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As a Matter of Fact:

Factual Methodology in *Obergefell v. Hodges* and its Implications for Public Policy

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In June 2015, the Supreme Court of the United States handed down a decision in *Obergefell v. Hodges* which shook the ground of policy and jurisprudence. Speakers either hailed it as a landmark decision for equality and praised it for its insights or denounced it as a dangerous redefinition of state laws and legal concepts that lacked judicial restraint. By announcing in this decision that the Constitution prohibited states from defining marriage exclusively as a legal bond between a man and a woman, the Supreme Court hardened the lines in a cultural battle that had been simmering for decades. Now, as both sides of this cultural conflict draw up the battle lines and try to discern the next steps they will take, legal scholars are trying to figure out the implications of the confusing decision the Supreme Court reached in *Obergefell*. Much of this confusion has arisen because instead of following the usual factual methodology to reach this groundbreaking (and very controversial) decision, the Supreme Court used an abnormal pattern of fact-finding. The use of abnormal methodology resulted in many complicated and tumultuous policy questions at both the State and National levels of government.

### **Factual Sources in *Obergefell v. Hodges***

When examining evidence in *Obergefell*, the Supreme Court drew upon a number of sources, including both past precedent and facts produced by *Amici Curiae* briefs. The Court used two types of precedent: binding precedent from Supreme Court cases and persuasive precedent from lower courts. The lower court opinions were used primarily to introduce facts to the record, while binding precedent was used to introduce both facts and constitutional principles. Although citing past precedent is standard practice, the method the Court used in handling the *Amici Curiae* briefs was atypical, and therefore resulted in an unstable factual basis for their decision.

The generally accepted method for dealing with *Amici Curiae* briefs is to only use them insofar as they provide generally known historical facts or arguments from Court precedent. In *Obergefell*, however, the Court did not use the briefs to provide legal arguments; instead, it used them to introduce both explanations of historical trends and evidentiary testimony regarding the validity of arguments offered by the Respondent.<sup>1</sup> This usage of *Amici Curiae* briefs was a clear departure from the accepted norms.

While not all of the types of sources used by the Court in *Obergefell* were equally controversial, they were all poorly applied. The Supreme Court used many decisions concerning the right to marry, but they used no precedent that referred to a constitutional power to define marriage. An applicable Court precedent would have stated that when a definition was passed for the purpose of discrimination it should be changed by the Court. However, no such precedent was introduced. Instead, the Court proceeded upon the assumption that marriage was not defined as the States defined it.<sup>2</sup> In addition, when the Court used *Amici* briefs to introduce facts, they relied solely upon briefs for the Petitioner and the facts included therein. By not using Respondent briefs in a similar manner, the justices appeared to reach their decision long before the case was ever brought before the Court.

### **Factual Sources in *Amici Curiae* Briefs Used by the Court**

When examining the cited *Amici* briefs to determine why the Court used them, it is instructive to note what those briefs based their arguments on. An appropriate use of the briefs

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1. *Obergefell v. Hodges*, 135 S. Ct. 2588, 2595-96, 2600 (2015).

2. *Id.* at 2594. The Court stated that far from devaluing marriage, the petitioners sought the benefits and responsibilities of marriage, and that same sex marriage was their only path. By referencing same-sex marriage as an established entity, the Court automatically considered same-sex marriage to be as real and definite as heterosexual marriage, which the states in question vigorously denied in their laws and constitutions.

would have involved incorporating facts rooted in verified sworn testimony at the trial level. However, such is not the case for the briefs in *Obergefell*.

Of all the *Amici* briefs cited by the Court, only the Brief for the Scholars of the Constitutional Rights of Children complied with the generally accepted standards. These standards state that when arguing a case before the Court, only sworn facts within the Record are accepted as truthful and trustworthy. The Brief for the Scholars of the Constitutional Rights of Children rightly relied upon Court precedent to establish the constitutional rights of children in their relationships with their parents.<sup>3</sup>

