

2016

Same-Sex Marriage Litigation and Children's Right to be Queer

Clifford J. Rosky

S.J. Quinney College of Law, University of Utah, clifford.rosky@law.utah.edu

Follow this and additional works at: <http://dc.law.utah.edu/scholarship>

 Part of the [Civil Rights and Discrimination Commons](#), [Family Law Commons](#), [Human Rights Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Clifford Rosky, Same-Sex Marriage Litigation and Children's Right to Be Queer, 22 GLQJ. LESBIAN GAY STUD. 541–568 (2016)

This Article is brought to you for free and open access by the Utah Law Scholarship at Utah Law Digital Commons. It has been accepted for inclusion in Utah Law Faculty Scholarship by an authorized administrator of Utah Law Digital Commons. For more information, please contact valeri.craige@law.utah.edu.

SAME-SEX MARRIAGE LITIGATION AND CHILDREN'S RIGHT TO BE QUEER

Clifford Rosky

*This essay examines how lawyers and judges have framed the question of children's queerness in litigation over same-sex marriage. First, it argues that in *United States v. Windsor* and *Obergefell v. Hodges*, the US Supreme Court invoked the tropes of dignity, injury, and immutability to set the outer limits of sexual liberty for both children and adults. Next, the essay looks back to the early work of queer theorists, legal scholars, and lawyers to unearth a more promising vision of law's relationship to children's queerness. By juxtaposing how two judges approached the possibility of the gay child in *Utah* and *California*, it develops a claim that has yet to be vindicated — that the US Constitution protects every child's right to be queer.*

Marriage Equality: The Indignity of Victory

Three years ago, in *United States v. Windsor*, the Supreme Court struck down the Defense of Marriage Act (DOMA), which defined the word marriage as “a legal union of one man and one woman” under federal law.¹ Last year, in *Obergefell v. Hodges*, the Court struck down the country's remaining state laws that prohibited same-sex couples from marrying and denied recognition to same-sex marriages performed in other states.² As a result of these rulings, the federal government now recognizes same-sex marriages and same-sex couples have the freedom to marry in all fifty states.

Needless to say, however, these rulings have not realized the most profound hopes and aspirations of the country's queers. To begin with, both rulings emphatically declare that the institution of marriage confers “dignity” upon couples who enter it. By doing so, they proudly privilege married over unmarried persons. In *Windsor*, the Court repeatedly speaks as if the dignity of human beings, and human relationships, was somehow derived from the government's authority to recognize marriages. In one passage, the Court claims that when the state of New York allowed same-sex couples to marry, “the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import” (2692). In another, the Court refers to “the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power” (2693). In yet another, the Court explains that the state's conferral of legal “responsibilities, as well as rights, enhance the dignity and integrity of the person” (2694). In the Court's view, DOMA was unconstitutional because it refused “to acknowledge a status the State finds to be dignified and proper” (2596).

In *Obergefell*, the Court could not plausibly claim that states like Ohio, Michigan, and Kentucky had “conferred dignity” on same-sex couples. Unlike New York, these states had specifically banned same-sex couples from marrying. Instead, the Court showers dignity on the institution of marriage and applauds the dignity of the petitioners for seeking to enter it. In just fifteen pages, the Court offers too many superlatives for marriage to present them in toto. The following paragraph, which purports “to note the history of the subject,” is illustrative:

From their beginning to their most recent page, the annals of history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the

secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. (2594)

Even after the opinion turns to legal analysis, the homage to marriage continues. Relying on “this Court’s cases and the Nation’s traditions,” the Court posits that “marriage is a keystone of our social order” — “the foundation of the family and of society, without which there would be neither civilization nor progress” (2601). Quoting Alexis de Tocqueville, the Court posits that reverence for marriage is a defining feature of the nation itself: “There is certainly no country in the world where the tie of marriage is so much respected as in America” (2601). In light of the Court’s earlier analysis in *Windsor*, it is hardly surprising that in *Obergefell*, the Court finds “dignity” in the decision of two persons to marry each other: “There is dignity in the bond between two men or two women who seek to marry and in their autonomy make such profound choices. . . . The right to marry thus dignifies couples who ‘wish to define themselves by their commitment to each other’ ” (2599 – 2600).

Throughout the opinion, the Court praises the petitioners because they have shown such profound “respect” for the institution of marriage — like the Court, and the Nation itself: “It is the enduring importance of marriage that underlies the petitioners’ contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect — and need — for its privileges and responsibilities” (2594). “It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves” (2608).

By this point, the Court’s spiral of dignification is almost too tight to trace: the Court dignifies marriage; marriage dignifies the petitioners; the petitioners dignify marriage; the Court dignifies the petitioners not only because marriage dignifies them, but also because they dignify marriage. . . .³ Even so, one might hold out hope that the Court’s effusive praise is little more than lofty rhetoric — what the lawyers call “dicta,” rather than the reasoning or “holding” of the ruling itself.⁴ But in a remarkable passage, the Court insists that the “respect” that the petitioners have shown for marriage is legally relevant and serves as a foundation of the constitutional claims that they have put forward: “*Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order. But that is neither their purpose nor their submission*” (2594; emphasis added).

The implication of such “submissions” is readily apparent: while granting same-sex couples the freedom to marry, the Court denigrates millions of unmarried persons and nonmarital relationships. To prove that marriage is “a two-person union unlike any other,” the Court portrays unmarried people as lonely and fearful: “Marriage responds to the universal fear that a lonely person might call out only to find no one there” (2600). In the opinion’s coda, this hierarchy of dignity and respect is made painfully clear. On the one hand, the Court writes, “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family” (2608). On the other hand, the Court notes that the petitioners’ “hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions” (*ibid.*).

In expounding the importance of marriage, the Court emphasizes that the institution serves to promote children’s best interests: “The right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education” (2590). On several occasions, the Court observes, it has described the rights to marry, procreate, and parent “as a unified whole” (*ibid.*). Without the “recognition” that marriage affords, the Court reasons, “children suffer the stigma of knowing their families are somehow lesser” (*ibid.*). Although the

Court insists that “the right to marry cannot be conditioned on the capacity or commitment to procreate” (ibid.), it indicates that marriage dignifies children as well as parents — and conversely that the responsibilities of procreation and parenting dignify the sexual relationship between two married adults.

Homophobia: The New Child Abuse

Of course, there is something ironic about the Court’s invocation of procreation, parenting, and the protection of children in this particular context. For many years, opponents of same-sex marriage have insisted that procreation is the purpose of marriage, and same-sex couples cannot marry because they cannot procreate. More broadly, however, the question of children’s welfare has long played a pivotal role in the LGBT movement’s triumphs and setbacks. For a very long time, in a wide range of settings, public officials have justified discrimination against LGBT people by invoking what I have called “the fear of the queer child” (Rosky 2013: 607) — the premise that the state has a legitimate interest in promoting heteronormativity and discouraging queerness during childhood. The simplest version of this fear is that “exposure to homosexuality would turn children into homosexuals,” but the idea is considerably more capacious, flexible, and nuanced than this simple formulation suggests.⁵ In the broadest sense, it includes the fears that exposing children to homosexuality and gender variance will make them more likely to develop same-sex desires; engage in same-sex acts; form same-sex relationships; identify as lesbian, gay, bisexual, or transgender; or deviate from traditional gender roles.

Notwithstanding the LGBT movement’s remarkable progress in recent years, examples of this fear are not hard to find. In Windsor, the opponents of same-sex marriage claimed that DOMA was justified by the government’s interest in protecting children — specifically, in “promoting child-rearing by both a mother and a father.”⁶ Because of “the different challenges faced by boys and girls as they grow to adulthood,” they reasoned, it was “at least rational to think that children benefit from having parental role models of both sexes” (ibid). As the term role model suggests, they implied that children would benefit from having both a mother and a father by learning the appropriate ways to be male or female, masculine or feminine, mother or father: “Men and women are different,” they explained; “so are mothers and fathers” (ibid).

