COLUMBIA LAW REVIEW
SIDEBAR

VOL. 114 **NOVEMBER 10, 2014** **PAGES 97–106**

GENDER DIVERSITY AND SAME-SEX MARRIAGE

Ian Farrell & Nancy Leong***

INTRODUCTION

Opponents of same-sex marriage have recently adopted a curious new argument. The argument goes something like this. The Supreme Court has held that diversity is a compelling state interest in institutions of higher education. Opposite-sex marriage includes gender diversity, while same-sex marriage does not. Therefore, states may allow opposite-sex marriage while banning same-sex marriage—even if the ban triggers heightened scrutiny under equal protection or due process—because opposite-sex marriage furthers gender diversity, while same-sex marriage does not.

The argument has found its way into briefs. In an emergency petition asking the Supreme Court to stay the district court's decision invalidating Utah's same-sex marriage ban, for example, Utah argued that "[s]ociety has long recognized that diversity in education brings a host of benefits to students," and "[i]f that is true in education, why not in parenting?"[1] As Utah put it: "[T]he *combination* of male and female parents is likely to draw from the strengths of both genders in ways that cannot occur with any combination of two men or two women, and . . . this gendered, mother–father parenting model provides important benefits to children."[2]

Likewise, in defending its ban in *Kitchen v. Herbert* before the Tenth Circuit, Utah argued that "moms and dads are different, not interchangeable, and . . . the diversity of having both a mom and a dad is the ideal parenting environment."[3] It emphasized the government interest in "providing what experts have called 'gender complementarity'—i.e.,

* Assistant Professor, University of Denver Sturm College of Law.

** Associate Professor, University of Denver Sturm College of Law.

1. Reply in Support of Application to Stay Judgment Pending Appeal at 15, Herbert v. Kitchen, 134 S. Ct. 893 (2014) (No. 13A687) [hereinafter Utah Stay Application Reply], available at http://ak.podcast.foxnewsradio.com/news/dotcom/13A687%20Herbert%20v%20Kitchen%20Reply.pdf (on file with the *Columbia Law Review*).

2. Id. at 14.

3. Brief of Appellants Gary R. Herbert & Sean D. Reyes at 1, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178), 2014 WL 580550.

diversity—in parenting."[4] As to both claims, Utah argued that the argument is "supported by sound social science."[5] Its reply brief reiterated that "[t]he Supreme Court also affirms the general value of gender diversity";[6] that is, "the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."[7] That the briefs have taken up this argument is perhaps unsurprising, given that both legal and popular discourse critique the "genderless marriage" with some frequency.[8]

This argument fails for a number of reasons. It erroneously conflates sex and gender, impermissibly relies on sex and gender stereotyping, lacks credible empirical support, draws untenable analogies, runs afoul of well-established doctrine, and, taken to its logical conclusion, leads inexorably to a number of consequences that are either universally undesirable or that we are fairly certain its proponents do not support. In short, we think the argument wholly unsuccessful and urge courts not to entertain it.

We divide our argument into two Parts. Part I describes problems with the factual and logical premises of the gender-diversity argument against same-sex marriage. Part II explains that—even if, counterfactually, we accept these premises as correct—the gender-diversity argument runs headlong into a host of logical and doctrinal obstacles. We conclude that, in addition to the myriad problems with the gender-diversity argument we have already described, the argument is poor legal strategy and unlikely to persuade the Supreme Court.

---

4. Id. at 26.

5. Id. at 1.

6. Reply Brief of Appellants Gary R. Herbert & Sean D. Reyes [Corrected] at 32, *Kitchen*, 755 F.3d 1193 (No. 13-4178), 2014 WL 1287029 (citing Nguyen v. INS, 533 U.S. 53, 73 (2001)).

7. Id. at 29 (alteration in original) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)) (internal quotation marks omitted).

