would be a better base for major decisions like a state’s marriage ban.¹⁴⁴ Additionally, Regnerus suggested that this type of study is needed to conclude that no difference exists between outcomes for children raised by same-sex parents and children raised by opposite-sex parents.¹⁴⁵ Price called into question the limitations of convenience sampling, noting “it’s not clear whether you are actually going to learn something about the group you care about because you are going to end up with a group that selected themselves into your study.”¹⁴⁶ Allen reviewed sixty studies and concluded that they are not generalizable—the samples focused on lesbian parents instead of both gay and lesbian parents and were cross-sectional rather than longitudinal.¹⁴⁷ Lastly, Loren Marks, an expert in family studies, responded to the American Psychological Association’s (APA) position statement on lesbian and gay parenting.¹⁴⁸ Marks testified that the studies were not representative of the population in terms of cultural, ethnic, and economic diversity.¹⁴⁹ The studies were based on convenience samples made mostly of lesbian

140. Transcript of Record, *supra* note 1, vol. 7, pt. 1, at 82.

141. *Id.* at 41–43.

142. Transcript of Record, *supra* note 1, vol. 1, pt. 3, at 33, 36.

143. *Id.* at 36–37.

144. Transcript of Record, *supra* note 1, vol. 5, pt. 2, at 21–26. Regnerus opined that it is unwise to rely on nonprobability studies “to settle an intellectual about No Differences.” *Id.* at 111.

145. *Id.* at 36–37.

146. *Id.* at 46–47.

147. Transcript of Record, *supra* note 1, vol. 8, at 21, 23, 27. Dr. Allen did admit that there was a consensus reached in the study, because the researchers came to the same conclusion, but that the consensus was not warranted because it was based on fifty-five “preliminary” studies. *Id.* at 38.

148. Transcript of Record, *supra* note 1, vol. 7, pt. 1, at 64. Marks is an associate professor at Louisiana State University. *Id.* at 58–59. He describes family studies as a hybrid between psychology and sociology. *Id.*

149. *Id.* at 82–83.

mothers—white, well educated, and wealthy—but not gay fathers.¹⁵⁰ The studies also often used single-parent heterosexual homes as the group representing all heterosexual parents.¹⁵¹

On Friday, March 21, 2014, U.S. District Court Judge Bernard A. Friedman ruled that the ban was unconstitutional, sending almost three hundred same-sex couples to clerks' offices for marriage licenses over the weekend.¹⁵² The following Tuesday, however, the Court of Appeals for the Sixth Circuit issued a stay on marriage licenses for same-sex couples to allow the state to appeal the ruling.¹⁵³ On January 16, 2015, the Supreme Court of the United States granted certiorari for consolidated cases from the Sixth Circuit.¹⁵⁴

III. SHIFTING FROM OBJECTIVE TO NORMATIVE QUESTIONS ABOUT SEXUAL ORIENTATION

A comparison of the previous sections on the movement away from seemingly objective questions about the nature of adult sexual orientation in Part I and the movement towards objective questions about “outcomes for children” in the parenting context in Part II demonstrates that there is something unique at stake in the latter context. This Part asserts that children are the difference—children are gay rights opponents' redirected focus from the acceptability of same-sex relationships. Children are the proxy for anxieties about the production and reproduction of divergent sexual orientation identities, and they allow the debate about the immutability of sexual orientation to resurface. Rather than returning to the debate over the nature of sexual orientation, courts should dismiss these questions as irrelevant and instead center normative questions, drawing on the treatment of sexual orientation identity in the equal protection context.

A. *The Child as Proxy for Anxieties About Divergent Identities*

Professor Clifford Rosky has characterized the anxieties about divergent identities in children as the “fear of the queer child.”¹⁵⁵ Describing this fear, Rosky notes that it includes “fears that exposing children to homosexuality and gender variance will make them more likely to develop homosexual desires, engage in homosexual acts, form homosexual relationships, deviate from traditional gender

150. *Id.* at 84.

151. *Id.* at 86.

152. Order Granting Motion to Stay at 1, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341) (granting Michigan's motion to stay the district court's order pending final disposition of Michigan's appeal).