In the congressional debates over DOMA, the law’s sponsors were less cryptic about the lessons that they sought to impart to “the children of America.”⁷ By posing a series of rhetorical questions, Representative Charles Canady signaled that the law was designed to channel children into heterosexual relationships:

Should this Congress tell *the children of America* that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?

Should this Congress tell *the children of America* that we as a society believe there is no moral difference between homosexual relationships and heterosexual relationships?

Should this Congress tell *the children of America* that in the eyes of the law the parties to a homosexual union are entitled to all the rights and privileges that have always been reserved for a man and a woman united in marriage? (emphasis added)⁸

In a legislative report supporting the bill, Representative Canady cautioned his colleagues “against doing anything which might mislead *wavering children* into perceiving society as indifferent to the

sexual orientation they develop,” in order to protect society’s interest “in reproducing itself” (emphasis added).⁹

In striking down DOMA, however, the Windsor Court found that the law was actually harming children, instead of protecting them. In addition to finding that DOMA “injured,” “disparaged,” and “demeaned” same-sex couples, the Court declared that the law “humiliates tens of thousands of children now being raised by same-sex couples” by making 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 and in their daily lives” (2695 – 96, 2594, 2595). As if that were not sufficient, the Court added that “DOMA also brings financial harm to children of same-sex couples” by raising “the cost of health care for families” and denying “benefits allowed to families upon the loss of a spouse and parent” (2596).

In Obergefell, the Court doubled down on the claim that laws against same-sex marriage are harmful to the children of same-sex couples: “Without the recognition, stability, and predictability marriage offers, these children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples” (2590).

More than anything else, this paradigm shift signals the wholesale demise of discrimination against same-sex couples in family law. As Lauren Berlant (1997: 1, 5) reminds us, US citizenship and nationhood are perennially defined by reference to competing claims about children and childhood. As a result, Lee Edelman (2004: 3) adds, both sides of any legal or political conflict must be able to position themselves as “fighting for the children,” because there is no other side for which one can fight. Once Windsor proclaimed that laws against same-sex marriage were “harming” and “humiliating” children — instead of benefiting or protecting them — it was just a matter of time until the movement won the freedom to marry and adopt in all fifty states.

This is good news for same-sex couples — or at least, for the “noble” and “dignified” couples who are willing and able to enter into the “sacred” union of spouses. But it is bad news for other sexual dissidents, whose lives are still routinely regulated in the name of protecting kids. If Windsor and Obergefell signal that such groups will not win the law’s protection unless and until they can plausibly claim to be protecting children, then it may be a long time before sexual liberty comes to unmarried parents — not to mention anyone who engages in presumably less “dignified” practices such as polyamory and sex work.¹⁰ It may also be bad news for the children of such persons, who seem likely to remain pawns in the nation’s struggles over the prevailing definitions of family life.

As Wendy Brown’s (1995) work predicts, the Court’s willingness to protect the children of same-sex couples, and the couples themselves, was explicitly premised on the recognition of injuries to both groups.¹¹ To qualify for the Constitution’s protections, both children and parents were legally required to identify themselves as vulnerable victims — literally “demeaned,” “disrespected,” “harmed,” “humiliated,” “injured,” “stigmatized,” and “wounded” (Obergefell: 2695 – 96) in the Court’s terms. In Windsor and Obergefell, then, the balance of power swung from right to left, but the cult of the Child was reaffirmed (Edelman 2004: 19). Within the child protection paradigms presented by both parties, children were always at risk, in one way or another. The parties have now traded places in victory and defeat, but children have always been in need of protection — first from homosexuals, now from homophobes.

Of Nature and Nurture: *Obergefell’s* Gay Child

And what of the queer child now? After Obergefell, do we know where our children

are?

Sadly, no. In *Obergefell*, the Court offers only one portrayal of children being raised by same-sex parents: the three adopted children of April DeBoer and Jayne Rowse. In the Court's account, the couple's children were always gendered, but they were never sexualized: "a baby boy," "another son," and "a baby girl" (2595). Despite the country's long-standing fears about the spread of homosexuality, the Court's opinions in *Windsor* and *Obergefell* offer no comment on the possibility of the protogay child — the elephant in the movement since long before Stonewall (Rosky 2013b: 618 – 64). In both opinions, the children of same-sex couples are explicitly recognized and protected, but the specter of a gay child remains invisible (Stockton 2009: 6 – 8).

Paradoxically, *Obergefell* does stake a claim that bears on the production of gay children — but for queers, it is the kind of claim that only makes matters worse. In a painful attempt to illustrate how the country's attitudes about homosexuality have evolved, the Court writes: "For much of the 20th century, . . . homosexuality was treated as an illness. . . . Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable" (2596).¹² Worse yet, the Court claims that the supposedly "immutable nature" of homosexuality is pertinent — and again, possibly prerequisite — to the success of the petitioner's constitutional claims. After insisting that the petitioners have come to praise marriage, not to bury it, the Court posits that same-sex couples have no other means to achieve such a sanctified status: "And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment" (*Obergefell*: 2594).

The argument from immutability has many flaws, all of which have been amply documented by queer theorists and legal scholars, among many others.¹³ Most fundamentally, the argument proceeds from the troubling premise that same-sex couples deserve civil rights only because "we can't help it" (Schmeiser 2009: 1520 – 21). In this sense, the immutability argument is an acquittal on an empirical technicality: a declaration that lesbian and gay people are innocent of homosexual choices, because, being "born that way," they had no meaningful alternatives to same-sex relationships. As one court explained: "Marrying a person of the opposite sex is an unrealistic option for gay and lesbian individuals (*Perry v. Schwarzenegger*: 969).

And it is not just gay adults who are innocent: it is the children of same-sex couples, too. In *Obergefell*, the Court stresses that children being raised by same-sex couples "suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life" (2600). In short, we cannot punish the kids for the same reason that we cannot punish the parents. They are born into these families; they cannot help themselves. By claiming that homosexuality is "normal" and "immutable," the Court implies that homosexuality is natural. What a bummer! There is no one to blame.

By positing that homosexuality is "immutable," the Court implicitly presumes that gay adults were once gay children — or at least protogay children, or gay teenagers. Strangely, however, the Court says nothing more to specifically address the fear that allowing same-sex couples to marry could influence the sexual orientation of children — not only the children of same-sex couples but all "the children of America."¹⁴ In this sense, the gay child is born in *Obergefell*, but it is kept just out of sight, and just out of mind. As Kathryn Bond Stockton (2009: 6 – 8) notes, the figure of the gay child exists only in the past, as an unmentioned memory in the childhood of gay adults. While the Court insists that the children of same-sex couples are wounded — "harmed" and "humiliated" (*Obergefell*: 2601) — it does not contemplate the possibility that gay and lesbian children are among them. Simply put, the sexuality of these children is not mentioned. In Stockton's (2009: 6) terms, the children of same-sex couples are asexual or desexualized — and yet they are implicitly presumed to be heterosexual.

The tragedy is that the battle over same-sex marriage did not have to end on such a sour note. Strictly speaking, the Court's claims about the dignity of marriage, the need to protect vulnerable kids, and the immutability of homosexuality were gratuitous. Without psychoanalyzing the justices' motives, one can say that the Court could easily have reached the same result without relying on such troubling premises. If anything, the claim of immutability stands in marked tension with the underlying logic of Obergefell: by upholding "the right to personal *choice* regarding marriage," the Court vindicated same-sex marriage as a matter of individual autonomy rather than equality among groups (2599; emphasis added). Quoting a 1967 ruling on interracial marriage, the Court observed: "The freedom to marry, or not marry . . . resides with the individual" (*ibid.*, quoting *Loving v. Virginia*). If same-sex marriage is an option for everyone — a fundamental right — then it hardly matters whether anyone is "born" wanting to marry a person of the same sex.