8. See, e.g., Katharine Baker, Genderless Marriage, Concurring Opinions (Oct. 22, 2012), http://www.concurringopinions.com/archives/2012/10/67570.html (on file with the *Columbia Law Review*) ("The fundamental debate over marriage in this country is, for many, a disagreement about whether the phrase 'genderless marriage' is an oxymoron, or an ideal for which we all should be striving."); Michael Erickson & Jenet Jacob Erickson, Philosopher Kings: Transformative Decisions Best Left to People's Representatives, Deseret News (July 13, 2014, 12:00 AM), http://www.deseretnews.com/article/865606807/Philosopher-kings-Transformative-decisions-best-left-to-peoples-representatives.html (on file with the *Columbia Law Review*) ("[O]ver the last several years, marriage has become increasingly genderless in the wake of well-meaning efforts to extend societal recognition to gays and lesbians."). The detractors of genderless marriage are perhaps themselves reacting to the proposition of some marriage-equality supporters that marriage should be redefined as a genderless institution. See, e.g., Kevin Armento, Genderless Marriage: Redefining the Debate, Huffington Post (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/kevin-armento/genderless-marriage-redef_b_343146.html (on file with the *Columbia Law Review*) (last updated May 25, 2011, 2:30 PM) (advocating for "[r]e-branding" same-sex marriage as "genderless marriage").

I. FLAWED PREMISES

The gender-diversity argument against same-sex marriage hinges on the notion that a marriage of a male and a female will, in fact, be gender diverse. In so doing, the argument wrongly conflates sex—a biological classification—and gender—a construct created by society and culture. It is entirely possible that a relationship composed of two people of different sexes could include two people of the same gender. Alternatively, a relationship composed of two people of the same sex could include two people of different genders. Sex and gender are correlated, but the correlation is imperfect. A prohibition on same-sex unions is no guarantee of gender diversity in marriage.

Even if we overlook the conflation of sex and gender, the gender-diversity argument relies on—and, indeed, attempts to reinforce—a false binary. Social science simply does not support the proposition that gender is binary—that is, that people are either men or women. Many people identify as neither men nor women, instead identifying as gender fluid or as third-gender or as agender.[9]

Moreover, the gender-diversity argument rests on flawed stereotypes of what it means to be a man or a woman. It may be true that, according to available social-science evidence, sex correlates to some degree with particular traits.[10] Males are more likely to exhibit dominance, for instance. More females are nurturing.[11] But these are broad generalizations, not universal truths. Someone's sex is no guarantee that he or she will possess any particular set of traits.[12]

---

9. Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History 11 (Gilbert Herdt ed., 1994) (challenging conventional wisdom that "two sexes or genders are in the nature of things, be they defined as biological or social").

10. See generally Dario Maestripieri, Gender Differences in Personality Are Larger than Previously Thought, Psychol. Today (Jan. 14, 2012), http://www.psychologytoday.com/blog/games-primates-play/201201/gender-differences-in-personality-are-larger-previously-thought (on file with the *Columbia Law Review*) (describing study analyzing personalities of men and women suggesting "when it comes to personality men and women belong to two different species"). We note that the described study also conflates sex and gender, but the larger point—that some personality traits are somewhat correlated with both sex and gender—remains.

11. Id.; Marco Del Giudice, Tom Booth & Paul Irwing, The Distance Between Mars and Venus: Measuring Global Sex Differences in Personality, PloS One, Jan. 2012, at 1, 4, available at http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0029265&representation=PDF (on file with the *Columbia Law Review*).

12. Indeed, the Supreme Court has long recognized the constitutional impermissibility of reliance on gender stereotypes. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").

We agree with the states that have relied on the gender-diversity argument on one point. Unquestionably there are biological differences between males and females, and to the extent that sex and gender do overlap, a same-sex role model may be able to help a child of the same sex negotiate specific biological issues, such as puberty.[13] Likewise, society treats men and women differently. Setting aside whether one thinks this is a good thing, it is certainly something that—in the short term—is unlikely to change. In many instances, it may be beneficial and desirable for a child to have a role model of his or her own gender who can empathize with some of the specific challenges that people of that gender face, and who can offer advice on how to negotiate one's gender in a society that sees gender as meaningful.

