Symposium on
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ABSTRACTS

The Right to (Same-Sex) Divorce in Israel
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Israeli law provides no uniform territorial law that applies to marriage and no civil marriage exists in Israel. As a result, same-sex couples cannot marry in Israel. Same-sex couples are not the only couples that cannot get married in Israel due to the complete governance of religious laws on marriage. Those who meet minimum age and consent requirements who cannot get married in Israel include persons who do not belong to a recognized religious community and inter-faith couples. Therefore, since the early days of the State of Israel, couples that could not marry in Israel or did not want a religious marriage have looked for ways to bypass the religious restrictions on marriage in Israel. One common practice is to get married abroad. Israeli law has registered couples married abroad as married in Israel and provided them with all the benefits of marriage without explicitly ruling on the validity of such marriages since the seminal case of Funk-Schlesinger.

The validity under Israeli law of same-sex marriage celebrated abroad between two Israeli citizens and residents is unclear. Regardless of their validity, same-sex marriages are registered in the Israeli population registry based on a recent Supreme Court’s decision, along with heterosexual civil marriages consecrated abroad. However, the Israeli Supreme Court, in ordering the registration of same-sex marriages entered into abroad did not address the question of their dissolution, not even for the limited purpose of change of registry.

As with marriage, divorce in Israel is under the exclusive jurisdiction of religious courts and governed by religious laws (excluding inter-faith spouses or spouses who do not belong to a recognized religious community). The Supreme Court reinforced and buttressed this exclusivity in holding that heterosexual same-faith couples who chose to marry in a civil ceremony outside Israel, are under the jurisdiction of the relevant religious court when they wish to divorce. Supposedly, dissolution of a marital bond between same-sex couples who both belong to the same recognized religious community is under the jurisdiction of the relevant religious court. However, when the first case of same-sex marriage dissolution was submitted to the rabbinical court, the rabbinical court refused to open a file for the case. The couple then submitted the application to the civil family court. However, there is no civil law of divorce in Israel, which family courts can apply, and the validity of the marriage itself is still an open question. Same-sex couples, therefore, may find it impossible to divorce. This situation brings up the question of the right to divorce, and the meaning of such a right in the unique Israeli context, if it exists.

The term "divorce" in Israel refers merely to the dissolution of the marital bond in the sense of changing the parties' status from "married" to "divorced." Given the governance of religious laws over matters of marriage and divorce, the Israeli Supreme Court has interpreted the term "matters of divorce" narrowly, so that it applies only to the limited question of dissolution of the marital bond. All other issues, such as property distribution, spousal support payments, and certainly issues that concern custody and child support, are not considered as "matters of divorce" (neither are they considered as "matters of marriage").
In addition, most religious laws recognized in Israel severely restrict the option to end (heterosexual) marriage through divorce. Since, the civil system cannot provide the parties with formal divorce itself, its response has been to provide individuals with the consequences of divorce while they are still formally married. Civil family courts divide property, order the sale of the family home, decide on children's custody and support issues – all while the parties are not legally divorced. Even new relationships formed by formally married individuals are legally recognized and generate rights and obligations under the laws applied to unmarried cohabitants ("reputed spouses"), despite a criminal prohibition on bigamy. Same-sex couples who separate can, therefore, live apart, divide their property and establish new relationships that will be recognized under the law, even absent a formal divorce.

In this legal context, do same-sex couples have a right to some formal divorce procedure? I submit that they do, and argue for a recognition of a Basic Right to divorce under Israeli constitutional law.

The Case Against Civil Marriage
J. David Bleich

To the modern mind often that which is legal is incorrectly perceived as moral as well. The constitutional mandate for recognition of same-gender marriage certainly has created that perception in many minds. Elimination of marriage as a legally established institution would remove the source of that perception.

Prior to the French Revolution marriage was regarded as a religious institution subject to ecclesiastic control exclusively. Separation of Church and State was accompanied by establishment of civil marriage as a legal alternative. In some European jurisdictions civil marriage and religious marriage require separate ceremonies. In others, members of the clergy are, in effect, deputized to act as officers of the State in solemnizing civilly recognized marriages. Pursuant to the Ehepatent promulgated in the Austro-Hungarian Empire during the latter part of the eighteenth century, clergy were not merely permitted but required under threat of penal sanction to officiate at any marriage for which a license was issued by the State despite qualms of religious conscience.

