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Social Science Studies and the Children of Lesbians and Gay Men: The Rational Basis Perspective

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SOCIAL SCIENCE STUDIES AND THE CHILDREN OF LESBIANS AND GAY MEN: THE RATIONAL BASIS PERSPECTIVE

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This Article seeks to determine whether the social science literature on the children of lesbians and gay men precludes the government from relying on child welfare considerations to justify same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the highly deferential rational basis test. Under that test, courts must uphold laws and regulations that have any conceivable basis of fact which is rationally related to a legitimate state interest. After comprehensively reviewing the social science literature, the Article concludes that the empirical evidence showing the lack of an association between parental sexual orientation and the psychological and social functioning of children is so conclusive and uniform that there is no conceivable factual basis for suggesting otherwise. The Article, however, also concludes that there are sufficient indicia of possible differences—between the children of lesbian/gay parents and those of heterosexual parents—in matters related to gender attitudes/interests and sexual orientation to satisfy the easy-to-meet factual component of the rational basis test. But this indicia of possible difference does not justify the differential treatment of lesbians and gay men in matters related to marriage and parenting because the government does not have a legitimate interest in either promoting specific gender attitudes and interests or in discouraging same-sex sexual orientations and conduct. At the end of the day, therefore, child welfare considerations constitute impermissible bases for the government's differential treatment of lesbians and gay men in matters related to marriage and parenting, even under the highly deferential rational basis standard.

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* Professor of Law and Judge Frederick Lacey Scholar, Rutgers University School of Law (Newark). I would like to thank Courtney Joslin, Clifford Rosky, and Michael Wald for reading a draft of this Article and providing extremely helpful comments and suggestions. I would also like to thank Charlotte Patterson for a lengthy telephone conversation during which she provided me with thoughtful guidance on some of the issues addressed here. All errors are, of course, my responsibility. This Article is part of an ongoing project exploring the role of procreation and child welfare in legal and policy debates involving same-sex marriage that will be published in book form by Oxford University Press.

INTRODUCTION

When the Supreme Court in 1967 struck down antimiscegenation statutes in *Loving v. Virginia*,[1] it did not reference the empirical literature on the children of interracial relationships.[2] Indeed, empirical questions regarding interracial families

[1] 388 U.S. 1 (1967).

[2] *See generally id.* The Court's unwillingness to address empirical questions about the children of interracial marriages is noteworthy given that the state contended in *Loving* that its antimiscegenation law was constitutional in part because of the harmful effects of interracial marriages on children. As the State's brief put it, in quoting from a decision from the Louisiana Supreme Court,

> [a] state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races

played no role in the Court's conclusion that antimiscegenation statutes violated the equality and liberty rights of individuals under the Constitution.[3]

In contrast to how the Supreme Court dealt with the interracial marriage question, contemporary courts have frequently turned to the social science literature on parenting by lesbians and gay men in assessing the constitutionality of same-sex marriage bans and parenting restrictions affecting sexual minorities. Some of these courts have relied on the empirical literature's findings to strike down the laws in question.[4] Other

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> and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Brief and Appendix on behalf of Appellee at 35, Loving v. Virginia, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931 at *35 (footnote omitted) (citation omitted) (quoting *State v. Brown*, 108 So. 2d 233, 234 (La. 1959), which quoted *Brown v. Board of Ed.*, 347 U.S. 483, 494 (1954)). The state added that "[i]f this Court . . . should undertake such an inquiry [about the wisdom of antimiscegenation laws], it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view." *Id.* at 41. I explore the role that concerns about interracial children played in the enactment and enforcement of antimiscegenation laws in Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2736–47 (2008).

[3] While the Supreme Court in *Loving* did not find it necessary to weigh in on the empirical questions surrounding interracial marriages, the California Supreme Court did just that when it struck down its state's antimiscegenation law on federal constitutional principles almost twenty years earlier. *See* Perez v. Lippold, 198 P.2d 17, 22–26 (Cal. 1948) (rejecting several empirical claims raised by the state, including that racially heterogeneous children were inferior to their racially homogenous parents, that whites were physically and mentally superior to blacks, and that interracial children inevitably suffered from social stigma and inferiority). For his part, the dissenting judge used two pages of his opinion to summarize the empirical studies that in his view supported the legislature's determination that interracial marriages were harmful to society and to children. *Id.* at 44–45 (Shenk, J., dissenting).

[4] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology."); Fla. Dep't of Children and Families v. Matter of Adoption of X.X.G., 45 So. 3d 79, 87 (Fla. Dist. Ct. App. 2010) (holding that sufficient evidence was in the record to support the trial court's conclusion that the social science "reports and studies find that there are no differences in the parenting of homosexuals or the adjustment of their children. . . . As a result, based on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise.") (emphasis omitted); *see also* Gill v. Off. of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D.Mass. 2010), *aff'd on other grounds*,

courts have reached the opposite conclusion, holding that the studies fail to undermine "commonsense premise[s]"[5] and "unprovable assumptions"[6] about the benefits to children of being raised by married heterosexual parents. From these courts' perspective, child welfare arguments that are linked to parental sexual orientation are sufficient to uphold the constitutionality of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men under the rational basis test.[7]

The question of which level of judicial scrutiny should be applied to sexual orientation classifications has been a highly contested one in equal protection litigation challenging the constitutionality of same-sex marriage bans and parenting restrictions affecting lesbians and gay men. Some courts have concluded that sexual orientation

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682 F.3d 1 (1st Cir. 2012) ("Since the enactment of [the Defense of Marriage Act], a consensus has developed among the medical, psychological, and social welfare communities that children raised by gay and lesbian parents are just as likely to be well-adjusted as those raised by heterosexual parents.").

5 Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

6 Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 819 (11th Cir. 2004).

7 *See, e.g.*, *id.* at 826 (concluding that it is not "irrational for the legislature to proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries"); Jackson v. Abercrombie, No. 11-00734 ACK-KSC, 2012 WL 3255201 at *42 (D. Ct. Haw. Aug. 8, 2012) ("[T]he rational basis standard only requires that the optimal parenting rationale be based on rational speculation that other things being equal, it is best for children to be raised by their married biological parents or with two parents of opposite genders. Here, the parties['] conflicting evidence establishes that the question 'is at least debatable.'"); *Hernandez*, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. . . . Plaintiffs, and amici supporting them, argue that the proposition asserted is simply untrue . . . . Perhaps they are right, but the Legislature could rationally think otherwise."); *id.* at 8 ("Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home."); Andersen v. King Cnty., 138 P.3d 963, 983 (Wash. 2006) ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive."); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 980 (Mass. 2003) (Sosman, J., dissenting) ("The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes?"); *id.* at 1000 (Cordy, J., dissenting) ("Working from the assumption that a recognition of same-sex marriages will increase the number of children experiencing . . . alternative [family structures], the Legislature could conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.").

classifications merit the application of heightened scrutiny,[8] while others have held that they should be assessed under the highly deferential rational basis test.[9]

This Article does not address the question of which level of judicial review is appropriate when assessing the constitutionality of regulations that make distinctions on the basis of sexual orientation. Instead, it seeks to determine whether the empirical literature's findings on the children of lesbians and gay men precludes the government from relying on claims regarding purported links between parental sexual orientation and the well-being of children to justify same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the rational basis test.[10]

Under that test, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[11] In addition, the rational basis test "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices,"[12] and it "do[es] not demand of legislatures scientifically certain criteria of legislation."[13]

Despite its clear deferential posture toward legislative choices, the rational basis test imposes at least two limitations on the government's authority to regulate. The first is a requirement that there be a "reasonably conceivable state of facts" that supports the differential treatment in question.[14] This requirement demands that laws be defended on grounds which have not been shown to be erroneous.[15] As the Supreme

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[8] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009).

[9] *See, e.g.*, *Lofton*, 358 F.3d at 817–18; Conaway v. Deane, 932 A.2d 571, 608 (Md. 2006); *Andersen*, 138 P.3d at 975–76.

[10] If the social science literature on the children of lesbians and gay men does not provide a sufficient ground for supporting same-sex marriage bans and parenting restrictions affecting lesbians and gay men under rational basis review, then it will also fail to justify those regulations under more rigorous forms of judicial scrutiny.

[11] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993); *see also* Vance v. Bradley, 440 U.S. 93, 111 (1979) (holding that, under the rational basis test, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker").

[12] *Beach Commc'ns*, 508 U.S. at 313.

[13] Ginsberg v. New York, 390 U.S. 629, 642–43 (1968) (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911)) (internal quotation marks omitted); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (judicial inquiries under the rational basis test, "where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it").

[14] *Beach Commc'ns*, 508 U.S. at 313.

[15] *See Carolene Prods.*, 304 U.S. at 154 ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that

Court has explained, "even the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation."[16]

A second limitation imposed by the rational basis test on state action is that the government, when it makes rights and benefits available to some but not others, must do so in the pursuit of a *legitimate* state interest.[17] The absence of such an interest requires courts to find the law in question constitutionally invalid.[18]

Social science studies on the children of lesbians and gay men are constitutionally relevant if they help support or undermine claims that allowing same-sex couples to marry, or permitting lesbians and gay men to serve as adoptive and foster care parents, has potential negative consequences for children. In assessing the constitutional relevance of the studies, however, courts have tended to lump them together, treating the empirical literature largely as an undifferentiated whole.[19] This is an incorrect approach because the social science studies, in seeking to determine whether there may

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those facts have ceased to exist."); *see also* Plyler v. Doe, 457 U.S. 202, 228 (1982) (rejecting government's factual claim that a law which prohibited undocumented children from attending public schools satisfied the rational basis test because it helped save money given that "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc").

[16] Heller v. Doe, 509 U.S. 312, 321 (1993).

[17] *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2009). A third limitation imposed by the rational basis test is that there must be a rational relationship between the government's ends and the means it has chosen to achieve them. *See* Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (rational basis review "requires only that the classification rationally further a legitimate state interest").

[18] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633–36 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973). Some courts and commentators have argued that the Supreme Court has applied a form of heightened rational basis review in cases involving "historically disadvantaged or unpopular" groups like lesbians and gay men. *See, e.g.*, Massachusetts v. Dep't of Health & Human Servs., 682 F.3d 1, 10 (1st Cir. 2012); *see also* Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 306–28 (2011) (arguing that different courts have applied different versions of the rational basis test, one deferential and the other more demanding, in gay rights cases); Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in* Perry v. Brown, 64 STAN. L. REV. ONLINE 111, 111 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/64-SLRO-111.pdf (arguing that the federal appellate court in *Perry v. Brown* "grounded [its] analysis in an application of heightened rational basis scrutiny[ ] derived from *Romer v. Evans*"). Even if this claim is correct, I do not, in this Article, deploy a heightened form of rational basis review; instead, my analysis tracks the traditional (and highly deferential) understanding of the rational basis test.

[19] *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 825 (11th Cir. 2004) (discussing social science literature on parenting by lesbians and gay men without making distinctions based on the studies' differing subject matters); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 980 (Mass. 2003) (Sosman, J., dissenting) (same); *id.* at 999–1000 (Cordy, J., dissenting) (same).

be associations (or correlations) between parental sexual orientation and child outcomes, have investigated distinct areas of child development.[20]

This Article is the first law review article that divides the social science literature on the children of lesbians and gay men into three distinct subject areas of investigation.[21] The first area addresses the children's psychological and social functioning, including matters such as behavioral adjustment, emotional well-being, self-esteem, school performance, and peer relations.[22] The second area consists of the gender attitudes and interests of the children of lesbians and gay men.[23] Finally, the third area relates to the sexual orientation of those children.[24]

The legal literature has not only failed to make distinctions among the empirical studies on lesbian and gay parents based on the subject matters they investigate—it has also failed to address comprehensively the social science findings on the children of lesbians and gay men while exploring their constitutional implications under the rational basis test.[25] This lack of attention by legal commentators is surprising given

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[20] It is important to distinguish between association and causation. The existence of an association between one variable and another does not establish that one *caused* the other. *See* Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 616–17 (2009). Although it may be possible to appropriately infer causation when the evidence of association from many different studies is clear and convincing, individual social science studies of child outcomes cannot, by themselves, usually establish causation; as a result, such studies generally limit themselves to searching for associations. Regardless, it is clear that under the highly deferential rational basis test, the government would not have to prove causation between parental sexual orientation and differences in child development. The showing of an association between the two would be enough to meet the easy-to-satisfy factual component of that test.

[21] The studies on lesbian and gay parents address additional areas of investigation. Several studies, for example, have investigated the reasons why some lesbians and gay men choose to become parents. *See, e.g.*, Jerry J. Bigner & R. Brooke Jacobsen, *The Value of Children to Gay and Heterosexual Fathers*, 18 J. HOMOSEXUALITY 163 (1989); Henny M.W. Bos et al., *Planned Lesbian Families: Their Desire and Motivation to Have Children*, 18 HUM. REPROD. 2216 (2003). Another set of studies has investigated possible differences between lesbian and heterosexual parents on measures such as commitment to, and emotional involvement with, their children. *See* sources cited *infra* note 120. Other studies have researched the internal family functioning of lesbian households, including the division of household labor. *See, e.g.*, Raymond W. Chan et al., *Division of Labor Among Lesbian and Heterosexual Parents: Associations with Children's Adjustment*, 12 J. FAM. PSYCHOL. 402, 414–15 (1998); Megan Fulcher et al., *Individual Differences in Gender Development: Associations with Parental Sexual Orientation, Attitudes, and Division of Labor*, 58 SEX ROLES 330, 334 (2008). Although these are all important areas of research, my focus in this Article is on studies that have sought to measure child outcomes directly. I also focus on quantitative (as opposed to qualitative) studies that use statistical methods to compare the children of lesbian and gay parents with those raised by heterosexual parents.

[22] *See infra* Part I.A.

[23] *See infra* Part II.A.

[24] *See infra* Part III.A.

[25] The articles in legal journals that seek to provide comprehensive reviews of the social science literature on lesbian and gay parenting are several years old. *See, e.g.*, Carlos A. Ball

the important role that the social science literature has played in courts' assessment of the constitutionality of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men.[26] This Article seeks to fill this void in the legal literature in two ways. First, it provides a comprehensive review of the empirical literature on the children of lesbians and gay men to date, divided into the three subject areas of investigation already noted: psychological and social functioning (Part I), gender attitudes and interests (Part II), and sexual orientation (Part III).

Second, this Article explores the interplay between the empirical literature's findings on the children of lesbians and gay men and the proper application of the rational basis test in assessing the constitutionality of same-sex marriage bans and of parenting restrictions affecting sexual minorities.[27] I argue in this Article that the correct application of the rational basis test prevents the government from relying on child welfare considerations to prohibit same-sex couples from marrying and to restrict the ability of individuals to serve as adoptive and foster care parents based on their sexual orientation.

As I explain in Part I, the social science evidence showing a lack of an association between parental sexual orientation and the psychological and social functioning of children is so conclusive and so uniform, that efforts to impose marriage and parenting restrictions on lesbians and gay men based on concerns about such functioning are irrational (and therefore unconstitutional) because they lack a defensible factual foundation.[28]

I also, in Part I, respond to critics who contend that the social science studies on the children of lesbian and gay parents are unreliable because they are methodologically flawed.[29] In addition, I explain why a recent study which claims that its findings undermine the consensus among social scientists regarding the lack of an association between parental sexual orientation and child outcomes[30] does not justify the differential treatment of lesbians and gay men in matters related to marriage and parenting, even under the rational basis test.[31]

I end Part I by addressing the contention made by some critics that the social science evidence shows that being raised by married mothers and fathers who are

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& Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 279–308; Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 134–46 (2008); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 393–400 (2006); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 853–57. In addition, none of these articles explore the interplay between the rational basis test and the empirical literature on lesbian and gay families.

26 *See supra* notes 4–7 and accompanying text.

27 *See infra* Parts I.B., II.B & III.B.

28 *See infra* Parts I.A & I.B.

29 *See infra* Part I.C.

30 Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings From the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012).

31 *See infra* Part I.D.

biologically related to their children is the optimal family environment for children. The critics then claim that this (purported) optimality is enough to establish the rationality of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men.[32] As I will explain, the social science literature does not support the optimality argument's empirical claims.[33]

The clear absence of empirical findings showing differences in the psychological and social functioning of children of lesbians and gay men, when compared to the children of heterosexual parents, means that the contention that parental sexual orientation is associated with such functioning cannot be defended factually, and thus fails to satisfy the rational basis test. As I explain, however, the same cannot be said about the gender attitudes and interests (Part II) and the sexual orientation (Part III) of the children of lesbians and gay men. The empirical evidence does *not* permit us to conclude that there is a clear association between the sexual orientation of lesbian and gay parents and both the gender attitudes/interests and the sexual orientation of their children. At the same time, however, the empirical evidence contains sufficient indicia of possible differences in these two areas to satisfy the easy-to-meet factual component of the rational basis test.[34] The empirical literature, in other words, prevents us from concluding that there is no "reasonably conceivable state of facts" showing differences between the children of lesbians and gay men on the one hand and those of heterosexuals on the other in matters related to gender interests/attitudes and sexual orientation.[35]

Specifically, as I explain in Part II, a minority of studies suggest that the daughters of lesbian mothers evince attitudes and engage in play and school activities that are less consistent with traditional gender expectations when compared to the daughters of heterosexual parents.[36] Similarly, as I explain in Part III, a minority of studies suggest that the daughters of lesbian mothers express a greater interest in participating in same-sex relationships than do the daughters of heterosexual parents.[37]

The existence of possible differences in these matters is enough to satisfy the first requirement of the rational basis standard, that is, that there be a reasonably conceivable factual basis for the view that some of the ways in which the children of lesbian and gay parents develop may be different from how the children of straight parents develop. The mere existence of possible differences, however, is not enough to satisfy the rational basis test's second—and more normative—requirement, that is, that the differences in question have a rational relationship to a *legitimate* state interest.

It is important, at this early stage, to emphasize a crucial distinction between—what I am here calling—the first category of social science studies on parenting by lesbians and gay men (addressing children's psychological and social functioning)[38] and

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32 *See infra* Part I.E.

33 *See infra* Part I.E.

34 *See infra* Parts II.B. & III.B.

35 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

36 *See infra* notes 331–32, 347, 359, 369–71 and accompanying text.

37 *See infra* notes 451–52, 467 and accompanying text.

38 *See infra* Part I.A.

the second and third categories (addressing children's gender attitudes/interests[39] and sexual orientation,[40] respectively). The State clearly has a legitimate interest in seeking to promote the psychological and social functioning of children. Or, to be more specific, the State clearly has a legitimate interest in implementing policies that, for example, promote children's behavioral adjustment and academic performance. Regarding the first category of social science studies on the children of lesbian and gay parents, in other words, there can be no reasonable disagreement with the normative claim that a higher psychological and social functioning in children is better than a lower one.

In contrast, the normative implications of possible differences among children depending on parental sexual orientation found in the second and third categories of studies are much more likely to be subject to dispute. Whether particular outcomes found in the second and third categories of studies are deemed positive or negative depends largely on differing normative judgments about what is best for children. Social conservatives who value traditional gender roles, for example, may be troubled by the fact that some of the social science studies suggest that the daughters of lesbian mothers abide by fewer traditional gender expectations than do the daughters of heterosexual parents.[41] Similarly, social conservatives who believe that having a same-sex sexual orientation is problematic may be troubled by the fact that some of the studies indicate that the daughters of lesbian mothers express a greater interest in engaging in same-sex sexual relationships than do the daughters of heterosexual parents.[42] Social progressives, on the other hand, may contend that neither of these correlations—even if they were someday conclusively shown to exist—justifies social concern.

It may seem at first blush that these types of normative disagreements immunize marital bans and parenting restrictions affecting lesbians and gay men from constitutional challenge under the highly deferential rational basis test. This is because it may be argued that legislatures, and not courts, should have the final word on how to resolve policy disagreements that pertain to whether certain empirical findings are normatively problematic.[43] From this perspective, if the legislature, for example, believes that society is better off when individuals behave according to certain gender norms, or when individuals engage in different-sex sexual conduct as opposed to in same-sex sexual conduct, then it would be justified in enacting marriage bans and parenting restrictions

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39 *See infra* Part II.A.

40 *See infra* Part III.A.

41 *See, e.g.*, Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbigay" Parenting*, 23 QUINNIPIAC L. REV. 541, 559–60 (2004) (expressing concern about the gender development of the children of lesbians and gay men).

42 *See generally* George W. Dent, Jr., *Straight Is Better: Why Law and Society May Justly Prefer Heterosexuality*, 15 TEX. REV. L. & POL. 359 (2011) (arguing that society is better off when it promotes heterosexuality and discourages homosexuality).

43 *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004) (expressing unwillingness to interfere with legislative discretion concerning the "ongoing public policy debate" on the "compatibility of homosexual conduct with the duties of adoptive parenthood").

based on the indicia of possible difference—suggested by a minority of the social science studies—in the gender attitudes/interests and sexual orientation of the children of lesbians and gay men when compared to those of straight parents.

I argue in this Article, however, that constitutional principles limit the ability of the government to institute policies based on normative assessments regarding the possible differences in gender attitudes/interests and sexual orientation between the children of lesbian/gay parents and those of heterosexual parents. Specifically, I explain in Part II that the State does not have a legitimate interest in encouraging individuals to behave in certain ways (or to pursue certain preferences) based on their gender.[44] Government policies aimed at promoting particular gender-based attitudes and interests are constitutionally illegitimate because they are based on assumptions about what is appropriate or best for individuals based on their sex.[45]

Similarly, I explain in Part III that the State does not have a legitimate interest in attempting to influence the sexual orientation of individuals, or in discouraging individuals (including adolescents) from engaging in same-sex as opposed to different-sex sexual conduct.[46] Government policies that are aimed, in effect, at discouraging homosexuality are constitutionally illegitimate because they are based on social disapproval of lesbians and gay men.[47]

At the end of the day, therefore, the social science literature does not allow the government to defend same-sex marriage bans and parenting restrictions affecting lesbians and gay men based on child welfare considerations, even under the highly deferential rational basis test. The part of that literature which addresses psychological and social functioning fails in this regard because it deprives the government of a conceivable factual basis for the notion that there are differences in such functioning between the children of lesbian/gay parents and straight parents. In addition, while the empirical literature on the gender interests/attitudes and sexual orientation of children does provide the government, for purposes of the easy-to-satisfy rational basis test, with the necessary minimum empirical indicia of possible differences, the State lacks a legitimate interest in setting policy based on those differences.

Some gay rights opponents have taken the position that *any* evidence of difference between the children of lesbians and gay men and those of heterosexuals is enough to justify the differential treatment of lesbian and gay individuals in matters related to marriage and parenting.[48] Some courts have followed suit by treating the social science

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[44] *See infra* Part II.C.