But the gender-diversity argument against same-sex marriage relies on a highly questionable assumption: No one other than a child's parents can provide that kind of empathy, support, and positive role-modeling associated with particular genders. Reality simply does not bear out this assumption. Children can be positively influenced by any number of people—grandparents, aunts and uncles, other relatives, family friends, teachers, members of their religious community, and so forth—and at least some of these people are likely to be able to serve as a firsthand resource for the child in negotiating his or her gender identity.[14] Moreover, the fact that a child has two parents of different sexes or genders is no guarantee that one of the parents will be a good role model for a child of the same gender. Put simply, some people are good role models and some are not—regardless of whether they share the same sex as their children. A male parent may possess personality traits, skills, and attributes that allow him to be an excellent parent—and better than his female coparent—in ways usually associated with women (and vice versa).[15] Having a parent of a particular sex or gender is no guar-

---

13. The fact that there is some value to having a same-sex role model does not lead to the conclusion that having a same-sex parent is a compelling or even a rational state interest. We do not, for example, ban interracial adoption, even though parents have not necessarily experienced firsthand certain issues their child will experience as a member of a different race.

14. Cf. Noelle M. Hurd et al., Negative Adult Influences and the Protective Effects of Role Models, 38 J. Youth & Adolescence 777, 786 (2009) (finding nonparental role models had protective effects against negative life outcomes); Jean E. Rhodes et al., Natural Mentors: An Overlooked Resource in the Social Networks of Young, African American Mothers, 20 Am. J. Community Psychol. 445, 445 (1992) (finding young African American women were less depressed and had fewer other problems when they had "natural mentors," defined as "supportive nonparent/nonpeer support figures").

15. See Timothy J. Biblarz & Judith Stacey, How Does the Gender of Parents Matter?, 72 J. Marriage & Fam. 3, 3 (2010) (finding strengths typically associated with married mother–father families appear to same extent in families with two mothers and potentially in those with two fathers); cf. Cavan Sieczkowski, Father and Daughter Lip Dub Iggy Azalea's "Fancy," and It's the Realest, Huffington Post (May 22, 2014, 10:20 AM), http://www.huffingtonpost.com/2014/05/22/father-daughter-iggy-azalea-fancy_n_5372019.html

antee that the parent will be a good role model or better at interacting with a child of a particular sex or gender.

Ultimately, the gender-diversity argument against same-sex marriage depends on an empirical question: Do same-sex couples make worse parents than opposite-sex couples? To a large degree, this argument depends on a now-discredited study by Mark Regnerus that found better outcomes for children raised by opposite-sex couples.[16] The study was suspect from creation—it was funded by conservative think tanks.[17] It is likewise suspect in methodology—for example, its myriad problems include the fact that, while it examined 15,000 children, only 248 had even one parent who had ever had a same-sex relationship and "only two were actually raised for any significant period of time by a stable same-sex couple";[18] other commentators have pointed out further problems.[19] Moreover, Regnerus's department at the University of Texas publicly stated that it did not sanction his work;[20] *Social Science Research*, in which the study originally appeared, later performed an audit and announced that the study should not have been published;[21] and Judge Bernard Friedman, a Reagan appointee, pronounced the study "entirely unbe-

---

(on file with the *Columbia Law Review*) (commending father who lip syncs with daughter—an activity that stereotypically would be regarded as feminine—in YouTube video).

16. Mark Regnerus, How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study, 41 Soc. Sci. Res. 752 (2012) (presenting purported findings that children of intact opposite-sex couples attain better health, education, and financial outcomes).

17. See Philip N. Cohen, Regnerus Affair Timeline, with Maze, Family Inequality (Aug. 6, 2013, 11:03 AM), http://familyinequality.wordpress.com/2013/08/06/regnerus-affair-timeline-with-maze/ (on file with the *Columbia Law Review*) (reporting funding by conservative Witherspoon Institute and Bradley Foundation); Steve Kolowich, Is the Research All Right?, Inside Higher Ed (July 13, 2012, 3:00 AM), https://www.insidehighered.com/news/2012/07/13/ut-austin-scrutinizes-ethics-controversial-same-sex-parenting-study (on file with the *Columbia Law Review*) (same).

18. Nathaniel Frank, What Does Mark Regnerus Want?, Slate (July 10, 2014, 10:20 AM), http://www.slate.com/blogs/outward/2014/07/10/mark_regnerus_is_back_with_more_anti_gay_family_science.html (on file with the *Columbia Law Review*).