The recent incident involving a county clerk in Kentucky illustrates the moral conflict to which Obergefell has given rise. Rooted in the 14th amendment and hence having priority over earlier amendments, including the free exercise clause of the first amendment, it is not inconceivable that a suit might be brought to compel a clergyman, as an officer of the State to officiate at a homosexual marriage.

Both the moral conflicts and constitutional issues could be obviated by returning to the status quo ante in which marriage was regarded as a religious sacrament. As a legal institution it is superfluous. The same legal effect might be accomplished by designating a best friend who would be assigned the same rights and privileges now enjoyed by a lawfully wedded spouse including, but not limited to, a right of inheritance similar to dower and status as next of kin for all rights and prerogatives presently vested in a spouse.

Unlike the case with regard to a civil union, the category of “best friend” need not be limited to a domestic partner. Indeed, such a person might even be a member of the class of persons forbidden as consorts by reason of consanguinity. Such designation would be revocable at will. The serendipitous advantage is that such an institution would remove legal inequities now suffered by persons who do not have or do not seek domestic partners of any gender.
Can We All Get Along?:
Obergefell v. Hodges and the Meaning of Rationality in Constitutional Adjudication
John M. Breen

Combined with a number of lower federal and state supreme court decisions, Obergefell v. Hodges raises the question: “What constitutes a rational legal argument in constitutional adjudication?” The reason why this question is now pressing is that, beginning with Goodridge v. Dept. of Public Health, many courts concluded that support for the traditional, conjugal understanding of marriage as the union of one man and one woman as the optimal family structure for the raising of children was not rational. Although Obergefell is somewhat opaque on this precise issue, it overturned a Sixth Circuit decision that reached the opposite conclusion.

Assuming that they are acting in good faith, the opponents on opposite sides of a given legal debate should not find one another’s arguments to be persuasive. But the inability of legal interlocutors to agree on what constitutes a rational argument poses a serious challenge for the continuing viability of our society as a political community under the rule of law. Here I examine what it means to make a rational argument, and the Obergefell decision itself, in light of the traditional modes of constitutional argumentation: arguments from text, history, structure, theory, precedent, and value. Although not irrational, I conclude that the Obergefell majority’s almost complete reliance on arguments from value place the decision on the margins of constitutional rationality and legitimacy.

I conclude with some final thoughts on the nature of rational legal argument in light of Obergefell. Given that the touchstone of the decision is “dignity,” the case does not stand for the proposition that rationality in law can only be demonstrated through empirical proof. This is significant given the debate over same-sex parenting relative to childrearing in the context of traditional marriage. Furthermore, where a law, like marriage as traditionally defined, serves a channeling function – in this case toward what the state judges to be the optimal environment for childrearing – and where alternate environments are legal and cannot be prohibited (because of constitutional protection) a certain looseness with respect means and ends should be expected and tolerated. This further suggests that the pivotal analogy between Obergefell and prior Supreme Court decisions should not have been to Loving v. Virginia, but to Maher v. Roe and Harris v. McRae.

The Fall of Fertility:
How Redefining Marriage Will Further Declining Birthrates in the United States
Jason Carroll

The current debate over the definition of marriage is typically portrayed as a decision about whether to “expand” or “extend” the boundaries of marriage to include same-sex couples. This argument, however, rests on the assumption that the basic nature of marriage will remain largely unchanged by granting marriage status to same-sex partnerships and that all this policy change would do is absorb same-sex partnerships within the existing boundaries of marriage and extend the benefits of marriage to a wider segment of society. Indeed, the very term “same-sex marriage” implies that same-sex couples in committed relationships are already a type of marriage that should be appropriately recognized and labeled as such. But this understanding is flawed in that it fails to recognize how defining same-sex partnerships as marriages would signify a fundamental change in how marriage is collectively understood and the primary social purposes for which it exists.