[45] *See infra* Part II.C.

[46] *See infra* Part III.C.

[47] *See infra* Part III.C.

[48] *See, e.g.*, Wardle, *supra* note 41, at 559–60. I have elsewhere urged gay rights proponents not to allow their opponents to frame the debate over the social science literature on the children of lesbians and gay men as one that equates findings of *difference* with ones of harm. *See* Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 706–20 (2003).

evidence as an undifferentiated whole, relying on any possible findings of difference to uphold same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the rational basis test.[49] The principal aim of this Article is to show that constitutional principles require courts to make distinctions among the different categories of findings in the social science literature on the children of lesbians and gay men. It turns out that, as a constitutional matter, not all differences in this area are equal.

I. THE PSYCHOLOGICAL AND SOCIAL FUNCTIONING OF CHILDREN

The primary focus of the social science literature on the children of lesbians and gay men has been on their psychological and social functioning. These studies have looked at measures such as behavioral problems, emotional well-being, self-esteem, school performance, and peer relations. In the first section below, I summarize the studies' findings.[50] I then assess those results from the perspective of the rational basis test and argue that the empirical literature's findings are so consistent and so uniform in failing to find differences in the psychological and social functioning of the children of lesbian and gay parents when compared to those of heterosexual parents, that they render claims to the contrary factually unsupportable.[51] I also explain why the (1) studies' methodologies and approaches, (2) findings of a recent study purporting to show negative outcomes among children of lesbian/gay parents, and (3) so-called family optimality considerations fail to raise reasonable doubts about the empirical literature's findings.[52]

A. Summary of the Social Science Studies

The vast majority of children raised by lesbians and gay men in the 1970s and 1980s—during the early days of parenting by open lesbians and gay men—were born to heterosexual marriages that later dissolved.[53] Not surprisingly, therefore, the first published social science studies on the children of sexual minorities involved this population. One of the earliest studies, published in 1981, was led by Martha Kirkpatrick.[54] The Kirkpatrick study compared the psychological functioning of twenty young children raised by lesbian mothers with that of twenty young children raised by single heterosexual mothers.[55] A psychiatrist interviewed each mother about the developmental

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[49] *See supra* note 19 and accompanying text.

[50] *See infra* Part I.A.

[51] *See infra* Part I.B.

[52] *See infra* Parts I.C., I.D. & I.E.

[53] CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 7–8 (2012).

[54] Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545 (1981). The Kirkpatrick study also investigated the children's gender attitudes and interests. I discuss that part of the study in *infra* notes 321–24 and accompanying text.

[55] Kirkpatrick et al., *supra* note 54, at 545–46.

history of her child.[56] In addition, a psychologist and child psychiatrist evaluated each child without knowing the sexual orientation of his or her mother.[57] The researchers did not find differences in the rates of emotional problems between the two groups of children.[58]

Two years later, Susan Golombok and a team of British researchers published the results of their study comparing thirty-seven children raised by lesbian mothers with thirty-eight children raised by heterosexual single mothers.[59] After interviewing the mothers and the children, the researchers found that "only a small minority of children showed significant psychiatric problems" and that of those, a majority were being raised by heterosexual parents.[60] The study also found that there were no differences in the quality of peer relations between the two groups of children, "meaning that they were [equally] able to make and maintain relationships with people of their own age."[61]

The researchers followed up on their study twelve years later, when the children in the original study were young adults.[62] After interviewing the young men and women, the researchers found no differences in either the levels of anxiety or depression between the children of lesbian mothers and those of heterosexual mothers.[63]

In 1989, Sharon Huggins published a study that investigated differences in self-esteem between eighteen adolescents raised by divorced lesbian mothers and the same number by divorced heterosexual mothers.[64] Relying on a widely used questionnaire to measure self-esteem,[65] Huggins found no differences in the self-esteem scores between the two groups of adolescents.[66]

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[56] *Id.* at 546.

[57] *Id.*

[58] *Id.* at 547.

[59] Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551, 554 (1983). As with the Kirkpatrick study, "nearly all the children [in both groups] had been born into a heterosexual household." *Id.* at 569. The Golombok study also investigated the children's gender attitudes and interests. I discuss that part of the study in *infra* notes 325–27 and accompanying text.

[60] Golombok et al., *supra* note 59, at 565.

[61] *Id.* at 567.

[62] *See* Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian Families*, 65 AM. J. ORTHOPSYCHIATRY 203 (1995). The researchers also studied the young adults' sexual orientation, *id.* at 210–11, and then published a separate report on those findings. *See* Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings From a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3 (1996). I discuss those results in *infra* notes 444–52 and accompanying text.

[63] Tasker & Golombok, *supra* note 62, at 211.

[64] Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, 18 J. HOMOSEXUALITY 123, 126 (1989).

[65] The Huggins study relied on Stanley Coopersmith's Self-Esteem Inventory (SEI). *Id.* at 124.

[66] *Id.* at 131.

Beginning around the middle of the 1980s, a growing number of lesbians started coming out of the closet *before* having children.[67] Many of these women conceived children through donor insemination, and then proceeded to raise children, either by themselves or with female partners, without fathers from the very beginning.[68] As the number of these so-called planned lesbian families grew, social scientists turned their attention to them. The first study of children raised by lesbians in fatherless homes from the beginning was conducted by Charlotte Patterson and published in 1994.[69] Patterson interviewed sixty-six mothers in the San Francisco area, most of whom identified themselves as lesbian (with the remainder self-identifying as bisexual), as well as their thirty-seven children, aged four through nine.[70] Patterson found no differences in the rates of behavioral problems or social competence between the children in the study and the results of national studies of children of the same age.[71] The children in the Patterson study did report higher levels of stress,

> but they also reported a greater overall sense of well-being than did children of heterosexual mothers. In other words, children of lesbian mothers said that they more often felt angry, scared, or upset but also said that they more often felt joyful, content, and comfortable with themselves than did children of heterosexual mothers.[72]

Since most of the children in the early days of lesbian parenting were conceived through heterosexual relationships that later dissolved, it made sense for the control groups in the early studies to be comprised of children who were being raised by single heterosexual mothers following the dissolution of their relationships with the fathers.[73] In this way, the studies were able to control for the effects of familial dissolution on child development. As the number of children in planned lesbian families headed by couples grew, however, researchers began using control groups comprised of children raised by heterosexual couples. In 1995, David Flaks and a team of researchers published a study that relied on questionnaires completed by parents and teachers, as well as on standard evaluation tests of children, to compare the cognitive functioning and behavioral adjustment of fifteen children of lesbian couples conceived through donor insemination with fifteen children raised by heterosexual couples conceived in the same

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67 *See* BALL, *supra* note 53, at 83–85.

68 *Id.*

69 *See* Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity*, *in* LESBIAN AND GAY PSYCHOLOGY 156 (Beverly Greene & Gregory M. Herek eds., 1994).

70 *Id.* at 159–60.

71 *Id.* at 166–67.

72 *Id.* at 168 (citation omitted). Patterson suggested that one possible explanation for these findings was that the children of lesbian mothers felt more comfortable expressing emotional experiences (whether positive or negative) than did the children of heterosexual parents. *Id.* at 170.

73 *See, e.g.*, Huggins, *supra* note 64, at 126; Kirkpatrick et al., *supra* note 54, at 545–46.

way.[74] The researchers found no cognitive or behavioral differences between the two groups of children.[75]

In 1997, a Dutch research team led by Anne Brewaeys published the results of a study of thirty families headed by lesbian couples.[76] Each family had a child conceived through donor insemination who was between the ages of four and eight.[77] There were two control groups: one consisting of thirty-eight heterosexual families who conceived through donor insemination and thirty heterosexual families who conceived through sexual intercourse.[78] After conducting in-depth interviews of both parents and children,[79] the researchers did not find any differences in the emotional and behavioral adjustment of the children of lesbian mothers when compared to the children in either group of heterosexual families.[80] The children of lesbian mothers also had similar adjustment scores when "compared to a large Dutch population sample. Thus no evidence was found for the supposition that father absence would lead to increasing emotional problems among children."[81]

Several years later, the Dutch researchers followed up with twenty-four of the children of lesbian mothers in the original study and compared them to twenty-four children raised in heterosexual families.[82] After interviewing the children, and gathering data collected from questionnaires completed by parents and teachers,[83] the researchers found that "[t]here were no significant differences between the two groups on the following scales: global self-esteem, social acceptance, school, sports, physical appearance, behaviour, [and] friendship."[84]

The British researcher Susan Golombok who, as already noted, led one of the earliest studies of lesbian families in the 1980s,[85] led a different team of researchers

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[74] David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 DEVELOPMENTAL PSYCHOL. 105, 107–08 (1995).

[75] *Id.* at 109.

[76] Anne Brewaeys et al., *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349, 1349 (1997).

[77] *Id.* at 1351.

[78] *Id.*

[79] *Id.* at 1352–53.

[80] *Id.* at 1355.

[81] *Id.* at 1356. The study also investigated the children's gender attitudes and interests. I discuss that part of the study in *infra* notes 333–35 and accompanying text.

[82] K. Vanfraussen et al., *What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 J. REPROD. & INFANT PSYCHOL. 237, 239–40 (2002).

[83] *Id.* at 240–41.

[84] *Id.* at 247. The results indicated that the teachers believed that the children in lesbian families showed greater attention problems than the children in heterosexual households. *Id.* at 248. The same attention-related discrepancy was not found in the questionnaires filled out by the parents and the children. *Id.*

[85] *See supra* notes 59–61 and accompanying text.

in a study, published in 1997, of children raised by lesbian mothers and conceived through donor insemination.[86] A total of thirty lesbian mother families participated in this study;[87] half of the lesbian mothers were single and the other half lived with female partners.[88] The young children of lesbian mothers (with a mean age of six) were compared to a group of young children raised by forty-one single heterosexual mothers and another group raised by forty-one coupled heterosexual parents.[89] Combining interviews of the mothers with testing of the children,[90] the researchers found no differences in the rates of emotional and behavioral problems between the three groups.[91] The researchers, however, did find differences in two other measurements: first, the children raised in homes without fathers felt more secure in their attachment to their parents;[92] second, children in those homes perceived themselves to be less cognitively competent.[93] There were, however, no significant differences in either of these measures between the children of lesbian mothers and those of single heterosexual mothers, meaning that the differences were not associated with parental sexual orientation.[94]

Golombok and her colleagues followed up with the same children six years later, when they were around twelve years old.[95] After interviewing the parents and their children, and after collecting data through questionnaires completed by both,[96] the researchers found no differences between the three groups of children in socioemotional development, school adjustment, or peer relations.[97]

In 1998, a research team headed by Raymond Chan published a study of lesbian and heterosexual parents (both singles and couples) who relied on the services of a California sperm bank to conceive children.[98] A total of eighty families participated in the study.[99] Their breakdown was as follows: thirty-four families headed by lesbian couples; twenty-one by single lesbians; sixteen by heterosexual couples; and nine by

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86 Susan Golombok et al., *Children Raised in Fatherless Families From Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. CHILD PSYCHOL. & PSYCHIATRY 783 (1997).

87 *Id.* at 784.

88 *Id.*

89 *Id.* at 785.

90 *Id.* at 786.

91 *Id.* at 787–88.

92 *Id.*

93 *Id.*

94 *Id.*

95 Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families From Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 1407, 1409 (2004).

96 *Id.* at 1410.

97 *Id.* at 1413–15. The study also investigated the children's gender attitudes and interests. I discuss that part of the study in *infra* notes 337–41 and accompanying text.

98 Raymond W. Chan et al., *Psychosocial Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 444 (1998).

99 *Id.* at 445.

heterosexual single mothers.[100] The researchers asked parents and the children's teachers to complete questionnaires.[101] Not surprisingly, the study found that the "children exhibited more behavior problems when parents reported more parenting distress and more dysfunctional parent-child interactions."[102] However, there were no differences in behavioral problems as correlated to parental sexual orientation.[103]

In 1999, a research team headed by Tamar Gershon studied how seventy-six adolescent children of lesbian mothers coped with stigma and how it affected their self-esteem.[104] After collecting information from the adolescents through interviews and questionnaires,[105] the researchers found both that the adolescents perceived stigmatization because of having lesbian mothers and that "[m]any of them have developed specific means of coping, and overall, have good self-esteem when compared to the norms."[106] The researchers also found that the adolescents who disclosed their mothers' sexual orientation to others "had higher self-esteem with regard to their ability to form close friendships than those who practiced less disclosure."[107]

In the late 1990s, Susan Golombok and a team of British researchers used data from the Avon Longitudinal Study of Parents and Children (ALSPAC) to identify lesbian mothers.[108] "The ALSPAC enrolled any woman expecting a baby between April 1, 1991, and December 31, 1992, who was resident in Avon, a clearly defined area of southwest England" with a population of one million.[109] Golombok and her team studied the children in thirty-nine lesbian-mother families and compared them to two control groups (also drawn from the ALSPAC), one consisting of seventy-four two-parent heterosexual families and the other of sixty families headed by single heterosexual mothers.[110] The researchers, after conducting interviews of the parents and the children's teachers,[111] found "that children reared by lesbian mothers appear to be functioning well and do not experience negative psychological consequences arising from the nature of their family environment."[112]

A research team headed by Beth Perry turned to the same families identified through ALSPAC to study the play narratives of seven-year-old children in order to

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[100] *Id.*
[101] *Id.* at 446–47.
[102] *Id.* at 449.
[103] *Id.* at 448.
[104] Tamar D. Gershon et al., *Stigmatization, Self-Esteem, and Coping Among the Adolescent Children of Lesbian Mothers*, 24 J. ADOLESCENT HEALTH 437 (1999).
[105] *Id.* at 439.
[106] *Id.* at 444.
[107] *Id.* at 443.
[108] Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20 (2003).
[109] *Id.* at 22.
[110] *Id.*
[111] *Id.* at 23.
[112] *Id.* at 30.

assess the social and emotional development of the children of lesbian mothers as compared to a group of children raised by heterosexual parents.[113] Knowing that the more positive the stories told by children through their play narratives, the more secure they feel,[114] the researchers found that the narratives of children in both groups

> represented their mothers as equally positive and showed their mothers to have similar levels of discipline. Similarly, children from lesbian-mother families showed no more aggressive/negative emotion themes within the narratives, had no less coherent story narratives, and had just as favorable endings to their stories as children from heterosexual families.[115]

The researchers concluded that lesbian mothers' children felt as securely attached to their parents as did the children of heterosexuals[116] and that they did "not experience negative psychological consequences from being raised in a lesbian-mother family."[117]

Meanwhile, in Holland, Henny Bos and a team of researchers identified one hundred lesbian couples who were raising their children from birth and compared them to one hundred heterosexual parent couples.[118] Using three different methods of data collection (questionnaires, observations, and diaries),[119] the researchers found that the children of lesbian mothers did not have greater behavioral problems than did the children of heterosexual parents.[120] A follow-up study found that "[t]he children [of

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[113] Beth Perry et al., *Children's Play Narratives: What They Tell Us About Lesbian-Mother Families*, 74 AM. J. ORTHOPSYCHIATRY 467 (2004).

[114] As the researchers note,

> [i]t has been found that securely attached children are more likely to provide favorable solutions to the stories that are presented, whereas insecurely attached children tend to end stories negatively. In addition, securely attached children tend to have positive representations of themselves and others and portray the child doll as competent, valuable, and worthy and the mother doll as providing safety and protection. Insecurely attached children, on the other hand, are more likely to portray the child doll as helpless, isolated, and/or rejected or as displaying violent or negative behaviors.

Id. at 468 (citations omitted).

[115] *Id.* at 474.

[116] *Id.* at 475.

[117] *Id.* at 477.

[118] Henny M.W. Bos et al., *Child Adjustment and Parenting in Planned Lesbian-Parent Families*, 77 AM. J. ORTHOPSYCHIATRY 38 (2007).

[119] *Id.* at 39.

[120] *Id.* at 41. Bos's research team is one of several that has also looked into differences between parents, depending on family structure, on measures such as parental commitment to and emotional involvement with the children. *Id.* at 45. Bos and her team of researchers found that "[l]esbian [nonbiological] mothers are more committed as a parent than are heterosexual fathers; that is, they display a higher level of satisfaction with their partner as coparent and

lesbian mothers] in the sample generally reported low levels of stigmatization and their scores on psychological adjustment were similar compared to (Dutch) studies based on a population sample."[121]

An American research project, known as the National Longitudinal Lesbian Family Study (NLLFS), has also studied families headed by lesbians who conceived children through donor insemination.[122] The researchers interviewed the mothers when the children were toddlers,[123] and then again when the children were five[124] and ten years old.[125] When the children reached the age of ten, the researchers also interviewed them.[126] The researchers found that, among the seventy-four ten-year-old children of lesbian mothers participating in the study,[127] "[t]he prevalence of developmental disorders . . . (15%) was comparable to that of U.S. children under 18 (17%)."[128] The researchers also

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spend more time on childcare and less on employment." *Id.* The researchers added that the lesbian coparents "are more effective and more committed than heterosexual fathers as a parent. They show higher levels of support (e.g., more emotional involvement and parental concern) and lower levels of control (less power assertion, less structure, less limit-setting, and more respect for the child's autonomy)." *Id.*; *see also* Brewaeys et al., *supra* note 76, at 1354 (finding that "[t]he quality of the parent-child interaction was significantly higher for the lesbian [nonbiological] mothers than for the heterosexual fathers in" the straight family comparison groups); *id.* (reporting that nonbiological "mothers of lesbian families were significantly more involved in practical childcare activities compared with fathers in both heterosexual control groups"); Susan Golombok & Shirlene Badger, *Children Raised in Mother-Headed Families From Infancy: A Follow-Up of Children of Lesbian and Single Heterosexual Mothers, at Early Adulthood*, 25 HUM. REPROD. 150, 154 (2010) ("[M]others from mother-headed households were more emotionally involved with their young adult children than were mothers from traditional families . . . ."). *But see* Golombok et al., *supra* note 108, at 30 (reporting that "co-mothers in lesbian-mother families were less likely to show raised levels of emotional involvement with the children than were the fathers in heterosexual families").

121 Henny M.W. Bos & Frank van Balen, *Children in Planned Lesbian Families: Stigmatisation, Psychological Adjustment and Protective Factors*, 10 CULTURE HEALTH & SEXUALITY 221, 230–32 (2008).

122 *See About*, NAT'L LONGITUDINAL LESBIAN FAM. STUDY, http://www.nllfs.org/about (last visited Mar. 15, 2013).

123 Nanette Gartrell et al., *The National Lesbian Family Study: 2. Interviews With Mothers of Toddlers*, 69 AM. J. ORTHOPSYCHIATRY 362 (1999).

124 Nanette Gartrell et al., *The National Lesbian Family Study: 3. Interviews With Mothers of Five-Year-Olds*, 70 AM. J. ORTHOPSYCHIATRY 542 (2000).

125 Nanette Gartrell et al., *The USA National Lesbian Family Study: Interviews With Mothers of 10-Year-Olds*, 16 FEMINISM & PSYCHOL. 175 (2006).

126 Nanette Gartrell et al., *The National Lesbian Family Study: 4. Interviews With the 10-Year-Old Children*, 75 AM. J. ORTHOPSYCHIATRY 518, 519–20 (2005).

127 *Id.* at 519.

128 *Id.* at 523 (citation omitted). The comparison measurement was the Child Behavior Checklist (CBCL). *Id.* at 520. "The CBCL was designed to assess competencies and behavioral/emotional problems in 4–18-year-old children as reported by parents or other caregivers. The child's score is compared with a normative sample to determine whether she or he falls in the clinical, borderline clinical, or nonclinical range." *Id.* (citation omitted).

found that when it came to "social and psychological development, the . . . children [of lesbian mothers] were comparable to children raised in heterosexual families."[129]

The NLLFS researchers followed up with their subjects seven years later.[130] They found, based on reporting by both the mothers and their seventeen-year-olds, that the children of lesbian mothers "rated significantly higher in social, school/academic, and total competence and significantly lower in social, rule-breaking, aggressive, and externalizing problem behavior than the comparison group."[131]

Similar findings were made by a research team headed by Jennifer Wainright that relied on a large national sample of American adolescents called the National Longitudinal Study of Adolescent Health (Add Health).[132] "Add Health is a school-based study of the health-related behaviors of adolescents in Grades 7 to 12."[133] The Add Health researchers interviewed 12,105 adolescents.[134] A parent of each of the adolescents was also asked to fill out a questionnaire.[135]

Wainright and her team used the Add Health data to identify forty-four adolescents who were being raised in households led by two women.[136] The researchers then matched each of those adolescents with one from the Add Health database who was being raised by opposite-sex parents.[137] The criteria used to match adolescents were "sex, age, ethnic background, adoption status (identified through parent reports), learning disability status, family income, and parent's educational attainment."[138]

The researchers did not find any differences in psychosocial adjustment, as reflected in depressive symptoms, anxiety, and self esteem, between the two groups of adolescents.[139] There were also no differences in school functioning as measured

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[129] *Id.* at 523. The researchers reported that "[t]he NLFS children differed from the normative population on only one measure: The mean for girls on the Externalizing behavior scale was significantly lower than the norm, indicating fewer such problems than would be expected." *Id.* at 521.

[130] Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28 (2010).

[131] *Id.* at 32. The "comparison group consisted of maternal reports on 49 girls and 44 boys, all 17 years old." *Id.* at 30. As occurred when the children were ten years old, see *supra* note 126, the researchers seven years later found that a high percentage (41%) of the children of lesbian mothers in the study "had experienced stigmatization based on homophobia." Henny Bos & Nanette Gartrell, *Adolescents of the USA National Longitudinal Lesbian Family Study: Can Family Characteristics Counteract the Negative Effects of Stigmatization?*, 49 FAM. PROCESS 559, 564 (2010). "Despite this, the NLLFS adolescents were rated lower in externalizing problem behavior than age-matched peers in [a] normative sample." *Id.* at 568.

[132] Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 CHILD. DEV. 1886 (2004).

[133] *Id.* at 1888.

[134] *Id.* at 1889.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1892.

by the students' grade point averages.[140] The researchers, however, did find that family type was correlated with the degree to which adolescents felt connected to their schools, with adolescents raised by same-sex parents showing a higher degree of school connectedness than adolescents raised by different-sex couples.[141] (School connectedness was measured using criteria such as "the degree to which adolescents felt close to other students, felt like part of their school, felt safe in their school, felt that teachers treated students fairly, and were happy at their school.")[142]

Using the same data, Wainright and Charlotte Patterson published a report two years later finding no differences in the rates of delinquency, victimization, and substance use among the adolescent children of lesbian mothers when compared to the children of heterosexual parents.[143] Wainright and Patterson also published a study in 2008 analyzing the Add Health data with the objective of determining whether parental sexual orientation was associated with the quality of children's peer relations.[144] The data showed that peer relations were stronger among adolescents who reported engaging in more activities with their mothers, and whose parents reported having good

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[140] *Id.* at 1892, 1895.