While constitutional law is an imperfect vehicle for queer politics, the logic of the Supreme Court's earlier rulings — prior to *Windsor* and *Obergefell* — had left the Court ample room to adopt a more promising vision of the law's relationship to children's queerness. In the sections that follow, I give a brief genealogy — in queer theory, legal scholarship, and judicial opinions — of a constitutional claim for children's right to be queer.

The Early Years: Birthing the Gay Child

Since the earliest days of the LGBT movement, most advocates have responded to the opposition's fears of "recruiting" and "role modeling" by attempting to debunk them — to refute them with arguments based on empirical data (Rosky 2013b: 665 – 84). In one case after another, LGBT advocates have insisted that role modeling could not possibly work, because "the vast majority of lesbian and gay adults were raised by heterosexual parents" and "the vast majority of children raised by lesbian and gay parents eventually grow up to be heterosexual."¹⁵ Above all, they have argued that children's sexual and gender development cannot be influenced by parents or teachers, because a person's sexual orientation and gender identity are fixed early in life and cannot be learned, taught, chosen, or changed.¹⁶

Yet even as early as Anita Bryant's campaign in the late 1970s, there were LGBT advocates who presented a more ambitious challenge to the opposition's recruiting and role modeling arguments. One notorious example was Bob Kunst, a Dade County activist whom Bryant had accused of handing out pamphlets about homosexuality at local high schools. Throughout Bryant's campaign, Kunst brazenly admitted that Dade County's antidiscrimination law would provide lesbian and gay youth with role models — indeed, he identified himself as "an absolutely positive role model" (Clendinen and Nagourney 1999: 301), and he claimed that providing children with gay role models was one of the antidiscrimination law's principal benefits (Fejes 2008: 81). In a public meeting at a local church in Miami, Kunst speculated that between 10 and 15 percent of children in Dade County were already "homosexual" — in his view, "people were inherently bisexual; an individual's specific sexuality was in many ways a matter of choice; the goal was to explore it" (*ibid.*: 131, 67). He was especially fond of drawing an analogy between sexuality and ice cream flavors: "Life is like ice-cream, there's 38 flavors out there, you choose the flavor you want" (*ibid.*: 68). He described his strategy in unapologetically radical terms, arguing that activists must " 'expose the root of homophobic insecurity and call it like it is' and be 'outfront all the way through, redefining same-sex and both-sex experiences in terms of the beautiful new role models they represent' " (*ibid.*: 147). However naive Kunst may have seemed during this era, he was not alone in making such claims. In 1981 Gore Vidal wrote in the *Nation* that "a teacher known to be a same-sexer would be a splendid role model for those same-sexers that he — or she — is teaching" (512).

Queer theorists were not far behind. In 1989 Eve Kosofsky Sedgwick (1991: 18, 23) delivered a trail-blazing talk, “How to Bring Your Kids Up Gay: The War on Effeminate Boys,” in which she railed against society’s widespread “wish that gay people not exist” and, in particular, the lingering “desire for a nongay outcome” among childhood psychologists. In the early 1990s Sedgwick’s battle cry was taken up by a new vanguard of scholars in other fields. In 1994, for example, the psychologist Laura Benkov observed that in custody and visitation cases involving a lesbian or gay parent, both sides tacitly assumed that children should be discouraged from becoming lesbian, gay, or bisexual. Although she acknowledged that “refuting the worry that children raised by homosexuals will themselves grow up to be gay was a pivotal step in the legal advocacy for homosexual parents,” she emphasized that it was only the first step, because it sought to answer “homophobic questions on homophobic terms” (Benkov 1994: 62, 63). She lamented: “It seems society is not ready yet for a more deeply challenging response to the question of whether the kids of homosexuals will grow up to be gay — namely, *so what if they do?*” (ibid.: 63; emphasis added).

Meanwhile, legal and cultural theorists were moving quickly to develop Sedgwick’s insights into the academy’s first overtly legal and political arguments for the liberation of homosexuality, rather than the protection of homosexuals. In 1994 Janet Halley published a withering critique of the legal argument that gays should be protected by courts because sexual orientation is “immutable”; the following year, Lisa Duggan (1994: 8 – 9) urged queers to launch a “No Promo Hetero” campaign, in response to the opposition’s rallying cry of “No Promo Homo.” Although neither Halley nor Duggan focused specifically on the context of queerness in childhood, they both invoked Sedgwick’s work to articulate universalizing claims on behalf of all queers — indeed, on behalf of all queerness — rather than the distinct minority of people who identify as lesbian, gay, or bisexual.

Minor Disregard: The Child’s Right to Come Out

Within a few years, the law professor Teemu Ruskola (1996: 269) used the work of early queer theorists as a springboard from which to criticize “the legal construction of the fantasy that gay and lesbian youth do not exist.” Even today, Ruskola’s article “Minor Disregard” is still widely cited as the foundation of legal scholarship on homosexuality and childhood. In the wake of Windsor and Obergefell, his argument merits careful scrutiny as a kind of historical artifact of the modern LGBT movement: the legal academy’s first brief for the judicial recognition of gay teens.

In this trailblazing article, Ruskola begins by explaining that according to “popular, medical, and legal understandings of homosexuality . . . gay kids are not gay but merely ‘confused,’ ” and “there is no conceptual space for a coherently gay adolescent” (ibid.: 270). Above all, he locates this fantasy in “the seemingly indestructible myth of homosexual recruitment” — the axiom that homosexuals must recruit, because they cannot reproduce (ibid.: 273). After painting this grim portrait, Ruskola modestly argues that “gay kids deserve recognition, respect, and protection” (ibid.: 272). More than anything else, he emphasizes the recognition of gay youth — the act of naming children as “gay” — as the primary way to respect and protect them: “The first step in the protection of gay kids must be to see them as gay kids; unless the law is able to name the child, it will be unable to safeguard him or her” (ibid.: 273). Based on this principle, he sounds “a call for the law to recognize and protect the youth who identify themselves as gay and lesbian by *naming* them as gay and lesbian, rather than as confused, presumptively heterosexual future adults” (ibid.: 274; emphasis added).

In an especially provocative move, Ruskola means to challenge “the assumption that kids cannot be gay in the first place” by asking “what if homosexuality is not a matter of children’s derailed sexual development, of kids growing up to be gay, but of being gay?” (ibid.: 319, 320). Against a world of doubt, he insists that children can be gay in the here and now, even before they

are adults. He observes that despite the pervasive belief that homosexuality is only for adults, “it is a fact — and a miracle — that there are youth who, against all odds, self-identify as gay” (ibid.: 323). He emphasizes that “whether we call them gay kids or confused children matters a great deal,” because “the act of renaming youth with same-sex erotic desires as gay or proto-gay has direct implications for what it means to protect them” (ibid.: 324).

It is no wonder that Ruskola’s argument has been so influential and has stood up to the passage of time so well. Twenty years ago, it was both visionary and brave to offer such a full-throated defense of “gay and lesbian youth,” when the sociology on this subject was still new (Ruskola 1996: 270n4) and queer theory had barely been discovered by law professors.¹⁷ And despite Ruskola’s (1996: 272, 274) polemical style, it is hard to quarrel with his basic principle that “gay kids deserve recognition, respect, and protection” or his modest proposal that “the law [should] recognize and protect the youth who identify themselves as gay and lesbian by naming them as gay and lesbian, rather than as confused.” Yet Ruskola’s argument seems to leave behind some of the normative challenges presented by those who preceded him — not only Kunst and Vidal, but Sedgwick and Benkov. Each of Ruskola’s departures from this early work turns on his concept of gay and lesbian youth, which imposes three distinct limitations on the scope of his argument.