19. See, e.g., Nathaniel Frank, Op-Ed., Dad and Dad vs. Mom and Dad, L.A. Times (June 13, 2012), http://articles.latimes.com/2012/jun/13/opinion/la-oe-frank-same-sex-regnerus-family-20120613 (on file with the *Columbia Law Review*) (finding Regnerus makes circular conclusion that when one parent shatters family by leaving, departure harms family); Philip N. Cohen, 200 Researchers Respond to Regnerus Paper, Family Inequality (June 29, 2012, 11:00 AM), http://familyinequality.wordpress.com/2012/06/29/200-researchers-respond-to-regnerus-paper/ (on file with the *Columbia Law Review*) (finding peer-review process abnormally short and questioning reviewers' expertise and impartiality).

20. Dep't of Sociology, Statement from the Chair Regarding Professor Regnerus, Univ. of Tex. at Austin (Apr. 12, 2014), http://www.utexas.edu/cola/depts/sociology/news/7572 (on file with the *Columbia Law Review*) ("Dr. Regnerus' opinions . . . do not reflect the views of the Sociology Department of The University of Texas at Austin.").

21. Darren E. Sherkat, The Editorial Process and Politicized Scholarship: Monday Morning Editorial Quarterbacking and a Call for Scientific Vigilance, 41 Soc. Sci. Res. 1346, 1347–49 (2012) (finding "serious flaws and distortions" in Regnerus's paper).

lievable and not worthy of serious consideration" in striking down Michigan's ban on same-sex marriage.[22] Perhaps most remarkably, Utah renounced its reliance on the study the day before its Tenth Circuit argument in *Kitchen v. Herbert*.[23]

In addition to researchers discrediting the Regnerus study, other recent research has found precisely the opposite: On average, children raised by same-sex couples do slightly better in measures of health and well-being than those raised by opposite-sex couples.[24] To the extent that children raised by same-sex parents experience a disadvantage, it is a result of social stigma attached to their family arrangement, not to the family arrangement itself. And perhaps one of the most intriguing features of the study is its suggestion that children raised by same-sex parents do better because of the absence of the very structures that the gender-diversity argument strives to instantiate. That is, because same-sex households are less burdened by gender stereotypes, such a household eliminates a source of tension and conflict, improving the well-being of children raised in that environment.

Diversity is characterized in the arguments of same-sex marriage opponents as having instrumental value, not intrinsic value. That is, gender diversity is valuable because it results in better parenting, not because diversity is valuable in and of itself.[25] The claim that gender diversity in marriage is valuable—let alone a compelling interest—fails if the empirical evidence does not support diversity's instrumental value. And here, as even the purveyors of the gender-diversity argument seem to acknowledge, the empirical evidence does not.

II. DOCTRINAL FLAWS AND LOGICAL FALLACIES

Given that the gender-diversity argument against same-sex marriage rests on the instrumental value of gender diversity, the argument ultimately collapses into the more common claim that children are better off with gender-diverse parents. But framing the argument in terms of diversity is not a mere linguistic difference. Opponents of same-sex marriage, such as Utah, are invoking the value of gender diversity to gain a doctrin-

---

22. DeBoer v. Snyder, 973 F. Supp. 2d 757, 766 (E.D. Mich. 2014).

23. Rule 28(j) Letter Regarding Press Reports on Professor Regnerus Study at 1–2, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178), available at http://www.washingtonblade.com/content/files/2014/04/217359315-13-41789-5240.pdf (on file with the *Columbia Law Review*) ("[T]he Regnerus study cannot be viewed as conclusively establishing that raising a child in a same-sex household produces outcomes that are inferior to those produced by man–woman parenting arrangements.").

24. Simon R. Crouch et al., Parent-Reported Measures of Child Health and Well-being in Same-Sex Parent Families: A Cross-Sectional Survey, BMC Pub. Health (June 21, 2014), http://www.biomedcentral.com/1471-2458/14/635 (on file with the *Columbia Law Review*).