In a formal statement, seventy prominent academics from all relevant disciplines expressed “deep concerns about the institutional consequences of same-sex marriage for marriage itself,” concluding that
“[s]ame-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage” and “undermine the idea that children need both a mother and a father.”\textsuperscript{1} Further, as described in the Brief \textit{Amici Curiae} of Scholars of Marriage\textsuperscript{2} one-hundred prominent scholars asserted that a genderless redefinition of marriage would undermine the critical social norms of marriage, including the norm linking marriage with procreation – thus weakening the institution of marriage as a whole, with significant implications for our broader society.

Building off of these statements, this presentation will provide an overview of our Brief \textit{Amici Curiae} of Scholars of Fertility and Marriage and provide further analysis of this “procreative norm” associated with the man-woman definition of marriage. We concur with these other scholars who have raised concerns about weakening that link and the potentially profound impact it could have on the United States’ declining and already below-replacement level fertility rate, increasing the likelihood of bringing within our borders the socioeconomic problems experienced by countries abroad with sustained, extremely low fertility rates.

\textbf{The Development of the Issue of Same-sex Couples Under Israeli Law}

Yitshak Cohen

The State of Israel determined by legislation that matters of personal status including marriage and divorce are subject to personal law, namely religious law. Since the applicable law is personal and not territorial, it varies from person to person and is not uniform as under civil law. This simply means that Israel has no separation of religion and state in matters of divorce and marriage. Religion is the only determining factor in these matters. Thus, for example, marriages prohibited by religious law do not exist in Israel. This is true for all four major religions in Israel: Christianity, Islam, the Druze Religion and Judaism. The discussion of same-sex couples in Israeli law should have ended here: marriage and even sexual relations between same-sex partners are prohibited by four religions in Israel. Therefore they have no place in a state in which religious law prevails in matters of status.

Well, expect a surprise. The courts in Israel, that have more of a civil than a religious orientation looked for ways to bridge the gap between the religious law and the reality as they understood it. In some cases they have recognized same-sex couples. The change started by providing material economic rights such as the right to a benefit given to the spouse by an employer; mutual inheritance rights, and more. The courts did not stop there but continued both on the public level and in matters of status. For example, today same-sex couples can be registered as a married couple in the Registry Office if they were married overseas, and they can adopt children just as a heterosexual couple can. Some argue that today there is no longer any meaning to the law which states that marriage shall be determined only by the personal religious law. The decisions made in these matters are sharply disputed and raise the constant prevailing tensions regarding Israel not only as a Jewish state but also as a democratic state. Although the Basic Laws stipulate that Israel is both, in practice these values conflict and often collide. This tension is clearly reflected in and may be analyzed through the issue of same-sex couples.

\textsuperscript{1} The Witherspoon Institute, \textit{Marriage and the Public Good: Ten Principles} 18-19 (2006).
\textsuperscript{2} Brief \textit{Amici Curiae} of Scholars of Marriage, \textit{Obergefell v. Hodges}, Nos. 14-556, 14-562, 14-571, 14-574.
**Obergefell and the Rise of Meaningless Marriage**
George Dent

For thousands of years the institution of marriage has been designed for the benefit of children by tying them to the extent possible to their biological parents. By mandating equal legal recognition for marriages of same-sex couples in *Obergefell v. Hodges*, the Supreme Court has eviscerated this social function of marriage. Various commentators have suggested that marriage will now serve to promote caring, committed adult relationships. Others claim that after *Obergefell* marriage serves the social function of conferring dignity equally homosexuality and normal sexuality (heterosexuality).

Under either of these rationales marriage would have to be radically transformed. More important, however, neither of these rationales is plausible as a matter of public policy. As a result, *Obergefell* has deprived legal marriage of any meaning at all; marriage now is just a registration of a group of persons who for any reason whatsoever want to be legally married. By draining marriage of its traditional social significance, *Obergefell* not only forfeits the support of widely held social norms deriving from long-standing traditions of Western civilization and its principal religions, but places the law in direct opposition to these norms. By so doing, *Obergefell* will eviscerate support for marriage. Many commentators consider this a good thing, but it will result in more children growing up without the benefit of living with both their parents and will exacerbate inequality in our society. Lawmakers may legitimately act against *Obergefell* and should consider doing so.