The first limitation is readily apparent: Ruskola leaves the “B” and the “T” out of “LGBT,” along with the Q, I, and A, for that matter. Throughout the article, he uses advocates on behalf of “gay and lesbian youth.” Although he invokes the phrase “queer kids” several times, he uses it synonymously with “gay and lesbian youth,” rather than in any more inclusive manner. He makes only passing reference to bisexual children, and no reference to transgender, intersex, or asexual children at all. While these oversights are unfortunate, they are likely a product of the time in which Ruskola was writing. With the benefit of new insights, they are easy to fix. Rather than limit ourselves to a claim on behalf of “gay and lesbian youth,” advocates can and do now insist that the law should recognize the sexuality and gender of all children, regardless of whether they happen to be lesbian, gay, bisexual, transgender, queer, intersex, or asexual.¹⁸

But Ruskola’s use of the phrase “gay and lesbian youth” raises two other questions for queers — questions that are less obvious but more profound. The first is the mysterious way that Ruskola deploys the concept of youth, as if it were synonymous with the concept of child. Although he often insists that gay and lesbian youth do exist, he uses the term youth interchangeably with several others — adolescent, teenager, minor, child, and kid — which do not typically refer to the same stage in a person’s development. In the opening paragraph, for example, he objects to the fantasy that “gay and lesbian *youth* do not exist,” the belief that “gay *kids* are not gay but merely ‘confused,’ ” and the lack of any “conceptual space for a coherently gay *adolescent*” (Ruskola 1996: 270; emphasis added). The problem is not that Ruskola leaves these terms undefined but that he conflates them in ways that confine homosexuality — reassuringly — to the teenage years. By using narrow terms like adolescent and teenager as substitutes for broader terms like child and kid, Ruskola seems to collapse the latter into the former — and thus to limit himself to a defense of homosexuality in adolescence. If we ultimately want to make room for a coherently gay child, then why object only that “there is no conceptual space for a coherently gay adolescent?” (ibid.: 270).¹⁹

This query raises the final limitation in Ruskola’s argument: What *is* a “gay” or “lesbian” child — and what, for that matter, is a “bisexual” or “transgender” child? What precisely must a child think, say, or do to be considered “gay” or “lesbian” and thereby qualify for the law’s protections? In this argument on behalf of “gay and lesbian youth,” how is children’s homosexuality defined — by reference to desire, behavior, relationship, identification, or by some combination of these criteria? To such questions, Ruskola gives a straightforward answer: he presumes that to qualify as “gay” or “lesbian” before the law, children must identify themselves in these terms. He emphasizes that “it is a fact — and a miracle — that there are youth who, against all odds, *self-identify*

as gay,” and he argues that “the law [should] recognize and protect the youth *who identify themselves* as gay and lesbian by naming them as gay and lesbian, rather than as confused” (ibid.: 323, 274; emphasis added).

This principle of self-identification is not problematic, as far as it goes: surely children should have the freedom to identify themselves as lesbian, gay, bisexual, or transgender, if they choose to. But as Sedgwick (1990: 42) once warned, “Many gay adults may never have been gay kids and some gay kids may not turn into gay adults,” so the principle can and should be pushed a bit farther. What protections might the law offer to children who entertain same-sex fantasies, harbor same-sex desires, engage in same-sex behavior, and enter same-sex relationships — but are either unable or unwilling to identify as lesbian, gay, or even bisexual during childhood? What legal protections might exist for children who vary from traditional gender norms, but do not identify as transsexual or even transgender? Using queer theory as a guidepost, can lawyers and judges articulate claims not only for some children’s right to identify as LGBTQIA, but for the potential of queerness in every child?

No Promo Hetero: Before the Law

It took several years before anything approaching Ruskola’s vision was articulated by lawyers or adopted by courts. In two prominent cases — *Lawrence v. Texas* and *Perry v. Schwarzenegger* — lawyers and judges began to build a constitutional case for children’s right to be queer. In *Lawrence v. Texas*, the attorney Paul Smith argued the case for John Lawrence and Tyron Garner, two men who had been convicted under a Texas sodomy law, before the United States Supreme Court.²⁰ In his opening argument, Smith told the justices that even when acts of sodomy were not criminally prosecuted, laws against sodomy were often invoked to justify discrimination against lesbian and gay people in other settings: “They’re denied visitation to their own children, they’re denied custody of children, they’re denied public employment. They’re denied private employment.” In response, Chief Justice William Rehnquist asked Smith whether his argument could be used to challenge a school’s preference for hiring heterosexual teachers: “If you prevail, Mr. Smith, and this law is struck down, do you think that would also mean that a State could not prefer heterosexuals to homosexuals to teach kindergarten?”

Smith had prepared for general questions about how legalizing sodomy would affect children’s sexual development, but he had not anticipated this particular question about the constitutionality of discrimination against gay teachers (Carpenter 2012: 230). He cleared his throat, and for a moment, he seemed to grasp for a way to distinguish between the two policies. “I think the issue of — of preference in the educational context would involve very different criteria, Your Honor, and very different uh, uh — considerations.” Regaining his footing, he proposed that “the State would have to come in with some sort of a justification.”

Taking up Smith’s challenge, Justice Antonin Scalia gamely asked whether the state’s justification could be “the same that’s alluded to here, disapproval of homosexuality.” Smith replied, “Well, I think it would be highly — highly problematic, such a — justification . . . if that were the only justification that could be offered, there was not some showing that there would be any more concrete harm to the children in the school.” Now that the tables had turned, it was Justice Scalia who seemed to struggle to express himself in suitable language: “Only that the children might — might — might be induced to, uh — to, to — to, to follow the path of homosexuality.”

Given that Justice Scalia is rarely at a loss for words, the pauses in this sentence seem especially significant. In 1978, then-Justice Rehnquist had colorfully compared the contagiousness of homosexuality and measles;²¹ by 2003, Justice Scalia was apparently uncomfortable speaking in such colorful metaphors. Rather than suggest that a gay teacher would “seduce,” “indoctrinate,” or

“recruit” children into homosexuality, he felt compelled to articulate the fear of the queer child in more neutral terms. But in another sign of the times, Justice Scalia’s attempt at subtlety did not seem to pay off with the spectators. As soon as he proffered the theory that “the child might be induced to follow the path of homosexuality,” the noises from the gallery were audible: some laughed; others groaned.²²

Of course, Smith did neither; he did not have such luxuries. He could have replied that Justice Scalia’s claim was absurd because homosexuality was not a “path,” or something that would “follow” from children being taught by gay teachers. But as Smith later explained, he did not want to get himself mired in “complicated questions of whether sexual orientation is genetic or developed, chosen or unchosen, fixed or immutable” (Carpenter 2012: 230). At the same time, however, he did not want to concede that Justice Scalia’s claim was factually valid or that the state could legitimately prefer to hire heterosexuals as kindergarten teachers (*ibid.*). Instead of challenging Justice Scalia on empirical grounds, Smith replied that Justice Scalia’s logic was essentially circular, because it was based on nothing more than disapproval of homosexual choices, or a preference for one group over another: “Well, I — I think the State has to have a greater justification for its discrimination than we prefer pushing people towards heterosexuality. That amounts to the same thing as disapproval of people’s choices in this area and there has to be a more — more reasons and justifiable distinction than simply we prefer this group of people, the majority, instead of this group of people, the minority” (*ibid.*: 21). Without claiming that children were “born” gay — or more broadly, that homosexuality was “immutable” — Smith had revealed the state’s concerns about children’s heterosexual development as nothing more than a long-standing tradition of homophobia.

