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## DeBoer v. Snyder: A Case Study In Litigation and Social Reform

Wyatt Fore

*University of Michigan School of Law*

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DEBOER V. SNYDER: A CASE STUDY IN  
LITIGATION AND SOCIAL REFORM

*Wyatt Fore\**

ABSTRACT

*On April 28, 2015, the Supreme Court will hear oral arguments for four cases from the Sixth Circuit addressing the constitutionality of state bans on same-sex marriage. This Note examines DeBoer v. Snyder, the Michigan marriage case, with the goal of providing litigators and scholars the proper context for our current historical moment in which (1) the legal status of LGBT people; and (2) the conventional wisdom about the role of impact litigation in social reform movements are rapidly evolving.*

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## INTRODUCTION

On March 21, 2014, United States District Court Judge Bernard Friedman issued an opinion finding that a Michigan constitutional amendment restricting marriage between one and one woman “impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause.”<sup>1</sup> To nearly everyone’s surprise, Judge Friedman issued no stay along with the opinion, and the next day, Saturday, March 22, 2014, four counties began issuing marriage licenses at 8:00 a.m. before the Sixth Circuit issued a stay in the late afternoon.<sup>2</sup> How could *DeBoer v. Snyder*, a case initially about adoption rights, come to invalidate a constitutional amendment passed by 59% of Michigan voters<sup>3</sup> a mere decade before?

To most observers of marriage equality litigation, *DeBoer* was a strange case. For the first time since the 2010 District Court trial in *Perry v. Schwarzenegger*,<sup>4</sup> the Proposition 8 case, a marriage equality suit had an actual trial, with both parties highlighting their respective legal theories and facts. By the end, the *DeBoer* trial essentially boiled down to a core question of fact: is it necessary to “provid[e] children with ‘biologically connected’ role models of both genders . . . to foster healthy psychological development”?<sup>5</sup> Adding to the strangeness of the trial was the lack of a national LGBT group driving the litigation, although groups such as the national American Civil Liberties Union (“ACLU”), and the Gay and Lesbian Advocates and Defenders (“GLAD”) assisted with trial preparation. Further, famous LGBT rights attorney Mary Bonauto of GLAD signed onto the Supreme Court certiorari petition and merits brief, and will present the oral arguments. In contrast to the early marriage cases, *DeBoer* was certainly not part of a carefully selected, state-by-state litigation strategy led by LGBT groups; rather, the Michigan case was led by an unlikely group of trial attorneys specializing in criminal defense and family law. Adding to the case’s

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1. *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).
  2. See Rebecca Cook, *Ruling to Strike Down Michigan Gay Marriage Ban Put On Hold*, REUTERS, Mar. 22, 2014, available at <http://www.reuters.com/article/2014/03/22/us-usa-gaymarriage-michigan-idUSBREA2K1Y420140322>. Governor Snyder (R) announced that Michigan would not recognize these marriages but a Federal District Court ordered the State to do so on January 15, 2015. *Caspar v. Snyder*, No. 14-CV-11499, slip op. at 46–47 (E.D. Mich. Jan. 15, 2015).
  3. CNN, *Election 2004 Results*, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> (last visited Apr. 2, 2015).
  4. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *certified question*, 628 F.3d 1191 (9th Cir.); *answered* 52 Cal. 4th 1116 (2011), *aff’d sub nom Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
  5. Opinion and Order Denying Cross Motions for Summary Judgment at 5–6, *DeBoer* 973 F. Supp. 2d 757 (No. 12–10285).

drama, the Supreme Court resolved *United States v. Windsor*,<sup>6</sup> and *Hollingsworth v. Perry*<sup>7</sup> in the summer of 2013, mere months before the *DeBoer* trial was ordered. Together, *Windsor* and *Perry* resulted in a one-two punch that struck down the federal Defense of Marriage Act (“DOMA”), and legalized same-sex marriage in California. Lastly, *DeBoer* originates out of a place synonymous with down-home Middle American values: the state of Michigan—not a place commonly associated with cutting-edge LGBT activism.

More importantly, *DeBoer* and the other post-*Windsor* decisions represent a change in how observers view the conventional wisdom about the role of litigation in the marriage equality movement. This wave of marriage litigation, which has witnessed great advances in public opinion and legal doctrine, has countered conventional wisdom that “activists for same-sex marriage turn[ ] to courts too soon in the reform process,”<sup>8</sup> causing harmful backlash. The legacies of severe backlash to other liberal landmark cases, such as *Brown v. Board*<sup>9</sup> and *Roe v. Wade*,<sup>10</sup> compounded with more recent experiences of litigation campaigns for marriage in Hawaii,<sup>11</sup> Vermont,<sup>12</sup> and especially Massachusetts,<sup>13</sup> created an entire generation of social reformers averse to high-profile litigation.<sup>14</sup> Thus, the state of the marriage equality movement has been a constant tension: a deep craving for the brass ring of full marriage rights in all fifty states and a deep concern with creating bad precedent and cultural backlash. For the first time in the marriage equality movement, litigation has created a sense of momentum and inevitability, rather than anxiety about next steps.

This Note is a case study about *DeBoer v. Snyder*, the Michigan same-sex marriage case. This Note is not about the role of marriage in the wider LGBT movement, nor about the strengths and weaknesses of legal theories on marriage, nor does it propose a new theory of sexual identity and the law. Rather, this Note explores the unique position that *DeBoer* occupies in the post-*Windsor* movement. Part I will explain the history of the *DeBoer* case, marking its transition from a targeted adoption impact litigation case

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6. 133 S. Ct. 2675 (2013).

7. 133 S. Ct. 2652 (2013).

8. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 416 (2d ed. 2008).

9. 347 U.S. 483 (1954).

10. 410 U.S. 113 (1973).

11. *Baehr v. Miike*, CIV. No. 91–1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *superseded by constitutional amendment*, HAW. CONST. art. 1, § 23, *as recognized in* No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).

12. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

13. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

14. *See generally* MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

into a full-blown marriage trial. Part II will examine the existing “constrained court” model, whereby the use of litigation as a tool in social reform is criticized in academic scholarship. Finally, Part III will examine ramifications of *DeBoer* on existing theories of impact litigation and social movements, particularly within the LGBT context. Most notably, in Part III, I will argue that *DeBoer* exemplifies the limitations of the critique that litigation is inherently problematic, and that marriage equality advocates have wisely (1) adopted an “under the radar” strategy to establish parental rights first; (2) used high-profile cases as one of several tools in a multidimensional approach; and (3) done so as a targeted impact litigation device.

## I. DEBOER V. SNYDER: A BRIEF HISTORY

### A. *Marriage and Adoption in Michigan*

In response to *Goodridge v. Dep’t of Public Health*,<sup>15</sup> the Massachusetts Supreme Judicial Court’s decision establishing same-sex marriage, “traditional marriage” activists in nearly every other state took immediate steps to amend state constitutions to prevent similar state court judgments. Michigan was no different. The result was the Michigan Marriage Amendment (“MMA”), which passed with 59% of the vote in November 2004.<sup>16</sup> The MMA states: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”<sup>17</sup> Importantly, the Michigan Supreme Court has interpreted the MMA as banning the recognition not only of same-sex marriage and civil unions, but also domestic partnerships and other benefits by public institutions,<sup>18</sup> reflecting a strongly conservative judicial interpretation of the scope of the Amendment. The MMA solidified historic policy in granting licenses only to marriages consisting of one man and one woman.<sup>19</sup> State recognition has many implications under Michigan

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15. 798 N.E.2d 941 (Mass. 2003).

16. CNN, *supra* note 3.

17. MICH. CONST. art. I, § 25.

18. *See Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008).

19. Same-sex marriage had already been banned by statute in 1996. 1996 Mich. Legis. Serv. P.A. 324 (West) (codified at MICH. COMP. LAWS §§ 551.1–551.4 (Westlaw through P.A.2014, No. 572 of the 2014 Reg. Sess.)). Before 1996, Michigan law had recognized only different-sex marriages through the traditional understanding of marriage. *See* Associated Press, *House OK’s Gay Marriages*, TOLEDO BLADE, May 29, 1996, at 12. *See also* An Act Regulating Marriages § 1(1820), in 1 LAWS OF THE TERRITORY OF MICHIGAN 646 (1871).

law, including access to a spouse's workers' compensation and retirement,<sup>20</sup> inheritance rights to an intestate spouse's estate,<sup>21</sup> and the right to make health decisions for a disabled spouse,<sup>22</sup> among many other benefits.

Most importantly for the *DeBoer* case, however, is Michigan's restriction of joint adoption rights to legally married couples.<sup>23</sup> The Michigan statute can be read to permit second-parent adoptions<sup>24</sup> by legally unmarried couples, and in fact, several judges in Michigan have in the past quietly authorized joint adoption by same-sex couples. However, the practice largely ended in 2002, when Judge Archie Brown, then Chief Judge of the Washtenaw County Circuit Court, sent a message to judges in that circuit effectively banning such adoptions as violations of state law.<sup>25</sup>

Several Michigan LGBT advocates argued that the Chief Judge's actions were not a binding interpretation of the law and encouraged judges to grant second-parent adoptions, a common strategy among advocates of same-sex couples seeking to adopt.<sup>26</sup> Some Michigan judges even agreed and accepted those adoptions, and this information was quietly shared within the local LGBT community.<sup>27</sup> Even as *DeBoer* was beginning, the Michigan ACLU had just won an adoption case in a Michigan Appellate court. In a *per curiam* opinion, the court found that an existing second-parent adoption could not be invalidated by collateral attack<sup>28</sup>—a key precedent in the slow process of reversing Michigan's de facto second-parent adoption ban. However, on the surface at least, the law and reality were clear: Michigan law banned joint adoption by unmarried couples.

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20. Mich. Comp. Laws § 418.331 (Westlaw through P.A.2014, No. 572 of the 2014 Reg. Sess.).

21. *Id.* § 700.2201.

22. *In re Martin*, 504 N.W.2d 917 (1993).

23. *See* Mich. Comp. Laws § 710.24 (Westlaw through P.A.2014, No. 572 of the 2014 Reg. Sess.). *See also id.* § 333.20179 (regulation of assisted reproductive technology). Whether the law actually blocks joint adoption for unwed spouses is a contested issue, discussed *infra* Part III-a.

24. Second-parent adoption allows “a second parent to adopt a child without the ‘first parent’ losing any parental rights. In this way, the child comes to have two legal parents. It also typically grants adoptive parents the same rights as biological parents in custody and visitation matters.” *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Mar. 5, 2015).

25. Associated Press, THE ARGUS-PRESS, *Judge Blocks the Last Adoption Hope for Gay, Unwed Couples*, June 6, 2002, at 16 [hereinafter “*Judge Blocks the Last Adoption Hope for Gay, Unwed Couples*”].

26. *See* Alison Gash, Under the Radar: How Silence Saves Civil Rights 64 (Fall 2010) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

27. Interview with Jay Kaplan, Staff Attorney, Michigan ACLU (May 26, 2014).

28. *Usitalo v. Landon*, 829 N.W.2d 359, 364 (Mich. App. 2012).

Further, Michigan's constitutional ban on same-sex marriage in the wake of *Goodridge* followed a national trend in constitutionally barring same-sex relationship recognition. Before Massachusetts, no state had recognized marriage equality, and nearly every state had already banned same-sex marriage by statute. However, the *Goodridge* decision, decided under the state Constitution, put other states' statutes into constitutional jeopardy. Opponents outnumbered supporters of marriage equality nearly two-to-one,<sup>29</sup> and conservative political elites immediately recognized a wedge issue to divide Democrats, as well as drive conservative voters to the polls.<sup>30</sup> As a result, in 2004-05 alone, thirteen states held popular votes on constitutional amendments, with nine states following their lead in 2006 and three more in 2008.<sup>31</sup>

The role of constitutional votes banning same-sex marriage was a popular topic during the 2004 general election, with most commentators arguing that conservatives effectively used the various state referenda as a tool in crucial Presidential swing states, delivering large numbers of religious conservatives to the polls throughout the country.<sup>32</sup> Thus, the MMA reflected not just state-specific marriage history, but also a concerted, national strategy by conservative leaders to use the issue for electoral purposes.