**Deconstructing Marriage/Reconstructing Marriage**
Carlos Martinez de Aguirre

Marriage, as legal institution, has experienced a sharp process of deconstruction in most of the western countries in the last decades: many of the characteristic features of marriage from the legal point of view (legal duties of the spouses, stability, heterosexuality), have progressively lost relevance, even have been erased from the Law. This has happened (and is still happening) in current Spanish Law, where marriage has become from more than a contract, to less than any contract. On the other hand, the evolution of marriage as a social institution has been much more slower than the legal one. A big effort is needed to reconstruct marriage both in Law and in Society: marriage has been legally deconstructed, and we need to start the reconstruction. My paper is based in Spanish Law, and consists of two parts: a short survey of the process of deconstruction of marriage, and some ideas about the ways to reconstruct it.

**Marriage, Self-Definition and Self-Expression**
William C. Duncan

Professor Anthony Esolen recently offered an analogy of a “carpenter whose tools are out of kilter.” That craftsman will find that, with those tools, he will “not have built a bad house; he will not have built a house at all.” In *Obergefell v. Hodges*, the United States Supreme Court attempted a renovation on the institution of marriage to make it roomier. This paper will discuss the “tools” the Court employed in its work and make some observations about the likely features of the resulting edifice. This latter discussion will focus particularly on the implications of the Court’s decision for the law of parenting and on dissent from the Court’s holding.
In discerning the nature of marriage, the law ought to be guided by the principle of subsidiarity. This principle – less well known in the United States than in Europe, where it is endorsed in several international instruments -- instructs government and the law to recognize the smaller organizations of society and to foster their flourishing. The principle – broadly developed, as is here recommended -- encourages the law to consider sensitively the aims, intentions, and purposes embraced by those who participate in important affiliations. This is specially so with regard to marriage. The principle of subsidiarity directs the law to be guided by the goods which are pursued by the participants in marriage. (Participants, by the way, include not only the spouses but also offspring, grandparents, other relatives, and all who bring forward society’s “great procession.”).

Wise discernment of the nature of marriage, or of any affiliations dear to the human heart, requires a deep understanding of “anthropology”: the nature and good of man’s ways and the deeper springs of his being. Regrettably, a shallow and distorted anthropological ideology informs the opinions of some of our judges and lawmakers: one which identifies the person as, if not entirely “without qualities,” then as an emotionalized being characterized by transient traits grounded in impulse, desire, and unconsidered habits. This impoverished understanding is reflected in some judicial opinions relating to marriage and the family.

Many modern people do, it must be conceded, seem to bear a resemblance to the “person without qualities.” Deeper down, however, almost everyone aspires to something firm and lasting as the grounding of his character; and certainly as the grounding for his marriage. The principle of subsidiarity exhorts the law to assist in the realization of these aspirations.

The definition of marriage in a number of Western juridical systems has been deprived of some of its constitutive elements. This new idea of marriage, that includes different kinds of unions with diverse aims, appears to enjoy the support of the majority of the population. Recent rulings of the Supreme Courts of Spain, United States and other countries confirmed the general acceptance of this new shape of the marital union. The scenario of the debate of marriage has deeply changed in a short time; now, those who defend marriage with all its essential features are regarded as outlaws or even bigots. These developments led the regulation of marriage to a crossroads, where we may ask ourselves which direction should we take, or what can we do to protect marriage in the current situation. The paper conveys some reflections on this issue, as well as the prospective on the regulation of marriage in the future.

This presentation raises the question of what it means when marriage no longer solely means the union of a man and a woman. As the Supreme Court admitted, marriage may be society’s most enduring and essential institution. As with any institution, changing the basic definition and social understanding of marriage will change the behavior of its members. The gender composition of marriage is now a private matter, a personal choice, and not a legal requirement. “Whatever” is now the answer to the question,
“What is the gender composition of marriage?” What does whatever mean? If there are benefits to this change for same-sex individuals and their families, are there also risks for heterosexual society that accompany this redefinition of marriage?

