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Spring 5-2016

## The Role and Rhetoric of Interest Groups in Obergefell v. Hodges' Amicus Briefs

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THE ROLE AND RHETORIC OF INTEREST GROUPS IN *OBERGEFELL V.  
HODGES'* AMICUS BRIEFS

by

Heidi Mills

A Thesis Submitted in Partial Fulfillment  
of the Requirements for a Degree with Honors  
(Mass Communication and Political Science)

The Honors College

University of Maine

May 2016

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## DEDICATION

To my family and friends,  
who never stopped cheering me on,  
who constantly believed in my potential,  
and pushed me to rely on God alone when it mattered most.

## ABSTRACT

This thesis explores the expression of polarization surrounding the most recent same-sex marriage case in the Supreme Court, *Obergefell v. Hodges*. 28 amicus briefs, submitted from interested groups and concerned individuals in support of either the petitioners or the respondents, were analyzed for the major points of concurrence and disagreement between the two sides. The aim of the study was to come to a more nuanced understanding of the ways in which both sides express their arguments either for or against same-sex marriage. What the findings of the content analysis suggest is that interest groups on both side of the same-sex marriage debate are not polarized merely because they are dissimilar. Instead, they are polarized because they possess many of the same values about the importance of marriage, family, and Constitutional law in society, but they differ as far as their methods of maintaining the sanctity of these institutions for future generations.

## INTRODUCTION

The issue of same-sex marriage has been a hot-button issue within the United States ever since the Stonewall Riots, the foundation of the modern LGBT rights movement. Polarization, or the extent to which opinions on either side of an issue are highly divergent from one another, has characterized the heart of this debate. Numerous interest groups have weighed in on this topic, along with invested politicians and concerned individuals alike, and no consensus has yet to emerge. The battle over this issue has been waged on numerous fronts, including newspaper headlines, television segments, public protests, legislative chambers, and state and federal courtrooms. In the minds of many of these interested parties, they were fighting for nothing less than the future of the nation.

In July 2015, the Supreme Court handed down the landmark decision in *Obergefell v. Hodges*, which affirmed that same-sex couples possess the fundamental right to marry. During this decision, many interested parties submitted *amicus curiae*, or friend of the court, briefs to express their opinions to the Court and contribute to the ultimate decision. These amicus briefs are not so much a cause of polarization within society, but rather an expression of the polarization that already exists. This thesis will provide a context for understanding amicus briefs as a symptom, not a cause for polarization, and analyze these briefs for the major thematic arguments that make up the rhetoric of both sides of the debate. Lastly, the thesis will discern 1) what these amicus briefs say about essential character of the debate over same-sex marriage, 2) analyze which arguments are likely to continue to be made in the wake of the Supreme Court case, and 3) look ahead to the future of the debate over this issue within broader society.

The first chapter of this thesis will provide an overview of theories of polarization and attempt to answer some key questions regarding the character of the conflict within the United States. The chapter will describe James Davison Hunter's classic example of the “culture war” and address some of the major critiques of his argument from Alan Wolfe and Morris Fiorina. These three scholars acknowledge that there are certain issues that polarize political discourse, but they disagree on the main distinguishing factors that contribute to this polarization. However, they all seem to arrive at the consensus that elites, not necessarily individual people, contribute to the ubiquitous air of polarization surrounding certain issues, like abortion and same-sex marriage. One of the major fronts where these elites are able to clash directly with one another on such divisive issues is the Supreme Court.

The second chapter explores the role of the Court in the battle over same-sex marriage. It traces the history of same-sex marriage litigation from the 1970s, following the infamous Stonewall Riots, all the way up to the present day. Members of the LGBT community have long brought their cases before the Court, arguing that their denial of marriage licenses violates their Constitutional rights to due process and equal protection under the law. Interest groups on both sides of the aisle have made their cases before state and federal courts. In recent years, three cases have made it up to the Supreme Court: *Hollingsworth v. Perry*, *United States v. Windsor*, and *Obergefell v. Hodges*. Each of these decisions expanded the rights of same-sex couples until, finally, in *Obergefell*, the Court granted same-sex couples the right to marry. Interested parties contributed to the case not only by sponsoring the litigation, but also by submitting *amicus curiae* briefs to advocate

for their preferred course of action.