Seven years later, in the highly publicized case *Perry v. Schwarzenegger*, Chief Judge Vaughn Walker invalidated Proposition 8, the California ballot initiative that banned same-sex couples from marrying. In legal terms, Judge Walker’s opinion was issued by a trial court, so it was not binding on courts outside California. But in cultural terms, it marked a significant step in the evolution of children’s right to be queer. In his remarkable ruling, Judge Walker offered the judiciary’s only explicit rejection of “the fear that exposing children to homosexuality will turn them into homosexuals” (1003).

During the ballot campaign for Prop 8, the law’s sponsors had claimed that it would “protect our children from being taught in public schools that ‘same-sex marriage’ is the same as traditional marriage” (quoted in *ibid.*: 930). Because “state law may require teachers to instruct children as young as kindergarteners about marriage,” they warned, “TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage” (Prentice et al. 2008). To dramatize this danger, the campaign aired a television commercial in which a young girl tells her mother: “Mom, guess what I learned in school today? . . . I learned that a prince can marry a prince, and I can marry a princess!” (Perry: 990).

When Prop 8’s sponsors were hauled into court, however, they took pains to distance themselves from the campaign’s fiery rhetoric. Rather than claiming that Prop 8 could be justified by the notion that “exposure to homosexuality would turn children into homosexuals,” they claimed that the law was designed only “to protect children from learning about same-sex marriage in school” (1003). Perhaps because they sensed the weakness of this argument, they declined to explain why children should be protected from learning about this particular subject. Instead, they sought to justify Prop 8 only on other grounds — as a way to preserve “the traditional institution of marriage,” foster “naturally procreative relationships,” and protect “the . . . rights of individuals and institutions that oppose same-sex marriage on religious and moral grounds” (998 – 1001).

Judge Walker was not fooled by this bait-and-switch tactic. Drawing on expert testimony to place the Prop 8 campaign in “historical context,” the judge found that the campaign’s advertisements “insinuated that learning about same-sex marriage could make a child gay or lesbian

and that parents should dread having a gay or lesbian child” (998). Based on “the evidence at trial,” he concluded that both of these fears were “completely unfounded” (1003).

At first glance, this sentence appears to be a classic restatement of the LGBT movement’s immutability apologetics: “Don’t worry folks, homosexuality is not contagious. Kids are born gay or straight, so there’s nothing to fear.” By invoking the facts, rather than the law, Judge Walker initially seems to attack the empirical premise that queerness could be contained, without challenging the normative premise that queerness should be contained. But a closer reading of Perry reveals that Judge Walker’s reference to “the evidence presented at trial” is misleading, because it does not refer to the kind of evidence that one would expect — evidence that sexual orientation is immutable. Elsewhere in his ruling, Judge Walker offers a long list of “findings of fact” — eighty in all — based on his review of the evidence presented at trial (953 – 91). In one of these eighty findings, he does conclude that “individuals do not generally choose their sexual orientation” and that “no credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation” (966). But he does not rely on this finding as one of the reasons for rejecting “the fear that exposing children to homosexuality would turn them into homosexuals” or the notion that “parents should dread having children who are not heterosexuals” (1003).

Instead, Judge Walker cites fourteen other findings to support his statement that “these fears were completely unfounded” (1003). His first finding is better characterized as a conclusion of law, rather than a finding of fact: “California has no interest in asking gays and lesbians to change their sexual orientation or in reducing the number of gays and lesbians in California” (967). Even if California could change gays and lesbians, he reasons, the government would not have any legitimate reason for doing so. Why not? Because, as he explained, “same-sex sexual orientation does not result in any impairment in judgment or general social and vocational capabilities,” “sexual orientation is not related to an individual’s ability to contribute to society or perform in the workplace,” and finally, “same-sex couples are identical to opposite-sex couples in the characteristics relevant to the ability to form successful marital unions” (ibid.). Instead of finding that a person’s sexual orientation is biologically determined, Walker declares that it just does not matter, because a person’s sexual orientation is not legally relevant.

To assess how Judge Walker’s argument builds on Ruskola’s, it is helpful to compare the Perry opinion to Judge Robert Shelby’s opinion in *Kitchen v. Herbert*, another highly publicized same-sex marriage case.²³ In 2013, shortly after *Windsor* was decided, Judge Shelby was asked to review the constitutionality of Amendment 3, Utah’s law that banned same-sex couples from marrying (1181). As one would expect, Judge Shelby subjected Utah’s law to the same framework that the Supreme Court had laid out in *Windsor*. After recognizing that “roughly 3,000 children are currently being raised by same-sex couples in Utah,” Judge Shelby reasoned that “these children are . . . worthy of the State’s protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples” (1212). Quoting extensively from *Windsor*, he explained that “Amendment 3 ‘humiliates . . . thousands of children now being raised by same-sex couples,’” and that “Amendment 3 ‘also brings financial harm to children of same-sex couples’ ” (ibid.). After laying out the Supreme Court’s analysis of the harms in *Windsor*, Judge Shelby then extended the same principle to “children . . . who themselves are gay or lesbian” (1213): “Finally, Utah’s prohibition of same-sex marriage further injures *the children of both opposite-sex and same-sex couples who themselves are gay or lesbian*, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends” (ibid.; emphasis added).

Responding to Ruskola’s prophetic call, Judge Shelby pushed the law’s recognition of gay children yet another step forward. Unlike the Supreme Court in *Obergefell*, Judge Shelby explicitly

recognized that his jurisdiction included “children . . . who . . . are gay or lesbian,” and he specifically imagined how the state’s marriage laws would affect them. In this respect, Judge Shelby’s opinion is even more ambitious than Judge Walker’s: whereas Judge Walker imagined the possibility of a lesbian or gay child, Judge Shelby acknowledged the actual existence of “children who . . . are gay or lesbian.”

Ultimately, however, Judge Shelby’s analysis falls back on the gratuitous rhetoric of “harm” and “humiliation” articulated by the Supreme Court in *Windsor*. Rather than insisting that Utah had “no interest” in encouraging children to be heterosexual, he focused on how the state had injured “children who . . . are gay or lesbian.” But as Paul Smith and Judge Walker demonstrate, the rhetorics of injury and identity are not only unfortunate but unrequired. To reject the fear of the queer child, lawyers and judges need not prove that sexual orientation is “immutable” — or even that some children really “are” lesbian, gay, or bisexual. Drawing on a long line of Supreme Court cases before *Windsor* and *Obergefell*, they can maintain that the state has no interest in promoting heteronormativity during childhood, for the same reasons that it has no interest in promoting heteronormativity at any age. Simply put, the state can offer no independent justification for encouraging children to be “straight” or discouraging them from being “queer.” As a result, the state must adopt a neutral stance vis-à-vis the trajectory of children’s sexual and gender development. Borrowing from Duggan’s “Queering the State” (1994), we might call this the doctrine of “No Promo Hetero.”

I have published an extended analysis of the constitutional foundations for this claim in other work (Rosky 2013a: 434 – 500), so I sketch only the broad contours of my legal argument here. Building on a schema familiar to legal scholarship on LGBT rights, No Promo Hetero challenges the state’s interest in promoting heterosexuality in childhood by articulating a tripartite defense of children’s speech, status, and conduct. It argues that these three aspects of children’s sexuality and gender are connected to and protected by the Constitution’s free speech, equal protection, and due process guarantees. When the state asserts that the promotion of heteronormativity in childhood is a legitimate state interest, it violates at least one if not all of these guarantees. When the state targets children’s speech, it engages in a form of “viewpoint discrimination” that violates the free speech protections of the First and Fourteenth Amendments (ibid.: 436 – 44, 465 – 69). When the state targets children’s status, it betrays a form of “class-based animus” that violates the equal protection guarantees of the Fifth and Fourteenth Amendments (ibid.: 444 – 53, 469 – 73). When the state targets children’s relationships, it evinces a form of “moral disapproval” that violates the due process protections of the Fifth and Fourteenth Amendments (ibid.: 453 – 58, 473 – 78). Taken together, these constitutional guarantees prohibit the state from attempting to regulate the sexual and gender valence of children’s speech, status, and conduct. By doing so, they establish every child’s right to be queer.