[141] *Id.* at 1892.

[142] *Id.* at 1891.

[143] Jennifer L. Wainright & Charlotte J. Patterson, *Delinquency, Victimization, and Substance Use Among Adolescents With Female Same-Sex Parents*, 20 J. FAM. PSYCHOL. 526 (2006). "Victimization" was measured by asking the adolescents how often they "had been shot at, cut, or jumped; had a gun or knife pulled on them; or had seen someone shot or stabbed." *Id.* at 527.

With regards to substance abuse, the researchers "did not find a statistically significant difference in adolescents' reports of their frequency of alcohol, tobacco, or marijuana use as a function of family type." *Id.* at 528. A longitudinal British study that compared the use of alcohol and marijuana among young adults found that the children of single heterosexual mothers and of lesbian mothers reported less problem drinking than did the children of heterosexual couples. Golombok & Badger, *supra* note 120, at 154. There were no differences in the reported use of marijuana. *Id.* Another longitudinal study found no differences in the rates of reported heavy use of alcohol and drugs between the seventeen-year-old children of lesbian mothers and adolescents in a national probability sample. Naomi G. Goldberg et al., *Substance Use by Adolescents of the USA National Longitudinal Lesbian Family Study*, 16 J. HEALTH PSYCHOL. 1231 (2011). The children (regardless of gender) of lesbian mothers, however, reported that they were more likely to have used alcohol and marijuana than the children in the national sample, and the boys (but not girls) reported that they were more likely to have used hallucinogens. *Id.* at 1237. The researchers hypothesized that the seventeen-year-old children of the lesbian mothers may have felt more comfortable reporting alcohol and drug use for several reasons. First, unlike the adolescents in the national sample, the participants in the longitudinal study of lesbian families had gotten to know (and trust) the researchers over the course of many years. *Id.* Second, the children of the lesbian mothers "were able to complete their surveys via the Internet at a place of their choosing. Because they knew that personal details of their lives would be kept in confidence, they may have felt more comfortable disclosing substance use than the . . . adolescents [in the national probability sample], who completed their surveys in classrooms with both a teacher and a survey representative present." *Id.* at 1237–38.

[144] Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations Among Adolescents With Female Same-Sex Parents*, 44 DEVELOPMENTAL PSYCHOL. 117 (2008).

relationships with their children.[145] Parental sexual orientation, however, was not associated with the quality of the adolescents' peer relations.[146]

The psychological and social functioning of children of lesbian mothers was also the subject of a report published by Ian Rivers and a team of British researchers in 2008.[147] As with the Add Health study in the United States, researchers in the United Kingdom recruited a large group of adolescents (over 2,000) to study their behavior.[148] Of these youths, eighteen reported living with female same-sex couples.[149] Rivers and his team matched each of these students with comparable children from a control group of adolescents raised by two different-sex parents.[150] Relying on questionnaires completed by adolescents in both groups, the study found no differences in the experience of victimization (or "bullying").[151] It also found no differences in psychological functioning as reflected in anxiety and depression between the adolescent children of lesbian couples and those of heterosexual couples.[152]

Some researchers have focused specifically on the adopted children of lesbians and gay men. In 2005, Stephen Erich and a team of researchers published a study of sixty-eight young adopted children being raised in twenty-four lesbian households and twenty-three gay male ones.[153] After collecting data through parental questionnaires, the researchers found that "[t]he overwhelming majority of the adopted children of these gay and/or lesbian parents are not exhibiting any significant behavioral problems."[154] Four years later, Erich and another team of researchers published the results of a separate study of 176 adolescents raised by 127 heterosexual adoptive parents and thirty-four adolescents raised by twenty-seven lesbian or gay male parents.[155] In assessing the responses of questionnaires completed by the adolescents, the researchers found no differences in their attachment to parents or to peers.[156] The researchers also found no differences in "adolescent life satisfaction [and] adolescent social desirability score[s]."[157]

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145 *Id.* at 123–24.

146 *Id.*

147 Ian Rivers et al., *Victimization, Social Support, and Psychosocial Functioning Among Children of Same-Sex and Opposite-Sex Couples in the United Kingdom*, 44 DEVELOPMENTAL PSYCHOL. 127 (2008).

148 *Id.* at 128–29.

149 *Id.* at 129.

150 *Id.*

151 *Id.* at 131–32.

152 *Id.* at 132.

153 Stephen Erich et al., *Gay and Lesbian Adoptive Families: An Exploratory Study of Family Functioning, Adoptive Child's Behavior, and Familial Support Networks*, 9 J. FAM. SOC. WORK 17, 22–23 (2005).

154 *Id.* at 27.

155 Stephen Erich et al., *An Empirical Analysis of Factors Affecting Adolescent Attachment in Adoptive Families with Homosexual and Straight Parents*, 31 CHILD & YOUTH SERVICES REV. 398, 400 (2009).

156 *Id.* at 402.

157 *Id.* at 401. One of the parents in each family also completed a survey. *Id.* at 400. The researchers found no differences between the heterosexual and lesbian/gay parents in the degree

In 2010, Rachel Farr and a team of researchers published a study comparing children adopted by fifty-six same-sex couples (both male and female) to those adopted by fifty different-sex parents.[158] The study, which included interviews of parents, children, teachers, and outside caregivers, found that child behavioral problems were associated with the degree of stress felt by the parents,[159] but not with parental sexual orientation.[160]

Another study of adopted children was led by Justin Lavner and published in 2012.[161] It focused on high-risk children in Los Angeles County who transitioned from the foster care system to adoptive homes.[162] Sixty of the participating families were headed by heterosexuals, fifteen by gay men, and seven by lesbians.[163] Most of the adoptive parents (sixty-eight percent) were either married or living with a domestic partner.[164] The children's high-risk background was reflected in the fact that, for example, eighty-nine percent "had documented prenatal substance exposure."[165] The average age of the children at the time of the adoption placement was four.[166]

Lavner and his team of researchers assessed the children's cognitive development and their levels of behavioral problems at two months, one year, and two years after placement through parental questionnaires and by interviewing and testing the children.[167] They found no significant differences in cognitive development or in behavioral problems despite the fact "that the children adopted by gay and lesbian parents had significantly higher levels of background risk and were more likely to be of a different ethnicity than their adoptive parents compared with children in heterosexual households."[168]

Finally, there have been two recent studies that have looked at the academic performance of children raised by lesbians and gay men. In 2010, sociologist Michael Rosenfeld published a study assessing how children of same-sex couples were doing academically compared to children raised by heterosexual parents.[169] In particular,

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of relationship satisfaction with their children. *Id.* at 401. There were also no differences in "parent life satisfaction [and] parent social desirability score[s]." *Id.*

[158] Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164 (2010).

[159] *Id.*

[160] *Id.* at 174.

[161] Justin A. Lavner et al., *Can Gay and Lesbian Parents Promote Healthy Development in High-Risk Children Adopted from Foster Care?*, 82 AM. J. ORTHOPSYCHIATRY 465 (2012).

[162] *Id.* at 466–67.

[163] *Id.* at 467.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 470. The only statistically significant difference found by the researchers was that the children of lesbian and gay parents evinced fewer internalizing behavioral problems than did the children of heterosexual parents at the first evaluation, that is, two months after placement. *Id.* at 468.

[169] Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755 (2010).

Rosenfeld studied the degree to which children progress normally through school without needing to repeat grades (also known as "grade retention").[170] As Rosenfeld explained, "[g]rade retention is an important childhood outcome because retention in the primary grades is a strong indicator of a lack of childhood readiness for school, and effective parenting is a crucial ingredient in school readiness."[171]

Using data from the 2000 census, Rosenfeld identified "3,502 children of same-sex couples who had been living with both parents for at least five years (2,030 children living with lesbian mothers and 1,472 children living with gay fathers)."[172] He compared the school progress of these children to "more than 700,000 children in Grades 1–8 from other family types."[173]

In analyzing the data, Rosenfeld found that the children of married heterosexual parents had a lower grade retention rate (6.8%) than did the children of lesbian mothers (9.5%) and gay fathers (9.7%).[174] But Rosenfeld also found that "[p]arental [socioeconomic status] accounts for more than one-half of the relatively small gap in grade retention between children of heterosexual married couples and children of same-sex couples."[175] (Census data showed that married heterosexual parents with children have a higher average annual income ($58,000) than same-sex couples who are raising children ($50,000).)[176] After Rosenfeld accounted for socioeconomic status, he found that "children of same-sex couples cannot be distinguished [in grade retention rates] with statistical certainty from children of heterosexual married couples."[177]

The second recent study of academic performance was published in 2012 by David Potter.[178] That study compared math assessment scores of children raised by same-sex couples to those of children raised by married heterosexual couples.[179] The

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170 *Id.* at 758.

171 *Id.* (citing J. Brooks-Gonn & L.O. Markman, *The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness*, 15 FUTURE CHILD. 139 (2005)).

172 *Id.* at 757.

173 *Id.*

174 *Id.* at 761.

175 *Id.* at 770.

176 *Id.* at 765.

177 *Id.* at 770. Rosenfeld also noted that the children of married heterosexual parents are less likely to be black or Hispanic, and therefore less vulnerable to discrimination. *Id.* at 765. In addition,

> [a]mong all family types, children of lesbian mothers were the most likely (more than 12%) to be adopted children, stepchildren, or foster children. Because economic disadvantage, minority racial/ethnic status, and experience with the adoption or foster care system are all challenges for children, a careful analysis of the school performance of children of gay and lesbian parents must take these disadvantages into account.

Id.

178 David Potter, *Same-Sex Parent Families and Children's Academic Achievement*, 74 J. MARRIAGE & FAM. 556 (2012).

179 *Id.* at 561.

data for the study came from the Early Childhood Longitudinal Study–Kindergarten Cohort (ELCS–K).[180] The ELCS–K collected data from 20,000 kindergarten children in the fall of 1998.[181] Data was again collected when the children reached the first, third, fifth, and eighth grades.[182] One hundred and fifty-eight of the children in the ELCS–K were identified as living in households led by same-sex couples while studying in at least one of those grades.[183]

Potter initially found that the math scores of the children of same-sex couples were lower than those of children raised by married heterosexuals and that the difference was statistically significant.[184] But when Potter accounted for the number of family transitions (i.e., the number of changes in a child's family structure), there was no significant difference in the math assessment scores between the children of different-sex couples and those of same-sex ones.[185] This meant that the lower scores found among the children raised by same-sex couples were associated with the number of changes in the composition of the children's family structures and not with parental sexual orientation.[186]

B. Assessing the Empirical Literature from the Rational Basis Perspective

The evidence showing that parental sexual orientation is not associated with the psychological and social functioning of children has been remarkably consistent through the decades. Studies going back thirty years show that there are no differences between the children of lesbian/gay parents and those of heterosexuals in a broad array of measures, including emotional adjustment,[187] behavioral problems,[188] cognitive functioning,[189] anxiety or depression,[190] self-esteem,[191] delinquency and substance

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180 *Id.* at 560.
181 *Id.*
182 *Id.* Potter controlled for variables such as the child's gender and race/ethnicity, language spoken at home, and parents' educational level. *Id.* at 561.
183 *Id.* at 560.
184 *Id.* at 560, 564.
185 *Id.* at 564.
186 *Id.* After controlling for the number of family transitions, Potter found that children in same-sex parent homes had higher math assessment scores than those in homes led by married heterosexuals, but the difference was not statistically significant. *Id.* Potter also found no significant difference in the math assessment scores of children raised by same-sex parents when compared to those raised in what he called other "nontraditional" families, such as those led by divorced or single parents who never married. *Id.* at 566. This finding also suggests that parental sexual orientation is not associated with children's academic performance. *See id.* at 567.
187 *See supra* notes 80–81, 97, 112, 117, 121, 128–29 and accompanying text.
188 *See supra* notes 60, 75, 91, 103, 120, 131, 154, 159–60, 168 and accompanying text.
189 *See supra* notes 71, 75, 168 and accompanying text.
190 *See supra* notes 63, 139, 152 and accompanying text.
191 *See supra* notes 66, 84, 106–07, 139 and accompanying text.

abuse,[192] attachment to parents,[193] victimization,[194] social competence,[195] peer relations,[196] and school performance.[197] Not surprisingly, given the remarkable degree of consistency in the empirical findings, several professional organizations, including the American Psychological Association and the American Academy of Pediatrics, have issued reports concluding that the social science evidence does not support the contention that children are harmed by their parents' same-sex sexual orientation.[198]

As a result, the contention that same-sex marriage bans and parenting restrictions affecting lesbians and gay men are justified by possible differences between the psychological and social functioning of children of lesbians and gay men and that of children of heterosexuals, has no empirical basis of fact. The absence of a factual foundation means that efforts to justify the differential treatment of lesbians and gay men in matters related to marriage and parenting based on the psychological and social functioning of their children does not pass constitutional muster, even under the highly deferential rational basis test.

It is helpful to compare the current state of the empirical literature on the question of whether parental sexual orientation is associated with the psychological and social functioning of children with the state of the empirical literature, as it existed several decades ago, on the question of whether the use of marijuana is harmful. This latter question was subject to significant litigation during the 1970s and 1980s, as courts applied the rational basis test to assess the contention, raised by some criminal defendants, that empirical studies showing a lack of harm from marijuana use rendered irrational the criminalization of the possession of small amounts of that drug.[199] But in reviewing the empirical literature, courts consistently noted the existence of competing studies

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192 *See supra* note 143 and accompanying text.

193 *See supra* notes 92–94, 116, 156 and accompanying text.

194 *See supra* notes 143, 151 and accompanying text.

195 *See supra* notes 131, 157 and accompanying text.

196 *See supra* notes 61, 84, 97, 144–46, 156 and accompanying text.

197 *See supra* notes 131, 140–42, 177, 184–86 and accompanying text.

198 *See* AM. PSYCHOL. ASS'N, LESBIAN AND GAY PARENTING 15 (2005) (concluding, after reviewing social science studies of families headed by lesbians and gay men, that "[n]ot a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents"); Ellen C. Perrin et al., *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 343 (2002) ("[P]arents' sexual orientation is not a variable that, in itself, predicts their ability to provide a home environment that supports children's development."); *see also Sexual Orientation, Parents, & Children*, AM. PSYCHOL. ASS'N (2004), http://www.apa.org/about/policy/parenting.aspx (concluding that "[o]verall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents").

199 *See, e.g.*, Illinois NORML, Inc. v. Scott, 383 N.E.2d 1330, 1335–36 (Ill. App. Ct. 1978); State v. Mitchell, 563 S.W.2d 18, 26 (Mo. 1978); State v. Ennis, 334 N.W.2d 827, 834 (N.D. 1983).

that indicated the possibility of harm.[200] The absence of consistency and uniformity in the empirical studies on the extent of harm associated with marijuana led courts to properly conclude that the question of whether its use should be criminalized was one for legislatures and not for courts.[201]

In stark contrast to the marijuana issue, there is *no* empirical evidence that the psychological and social functioning of children is associated with parental sexual orientation.[202] To claim that same-sex marriage bans and parenting restrictions affecting lesbians and gay men are justified because of the possible psychological or social harm to children from having lesbian or gay parents simply has no empirical support. As a result, courts should not defer to legislative judgments on this point, even when applying the rational basis test.

Twenty years ago, when Justice Clarence Thomas was a federal circuit judge, he wrote that "[i]f a legislature could make a statute constitutional simply by 'finding' that black is white or freedom [is] slavery, judicial review would be an elaborate farce."[203] The same reasoning applies to the question of the psychological and social functioning of the children of lesbians and gay men. Despite much study, there is no evidence supporting claims that there are (or might be) differences in such functioning. This makes it irrational for the government to rely on those claims to justify laws that restrict the ability of lesbians and gay men to marry or to serve as parents.

C. Questions of Methodology

Critics sometimes claim that the question of whether parental same-sex sexual orientation is associated with negative outcomes in children is subject to reasonable dispute because the studies on children of lesbians and gay men are methodologically flawed. These critics raise two main concerns: First, that the studies have relied on small and nonrandom samples of lesbian and gay parents; and second, that most of the studies have focused on young children and that there is, therefore, insufficient information about the older children of lesbians and gay men. I address both of these

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[200] *See, e.g.*, *Illinois NORML*, 383 N.E.2d at 1334 ("The trial judge took judicial notice of a scientific dispute on the issue of the harmfulness of cannabis use."); *Mitchell*, 563 S.W.2d at 26 ("Although [the defendant] has directed the court's attention to numerous studies which comment on the harmlessness of marihuana, there are, however, other authorities which take a contrary view regarding the hazards involved in using marihuana.").

[201] *See, e.g.*, *Illinois NORML*, 383 N.E.2d at 1334 ("Where, as here, the issue is whether there was a rational basis for the legislation, the existence of scientific evidence supporting such legislation, even though disputed by other studies, provides that rational basis and the legislation should be upheld."); *Mitchell*, 563 S.W.2d at 26 ("In light of the fact that we are dealing with a debatable medical issue, we cannot conclude that the legislature acted arbitrarily or irrationally in [criminalizing marijuana use]." (citations omitted)); *Ennis*, 334 N.W.2d at 835 ("[B]ecause the issue of whether or not marijuana is properly classified as a Schedule I drug is fairly debatable, we will not usurp the legislature's factfinding function.").

[202] *See supra* Part I.A.

[203] Lamprecht v. FCC, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992).

concerns below and explain why neither is sufficient to raise reasonable doubts about the value of the empirical literature on parenting by lesbians and gay men.

1. Sampling Issues

Critics of the social science studies on lesbian and gay families frequently dismiss their findings on the ground that they are based on small and nonrandomly selected samples of lesbian and gay families.[204] The nature of these samples, it is argued, precludes the reaching of definitive conclusions about how children are doing in families headed by lesbians and gay men who have not participated in the studies.[205] Some judges have relied on this criticism to raise doubts about the studies' validity, doubts that in their view are enough to uphold same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the rational basis test.[206]

Social scientists frequently use so-called convenience (as opposed to random) samples to identify study subjects, especially when there is limited or no availability of random samples. As Professor Michael Wald has noted, the use of convenience samples is

> common in virtually all research related to controversial family law policies, such as the desirability of transracial adoptions, fathers as parents, the desirability of joint custody, the conditions under which a custodial parent should be allowed to relocate to a home distant from a noncustodial parent, or the impact of grandparent visitation.[207]

Indeed, much of the literature on the parenting styles of married mothers and fathers, which is sometimes cited by those who raise the family optimality argument in gay rights cases,[208] *is based on the same kind of convenience samples* that the same critics (conveniently) find unreliable in the context of lesbian and gay parents.[209]

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[204] *See, e.g.*, Defendant-Intervenors-Appellants Opening Brief at 89–90, Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 10-16696); Brief of Amici Curiae National Organization for Marriage et al. in Support of the Intervening Defendants-Appellants, at 26–27, Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 10-16696); Dent, *supra* note 42, at 377; George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343, 353–61 (2001).

[205] *See, e.g.*, Wardle, *supra* note 25, at 846 ("[T]he sample population in these studies is not likely to fairly represent the whole group of homosexual parents that is to be examined.").

[206] *See, e.g.*, Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 825 (11th Cir. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 999 (Mass. 2003) (Cordy, J., dissenting).

[207] Wald, *supra* note 25, at 409 (footnote omitted).

[208] *See infra* notes 288–96 and accompanying text.

[209] A brief filed by a conservative association of pediatricians with the Court of Appeals in *Perry v. Brown* relied on studies that used convenience (i.e., non-random) sampling to defend

There is an entirely valid reason for the limited availability of random samples of lesbian and gay parents, namely that they, along with their children, are vulnerable to discrimination and stigmatization.[210] It might be possible, in a society in which there are no legal or social consequences to being identified as lesbian or gay, to easily collect data on the children of randomly selected lesbian and gay parents. But since we do not live in such a society, social scientists must do the best they can with the limitations they confront.

Given the dearth of randomly selected samples of lesbian and gay parents available at the time, early researchers working in this area had to identify sexual minority family households through convenience sampling, including through word of mouth,[211] by placing advertisements in lesbian/gay publications,[212] and by contacting lesbian/gay organizations and community groups.[213] Since then, however, there have been concerted efforts by social scientists who study lesbian and gay families to address the sampling concerns raised by critics. For example, the marked increase in the number of lesbians

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its view that men and women parent in different ways. *See* Brief of the American College of Pediatricians in Support of Appellants, Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 10-16696). For example, the brief cited to one study whose child subjects all attended two private schools in Houston. *Id.* at 22 (citing Thomas G. Power et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCHOL. 980 (1994)). Another study cited in the same brief identified parent subjects by placing advertisements in Montreal neighborhood newspapers. *Id.* at 21 (citing Daniel Paquette & Mark Bigras, *The Risky Situation: A Procedure for Assessing the Father-Child Activation Relationship*, 180 EARLY CHILD DEV. & CARE 33 (2010)).

[210] *See, e.g.*, Gartrell & Bos, *supra* note 130, at 34 (noting that some participants in a longitudinal study of lesbian families in years passed "expressed fears that legislation could be enacted to rescind the parenting rights of lesbian mothers"); Gershon et al., *supra* note 104, at 443 ("Because of the stigmatized nature of homosexuality, our target population is considered a hidden population. Thus, it would have been difficult to recruit our study sample through standard sampling procedures.").

[211] *See, e.g.*, Gershon et al., *supra* note 104, at 438; Huggins, *supra* note 64, at 126; Kirkpatrick et al., *supra* note 54, at 546. The use of "snowballing," a sampling procedure that relies on already identified study subjects to assist researchers in finding additional subjects, "is a widely used procedure for sampling hidden populations, particularly in situations where members of a population are difficult to locate or may be reluctant to participate in research because membership in the population involves stigmatized behavior." Golombok et al., *supra* note 108, at 22 (citations omitted). Social scientists' use of snowballing sampling methods has by no means been limited to the study of lesbian and gay families. *See, e.g.*, Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174 (1997); Marina Spreen & Ronald Zwaagstra, *Personal Network Sampling, Outdegree Analysis and Multilevel Analysis: Introducing the Network Concept in Studies of Hidden Populations*, 9 INT'L SOC. 475 (1994).

[212] *See, e.g.*, Flaks et al., *supra* note 74, at 107; Golombok et al., *supra* note 59, at 569; Kirkpatrick et al., *supra* note 54, at 546.