The Juicy Truth About What Will Happen to Women After Obergefell
Lynne Marie Kohm & Sandra E. Alcaide

This paper will consider the effective changes to marriage as a result of Obergefell and how those changes will cause women and children to suffer harm, while simultaneously fostering the exit from marriage by men. Our thesis will discuss whether and how same-sex marriage advances the exit from marriage by heterosexual men, and how that will affect women and children in a collateral fashion. We will consider this question in three sections: how women are affected in inequality, how women are affected in child bearing as commoditized surrogates, and how women and children are affected in child rearing.

Obergefell and the Future of Substantive Due Process
Richard Myers

Obergefell v. Hodges is an enormously important decision that will have profound effects on marriage and religious liberty in the United States. Those issues will be explored in great detail, including by several of the speakers at this conference. In this paper, I will focus on a different issue. The principal basis for the Court’s holding that laws defining marriage as the union between one man and one woman are unconstitutional was the doctrine of substantive due process. That came as a surprise to some observers because much of the emphasis in the challenges to the constitutionality of traditional marriage laws was on equality themes. The Court’s reliance on substantive due process revived a doctrine that had fallen into disfavor and opens the prospect that the doctrine might be used in other areas. For example, there has been much focus on whether Obergefell’s due process holding might be extended to protect polygamy. The most important substantive due process issue in the coming years, however, is likely to be whether Obergefell portends a Supreme Court ruling overruling Washington v. Glucksberg. I think that Obergefell does make it likely that the Court will invalidate laws banning assisted suicide and it is that issue that I will address in this paper.

Conscience and the Culture Wars
Douglas NeJaime

This talk analyzes conscience claims emerging in U.S. culture wars. Complicity-based conscience claims—where religious objectors seek exemptions from laws that they assert make them complicit in the sins of others—are common in culture war contexts and pose special concerns about third-party harm. The accommodation of complicity-based claims exponentially expands the universe of potential objectors—especially a concern where the traditional norms animating the objections have only recently been disestablished. Under these circumstances, barriers to access of goods and services may spread, and their social meaning will be legible and stigmatizing. As importantly, sanctioning complicity-based claims frustrates attempts to mediate the impact of religious accommodation on third parties.
The Impact of Obergefell – Traditional Marriage’s New Lease on Life?
David Pimentel

Many social conservatives are lamenting the Obergefell decision as the latest blow to traditional marriage, a concept they hold dear. Indeed, in American society, marriage has been on a steady decline for at least 50 years. Its legal significance has eroded as legal alternatives to marriage have proliferated, and as marital rights have been extended to various types of relationships that fall short of the level of commitment demanded by marriage. But the Obergefell decision may not be what it seems; there’s compelling reason to believe that it signals the resurgence of marriage in American society.

Justice Kennedy’s opinion in Obergefell is remarkable in its thrust and tone, because it depends in large part upon the cultural significance of the marriage bond, the resonance that the concept of marriage has in our society. This comes at a time when that resonance has never been weaker, as fewer couples are choosing to marry, and as the legal system offers them fewer reasons to do so. Among other legal developments diminishing and devaluing the marriage contract, the legal benefits of marriage have been extended to unmarried couples in a range of alternative relationships, including civil unions and domestic partnerships. The upshot is that marriage has ceased to provide a bright-line legal status that triggers recognition and benefits for couples.

Much of the impetus for creating and legally recognizing these alternatives to marriage was the desire to give same-sex couples access to those same benefits. Post-Obergefell, of course, same-sex couples have access to marriage. And Justice Kennedy has reaffirmed the cultural resonance of marriage, in the midst of and as a reason for extending its availability to same-sex couples. Motivated not by the marriage’s decline, but by its continuing significance, his opinion recognizes the desire of same-sex couples to make this public declaration of love and commitment to each other, and to have society acknowledge it.