*Amicus curiae* briefs, as will be explored in Chapter Three, are one of the major ways that interest groups advocate and lobby within the judicial system. The amicus brief has evolved throughout its history, from its earliest reputation under English common law as a neutral brief by uninterested bystanders to its modern understanding as an advocacy document on behalf of one side in a case. Under the current judicial system, amicus briefs are increasingly being submitted by interested parties in support of the petitioners or the respondents. In this way, elites are able to express their arguments in support of a particular course of action and potentially impact the Court's ultimate decision. The chapter defines the modern uses and limitations of the amicus brief as an advocacy document and provides basic reasons for why these documents are useful in exploring polarization, especially within the context of modern Supreme Court decisions.

The following chapter will describe the methodology behind the content analysis of 29 randomly-selected briefs from *Obergefell v. Hodges*. First, it will provide an explanation of content analyses in a general, theoretical sense and describe some of its key advantages and disadvantages. Next, it will lay out precisely the procedures used to conduct the content analysis and code for particular arguments within the petitioners' and the respondents' briefs. The purpose of the content analysis was not to discover the key causes of polarization within the briefs, but rather to describe the ways in which an already polarized document expresses that polarization. The very fact that amicus briefs are being submitted in a Supreme Court case in favor of one side or the other presupposes polarization; this study is particularly interested in the construction of the polarization

and what the most commonly-used arguments say about the ways in which both sides relate to (or do not relate to) one another.

To that end, the last two chapters analyze the amicus briefs in depth. First, the chapter on the findings will delineate some of the major thematic arguments used across all of the briefs, not just the ones from the petitioners' or the respondents' *amici*. The chapter will lay the groundwork for understanding the ways in which the two sides construct their arguments around certain key points, like the harms to the LGBT community or the redefinition of marriage. In addition, the findings section will explore those times when the petitioners or the respondents discuss arguments that do not appear on both sides in relatively equal proportions and describe those differences. In other words, the findings chapter will provide a roadmap for understanding the most pertinent arguments made across the briefs.

The next chapter will explore precisely what those arguments mean within the larger context of polarization. How can we use the construction of the arguments within the briefs to understand polarization in a larger context? How are the briefs an expression of, but not a cause of, polarization that already exists within our political system? Perhaps most importantly, what do these chief arguments say about the future direction of polarization within the United States, both in the legal context and otherwise? The analysis will pose preliminary answers to these questions. Finally, the chapter will explore some key limitations of the study and directions for further research in this area.

## CHAPTER ONE: Theories of Polarization

Is the United States polarized?

This question has plagued many social scientists over the years as they have studied American society. Before answering it, however, it would be useful to define exactly what this thesis refers to when it mentions polarization. For the purposes of this thesis, polarization will be defined as “the extent to which opinions on an issue are opposed in relation to some theoretical maximum.”<sup>1</sup> In other words, polarization is the distance between the two side's opinions on an issue. If the two sides agree on a certain point, there would be no distance between their opinions and therefore no polarization. If two sides say precisely the opposite in relation to some issue, then there would be an expanse of distance between them and therefore a large degree of polarization. Polarization is not “mere incivility.”<sup>2</sup> It is not related to the vitriol or, conversely, the calm, used by two parties in expressing their opinion. Instead, polarization is a term used to describe the distance between two disparate opinions about anything from taxes to same-sex marriage.

One only has to look at the current political climate to see evidence of polarization. The two main parties in our society, the Republicans and the Democrats, fight for control of the government. They constantly seek to wrestle power from the other side to achieve their own policy initiatives. Regardless of their primary motivations, and regardless of the party who ultimately gains power, there appears to be a gradual widening of the chasm between the two parties. Competition exists “between equally balanced but extreme

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1 DiMaggio, Paul, John Evans, and Bethany Bryson. 1996. “Have American's Social Attitudes Become More Polarized?” *American Journal of Sociology* 102(3). University of Chicago Press.

2 *Ibid.*

support coalitions throughout most of the United States.” The Republicans have their base, the Democrats have their base, and neither is willing to sacrifice their “relatively extreme views” in order to represent a moderate position.<sup>3</sup> In this way, the parties constantly seek the assurance that comes from being a majority party in the government. Thus, contemporary politics is characterized predominantly as a tug-of-war between two extremely disparate factions within larger society itself. It seems we exist within a hopelessly partisan society, perpetuated predominantly by the Republicans and the Democrats.