The latter claim may seem surprising, given that the arguments presented by Smith and Walker were focused exclusively on the state’s authority to prevent adults from influencing children’s sexual and gender development. But a child’s right to be queer follows logically from traditional liberal understandings of the relationship between the state’s authority and individual rights. In the legal imaginary of the United States, individual liberty has traditionally been conceptualized in negative terms — as a freedom from governmental restraints, rather than an entitlement to governmental benefits.²⁴ Within this syllogism, every limit on the government’s authority can be understood as an individual right and vice versa.

In light of this logic, the doctrine of No Promo Hetero inherently entails every child’s right to be queer. Like all children’s rights — indeed, like all constitutional rights — a child’s right to be queer is not absolute. It must be balanced against a parent’s right to direct the care, custody, and control of her child and the state’s interest in protecting all children’s welfare. But within these

parameters, every child has a right to an “open future” in sexual and gender development — at the very least, an equal liberty to be straight or queer.²⁵

Law's Limits

Of course, even if this claim of No Promo Hetero were vindicated by the Supreme Court, it too would offer no panacea for queers. As Duggan (1994: 10 – 11) herself cautions, “Because this case is formulated within the terms of liberalism, it may trap us in as many ways as it releases us.” In particular, Duggan worries that No Promo Hetero “seems to construct a zone of liberty in negative relation to the state,” insofar as “it argues about what the state canNOT do” (ibid.: 11).²⁶ Duggan’s qualms about the limits of liberalism are especially relevant in the context of childhood. Because children are less physically and emotionally developed than adults, they do not enjoy the same degree of autonomy, especially with regard to sexuality and gender.

At the most obvious level, the Constitution does not grant children the legal authority to consent to sexual relations. Although the age of sexual consent varies from state to state, it falls between the ages of sixteen and eighteen in all US jurisdictions. In the 1970s, when a plaintiff asked the Supreme Court to recognize “a right of minors as well as adults to engage in private consensual sexual behavior,” two justices wrote separately to reject this claim as “frivolous.”²⁷ Even in *Lawrence v. Texas* — which recognized the individual’s liberty to choose homosexual relationships — the Court emphasized that “the present case does not involve minors” but rather “two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”²⁸

In addition, the regulation of children’s sexual and gender development is substantially privatized: it is governed by family, friends, surrogates, and social norms more than teachers, judges, and legal rules. And within the domain of family law, it is parents who rule the roost. Nearly one hundred years ago, the Supreme Court held that parents have the fundamental right to direct the care, custody, and control of a child,²⁹ and the Court has reaffirmed this principle in recent years.³⁰ Under this doctrine, the state must presume that a parent acts in her child’s best interests unless a court determines that the child has been abused or neglected, or that the parent is no longer fit to care for the child.³¹

Whatever one thinks of these distributions of power among parent, state, and child, the doctrine of No Promo Hetero need not disrupt them. Within broad boundaries, the principle allows the government to prohibit children from engaging in sexual relations, just as the laws in all fifty states already do. This does not imply, however, that the principle has no bearing on children’s sexual liberties. In *State v. Limon*, for example, the Kansas Supreme Court struck down a law that imposed harsher punishments on minors who engaged in same-sex behavior than minors who engaged in other-sex behavior.³² Similarly, in *Nguon v. Wolf*, a federal court in California held that a public school could not discipline students for displaying same-sex affections unless it imposed the same sanctions on students for displaying other-sex affections.³³ And finally, in *McMillen v. Itawamba County School District*, a federal court in Mississippi ruled that a public school could not prohibit a female student from bringing her girlfriend to the prom or wearing a tuxedo.³⁴ Even if the Constitution does not offer children a broad liberty to engage in sexual conduct, it still protects every child’s equal liberty to choose between same-sex or other-sex conduct.³⁵

Within similarly broad boundaries, the principle of No Promo Hetero permits parents to do precisely what it prohibits the government from doing — attempting to influence the trajectory of children’s sexual and gender development. Under this regime, some parents would encourage children to be straight, others would encourage them to be queer, and still others would take a neutral stance, granting children the freedom to answer such questions for themselves. But within

what boundaries? For present purposes, the existing body of abuse and neglect law provides a plausible starting point. At a minimum, federal law effectively establishes that parents may not act in a manner that causes a child's "death, serious physical or emotional harm, sexual abuse, or exploitation, or . . . presents an imminent risk of serious harm."³⁶ So even if parents attempt to encourage children to be straight or discourage children from being queer, they may not do so in any manner that poses an imminent risk of serious harm.

Like many child welfare determinations, such cases would turn on the prevailing consensus of physicians, psychiatrists, and psychologists who study child development. During the past several decades, a broad consensus has developed among medical professionals that homosexuality is not a mental illness and that therapies aimed at changing a minor's sexual orientation are harmful and dangerous (American Academy of Pediatrics et al. 2008). By contrast, the American Psychiatric Association has only recently taken steps to destigmatize the diagnosis of "Gender Identity Disorder," which is now known as "Gender Dysphoria" (American Psychiatric Association 2013: 512). Even now, some licensed physicians continue to support "corrective therapy" for children who receive this diagnosis.³⁷ Unless and until a new consensus emerges, courts may be less willing to conclude that forcing a child into corrective therapy for "Gender Identity Disorder of Childhood" is a form of abuse or neglect.³⁸

But if we focus only on traditional settings in which the state stands in the background — a husband and wife raising a child together — we miss the most powerful thrust of No Promo Hetero. Liberal mythology aside, the state acts in loco parentis in a long list of ways, intervening both directly and indirectly in children's sexual and gender development. Adoption and foster care are only the most obvious examples. When parents litigate custody and visitation disputes, they are subject to judicial determinations of children's best interests.³⁹ In public schools, the modern state is ubiquitous — in the hiring and firing of teachers, the setting of curriculums, even the acquisition of library books.⁴⁰ In public hospitals, physicians routinely designate newborns as "male" or "female" and prescribe cosmetic genital surgeries and hormone treatments for children who fall outside the binary model of gender and sex.⁴¹ Under the regime of No Promo Hetero, the fear of the queer child would be banished from all these settings.

In *Obergefell*, the Supreme Court reassured the nation that the children of same-sex couples — and the couples themselves — would dignify marriage and be dignified by it. In this historic moment, the Court implied that society's long-standing concerns about the spread of homosexuality were misplaced, because "sexual orientation is both a normal expression of human sexuality and immutable" (2596). Forty years after the rise of the modern LGBT movement, the time has come to defend children's queerness on its own terms, rather than assuring the world that homosexuality and gender variance can be quarantined. The state does not have any legitimate interest in promoting heteronormativity in childhood, for the same reasons that it does not have any interest in promoting heteronormativity at any age. The Constitution protects every child's right to an open future in sexual and gender development — an equal liberty to be straight or queer.

Notes

I am grateful to the University of Chicago, the University of Indiana – Bloomington, the University of Utah, and the Association of Law, Culture and the Humanities for the opportunity to present early drafts of this article. I would like to thank Carlos Ball, Michael Boucai, Emily Buss, Mary Anne

Case, Anne Dailey, Julian Gill-Peterson, Michael Grossberg, Elizabeth Freeman, Rebekah Sheldon, and Kathryn Bond Stockton, as well as two peer reviewers, for providing thoughtful feedback.