Importantly, however, the *DeBoer* plaintiffs argued that “[t]here is no one ‘traditional’ view of marriage,” and that

[f]eatures once considered essential – particularly (a) subordination of women, (b) limited ability to exit a failed marriage; and (c) racial restrictions – have been eliminated in response to social, economic, and ethical changes.<sup>33</sup>

For instance, although Michigan once placed racial restrictions on marriage in 1838,<sup>34</sup> shortly after achieving statehood, the legislature repealed the ban in 1883.<sup>35</sup> Another example is Michigan's system of coverture, a system of marriage whereby a married woman has few legal rights,

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29. Klarman, *supra* note 14, at 183.

30. James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), [http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html?\\_r=0](http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html?_r=0).

31. See *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (updated Jan. 16, 2015).

32. See Dao, *supra* note 30.

33. Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 4, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

34. Expert Witness Report of Nancy F. Cott, Ph.D. at para. 48, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285).

35. See *id.* at para. 70.

because she is “covered” by her husband. That system was gradually repealed by a series of legislative reforms beginning in 1855, but not fully eliminated until the adoption of the Michigan Constitution of 1963.<sup>36</sup> These reforms were confirmed by a 1981 statute that formally repealed the Married Women’s Property Acts of 1855, 1911, and 1917, and “abrogated the common law disabilities of married women.”<sup>37</sup> Similarly, Michigan’s divorce law transitioned from a primarily adversarial process based on grounds of “breach of marriage,” such as adultery, desertion, or cruelty,<sup>38</sup> into “no-fault divorce” in 1971.<sup>39</sup> This background of changing marriage laws in Michigan presented a strong backdrop to attack the defendants’ argument that marriage had remained static throughout the state’s history.

### B. *Dramatis Personae*

The plaintiffs, April DeBoer and Jayne Rowse, are a committed same-sex couple who reside in Oakland County, Michigan, in a suburban community outside of Detroit. DeBoer is a nurse in the neonatal intensive care unit, and Rowse is an emergency room nurse.<sup>40</sup> They have (separately) adopted three children, and serve as foster parents for the state of Michigan. However, due to Michigan’s legal restrictions on joint adoption except by married couples, DeBoer and Rowse have adopted their children individually.<sup>41</sup> DeBoer and Rowse had previously investigated the possibility of a second-parent adoption, but were told that Michigan law effectively denied them such an opportunity.<sup>42</sup> In *DeBoer v. Snyder*, the plaintiffs and state-defendants stipulated that DeBoer and Rowse “are responsible and caring parents who are providing a stable and loving home for their children,”<sup>43</sup> and had a commitment ceremony in lieu of a legal wedding in 2007.<sup>44</sup>

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36. MICH. CONST. art. 10, § 1. *See also* Expert Witness Report of Nancy F. Cott, Ph.D, *supra* note 34, at para. 60.

37. Mich. Comp. Laws §§ 557.21-557.29 (Westlaw through P.A.2014, No. 572 of the 2014 Reg. Sess.). *See also* Expert Witness Report of Nancy F. Cott, Ph.D, *supra* note 34, at para. 60.

38. *See* Expert Witness Report of Nancy F. Cott, Ph.D, *supra* note 34, at paras. 75–78.

39. Mich. Comp. Laws Ann. § 552.6 (Westlaw through P.A.2014, No. 572 of the 2014 Reg. Sess.); Expert Witness Report of Nancy F. Cott, Ph.D, *supra* note 34, at para. 79.

40. Stipulated Facts Regarding Plaintiffs at para. 3, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

41. *Id.* at paras. 4–5.

42. Interview with April DeBoer (May 24, 2014).

43. Stipulated Facts Regarding Plaintiffs, *supra* note 40, at para. 9.

44. *Id.* at para. 2.



DeBoer and Rowse individually adopted three children. The first, N,<sup>45</sup> was born to a biological mother who was homeless and had severe psychological impairments. N's biological father has not been involved in his life. DeBoer and Rowse began caring for N shortly after his birth, and Rowse legally adopted him as a single person in 2009.<sup>46</sup> The second child, J, was born premature at 25 weeks, weighing 1 pound 9 ounces, and was given up immediately by his biological mother. J's foster care agency immediately requested that DeBoer and Rowse take him home. J was subsequently adopted by Rowse as a single person, and with years of intensive therapy and medical attention, many of J's physical conditions have been resolved.<sup>47</sup> The third child, R, was born in 2010 to a teenage biological mother who received no neonatal care, and who gave birth at her mother's home. In April 2011, DeBoer adopted R as a single person.<sup>48</sup>

For the *DeBoer* trial, the particular facts of these children's lives had a tremendous impact on the Court, which found that "[n]o court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs who seek to ensure that the state may no longer impair the rights of their children and the thousands of others now being raised by same-sex couples."<sup>49</sup>

Although the Michigan ACLU was pursuing a strategy of slowly reversing Michigan's adoption ban via state court judgments, one attorney in private practice, Dana Nessel, decided that the time had come to cut the Gordian knot with a Federal challenge. While LGBT advocates had experienced mixed success in challenging state adoption bans in courts,<sup>50</sup> many felt there could be an opening in Michigan. After talking with a number of same-sex couples, Nessel, along with another experienced Michigan trial attorney, Carole Stanyar, found DeBoer and Rowse ideal plaintiffs in challenging Michigan's adoption ban.<sup>51</sup> Soon, the trial team expanded to include Ken Mogill, another experienced Michigan trial attorney and law

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45. The children's names have been redacted to preserve the family's privacy.

46. Amended Complaint for Declaratory and Injunctive Relief at para. 11, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

47. *Id.* at para. 12.

48. *Id.* at para. 10.

49. *DeBoer*, 973 F. Supp. 2d at 775.

50. *Compare, e.g.,* Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (upholding Florida's ban on adoption by openly gay people), *with* Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429 (Ark. 2011) (striking down Arkansas's constitutional ban on adoption by openly gay people).

51. Julie Bosman, *One Couple's Unanticipated Journey to Center of Landmark Gay Rights Case*, N.Y. TIMES, Jan. 25, 2015, at A14, *available at* <http://www.nytimes.com/2015/01/25/us/one-couples-unanticipated-journey-to-center-of-landmark-gay-rights-case.html>.

professor, as well as Bob Sedler, a constitutional law professor at Wayne State. Sedler had a long history of liberal constitutional challenges under his belt, including high profile challenges to Michigan's ban on interracial adoption, and he had a reputation as a prominent commentator on the Detroit-area school desegregation case, *Milliken v. Bradley*.<sup>52</sup>

The case was assigned to Judge Bernard Friedman, a Reagan appointee. Although the plaintiffs' attorneys were initially worried about trying the case in front of a conservative judge, it soon became apparent that he was not a stranger to LGBT families and the legal issues they face, having hired now-Judge Judy Levy as his law clerk in 1995. While a clerk, Levy became pregnant with the hopes of starting a family with her female partner, and Judge Friedman "took a special interest in Levy's growing family."<sup>53</sup> Thus, although "Friedman's posture in the DeBoer suit was a cautious one,"<sup>54</sup> his life experiences opened up an opportunity to be receptive to the plaintiffs' legal arguments.

### C. Evolution of the Case

DeBoer and Rowse live together with their three children as a singular family unit, and each wants to adopt her respective partner's children as a second parent.<sup>55</sup> Although the state of Michigan suggested that "if the intent for recognition of second-parent adoptions . . . is to provide emotional or financial support for children, Michigan law already provides such legal structures,"<sup>56</sup> family law scholars overwhelmingly find that legal adoption is strongly preferable to other legal ways of ordering family affairs. For example, legal guardianship "can be challenged by a biological parent,"<sup>57</sup> and "older children do recognize the difference [between guardianship and legal parenthood] . . . and . . . it doesn't afford the same level of permanency as a legal tie."<sup>58</sup> Further, as Prof. Vivek Sankaran, an expert for the plaintiffs on the Michigan child welfare system, noted, "establishing a guardianship is

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52. 418 U.S. 717 (1974).

53. Brian Dickerson, *What Judge Friedman Learned about Gay Families from a Lesbian Law Clerk*, DETROIT FREE PRESS (Mar. 23, 2014, 9:43 AM), <http://archive.freep.com/article/20140323/COL04/303230067/judge-bernard-friedman-gay-marriage-michigan>.

54. *Id.*

55. Amended Complaint for Declaratory and Injunctive Relief, *supra* note 46, at 4.

56. State Defendant's Motion for Summary Judgment at 33, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12-10285).

57. Trial Transcript Volume 1 – Part B at 79, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285).

58. *Id.*

something that's difficult, expensive, time consuming, and really threatens the sense of stability and permanency for children in those homes."<sup>59</sup>

As a result, although legal guardianship may seem superficially attractive, DeBoer and Rowse perceived two different kinds of resulting injuries: First, a pecuniary injury of loss of legal rights and benefits, including access to public benefits, legal protections regarding health insurance, and increased tax burdens. Second, a larger sense of government-enforced social stigma resulting from the status of not being a 'real family.'

These stigmatic injuries are suffered commonly not only by parents, but also by their children, which raises potential constitutional issues. For example, in the illegitimate children cases, the Supreme Court found that "[i]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."<sup>60</sup> The Court has also noted such injuries to children in the marriage context in *Windsor*, when Justice Kennedy argued that DOMA "humiliates tens of thousands of children now being raised by same-sex couples," and makes it hard for those "children to understand the integrity and closeness of their own family."<sup>61</sup>

On January 23, 2012, DeBoer and Rowse filed a lawsuit in the Eastern District of Michigan aiming to strike down Michigan's adoption statute, which bars unmarried persons from jointly adopting children, alleging the constitutional injuries just described. DeBoer and Rowse's complaint lists not only themselves as plaintiffs, but also their children, because the "disparate treatment of the children of unmarried parents and of unmarried parents seeking a step-parent adoption, based upon the marital status of the parents, violates the Equal Protection Clause of the United States Constitution."<sup>62</sup> Implicit in this claim of harm is a strong reliance on social science. "[T]he undisputed sociological and psychological evidence demonstrates that unmarried persons, straight, gay, or lesbian, are no less loving, caring and effective parents than those parents who are married to each other."<sup>63</sup> Although the complaint briefly mentioned that the "Michigan Constitution prohibits same-sex couples from marrying . . . [and that] DeBoer and Rowse would marry in the State of Michigan if legally permitted,"<sup>64</sup> the original complaint only aimed to declare "that the provisions of MCL 710.24, which prohibits second parent adoptions by unmarried persons, violates the

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59. Trial Transcript Volume 2 – Part B at 29, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285).

60. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

61. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

62. Original Complaint at para. 20, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285).

63. *Id.* at para. 21.