Accordingly, the Obergefell decision may signal the start of the backswing of the pendulum, and marriage can reclaim the significance it once had and that Justice Kennedy insists it still carries. Now that marriage is available to everyone, there is no longer a reason to recognize domestic partnerships, or other, lesser alternatives to the marriage contract. The rhetoric of the defendants in Obergefell, and the other same-sex marriage cases, suggests that the state’s interest in promoting marriage is tied very much to the interests of children, who benefit from stability and security in their family situation and from growing up in a two-parent household. If true, the state should be interested in withholding the recognition and benefits from couples not willing to make the long-term commitment contemplated by marriage vows. Perhaps in a post-Obergefell society, now that marriage is available to all, the states can give renewed priority to promoting stability and permanence in families, and phase out legal recognition and benefits for alternative relationships that fall short of the full marriage commitment.

The creation and recognition of alternatives to marriage—supported by many religious conservatives as a means of staving off recognition of same-sex marriage—may have backfired, contributing to the erosion of marriage as a meaningful legal institution. Clarity in the law will benefit from a return to bright line rules, where nothing less than marriage itself qualifies individuals to enjoy and claim legal status as a couple, gay or straight. At the same time, this would better serve the state’s stated interest in promoting the security and stability of family relationships. In this sense, the Obergefell decision may not signal traditional marriage’s demise as much as its rebirth, in an incarnation that is both more inclusive and more robust.
What Obergefell May Mean for Academic Freedom
Charles Russo

Solicitor General Donald Verrilli’s words, uttered in response to a question posed by Justice Samuel during oral arguments in Obergefell v. Hodges (Obergefell), likely sent chills up the spines of leaders in faith-based educational institutions from pre-schools to colleges and universities. In Obergefell, the Supreme Court, in a five-to-four judgment, imposed same-sex unions on the United States. Verelli’s words, suggesting that the tax exempt status of faith-based institutions could be at risk if they do not embrace such relationship, combined with the outcome in Obergefell have a potentially chilling effect on religious freedom not just in educational institutions, the primary focus of this article, but on a wide array of houses of worship, not to mention health and social services type agencies. In fact, Obergefell was handed down amid a growing body of actions demonstrating hostility to religion, not all of which have been litigated.

Against this backdrop of threats to religious freedom on the post-Obergefell horizon, the remainder of this article is divided into three substantive parts. The first section briefly reviews recent Supreme Court judgments undercutting religious freedom when it comes into conflict with the interests of individuals who are gay as the Justices have not sought to forge a path of compromise protecting the rights of persons on both sides of the issue. The second part reviews the judicial history of Obergefell along with a summary, analysis, and critique of key portions of the Justices’ opinions. The third section reflects on the status of religious freedom for faith-based institutions and their employees, cautioning them to be aware of the coming legal battles at a time when some of their most cherished of rights are under steady attack by those who would usher in a fundamental transformation of the United States leading to a “closing of the American mind.” The article rounds out with a brief conclusion.

Obergefell And The Marriage Ecosystem:
(Another Reason) Why the Decision Was Wrong And Should Be Overruled
Gene Schaerr

The majority’s 5-4 ruling in Obergefell will likely weaken the whole institution of marriage, and with it the social ecosystem that has grown up around it. That is not because same-sex marriages will directly harm existing man-woman marriages. It is because the forced redefinition carries the substantive risk of undermining important social norms—like the value of biological connections between parents and children—that arise from the man-woman understanding of marriage, that typically guide the procreative and parenting behavior of heterosexuals, and that are highly beneficial to their children. Accordingly, the Obergefell majority’s imposition of same-sex marriage on the states creates enormous risks of substantial long-term harm, especially to the children of man-woman couples.

This article shows that the desire of most States to avoid those risks provides ample constitutional justification for their decision to limit marriage to man-woman couples. Section I describes the benefits of the man-woman understanding of marriage and its associated secular norms. Section II then explains how redefining marriage in genderless terms undermines those norms and thereby creates enormous social costs and risks. The seriousness of those risks cannot be denied: In every U.S. jurisdiction for which such data are available, after the adoption of same-sex marriage, the opposite-sex marriage rate declined by least five percent—in comparison to a national marriage rate that, in the past few years, has been fairly stable. If a forced redefinition of marriage were to cause only a five percent permanent decline in U.S. opposite-sex marriage rates, under reasonable assumptions and over the next fertility cycle (30 years), that decline would result in nearly 1.3 million fewer women marrying. That in turn would
lead to nearly 600,000 more children born into nonmarital parenting situations, and nearly 900,000 more children aborted.