1. *United States v. Windsor*, 133 S. Ct. 2675, 2013. Hereafter cited by page number.
2. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2015. Hereafter cited by page number.
3. Cf. Stuart Hall et al. (1978: 220) defining “the signification spiral” as “a self-amplifying sequence within the area of signification: the activity or event with which the signification deals is escalated — made to seem more threatening — within the course of signification itself.”
4. See Black’s Law Dictionary, 6th ed., s.v. “obiter dictum”: “an observation or remark made by a judge in pronouncing an opinion . . . [that is] not necessarily involved in the case or essential to its determination.”
5. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). Hereafter cited by page number.
6. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 48, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).
7. 142 Cong. Rec. H7491 (daily ed. July 12, 1996) (statement of Rep. Canady).
8. 142 Cong. Rec. H7491 (daily ed. July 12, 1996) (statement of Rep. Canady).
9. H.R. Rep. No. 104-664, at 15 n.53 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919 n.53.
10. Franke (2004: 1399, 1413): “The subjects of gay and lesbian political organizing at this moment have become same-sex couples, not persons who seek nonnormative kinship formations or individuals who engage in nonnormative sex”; Butler (2002: 229, 230 – 31), calling on queers to “attend to the foreclosure of the possible that takes place when, from the urgency to stake a political claim, one naturalizes the options that figure most legibly within the sexual field”; and Berlant (1998: 281, 286): “Why, when there are so many people, only one plot counts as ‘life’ (first comes love, then . . .)? Those who don’t or can’t find their way into that story — the queers, the single, the something else — can become so easily unimaginable, even often to themselves.”
11. Brown (1995: 134): “Historically, rights have been claimed to secure formal emancipation for individuals stigmatized, traumatized, and subordinated by particular social identities, to secure a place for such individuals in a humanist discourse of universal personhood. . . . when they are ‘brought into discourse,’ rights are more likely to become sites of the production and regulation of identity as injury than vehicles of emancipation.”
12. The Court does not say precisely what it means by the term immutable, but it hardly matters. In an earlier case, the Court claimed “sex” was “an immutable characteristic” because it was “determined solely by the accident of birth” and therefore did not bear any “relationship to individual responsibility” (*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality)).
13. See, e.g., Clarke 2015; Schmeiser 2009: 1520 – 21; Boucai 2012: 415, 168; Warner 1999: 9; Balkin 1997; Halley 1994: 503; and Sedgwick 1990: 41 – 44. 14. 142 Cong. Rec. H7491 (daily ed. July 12, 1996).
15. See, e.g., American Psychological Association 2006: 22 – 23. This claim has been included in numerous amicus briefs filed in support of challenges to laws prohibiting same-sex marriage and adoption by same-sex couples, and it has long been a staple of legal scholarship on lesbian and gay parenting. See Rosky 2013a: 429n12. 16. See, e.g., Brief for Appellees, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2010) (No. 10-16696), 63: “The vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual’s sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual.”
17. In 1995 Valdes called for “the initiation of Queer legal scholarship as a theoretical and political enterprise” (334).

18. The reasons for doing so are manifold. Most obviously, bisexual, transgender, queer, intersex, and asexual children exist, and they suffer from many of the same harms that lesbian and gay children do. They, too, should be protected from these harms, for the simple reason that all people should. More subtly, however, any specific attempt to protect lesbian and gay children — i.e., to establish protections that include only lesbian and gay children, without parallel protections for BTQIA children — is likely to be self-defeating.

Of course, the distinctions among LGBTQIA children are conceptually important, and they correspond to meaningful differences in children's lives. But in light of the long tradition of conflating children's homosexuality, bisexuality, and gender variance in anti-LGBT discourse, it is vital that legal protections are designed broadly to include all these concepts. To take just a few examples: for decades, medical and legal authorities have claimed that children pass through a phase of "bisexuality" as they develop toward heterosexual adulthood — a phase that is used to justify shielding children from exposure to gay and bisexual adults, and to refute children's attempts to come out as gay or bisexual. Similarly, boys use "sissy" and "fag" interchangeably on the playground, and opponents often claim that children who come out as gay or transgender are both "confused." Given the opposition's tendency to conflate children's queerness along multiple axes, the fear of the queer child should be answered with legal protections that present a unified front. Advocates should defend BTQIA children to the same extent — and when possible, in the same breath — that they defend lesbian and gay children. As Sedgwick (1991: 20) writes, "To begin to theorize gender and sexuality as distinct though intimately entangled axes of analysis has been, indeed, a great advance of recent lesbian and gay thought. There is a danger, however, that that advance may leave the effeminate boy once more in the position of the haunting object — this time the haunting object of gay thought itself."

19. Of course, Ruskola likely had pragmatic reasons for limiting himself to a defense of gay adolescence: in 1996 it was radical enough to ask judges to recognize, respect, and protect gay teens, without calling to mind the existence of gay toddlers. And Ruskola surely knew that once courts established a bulwark for the equal protection of gay teens, advocates would someday invoke this principle on behalf of gay children at any age. Indeed, this kind of incrementalism has long been evident in advocacy on behalf of children's queerness. As early as the 1970s, gay liberation groups were organizing on college campuses, but it was not until the 1990s that the Gay, Lesbian & Straight Education Network took on the issue of gay-straight alliances in secondary schools, and it was not until 2012 that GLSEN broached the touchy subject of "homophobia, gender expression and LGBT-inclusive family diversity at the elementary school level" (GLSEN and Harris Interactive 2012: title page). Yet however useful such stalling tactics may have been in 1996, they are beginning to seem dated now. As Kathryn Bond Stockton (2009: 6 – 7) observes, our popular and academic discourses have finally begun to admit the possibility of gay "youths" and "gay teenagers," and we have even begun to speak of gay "children" in the past tense — such as when Oprah Winfrey says of a guest on her talk show, "he knew he was gay at age four." Yet even now, both our courts and our culture remain hesitant to recognize that a "child" can be "gay" or "lesbian" in the present tense.

20. Transcript of oral argument in *Lawrence v. Texas*, 539 US 558, No. 02-102. The quotations that follow are based on the audio recording, which is available at www.oyez.org/cases/2002/02-102.

21. *Ratchford v. Gay Lib*, 434 U.S. 1080, 1084 (1978), Rehnquist, J., dissenting.

22. Compare *Yoshino* 2006: 206 with *Carpenter* 2012: 231.

23. *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah Dec. 20, 2013). Hereafter cited in the text.

24. In his dissent from *Obergefell*, Justice Clarence Thomas claimed that the majority's understanding of the "freedom to marry" represented a troubling exception to this general rule (2634). See also Franke 2004: 1414 ("It is wrong to understand the fight for gay marriage as a fight

for sexual freedom or, for that matter, relationship-based freedom. Marriage is not a freedom. Rather, it is a power”).

25. See Feinberg 1980, 124; and Rachmilovitz 2014: 1374.

26. To guard against this risk, Duggan (1994: 11) recommends “carefully fram[ing]” the argument, first, “to emphasize that state institutions must be evenhanded in the arena of sexuality, not that sexuality should be removed from state action completely,” and second, to “make the crucial distinction between state institutions (which must, in some sense, be neutral) and ‘the public’ arena, where explicit advocacy is not only allowable but desirable.”

27. *Carey v. Population Services International*, 431 U.S. 678, 702 – 703 (1977).

28. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

29. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

30. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

31. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

32. *State v. Limon*, 122 P.3d 22 (Kan. 2005).

33. *Nguon v. Wolf*, 517 F. Supp. 2d at 1177 (C.D. Cal. 2007).

34. *McMillen v. Itawamba County School District*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).