25. See supra notes 3–4 and accompanying text (discussing argument that gender diversity creates ideal parenting environment).

al foothold by leveraging the Supreme Court's jurisprudence on diversity in higher education.[26] In this Part, we explain that even if we accept that gender diversity in child rearing is—counterfactually—a compelling interest, a ban on same-sex marriage nonetheless fails under the Court's equal-protection jurisprudence.

A. *Unworkable Analogies*

The gender-diversity argument involves a simple and uncritical analogy between education and diversity. As Utah posited in its emergency petition to the Supreme Court, if "diversity in education brings a host of benefits to students," then "why not in parenting?"[27] There are many answers to Utah's question, and at least one of them is as simple as the question itself: because a marriage is very different from a school. And even if we ignore this rather obvious difference, a same-sex marriage ban would nonetheless fail because it mandates an unconstitutional quota of men and women.

A marriage is different from a school in numerous ways that bear upon the role of diversity in each institution. A public school has a faculty and a student body, and a state actor decides which students gain admission. A marriage consists of two spouses. A state actor decides which couples are admitted to the institution, in a sense, by setting the eligibility requirements, but does not have a hand in which individuals choose to marry each other. Nor does marriage involve any of the ability sorting commonly associated with institutions of higher education—there is no marital equivalent to either the Ivy League or the local community college. So the analogy between school and marriage is tenuous. It would be a strange school indeed that had only two students, who chose each other, subject only to state endorsement.

Moreover, the supposed benefits of diversity accrue differently in a school and in a marriage. In a school, diversity within a student body is a compelling state interest because it benefits the students themselves.[28] But in a marriage, gender diversity is allegedly a state interest that benefits not the participants, but rather the children—if any—that the marriage produces. The difference is material: While diversity in higher education thus benefits all the students within a school, diversity within a marriage is at best claimed to benefit other people who might or might not actually exist.

Finally, there are quantitative differences. A state actor can craft a student body that is diverse along many dimensions—race, gender, sex-

---

26. See, e.g., Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2419 (2013) (reaffirming diversity as compelling state interest).

27. Utah Stay Application Reply, supra note 1, at 15.

28. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 328–30 (2003) (finding diversity promotes cross-racial understanding, deflates racial stereotypes, and improves students' learning outcomes).

ual orientation, wealth, family background—that are relevant to improving the educational experience. But it is not practically possible for a state to craft each marriage to be similarly diverse, even though these other dimensions of diversity could be just as important to child rearing as the (putative) value of gender diversity.

The structural limitations on marriage are such that the only mechanism for achieving gender diversity is to insist that the spouses are diverse—and with only two spouses, that means insisting one spouse be a man and the other a woman. However, this entails exactly what the Supreme Court has repeatedly rejected in education: a quota. In *Grutter v. Bollinger*, the Court explained that narrow tailoring meant "universities cannot establish quotas for members of certain racial groups."[29] Requiring "some specified percentage of a particular group" within the student body would be "patently unconstitutional."[30] But a same-sex marriage ban squarely satisfies the definition of a "quota,"[31] in that the ban mandates precisely one place in each marriage for men and one for women. Fifty percent of the marriage places are reserved for men and fifty percent for women.

In other words, even if one accepts—against all creditable empirical evidence—that gender diversity improves parenting, and even if one accepts—despite the obvious structural differences—that marriage and education are analogous, the gender-diversity argument nonetheless fails. The proponents seek to leverage the Court's education-diversity doctrine, but same-sex marriage bans constitute a quota, and quotas are unconstitutional under that very doctrine.

B. *Unintended Consequences*

As we have shown, a state may not require that a marriage be diverse along any particular dimension, such as sex or gender. And that is clearly the correct result. Imagine if it were otherwise. Racial diversity is clearly a compelling interest in education. But we would surely balk at a ban on intraracial marriage, a ban that would be constitutionally permissible under a broader version of the marriage-diversity argument. The same reasoning applies to other dimensions of diversity: If a ban on same-sex marriage is a permissible way of promoting gender diversity, so too is a ban preventing marriage between two Christians as a way of promoting

---

29. Id. at 334; see also Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (striking down automatic numerical bonus system for underrepresented minorities in undergraduate admissions because program was not narrowly tailored); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 275, 319–20 (1978) (opinion of Powell, J.) (invalidating medical-school-admissions system that set aside sixteen seats for underrepresented minorities).