The other sources utilized by the *Amici* briefs, however, involved articles and books which, although presumably peer-reviewed, were still challenged by opposing viewpoints. Neither the *Amici* briefs nor the Court took those opposing viewpoints into consideration; instead, they simply asserted their own position. At least one brief asserted that “homosexuality was an immutable characteristic” based on a study which asked homosexuals if they considered their orientation a personal choice or an individual identity.<sup>4</sup> An unsworn study based on subjective and non-expert testimony was thus used by the Supreme Court as a cornerstone of their opinion in *Obergefell*. Similarly, the *Amicus* brief filed by Gary J. Gates relied on a Pew Research Survey. The Court asserted that “hundreds of thousands of children” are raised in homes involved in a committed same-sex relationship. While the wording is technically applicable, the actual statistic returned an answer of 210,000 children—hardly what was inferred,

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3. Brief for Constitutional Scholars of the Constitutional Rights of Children as *Amici Curiae* in support of Petitioners, *Obergefell v. Hodges*, No. 14-556 (June 26, 2015).

4. Brief for the American Psychological Association, et al. as *Amici Curiae* in support of Petitioners at 8-9, *Obergefell v. Hodges*, No. 14-556 (June 26, 2015).

and certainly not derived from the most reliable source available.<sup>5</sup> Not only did the Court use an unverified source of debatable veracity, but they also used wordplay to distort the apparent results to make a more compelling argument. In doing so, they undermined their own claims to being unbiased, because if the argument was in fact compelling, no Court should have to rely upon rhetoric and unreliable statistics to make their case.

### **Fact Patterns and Usage at the Trial Level**

This oversight on the part of the Supreme Court is dismaying in part because even though the Court had access to a number of facts at the trial level, it made little or no use of them. While it is true that only one of the cases at the trial level included the evidence gathered within its opinion, that decision and the evidence contained within it represented both sides of the debate.<sup>6</sup> By not even considering the statistical claims of the opposing side when comparing statistics, the Supreme Court undermined its own case by apparently pursuing data which fit its own opinions, rather than data provided by the most reliable studies available.

In *DeBoer v. Snyder*, the District Court laid out the evidence in favor of striking down the State provisions prohibiting same-sex marriage. The first testimony examined was given by a psychologist named David Brodzinsky. He testified to the sufficiency of a same-sex relationship in providing the same level of parenting as a heterosexual marriage.<sup>7</sup> The Court noted that his testimony was criticized by the respondents for using of “convenience sampling,” but he argued that such sampling, while critiqued for its small sample sizes, was widely accepted in the field of

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5. Brief for Gary J. Gates as *Amicus Curiae* in support of Petitioners at 4, *Obergefell v. Hodges*, No. 14-556 (June 26, 2015).

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

7. *Id.* at 761.

sociology.<sup>8</sup> Next, a sociologist named Michael Rosenfeld testified that, based upon his research, same-sex couples show the same level of stability as normal couples as long as same-sex marriages were legally recognized.<sup>9</sup> The last witness against the ban was a historian, Nancy Cott, who testified that provisions banning same-sex marriage undermined the historical benefits afforded to married couples.<sup>10</sup>

The District Court then moved to consider evidence from the proponents of the marriage ban. Sociologist Mark Regnerus presented a study arguing that children who grew up with same-sex parents were more likely to be unmotivated and uncommitted. The trial court considered his evidence “entirely unbelievable, [hastily concocted], and not worthy of serious consideration.”<sup>11</sup> However, other evidence provided by family studies professor Loren Marks and economists Joseph Price and Douglas Allen agreed with Regnerus’s conclusion. These studies demonstrated flaws with Rosenfeld’s work, and argued that children coming from same-sex marriages were more prone to crime, less prone to finishing high school, and generally more troubled.<sup>12</sup> The District Court once again dismissed their conclusions as “largely unbelievable,” criticizing their opinions for not aligning with the opinions of the majority of their colleagues. However, Price and Allen maintained that most other sociologists were under pressure to agree with the majority and thus used a sampling method that gave flawed results.<sup>13</sup>

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8. *Id.* at 762.

9. *Id.* at 762-63.

10. *Id.* at 764-65.

11. *Supra.* at 766.

12. *Id.* at 766-68.

13. *Id.* at 768.