[213] *See, e.g.*, Flaks et al., *supra* note 74, at 107; Golombok et al., *supra* note 59, at 569.

who became parents through donor insemination, beginning around the middle of the 1980s, allowed researchers to rely on more systematic sampling methods.[214] Anne Brewaeys and her team of researchers, for instance, focused on a consecutive sample of all thirty lesbian mother families who used the services provided by a fertility clinic at a Dutch hospital to conceive children between 1986 and 1991.[215] Similarly, Raymond Chan and his team of researchers studied most of the lesbian mothers who used a California sperm bank to conceive children prior to 1990.[216] This type of sampling based on all (or most) of the lesbian mothers who used the services of a particular clinic has the "advantage of . . . avoid[ing] the potential bias associated with volunteer samples."[217] This potential exists because it is possible that the willingness to volunteer by responding, for example, to a notice looking for study subjects placed in a lesbian/gay publication is greater among parents whose children are doing well than it is among those whose children are experiencing difficulties.[218]

The fact that a growing number of lesbians and gay men are adopting children has also permitted researchers to gain access to broader sample populations of parents.[219] For example, Rachel Farr and her team of researchers studying adopted children recruited families headed by lesbians and gay men with the assistance of five adoption agencies located in the Northeast, Mid-Atlantic, South, and the West Coast.[220] This resulted in a large and geographically diverse group of study subjects.[221]

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214 *See, e.g.*, Brewaeys et al., *supra* note 76, at 1351.

215 *Id.* Earlier studies of lesbian mothers who used donor insemination to conceive relied on volunteer samples. *See, e.g.*, Flaks et al., *supra* note 74, at 107; Patterson, *supra* note 69, at 158 –59.

216 Chan et al., *supra* note 98, at 444.

217 Golombok et al., *supra* note 108, at 21.

218 *Id.* ("Although it is not known how, or to what extent, the samples studied have been biased, lesbian mothers whose children show atypical gender development or psychological problems may have been unlikely to volunteer, particularly because lesbian-mother families are so often the focus of prejudice and discrimination."). Another way of addressing the possible bias in volunteer samples of lesbian mothers is to also interview third parties such as teachers and caregivers. For studies that have partly relied on data gathered from third parties, see, e.g., Chan, *supra* note 98, at 448; Farr et al., *supra* note 158, at 166; Flaks et al., *supra* note 74, at 108; MacCallum & Golombok, *supra* note 95, at 1416; Vanfraussen et al., *supra* note 82, at 241.

Yet another way of addressing the possible volunteer bias is by identifying study subjects *before* they have children. The National Longitudinal Lesbian Family Study, *see supra* notes 122–31 and accompanying text, is an example of such a study. *See* Goldberg et al., *supra* note 143, at 1238 (noting that the NLLFS "[f]amilies were recruited before the birth of the child participating in the study, so the findings are not skewed by overrepresentation of families who volunteer when it is already clear that their offspring are functioning well").

219 Farr et al., *supra* note 158, at 164–67.

220 *Id.* at 167.

221 *Id.*

In addition, and perhaps most importantly, several recent studies on lesbian and gay parenting *have been based on large groups of randomly selected study subjects*.[222] These include the Golombok team's use of the Avon Longitudinal Study of Parents and Children in England,[223] the Perry team's use of the same study,[224] the Wainright team's use of the Add Health in the United States,[225] the Rivers team's use of a representative sample of adolescents from the United Kingdom,[226] Michael Rosenfeld's use of American census data,[227] and David Potter's use of the Early Childhood Longitudinal Study–Kindergarten Cohort.[228]

The findings of studies that have relied on large and randomly selected subjects are entirely consistent with those that have used small and nonrandom samples. Indeed, the crucial point is that, *regardless of the sampling procedures used*, the empirical evidence consistently and uniformly shows no association between parental sexual orientation and the psychological and social functioning of children.

2. The Age of the Children

Critics of the social science studies on lesbian and gay parents have also claimed that they focus too much on young children, and not enough on the adolescent and young adult children of lesbians and gay men.[229] These critics then contend that we do not yet know the long term impact on children of having openly lesbian or gay

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222 *See* Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 9–10 (2010) ("Since 2001, the quality of the samples and data has advanced notably. New waves from longitudinal studies on children approaching early adolescence have appeared, and several studies attained larger, more representative samples." (citations omitted)).

223 *See supra* notes 108–12 and accompanying text. After identifying lesbian-headed families through the Avon Longitudinal Study of Parents and Children, Golombok and her team of researchers used snowballing methods to identify additional lesbian families who later moved to the area. Golombok et al., *supra* note 108, at 22. The researchers compared the lesbian mothers identified through the random sample with those identified through snowballing. *Id.* "After age was controlled for, significant differences were identified for only 5% of the variables, the proportion that would be expected by chance, which suggests that the non-ALSPAC families were closely comparable to those recruited directly through the ALSPAC." *Id.* at 31.

224 *See supra* notes 113–17 and accompanying text.

225 *See supra* notes 132–46 and accompanying text.

226 *See supra* notes 147–52 and accompanying text.

227 *See supra* notes 169–77 and accompanying text.

228 *See supra* notes 178–86 and accompanying text.

229 *See, e.g.*, Wardle, *supra* note 25, at 849 ("The absence of longitudinal studies is another serious weakness in social science research that purports to show the absence of detrimental effects of homosexual parenting. Problems that are not apparent in the lives of preschool or grade school children, for example, may well emerge during adolescence or young adulthood . . . ." (footnote omitted)).

parents.[230] Some judges have relied on this criticism to raise doubts about the validity of the studies, doubts that in their view are enough to uphold same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the rational basis test.[231]

It should not strike anyone as particularly surprising that the children in the early studies on lesbian and gay parenting were relatively young. For example, researchers turned their attention to planned lesbian families shortly after those families were first formed.[232] As a result, the children in the early studies were quite young.[233] As the years progressed, the children in these families grew older, making it possible to study adolescents and young adults. One study from 1995, for example, focused on young adult children of lesbian mothers.[234] In 1999, a study was published on children aged eleven to eighteen.[235] In 2004, and then again in 2006 and 2008, researchers published studies of teenage children of lesbian mothers identified through the National Longitudinal Study of Adolescent Health.[236] In 2008 and 2009, two additional studies of adolescents were published, one of British youth[237] and the other of American teenagers who were adopted by lesbian and gay parents when they were young.[238] And in 2010, researchers published two studies of older children: one of seventeen-year-olds whose lesbian mothers were part of the National Longitudinal Lesbian Family Study[239] and the other of young adults who were part of a British longitudinal study.[240] It is simply incorrect to suggest, therefore, that the social science evidence on the children of lesbian and gay parents has focused almost exclusively on young children.

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[230] *See, e.g.*, Wardle, *supra* note 41, at 543 ("Because homosexual parenting is a relatively recent phenomenon of significant size, there is not much known about how it affects children to be raised by a same-sex couple, and for the same reason, the social effects of lesbigay parenting are not well known, either.").

[231] Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 825 (11th Cir. 2004) (noting "the absence of longitudinal studies following child subjects into adulthood"); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 980 (Mass. 2003) (Sosman, J., dissenting) (claiming that "the recency of th[e] phenomenon [of lesbian and gay parenting] has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years").

[232] *See supra* notes 73–81 and accompanying text.

[233] *See, e.g.*, Brewaeys et al., *supra* note 76, at 1351 (children in study were eight years old); Chan et al., *supra* note 98, at 445 (children in study "averaged 7 years of age").

[234] Tasker & Golombok, *supra* note 62, at 206.

[235] Gershon et al., *supra* note 104, at 438. Additionally, a Dutch study of the children of lesbian mothers included children between the ages of seven and seventeen. Vanfraussen et al., *supra* note 82, at 240.

[236] Wainright et al., *supra* note 132; Wainright & Patterson, *supra* note 143; Wainright & Patterson, *supra* note 144.

[237] Rivers et al., *supra* note 147.

[238] Erich et al., *supra* note 153.

[239] Gartrell & Bos, *supra* note 130.

[240] Golombok & Badger, *supra* note 120.

A related contention raised by some courts in critiquing the social science literature is that parenting by lesbians and gay men is a new phenomenon and that, as a result, not enough time has elapsed to adequately study its impact on children. For example, the U.S. Court of Appeals for the Eleventh Circuit has claimed that "[s]cientific attempts to study homosexual parenting in general are still in their nascent stages"[241] and the New York Court of Appeals has concluded that "there has not been enough time to study the long-term results of . . . child-rearing" by lesbians and gay men.[242] These courts have failed to provide the temporal period—perhaps fifty years? perhaps a century?—at which point they would consider it appropriate to trust the studies' findings. We do know, however, that parenting by openly lesbian and gay individuals has been around for the last four decades.[243] We also know that social scientists began studying such parenting in the 1970s,[244] with every ensuing decade bringing additional studies.[245] Several of those studies have been longitudinal, that is, they have followed the same children over the course of many years.[246] And, as already noted, it has been possible to study the children of lesbians and gay men into adolescence and adulthood. It is not persuasive to claim, therefore, that the "recent" nature of lesbian and gay parenting *by itself* provides a rational basis—*regardless* of what the empirical studies actually show—to justify same-sex marriage bans and parenting restrictions affecting lesbians and gay men.

Courts, policymakers, and advocates on both sides have tasked social scientists with the difficult responsibility of essentially proving a negative, that is, that the sexual orientation of lesbian and gay parents does not harm their children.[247] It is always possible to take issue with the methodological choices of researchers who have taken on this responsibility, especially when there are significant challenges in identifying study subjects because of the stigma and discrimination that might befall not only adult participants, but also their children.[248] At the end of the day, however, we are left with two seemingly clear conclusions: first, that the methodological quality of the

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[241] Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 826 (11th Cir. 2004).

[242] Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 979 (Mass. 2003) (Sosman, J., dissenting) ("[T]he attempts at scientific study of the ramifications of raising children in same-sex couple households are . . . in their infancy . . . .").

[243] *See* BALL, *supra* note 53, at 6–7.

[244] *See, e.g.*, Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978).

[245] *See supra* Part I.A.

[246] *See, e.g.*, Gartrell & Bos, *supra* note 130; Golombok & Badger, *supra* note 120; Tasker & Golombok, *supra* note 62.

[247] *See* H.M.W. Bos et al., *Lesbian Families and Family Functioning: An Overview*, 59 PATIENT EDUC. & COUNSELING 263, 264–65 (2005) ("[T]he implicit aim of these studies was to demonstrate that lesbian parents and their children are not different from heterosexual parents and their children, and that lesbian parents are no less successful or less worthy than heterosexual parents are.").

[248] *See supra* notes 210–13 and accompanying text.

studies on the children of lesbians and gay men has been continuously improving through the years; and second, that the newer and methodologically more sound studies, like the older and methodologically more limited ones, consistently and uniformly show that parental sexual orientation is not associated with the psychological and social functioning of children.[249]

D. The Regnerus Study

A study conducted by the sociologist Mark Regnerus, published as I was finishing this Article, purports to find associations between parental same-sex sexual orientation and negative outcomes in children.[250] According to Regnerus, of the three thousand young adults (between the ages of eighteen and thirty-nine) who participated in the study, one hundred and seventy-five had lesbian mothers and seventy-three had gay fathers.[251] After comparing the answers given by adult children raised by individuals identified in the study as lesbian or gay to those raised from birth by married heterosexuals,[252] Regnerus found several statistically significant differences. The adult children of lesbian mothers, for example, reported higher levels of unemployment, depression, cigarette smoking, marijuana use, and criminal arrests and a lower level of educational attainment than did the adult children of married heterosexual parents.[253]

[249] It seems that some gay rights opponents will never be persuaded that the social science literature accurately reflects what is happening in households headed by lesbians and gay men. In fact, some critics have accused researchers of being biased and of presenting data in ways that further their political and personal goals. *See, e.g.*, *Ex Parte* H.H., 830 So. 2d 21, 36 n.11 (Ala. 2002) (Moore, C.J., concurring) ("Apparently, there is widespread bias among those researching the very area we are dealing with in this opinion—the effects upon children of parents who practice homosexuality . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 999 (Mass. 2003) (Cordy, J., dissenting) (noting that some critics of the literature on parenting by lesbians and gay men claim that it uses "hypotheses [that] are too infused with political or agenda driven bias" (citations omitted)). It should be noted, however, that the social science studies on the children of lesbians and gay men referred to in this Article were published in peer-review journals, which means that they were evaluated and vetted by experts in the relevant fields. Clearly, at least those experts who recommended that the studies be published believe that they constitute valuable contributions to the literature and do not simply reflect the researchers' biases.

[250] Regnerus, *supra* note 30.

[251] *Id.* at 755. I below explain the controversial way in which Regnerus determined the sexual orientation of the respondents' parents. *See infra* notes 257–63 and accompanying text.

[252] Regnerus, *supra* note 30, at 757. Regnerus also sought to measure outcomes in children raised in other forms of family structures, including adoptive, stepparent, and single homes. *Id.* at 758. His main interest in the study, however, was to compare the responses of the children of lesbian mothers and gay fathers with those of intact, married heterosexual households. *Id.* at 763 (noting that his "attention has been primarily directed at the inter-group differences" between these three types of household structures).

[253] *Id.* at 761–62. Regnerus also found that the children of lesbian mothers were more likely to have been sexually abused by "a parent or other adult caregiver" than those raised in intact

Although there were fewer differences between the latter and the young adult children of gay fathers,[254] Regnerus found that those with gay fathers reported, for example, higher levels of depression, cigarette smoking, and criminal arrests.[255]

Not surprisingly, critics of parenting by lesbians and gay men have been quick to use the Regnerus study to question the broad consensus in the social science literature that parental sexual orientation is not associated with the well-being of children.[256] It is not at all clear that the findings of any one study are enough to undermine a broad consensus among social scientists, one developed over decades of study. Be that as it may, even if we concede, for purposes of argument, that one study showing an association between parental sexual orientation and child outcomes would be enough to satisfy the easy-to-meet factual component of the rational basis test, the Regnerus study is not such a study.

The Regnerus study does not show an association between parental sexual orientation and child outcomes because it relies on an unreasonably broad characterization of who should be deemed a "lesbian mother" or a "gay father." The study attempted to identify lesbian and gay parents by asking adult children whether their parents had a same-sex relationship between the time they were born until they turned eighteen (or whenever they left home).[257] If the adult child's answer to that question was "yes," then Regnerus categorized the parent in question as either a lesbian mother or a gay father.[258] Although, as explained in Part III, it is possible to reasonably disagree about

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heterosexual households. *Id.* at 763 (The same was not true of the children of gay fathers. *Id.* at 761.). Regnerus noted that "[i]t is entirely plausible . . . that sexual victimization could have been at the hands of the respondents' biological father, prompting the mother to leave the union and—at some point in the future—commence a same-sex relationship." *Id.* at 763.

254 *Id.* at 763 ("[T]here are simply fewer statistically-significant distinctions to note between [children raised in intact heterosexual households and those raised by gay fathers] than between [children raised in intact heterosexual households and those raised by lesbian mothers], which may or may not be due in part to the smaller sample of respondents with gay fathers in the [study], and the much smaller likelihood of having lived with their gay father while he was in a same-sex relationship.").

255 *Id.* at 761–62.

256 *See, e.g.*, Reply Brief for Defendant-Appellant the Bipartisan Legal Advisory Group of the United States House of Representatives at 27 n. 9, Windsor v. U.S., 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (Nos. 12-2335, 12-2435); Maggie Gallagher, *The Best or the Worst of All Possible Gay-Parenting Studies?*, NAT'L REV. ONLINE (June 12, 2012), http://www.nationalreview.com/corner/302511/best-or-worst-all-possible-gay-parenting-studies-maggie-gallagher; Peter Sprigg, *New Study on Homosexual Parents Tops All Previous Research*, FAM. RES. COUNCIL, http://www.frc.org/issuebrief/new-study-on-homosexual-parents-tops-all-previous-research (last visited Mar. 15, 2013). The Regnerus study has already been cited by one court in a same-sex marriage case in concluding that there is a reasonable disagreement among experts over whether, "other things being equal, it is best for children to be raised by their married biological parents or with two parents of opposite genders." Jackson v. Abercrombie, No. 11-00734 ACK-KSC, 2012 WL 3255201 at *42 (D. Ct. Haw. Aug. 8, 2012).

257 Regnerus, *supra* note 30, at 756.

258 *Id.*

how best to define and determine the sexual orientation of individuals,[259] it is unreasonable to posit that participation in *one* same-sex relationship (as reported by a nonparticipant in that relationship) over the course of eighteen years (or more) *regardless of the relationship's duration or level of commitment* is enough to characterize the individual in question as lesbian or gay.[260] Indeed, the study's unreasonably broad definition of "lesbian mother" and "gay father" meant that less than a quarter (23%) of the respondents who reported that their mothers had participated in a same-sex relationship lived with both their mother and her female partner for at least three years.[261] And only a tiny number (2%) of the respondents who claimed that their fathers had participated in a same-sex relationship lived with their father and his male parent for at least three years.[262]

The legal and policy issues implicating the possible association between parental sexual orientation and child outcomes involve either (1) individuals who are in committed same-sex relationships (e.g., same-sex marriage and adoption by same-sex couples) or (2) lesbian or gay individuals who are currently single, but who may enter into committed same-sex relationships in the future (e.g., adoption by single lesbians and gay men). These are the populations of current or prospective parents whose parenting abilities is subject to scrutiny due to the child welfare contentions raised by some who defend same-sex marriage bans and parenting restrictions affecting lesbians and gay men. Rather than seeking to identify members of these populations in order to compare their parenting abilities to those of married heterosexual parents, the Regnerus study included within the umbrella of lesbian mothers and gay fathers *any*

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[259] *See infra* notes 429–36 and accompanying text.

[260] As Regnerus acknowledges, his survey only asked whether the respondents believed that their parents had participated in a same-sex relationship. It did not inquire whether the respondents considered their parents to be lesbian or gay, or whether the parents self-identified as such. Regnerus, *supra* note 30, at 758 ("It is . . . very possible that the same-sex romantic relationships about which the respondents report were *not* framed by those respondents as indicating their own (or their parent's own) understanding of their parent as gay or lesbian or bisexual in sexual *orientation*.").

[261] *Id.* at 757. Close to half of the respondents (43%) who reported that their mother had participated in a same-sex relationship either never lived with their mother and a female partner, or did so for a period of less than four months before reaching the age of eighteen. *See id.*

[262] *Id.* Since there were seventy-three respondents in the study who had "gay fathers," *see id.* at 755, it appears that *only one or two of them* (2%) lived with their father and his male partner for at least three years. *Id.* at 757. Almost two-thirds (58%) of the respondents who reported that their fathers had had a same-sex relationship did not live with their fathers during that relationship. *Id.* And only twenty-three percent of the respondents reported living with their "gay father" and his male partner for more than four months. *Id.*

The problematic way in which Regnerus identified "lesbian mothers" and "gay fathers" is also reflected in how he dealt with respondents who reported both a mother and a father whom they believed participated in at least one same-sex relationship. Regnerus, in order to increase the number of "gay fathers" in his study, arbitrarily determined that those children should be deemed to have been raised by gay fathers rather than by lesbian mothers even though "ancillary analyses revealed comparable exposure to both their mother and father." *Id.* at 758.

respondent's parent who was ever in a same-sex relationship regardless of its duration or level of commitment.[263]

In addition, as one commentator has explained, "[b]ecause the [children in the lesbian mother] group [in Regnerus's study] is comprised of young adults who experienced multiple family forms and transitions, it is impossible to isolate the effects of living with a lesbian mother from experiencing divorce, remarriage, or living with a single parent."[264] Indeed, no one denies that, everything else being equal, children raised in intact two-parent households from a young age do better than children who experience family instability.[265] The Regnerus study does nothing more than reflect the well-understood point that family instability is associated with negative outcomes in children.[266] It is not at all surprising, for example, that the children of "lesbian mothers" (as defined in the Regnerus study) had worse outcomes than the children raised in intact heterosexual households given that (1) nearly half of the children of women identified as "lesbian mothers" reported that their biological parents were once married, but no longer are;[267] (2) fifty-eight percent of those children reported that their mothers had left their household during their childhood;[268] and (3) "just under 14% of them reported spending time in the foster care system."[269]

The question raised by the efforts to restrict the marital and parental rights of lesbians and gay men is not whether familial instability is associated with negative child outcomes (it clearly is). The question is instead whether parental sexual orientation is associated with those outcomes. The Regnerus study fails to address that issue because most of the adult children of "lesbian mothers" and "gay fathers" who participated in the research—unlike the children raised by heterosexual parents—were raised in households that experienced significant familial disruptions.[270] Regnerus, in effect, "stacked the deck" by comparing children raised in stable and intact heterosexual

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[263] *See supra* notes 257–62 and accompanying text.

[264] Cynthia Osborne, *Further Comments on the Papers by Marks and Regnerus*, 41 SOC. SCI. RES. 779, 780 (2012).

[265] *See, e.g.*, Susan L. Brown, *Marriage and Child Well-Being: Research and Policy Perspectives*, 72 J. MARRIAGE & FAM. 1059, 1072 (2010).

[266] As Paul Amato notes,

> most of the young adults with gay or lesbian parents in the [Regnerus study] also experienced divorce as children. Consequently, it is likely that many of the disadvantages reported by these offspring were due to marital disruptions that preceded (or coincided with) the time when their parents come out as gay or lesbian. In other words, these disadvantages may be due to the failed heterosexual marriages of parents rather than the sexual orientations of parents.

Paul R. Amato, *The Well-Being of Children with Gay and Lesbian Parents*, 41 SOC. SCI. RES. 771, 773 (2012).

[267] Regnerus, *supra* note 30, at 757.

[268] *Id.*

[269] *Id.*

[270] *See* Osborne, *supra* note 264, at 780.

households with children raised by "lesbian mothers" and "gay fathers" who experienced family disruption and instability.[271] The design of this study is as flawed as one that sets out to investigate possible associations between parental sexual orientation and child welfare by comparing children raised by married same-sex couples from the beginning of the marriage to children raised by single heterosexual parents or by divorced and remarried heterosexuals. All of this should lead courts to reject efforts by conservative advocates to rely on the Regnerus study to undermine the broad consensus among social scientists that parental sexual orientation is not associated with the well-being of children.