Section III elucidates the logical and scientific flaws in Obergefell and other recent court opinions that have denied or downplayed the risks of a forced redefinition to the marriage ecosystem. As we show, all of the responses to those risks have relied upon misunderstanding, diversion and mischaracterization rather than serious analysis.

Building on this analysis, Section IV offers a compelling legal reason—beyond those articulated in the Obergefell dissents—why a future Supreme Court should overrule Obergefell. Specifically, a state’s decision to retain the man-woman definition is not only rational, but narrowly tailored to compelling, secular governmental interests. Accordingly, even if a state’s decision to adopt or retain the man-woman limitation were subject to the highest level of constitutional scrutiny—an issue the Obergefell majority did not bother to address—that decision is still within a state’s authority under the Fourteenth Amendment. And that means that, even if the Obergefell majority was correct in concluding that the general “right to marry” previously recognized by the Court extends to same-sex marriage, the majority was still wrong in holding the man-woman definition unconstitutional—especially without any explanation of why the majority believed that definition does not satisfy whatever legal standard the majority believed appropriate. For that reason alone, Obergefell was wrong as a matter of settled constitutional law, and devastatingly wrong as a matter of social policy.

Bad Information Makes for Bad Decisions:
Social Science Research and Same-Sex Marriage
Walter Schumm

On the surface the Obergefell v. Hodges Supreme Court decision appears to be based primarily on some peculiar version of law (Schumm, 2015b) rather than on sound social science. However, the road to that decision was paved with biased and faulty research that violated normal scientific norms of ethics and accuracy. Such flawed research results have often been accepted at face value by both professional social-science organizations and judicial authorities. Examples are presented of how basic “facts” such as how many children are being raised by same-sex parents have been extraordinarily incorrect; how nonrandom, “convenience” samples have been accepted as the only available option even though random, national samples have existed for many years; how sample designs have been corrupted; and how erroneous statistical analyses have been conducted. It appears that in many cases the role of politics has overridden scientific common sense and standard methodological protocols, damaging the credibility of both social scientists, the field of social science, and the integrity of many social science professional organizations. The acceptance of such inferior research, both in general and in terms of specific journal article results, as long as it appeared to support politically correct objectives, suggests the use of an approach to science whereby “the ends justify the means”. In the future, conservative social scientists must respond to bad research more quickly with rebuttals directly to the journals involved rather than to other journals and better coordination needs to occur between legal authorities and conservative social scientists.
Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond
Edward Stein

In his dissent in Obergefell, Chief Justice Roberts issued a challenge to the majority, saying in effect that the majority’s argument that prohibiting same-sex marriage is unconstitutional seems to also entail that prohibiting plural and group marriage is unconstitutional. Specifically, he said, “[M]uch of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.” My presentation focuses on a possible response to this challenge: being gay, lesbian or bisexual is immutable and/or innate, while being polyamorous is neither innate nor immutable.

In the past, some advocates of same-sex marriage tried to distinguish sexual orientation from polyamory in order to resist a slippery slope argument against same-sex marriage. As Andrew Sullivan put it almost twenty years ago, “[H]omosexuality… occupies a deeper level of human consciousness than a polygamous impulse.” After Obergefell, opponents of plural and group marriage—whatever their views of same-sex marriage—may find themselves wanting to make distinguish same-sex marriage and polygamy. Both may be tempted to use immutability to make these distinctions. I argue, however, the appeal to immutability fails whether in the hands of advocates of same-sex marriage trying to respond to Chief Justice Roberts’s challenge or in the hands of defenders of “traditional” marriage trying to argue against plural and group marriage. Careful consideration of the varied meanings of immutability suggests that polyamory and sexual orientation are not as different as we might think. I further suggest how, now that Obergefell has established that same-sex couples have a constitutional right to marry, defenders of “traditional marriage” may find themselves needing to radically reframe the arguments they make against plural and group marriage.