153. Kathleen Gray & Gina Damron, *Appeals Court Keeps Stay on Michigan Gay Marriages*, USA TODAY (March 25, 2014, 7:59 PM), <http://www.usatoday.com/story/news/nation/2014/03/25/michigan-gay-marriage/6883623> [<http://perma.cc/F4J8-8L9A>].

154. Oral arguments were heard on August 6, 2014. Maya Srikrishnan, *Federal Court Takes Up Gay Marriage Cases from 4 States*, L.A. TIMES (Aug. 6, 2014, 7:41 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-gay-marriage-20140806-story.html> [<http://perma.cc/7ATA-TFW2>].

155. Rosky, *Fear of the Queer Child*, *supra* note 12, at 608.

norms, or identify as lesbian, gay, bisexual, or transgender.”¹⁵⁶ Identifying this fear is useful for thinking about “child outcomes” because fear of the queer child is really a fear that sexual orientation could be transmitted. If a parent can pass on the trait of same-sex sexual orientation to a child who is otherwise not “born gay,” then the child’s sexual orientation is not innate, not immutable. This fear, then, is also a fear of the mutability of sexual orientation. Tracing the history of this fear from ancient Greece, through the nineteenth and twentieth centuries, to today,¹⁵⁷ Rosky notes its adaptability: “Over the course of centuries, the fear of the queer child has proved to be a remarkably nimble adversary—broad, subtle, and manifold.”¹⁵⁸ More recently, “[d]uring the 1990s, opponents of LGBT rights shifted away from explicit claims about children’s homosexuality, in favor of increasingly vague claims about children’s variance from traditional gender roles and identities.”¹⁵⁹ Rosky thus identifies the ways in which this fear of the queer child is often blanketed in vague claims that mask discussions about gender and sexuality variance.

Relying on family law cases, Rosky demonstrates how gay and lesbian parents are often stereotyped as either recruiters, “people who overtly encourage children to become homosexual by taking them to pro-gay events and exposing them to pro-gay media,” or as role models, “people who subtly encourage children to become homosexual by providing influential models of same-sex relationships.”¹⁶⁰ Unlike the overt stereotypes and criticisms made of parents in child custody disputes Rosky analyzes, Defendants in *DeBoer* implicitly alleged that Jayne and April, as role models, will provide suboptimal conditions for the rearing of their children—that Jayne and April are ill equipped to provide an environment in which their children can become straight boys and girls.

DeBoer illustrates what Rosky identifies—that opponents of LGBT rights continue to fear the transmission of sexual orientation and gender identity and use their concern for children as the proxy for this fear. Experts on both sides measured outcomes for children in terms of gender, sexual orientation, and sexual experience. For example, Plaintiffs’ expert Brodzinsky discussed children’s gender role behavior.¹⁶¹ Defendants’ expert Regenerus measured outcomes through children’s nonmonogamous relationships, same-sex relationships, and same-sex sexual experience.¹⁶² Specifically, Defendants argue that the “optimal environment” for raising children is one in which a child is raised by a married, biological mother and

156. *Id.* at 608.

157. *Id.* at 618–32.

158. *Id.* at 667.

159. *Id.* at 659.

160. Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 294 (2009).

161. Transcript of Record, *supra* note 1, vol. 1, pt. 3, at 26–27.

162. Transcript of Record, *supra* note 1, vol. 5, pt. 2, at 64–65.

father.¹⁶³ This argument presumes that mothers and fathers parent differently.¹⁶⁴ The mother and father are assumed to play complementary parenting roles, in which, for example, the mother teaches her child not only what it is to be a woman, but also that women are attracted to men. Therefore, gender-based role modeling arguments are not just about demonstrating proper gender roles to a child, but also how a proper gender identity is a straight identity.¹⁶⁵ Gender-based role modeling is, underneath the rhetoric about optimal environments and child outcomes, about the desire for parents to be straight role models.¹⁶⁶

The rationales underlying the Eleventh Circuit's decision in *Lofton* support the proposition that children are the unique factor catalyzing the reemergence of the immutability debate. The court began its discussion by distinguishing adoption from other contexts, like criminal law, government-benefits schemes, and access to public forums, because "the state's overriding interest is the best interest of the children."¹⁶⁷ To reiterate from Part II, the Eleventh Circuit then justified constitutionally suspect classifications made in the adoption context "[b]ecause of the primacy of the welfare of the child."¹⁶⁸ Opponents of same-sex marriage share this concern for children and the role of the state, and similarly use children to justify otherwise constitutionally intolerable classifications.