E. Questions of Family Optimality

Those who support same-sex marriage bans and parenting restrictions affecting lesbians and gay men often claim that households led by married mothers and fathers who are biologically related to their children are the optimal family structure for children.[272] Those who advance this family optimality argument then claim that it is rational for the government to prohibit same-sex marriage and restrict the ability of lesbians and gay men to serve as adoptive and foster care parents because doing so encourages the raising of children in households headed by different-sex married couples who are biologically related to their children.[273] Some courts have relied on the optimality argument

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[271] Gary J. Gates et al., *Letter to the Editors and Advisory Editors of* Social Science Research, 41 SOC. SCI. RES. 1350, 1351 (2012) ("[The Regnerus paper] fails to distinguish, for children whose parents ever had a same-sex relationship experience, the associations due to family structure from the associations due to family stability. However, [Regnerus] does attempt to distinguish family structure from family instability for the children of different-sex parents by identifying children who lived in an intact biological family.").

[272] *See, e.g.*, Brief of Family Research Council as Amicus Curiae in Support of Defendants-Respondents at 52, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (No. 98084) ("[T]he optimal environment for raising children is in a home comprised of the child's biological mother and father, who are married."); Brief of Appellant King County at 35, Andersen v. King County, 138 P.3d 963 (Wash. 2006) (No. 75934-1) (justifying limiting marriage to opposite-sex couples based on "the idea that, as a general rule, children tend to thrive in families consisting of mothers, fathers, and their biological children"); Brief of Amicus Curiae Alliance for Marriage, Inc., in Support of Appellants-Intervenors at 6, Andersen v. King County, 138 P.3d 963 (Wash. 2006) (No. 75934-1) ("[O]ur society holds a deeply-rooted view that the ideal situation for the upbringing of children is in a marriage with both a father and a mother, where the child is reared by both biological parents who are bound by familial bonds both to the child and to each other.").

[273] For example, after the constitutionality of Florida's gay adoption ban was challenged in federal court, the state argued

> that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida assert[ed], provide the stability that marriage affords and the presence of both male and female

to uphold the constitutionality of same-sex marriage bans and parenting restrictions affecting lesbians and gay men under the rational basis test.[274]

There are at least two possible responses to the family optimality claim. The first assumes, for purposes of argument, that married heterosexual parents provide the optimal family structure for children, but makes the logical point that there is no rational connection between the promotion of optimality in family structure and denying lesbians and gay men the opportunity to marry or to serve as parents. This is because heterosexual couples are not more likely to marry, and to accept the responsibilities of parenthood, simply because lesbians and gay men are prohibited from marrying or from serving as adoptive or foster care parents.[275] Since no heterosexual marries, or

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> authority figures, which it considers critical to optimal childhood development and socialization.

Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004). For its part, the state of Washington, in defending the constitutionality of its (now lifted) ban on same-sex marriage, contended "that rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in families consisting of a father, mother, and their biological children." *Andersen*, 138 P.3d at 983.

[274] *See, e.g.*, *Lofton*, 358 F.3d at 826 (concluding that it is not "irrational for the legislature to proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries"); *Hernandez*, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."); *Andersen*, 138 P.3d at 983 ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a 'traditional' nuclear family where children tend to thrive."); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 998–99 (Mass. 2003) (Cordy, J., dissenting) ("We must assume that the Legislature . . . might consider and credit studies that document negative consequences that too often follow children either born outside of marriage or raised in households lacking either a father or a mother figure, and scholarly commentary contending that children and families develop best when mothers and fathers are partners in their parenting . . . ." (footnote omitted)); Wardle, *supra* note 41, at 543 ("Compared to unmarried parents, and to single parents . . . and to stepparenting, parenting by their mother and father who are married to each other provides children and society with the most protections and advantages. . . . Logically, it is not unreasonable to expect that lesbigay parenting will not prove to be as beneficial for children or for society as parenting by a mother and father who are married to each other.").

[275] The Massachusetts Supreme Court, in its same-sex marriage opinion, noted that the government

> has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's preferred goal of protecting the "optimal" child rearing unit.

Goodridge, 798 N.E.2d at 963; *see also* Gill v. Off. of Pers. Mgmt., 699 F. Supp. 2d 374, 389 (D. Mass. 2010), *aff'd sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 decides to have children within marriage, based on the fact that lesbians and gay men are barred from marrying or from serving as adoptive and foster care parents, the regulations in question do not rationally further the purpose of promoting the "optimal" family structure for children.[276]

A second possible response to the family optimality argument is more relevant for our purposes because it addresses the claim's empirical foundations. In order to fully understand this second response, it is important to notice that the optimality argument is based on three different empirical claims: First, that children do better when raised by their biological parents; second, that children do better when raised by a female parent and a male parent; and third, that children do better when raised by married heterosexual couples. I below address each one of these claims.

1. The Claim that Children Do Better When Raised by Biological Parents

The social science studies cited by defenders of the family optimality claim compare the outcomes of children raised by married couples to those raised by single parents or by remarried parents (i.e., in stepparent households).[277] It is true that studies

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F.3d 1 (1st Cir. 2012) (noting that the denial of same-sex marriage does not "promote stability in heterosexual parenting"); Alaska Civil Liberties Union v. Alaska, 122 P.3d 781, 793 (Alaska 2005) ("There is no indication . . . that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry.").

[276] *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1089 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) ("It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman."); *Hernandez*, 855 N.E.2d at 31 (Kaye, C.J., dissenting) (noting that "no one rationally decides to have children because gays and lesbians are excluded from marriage"); Brief of Appellant at 27, *Lofton*, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD) ("[N]o one could rationally think that banning lesbians and gay men from the pool of prospective adoptive parents would increase the number of children adopted by a married mother and father.").

[277] For example, the defendants-intervenors' brief to the U.S. Court of Appeals for the Ninth Circuit in *Perry v. Brown*, Defendant-Intervenors-Appellants' Opening Brief, *supra* note 204, at 81, 87, cites the following studies, among others: SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003). An amicus brief written on behalf of the Alliance for Marriage in the Washington state same-sex marriage litigation, Brief of Amicus Curiae Alliance for Marriage et al., in Support of Appellant-Intervenors, *supra* note 272, at 8–11, cited *inter alia* the following studies: Deborah A. Dawson, *Family Structure and Children's Health and Well-Being*, 53 J. MARRIAGE & FAM. 573 (1991); Nadia Garnefski & Rene F. W. Diekstra, *Adolescents from One Parent, Stepparent and Intact Families: Emotional Problems and Suicidal Attempts*, 20 J. ADOLESCENCE 201 (1997); Judith Rubenstein et al., *Suicidal Behavior in Adolescents: Stress and Protection in Different Family Contexts*, 68 AM. J. ORTHOPSYCHIATRY

show that married couples are able to provide their children with greater amounts of financial and emotional support than single parents, which, in turn, generally leads those children to experience fewer behavioral and emotional problems while performing better in school than the children of single parents.[278] However, the vast majority of the parents who participated in these studies (both the married parents and the single ones) were biologically related to the children.[279] As a result, the "married parents vs. single parents" studies do not establish that the differences in child outcomes are attributable to biology.

It may seem at first glance that the studies, showing that children raised in intact married households generally have better outcomes than those raised in stepparent households, *do* show the benefits to children of being raised by their biological parents because children in stepparent households by definition share their home with an adult to whom they are not biologically related. It should be noted, however, that

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274 (1998); Elizabeth Thomson et al., *Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors*, 73 SOC. FORCES 221 (1994).

[278] For a summary of studies showing that children raised by married couples have generally better outcomes than those raised by single parents, see Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE CHILD. 75 (2005). It should be noted that some studies "have indicated that socioeconomic status explains most or all of the advantage of children raised by married couples." Rosenfeld, *supra* note 169, at 755. Michael Wald explains that the benefits to children of being raised in two-parent versus single-parent families is explained by

> (1) the advantages generated by the fact that two-parent families generally have higher income; (2) the fact that two parents provide more monitoring and supervision of children's activities and behavior; and (3) the greater consistency of parenting in homes with two caretakers, since single parents often become overburdened and less able to provide consistent care and nurture.

Wald, *supra* note 25, at 403.

It should also be noted that the fact that children in general do better when raised by married parents as opposed to by single parents does not mean that most children of single parents evince problems in psychological or social functioning. Indeed, "[n]umerous large-scale studies show that *the vast majority* of the children and adolescents who spend their childhoods living apart from one of their parents are well adjusted." Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 APPLIED DEVELOPMENTAL SCI. 98, 102 (2012) (emphasis added).

[279] As one of the leading books on the empirical study of single parenthood in the U.S. puts it in summarizing its findings, "growing up with only one *biological* parent frequently deprives children of important economic, parental, and community resources, and these deprivations ultimately undermine their chances of future success." MCLANAHAN & SANDEFUR, *supra* note 277, at 3 (emphasis added). It bears noting that those who raise family optimality argument in gay rights cases often cite the McLanahan and Sandefur book to support their empirical claims. *See, e.g.*, Defendant-Intervenors-Appellants Opening Brief, *supra* note 204, at 87; Brief of Amicus Curiae Alliance for Marriage, Inc., in Support of Appellant-Intervenors, *supra* note 272, at 16.

several of the studies in this area cited by defenders of the family optimality claim include adoptive parents within the definition of intact married households.[280] These studies therefore fail to establish that the differences in outcomes between children raised in intact married households and those in stepparent homes are attributable to the fact that there is a nonbiological parent in the latter.[281]

In addition, children in stepparent households have to cope with the challenges of adjusting to new home arrangements. As a leading sociologist—whose work is often cited in legal briefs by those who raise family optimality claims in gay rights cases[282]—explains, "stepfamily formation is stressful for many children because it often involves moving (generally to a different neighborhood or town), adapting to new people in the household, and learning new rules and routines."[283] We cannot conclude, therefore, that the general differences in child outcomes between children raised in intact married households and those raised in stepparent households are attributable to the absence of a biological link between the children in the latter group and one of the two adults in the household rather than to other factors, including family disruption and relocation.[284]

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[280] *See, e.g.*, Garnefski & Diekstra, *supra* note 277 (studying "adolescents living in intact families" without distinguishing between biological and adoptive parents); Thomson et al., *supra* note 277, at 225 (noting that for purposes of the study, "[f]amily structure was determined by the relationship of each parent to children younger than 19 in the household" and that "[o]riginal two-parent families are married-couple families in which all children younger than 19 in the household *were born to or adopted by the couple*" (emphasis added)); *see also* Lamb, *supra* note 278, at 105 (noting that "the term 'biological' has been used misleadingly in some of the research to identify children raised by the same parents from birth, whether or not they were biological or adoptive parents" (citing Shannon E. Cavanagh, *Family Structure History and Adolescent Adjustment*, 29 J. FAM. ISSUES 944 (2008))).

[281] It is important to note that defenders of the family optimality claim, in their efforts to show that children benefit from having a biological link to those who serve as their parents, have not relied on the contention that biological parents are better parents than adoptive ones. Indeed, David Blankenhorn, the only witness called by same-sex marriage opponents who discussed matters related to children during the Proposition 8 trial testified that "[t]he studies show that adoptive parents, because of the rigorous screening process that they undertake before becoming adoptive parents, actually on some measures outstrip the biological parents in terms of providing protective care for their children." Transcript of Proceedings at 2795, Perry v. Schwarzenegger, 704 F.Supp. 2d 921 (N.D. Cal. 2010) (No. C-09-2292VRW), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

[282] *See, e.g.*, Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 6; Brief of Family Research Council as Amicus Curiae in Support of Defendants-Appellants at 32 n.18, Conaway v. Deane, 932 A.2d 571 (Md. 2006) (No. 44).

[283] Amato, *supra* note 278, at 80.

[284] Defenders of the family optimality argument sometimes claim that, in the absence of an adoption, all same-sex couple households with children constitute a form of stepparent family because only one of the two adults can be biologically related to any one child. *See* Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 10–11. The "stepparent" label, however, does not fit the large number of lesbian and gay parents who, while not biologically related to their children, participated in the decision to have children

2. The Claim that Children Do Better When Raised by a Female Parent and a Male Parent

The social science studies relied on by supporters of the family optimality argument not only fail to support their claims regarding the value to children of being raised by their biological parents; the studies also fail to support the claim that children benefit from having a male and a female parent. It is the case that most single-parent households in the United States are headed by mothers.[285] This does not mean, however, that the better child outcomes found in children raised by married couples are attributable to the absence of a male parent in most single parent households, as opposed to the absence of a *second* parent.[286] The single parent studies cited by defenders of the family optimality argument, in other words, do not support the contention that it is the gender of the parents, as opposed to their number, that accounts for the differences in child outcomes.[287]

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with their same-sex partners who are biologically linked to the children. Those individuals are not similarly situated to heterosexual stepparents who enter the picture by marrying the biological parents, often several years after the children were born. Nonbiological lesbian and gay parents are frequently a part of their children's lives from the very beginning, and the children often consider them to be parents who are indistinguishable from their biological parents. *See* Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Facade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623, 665–66 (2012) (noting that young children jointly raised by co-parents do not make distinctions between legal and non-legal parents). In contrast, a stepparent is usually someone who was not a parent from birth, and is frequently deemed by the child, especially at the beginning of the relationship, to have a status that falls short of an actual parent. *See* Amato, *supra* note 278, at 80–81 ("[E]arly relationships between stepparents and stepchildren are often tense. . . . Some children experience loyalty conflicts and fear that becoming emotionally close to a stepparent implies betraying the nonresident biological parent.").

285 MCLANAHAN & SANDEFUR, *supra* note 277, at 6.

286 *See* Biblarz & Stacey, *supra* note 222, at 5 ("None of this research investigated whether the gender of the absent parent was responsible for different child outcomes in single- versus two-parent families."); Lamb, *supra* note 278, at 103 ("Research on children in both traditional and nontraditional families has demonstrated that *father* absence is not itself important to adjustment; instead, it is . . . the quality of the parent-child relationships, the quality of the relationship between the parents, and the adequacy of resources that explain the higher levels of maladjustment on the part of children and adolescents in one-parent families."); Wald, *supra* note 25, at 403 ("[W]hile research indicates that children do better, on average, when raised by two-always-married biological parents, it does not demonstrate that the gender of the two parents matters. In fact, most researchers who study the impact of family structure attribute the differences in children's outcomes primarily to the fact that there are two parents rather than one.").

287 It is sometimes claimed that children benefit from having one parent of their own sex and that parenting by lesbians and gay men is problematic because it, by definition, means that there is no parent of one of the sexes. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1000 n.29 (Cordy, J., dissenting). There is, however, little empirical support for the proposition that male children benefit uniquely from having a male parent and that female children benefit uniquely from having a female parent. A study that compared households led by single mothers to those led by single fathers did not find that daughters fared better in the former

Defenders of the optimality argument contend that there are differences in the parenting styles of male and female parents and that those differences benefit children in unique ways.[288] For example, an amicus brief filed by a conservative association of pediatricians with the Court of Appeals in the California Proposition 8 case claimed *inter alia* that "[i]n comparison to fathers, mothers generally maintain more frequent and open communication and enjoy greater emotional closeness with their children, in turn fostering a sense of security in children with respect to the support offered by the family structure."[289] The brief added that "[c]ompared to mothers, fathers are more likely to encourage children to try new things and to embrace novel situations and challenges,"[290] and that fathers "utilize a different discipline style than mothers, in that they discipline with less frequency, but greater predictability and less flexibility in terms of deviating from pre-determined consequences for particular behavior."[291]

Those who rely on the literature about the different parenting styles of male parents and female ones to defend marital and parenting restrictions on lesbians and gay men, however, do not disclose that the literature studies intact married heterosexual couples.[292] This limitation is crucial because even if it is the case that married heterosexual women, for example, parent in ways that are distinct from how married men parent, that does not mean that single mothers (regardless of their sexual orientation) and lesbian co-parents parent in the same ways. What defenders of the family optimality claim attribute to parental gender, in other words, might be explained by other factors such as marital status or the number of parents.[293]

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than in the latter or that sons did better in the latter than in the former. Brian Powell & Douglas B. Downey, *Living in Single-Parent Households: An Investigation of the Same-Sex Hypothesis*, 62 AM. SOC. REV. 521 (1997). The researchers noted that "[w]hat is striking is the extent to which the match between the sex of the parent and the sex of the child is unimportant." *Id.* at 530. They also concluded that "[o]ur findings . . . suggest[ ] that given comparable situations, fathers can provide as strong a role model to girls as to boys, just as mothers can be models to boys and girls." *Id.* at 537.

288 *See, e.g.*, Brief of Amicus Curiae Alliance for Marriage, Inc., Supporting Appellants-Intervenors, *supra* note 272, at 13.

289 Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 18–19 (citing ROSS D. PARKE, FATHERHOOD 7 (1996)). The brief added that "[m]others' typical mode of parent-child play is predictable, interactive, and geared toward joint problem-solving, which helps children to feel comfortable in the world they inhabit." *Id.* (citing ELEANOR MACOBY, THE TWO SEXES 266–67 (1998); PARKE, *supra*, at 5; KYLE D. PRUETT & MARSHA KLINE PRUETT, PARTNERSHIP PARENTING 18–19 (2009)).

290 Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 21 (citing PARKE, *supra* note 289, at 6).

291 *Id.* at 22 (citing Power et al., *supra* note 209, at 980-89).

292 *See, e.g.*, Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 17–23 (failing to note that the literature on gender-based parenting styles focuses on intact married heterosexual couples).

293 *See* Biblarz & Stacey, *supra* note 222, at 5 ("What we do not know is whether the[ ] average differences [reported in the research on married couples] derive from gender per se, from heterosexual gender, or from other factors.").

In addition, the literature in question does not seek to quantify child outcomes and therefore does not support the proposition that the differing parenting styles of married men and women *translate into better outcomes for children*. As Michael Lamb, the editor of one of the leading texts on the role that fathers play in the well-being of children,[294] explains, "there is no evidence that . . . sex differences in parental behavior have any implications for children's adjustment, or that adjustment is affected in any way when parents do not assume traditional sex-typed parenting styles."[295] Lamb adds that "[r]esearch conducted over the last four decades has demonstrated that both mothers and fathers are important to their children *as parents*, not as males and females, and that the parents' genders do not affect children's adjustment."[296]

The crucial question, then, is not whether female parents parent in ways that are distinct from how male parents parent (and vice versa). Instead, the crucial question is whether those differences are associated with child outcomes. The literature relied on by defenders of the family optimality argument in gay rights cases does not show the existence of such an association.

3. The Claim that Children Do Better When Raised by Married Heterosexual Couples

Defenders of the family optimality argument in gay rights cases attempt to support their view that children benefit from being raised by married heterosexual couples by pointing to studies comparing outcomes of children raised by married *heterosexual* parents to those of children raised by single (presumptively) *heterosexual* parents.[297] As already noted, several studies do suggest that married couples are able to provide their children with greater amounts of financial and emotional support than single parents, which, in turn, generally leads those children to experience fewer behavioral and emotional problems while performing better in school than the children of single parents.[298] The problem—and it is a fatal one for supporters of the family optimality argument in gay rights cases—is that the studies in question *compare one group of heterosexual parents with another group of such parents*. As a result, they do not address the question of whether parental sexual orientation is associated with better outcomes in children. The studies that *do* account for parental sexual orientation are those summarized in Part I.A.

In addition, many of the studies reviewed in Part I.A. account for the role of gender in parenting. Studies that compare lesbian couple households with heterosexual couple ones make it possible to assess whether the presence of a male parent in the

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294 *See* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael E. Lamb ed., 5th ed. 2010).

295 Lamb, *supra* note 278, at 103.

296 *Id.* (citation omitted).

297 *See, e.g.*, sources cited *supra* note 277.

298 *See supra* note 278 and accompanying text.

second family type makes a difference in the children's psychological and social functioning.[299] Those studies, unlike the ones relied on by defenders of the family optimality argument, compare two-parent households, thus allowing for the finding of associations between family structure and child outcomes that are based on the *gender* rather than on the *number* of parents.[300]

It is crucial to note, then, the empirical sleight of hand deployed by defenders of the family optimality argument. They rely on social science studies showing that children raised by married couples generally have better outcomes than those raised in single-parent (and stepparent) households to make three additional claims—one related to the supposed benefits of biological links between parents and their children;[301] a second related to the ostensible distinct benefits that are associated with having parents of different genders;[302] and a third related to the purported distinct benefits of being raised by married heterosexual parents[303]—that are not supported by those studies.[304]

At the end of the day, therefore, those who raise the family optimality argument to defend same-sex marriage bans and parenting restrictions affecting lesbians and gay men rely on empirical claims regarding the challenges faced by single parents—as well as stepparent households—in our society to make empirically unsupported claims about the benefits to children of being raised by heterosexuals as opposed to by lesbians or

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[299] For examples of such studies, see *supra* notes 74–75, 76–84, 118–20 and accompanying text.

[300] As Timothy Biblarz and Judith Stacey point out,

> [a]lthough research on lesbian moms investigated the impact of sexual identity on parenting, it contributes even more to understanding the effects of gender. Lesbian couples who have children with donor sperm or through adoption provide a natural experiment for assessing the effects of growing up without a male parent. Such research can control for the number of parents and their relational history.

Biblarz & Stacey, *supra* note 222, at 9.

[301] *See, e.g.*, Defendant-Intervenors-Appellants Opening Brief, *supra* note 204, at 80–81 (noting the "benefits [that] appear to flow in substantial part from the biological connection shared by a child with both mother and father").

[302] *See, e.g.*, *id.* at 81–82.

[303] *See, e.g.*, *id.* at 87.

[304] Although defenders of the family optimality argument try to legitimize their claims with a veneer of empiricism, the ultimate absence of empirical support for their positions may explain why they seem compelled, at the end of the day, to resort to vague and unempirical notions of "common sense" and "instinct" to defend the idea that it is best for children to be raised by married mothers and fathers who are biologically related to them. *See, e.g.*, Defendant-Intervenors-Appellants' Opening Brief, *supra* note 204, at 89 (criticizing the trial court for rejecting the "instinctive, commonsense belief" that children do best when raised by married heterosexual couples who are biologically related to their children); Brief of the American College of Pediatricians in Support of Appellants, *supra* note 209, at 23 ("Even in the absence of a detailed examination of social science data, common sense would suggest that children, like adults, benefit from balanced exposure to the diverse approaches reflected in the typical maternal and paternal parenting models.").

gay men. The fact that children generally do better when raised by two heterosexual parents who have never divorced than when raised by one heterosexual parent or by remarried straight parents tells us nothing about the differences between children raised by lesbian/gay parents and those raised by heterosexual parents. It is not rational to base assessments on the impact of parental sexual orientation on children by relying on empirical studies that do not account for the sexual orientation of parents. This is especially true when there is a large body of empirical literature that *has* sought to determine the relationship between parental sexual orientation and the psychological and social functioning of children. That literature, as we have seen, is remarkably consistent in showing no differences in such functioning that are associated with parental sexual orientation.