64. *Id.* at para. 14.

plaintiff children, parents and step parents' rights under the Equal Protection Clause . . . of the United States Constitution."<sup>65</sup>

Observers of the trial were surprised that Judge Friedman suggested amending the complaint to include a direct attack on the MMA.<sup>66</sup> At this point, the Supreme Court hadn't yet announced the decisions in *Windsor* and *Perry*, and few thought that a state constitutional amendment stood a solid chance at being struck down under Equal Protection jurisprudence. However, the plaintiffs' attorneys considered Judge Friedman's suggestion that a complaint alleging an adoption theory alone likely would not win in District Court, and that ironically, taking down the entire system of marriage discrimination stood a better chance.<sup>67</sup>

The plaintiffs' amended complaint was filed on September 7, 2012, and named three defendants: Michigan Governor Rick Snyder, Michigan Attorney General Bill Schuette, and Oakland County Clerk Bill Bullard.<sup>68</sup> However, in addition to the original adoption assertion, the amended complaint included a much wider claim: that "the disparate treatment of the same sex couples, and their children, in Michigan violates the Equal Protection Clause of the United States Constitution," and "the Michigan Marriage Amendment also violates the Due Process Clause of the United States Constitution."<sup>69</sup>

On March 7, 2013, Judge Bernard Friedman heard oral arguments on cross-motions for summary judgment, and announced his preference to wait until decisions had been announced in *Windsor* and *Perry*.<sup>70</sup> At that

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65. *Id.* at 6–7.

66. Jean Ann Esselink, *Federal Judge Encourages Lesbian Couple to Take On Michigan's Same-Sex Marriage Ban*, THE NEW CIVIL RIGHTS MOVEMENT (Aug. 29, 2012), <http://www.thenewcivilrightsmovement.com/federal-judge-encourages-lesbian-couple-to-take-on-michigans-same-sex-marriage-ban/discrimination/2012/08/29/47764>.

67. Crystal A. Proxmire, *Adoption Rights Suit Amended to Include Same-Sex Marriage*, BETWEEN THE LINES, Sept. 13, 2012, available at <http://www.pridesource.com/article.html?article=55644>.

68. Amended Complaint at 1, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (No. 12–10285). After the 2012 election, Lisa Brown, a staunch supporter of equal marriage rights, was elected Oakland County Clerk. She continued on as a named defendant, but adverse to the State-defendant's position. The plaintiffs are residents of Oakland County, an inner suburban county of Detroit. *DeBoer*, 973 F. Supp. 2d at 759 n.1 ("Plaintiffs later added Oakland County Clerk, Bill Bullard, Jr. as a party defendant, who was eventually replaced by his successor in office, defendant Lisa Brown. Although Brown is named as a defendant in this matter, she has adopted plaintiffs' legal position challenging the MMA").

69. Amended Complaint at 9, *DeBoer*, 973 F. Supp. 2d 757 (No. 12–10285).

70. John Wisely, *Michigan Judge Delays Decision on Gay Marriage*, USA TODAY, Mar. 7, 2013, available at <http://www.usatoday.com/story/news/nation/2013/03/07/michigan-gay-marriage-ban/1970305/>.

point in time, marriage equality advocates in general had a feeling of momentum; there was wide speculation about how the Supreme Court would handle *Perry* and *Windsor*, and the potential ramifications of those cases on the Michigan Marriage Amendment.<sup>71</sup> In particular, the subject of *Perry* included a voter-approved constitutional amendment that limited marriage to heterosexual couples, a fact pattern with strong similarities to the Michigan Marriage Amendment. The plaintiffs hoped that Judge Friedman would perceive a wider shift in the jurisprudence and strike down the Amendment in one easy stroke.<sup>72</sup>

After the decisions in *Perry* and *Windsor* were announced, oral arguments were scheduled on cross-motions for summary judgment on October 16, 2013. However, Judge Friedman “conclude[d] that a genuine issue of material fact exists with respect to the defendants’ gender role-modeling justification for the MMA,”<sup>73</sup> and that as a result “the parties must be afforded the opportunity to develop their own record in the matter.”<sup>74</sup> He ordered a trial for February 24, 2014 to resolve these questions of fact. At this point in time, no federal court had announced marriage equality-related decisions post-*Windsor*, and many anticipated that Michigan would be the first state to do so.<sup>75</sup>

However, District Courts across the country began striking down state constitutional bans on marriage equality. On July 22, 2013, the first post-*Windsor* marriage decision was announced when an Ohio District Court issued a temporary restraining order on enforcement of Ohio’s marriage amendment.<sup>76</sup> Then, on December 20, 2013, the next post-*Windsor* District Court opinion came when Judge Robert J. Shelby struck down Utah’s constitutional ban on same-sex marriage as unconstitutional, writing that “Amendment 3 [of the Utah Constitution] perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition.”<sup>77</sup> The Utah decision, unlike the Ohio decision before it, was striking in its sweeping language, extending its judg-

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71. Jacob Combs, *Scotland Readies Marriage Equality Bill, Michigan (Sort of) Recognizes Same-Sex Couple’s Marriage*, EQUALITY ON TRIAL (May 29, 2013), <http://www.equalityontrial.com/2013/05/29/scotland-readies-marriage-equality-bill-michigan-sort-recognizes-same-sex-couples-marriage/>.

72. VIDEO: *Highlights from Michigan Same-Sex Marriage Hearing*, PRIDESOURCE, (Oct. 16, 2013), <http://www.pridesource.com/article.html?article=62660>.

73. Opinion and Order Denying Cross Motions for Summary Judgment, *supra* note 5, at 7.

74. *Id.* at 8.

75. Combs, *supra* note 71.

76. *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio July 22, 2013).

77. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1215 (D. Utah 2013).

ment beyond the plaintiffs to the entire state. In the six days before a stay was issued, it is estimated that one-third of committed same-sex couples in that state married.<sup>78</sup> All eyes turned to Utah, a famously conservative and religious state, and then in quick succession, District Courts in Oklahoma,<sup>79</sup> Virginia,<sup>80</sup> and Texas<sup>81</sup> struck down their same-sex marriage bans, while a court in Kentucky mandated recognition of out-of-state marriages,<sup>82</sup> and Missouri allowed, by executive order, same-sex couples to file joint tax returns.<sup>83</sup> By the end of the Michigan trial, seven other states had federal district court judgments overturning portions of their respective constitutional bans. The opinions in these cases use sweeping language, often quoting from another marriage rights case, *Loving v. Virginia*,<sup>84</sup> and even citing Justice Scalia's dissent in *Lawrence v. Texas*.<sup>85</sup>

#### D. The Trial

The defendants in *DeBoer* articulated four justifications for the MMA: “(1) providing children with biologically connected role models of both genders that are necessary to foster healthy psychological development; (2) forestalling the unintended consequences that would result from the redefinition of marriage; (3) tradition or morality; and (4) promoting the transition of naturally procreative relationships into stable unions.”<sup>86</sup> However, Judge Friedman identified the core problem with the defendant's argument, writing that “a genuine issue of material fact exists with respect to defendants' gender role-modeling justifications for the MMA.”<sup>87</sup> To address the question of whether children of same-sex couples were harmed by the lack

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78. Trial Transcript Volume 3 at 36-37, *DeBoer*, 973 F. Supp. 2d 757 (No. 12-10285).

79. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

80. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

81. *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014).

82. *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. 2014).

83. Reid Wilson, *Missouri Governor Allows Same-Sex Couples to File Joint Tax Returns*, WASH. POST (Nov. 15, 2013), [http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/15/missouri-governor-allows-same-sex-couples-to-file-joint-tax-returns/?tid=pm\\_pop](http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/15/missouri-governor-allows-same-sex-couples-to-file-joint-tax-returns/?tid=pm_pop).

84. 388 U.S. 1 (1967).

85. See, e.g., *De Leon*, 975 F. Supp. 2d at 654, quoting *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (“[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation since the sterile and the elderly are allowed to marry.”).

86. Opinion and Order Denying Cross Motions for Summary Judgment, *supra* note 5, at 5-6.

87. *Id.* at 7.

of both genders as parents, both sides brought out expert witnesses in various fields of social science.<sup>88</sup>

The defendants' claims generally boiled down to two core points: (1) many scholars find that "the 'No Difference Consensus' that the plaintiffs rely on is flawed";<sup>89</sup> and (2) there has not been "enough time to determine with any certainty the affects [sic] that same sex marriage will have"<sup>90</sup> because same-sex marriage has only been legal in the United States for ten years. In response, the plaintiffs countered with three opposing propositions: (1) there is "a near universal conclusion that there's no difference"<sup>91</sup> between same-sex and different-sex parenting; (2) even if there were a difference, the "large percentage of children adopted from the foster care system by lesbians and gay men"<sup>92</sup> means the choice is between kids not getting adopted and allowing same-sex couples to adopt; and (3) even if there were differences, those differences don't support a categorical ban on marriage, as evidenced by marriage rights being given to all sorts of groups who have less favorable outcomes for children.

In comparing these competing visions, the trial came down to two central questions: (1) scientific support for the "no-difference conclusion" and (2) the role of child outcomes in the legal question of marriage rights. Interestingly, the question of the outcomes of the *plaintiffs'* children was secondary, as both parties stipulated that the plaintiffs offered a loving and supportive home and that but-for the plaintiff-mothers, the children would be in highly undesirable situations. This fact is revealing of marriage litigation broadly, namely that the central question is generally the status of LGBT people, and the facts of the plaintiffs are a secondary public relations story, rather than at the core of the case.

Just after 5 PM on Friday, March 21, 2014, Judge Bernard Friedman issued an opinion finding that the MMA "and its implementing statutes are unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."<sup>93</sup> Even more importantly, Judge Friedman issued no stay on the decision. As a result, on Saturday morning, county clerks in four Michigan counties—Muskegon, Ingham (Lansing), Washtenaw (Ann Arbor), and Oakland (where pro-equality defendant Lisa Brown was the clerk)—began issuing marriage li-

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88. *See*, *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 760–68 (E.D. Mich. 2014) (discussing the plaintiffs' and the defendants' various social science testimony).

89. Trial Transcript Volume 1 - Part A at 44, *DeBoer*, 973 F. Supp. 2d 757 (No. 12–10285).

90. *Id.* at 43.

91. *Id.* at 17.

92. *Id.* at 11.

93. *DeBoer*, 973 F. Supp. 2d at 775.

censes.<sup>94</sup> In the late afternoon, however, the Sixth Circuit issued a temporary stay, halting the marriages.<sup>95</sup>

In the meantime, hundreds of marriages were issued to same-sex couples in the state of Michigan.<sup>96</sup> Importantly, Judge Friedman used the opinion to rebuke the defendants' social science, finding that the defendants' witnesses were "largely unbelievable," and "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields."<sup>97</sup> Having a trial enabled Judge Friedman not only to find conclusions of law, but also to make judgments on questions of fact and witness credibility, which are much more difficult to overturn on appeal.<sup>98</sup> Further, LGBT advocates interpreted the timing and wording of the opinion—after 5 p.m. on a Friday when the Sixth Circuit was probably closed—perhaps as a way of ensuring that at least some same-sex couples would be able to marry on Saturday morning, when pro-equality county clerks were sure to open.<sup>99</sup>

### E. The Appeal

As 2014 progressed, marriage equality advocates continued to succeed in the federal courts.<sup>100</sup> The Fourth, Seventh, Ninth, and Tenth Circuits