Unpacking Defendant's argument in *DeBoer* reveals an empirical question about sexual orientation and gender identity: how does a parent's sexual orientation influence a child's sexual orientation or gender identity, or are those identities biologically determined? In other words, is sexual orientation immutable? The process of answering these questions should be guided by the heightened scrutiny debate in the equal protection context.

B. Drawing on Lessons from the Heightened Scrutiny Debate

In the level-of-scrutiny debate described in Part I, courts treat immutability not as a question of objective evidence, but as a question of whether the

163. Transcript of Record, *supra* note 1, vol. 1, pt. 1, at 41–42; Transcript of Record, *supra* note 1, vol. 6, pt. 1, at 73–74.

164. Transcript of Record, *supra* note 1, vol. 6, pt. 3, at 97–99 (testifying that "mothers spend[] more time reading, talking, and doing house work with their children around the home," but that in contrast, fathers "tend to stress competition, challenge, initiative, risk taking, and independence").

165. Rosky describes this desire as "draw[ing] support from conventional assumptions about the process of sexual development—that before puberty, children have both homosexual and heterosexual tendencies, and that during puberty, they develop sexual relationships based on models provided by adults, especially parents." Rosky, *supra* note 160, at 295.

166. Professor William N. Eskridge posits that marriage litigation is the best place for gay rights advocates to challenge these assumptions: "From a liberal perspective, marriage as one man, one woman is the ultimate testing ground for full public acceptance that variations in sex, gender, and sexuality are all benign and not just tolerable." William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1352 (2010).

167. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 809–10 (11th Cir. 2004).

168. *Id.* at 810.

characteristic is so central to the person's identity as to make it abhorrent for the government to penalize a person for refusing to change it.¹⁶⁹ Likewise, courts should treat LGB parenting with a similar apathy for empirical questions about the transmission of sexual orientation and gender identity. Empirical questions are distracting—constantly changing in form, purpose, and nuance; they are therefore "hard to pin down."¹⁷⁰ Empirical questions on identity are also extremely difficult to settle, as evidenced by the testimonial mess of experts in the *DeBoer* trial.¹⁷¹ As a litigation strategy, focusing on empirical questions and expert testimony is a costly endeavor.

Gay rights advocates impede this paradigm shift when making broad conclusions about the immutability of sexual orientation identity. For example, counsel for Jayne and April opened trial by stating:

[Thirty years ago,] in the face of that kind of discrimination most lesbians and some gay men were trying to live straight lives. Like a lot of other people they were inspiring. They wanted the State's ideal family, too. They wanted the picket fence, the children. They wanted an intact family. Many lesbians and gay men were trying to function in heterosexual marriages. Predictably it didn't work. You can't choose your orientation. Now we know that, didn't then.¹⁷²

While grounded in doctrine, gay rights advocates' use of immutability fails as a rhetorical and political strategy, actively alienating those who do not experience their sexual orientation as immutable.¹⁷³ Instead, advocates should use the opportunity to expose these arguments about biological preferentialism and dual-gender parenting¹⁷⁴ for what they are: claims masking the desire for heterosexual role modeling. As Professor Douglas NeJaime suggests, "[b]iological preferentialism reinvents arguments steeped in stereotypes. It should not be smuggled in to courts' analysis as a veiled justification for laws that maintain the sex-based distinction in marriage and withhold marriage from same-sex couples."¹⁷⁵ Preferences for heterosexual role modeling invite debate about the immutability of sexual orientation and its relevance—again, a distraction from a normative debate. Instead,

169. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

170. Rosky, *supra* note 12, at 667. Describing the fear itself, Rosky says, "[l]ike the facts it describes, the fear is a moving target; it is hard to pin down and dispute on empirical grounds." *Id.*

171. *Id.* at 668. "In one situation after another, when the empirical strategy is deployed against indoctrination, role modeling, and public approval fears, it runs up against the inherent uncertainty and incompleteness of the factual record." *Id.*

172. Transcript of Record, *supra* note 1, vol. 1, pt. 1, at 32.

173. See Halley, *supra* note 30, at 528. "Immutability offers no theoretical foundation for legal protection of those gay men and lesbians who experience their sexual orientation as contingent, mutable, chosen. . . . An adequate legal theory should protect the entire social class on whose behalf it is articulated." *Id.*

174. See NeJaime, *supra* note 89.

175. *Id.* at 95.

advocates should recognize the replication of immutability arguments and appeal to its irrelevance in the level of scrutiny context.

Once LGB advocates move on from debating the transmission of sexual orientation from adult to child, they can focus on the more pressing issue—challenging the normative premise that children are better off straight.¹⁷⁶ As a practical matter, the resurfacing of immutability arguments is an obstacle for LGB parenting, delaying, for example, the possibility of easing the plight of foster care youth. As Sankaran and Gates' testimonies in the *DeBoer* trial revealed, barriers to LGB parenting only worsen the dire situation faced by foster youth.¹⁷⁷ By focusing on whether sexual orientation and gender identity *can* be transmitted, courts delay the more important question: what is wrong with sexual orientation and gender identity variance? Every delay to the resolution of that question keeps foster youth in the foster system when they would otherwise be fostered or adopted by LGB persons, couples, or families. In broader terms, the delay of this question keeps the children of LGB parents unsure of the legitimacy of their own families.

This normative question about sexual orientation and gender variance is pressing. Professor William N. Eskridge answers it with what he terms “benign variation,” which suggests “no gender role is inevitably ‘best’ for every woman or every man, and no sexual practice or orientation is inevitably ‘best for every person.’”¹⁷⁸ Eskridge argues that the federal and state governments are already well on their way to fully adopting the idea of benign variation, as evidenced by the proliferation of antidiscrimination laws.¹⁷⁹ From this forthcoming consensus, Eskridge predicts, the Supreme Court will adopt the benign variation perspective and “disable the state from insisting on heterosexuality.”¹⁸⁰ Beyond benign variation, Eskridge argues that sexual and gender variation should also be thought of as productive, leading to questions such as “What messages should we be sending the nation’s youth? What relationship forms work best for family needs?”¹⁸¹ These questions will not come to the forefront of the debate until questions about the immutability of sexual orientation, and particularly about the immutability of parents’ sexual orientation, are disregarded.

176. Rosky, *supra* note 12, at 667–68.

177. Gates testified that same-sex couples are roughly twice as likely to raise a foster child than their opposite-sex counterparts. Transcript of Record, *supra* note 1, vol. 3, at 31. Sankaran, a clinical professor of law at the University of Michigan Law School in the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic, testified that eliminating barriers to both members of a same-sex couple adopting or fostering a child by allowing the couple to marry would result in fewer children in the adoption and foster care systems. Transcript of Record, *supra* note 1, vol. 2, pt. 2, at 63–65.

178. Eskridge, *supra* note 166, at 1341.

179. *Id.* at 1350.

180. *Id.* at 1352.

181. *Id.* at 1360.

CONCLUSION

DeBoer demonstrates how anxieties about divergent sexual orientation and gender identities evolve and become more sophisticated as legal arguments. It is generally settled that whether sexual orientation is immutable is an unnecessary inquiry for purposes of heightened scrutiny under the equal protection clause. Yet in cases involving children and parenting, the relevance of immutability seems to reemerge, indicating that children are proxies for sexual orientation transmission fears. Instead of giving this fear credence, lawsuits involving LGB parenting should instead recognize and draw on the settlement of the immutability factor in level-of-scrutiny doctrine to make room for the more pressing normative debate about benign variation of sexual orientation and gender identities.