II. THE GENDER ATTITUDES AND INTERESTS OF CHILDREN

The researchers who have studied the children of lesbians and gay men have not limited themselves to investigating their psychological and social functioning. They have also looked at other matters, including whether parental sexual orientation is associated with children's gender attitudes and interests. These studies have sought to determine the extent to which the children of lesbians and gay men have preferences and engage in activities that conform to what has traditionally been expected of children depending on their gender. (The question of the children's sexual orientation is a distinct issue, one that I address in Part III.)

In this section, I summarize the social science studies that have looked into the gender attitudes and interests of children raised in lesbian and gay households.[305] I then proceed to assess that empirical evidence from the perspective of the rational basis test and conclude that there is a "conceivable state of facts"[306] under which there may be an association between parental sexual orientation and the gender attitudes and interests of children.[307] In particular, a minority of studies suggest that the daughters of lesbian mothers have gender preferences and engage in activities that are less consistent with traditional gender expectations than are those of the daughters of heterosexual parents.[308]

I also argue, however, that the goal of encouraging children to form attitudes and pursue interests that are consistent with what has traditionally been expected of them depending on their gender does not constitute a legitimate state interest.[309] As a result, the State cannot constitutionally justify same-sex marriage bans and parenting restrictions affecting lesbians and gay men on the basis of a factually conceivable association between parental sexual orientation and the gender attitudes and interests of children.[310]

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305 *See infra* Part II.A.
306 *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).
307 *See infra* Part II.B.
308 *See infra* notes 331–32, 347, 359, 369–71 and accompanying text.
309 *See infra* Part II.C.
310 *See infra* Part II.C.

Before proceeding, it is important to distinguish gender identity from gender attitudes and interests. A handful of studies have looked at the extent to which the sons and daughters of lesbian mothers are comfortable with their respective male and female identities.[311] These researchers have failed to find disparities between the children's biological sex and the sex with which they self-identify.[312] A significantly larger number of studies have looked into the issue addressed in this section, that is, whether the gender attitudes and interests of children of lesbian and gay parents differ from those of heterosexual parents.[313]

A. Summary of the Social Science Studies

The first two published studies of gender-related matters that compared the children of lesbian mothers with those of heterosexual parents appeared in 1981.[314] The first study, conducted by Beverly Hoeffer, looked to children's play preferences to assess gender-related interests.[315] Hoeffer compared twenty children, between six and nine years old, raised by single lesbian mothers with twenty children of the same age raised by single heterosexual mothers.[316] Hoeffer sought to measure the mothers' "encouragement of sex-role behavior" in their children by asking each one "to rate . . . toys according to those that she most, somewhat, and least preferred for her child."[317] The researcher also asked the children about their toy preferences by asking them to choose among "sex-typed masculine, sex-typed feminine, and neutral toys familiar to school-aged children."[318] Hoeffer found that, although the lesbian mothers in the

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[311] *See, e.g.*, Henny Bos & Theo G.M. Sandfort, *Children's Gender Identity in Lesbian and Heterosexual Two-Parent Families*, 62 SEX ROLES 114 (2010); Golombok et al., *supra* note 59; Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167 (1986).

[312] *See, e.g.*, Bos & Sandfort, *supra* note 311, at 116, 119 (finding no differences between the children of lesbian mothers and those of heterosexuals in the extent to which they reported "being happy with [their] assigned gender (gender contentedness)"); Golombok et al., *supra* note 59, at 562 ("There was no evidence of inappropriate gender identity for any of the children. All reported that they were glad to be the sex that they were and none would prefer to be the opposite sex."); Green et al., *supra* note 311, at 175–76 (finding that none of the children in the study experienced a disconnect between their biological sex and their sense of gender identity).

[313] *See, e.g.*, Golombok et al., *supra* note 108, at 21 ("It is well established within the psychological literature that [while] gender identity [is] relatively fixed [, gender] attitudes are more open to parental influence and change.").

[314] An earlier study by Richard Green, which sought to investigate the gender attitudes and preferences of lesbian mothers and transgender parents, did not utilize a control group of heterosexual parents. *See* Green, *supra* note 244, at 696.

[315] Beverly Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian-Mother Families*, 51 AM. J. ORTHOPSYCHIATRY 536 (1981).

[316] *Id.* at 537.

[317] *Id.* at 538.

[318] *Id.* Examples of "feminine" toys were dolls and jump ropes. Examples of "masculine" toys were trains and rockets. And examples of gender-neutral toys were puzzles and marbles. *Id.*

sample "appeared more willing to encourage, or at least less likely to censor, boys' and girls' play with toys stereotypically associated with the opposite gender,"[319] parental sexual orientation was not associated with the degree to which their boys preferred "sex-typed masculine" toys and girls preferred "sex-typed feminine" ones.[320]

The second study published in 1981 was led by Martha Kirkpatrick.[321] It compared the gender development of twenty children, between five and twelve years old, raised by lesbian mothers with twenty children of the same age raised by single heterosexual mothers.[322] The Kirkpatrick study used criteria such as toy and play preferences, the sex of playmates, and "the sex of first-drawn figures" (i.e., whether the child, when asked to draw a figure, first draws one of his or her sex) to evaluate gender development.[323] The researchers found no differences in the children's gender attitudes and interests.[324]

In 1983, Susan Golombok and a team of British researchers published the results of their study comparing thirty-seven children raised by lesbian mothers with thirty-eight children raised by heterosexual single mothers.[325] The researchers developed two sex role scales meant to assess masculinity and femininity and then asked parents and their children about preferences related to toys, play activities, sports, books, and television shows.[326] The researchers found no differences in the gender attitudes and interests of the children of lesbian mothers when compared to those of heterosexual mothers.[327]

A few years later, a research team led by Richard Green also investigated whether there were gender-related differences between the children of single lesbian mothers and single heterosexual ones.[328] The sample consisted of fifty lesbian mothers and their fifty-six children, between three and eleven years old, and forty straight mothers and their forty-eight children of the same age range.[329] The researchers did not find differences in the boys' gender-related interests and preferences.[330] However, they did find a few such differences among the girls. The daughters of the lesbian

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319 *Id.* at 542.

320 *Id.* at 539.

321 Kirkpatrick et al., *supra* note 54.

322 *Id.* at 545–46. The Kirkpatrick study also investigated the children's psychological functioning. I discuss that section of the study in *supra* notes 54–58 and accompanying text.

323 Kirkpatrick et al., *supra* note 54, at 548.

324 *Id.* at 551.

325 Golombok et al., *supra* note 59, at 554. The Golombok study also investigated the children's psychological and social functioning. I discuss that section of the study in *supra* notes 59–61 and accompanying text.

326 *Id.* at 555.

327 *Id.* at 562.

328 Green et al., *supra* note 311.

329 *Id.* at 168. The two sets of mothers were matched using criteria such as age, race, children's sex and age, length of time since the separation from the husband/father, family income, and educational level. *Id.* at 169.

330 *Id.* at 179 ("The boys in both groups are similar and quite traditionally masculine.").

mothers, for example, expressed greater interest in careers traditionally dominated by men (such as law, medicine, and engineering) than did the daughters of straight mothers.[331] The girls raised by lesbian mothers were also "less traditionally feminine" in their dress choices and in their preferred activities while attending school and playing in their neighborhoods.[332]

In 1997, Anne Brewaeys and a team of Dutch researchers "us[ed] the preschool activities inventory [or PSAI], a psychometrically constructed screening instrument specifically designed to differentiate 'masculine' from 'feminine' boys and girls within a normal population sample."[333] The Brewaeys study compared children between the ages of four and eight raised in thirty lesbian families with young children in two control groups: one consisting of thirty-eight heterosexual families who conceived through donor insemination and thirty heterosexual families who conceived through sexual intercourse.[334] The researchers found no significant differences in the PSAI masculinity and femininity scores between the three groups for either boys or girls.[335]

In 2004, the British researchers Fionna MacCallum and Susan Golombok, as part of a longitudinal study of the children of lesbian mothers who conceived through donor insemination,[336] investigated the gender development of twelve-year-old children raised in three different types of families: twenty-five families headed by lesbian mothers, thirty-eight by single heterosexual mothers, and thirty-eight by heterosexual couples.[337] As in the Brewaeys study, the children were given a questionnaire meant to "assess[ ] [their] gender role orientation . . . [by] yield[ing] two separate independent subscale scores, one of masculinity and one of femininity."[338] The researchers found that the boys in father-absent homes rated higher in the femininity scale, but the difference was not associated with parental sexual orientation because no differences were found in that scale between the children of lesbian mothers and those of single heterosexual mothers.[339] The study found no significant differences in the masculinity scale among

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331 *Id.* at 176. In contrast, "[n]inety-five percent of all boys chose traditionally masculine jobs." *Id.*

332 *Id.* at 179. Charlotte Patterson's 1994 study of the children of lesbian mothers living in the San Francisco area reported that "the great majority [preferred] games that are generally associated with their own rather than with the opposite sex" and that "preferences for sex role behavior among the children of lesbian mothers appeared to be quite normal." Patterson, *supra* note 69, at 168–69.

333 Brewaeys et al., *supra* note 76, at 1353 (citations omitted). "The questionnaire requires mothers to rate the frequency of their child's play with a variety of toys, games and activities." *Id.*

334 *Id.* at 1351.

335 *Id.* at 1356. The researchers also investigated the children's psychological adjustment. I discuss that section of the study in *supra* notes 76–81 and accompanying text.

336 For the original study, see Golombok et al., *supra* note 86.

337 MacCallum & Golombok, *supra* note 95, at 1409.

338 *Id.* at 1412 (emphasis omitted).

339 *Id.* at 1415.

the boys in all three family categories.[340] It also found no differences in either the masculinity or the femininity scale among the girls in all three groups.[341]

In 2008, Megan Fulcher and a team of researchers reported on the findings of a study of sixty-six four-to-six-year-old children, half raised by lesbian couples and half by heterosexual couples.[342] The study found that the lesbian mothers "reported more liberal attitudes about children's gender-related behavior" than did the heterosexual parents.[343] Specifically, the lesbian mothers expressed views of proper behavior by boys and girls that were less consistent with traditional gender expectations than did the heterosexual parents.[344] The researchers also found that "lesbian mothers were more likely than heterosexual parents to divide both the labor involved in childcare and paid labor evenly."[345]

Despite these differences in parental attitudes and behaviors, the researchers found no differences in the two sets of children regarding "their knowledge of gender stereotypes, or in their [gender] preferences for current and future activities."[346] The research team, however, did find a statistically significant difference: "Children with lesbian parents found gender transgressions committed by boys to be less serious than did children of heterosexual parents."[347]

In another article published in 2008, Erin Suftin and her team of researchers studied gender-related issues by comparing twenty-nine families headed by lesbian couples with twenty-eight families headed by heterosexual ones.[348] The study included fifty-seven four-to-six-year-old children.[349] Relying on questionnaires, the researchers found that the lesbian mothers had "more liberal [gender] attitudes than did heterosexual parents."[350] The researchers also assessed the "gender stereotypicality"[351] of

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340 *Id.*

341 *Id.*

342 *See* Fulcher et al., *supra* note 21, at 332.

343 *Id.* at 336.

344 *Id.* In assessing the parents' gender attitudes, the researchers inquired about the extent to which they agreed or disagreed with propositions such as "'[i]t is more acceptable to me for a girl to cry than a boy (excluding major injuries)'" and "'[b]oys are naturally more adventurous than girls.'" *Id.* at 334.

345 *Id.* at 338. For other studies on the division of labor in lesbian couple households, see sources cited in *supra* note 21.

346 Fulcher et al., *supra* note 21, at 336.

347 *Id.* Gender transgression was measured by showing children pictures of other children engaged in gender atypical conduct, such as "[a] boy with fingernail polish and [a] girl playing football," and then asking them how they felt about the pictures. *Id.* at 334.

348 Erin L. Suftin et al., *How Lesbian and Heterosexual Parents Convey Attitudes About Gender to Their Children: The Role of Gendered Environments*, 58 SEX ROLES 501, 504 (2008).

349 *Id.*

350 *Id.* at 507.

351 *Id.* at 505. The researchers showed pictures of the children's bedrooms to eighty college students and asked them to identify the gender of the child in question, as well as how masculine or feminine the room seemed, based on the photographs. *Id.* at 505–06.

the children's bedrooms and found that "children of heterosexual parents had more strongly stereotyped bedrooms than the children of lesbian parents."[352] In addition, the researchers "found that children of lesbian mothers showed less traditional gender attitudes than did children of heterosexual parents."[353]

In analyzing the data, however, the researchers were unable to conclude that parental sexual orientation was associated with either the decoration of the children's bedroom or their gender attitudes.[354] This was because the children of heterosexual parents who had liberal gender views and the children of lesbian mothers scored similarly on both measures.[355] This led the researchers to conclude that it was the parents' gender attitudes, rather than their sexual orientation, that "were a key variable accounting for variations in children's gender role attitudes and in the qualities of children's physical environments."[356]

In an article published in 2010, the Dutch researchers Henny Bos and Theo Sandfort looked at questions of gender development and attitudes in comparing sixty-three children raised by lesbian mothers with sixty-eight children raised by heterosexual parents.[357] The researchers found that parental sexual orientation was not associated with differences in "gender typicality, gender contentedness [or gender-related] pressure from peers."[358] The study did find, however, that "[c]hildren in lesbian families were less likely to regard their own gender as superior (intergroup bias). They also reported less parental pressure to conform to gender stereotypes than children in heterosexual two-parent families."[359]

Another study published in 2010, this one led by Rachel Farr, investigated the gender development of young children raised by lesbian and gay adoptive parents and compared it to those of adopted children raised by heterosexual couples.[360] The researchers asked parents to answer questions about their children's preferences

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[352] *Id.* at 508.

[353] *Id.*

[354] *Id.*

[355] *Id.* at 509. As the report's authors put it, "[r]egardless of sexual orientation, parents who held liberal attitudes about children's gender-related behavior were less likely to provide their children with physical environments that were highly gender stereotyped and had children whose own attitudes about gender development were less stereotyped as well." *Id.*

[356] *Id.* The researchers added that "[t]his finding is consistent with a variety of related results that point to the importance of attitudes, behaviors, and relationships in the family of origin, rather than to structural features of the family such as parental sexual orientation, as the crucial factors that influence children's development." *Id.* at 509–10.

[357] Bos & Sandfort, *supra* note 311.

[358] *Id.* at 119.

[359] *Id.* The Dutch researchers, unlike Fulcher and her team, *see supra* notes 342–47 and accompanying text, did not test whether the differences in gender attitudes were associated with other variables, such as the division of labor within the families. *See* Bos & Sandfort, *supra* note 311, at 122.

[360] Farr et al., *supra* note 158.

regarding toys (e.g., guns vs. tea sets) and activities (e.g., playing sports vs. taking care of babies).[361] The responses showed no significant differences—boys and girls in both groups exhibited preferences and conduct that were typical of their gender.[362]

Finally, Abbie Goldberg also led a team of researchers who studied the gender-based play preferences of young children raised by lesbian and gay parents.[363] Goldberg's study, published in 2012, was the first to compare the gender preferences of children raised in adoptive heterosexual families with those of children adopted by lesbians and gay men.[364] The sample consisted of forty-eight heterosexual couples, forty-four lesbian couple families, and thirty-four gay male ones identified with the assistance of adoption agencies across the country.[365] The children, who had been in their adoptive homes for two years at the time of the study, were between two and four years old.[366]

The researchers, using the PSAI questionnaire,[367] gathered information from the parents regarding their children's play preferences.[368] They found that the differences in gender-based play preferences between the boys and girls of the heterosexual couples were greater than the differences between the boys and girls in the other two sets of families.[369] In other words, when the researchers compared the play preferences of children "*between genders* (boy versus girl) by family type," they found a statistically significant difference between the children of heterosexual parents and

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[361] *Id.* at 169.

[362] *Id.* at 173. The researchers concluded that

> [r]egardless of whether their parents were lesbian, gay, or heterosexual, most boys exhibited behavior typical of other same-aged boys, and most girls exhibited behavior typical of other same-aged girls. There were no significant differences as a function of family type. This finding is particularly noteworthy for the children of gay fathers, whose [effects on their children's] gender development has rarely been investigated in earlier studies. Our results suggest that parental sexual orientation is not as influential in young children's gender development as previously thought. Rather than parental sexual orientation, biological influences and other gender-typed socialization influences are likely to be particularly important early in children's development.

Id. at 175 (citations omitted).

[363] Abbie E. Goldberg et al., *Gender-Typed Play Behavior in Early Childhood: Adopted Children with Lesbian, Gay, and Heterosexual Parents*, 67 SEX ROLES 503 (2012).

[364] *Id.* at 503.

[365] *Id.* at 506, 508.

[366] *Id.* at 507.

[367] *See supra* note 333 and accompanying text.

[368] Goldberg et al., *supra* note 363, at 509.

[369] *Id.* at 511 ("We found that girls and boys in same-gender parent families in the US were significantly less differentiated (stereotyped) in their play behavior than girls and boys in heterosexual parent families . . . .").

those of lesbian and gay ones with the former showing a greater divide in their play preferences based on their gender.[370]

The researchers also looked at differences "*within gender* (boy versus boy, girl versus girl) by family type."[371] In doing so, they found a significant difference in the masculinity rating associated with the play preferences of the boys of lesbian mothers when compared to that of the boys in the other two sets of families.[372] There was, however, no significant difference in the play-related femininity rating of the girls of gay fathers when compared to that of girls in the other two sets of families.[373]

B. Assessing the Empirical Literature from the Rational Basis Perspective

I argued in Part I that the empirical evidence on the question of whether the psychological and social functioning of the children of lesbians and gay men differs from that of the children of heterosexual parents is so conclusive and uniform that there is no factual foundation to support the claim that such functioning is associated with parental sexual orientation. As a result, the government, even under the highly deferential rational basis test, should not be permitted to rely on purported differences in the psychological and social functioning of children raised by lesbians and gay men to justify same-sex marriage bans and parenting restrictions affecting sexual minorities.[374]

The empirical literature on the question of whether parental sexual orientation is associated with the gender attitudes and interests of children does not evince the same degree of conclusiveness and uniformity. Most studies (the Hoeffer[375] and Kirkpatrick studies from 1981,[376] the Golombok study from 1983,[377] the Brewaeys study from 1997,[378] the MacCallum and Golombok study from 2004,[379] and the Farr study from 2010[380]) found no significant differences in gender-related matters.[381] Another study (Suftin, 2008)[382] did find some differences in the gender attitudes of the children of lesbian mothers when compared to those of children of heterosexual parents, with the

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370 *Id.* The difference was greater between the boys and girls of heterosexual parents and those of lesbian mothers than it was between the former and the boys and girls of gay fathers. *Id.*

371 *Id.*

372 *Id.* at 512 ("We . . . found that boys in lesbian-mother families were rated as engaging in less masculine play than boys in other types of families.").

373 *Id.* ("[W]e did not find that the daughters of gay men were less feminine in their play behavior than the daughters of both lesbian and heterosexual mothers . . . .").

374 *See supra* Part I.B.

375 Hoeffer, *supra* note 315.

376 Kirkpatrick et al., *supra* note 54.

377 Golombok et al., *supra* note 59.

378 Brewaeys et al., *supra* note 76.

379 MacCallum & Golombok, *supra* note 95.

380 Farr et al., *supra* note 158.

381 *See supra* notes 315–27, 333–41, 360–62 and accompanying text.

382 Suftin et al., *supra* note 348.

former expressing views that were less gender stereotyped.[383] The researchers, however, concluded that those differences were associated with parental gender attitudes and behaviors rather than with parental sexual orientation.[384]

It is some of the other studies' findings that complicate matters and that could lead a court to conclude that the question of whether there is an association between parental sexual orientation and the gender interests and attitudes of children is subject to reasonable factual dispute. Specifically, Green's study from 1986 found that the daughters of lesbian mothers expressed greater interest in careers traditionally chosen by men than did the daughters of heterosexual mothers.[385] Green also found that the daughters of lesbian mothers wore clothes that were less traditionally feminine and that they were less likely to engage in traditionally feminine activities in their neighborhoods and schools.[386] In addition, the Fulcher study from 2008 found that the children of lesbian mothers were less troubled by the gender transgressions of other children than were the children of heterosexual parents.[387] For their part, Bos and Sandfort in 2010 reported differences in the extent to which the children of lesbian mothers believed their gender to be superior (they were less likely to think so than the children of heterosexuals), and in the extent to which lesbian mothers encouraged their children to abide by traditional gender expectations (they were less likely to do so than heterosexual parents).[388] Finally, the Goldberg study from 2012 found that the differences in gender-based play preferences between the boys and girls of heterosexual couples were greater than the differences between the boys and girls raised by same-sex couples.[389] That study also found that the play preferences of the boys of lesbian mothers were less typically masculine than those of boys raised by heterosexual or gay male parents.[390]

To be clear: the findings in the Green, Fulcher, Bos/Sandfort, and Goldberg studies do *not* permit us to conclude that there is a clear association between parental sexual orientation and the gender attitudes and interests of children; more studies would need to be conducted to be able to support such an assertion. But the first issue under the rational basis test is not whether there is conclusive evidence of difference; instead, the issue is whether there is a conceivable basis of fact to support the claim of possible differences between the children of lesbians and gay men and those of heterosexual

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383 *See supra* notes 351–53 and accompanying text.

384 *See supra* notes 354–56 and accompanying text.

385 *See supra* note 331 and accompanying text.

386 *See supra* note 332 and accompanying text. The Green study, however, did not find differences in the boys' gender-related interests and preferences. *See supra* note 330 and accompanying text.

387 *See supra* note 347 and accompanying text. The Fulcher study, however, did not find gender-related differences in the children's activity preferences. *See supra* note 346 and accompanying text.

388 *See supra* note 359 and accompanying text.

389 *See supra* notes 369–70 and accompanying text.

390 *See supra* note 371–72 and accompanying text.

parents.[391] Although there have been only four studies suggesting such an association,[392] while there have been several more suggesting the opposite,[393] it seems to me that the Green, Fulcher, Bos/Sandfort, and Goldberg studies on gender attitudes and preferences are sufficient evidence of possible indicia of difference to meet the easy-to-satisfy factual component of the rational basis test.

The fact, however, that there are indicia of empirical evidence supporting the existence of possible differences between the children of lesbian and gay parents and those of heterosexual parents on some measures does not end the constitutional inquiry. The rational basis test also requires that the differences in question be rationally related to the attainment of a legitimate state interest.[394]

The government, in other words, cannot simply argue that the possible differences in the gender attitudes and interests of the children of lesbians and gay men are enough to justify, under the rational basis test, the imposition of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men. Instead, the government must contend that the differences in question have some connection to the promotion of a legitimate state interest. In order to do so, the government would have to claim that it has the authority to set policies with the view of encouraging children to behave in gender-typical ways. As I argue in the next section, this leaves the government in the constitutionally untenable position of contending that the promotion of specific gender attitudes and interests is a legitimate state interest.