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94. *Updated: Oakland, Washtenaw, Muskegon, and Ingham County Clerks Will Be Open Saturday*, EQUALITY MICHIGAN (Mar. 22, 2014), <http://blog.equalitymi.org/post/80330954051/updated-oakland-washtenaw-muskegon-and-ingham>.
  95. Order Granting Stay Pending Appeal, *DeBoer*, 772 F.3d 388 (No. 14–1341).
  96. Complaint for Declaratory and Injunctive Relief at para. 30, *Caspar v. Snyder*, 2015 WL 224741 (E.D. Mich. 2015) (No. 14–11499).
  97. *DeBoer*, 973 F. Supp. 2d at 768.
  98. *Compare* Fed. R. Civ. Proc. 52(a)(6) ("Findings of fact . . . must not be set aside [by a reviewing court] unless clearly erroneous") *with* First Options of Chicago v. Kaplan, 514 U.S. 938, 947–48 (1995) (" . . . the standard a court of appeals should apply when reviewing a district court decision. . . [is] accepting findings of fact that are not 'clearly erroneous,' but deciding questions of law *de novo*").
  99. *Cf.* Mark Guarino, *Mich. Same-Sex Marriages 'Legal But Not Recognized.' How Did That Happen?*, CHRISTIAN SCIENCE MONITOR (Mar. 26, 2014), [http://www.csmonitor.com/ USA/ Justice/ 2014/ 0326/ Mich.-same-sex-marriages-legal-but-not-recognized.-How-did-that-happen-video](http://www.csmonitor.com/USA/Justice/2014/0326/Mich.-same-sex-marriages-legal-but-not-recognized.-How-did-that-happen-video).
  100. *See* *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014), *aff'd* 771 F.3d 456 (9th Cir. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Majors v. Horne*, 14 F. Supp. 3d 1313 (D. Ariz. 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Burns v. Hickenlooper*, No. 14-CV-01817-RM-KLM, 2014 WL 3634834 (D. Colo. Jul. 23, 2014); *Gen. Synod of the United Church of Christ v. Cooper*, No. 3:14CV213, 2014 WL 3939331 (W.D.N.C. Aug. 12, 2014); *Hamby v. Parnell*,



upheld district court judgments that struck down marriage bans, although they differed in their legal reasoning.<sup>101</sup> The Supreme Court then denied *certiorari* review of those appellate decisions on October 6, 2014,<sup>102</sup> letting the judgments stand, and allowing same-sex couples to wed immediately in Indiana, Oklahoma, Utah, Virginia, and Wisconsin.<sup>103</sup> Defending the Supreme Court's denial of *certiorari*, Justice Ruth Bader Ginsburg stated that until the circuits disagreed about the constitutionality, the Supreme Court would not intervene, because the "major job that the Court has is to keep the law of the United States more or less uniform," and thus "there is no crying need for us to step in."<sup>104</sup> Advocates for marriage equality widely perceived the denial of *certiorari*, as well as Justice Ginsburg's comments, as implying that the Supreme Court would soon be ready to decide the constitutionality of state marriage bans.<sup>105</sup>

Stopping the trend in favor of marriage equality, a three-judge panel of the Sixth Circuit announced its decision in *DeBoer* on November 6,

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No. 3:14-CV-00089-TMB, 2014 WL 5089399 (D. Alaska Oct. 12, 2014); Guzzo v. Mead, No. 14-CV-200-SWS, 2014 WL 5317797 (D. Wyo. Oct. 17, 2014); Marie v. Moser, No. 14-CV-02518-DDC/ TJJ, 2014 WL 5598128 (D. Kansas Nov. 4, 2014); Bradacs v. Haley, No. 3:13-CV-02351-JMC, 2014 WL 5840153 (D. S.C. Nov. 10, 2014); Wright v. State, No. 60CV-13-2662, 2014 WL 1908815 (Ark. Cir. Ct. May 9, 2014), *appeal filed*; Brinkman v. Long, No. 13-CV-32572, 2014 WL 3408024 (Colo. Dist. Ct. July 9, 2014); Huntsman v. Heavilin, No. 2014-CA-305-K (Fla. 16th Cir. Ct. July 17, 2014); Pareto v. Ruvlin, 21 Fla. L. Weekly Supp. 899a (Fla. 11th Cir. Ct. July 25, 2014); Costanza and Brewer v. Caldwell, 140 So.3d 1263 (La. 15th Jud. Cir. June 11, 2014). *Contra* Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014); Conde-Vidal v. Garcia-Padilla, No. 14-1253(PG), 2014 WL 5361987 (D.P.R. 2014).

101. See *Bostic*, 760 F.3d 352 (fundamental right); *Baskin*, 766 F.3d 648 (equal protection, rational basis plus); *Latta*, 771 F.3d 456 (fundamental right, heightened scrutiny for equal protection for sexual orientation as suspect class); *Bishop*, 760 F.3d 1070 (fundamental right); *Kitchen*, 755 F.3d 1193 (strict scrutiny because fundamental right, and unconstitutional classification under equal protection violated fundamental right).
102. See *Bostic*, 760 F.3d 352, *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014); *Baskin*, 766 F.3d 648, *cert. denied*, 135 S. Ct. 316 (Oct. 6, 2014); *Latta*, 771 F.3d 456, *cert. denied*, 135 S. Ct. 345 (Oct. 6, 2014); *Bishop*, 760 F.3d 1070, *cert. denied*, 135 S. Ct. 275 (Oct. 6, 2014); *Kitchen*, 755 F.3d 1193, *cert. denied*, 135 S. Ct. 893 (Oct. 6, 2014).
103. Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES, Oct. 7, 2014, at A1, available at [http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?\\_r=0](http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?_r=0).
104. 92nd Street Y, *Panel Discussion with Justice Ruth Bader Ginsburg, Justice Dorit Beinisch, and Nina Totenburg*, LIVESTREAM (Oct. 19, 2014, 7:30 PM), <http://new.livestream.com/92Y/SupremeCourt>.
105. See Chris Johnson, *Why Did Supreme Court Refuse to Hear Marriage?*, WASH. BLADE (Oct. 7, 2014), <http://www.washingtonblade.com/2014/10/07/made-supreme-court-take-pass-marriage/>.

2014, reversing the District court's judgment and reinstating marriage bans in Michigan, Ohio, Tennessee, and Kentucky.<sup>106</sup> Immediately, Supreme Court observers noted the importance of the decision.<sup>107</sup> By creating a circuit split, it heightened the importance of Supreme Court review.<sup>108</sup> The Supreme Court faced not only a split among the judgments of the circuits, but also a split in reasoning. The Sixth Circuit was in tension with the notion outlined in *Kitchen*, *Bishop*, and *Bostic* that marriage equality is a fundamental right, in conflict with the suspect categorization of sexual orientation by the Ninth Circuit, and finally, in conflict over the fact that marriage survives rational basis review in *Baskin*.<sup>109</sup>

As a threshold matter, the Sixth Circuit panel concluded that *Baker v. Nelson*<sup>110</sup> was controlling precedent. In *Baker*, the Minnesota Supreme Court found that the state could constitutionally restrict marriage to one man and one woman. The United States Supreme Court denied the appeal with a one-sentence order dismissing for “want of a substantive federal question.”<sup>111</sup> Summary affirmances, like *Baker*, are binding precedent “until such time as the [Supreme] Court informs [ ] that they are not,” or “doctrinal developments indicate otherwise.”<sup>112</sup> The panel found no doctrinal developments that either directly or indirectly overruled *Baker*, distinguishing landmark cases like *Windsor* on federalism grounds, and marriage rights going without mention in *Romer* and *Lawrence*.<sup>113</sup> The court also drew no conclusions from the Supreme Court's recent denial of *certiorari* in marriage cases, noting that “this kind of action (or inaction) imports no expression of

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106. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

107. Ruthann Robson, *Divided Sixth Circuit Creates Circuit Split in Same-Sex Marriage Litigation*, CONSTITUTIONAL LAW PROF BLOG (Nov. 6, 2014), <http://lawprofessors.typepad.com/conlaw/2014/11/divided-sixth-circuit-creates-circuit-split-in-same-sex-marriage-litigation.html>.

108. *See* SUP. CT. R. 10(a) (listing circuit splits as a consideration in granting certiorari).

109. *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (fundamental right); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (equal protection, rational basis plus); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (fundamental right, heightened scrutiny for equal protection for suspect class); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental right); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (strict scrutiny because fundamental right, and unconstitutional classification under equal protection violated fundamental right); *DeBoer*, 772 F.3d 388 (6th Cir. 2014) (no right to marry, mere rational basis equal protection review).

110. *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed*, 93 S. Ct. 37 (1972) (mem.) (finding no substantial federal question).

111. *Baker*, 93 S. Ct. 37.

112. *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (internal quotation marks omitted).

113. *DeBoer v. Snyder*, 772 F.3d 388, 401 (6th Cir. 2014).

opinion upon the merits of the case, as the bar has been told many times.”<sup>114</sup>

On the merits, the majority opinion notably adopted a rational basis test. Unlike the courts in *Romer v. Evans* and *Cleburne v. City of Cleburne*, however, the court did not adopt what is often termed “rational basis with a bite,”<sup>115</sup> but rather reserved the test that “[s]o long as judges can conceive of some ‘plausible’ reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens.”<sup>116</sup> On this reasoning, the Sixth Circuit quickly concluded that the state had several plausible legitimate rationales, including channeling the unintended effects of male-female sexual intercourse into marriage and waiting until more facts are known about the effects of same-sex marriage on society.<sup>117</sup> The court also quickly disposed of the notion that the state constitutional amendments were motivated by animus, noting that “if there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that the people of good faith care deeply about [and i]f that is animus, the term has no useful meaning.”<sup>118</sup> Judge Sutton was surely channeling Justice Scalia’s dissent in *Windsor*, stating that restricting marriage

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114. *DeBoer*, 772 F.3d at 402, quoting *United States v. Carver*, 260 U.S. 482, 490 (1925) (internal quotation marks omitted).

115. “Rational basis with a bite,” also called “rational basis plus,” is a form of rational basis review inconsistent with ordinary rational basis, in which nearly any justification satisfies the Court. Animus often serves as the trigger. Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, SCOTUS-BLOG (Aug. 23, 2011, 8:38 AM), <http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/>. See also *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause”). See also *Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 534-36 (1973) (finding unconstitutional a food stamp regulation targeting hippies for discrimination); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (finding unconstitutional the denial of a permit for a group home for the intellectually disabled on the basis of animus); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down a state constitutional amendment barring local ordinances listing sexual orientation as a protected category). The role of animus in equal protection jurisprudence remains hotly contested, however. Compare *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-68 (2001) (allowing “hardhearted” reasons to justify a law under rational basis, so long as there is a “hardheaded” reason) with *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (reasoning that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause”).

116. *DeBoer*, 772 F.3d at 404.

117. *DeBoer*, 772 F.3d at 405–06.

118. *DeBoer*, 772 F.3d at 408.

between one man and one woman is “not animus—just stabilizing prudence.”<sup>119</sup>

The majority opinion also adopted a democratic theory that emphasizes the role of respect for majority votes in constitutional lawmaking, expressing that “[w]hat remains is a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring the States in the Circuit to extend the definition of marriage to encompass gay couples.”<sup>120</sup> The opinion also took judicial notice of the history of discrimination against LGBT people, stating that “[w]e cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens.”<sup>121</sup> However, the opinion did not interpret the marriage ban as a state-enforced discriminatory norm, noting that “any loss of dignity and respect on this issue did not come from the Constitution. It came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the problem in the first instance.”<sup>122</sup>

The court then quickly disposed of similar claims regarding the right of *recognition* of an out-of-state marriage and the right to travel. Noting the ordinary choice of law rule that “the [Full Faith and Credit] Clause does not require a State to apply another state’s law in violation of its own legitimate public policy,” the court concluded that the Constitution does no work in recognizing an out of state marriage unless there is a constitutional right for same-sex couples to marry.<sup>123</sup> The court also quickly rejected the plaintiffs’ related claim that the non-recognition burdens their right to travel, because “[n]onresidents are treated just like other citizens of the State.”<sup>124</sup>

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119. *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting).

120. *DeBoer*, 772 F.3d at 396.

121. *DeBoer*, 772 F.3d at 413.

122. *DeBoer*, 772 F.3d at 417. In contrast, the Supreme Court has been more receptive of the theory that the state’s enforcement of discriminatory norms against LGBT people constitutes unconstitutional inequality. *See* *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres”); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[the] general announcement that gays and lesbians shall not have any particular protections from the law inflicts on them immediate, continuing, and real injuries”); *Windsor*, 133 S. Ct. at 2693 (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages”).