30. *Grutter*, 539 U.S. at 329–30 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)) (internal quotations marks omitted).

31. See id. at 334 (explaining quota system insulates categories of people with certain desired characteristics from competition with all others).

religious diversity, or—God forbid—between two heterosexuals as a way of promoting diversity in sexual orientation.[32] And so on.

We cannot imagine that these bans would find favor among same-sex marriage opponents (or proponents, for that matter). But racial, religious, and sexual-orientation diversity are critical interests in education, and the only way to ensure diversity in marriage is to insist that the spouses not share the relevant characteristic. The reason for this goes back to the structural differences between marriage and education: Marriage, as currently defined, involves only two people. Far greater opportunity for diversity, along more dimensions, exists in an institution with more participants. In fact, if diversity in marriage is a compelling interest, this speaks strongest in favor of polygamy. A marriage with more than two people would allow for greater diversity, without a fifty–fifty distribution, and the more spouses the better. A large polygamous marriage would allow for a single marriage to be diverse in terms of sex, race, and religion at the same time. In fact, the marriage-diversity argument appears to support not just permitting polygamy, but requiring it—which could be mandated without falling afoul of the quota problem, if the number of spouses were sufficiently high. If diversity in marriage really is a compelling interest, then polygamy is the gold standard.

We do not mean to suggest that allowing polygamy is an absurd result of arguments against bans on same-sex marriage (although we are willing to bite the bullet with regard to legally mandated polygamy). Rather, our point is that the marriage-diversity argument has consequences that its proponents would likely disavow—as well as supports absurd results, such as bans on heterosexual or intraracial marriage, and entails an unconstitutional quota system.

CONCLUSION

The gender-diversity argument against same-sex marriage is founded on false premises, and even if those premises are counterfactually taken as true, the argument fails on its own logic. But perhaps most damning is that the Justices are unlikely to find it persuasive.

Based on analysis of their past decisions, it seems likely that Justice Kennedy and the liberal Justices—Breyer, Ginsburg, Kagan, and Sotomayor—will agree with us that the gender-diversity argument is a transparent and poorly executed attempt to appropriate the diversity rationale for affirmative action in higher education. And the other Justices—particularly Roberts, who we believe is most kindly disposed to the argument that bans on same-sex marriage are invalid—will be far from eager to strike down a same-sex marriage ban in such a way as to

32. If one believes that a child is better off when he or she has a gender role model to relate to, then surely it is reasonable to accept that a gay child is better off with at least one gay parent, who can relate to his or her unique struggles as a gay teenager, for example.

add legitimacy to the concept of diversity as an important government interest. Recent decisions regarding diversity in higher education make his position clear.[33]

Although it is hardly our goal to aid state governments who insist on defending bans against same-sex marriage, the gender-diversity argument is so problematic that it does not deserve a seat at the table. In striking down Kentucky's same-sex marriage ban, Judge John Heyburn found the state's arguments that marriage laws are meant to promote procreation and increase birth rates "are not those of serious people."[34] The gender-diversity argument deserves the same assessment. Now that the Sixth Circuit has become the first federal appellate court to uphold state bans on same-sex marriage[35]—thereby creating a circuit split—the Supreme Court is more likely to grant certiorari in such a case in the relatively near future.[36] If it does so, we hope that the gender-diversity argument will play no part of the argument on either side.

Preferred Citation: Ian Farrell & Nancy Leong, *Gender Diversity and Same-Sex Marriage*, 114 COLUM. L. REV. SIDEBAR 97 (2014), http://www.columbialawreview.org/Gender-diversity_FL.

33. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (opinion of Roberts, C.J.) (responding to diversity argument with "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

34. Love v. Beshear, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014).

35. DeBoer v. Snyder, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014).

36. See Lyle Denniston, Sixth Circuit: Now, a Split on Same-Sex Marriage, SCOTUSBlog (Nov. 6, 2014, 4:50 PM), http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/ (on file with the *Columbia Law Review*) (indicating Sixth Circuit's ruling in *DeBoer* sets up "almost certain review by the Supreme Court" of same-sex marriage bans).