C. The Illegitimacy of the State's Promotion of Particular Gender Attitudes and Interests

The Supreme Court has left little doubt that it is constitutionally impermissible for a state to be in the business of encouraging individuals to pursue particular priorities and preferences depending on their gender.[395] The first time that the Court so held was in its 1975 ruling in *Weinberger v. Weisenfeld*.[396] In that case, the plaintiff's wife died while giving birth to the couple's son.[397] The deceased, who had worked for years as a teacher, had been the family's principal source of income.[398] After his wife's death, the plaintiff applied for a so-called "Mother's insurance benefit" under the Social

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391 *See supra* note 11 and accompanying text.

392 *See* Bos & Sandfort, *supra* note 311; Fulcher et al., *supra* note 21; Goldberg, *supra* note 363; Green et al., *supra* note 311.

393 *See, e.g.*, Farr et al., *supra* note 158; MacCallum & Golombok, *supra* note 95.

394 *See supra* notes 17–18 and accompanying text.

395 *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (discussing the Court's consistent presumption against the constitutionality of gender-based governmental policies).

396 420 U.S. 636 (1975).

397 *Id.* at 639.

398 *Id.* at 637 n.2, 639.

Security Act.[399] According to the relevant statutory provision, a widow with children was entitled to a survivor benefit based on the earnings of her deceased husband.[400] The provision, however, did not afford the same benefit to surviving widowers, leading social security officials to reject the plaintiff's benefit application.[401] He then sued the government arguing that the provision was unconstitutional because it denied him (and all other similarly situated men) equal protection under the Fifth Amendment.[402]

The government contended that the statutory provision did not violate the Constitution because it was a benign measure "reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families."[403] But after reviewing the measure's legislative history, the Court determined that its purpose was instead to encourage widows to stay at home caring for their minor children rather than to join the workforce after their husbands' deaths.[404] As the Court put it, Congress enacted the provision "because it believed that [women with minor children] should not be required to work."[405]

The Court made clear that the stereotypical view that women should stay at home caring for children while men should work outside of the home was an impermissible basis for a law.[406] The Court explained that even if "a man is working while there is a wife at home [, that] does not mean that he would, or should be required to, continue to work if his wife dies."[407] The Justices added that "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female."[408]

Since *Weisenfeld*, the Court has repeatedly held that the government cannot adopt policies with the goal of encouraging different preferences and choices among individuals depending on whether they are men or women. Less than a month after *Weisenfeld*, the Court, in *Stanton v. Stanton*,[409] addressed the constitutionality of a Utah statute that required parents to support their male children until they reached the age of twenty-one, while only demanding that they support their female children until they turned eighteen.[410] The state supreme court had upheld the provision based on the reasonableness of "old notions" such as (1) that men are expected to support their family through work and therefore need more education than women, which in turn means that male offspring need to be supported longer by their parents; (2) that "girls tend generally

399 *Id.* at 639.
400 *Id.* at 639 n.5.
401 *Id.* at 640.
402 *Id.* at 641–42.
403 *Id.* at 648.
404 *Id.* at 649–50.
405 *Id.* at 650.
406 *Id.* at 651–52.
407 *Id.* at 652.
408 *Id.*
409 421 U.S. 7 (1975).
410 *Id.* at 8–10.

to mature physically, emotionally and mentally before boys"; and (3) that women "generally tend to marry earlier."[411]

The U.S. Supreme Court rejected the state court's reasoning, explaining that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[412] The Court added that

> [t]o distinguish between [men and women] on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[413]

The Court applied the same reasoning in its 1978 ruling in *Orr v. Orr*.[414] In that case, the Court struck down an Alabama statute that rendered husbands, but not wives, liable for child support following a divorce.[415] The government claimed that its statute "effectively announc[ed] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role" and that it was "seeking . . . the reinforcement of that model among the State's citizens."[416] But the Court held that "this purpose cannot sustain the statute[ ]" and that, therefore, if it "is to survive constitutional attack, . . . it must be validated on some other basis."[417]

A few years later, the Court dealt with a Mississippi law that prohibited men from enrolling in a state-supported nursing school.[418] The Court, in striking down the statute, explained that the

> policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, [the school's] admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.[419]

The Court more recently returned to the question of whether the State may set policy based on it views of which interests and preferences are proper for individuals

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[411] *Id.* at 10 (quoting Stanton v. Stanton, 517 P.2d 1010, 1012 (Utah 1974)).
[412] *Id.* at 14–15.
[413] *Id.* at 15.
[414] 440 U.S. 268 (1979).
[415] *Id.* at 270–71.
[416] *Id.* at 279.
[417] *Id.* at 279–80.
[418] Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[419] *Id.* at 729–30 (footnote omitted).

depending on their gender in *United States v. Virginia*.[420] At issue in that case was the Virginia Military Institute's (VMI) policy of admitting only male students.[421] The state argued that women were incapable of benefitting from VMI's "adversative" method of instruction, which was characterized by "'[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.'"[422] The government claimed that there were important "psychological and sociological differences" between men and women that made the application of the adversative educational method to women less beneficial and effective.[423] But the Court had little difficulty rejecting the government's position, noting that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"[424]

It is clear, therefore, that it is constitutionally impermissible for the government to craft policies aimed at encouraging what it believes are proper attitudes and interests according to the gender of individuals. As a result, even if it could be shown conclusively that the sexual orientation of parents is associated with differences in their children's gender attitudes and interests, the State could not rely on that factual basis to justify the imposition of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men.

It may be objected that the Court's gender discrimination cases that I have explored here involved the application of heightened scrutiny—because the statutes and policies in question contained explicit gender classifications—and are therefore not relevant to the issue that I am addressing in this Article, namely, the interplay between the empirical literature on lesbian and gay parenting and the application of the highly deferential rational basis test.[425] Although the Court's review of the relationship between the government's means and its ends in the gender cases has undoubtedly been more searching than it would have been if it had applied the rational basis test, that does not undermine my point that the government's promotion of gender-based attitudes and interests among individuals can never constitute a legitimate state interest. Indeed, the Court has expressed most of its concerns with state-promoted gender stereotyping when analyzing the appropriateness of the government's objectives, rather than when assessing the link between those objectives and the means chosen by the State to achieve them.[426]

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[420] 518 U.S. 515 (1996).

[421] *Id.* at 519.

[422] *Id.* at 522 (quoting United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1994)).

[423] *Id.* at 549.

[424] *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

[425] The Court first explicitly applied heightened scrutiny in a case involving a gender classification in *Frontiero v. Richardson*, 411 U.S. 677, 682–83 (1973) (plurality opinion).

[426] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 279 (1979) (holding that the state's purpose of "allocat[ing] . . . family responsibilities under which the wife plays a dependent role" is constitutionally impermissible); Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975) (noting that

The Court has never suggested that the promotion of what the State considers to be proper gender-based preferences and behaviors would be a legitimate interest under the rational basis test. In fact, the opposite is the case. While discussing the government's stereotypical views regarding the different interests and choices of men and women in *Stanton v. Stanton*, the Court noted that it "perceive[d] nothing rational in the distinction drawn by" the statute in requiring parents to support male children for more years than female children.[427] The Court made clear that the statute was unconstitutional "under any test—compelling state interest, or rational basis, or something in between."[428]

At the end of the day, the government is not constitutionally able to defend same-sex marriage bans and parenting restrictions affecting lesbians and gay men by relying on the suggestion in some of the social science studies that the children of lesbian and gay parents may have gender attitudes and interests that are less traditional than those of children raised by heterosexual parents. The promotion of specific gender-based preferences and priorities among individuals can never constitute a constitutionally proper governmental objective, regardless of the applicable level of judicial review.

III. THE SEXUAL ORIENTATION OF CHILDREN

Of the three subject areas investigated by the social science studies discussed in this Article (psychological and social functioning, gender attitudes and interests, and sexual orientation), the one of sexual orientation is likely fraught with the greatest uncertainty. One reason for this uncertainty is the absence of a consensus among experts on how to determine an individual's sexual orientation. It has been suggested, for example, that whether an individual is lesbian or gay depends on the presence of one or more of several factors, including same-sex sexual attraction, same-sex sexual behavior, and/or self-identification as lesbian or gay.[429] It has also been suggested, however, that while these measures "capture related dimensions of sexual orientation[,] . . . none of the[m] . . . completely addresses the concept."[430]

There is also little consensus among scientists, psychologists, and other experts on the reasons why different individuals develop different sexual orientations.[431] One

Congress's purpose behind statutory provision under challenge was to allow widows to take care of children without having to work).

[427] Stanton v. Stanton, 421 U.S. 7, 14 (1975).

[428] *Id.* at 17.

[429] EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290 (1994) (noting that in order to determine "how many gays there are . . . one must ask whether this question refers to same-gender behavior, desire, self-definition, or identification or some combination of these elements").

[430] GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 2 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

[431] *See* Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCHOL. 130, 132 (1995) ("[I]t is impossible to disentangle

possible determinant of sexual orientation may be genetics. Some studies of siblings have found that identical twins are more likely to have the same sexual orientation than fraternal ones.[432] There are also studies suggesting that hormonal factors in a mother's womb may play a role in determining sexual orientation. Some studies, for example, have found an association between higher levels of the hormone androgen among mothers and a greater degree of same-sex sexual attraction among their offspring.[433]

It has also been suggested that environmental factors may play a role in determining sexual orientation. For a good part of the twentieth century, for example, many experts adhered to a Freudian psychoanalytic theory of sexuality that traced homosexuality to difficult relationships with parents.[434] Such a view is rarely defended these days, in part because there is little empirical support for it.[435] All of this means that, as the American Psychological Association notes, "[a]lthough much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles."[436]

Despite the difficulties that inhere in both defining sexual orientation and in accounting for why different individuals develop different sexualities, social scientists have attempted to determine whether there is an association between the sexual orientation of lesbian and gay parents and that of their children. In this section, I summarize the studies' findings.[437] I then proceed to assess the empirical evidence from the

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the biological and the psychological contributions to the behavioral differences that constitute sexual orientation.").

[432] *See, e.g.*, J. Michael Bailey et al., *Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample*, 78 J. PERSONALITY & SOC. PSYCHOL. 524 (2000); Niklas Langström et al., *Genetic and Environmental Effects on Same-Sex Sexual Behavior: A Population Study of Twins in Sweden*, 39 ARCHIVES SEXUAL BEHAV. 75 (2010).

[433] *See, e.g.*, Ralf W. Dittman et al., *Sexual Behavior in Adolescent and Adult Females with Congenital Adrenal Hyperplasia*, 17 PSYCHONEUROENDROCONOLOGY 153 (1992); Melissa Hines et al., *Androgen and Psychosexual Development: Core Gender Identity, Sexual Orientation, and Recalled Childhood Gender Role Behavior in Women and Men With Congenital Adrenal Hyperplasia (CAH)*, 41 J. SEX RES. 75 (2004).

[434] *See* Letter from Sigmund Freud to Anonymous Mother (Apr. 9, 1935), *reprinted in Historical Notes, A Letter from Freud*, 107 AM. J. PSYCHIATRY 786 (1951). The psychiatrist Charles Socarides was a prominent proponent of Freud's theory of sexuality. *See* CHARLES SOCARIDES, HOMOSEXUALITY 183–84 (1978).

[435] *See* Golombok & Tasker, *supra* note 62, at 5 ("[E]mpirical studies of the influence of parent-child relationships on the development of a gay or lesbian identity have produced inconclusive results.").

[436] AM. PSYCHOL. ASS'N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 2 (2008), *available at* http://www.apa.org/topics/sexuality/sorientation.pdf.

[437] *See infra* Part III.A.

perspective of the rational basis test and conclude that there is a "conceivable state of facts"[438] under which there may be an association between the sexual orientation of lesbian and gay parents and that of their children.[439] In particular, a minority of studies suggest that the daughters of lesbian mothers might be more interested in participating in same-sex sexual relationships than are the daughters of heterosexual parents.[440]

I also argue, however, that the goal of reducing or minimizing the number of individuals who develop a same-sex sexual orientation, or engage in same-sex sexual conduct, does not constitute a legitimate state interest.[441] As a result, the government cannot constitutionally justify same-sex marriage bans or the imposition of parenting restrictions affecting lesbians and gay men on the basis of a factually conceivable association between the sexual orientation of lesbian and gay parents and that of their children.[442]

A. Summary of the Social Science Studies

The first published study that directly compared the sexual orientation of children of lesbian parents[443] with a control group composed of children of heterosexual parents appeared in 1996.[444] In that report, Susan Golombok and a team of British researchers shared the findings of their longitudinal study of children of lesbian women who were born into heterosexual relationships.[445] (To distinguish this study from another longitudinal study led by Golombok discussed below, I will refer to it as the "Golombok Longitudinal Study 1.") The study compared twenty-five young adult children of lesbian mothers with twenty-one young adults raised by single heterosexual mothers.[446] When interviewing the adult children about sexual orientation issues, the investigators distinguished between sexual attraction, self-identification as lesbian or gay, and sexual

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438 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

439 *See infra* Part III.B. and accompanying text.

440 *See infra* notes 451–52, 467 and accompanying text.

441 *See infra* Part III.C.

442 *See infra* Part III.C.

443 Almost all of the studies in this area have investigated the sexual orientation of the daughters of lesbian mothers. One exception is a 1995 study that reported on the sexual orientation of eighty-two young adult sons of gay men. J. Michael Bailey et al., *Sexual Orientation of Adult Sons of Gay Fathers*, 31 DEVELOPMENTAL PSYCHOL. 124 (1995). The researchers, who did not use a control group composed of children of heterosexual parents, found that "[o]f sons whose sexual orientation could be rated with confidence . . . 91% were heterosexual," while the remaining 9% were gay. *Id.* at 126.

444 Golombok & Tasker, *supra* note 62. Richard Green published a study in 1978 that did not utilize a control group of children of heterosexual parents. Green et al., *supra* note 311, at 696. Most of the children in the study were not yet adolescents. *Id.* at 692. The primary purpose of the study was to assess the gender attitudes and preferences of the children rather than their sexual orientation. *Id.* However, Green reported that all of the (small number of) teenagers and young adults in the study had a heterosexual sexual orientation. *Id.*

445 Golombok & Tasker, *supra* note 62.

446 *Id.* at 5.

behavior.[447] They found no statistically significant difference between the two groups "in the proportion who reported sexual attraction to someone of the same gender."[448] There was also no statistically significant difference between the two groups of young adults in their rates of self-identification as lesbian or gay.[449] In addition, the researchers found that the sons in both groups did not show significant differences in their interest in participating in same-sex relationships.[450]

The results, however, were different for daughters. A statistically significant greater number of the daughters of lesbian mothers had had at least one sexual relationship with someone of the same sex.[451] In addition, a statistically significant greater number of daughters of lesbian mothers thought they might in the future experience same-sex attraction or enter into a lesbian relationship.[452]

Fourteen years later, the Dutch researchers Henny Bos and Theo Sandfort, in comparing sixty-three children between the ages of eight and twelve raised by lesbian mothers with sixty-eight children of the same age range raised by heterosexual parents, "measure[d] children's expectations of future heterosexual romantic involvement."[453] Specifically,

> [c]hildren were asked to rate on a 4-point scale how confident they were that in the future they would "marry a man", "have a family

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[447] *Id.* at 6.

[448] *Id.* at 7.

[449] *Id.* None of the sons of lesbian mothers self-identified as gay and two of the daughters of lesbian mothers identified as lesbian. *Id.* None of the children of heterosexual mothers identified themselves as lesbian or gay. *Id.*

[450] *Id.*

[451] *Id.* Although none of the children raised by heterosexual parents had experienced a same-sex relationship, five of the daughters (out of a total of seventeen) of lesbian mothers had been involved in one or more sexual relationships with a partner of the same gender. *Id.* There was also one son (out of a total of eight) of lesbian mothers who had experienced a same-sex relationship. *Id.*

A study published in 2004 that used data from Add Health, *see supra* notes 132–42 and accompanying text, to identify the children of female same-sex parents found no association between parental sexual orientation and either the percentage of the children who had engaged in sexual intercourse or the percentage who had been in a romantic relationship during the previous eighteen months. Wainright et al., *supra* note 132, at 1893; *see also* Erin Calhoun Davis & Lisa V. Friel, *Adolescent Sexuality: Disentangling the Effects of Family Structure and Family Context*, 63 J. MARRIAGE & FAM. 669, 676 (2001) (finding, in study that used data from Add Health, that "[g]irls and boys living in a lesbian family are similar in both their sexual timing [i.e., the age at which they first have sex] and the number of sexual partnerships to adolescents who do not report living in a lesbian family"). In the Wainright study, "[f]ewer than 10 adolescents [out of 88] reported same-sex attractions and same-sex romantic relationships in the past 18 months; therefore, under stipulations that permit[ted] the use of these data, group comparisons [were] not presented." Wainright et al., *supra* note 132, at 1893.

[452] Golombok & Tasker, *supra* note 62, at 7. Ten daughters of lesbian mothers reported this to be the case compared with one daughter of a heterosexual mother. *Id.*

[453] Bos & Sandfort, *supra* note 311, at 118.

> together with a man", "live together with a man", "have a child together with their husband" and "be in love with a man" . . . . In the boys' version, "man" and "husband" were replaced by "woman" and "wife".[454]

The researchers found that "children in lesbian families were less certain that in the future they would experience heterosexual attraction and engage in heterosexual relationships."[455]

In the same year that Bos and Sandfort published their study, Susan Golombok and Shirlene Badger reported on a follow-up to a study, conducted in the 1990s, that compared children of lesbian mothers to two control groups, one comprised of children raised by single heterosexual mothers and the other of children in households headed by different-sex couples (Golombok Longitudinal Study 2).[456] After the children in the Golombok Longitudinal Study 2 became young adults, researchers inquired about their sexual orientation.[457] Of the seventy young men and women in the study,[458] none identified as gay or lesbian, and only one (a daughter raised by lesbian parents) identified as a bisexual.[459] This study, therefore, showed no statistically significant difference between the sexual orientation (as measured by self-identification) of the children of lesbian mothers and that of the children of heterosexual parents.[460]

The most recent published study investigating a possible association between the sexual orientation of parents and that of their children appeared in 2011.[461] This report is part of the ongoing study known as the National Longitudinal Lesbian Family Study, which began in 1986.[462] The 2011 article reported on the sexual orientation and behavior of seventy-eight seventeen-year-olds raised by lesbian mothers from birth.[463]

Almost 20% of the daughters of lesbian mothers in the NLLFS identified themselves as bisexual, but none identified themselves "as predominantly-to-exclusively lesbian."[464] As for the lesbian mothers' sons, "2.7% self-identified in the bisexual spectrum, and 5.4% as predominantly or exclusively homosexual."[465]

The NLLFS researchers did not compare the rate of sexual orientation *self-identification* of the lesbian mothers' children with a national probability sample.

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454 *Id.*
455 *Id.* at 119.
456 Golombok & Badger, *supra* note 120.
457 *Id.* at 153.
458 *Id.* at 152.
459 *Id.* at 154.
460 *Id.* at 155.
461 Nanette K. Gartrell et al., *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, 40 ARCHIVES SEXUAL BEHAV. 1199 (2011).
462 *See supra* notes 123–31 and accompanying text.
463 Gartrell et al., *supra* note 461, at 1201.
464 *Id.* at 1205.
465 *Id.*

They did, however, compare the reported rates of same-sex sexual *behavior* with data from the 2002 National Survey of Family Growth (NSFG) conducted by the U.S. Department of Health and Human Services (HHS).[466] The NLLFS researchers found that the lesbian mothers' "adolescent girls were significantly more likely to have had sexual contact with other girls . . . than NSFG adolescent girls."[467] At the same time, the researchers found that adolescent boys of lesbian mothers in the study were not more likely to have engaged in same-sex sexual behavior than the boys in the NSFG.[468]

After the publication of the NLLFS report, HHS released new NSFG data collected between 2006 and 2008, a period that was closer to the time in which the NLLFS researchers collected their data on the seventeen-year-old children of lesbian mothers.[469] When the NLLFS researchers compared their data with that of the more recent NSFG study, they found no significant difference in the rates of same-sex sexual conduct between the adolescent sons *or daughters* of lesbian mothers in the NLLFS when compared to the adolescents in the NSFG.[470]

B. Assessing the Empirical Literature from the Rational Basis Perspective

Much of the social science literature fails to show an association between the sexual orientation of lesbian mothers and that of their children. There is little evidence, for example, that a larger percentage of children of lesbians identify as either lesbian or gay than do the children of heterosexuals. Neither the Golombok Longitudinal Study 1 nor the Golombok Longitudinal Study 2 found such an association.[471] In addition, the rate of lesbian or gay self-identification among the children of lesbian mothers found in the NLLFS study is comparable with the rates of self-identification found in recent national surveys.[472]

Furthermore, the Golombok Longitudinal Study 1 and the NLLFS did not find that the sons of lesbian mothers expressed a greater interest in same-sex sexual relationships

[466] *Id.* at 1202. "The NSFG data were weighted to ensure that the sample was similar to the United States population in terms of gender, age, and race/ethnicity." *Id.*

[467] *Id.* at 1202–04.

[468] *Id.* at 1205. The study also found that "the NLLFS adolescent girls and boys were significantly older than the gender-matched peers in the NSFG at the time of their first heterosexual contact." *Id.* at 1202. In addition, the researchers found that the daughters of lesbian mothers were "more likely to have used emergency contraception, and less likely to have used other forms of contraception, than NSFG adolescent girls." *Id.* at 1202–04.

[469] *See* Nanette K. Gartrell et al., *New Trends in Same-Sex Sexual Contact for American Adolescents?*, 41 ARCHIVES SEXUAL BEHAV. 5 (2012).

[470] *Id.* at 5–7. The findings that the boys in the NLLFS study were older at the time of their first heterosexual sexual contact, *see supra* note 468, and that the daughters of lesbian mothers were more likely to use emergency contraceptives, *see supra* note 468, were not replicated when using the more recent NSFG data. *See* Gartrell et al., *supra* note 469, at 5–7.

[471] *See supra* notes 449, 458–68 and accompanying text.