123. *DeBoer*, 772 F.3d at 418 (quoting *Nevada v. Hall*, 440 U.S. 410, 422 (1979)) (internal quotation marks omitted).

124. *DeBoer*, 772 F.3d at 420 (quoting *Saenz v. Roe*, 526 U.S. 489, 498 (1999)) (internal quotation marks and citation omitted).

In response, the dissent noted the unique position of the Michigan case in marriage jurisprudence; namely, it has a factual record. “The majority treats both the issues and the litigants here as mere abstractions. Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry . . . my colleagues view the plaintiffs as social activists who have somehow stumbled into Federal court.”<sup>125</sup> The dissent differed from the majority by adopting a more searching version of rational basis, noting that the “record is rich with evidence that . . . completely refutes the state’s effort to defend the ban against same-sex marriage that is inherent in the marriage amendment.”<sup>126</sup> This type of review does not offer judicial post-hoc rationalizations that characterize the ordinary rational basis review adopted by the majority.

In response to the Sixth Circuit’s opinion, the plaintiffs’ attorneys immediately filed a petition for *certiorari* and forwent the option of an en banc hearing.<sup>127</sup> The Supreme Court granted a *writ of certiorari* on January 16, 2015.<sup>128</sup>

## II. COURTS AND SOCIAL REFORM

Courts have played a key policymaking role throughout American history,<sup>129</sup> and the question of how social reformers should use courts has been hotly contested. This debate has centered on two questions: Whether judicial action is more prudent than focusing on the political branches, as well as whether pursuing change should occur via low-brow common-law rulemaking in lower-level courts, or high-brow constitutional doctrine.<sup>130</sup> *DeBoer* represents the interesting space that post-*Windsor* marriage litigation

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125. *DeBoer*, 772 F.3d at 421 (Daughtrey, J., dissenting).

126. *DeBoer*, 772 F.3d at 428 (Daughtrey, J., dissenting).

127. Chris Geidner, *Same-Sex Couples Heading to Supreme Court After Appeals Court Loss*, BUZZFEED NEWS (Nov. 7, 2014, 3:35 PM), <http://www.buzzfeed.com/chrisgeidner/same-sex-couples-lawyers-plan-next-steps-after-key-appeals-c> (last updated Nov. 7, 2014 4:05 PM).

128. *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015).

129. Compare MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* xv (1977) (arguing that common-law courts played a crucial role in the development of industrial capitalism in the United States through the evolution of common-law rules, rather than other policymaking tools, such as legislative acts or the tax code) with Gash, *supra* note 26, at 44 (arguing that evolution of family law rules about “best interests of the child” paved the way for legal and social acceptance of gay parenting).

130. Compare, e.g., Gash, *supra* note 26, at 44 (arguing that evolution of family law norms about “best interests of the child” paved the way for legal and social acceptance of gay parenting) with Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. Legal Analysis 87, 87 (2014) (arguing that *Windsor* represents a shift of constitutional jurisprudence in favor of marriage equality, and that

occupies in that it was built both on legal successes in ordinary common-law courts, as well as constitutional precedents set by the Supreme Court. Although many scholars have critiqued constitutional litigation as a social reform tool, such a hardline view has been softened<sup>131</sup> with the recent successes of LGBT litigation.<sup>132</sup>

#### A. The “Constrained Court” Model

The notion that courts are “not in the vanguard of any social change movement,” largely leaving social reform to the elected branches, has a long pedigree.<sup>133</sup> Scholarship in that vein generally examines the limitations of litigation as a social reform strategy, and argues that courts “are better equipped with machinery to discover the past than to forecast the future.”<sup>134</sup> This general lack of expertise at large-scale social reorganization means that courts offer only a “hollow hope” for social reform activists.<sup>135</sup> Although “[s]carcely any [political] question arises in the United States which does not become, sooner or later, a subject of judicial debate,” the “constrained court”<sup>136</sup> model generally argues that courts are not only structurally inhibited from major reorganizations of social relations, but also are particularly

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federalist rhetoric is only a way station toward later resolution in favor of marriage equality).

131. See, e.g., Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1237 (2010) (“For scholars of law and social change, the emergence of marriage equality . . . has provided an opportunity to test the contemporary validity of theories based on the now-dated civil rights paradigm. The result has been a renewed—and vigorous—debate over the promise and perils of social change litigation”).
132. For example, litigation against transgender discrimination has focused on interpreting the category of “sex” to include gender identity under sex stereotyping, and sex *per se* theories. Although this tactic has constitutional undertones, it largely has succeeded based on legal questions of statutory interpretation. See *Glenn v. Brumby*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), *aff’d*, 663 F.3d 1312 (11th Cir. 2011). See also Chris Geidner, *Justice Department Will Now Support Transgender Discrimination Claims in Litigation*, BUZZFEED NEWS (Dec. 18, 2014), <http://www.buzzfeed.com/chrisgeidner/justice-department-announces-reversal-on-litigating-transgen#.esoOLdnKO>.
133. Justice Ruth Bader Ginsburg & Dean Elena Kagan, *Remarks Commemorating Celebration 55: The Women’s Leadership Summit*, 32 HARV. J.L. & GENDER 233, 243 (2009).
134. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 264 (1977).
135. See generally ROSENBERG, *supra* note 8, HOROWITZ, *supra* note 134; Gerald Torres, *Legal Change*, 55 CLEVE. ST. L. REV. 135, 136 (2007) (“(E)xcessive belief in the efficacy of litigation leads to a misallocation of resources by social change activists”).
136. Rosenberg uses the term “constrained court” in *The Hollow Hope: Can Courts Bring About Social Change?*. I adopt the term here, due to the term’s extensive use by social movement scholars.

subject to backlash and “alter the order in which social change would otherwise have occurred.”<sup>137</sup>

Overall, commentators disagree about the general effectiveness of litigating for social reform,<sup>138</sup> but they do largely agree on its relative advantages and limitations. For example, although courts are able to use the full power of the state to enforce monetary remedies and injunctions, courts also take power from the perception that they are “willing to ‘take the heat’ . . . [compared] to legislators who [are] not.”<sup>139</sup> The judicial system also derives much of its power from the mythology surrounding the justice system: that every person gets her day in court, and that a court speaks authoritatively about what justice means. The “pull of the civil rights framework [of litigation] is so strong, not just as a way of legitimizing the marriage equality movement’s use of litigation, but also as a way of judging it,”<sup>140</sup> thus inviting comparisons not only to rhetorical form, but also legal substance. Such symbolic allure rarely occurs in the process of legislative law-making.

However, scholars who support the “constrained court” model argue that courts are also limited in both procedural and substantive ways. For example, adjudication tends to be absolutist in nature, focusing on whether or not a party has a right or a duty, rather than the political bargain-making inherent in legislating.<sup>141</sup> Further, commentators often critique that “[j]udges do not have the resources to undertake initiatives requiring administrative capacity, nor do they have the political legitimacy to engage in much activism not otherwise acceptable to the political system.”<sup>142</sup> Adjudication is limited to the particular parties in a dispute, which may result in “[p]iecemeal decisions [which] isolate artificially what in the real world is

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137. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005). Klarman has extensively documented the backlash to various pro-LGBT and racial equality court decisions. *See, e.g.*, KLARMAN, *supra* note 14; MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 153 (2007); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

138. Compare ROSENBERG, *supra* note 8 (arguing that lawyers have not achieved great social reform through the courts alone) with MICHAEL MCCANN, *RIGHTS AT WORK* (1994) (identifying the ways in which female union members used litigation as an organizing tool to build power).

139. HOROWITZ, *supra* note 134, at 20.

140. Cummings & NeJaime, *supra* note 131, at 1237.

141. *See* Lon L. Fuller, *The Form and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978) (noting the “relative incapacity of adjudication to solve ‘polycentric’ problems,” such as resource allocation).

142. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2067 (2002).

merged.”<sup>143</sup> It may also have a reactive posture. “Judges sit to hear disputes brought to them by parties; they do not initiate action.”<sup>144</sup> Perhaps most of all, commentators often describe courts as lacking in the technical expertise that political branches possess, because “courts [tend] to devote much more attention to the nature of the ailment they had diagnosed than to the workings of the cure they had prescribed.”<sup>145</sup>

### B. *The Special Problem of Backlash*

When opposing judicial remedies, proponents of the “constrained court” model also point to political backlash.<sup>146</sup> Backlash is particularly problematic during the implementation phase of a judicial judgment, where decisions often rely on political actors. Courts lack both the power of the sword, inherent in the executive branch, as well as the power of the purse, inherent in the legislative branch,<sup>147</sup> which are often necessary to execute complex judgments.

Because of backlash, LGBT activists have traditionally not only worried about losing in the courts, they’ve also been worried about *winning*.<sup>148</sup> LGBT activists learned their lesson of pushing too far, too fast in Hawaii in the early 1990s, when their actions unintentionally led to the passage of the Defense of Marriage Act (DOMA) in Hawaii in 1996, and in Massachusetts in 2003, which led to a backlash in other states, including Michigan.<sup>149</sup> Some scholars perceive the potential for backlash as inherent in the judicial process, where any person with an unpopular idea can litigate a wide-reaching Constitutional issue.<sup>150</sup> Many supporters of LGBT rights, including pro-equality institutions and legal scholars, worried about the *DeBoer* plain-

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143. HOROWITZ, *supra* note 134, at 37.

144. *Id.* at 38.

145. *Id.* at 262.

146. See, for example, JACK W. PELTASON, *FIFTY-EIGHT LONELY MEN* (1961), and MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND SAME-SEX MARRIAGE* (2012), for articulations of the pessimistic views of the judicial role in school desegregation and same-sex marriage, despite being written fewer than 10 years after respective landmark decisions, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Goodridge v. Dep’t of Public Health*, 440 Mass. 309 (2003).

147. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rositer ed., 1961).

148. KLARMAN, *supra* note 14, at 139 (“Perhaps even worse than [the plaintiffs in *Hollingsworth v. Perry*] losing in federal court, other commentators warned, would be winning, which might ignite a severe political backlash. . . .”).

149. *Id.* at 60–66, 106.

150. *Id.* at ix–x.



tiffs rushing to the Supreme Court too soon, for fear of setting binding bad precedent.<sup>151</sup>

Thus, the “constrained court” model perceives that litigation creates organizational hurdles for social reformers because it “siphons off crucial resources and talent, and runs the risk of weakening political efforts,”<sup>152</sup> instructing activists that “those who rely on litigation absent significant public and political support will fail to achieve meaningful change, and may set their cause back.”<sup>153</sup> Critics of marriage litigators embrace the “constrained court” model and point to the *Goodridge* decision in Massachusetts, which was “a boon for Republican [leaders]” while “gay marriage was a vexing issue”<sup>154</sup> for Democratic leaders. More specifically, the 2004 Bush campaign used marriage as a wedge issue to get conservative voters to the polls, resulting in “as resounding a defeat as any social group is likely to experience in American politics.”<sup>155</sup> As a result, even though “litigation has probably advanced the cause of gay marriage more than it has retarded it,” critics of litigation argue that “such litigation has also probably impeded the realization of other objectives of the gay rights movement.”<sup>156</sup>

### III. *DEBOER*: A DEFENSE OF LITIGATION AS A SOCIAL REFORM TOOL

Commentators often made the criticism that the LGBT movement relies “too much on the litigation groups and on legal victories” instead of “build[ing] a robust enough political arm,”<sup>157</sup> resulting in a situation whereby “[g]ay marriage litigation may also have distracted attention from other items on the gay rights agenda.”<sup>158</sup> These critics cite institutional limitations of litigation, using the “constrained court” model as a guide.<sup>159</sup>

Although the “constrained court” model offers more nuance than this Note can fully address, *DeBoer* and other contemporary marriage equality litigation offer three responses to critics of litigation: (1) the critique misses the ways that advocates have successfully used “under the radar” suits, using

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151. Trevor Ashley, *Gay Marriage Supporters Fear the US Supreme Court's Ruling Was a Sign*, KENTUCKY GUARDIAN (Jan. 17, 2010), <http://unitedwestandky.com/2010/01/gay-marriage-supporters-fear-the-u-s-supreme-courts-ruling-was-a-sign/>.