Convenience sampling has been criticized in the past. Although Brodzinsky argued that it was acceptable as long as the statistics could be duplicated by other studies, other fields of research have found that convenience sampling is ill-suited to making the sort of sweeping generalizations that the District Court relied upon in its opinion.<sup>14, 15</sup> Rather than carefully examine Brodzinsky's and Rosenfeld's studies, the District Court instead elected to dismiss their critics as a "fringe viewpoint that is rejected by the vast majority of their colleagues."<sup>16</sup> Considering that no scientific study challenging a consensus can rightly be called "fringe" simply because it represents a minority, this dismissal was a woefully ignorant decision. The scientific method dictates that if a survey method suffers from definite flaws, it is not validated simply because a decent majority of scientists decide to support it. Despite what Brodzinsky seemed to be inferring, a majority vote to ignore potential flaws does not make those flaws disappear.

Nevertheless, although the District Court's rejection of evidence was somewhat careless, it pales in comparison with the way the Supreme Court handled the factual record. Justice Kennedy did not consider any of the sworn testimony from the trial level, relying instead upon opinions and studies referenced in the *Amici Curiae* briefs. What is more, where the District

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14. *Id.* at 761-62.

15. Rachel A. Pruchno, et al., *Convenience Samples and Caregiving Research: How Generalizable Are the Findings?*, 48 *The Gerontologist* 820, 824 (2008) ("Identifying and recruiting members of rare populations...[from] settings where they tend to cluster or by using broadbased community networking strategies is likely to yield significant numbers of potential respondents. Yet...only a few studies have examined the extent to which knowledge generated from convenience samples can be generalized to a broader population. Results from our analyses suggest that one should make such generalizations cautiously. Our results suggest not only that people recruited to research studies using convenience methods are different from those recruited using RDD methods but also that findings and conclusions differ as a function of sampling strategy").

16. *DeBoer*, 973 F. Supp. 2d at 768.



Court gave at least token acknowledgment to the existence of evidence in favor of opposing viewpoints, the Supreme Court simply acted like such opposing viewpoints did not exist.

### **Effects of *Obergefell* Applications on Current and Future Policy Considerations**

When considering the implications of *Obergefell* for federal, state, and local policies, it is important to remember that the Supreme Court's decision never openly claimed to override other constitutional freedoms. However, there can be little doubt that it nevertheless opened the floodgates for controversial policy initiatives by emboldening and empowering a very eager and revolutionary agenda within the United States.

At the state level, the decision gave one simple directive. States were not allowed to deny same-sex couples a marriage license. Under this incredibly narrow ruling, there was plenty of room for accommodation of persons with religious objections.<sup>17</sup> That being the case, *Obergefell* did not resolve many issues in the LGBT debates. However, many persons who wished to advance a different agenda tried to suggest that the Court *had* resolved many issues. As a result, there was an increasing push to grant homosexuals a protective classification under the Federal Title VII, and many schools were pressured to increase same-sex inclusiveness in their curriculum and hiring processes.<sup>18</sup> The main reason these pushes exist, according to the Family Research Council, is because the same-sex marriage debate was never just about what the law required. The debate was not about the *right* to marriage, but the *meaning* of marriage; the real issue was thus a deep underlying cultural conflict. The requests and demands that were issued in the months after the *Obergefell* decision did not fall under its purview. Most people who filed

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17. FRC University, *Obergefell: One Year Later*, Family Research Council (June 24, 2016), <http://www.frc.org/events/obergefell-one-year-later>.

18. Maria Lewis, Mark Walsh, & Suzanne Eckes, *Legal Matters: The Impact of the Marriage Equality Decision on Schools*, Principal Leadership, Apr. 2016, at 56-58.

anti-discrimination lawsuits were not upset because State offices would not issue marriage licenses at all. Rather, they were upset because one single clerk attempted to opt out or delegate the job to a different co-worker.<sup>19</sup> The Court's decision in *Obergefell*, which might not have been reached if standard factual methodology had been followed, provided an opportunity for these complaints to be seen as legitimate in the eyes of the law.