The Innocent Victims of Obergefell
Lynn D. Wardle

The decision of the Supreme Court of the United States on June 26, 2015, in Obergefell v. Hughes, 576 U.S. ___, 135 S.Ct. 2584 (2015), interpreting the Constitution of the United States as requiring all states to legalize (license, permit and recognize) marriages between same-sex couples clearly implicates the legal and social meaning of marriage in this country, and probably will impact how marriage is perceived and legally-defined in some other countries and international organizations, as well. Marriage is an adult relationship because by definition and legal regulation in most nations only adults or older, adult-like adolescents are eligible to marry.

However, the legal definition of marriage also impacts children and women. Marriage and childrearing are closely linked in law and life. So the redefinition of marriage to include same-sex couples also redefines and alters the legal meaning and social understanding of parenting. It impacts the well-being of women as well, whose relational status is sacrificed. The redefinition of marriage to include same-sex couples will have profound impact upon some children and will have some impacts upon all children. It also will impact parenting, both directly through same-sex couple parenting and indirectly through the reconceptualization of the institution of marriage. Moreover, same-sex marriage was carried into American constitutional law upon the backs of children.

This paper considers the potential impacts, both negative and positive, of the legalization of same-sex marriage upon parenting, parents, and upon children. It will suggest that for children who are directly impacted, the potential of same-sex marriage for grave harms outweigh the potential for significant benefits. Also, for society and the indirect effects upon children in our society, the overall impacts of legalizing same-sex marriage will be detrimental.
Same Sex Marriage in Divided Societies: Is it Possible to Reconcile?  
Avishalom Westreich

The legal implications of the US Supreme Court’s recent ruling in *Obergefell v. Hodges* will probably not stop at the US borders. As in past value-based conflicts, the decision might strengthen the plight of same sex couples for legal recognition in other countries, nations, and cultures. Following the decision, it is reasonable to expect that it will bolster the trend to legal recognition of same sex partnerships and thus provide same sex couples with full and equal rights in a growing number of countries.

Israel is a paradigmatic example for a society divided in its attitude towards same sex relationships. A society in which the civil legal system recognizes (almost) full and equal rights of same sex couples, but a strong religious establishment objects it. A society in which same sex relationships are part of normal and regular life of some social groups, while others reject it. A society in which the political system tries (without full success) to walk between the raindrops: to provide same sex couples with civil rights, but without fully recognizing their relationships as equal. The direction of this process is however enhancing and increasing the rights of same sex couples including a *de-facto* right to marriage and divorce. In this environment, the *Obergefell v. Hodges* case will soon become part of the debate, mainly in the legal sphere; an additional argument (or even evidence) in favor of full recognition of same sex marriage.

At this stage, a greater challenge arises – in Israel, as well as in similar divided societies: will these legal reforms necessarily exacerbate intra-societal, cultural, religious and political strife? Is it possible to enhance reconciliation between contested parts of such a society, while advancing rights for same sex couples? In my opinion the answer is – Yes, but one must choose the appropriate strategy to do so. Bridging the gap between the deep differences in understanding and interpreting basic rights and values (e.g., equality and the right to marry) is difficult and almost impossible. The solution must be found in a different direction. Using H.L.A. Hart's classic model of legal-positivism I would like to argue that more modest expectations from the legal system of the divided society in which we live may assist in solving the problem. According to this model, the legal system ought to be based on social rules which treat certain types of behavior as a standard; shared social standards rather than substantial recognition of mutual and absolute rights and values.

Marital abode is a social standard which is shared by various groups in society. It includes most, if not all, aspects of the marital life: the right to marry (and the right to divorce), financial relationships, reproduction and so on. As a social standard it is shared and recognized by society's groups, each one with its own understanding of the substantive meaning of the rights and values connected to it. But this mutual recognition and sharing practices does not demand any part of the society to change its own values and beliefs.

Thus, bridging the gap between various groups in a divided society is possible even in the present context, when the very concept of marriage is seen so differently by diverse groups of the society. Bridging the gap while recognizing shared social standards – yes; enforcing the acceptance of substantial understanding of rights and values of one group on the other – no.