152. ROSENBERG, *supra* note 8, at 423.

153. *Id.* at 419.

154. KLARMAN, *supra* note 14, at 103–04.

155. *Id.* at 113.

156. *Id.* at 218.

157. Christopher de la Torre, *Interview with Kevin Cathcart, Lambda Legal Executive Director, 40 Years After Stonewall*, STONEWALL REBELS (July 10, 2009), <http://stonewallrebels.wordpress.com/tag/lambda-legal/>.

158. KLARMAN, *supra* note 14, at xi.

159. *See id.*

parenting rights as a precondition for contemporary marriage litigation;<sup>160</sup> (2) the movement has wisely adopted a “multidimensional advocacy”<sup>161</sup> approach, using litigation for doctrinal and organization purposes; and (3) current marriage litigation is more like impact litigation, rather than institutional reform.<sup>162</sup> Because the theoretical framework of litigation in social movements is so contested, the *DeBoer* trial allows commentators a pragmatic way of testing the boundaries of these frameworks; “[c]ase study analysis . . . contribute[s] to our understanding of important aspects of the lawyering process, such as how lawyers constructed goals, decided among tactical opinions, and responded to opponents’ efforts.”<sup>163</sup>

#### A. The “Under the Radar”<sup>164</sup> Approach

The “constrained court” model focuses on only one type of litigation: the high-profile lawsuit making the case about the status of LGBT people writ large. Although the stories of the plaintiffs in these lawsuits have been important, that importance stems from humanizing LGBT people themselves and garnering true empathy from judges and the public, rather than serving a doctrinal role. Central to this sort of lawsuit is a high degree of visibility, so that the case “cannot only be measured by their legal elements, but must also be measured in terms of their cultural and political effects.”<sup>165</sup>

In contrast to the marriage issue, litigation has achieved a great deal of success in same-sex parenting, as Alison Gash has extensively documented in her forthcoming book, *Below the Radar: How Silence Can Save Civil Rights*.<sup>166</sup> Although in “many ways, the stakes for these [same-sex] parents, and the issues raised in their arguments, parallel those involved in the very public and hostile battle over same-sex marriage,”<sup>167</sup> LGBT advocates were “struggling for (and winning) same-sex adoption and parental rights across

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160. See, e.g., Alison Gash, *Under the Gaydar*, WASH. MONTHLY, May/June 2013, available at [www.washingtonmonthly.com/magazine/may\\_june\\_2013/features/under\\_the\\_gaydar043855.php?page=all](http://www.washingtonmonthly.com/magazine/may_june_2013/features/under_the_gaydar043855.php?page=all).

161. Cummings & NeJaime, *supra* note 131, at 1242.

162. See *id.* at 1238.

163. *Id.* at 1239–40.

164. Credit goes to Alison Gash for developing and naming the “under the radar” approach in her dissertation, which will be released in book form soon. Gash, *supra* note 26. I continue with her terminology throughout this Note.

165. Evan Wolfson, *Where Perry Fits in the National Strategy to Win the Freedom to Marry*, 37 N.Y.U. L. & SOC. CHANGE 123, 127 (2013).

166. ALISON GASH, *BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS* (forthcoming May 2015). This Note’s citations refer to Gash’s unpublished dissertation. Gash, *supra* note 26.

167. Gash, *supra* note 26, at 44.

the country.”<sup>168</sup> Gash has identified that same-sex parenting rights were recognized by courts with varying degrees of success all across the country, but notably varied from local court to local court.<sup>169</sup>

This method, which Gash terms the “under the radar” approach, also occurred in Michigan, where second-parent adoptions were quietly issued throughout the 2000s. Although the Michigan Attorney General issued an opinion in 2004 which expressed that “couples of the same sex who marry in a state that recognizes same-sex marriages as valid are not legally authorized to adopt children in Michigan as a couple,”<sup>170</sup> at least one court has interpreted the non-binding opinion as incorrect, because the Michigan adoption statute on its face does not *prohibit* unmarried couples from adopting a child, but rather *authorizes* married couples and single individuals to adopt a child.<sup>171</sup>

Advocates argued that the best interests of the child standard, which governs the overarching policy of adoption, is the proper legal guide. Same-sex joint adoption in Michigan briefly made its way into public debate when a court in Washtenaw County began issuing adoptions in a way that caught public attention.<sup>172</sup> However, Washtenaw County Circuit Court Chief Judge Archie Brown effectively put a stop to second-parent adoptions in that jurisdiction, claiming that such adoptions violated Michigan law, which authorizes only single and married individuals to adopt.<sup>173</sup> Importantly, Chief Judge Brown accomplished this stoppage not by a conclusion of law in a lawsuit, but rather by sending the message to individual judges who had authorized these second-parent adoptions in the past.<sup>174</sup> Most significantly for the *DeBoer* case, the plaintiffs DeBoer and Rowse had previously looked into adopting their three children jointly, but were informed that a second-parent adoption was effectively barred in Michigan, precipitating the public federal challenge.<sup>175</sup>

In Michigan, the state affiliate of the ACLU had been pursuing a careful step-by-step litigation strategy for years to reverse these previous interpretations of Michigan’s adoption statute. For example, same-sex parents attempting to adopt jointly often found their petitions rejected outright by state judicial officers, and the Michigan ACLU considered challenging those

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168. *Id.* at 45.

169. *Id.* at 46–48.

170. Validity of Out-of-State Same-Sex Marriages in Michigan, Mich. Op. Att’y Gen. 7160, 2004 WL 2096457 (Sept. 14, 2004).

171. *See, e.g.,* Usitalo v. Landon, 829 N.W.2d 359, 363–64 (Mich. Ct. App. 2012).

172. *Judge Blocks the Last Adoption Hope for Gay, Unwed Couples*, *supra* note 25.

173. *Id.*

174. Interview with Sarah Zearfoss, Pro Bono Attorney for Michigan ACLU, in Ann Arbor, Mich. (Apr. 10, 2014).

175. Interview with April DeBoer, *supra* note 42.

rejections under the Due Process clause.<sup>176</sup> The Michigan ACLU's litigation strategy hinged on exhausting state remedies before turning to any Federal challenge, largely due to historic deference to State law on issues of family life.<sup>177</sup> The state affiliate achieved some success in combatting restrictive interpretations of the adoption law before the *DeBoer* case, by adopting an “under the radar” approach.<sup>178</sup>

For example, ACLU lawyers identified a divorcing lesbian couple who had jointly adopted their children in Michigan state court. In the case, one parent was attempting to collaterally attack the joint adoption, under the theory that such a second-parent adoption should not have been granted under Michigan law in the first place.<sup>179</sup> However, ACLU lawyers adopted an “essentially conservative argument, that you have to respect the rule of law,” that courts cannot put their imprimatur on something, only to then revoke it.<sup>180</sup> The result was success at the Michigan circuit court level, creating valuable state court precedent in reversing conventional interpretations of Michigan's adoption law.<sup>181</sup> Of course, the *DeBoer* case flew directly against the litigation strategy of the Michigan ACLU by federalizing the adoption issue.<sup>182</sup> For the Michigan ACLU, the *DeBoer* complaint was doubly risky: it presented a chance of creating bad case law and also publicly asserted that Michigan law banned same-sex parents from jointly adopting—an interpretation of law with which the Michigan ACLU seriously disagreed.<sup>183</sup>

These low-key adoption cases differ significantly from the marriage cases for several reasons. First, they were fought largely out of the public eye, with usually only the parties of the case paying attention, allowing judges to issue pro-LGBT rulings without fear of backlash. Thus, the “under the radar” approach worked to change the legal conversation and prevent backlash—even when parties *were not successful*. Second, the legal doctrine was different. Rather than a state or federal constitutional case under equal protection or due process, the legal standard was most often “best interests of the child”—a standard common to family law—allowing advocates to win changes to the existing law.<sup>184</sup> Further, family law is qualitatively less doctri-

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176. Interview with Sarah Zearfoss, *supra* note 174.

177. *Id.*

178. Interview with Jay Kaplan, *supra* note 27.

179. *See Usitalo v. Landon*, 829 N.W.2d 359, 363–64 (Mich. Ct. App. 2012).

180. Interview with Sarah Zearfoss, *supra* note 174.

181. *See Usitalo v. Landon*, 829 N.W.2d 359 (Mich. Ct. App. 2012).

182. Complaint for Declaratory and Injunctive Relief at paras. 20–23, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (No. 12–10285).

183. Interview with Sarah Zearfoss, *supra* note 174.

184. *See Gash*, *supra* note 26, at 44–46.

nal, with general doctrinal principles balanced against the particular equities of the case.<sup>185</sup>

This “under the radar” approach, particularly as exemplified by experiences in Michigan, has major implications for social movement theory, by questioning what theorists ordinarily think of as social movement organization. For example, the *DeBoer* plaintiffs sought to adopt their children, and only after being told that adoption was effectively barred under Michigan law did they launch a public suit in federal court.<sup>186</sup> Then, only after *DeBoer* became a *marriage* case did it begin to receive consistent national attention, and the focus of the case became discrimination against LGBT persons at large, instead of negotiating over what constituted the “best interests of the child.”<sup>187</sup>

Notably, per Gash, much of the success that current marriage equality litigation enjoys is based on the decades of success establishing same-sex parenting through the “under the radar” approach.<sup>188</sup> Normalizing already-existing same-sex parented families had an effect in the social realm, changing the public face of the LGBT movement from activists in San Francisco and Greenwich Village to the PTA moms and dads in their neighborhood. Thus, in Michigan, as well as in states across the country, earlier litigation establishing parental rights became a pre-condition for success in marriage rights by creating families who were harmed by marriage amendments. In many respects, Jayne Rowse and April DeBoer were ideal plaintiffs for this sort of impact litigation, heading a photogenic family in typical suburban Michigan. Through the larger cultural conversation about *DeBoer*, marriage equality stopped being a distant question, and became an issue that real people experienced right next door. For example, in the wake of the *DeBoer* injunction, Governor Rick Snyder announced he would not recognize marriages issued before the stay for the purposes of state law, but could not argue that they weren’t legal, or that real people did not experience a legal status change as a result of the ruling.<sup>189</sup>

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185. See, e.g., 43 C.J.S. Infants § 62 (2014) (“The primary consideration of juvenile proceedings in general is the welfare and best interests of the child, and the aim is not punishment but the protection, correction, rehabilitation, or redemption of the child.”).

186. Interview with April DeBoer, *supra* note 42.

187. Ed White, *April DeBoer and Jayne Rowse, Michigan Lesbian Couple, Could Challenge State’s Gay Marriage Ban*, HUFFINGTON POST (Mar. 6, 2013), [http://www.huffingtonpost.com/2013/03/06/april-deboer-jayne-rowse-michigan-lesbian-adoption-case\\_n\\_2820944.html](http://www.huffingtonpost.com/2013/03/06/april-deboer-jayne-rowse-michigan-lesbian-adoption-case_n_2820944.html).