The following quote from a commentary on the post-*Obergefell* policy climate written by a pro-same-sex author exemplifies the reality of this cultural clash:

This [Judeo-Christian] belief system [that certain actions are inherently sinful, and thus should be avoided]...should also be targeted in advocacy and intervention efforts. There is diversity in religious views with many Christians believing all persons are valued "children of God." Scriptural scholars, historians, and Web site authors have advanced more complex views of religious texts, thus raising serious questions about the sinful, amoral nature of homosexuality. Advocates of same-sex marriage might find these theological arguments helpful in fostering a more tolerant view of same-sex marriage among religiously devout individuals.<sup>20</sup>

In other words, same-sex advocates were not interested in letting religious conservatives mind their own business—rather than defending themselves, they felt they had to take an offensive action. It was not sufficient that men be allowed to marry men—they had to also have the approval of every one of their neighbors. If anyone professed a belief that homosexuals were endangering themselves in a sinful lifestyle, the same-sex lobby would not rest until that person had been convinced to stop doing so.

Unfortunately, that reaction was not restricted to the months immediately following *Obergefell*. The Court's decision gifted the same-sex lobby with a blank check in the policy-

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19. FRC University, *Obergefell: One Year Later*, Family Research Council (June 24, 2016), <http://www.frc.org/events/obergefell-one-year-later>.

20. Claire Wood & Daniel Perlman, *The Meaning of Intimacy: Post Obergefell Implications*, 15 *Analyses of Soc. Issues and Pub. Policy* 426, 427 (2015) (internal citations omitted).

making arena, and they are still cashing it in. Fortunately, the lobby is not unopposed; since *Obergefell* was handed down, no major church denomination has changed their stance in regard to same-sex marriage. It would seem that the battle lines are drawn.<sup>21</sup> However, the demands of the same-sex lobby are becoming increasingly militant. While *Obergefell* itself handed down very few legal imperatives beyond requiring States to issue marriage licenses to same-sex couples, the battles resulting from the decision have extended far beyond that to include non-discrimination laws, clashes with religious freedom, and many other constitutional issues. Even worse, state courts are ruling almost unanimously that non-discrimination laws trump religious freedoms.<sup>22</sup> This is not based on anything explicitly stated in the *Obergefell* decision, but instead rests its case on the fact that *Obergefell* tacitly placed a stamp of approval on same-sex activity, and in doing so granted it special legal protection.

As an example of this, a research article which proposed an action plan for the same-sex lobby included several potential solutions to the “problem” of resistance to the same-sex agenda:

Resistance to the Supreme Court decision may be especially pronounced in highly concentrated areas of individuals opposed to same-sex relationships. In these areas, one potential point of intervention may be through certification boards or training requirements for working with...[LGBT] individuals and same-sex couples. Furthermore, part of the efforts of policy makers should be directed toward combating the notions that homosexuality, bisexuality, pansexuality, asexuality, etc. is anything other than normal variation on the spectrum of human sexuality...[including] through altered expectations and requirements for school curriculum.<sup>23</sup>

In other words, if the same-sex lobby cannot convince adults to accept normalized same-sex relations as a natural part of the human bodily function, then it will do two things. First, it will

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21. FRC University, *Obergefell: One Year Later*, Family Research Council (June 24, 2016), <http://www.frc.org/events/obergefell-one-year-later>.

22. *Ibid.*

23. Claire Wood, *supra.* at 427.

require any job that involves interacting with LGBT people to “certify” that applicants agree with the same-sex lifestyle. Second, it will target children through public education—children who, having no concept of sexual identity, are ripe for the confusion and bewilderment that the sexual revolution uses to encourage alternate sexual lifestyles. In this way, the LGBT lobby becomes self-propagating, essentially recruiting and creating more members for itself.

### **Conclusion**

For the very same set of reasons, the Supreme Court’s decision in *Obergefell v. Hodges* was both expected and anomalous. In recent years, conservatives have condemned the Supreme Court for a lack of judicial restraint, so it was unsurprising to many that it committed overreach in the *Obergefell* case. However, almost no one could have predicted the slipshod way that the Court introduced facts into the record that had never been testified to in a court of law. There are many reasons that the standards of evidence exist. One reason is to ensure that the Court considers both sides of the argument, and the facts that favor them both. Another reason is that it prevents the Court from simply picking and choosing which facts it wishes to espouse as truth, without giving the other side a chance to refute those facts. However, the most important reason is that, without such standards, without concrete facts and sworn evidence, the Supreme Court will invariably hand down a decision that produces chaos rather than order, encourages anarchy instead of law, and grants groups like the same-sex lobby an open season to advance an agenda that seeks to suppress any who disagree with them.