35. Although No Promo Hetero does not challenge the law’s sweeping prohibitions against children’s sexual behavior, it does not thereby reintroduce the narrative of the “innocent child” by way of the vulnerable gay child. To be sure, this “innocence narrative” is available, and it is increasingly commonplace in discussions of the gay child. See, e.g., *Gillman v. School Board for Holmes County*, 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) (arguing that a principal’s targeting of gay and lesbian students “is particularly deplorable in light of studies which confirm the vulnerability of gay and lesbian students”); and Gilden (2013: 357) (tracking the use of a “gay teen innocence narrative” in several legal and cultural contexts). But in contrast to Ruskola’s defense of “gay and lesbian youth,” the principle of No Promo Hetero does not depend on identifying any children as LGBT or even identifying anyone as a “child.” On the contrary, No Promo Hetero claims that these questions of identity are irrelevant, because the government has no interest in promoting heteronormativity at any age.

36. Child Abuse Prevention and Treatment Act Reauthorization Act of 2010, Pub. L. No. 111-320, § 142, 124 Stat. 3482.

37. Erika Skougard (2011: 1161, 1162 – 63) observes that “childhood gender experts are sharply divided about the best treatment for . . . children” who are diagnosed with “Gender Identity Disorder of Childhood.”

38. See Skougard 2011. In recent years, some legislatures have attempted to resolve this issue on a statewide level by adopting a law that prohibits the practice of “conversion therapy” on minors, effectively establishing that this practice is a form of child abuse. See Eckholm 2012. Although these laws prohibit “sexual orientation change efforts,” they define this term to include “efforts to change behaviors or *gender expressions*,” as well as efforts “to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex” (California Business and Professions Code § 865(b)(1) (West 2013); emphasis added).

39. Rosky (2009: 257, 294 – 98) observes that in custody and visitation cases, litigants, experts, and judges often express concerns that lesbian and gay parents will serve as “role models,” influencing children’s sexual and gender development

40. On teachers, see *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 1340, 1347 P.2d (Wash. 1977), upholding the firing of a gay teacher based on “danger of encouraging expression of approval and of imitation” because “such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality.” On curricula, see *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), affirming dismissal of claims by parents seeking to exempt children from

“indoctrination” through elementary school lessons featuring children’s books about same-sex couples. On libraries, see *Board of Education v. Pico*, 457 U.S. 853 (1982), invalidating a school board’s decision to remove “filthy” books from libraries at high schools and junior high schools. 41. See Greenberg 2012: 11 – 26.

References

American Academy of Pediatrics et al. 2008. *Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*.
www.apa.org/pi/lgbt/resources/just-the-facts.pdf.

American Psychiatric Association. 2013. *Diagnostic and Statistical Manual of Mental Disorders*. 5th ed. Arlington, VA: American Psychiatric Association.

American Psychological Association. 2006. *Brief of Amicus Curiae in Support of Plaintiffs-Appellees for Citizens for Equal Prot. v. Bruning*. 455 F.3d 859 (8th Cir.) (No. 05-2604).

Balkin, Jack. 1997. “The Constitution of Status.” *Yale Law Journal*, no. 106: 2313 – 74.

Benkov, Laura. 1994. *Reinventing the Family: The Emerging Story of Lesbian and Gay Parents*. New York: Crown.

Berlant, Lauren. 1997. *The Queen of America Goes to Washington City: Essays on Sex and Citizenship*. Durham, NC: Duke University Press.

———. 1998. “Intimacy: A Special Issue.” *Critical Inquiry*, no. 24.

Boucai, Michael. 2012. “Sexual Liberty and Same-Sex Marriage: The Argument from Bisexuality.” *San Diego Law Review* 49, no. 2: 168, 415 – 53.

Brown, Wendy. 1995. *States of Injury: Power and Freedom in Late Modernity*. Princeton: Princeton University Press.

Butler, Judith. 2002. “Is Kinship Always Already Heterosexual?” In *Left Legalism / Left Critique*, edited by Wendy Brown and Janet Halley, 229 – 58. Durham, NC: Duke University Press.

Carpenter, Dale. 2012. *Flagrant Conduct: The Story of Lawrence v. Texas: How a Bedroom Arrest Decriminalized Gay Americans*. New York: Norton.

Clarke, Jessica. 2015. “Against Immutability.” *Yale Law Journal* 125, no. 1.
www.yalelawjournal.org/article/against-immutability.

Clendinen, Dudley, and Adam Nagourney. 1999. *Out for Good: The Struggle to Build a Gay Rights Movement in America*. New York: Simon and Schuster.

Duggan, Lisa. 1994. “Queering the State.” *Social Text*, no. 39: 1 – 14.

Eckholm, Erik. 2012. "Gay 'Cure' for Minors Is Banned in California." *New York Times*, October 1.

Edelman, Lee. 2004. *No Future: Queer Theory and the Death Drive*. Durham, NC: Duke University Press.

Feinberg, Joel. 1980. "The Child's Right to an Open Future." In *Whose Child? Children's Rights, Parental Authority, and State Power*, edited by William Aiken and Hugh LaFollette, 124 – 53. Totowa, NJ: Rowman and Littlefield.

Fejes, Fred. 2008. *Gay Rights and Moral Panic: The Origins of America's Debate on Homosexuality*. New York: Palgrave Macmillan.

Franke, Katherine. 2004. "The Domesticated Liberty of *Lawrence v. Texas*." *Columbia Law Review* 104: 1399 – 1527.

Gilden, Andrew. 2013. "Cyberbullying and the Innocence Narrative." *Harvard Civil Rights – Civil Liberties Law Review* 48: 357 – 407.

Greenberg, Julie A. 2012. *Intersexuality and the Law: Why Sex Matters*. New York: New York University Press.

GLSEN and Harris Interactive. 2012. *Playgrounds and Prejudice: Elementary School Climate in the United States, A Survey of Students and Teachers*. New York: GLSEN.

Hall, Stuart, et al. 1978. *Policing the Crisis: Mugging, the State, and Law and Order*. New York: Palgrave Macmillan.

Halley, Janet. 1994. "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability." *Stanford Law Review* 36, no. 3: 503 – 68.

Prentice, Ron, et al. 2008. *Arguments in Favor of Proposition 8. California General Election Official Voter Information Guide*. vigarchive.sos.ca.gov/2008/general/argu-rebut/argu-rebutt8.htm.

Rachmilovitz, Orly. 2014. "Family Assimilation Demands and Sexual Minority Youth." *Minnesota Law Review*, no. 98: 1374 – 1452.

Rosky, Clifford J. 2009. "Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia." *Yale Journal of Law and Feminism* 20, no. 2: 257 – 355.

———. 2013a. "No Promo Hetero: Children's Right to Be Queer." *Cardozo Law Review* 35: 425 – 510.

———. 2013b. "Fear of the Queer Child." *Buffalo Law Review*, no. 61: 607 – 97.

Ruskola, Teemu. 1996. "Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist." *Yale Journal of Law and Feminism* 8, no. 2: 269 – 331.

Schmeiser, Susan R. 2009. "Changing the Immutable." *Connecticut Law Review* 41, no. 5: 1495 – 1522.

Sedgwick, Eve Kosofsky. 1990. *Epistemology of the Closet*. Berkeley: University of California Press.

———. 1991. "How to Bring Your Kids Up Gay." *Social Text*, no. 29: 18 – 27.

Skougard, Erika D. 2011. "The Best Interests of Transgender Children." *Utah Law Review*, no. 3: 1161 – 1201.

Stockton, Kathryn Bond. 2009. *The Queer Child, or Growing Sideways in the Twentieth Century*. Durham, NC: Duke University Press.

Valdes, Francisco. 1995. "Queer Legal Theory." *California Law Review* 83, no. 1: 344 – 77.

Vidal, Gore. 1981. "Some Jews and the Gays." *Nation*, November 14, 508 – 17.

Warner, Michael. 1999. *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life*. Cambridge, MA: Harvard University Press.

Yoshino, Kenji. 2006. *Covering: The Hidden Assault on Our Civil Rights*. New York: Random House.