188. See Gash, *supra* note 26, at 44–47.

189. Associated Press, *Michigan Gov Says State Won’t Recognize Same-Sex Marriages*, N.Y. DAILY NEWS (Mar. 26, 2014), <http://www.nydailynews.com/news/politics/michigan-gov-state-won-recognize-same-sex-marriages-article-1.1735661>.

Such a strategy undoubtedly had an effect on Judge Friedman, who noted in his opinion that “[i]n attempting to define this case as a challenge to ‘the will of the people,’ state defendants lost sight of what this case is truly about: people.”<sup>190</sup> However, Judge Friedman was not the only one moved by the injury marriage bans caused children. The reality of same-sex partners raising children has affected many members of American society, including Justice Kennedy, the critical swing vote of the Supreme Court.<sup>191</sup> Under the posture of *Windsor v. United States*,<sup>192</sup> for example, Justice Kennedy found that § 3 of the Defense of Marriage Act (DOMA),<sup>193</sup> “humiliates tens of thousands of children now being raised by same-sex couples.”

Twenty years ago, this injury would have been almost unthinkable to many judges who probably did not know any gay families raising children. In contrast to an older view where same-sex parenting would be seen as a new experiment, Justice Kennedy argued that same-sex-parented families *already* exist. The Federal government, through DOMA, “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community,”<sup>194</sup> which was critical to the Court’s conclusion that DOMA “is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”<sup>195</sup>

For Justice Kennedy, the harm done to these children of same-sex couples seemed an unfair stigmatization that had constitutional dimensions, similar to the impermissible stigma inflicted by the state on illegitimate children. “Imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”<sup>196</sup> Even more appropriate, the Supreme Court has consistently held that illegitimate children cannot be burdened with this stigma for the sole purpose of encouraging legitimate

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190. *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (citations omitted).

191. Robert Barnes, *Justice Kennedy: The Highly Influential Man in the Middle*, WASH. POST (May 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/12/AR2007051201586.html>.

192. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

193. 1 U.S.C. § 7 (1996) (Westlaw through P.L. 113–234).

194. *Windsor*, 133 S. Ct. at 2694 (2013).

195. *Windsor*, 133 S. Ct. at 2695. The opinion seems to be channeling the equal protection aspect of the Fifth Amendment’s Due Process clause, citing famous Equal Protection cases *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996).

196. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

familial structures,<sup>197</sup> with this sense of unfair burden being grounded in historic understandings of equal protection.<sup>198</sup>

Same-sex-parented families achieved legal status through the “under the radar” approach, even when the parents lost, thus establishing a critical pre-condition for legal challenges for marriage rights. By denying the couples recognition, the state denies those existing families equal benefits in practice, not merely in theory. This vision makes marriage equality opponents appear to be ducking reality, forcing them to claim more distant or theoretical injuries.<sup>199</sup> As a result, the “under the radar” approach appeals to a judge’s common sense, rather than rigid doctrinal categories, paving the ground for wider constitutional change.<sup>200</sup>

Consequently, although the *DeBoer* case is about the legal status of same-sex couples, it has been couched in efforts to recognize *existing* changes to the social order that had already occurred “under the radar,” rather than using big-ticket marriage litigation to *change* the nature of the social order itself. As Judge Friedman stated, “[t]aken together, both the *Windsor* and *Loving* decisions stand for the proposition that, without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence.”<sup>201</sup> Judge Friedman’s language channels Justice Kennedy’s LGBT constitutional opinions, which offer a vision of legal equality that follows social conditions.<sup>202</sup> Thus, the changing social mores of the last half-century “show an emerging awareness that liberty

197. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mills v. Habluetzel*, 456 U.S. 91, 101 n.8 (1982). But cf. *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (“it is thus neither illogical nor unjust . . . [to] not confer [ ] upon a biological father the statutory right to sue for the wrongful death of his illegitimate child”).

198. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 560-62 (1896) (Harlan, J., dissenting) (stating that segregation of railway passengers creates a “badge of servitude” because it proceeded “on the ground that colored citizens are . . . inferior and degraded.”); see Reva Siegel, *Equality Talk: Antisubordination and Anticlassification in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1542 (2004) (“the judiciary has developed the concept of discriminatory purpose with sensitivity of the status of groups that government benefits and burdens”).

199. See, e.g., Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y. 245, 262 (2011) (“Enshrining the revisionist view [of marriage to include same-sex couples] would not just wear down but tear out this foundation, and with it any basis for reversing other recent trends and restoring the many social benefits of a healthy marriage culture. Those benefits redound to children and spouses alike”).

200. Such a strategy was proposed in the wake of *Romer v. Evans*. See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 47 (1996).

201. *DeBoer*, 973 F. Supp. 2d at 774 (E.D. Mich. 2014).

202. See, e.g., *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) (“Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity

gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>203</sup> This vision of equal protection thus perceives government discrimination as impermissibly interfering with reality, in contrast to opponents of marriage equality, who largely view marriage equality as a government-mandated social experiment.<sup>204</sup>

### B. *Multidimensional Advocacy*

Public policymaking in the United States is not centralized, but largely diffuse, spread not only horizontally among the three branches of government, but also vertically among the Federal, state, and local levels. Although media portrayals focus on landmark cases that lead grand social reform, such as *Brown v. Board*, social movements show that successful reform unsurprisingly comes when advocates use litigation as one of many tools.<sup>205</sup> As a result, particularly in the context of LGBT litigation, “the scholarly focus on litigation as the social reform vehicle-of-choice for movement lawyers is outmoded,” an assertion made not to “diminish [litigation’s] importance as a movement strategy,”<sup>206</sup> but rather to encourage a more comprehensive analysis.<sup>207</sup>

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caused by simple want of careful, rational reflection, or from some instinctive mechanism to guard against people who appear to be different”).

203. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

204. *See, e.g.*, Transcript of Oral Argument at 18-19, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013) (No. 12-144) (“[I]t is impossible for anyone to foresee the future accurately enough to know exactly what those real-world consequences would be [of same-sex marriage] . . . I think it better for California to hit the pause button and await additional information from the jurisdictions where this experiment is still maturing”).

205. *See, e.g.*, STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974) (explaining the role of constitutional rights in progressive social movements); MCCANN, *supra* note 138 (discussing the role litigation played in the pay equity movement); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. LAW & SOC. SCI. 17 (2006) (surveying the recent incorporation of litigation efforts by social movements); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) (explaining the effect of social movements on the evolution of the equal protection clause); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (exploring the use of litigation by the guns rights movement and its compatibility with the Second Amendment); JACK BALKIN, *LIVING ORIGINALISM* (2011) (demonstrating how the civil rights movement is consistent with the constitutional theory of originalism).

206. Cummings & NeJaime, *supra* note 131, at 1317.

207. *See generally* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).



LGBT advocates have largely “viewed litigation as just one tactic in their repertoire, seizing upon the dynamic relationship among courts, other governmental branches, elites, and the public.”<sup>208</sup> Even Evan Wolfson, a prominent lawyer in the marriage equality movement, agrees that:

We knew it was not going to be enough to just have one case (Hawaii or Vermont, California or Iowa) or one state (Vermont or California) or one methodology (litigation, rather than, say, legislation), and so forth and so on. What we needed and called for and built was an affirmative and sustained campaign that reflected what I described repeatedly as the four multi’s: multi-year, multi-state, multi-partner, and multi-methodology.<sup>209</sup>

The LGBT movement dedicates a great deal of resources to non-litigation tactics of social reform, such as pride parades, LGBT-themed media and professional organizations, and institutional activism.<sup>210</sup> For example, two of the flagship civil rights organizations fighting for LGBT equality, the Human Rights Campaign and the National Gay and Lesbian Task Force, employ *zero* staff members dedicated to impact litigation.<sup>211</sup> Rather, the movement uses a polyvocal approach, pitting tactics against each other to stir a productive tension.<sup>212</sup> In this way, advocates make small steps of progress where they can, and those smaller victories open up opportunities for progress in other arenas. Critics who focus purely on short-term doctrinal change as the goal of litigation alone focus too much on the primary effects of litigation (i.e., which party wins) and “have tended to ignore or undervalue the forms of political engagement that create democratically legitimate constitutional meaning.”<sup>213</sup>

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208. Cummings & NeJaime, *supra* note 131, at 1317.

209. Wolfson, *supra* note 165, at 125.

210. MOVEMENT ADVANCEMENT PROJECT, 2014 NATIONAL MOVEMENT REPORT: A FINANCIAL OVERVIEW OF LEADING ADVOCACY ORGANIZATIONS IN THE LGBT MOVEMENT 3 (Dec. 2014), available at <http://www.lgbtmap.org/file/2014-national-lgbt-movement-report.pdf> (noting that only 3% of all LGBT nonprofit budgets are dedicated to legal expenses).

211. E-mail from Sarah Warbelow, Legal Director, Human Rights Campaign, to author (May 27, 2014) (on file with author).

212. See, e.g., MOVEMENT ADVANCEMENT PROJECT, *supra* note 210, at 2–4.

213. Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 391 (2007). Note also that litigation itself often causes political-legal actors to respond, such as when anti-DOMA litigation caused the Department of Justice and the President to cease defending DOMA, and conclude that “classifications based on sexual orientation warrant heightened scrutiny.” Letter from Eric Holder, Att’y Gen., to John A. Boehner, Speaker, H.R.,

Of course, this criticism does not diminish the ways in which marriage equality advocates have used litigation to further the larger movement. For example, advocates have used litigation to “force a conversation within the polity about what the Constitution should mean.”<sup>214</sup> Courts play a special role in this dialogue, because they “facilitate and mold the national dialogue concerning the meaning of the Constitution, particularly but not exclusively with regard to the meaning of our fundamental rights.”<sup>215</sup> The conversation itself “us[es] doctrinal arguments and concepts to pressure elected officials and convince lower court judges to support the marriage equality cause.”<sup>216</sup>

Such a doctrinal conversation was noted implicitly by Judge Friedman himself in *DeBoer*: “[T]he [Supreme] Court’s decision in *Windsor* does not answer the question presented here [if the fundamental right to marry includes same-sex couples], but its reasoning is nonetheless highly relevant.”<sup>217</sup> Judge Friedman’s words demonstrate the ongoing dialogue currently happening within the courts. In this way, a “court’s options are limited by social norms, [but] judges also can influence the evolution of those norms.”<sup>218</sup>

This conversation occurs not only within the judicial branch, but also among the wider public. *DeBoer* highlights the way that marriage equality advocates have used litigation as a tool, changing that public conversation from an issue settled in 2004 by Constitutional Amendment into an evolving conversation in Michigan about human rights.<sup>219</sup> For example, the post-*Windsor* wave of marriage equality litigation has increased the salience of marriage equality as a political issue, providing the opportunity for political leaders to announce their support of marriage equality despite previous opposition.<sup>220</sup> Although no major public figures changed their position pub-

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(Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act>.

214. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1259 (2004); see also FRIEDMAN, *supra* note 207.

215. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993).

216. Douglas NeJaime, *Doctrine in Context: Responding to Michael Klarman, Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. F. 10, 10–11 (2013).

217. *DeBoer*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

218. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000).

219. Cf. Julie Pace, *Prop. 8 Lawyer’s View on Gay Marriage Evolving*, HUFFINGTON POST (Apr. 17, 2014, 12:38 PM), [http://www.huffingtonpost.com/2014/04/17/charles-cooper-prop-8\\_n\\_5167857.html](http://www.huffingtonpost.com/2014/04/17/charles-cooper-prop-8_n_5167857.html) (quoting Charles Cooper, “[m]y views evolve on issues of this kind the same way as other people’s do, and how I view this down the road may not be the way I view it now, or how I viewed it ten years ago.”).