[472] For a summary of those surveys, see Gates, *supra* note 430, at 3–5.

than did the sons of heterosexual parents.[473] The two studies, however, did find differences among the daughters. A statistically significant higher number of daughters of lesbian mothers in the Golombok Longitudinal Study 1 had engaged in at least one same-sex sexual relationship, while a higher number thought they might enter into such relationships in the future.[474] For their part, the NLLFS researchers, when using the older NSFG data, found that a higher percentage of daughters of lesbian mothers had engaged in same-sex sexual conduct.[475] But when the NLLFS researchers did the comparative analysis using the more recent NSFG data, they found no differences in the rates of same-sex sexual behavior among boys or girls.[476]

Finally, the Bos and Sandfort study found lower rates of expected heterosexual attraction among the children of lesbian mothers.[477] It bears emphasizing, however, that that study focused on children (preadolescents between the ages of eight and twelve) who were significantly younger than the children in the Golombok Longitudinal Study 1 (young adults)[478] and those in the NLLFS (seventeen-year-olds).[479] It is reasonable to believe that, in assessing sexual orientation, data gathered from children who are adolescents or older are more reliable than data gathered from preadolescents.

In short, the empirical evidence by no means supports the conclusion that there is a clear association between the sexual orientation of lesbians and gay men and that of their children. Indeed, it is notable that no study has found a higher rate of self-identification as lesbian or gay among the children of lesbian mothers.[480] In addition, no study has found that the boys of lesbian mothers expressed a greater interest in same-sex sexual relationships than did sons raised by heterosexual parents.

Under the rational basis test, however, the first question is not whether the empirical evidence shows a clear association between the sexual orientation of lesbian parents and that of their children. Instead, the issue is whether the empirical evidence might lead a reasonable observer to conclude that the question of a possible association between the two has some conceivable empirical basis.[481] This is a close call given that most studies have found no such association. Nonetheless, it seems to me that the findings on the sexual histories and interests of the daughters of lesbian mothers contained in the Golombok Longitudinal Study 1,[482] as well as in the NLLFS report that used the

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[473] *See supra* notes 450, 468 and accompanying text.
[474] *See supra* notes 451–52 and accompanying text.
[475] *See supra* notes 467 and accompanying text.
[476] *See supra* note 470 and accompanying text.
[477] *See supra* note 453–55 and accompanying text.
[478] *Compare* Bos & Sandfort, *supra* note 311, at 118, *with* Golombok & Tasker, *supra* note 62, at 5.
[479] *Compare* Bos & Sandfort, *supra* note 311, at 118, *with* Gartrell et al., *supra* note 461, at 1201.
[480] It bears noting, however, that a relatively high percentage (20%) of daughters of lesbian mothers in the NLLFS study identified as bisexual. *See supra* note 464 and accompanying text.
[481] *See supra* note 11 and accompanying text.
[482] *See supra* notes 451–52 and accompanying text.

older NSFG data,[483] provide sufficient indicia of a possible association to meet the easy-to-satisfy factual component of the rational basis test.[484]

However, the existence of possible empirical support for the claim that there may be differences in the sexual orientation of the children of lesbian and gay parents when compared to that of heterosexual parents does not end the constitutional inquiry. The rational basis test also requires that the possible differences in question be rationally related to the attainment of a legitimate state interest.[485]

The government, in other words, cannot simply argue that the possible differences in the sexual orientation of the children of lesbians and gay men is enough to justify, under the rational basis test, the imposition of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men. Instead, the government must contend that the possible differences have some connection to the promotion of a legitimate state interest.[486] In order to do so, the government has to claim that it is better for individuals to develop a different-sex sexual orientation than a same-sex one, or at least that it is better for sexually active individuals to engage in different-sex sexual acts than in same-sex sexual ones. But, as I argue in the next section, the government does not have a legitimate interest in discouraging same-sex sexual orientation or conduct.

C. The Illegitimacy of the State's Efforts To Discourage Individuals from Developing a Same-Sex Sexual Orientation or Engaging in Same-Sex Sexual Conduct

The government may claim that it has two interests arising from the possible differences between the sexual orientation of the children of lesbians and gay men and the sexual orientation of children raised by heterosexual parents. First, the State may argue that it is better to be straight than gay and that it therefore has a legitimate interest in discouraging homosexuality generally. Second, the government may argue, more narrowly, that it has a legitimate interest in discouraging same-sex sexual conduct among adolescents in particular. For the reasons I explain below, neither of these contentions passes constitutional muster, even under the rational basis test.

1. Discouraging Same-Sex Sexual Orientation or Conduct

The first time the Supreme Court addressed the question of whether the State has a legitimate interest in discouraging homosexuality was in *Bowers v. Hardwick*.[487]

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[483] *See supra* note 467 and accompanying text.

[484] The sociologists Judith Stacey and Steven Biblarz, in an influential article published in 2001, contended that the evidence of a possible association between the sexual orientation of lesbian and gay parents and that of their children was stronger than many researchers acknowledged. *See* Judith Stacey & Steve Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 177–78 (2001). I explore the legal and policy implications of Stacey and Biblarz's article in Ball, *supra* note 48, at 697–705.

[485] *See supra* notes 17–18 and accompanying text.

[486] *See supra* notes 17–18 and accompanying text.

[487] 478 U.S. 186 (1986).

The *Bowers* Court, after rejecting the argument that sodomy laws as applied to same-sex sexual conduct violated a fundamental right, upheld those statutes by holding that majoritarian moral disapproval of homosexuality constituted a legitimate ground upon which to prohibit same-sex sexual conduct under the Due Process Clause.[488]

Ten years later, however, the Court followed a vastly different approach in the equal protection case of *Romer v. Evans*.[489] Colorado voters in 1994 approved a state constitutional amendment that would have deprived lesbians, gay men, and bisexuals (and no others) of antidiscrimination protection under state and local law.[490] The *Romer* Court, in striking down the amendment as unconstitutional, made clear that the enactment of laws aimed at expressing disapproval of a disfavored group does not constitute a legitimate state interest under the rational basis test.[491] As the Court explained, the rational basis inquiry was intended to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[492] This means that a law that is enacted in order to discourage individuals from identifying as lesbian, gay, or bisexual cannot pass constitutional muster.

That this is the case is clear from the recent federal Court of Appeals ruling striking down California's constitutional amendment banning same-sex marriage (Proposition 8). In doing so, the Court of Appeals relied extensively on *Romer*'s holding that disapproval of homosexuality does not constitute a legitimate state interest.[493] The court concluded that Proposition 8, which deprived lesbians and gay men (and no others) of a pre-existing right to marry,[494] could only be explained as

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488 *Id.* at 196.

489 517 U.S. 620 (1996).

490 *Id.* at 623–24.

491 *Id.* at 635 ("We cannot say that [the Colorado constitutional provision] is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."). Several years earlier, the Court struck down a law that disqualified individuals who shared households with unrelated individuals from qualifying for food stamp benefits. *See* Dep't of Agric. v. Moreno, 413 U.S. 528 (1973). After determining from the legislative history that the law was "intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program[,]" the Court held that "a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.*

492 *Romer*, 517 U.S. at 633. The Court added that the "sheer breadth" of the Colorado constitutional provision was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacked a rational relationship to legitimate state interests." *Id.* at 632.

493 Perry v. Brown, 671 F.3d 1052, 1080-81 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012).

494 *Id.* at 1079. As the *Perry* court explained, lesbians and gay men had been guaranteed the opportunity to marry as a result of the state supreme court's ruling in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). *Perry*, 671 F.3d at 1079. Proposition 8 was a direct response to the state court's ruling. *Id.*

a manifestation of majoritarian disapproval of gay people by California voters.[495] As the court explained,

> [u]nder *Romer*, we must infer from Proposition 8's effect on California law that the People took away from gays and lesbians the right to use the official designation of "marriage"—and the societal status that accompanies it—because they disapproved of these individuals *as a class* and did not wish them to receive the same official recognition and societal approval of their committed relationships that the State makes available to opposite-sex couples.[496]

The Court of Appeals noted that laws sometimes are based on disapproval of a disfavored group,[497] but that in order to pass constitutional muster under the rational basis test after *Romer v. Evans*, they must be "justified by reference to some *independent* purpose they serve."[498] The fact that there was no purpose behind Proposition 8, other than to express disapproval of homosexuality, meant that the provision was unconstitutional.[499]

Similarly, efforts to justify restrictions on the marital and parenting rights of lesbians and gay men because of the possibility that their children will identify as lesbian or gay is nothing more than an expression of animosity toward sexual minorities. As Professor Clifford Rosky explains, "[i]t is difficult to think of a clearer example of animosity toward a class than the simple fear that the class will gain new members—other than the hope that the class will lose existing members, which is closely related."[500]

Romer, then, stands for the principle that discouraging homosexuality does not constitute a legitimate state interest. As Cass Sunstein notes, "[t]he underlying judgment in *Romer* must be that, at least for purposes of the Equal Protection Clause, it is no longer legitimate to discriminate against homosexuals as a class simply because the state wants to discourage homosexuality . . . . The state must justify discrimination on some other, public-regarding ground."[501]

The Colorado constitutional amendment at issue in *Romer* was a "status-based enactment" that sought to discourage individuals from identifying as lesbian, gay, or bisexual by withholding from them the protections afforded by antidiscrimination

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495 *Perry*, 671 F.3d at 1093.

496 *Id.*

497 *Id.* at 1094. The court provided the example of a law that "grants educational benefits to veterans but denies them to conscientious objectors who engaged in alternative civilian service." *Id.* (citing Johnson v. Robinson, 415 U.S. 361, 362–64 (1974)).

498 *Id.*

499 *Id.* ("Enacting a rule into law based solely on the disapproval of a group . . . 'is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.'" (quoting Romer v. Evans, 517 U.S. 620, 635 (1996))).

500 Clifford J. Rosky, No Promo Hetero: Children's Right to Be Queer 20 (unpublished manuscript) (on file with author).

501 Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996).

laws.[502] Defenders of same-sex marriage bans and of parenting restrictions affecting lesbians and gay men may argue that even if the State does not have a legitimate interest in discouraging same-sex sexual *orientation*, it does have such an interest in discouraging same-sex sexual *conduct*. The problem with this argument, of course, is that it runs head-on into *Lawrence v. Texas*,[503] the case in which the Court overruled *Bowers v. Hardwick* by striking down sodomy laws as unconstitutional under the Due Process Clause.[504]

One of the crucial principles that emerges from *Lawrence* is that a law that is intended to discourage same-sex sexual behavior is no more legitimate than one aimed at the status of being lesbian, gay, or bisexual.[505] Indeed, the Court recently cited to *Lawrence* in stating that "[o]ur decisions have declined to distinguish between status and conduct" in the context of sexual orientation.[506]

In *Lawrence*, the government argued that it had a legitimate interest in having its laws reflect moral disapproval of same-sex sexual conduct.[507] The Court, however, rejected the view that moral disapproval of particular conduct can by itself constitute a legitimate state interest.[508] In doing so, the Court emphasized that gay people, like straight ones, have autonomy-based interests in making decisions related to their sexuality.[509] The freedom to make those choices without state interference, the Court made clear, is a central component of human dignity.[510] The liberty interests of individuals in

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502 *Romer*, 517 U.S. at 635.

503 539 U.S. 558 (2003).

504 *Id.* at 578–79.

505 *Id.* at 575 ("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 . . . ."(emphasis added)).

506 Christian Legal Soc. v. Martinez, 130 S.Ct. 2971, 2990 (2010).

507 *Lawrence*, 539 U.S. at 582 (2003) (O'Connor, J., concurring) ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality."); *see also* Brief of Respondent at 42–49, *Lawrence*, 539 U.S. 558 (No. 02-102) (raising the morality argument).

508 *Lawrence*, 539 U.S. at 577–78; *see also* Massachusetts v. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) ("[S]peaking directly of same-sex preferences, *Lawrence* ruled that moral disapproval alone cannot justify legislation discriminating on this basis." (citation omitted)). Unlike the *Lawrence* majority, Justice Sandra Day O'Connor would have struck down the statute under the Equal Protection Clause. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). O'Connor explained that "[m]oral disapproval . . . like a bare desire to harm . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* (citing Romer v. Evans, 517 U.S. 620, 634–35 (1996); Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). She added that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.*

509 *Lawrence*, 539 U.S. at 574.

510 *Id.* at 574. As the Court explained,

> [t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy,

matters related to sexuality, therefore, limit the government's authority to discourage same-sex sexual conduct.

It is true, of course, that *Lawrence* involved the State's exercise of its most coercive power: the authority to criminalize conduct.[511] In seeking to discourage homosexuality through marriage bans and the imposition of parenting restrictions affecting lesbians and gay men, the State would not be threatening to incarcerate anyone. Nonetheless, there is something deeply troubling, even Orwellian, about the government setting policy with the goal of attempting to influence the sexual orientation of individuals, as well as the choices they make when deciding how (and with whom) to be sexually intimate. Such a goal is clearly inconsistent with the considerations of human autonomy and dignity that served as the normative foundations of the Court's ruling in *Lawrence*.[512]

2. Discouraging Same-Sex Sexual Conduct Among Adolescents

The government may try to argue that even if it does not have the constitutional authority to try to influence the sexual orientation or conduct of adults, it does have a legitimate interest in seeking to influence the sexual conduct of adolescents. Specifically, the government may rely on the possibility of a higher rate of nonheterosexuality among the children of lesbian and gay parents to justify imposing same-sex marriage bans and parenting restrictions affecting lesbians and gay men by contending that it has a legitimate interest in discouraging same-sex sexual behavior among adolescents.

It may be true that the State has a legitimate interest in generally discouraging sexual conduct by minors.[513] That is not, however, the interest that is at issue here. Instead,

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> are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)); *see also id.* at 578 (noting that lesbians and gay men "are entitled to respect for their private lives").

[511] *Id.* at 575.

[512] Judge Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit explained this point well when she noted that

> [i]n our democracy, . . . it is not the province of the State, even if it were *able* to do so, to dictate or even attempt to influence how its citizens should develop their sexual and gender identities. This approach views homosexuality in and of itself as a social harm that must be discouraged, and so demeans the dignity of homosexuals, something that *Lawrence* specifically proscribes.

Lofton v. Sec'y of Dep't of Children & Family Servs., 377 F.3d 1275, 1300 (11th Cir. 2004) (Barkett, J., dissenting from denial of en banc review) (citing *Lawrence*, 539 U.S. at 578).

[513] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 n.17 (1977) (plurality opinion) ("[I]n the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults."). It bears emphasizing that the *Carey* Court recognized that adolescents enjoy a constitutional right to privacy that limits the ability of the State to regulate in matters related to procreation. *Id.* at 693.

the question is whether the State has a legitimate interest in discouraging *same-sex* sexual conduct in particular among adolescents. Unfortunately for the government, the effort to discourage same-sex sexual conduct among adolescents to a greater extent than different-sex sexual conduct among the same age group has not survived equal protection analysis under the rational basis test.[514]

In 1999, the Kansas legislature approved a measure, commonly known as the "Romeo and Juliet" law,[515] which authorized judges to impose a significantly shorter prison sentence on a teenage defendant who had sex with a minor than would be imposed if the defendant had been an adult.[516] But in order to qualify for the shorter sentence, the teenage defendant had to be of a different sex than the minor.[517] This made teenage defendants who had sex with minors of the same sex ineligible for the significant reduction in jail time available to teenagers who had sex with minors of a different sex.[518]

The state of Kansas, in defending its Romeo and Juliet law from an equal protection challenge in *State v. Limon*,[519] asserted that it had a legitimate interest in discouraging same-sex sexual conduct among minors.[520] As the government explained in its brief to the Kansas Supreme Court, "[t]he statute observes the delicate nature of child sexual orientation and appreciates the fact that children will gravitate toward the traditional sexual relationships throughout their teen years."[521] The brief added that "a

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514 *See* State v. Limon, 122 P.3d 22, 38 (Kan. 2005) (holding that a statute allowing for the imposition of a less severe penalty on individuals convicted of having sexual contact with minors as long as the perpetrator and victim are of the opposite sex is unconstitutional).

515 KAN. STAT. ANN. § 21-3522 (1999), *declared unconstitutional in part by Limon*, 122 P.3d 22 (repealed 2010).

516 *Limon*, 122 P.3d at 24.

517 *Id.*

518 *Id.*

519 122 P.3d 22 (Kan. 2005).

520 *Id.* at 26; *see also* Supplemental Brief of Appellee at 9, *Limon*, 122 P.3d 22 (No. 00-85898-AS). When the defendant in *Limon* was eighteen, he had consensual oral sex with a fourteen-year-old boy at a school for developmentally disabled children. *Limon*, 122 P.3d at 26. Limon was convicted of engaging in sodomy. *Id.* The Romeo and Juliet law reduced the sentences of those convicted of

> voluntary sexual intercourse, sodomy, or lewd touching when, at the time of the incident, (1) the victim is a child of 14 or 15; (2) the offender is less than 19 years of age and less than 4 years older than the victim; (3) the victim and offender are the only ones involved; and (4) the victim and offender are members of the opposite sex.

Id. (citing KAN. STAT. ANN. § 21-3522 (1999) *declared unconstitutional in part by Limon*, 122 P.3d 22 (repealed 2010)). Limon met all of these criteria, except that he and the victim were both of the same sex. *Id.*

Limon was sentenced to a prison term of 206 months (a little over seventeen years). *Id.* at 25. If the Romeo and Juliet law had applied to him, he would have been subject to an incarceration period of a little over a year. *Id.* In addition, Limon's ineligibility for the benefits of the Romeo and Juliet law meant that he would have to register as a persistent sex offender. *Id.*

521 Supplemental Brief of Appellee, *supra* note 520, at 8.

rational basis exists for the Legislature . . . to limit the Romeo and Juliet provisions to heterosexual teens as the law furthers the legitimate purpose of recognizing and, in part, promoting traditional sexual relationships between teenagers."[522]

The Kansas high court, however, rejected the proposition that the government has a distinct legitimate interest in discouraging same-sex sexual conduct among adolescents.[523] The *Limon* court acknowledged that "the State has broad powers to protect minors."[524] But that authority did not allow it to discourage same-sex sexual conduct among adolescents in the absence of evidence that "homosexual sexual activity is more harmful to minors than adults."[525] The court made clear that even when it comes to minors, and even under the rational basis test,[526] the government must justify the differential treatment of individuals by doing more than simply stating that society has an interest in having adolescents develop as heterosexuals, as opposed to as lesbians, gay men, or bisexuals.[527]

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[522] *Id.* at 9. The Kansas Court of Appeals in 2002 upheld the Romeo and Juliet law before the U.S. Supreme Court ruled in *Lawrence*. State v. Limon, 41 P.3d 303 (Kan. Ct. App. 2002), *vacated*, Limon v. Kansas, 539 U.S. 955 (2003). The Supreme Court, after issuing its ruling in *Lawrence*, granted certiorari in *Limon*, vacated the state court's judgment, and remanded the case for further consideration. *Limon*, 539 U.S. 955. After remand, the Court of Appeals once again upheld the statute. *State v. Limon*, 83 P.3d 229 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005). One of the judges who voted to do so endorsed the state's argument by noting that

> traditional sexual mores have played a significant role in the sexual development of children. During early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity. As a result, the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the traditional sexual development of children.

Id. at 236. The judge added that "the classification is proper because it is rationally related to the purpose of protecting and preserving the traditional sexual mores of society and the historical sexual development of children." *Id.* at 237. The other judge who voted to uphold the law did so on public health grounds. *Id.* at 242 (Malone, J., concurring). I discuss the state's effort to justify the Romeo and Juliet law based on public health grounds in *infra* note 527.

[523] *Limon*, 122 P.3d at 35.

[524] *Id.*

[525] *Id.*

[526] The court rejected the defendant's invitation to subject the Romeo and Juliet law to heightened scrutiny, and instead applied rational basis review. *Id.* at 30.

[527] *Id.* at 35; *see also* Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZONA L. REV. 913, 956 (2011) ("Just as the state cannot legislate based on the fear that gay adults are dangerous, it cannot legislate on the fear that gay adults will influence children's sexual development or the fear that there will be more lesbian, gay, or bisexual children in the world."). The government in *Limon* attempted to use public health concerns as a justification for the differential treatment of gay teenagers. Supplemental Brief of Appellee, *supra* note 520, at 12–13. As the state put it in its brief, "[t]he contemporary plague of AIDS alone supports the legitimate exercise of governmental police power to not extend [the] benefit [of the Romeo and Juliet law] to homosexual teens." *Id.* at 13. The court, however, rejected this reasoning, noting that, under it, the statute created "one of those seemingly

At the end of the day, it is constitutionally untenable for the government to argue that laws which treat lesbians and gay men differently than heterosexuals in matters related to marriage and parenting can be justified by a governmental preference that individuals, whether they be adults or minors, do not identify as lesbian or gay and that they not engage in same-sex sexual acts. This means that even if the question of whether there is an association between the sexual orientation of lesbian and gay parents and that of their children is subject to reasonable dispute within the meaning of the rational basis test, the government is still precluded from relying on the possibility of such an association to justify same-sex marriage bans and parenting restrictions affecting lesbians and gay men.

CONCLUSION

This Article has sought to show that, in assessing the social science literature on the children of lesbians and gay men under the rational basis test, it is necessary to distinguish between different areas of study. It is clear that there is no empirical support for the proposition that parental sexual orientation is associated with differences in children's psychological and social functioning. Although it is unlikely that the social science literature—no matter how extensive or conclusive—will ever persuade committed opponents of gay rights on this point, it is crucial that courts in this area not hide behind the admittedly highly deferential judicial posture required by the rational basis test to accept factual claims that have no empirical support.

It is also crucial that courts distinguish between studies that have sought to measure the psychological and social functioning of children from those that have investigated their gender attitudes/interests and sexual orientation. As we have seen, a minority of studies suggest possible differences in these two areas between the children of lesbians and gay men and those of heterosexuals. These possible differences, however, do not justify the imposition of legal restrictions that treat lesbians and gay men differently than heterosexuals because the government does not have a legitimate interest in promoting particular gender-based attitudes/interests, or in discouraging individuals from either identifying as lesbian/gay or engaging in same-sex sexual conduct.

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paradoxical situations where the classification is both over- and under-inclusive." *Limon*, 122 P.3d at 36. Specifically, the legislature did not make the protection provided by the Romeo and Juliet law available to female teenagers who had sex with female minors even though the risk of HIV transmission from one female to another as a result of sexual conduct "is negligible." *Id.* At the same time, the legislature made the legal protection available to heterosexual teenagers even though "the gravest risk of sexual transmission [of HIV] for females is through heterosexual intercourse." *Id.* at 37. The court added that

> [t]here is a near-zero chance of acquiring the HIV infection through the conduct which gave rise to this case, oral sex between males, or through cunnilingus. And, although the statute grants a lesser penalty for heterosexual anal sex, the risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals.

Id.