220. The Kentucky Attorney General is a famous example. He previously opposed marriage equality, and led the case defending the state’s marriage amendment at the trial

licly as a result of *DeBoer*, the case itself brought a flurry of media coverage, stirring a debate in the wider Michigan electorate on the fairness of the MMA, delegitimizing the amendment in the process. In particular, media coverage of the trial questioned the underlying assumptions about social science of same-sex parenting,<sup>221</sup> and shifted the conversation from numbers to actual people. This human aspect of the LGBT political movement is tremendously important politically, as LGBT leaders have long recognized.<sup>222</sup>

LGBT advocates have also deftly used the unique messaging qualities of marriage; an “extraordinarily powerful vocabulary that doesn’t fix everything, but that has been an engine to help move everything forward.”<sup>223</sup> This language focuses on individualized experiences that are highly relatable to non-LGBT audiences; namely, that marriage is “focused on love, commitment, and responsibility . . . Marriage is about the commitment we make to the one we love, and the promise a couple makes to take care of each other.”<sup>224</sup>

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court level; however, he reversed his position in an emotional public statement. Michael A. Lendenberger, *Kentucky’s Attorney General Explains Why He Won’t Defend Gay Marriage Ban*, TIME (Mar. 4, 2014), [www.time.com/12568/kentucky-gay-marriage-jack-conway](http://www.time.com/12568/kentucky-gay-marriage-jack-conway).

221. Brian Dickerson, *If Kids Come First, Should Marriage be Reserved for Only Few?*, DETROIT FREE PRESS (Feb. 27, 2014), <http://www.freep.com/article/20140227/COL04/302270088/same-sex-marriage-Michigan-Deboer-Schuette-constitutional-ban-gay>.

222. See, e.g., Patrick Range McDonald, *California Celebrates Harvey Milk Day: Excerpts from 1978 ‘Gay Freedom’ Speech*, L.A. WEEKLY (May 22, 2012), [www.laweekly.com/news/california-celebrates-harvey-milk-day-excerpts-from-1978-gay-freedom-speech-2387355](http://www.laweekly.com/news/california-celebrates-harvey-milk-day-excerpts-from-1978-gay-freedom-speech-2387355). Harvey Milk, the first non-incumbent openly gay man in the United States to be elected into public office, gave a stirring speech at the Gay Freedom Day Parade in San Francisco in 1978, highlighting the importance of personal dialogue to the LGBT movement, saying:

Gay brothers and sisters, . . . You must come out. Come out. . . to your parents. . . I know that it is hard and will hurt them but think about how they will hurt you in the voting booth! Come out to your relatives. . . come out to your friends. . . if indeed they are your friends. Come out to your neighbors. . . to your fellow workers. . . to the people who work where you eat and shop. . . come out only to the people you know, and who know you. Not to anyone else. But once and for all, break down the myths, destroy the lies and distortions. For your sake. For their sake. For the sake of the youngsters who are becoming scared by the votes from Dade, [Florida] to Eugene, [Oregon].

*Id.*

223. Wolfson, *supra* note 165, at 165.

224. MOVEMENT ADVANCEMENT PROJECT, AN ALLY’S GUIDE TO TALKING ABOUT MARRIAGE 2, *available at* <http://www.lgbtmap.org/file/allys-guide-talking-about-marriage.pdf>.

In this way, putting the plaintiffs' stories front and center allows the LGBT movement to put a human face on marriage discrimination and provides a language with which listeners can identify on an emotional level. Most people, regardless of sexual orientation, pursue romantic relationships,<sup>225</sup> and over 80% of Americans will marry by the time they turn forty years old.<sup>226</sup> As a result, marriage litigation has been a useful tool, "constructing social meaning and shaping the way that elites and the public perceive a movement's claims and demands."<sup>227</sup> Even "loss may yield many of the indirect effects that scholars have identified in the context of litigation victory and litigation process, but it may do so in ways that are uniquely tied to loss itself,"<sup>228</sup> like instilling urgency.

For example, Dana Nessel, one of the *DeBoer* attorneys, noted that she felt that "the [Michigan] adoption code was appalling and needed to be rectified," directly leading to her involvement in the *DeBoer* case.<sup>229</sup> This sense of the need to "do something" directly led to her involvement in the *DeBoer* case. From the outside, a family law attorney from Southeast Michigan leading a major constitutional case without the support of any LGBT group may seem odd. However, it reflects an underlying truth about *Goodridge* and its subsequent backlash: it radiated a sense of possibility that extended far beyond the established groups and agreed-upon strategy. In this way, even litigation loss has major organizational benefits, including creating deadlines and urgency to maximize organizational capacity, by "raising consciousness, mobilizing constituents, and documenting an alternative understanding of rights."<sup>230</sup>

Scholars of social movements have taken note of the "dynamic triangular relationship among social movement organizations, countermovement organizations, and grassroots supporters of same-sex marriage," which "triggered a 'cycle of contention' that mobilized LGBT everyday activists to urge movement organizations to take up the cause of same-sex marriage."<sup>231</sup>

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225. See Brief for the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance at 11–12, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2012) (No. 12–144) ("Like heterosexuals, most gay and lesbian people want to form stable, long-lasting relationships, and many of them do") (internal citations omitted).

226. Paula Goodwin et al., *Who Marries and When? Age at First Marriage in the United States: 2002*, CENTER FOR DISEASE CONTROL 1 (June 2009), <http://www.cdc.gov/nchs/data/databriefs/db19.pdf>.

227. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 944 (2011).

228. *Id.* at 945.

229. Bosman, *supra* note 51.

230. NeJaime, *supra* note 227, at 953–56.

231. Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449, 450 (2014).

LGBT advocates in the post-*Windsor* round of marriage litigation have used litigation in this way exceptionally well. For example, the Human Rights Campaign (“HRC”), the nation’s largest LGBT civil rights organization with a highly identifiable logo, rebranded themselves with a red color scheme during oral arguments for *Perry* and *Windsor*.<sup>232</sup> The red logo served several purposes: to reverberate support for LGBT rights broadly around the internet, to raise awareness of this highly important litigation campaign, and to push out HRC’s brand and build organizational support. HRC accomplished these goals by using one of the most powerful symbols the American constitutional order has: equality. Even though HRC wasn’t involved directly in any of the litigation, it used the litigation itself to make a broader constitutional statement.

This emotional component carries over into the legal context as well. The Court has emphasized marriages as “expressions of emotional support and public commitment.”<sup>233</sup> Although “marital status often is a precondition to the receipt of government benefits,”<sup>234</sup> the Court has focused its constitutional inquiry on the fact that “[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred,”<sup>235</sup> rather than merely a bureaucratic paperwork filing,<sup>236</sup> and is distinct from the legal right to procreate,<sup>237</sup> or the continuation of traditional gender roles alone.<sup>238</sup>

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232. See Mackenzie Yang, *What Is the Red Equal Sign All Over Facebook and Twitter?*, TIME (Mar. 26, 2013), <http://newsfeed.time.com/2013/03/26/what-is-the-red-equal-sign-all-over-facebook-and-twitter/>.

233. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

234. *Turner*, 482 U.S. at 96.

235. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

236. See, e.g., *Turner*, 482 U.S. at 95–96 (stating marriage is an expression of emotional support and public commitment); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (discussing marriage as the most important relation in life that lies at the foundation of the family and society, without which there would be neither civilization nor progress) (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating marriage is one of the “basic civil rights of man, fundamental to our very existence and survival”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating right to marry is essential part of liberty protected by the Due Process Clause).

237. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1971) (striking down state law that permitted married persons to obtain contraceptives but not unmarried persons on the grounds that all individuals, married or unmarried, have the right to be free from unwarranted governmental intrusion that affects their decision whether to have children); *Griswold*, 381 U.S. at 485–86 (striking down state law that banned use of contraceptives on the grounds that it unconstitutionally intrudes upon right to marital privacy).

238. See generally *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (striking down gender-based distinction that prevented survivors’ benefits based on the earnings of a deceased wife in the Social Security Act as unconstitutional).

### C. *Impact Litigation, not Institutional Reform*

Marriage equality is strikingly different from the long line of liberal institutional reform cases, on which the “constrained court” model focuses its critique. For example, institutional reform cases tend to involve complex fact patterns that the plaintiffs would like to see changed, and involve a wide variety of institutions, including prisons and jails,<sup>239</sup> schools,<sup>240</sup> mental health institutions,<sup>241</sup> public housing,<sup>242</sup> and various other institutions. This is not to say that institutional reformers do not also want to see the law changed, but rather, a plaintiff’s primary goal is to use litigation as a bargaining chip in restructuring institutions. In contrast, impact litigation tends to focus more on shifting doctrine itself. Although the reformed doctrine most likely has important impacts for real people on the ground, the primary purpose is more focused on changing the status-making aspect of the law.<sup>243</sup>

Impact litigation is built on the judicial process, which “draw[s] the enduring values from an eighteenth-century constitutional document and adapt[s] them to contemporary circumstances,”<sup>244</sup> through the legal discourse of rights. Although the lack of marital rights injures same-sex couples, the injury to them is in the status-making aspect of law, which not only bars same-sex couples from the legal status of marriage, but also teaches them “that their marriage is less worthy than the marriages of others.”<sup>245</sup>

This has several important implications. First, scholarly concern about the judicial implementation to enforce rights isn’t present. Rather than appointing judicial monitors and dealing with a docket-consuming wave of

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239. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011); Remedial Order, Injunction, & Certification of Interlocutory Appeal, *Armstrong v. Wilson*, No. 4:94-cv-02307-CW (N.D. Cal. Sept. 20, 1996), *aff’d in part, rev’d in part sub nom.* *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002).

240. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

241. See, e.g., *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. Dec. 10, 1971), *op. supplemented* *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. Apr. 13, 1972), *aff’d in part, rev’d in part sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

242. See, e.g., *Tinsley v. Kemp*, 750 F. Supp. 1001 (W.D. Mo. Jan. 30, 1990). See Carolyn Hoecker Luedtke, *Innovation or Illegitimacy: Remedial Receivership in Tinsley v. Kemp Public Housing Litigation*, 65 MO. L. REV. 655 (2000), for a case study on the *Tinsley* success story.

243. See, e.g., Brief of Petitioners at 11–12, 32, *Lawrence v. Texas*, 539 U.S. 558, 2003 (No. 02–102) (“Texas’s Homosexual Conduct Law violates the Fourteenth Amendment for the additional reason that it singles out a certain class of citizens for disfavored legal status”) (citations omitted) (internal quotation marks omitted).

244. SCHEINGOLD, *supra* note 205, at 28.

245. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

ensuing legislation, marriage equality can be enforced with a simple injunction authorizing state authorities to issue marriage licenses to same-sex couples. Second, backlash may occur in the political branches, but to be realistic, there is very little that political actors are able to do to frustrate a judicial injunction authorizing marriage equality. This contrasts strongly with the dizzying array of strategies executed by state and local authorities to frustrate, for example, school desegregation.<sup>246</sup> Thus, although impact litigation certainly may engender political backlash, the point is that such backlash is far more distant from the implementation of the judgments.

#### CONCLUSION

It is an exciting time to witness marriage equality litigation. Although historically, marriage litigation has resulted in severe and nationwide backlash, a sense of hope has spread within the LGBT movement. Although no person can predict the future, the recent string of wins has created a sense of momentum in the movement for marriage equality. In the post-*Windsor* cases, the LGBT movement has decentralized in important ways. While historically, LGBT cases have been coordinated and planned, with most legal activists highly nervous of potential backlash, a new wave of legal activists have begun using existing precedent to greatly expand the playing field. Although marriage equality advocates would be wise to not rely exclusively on litigation to accomplish their cause, litigation has undoubtedly played a large role in bringing about social reform. ✿

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246. See generally PELTASON, *supra* note 146.