In the early years of American society, however, this polarization did not exist. In fact, many observers of American politics criticized the fact that the parties were “nonprogrammatic, unprincipled, and ideologically indistinct.”<sup>4</sup> This fact has begun to change in recent years as the two parties increasingly diverge from one another. Many political theorists, reporters, and commentators have explored the nature of this polarization. In particular, they have demonstrated through empirical research that the Republicans and the Democrats “are each growing more homogeneous in their policy positions, while the differences between the two parties' stands on major policy issues are expanding.”<sup>5</sup> In other words, within the party, politicians and other officials are beginning to create a programmatic set of policy stances and issue positions that are relatively uniform among individuals. At the same time, these views are gradually becoming more conservative, on the side of the Republicans, and more liberal, on the side of the

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3 Poole, Keith T., and Howard Rosenthal. “The Polarization of American politics.” *The Journal of Politics* 46, no. 04 (1984): 1061.

4 Layman, Geoffrey C. “Party Polarization in American Politics, Characteristics, Causes, and Consequences.” *Annual review of political science* 9, no. 1 (2006).

5 *Ibid.*

Democrats. It seems, in this case, that two roads have diverged and they will likely never meet again, unless both parties decide to retreat back to their previously neutral positions.

However, a chief question is whether this level of polarization accurately represents the position of the average voter in the United States. Within the country, there are many middle-of-the-road voters that are not necessarily represented by the two major parties. These voters are not Republicans or Democrats. They are not members of “a silent majority desiring some radical social change,” but rather, they are moderate individuals who desire only to avoid the tumultuous policy shifts that are caused by our political system.<sup>6</sup> However, avoiding these policy shifts with each new election as one or the other party comes into power is not as simple as it sounds. Increasingly, voters are encouraged to pick a side, to choose between two “programmatic and ideologically cohesive parties” that present the voters “with clear-cut policy choices.” The winning party would, of course, attempt to “carry out its policy commitments in office.”<sup>7</sup>

Thus, the middle-of-the-road voters have two choices: 1) remain moderate and risk not being represented by their chosen political official; or 2) choose a side.

Evidence exists that support the selection of both choices. Alan Abramowitz, prominent political scientist at Emory University, argues that the presence of polarization in today's politics does not discourage voters from participating. To the contrary, the sharp divide between the Republicans and the Democrats on important policy issues, ranging from social issues like homosexuality and abortion to economic issues like welfare, has clarified the choices put before the voter and increased the stakes in each

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<sup>6</sup> Poole, Keith T. “The Polarization of American politics.”

<sup>7</sup> Abramowitz, Alan I. *The disappearing center: Engaged citizens, polarization, and American democracy*. Yale University Press, 2010.

election. As a result, the average citizen would be much more likely to vote and engage in other political activities. Therefore, the effect of this party polarization is at least partly positive, since it contributes to higher voter turnout and increased participation in other political activities, like talking about politics with friends and family, displaying yard signs, and giving money to candidates and parties.<sup>8</sup> When voters are given clear choices between two parties, and when one of the parties supports their deeply-held beliefs and the other party does not, logically the voter will choose to throw their hat into the former party's ring. Even though many modern political scientists claim that “ordinary Americans are losing interest in government and politics as a result of growing partisan animosity and ideological partisanship,” Abramowitz argues that precisely the opposite is true.<sup>9</sup>

However, there is a flip side to this equation: namely, the tendency of a large population of voters to refuse involvement within the political system precisely because of this polarization.<sup>10</sup> James Davison Hunter, best known for his literature regarding the culture war hypothesis (discussed later in this chapter), puts forth the idea that the vast majority of Americans do not align themselves with a particular ideological or partisan system of thought. Instead, most Americans exist in the middle territory between these two ideological extremes of American culture.<sup>11</sup> Although some naturally lean toward one side or the other, there are certain people who remain seemingly “oblivious” to either party and therefore continue as moderate voters.<sup>12</sup>

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8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 Hunter, James Davison.

12 DiMaggio, Paul. “Have American's Social Attitudes Become More Polarized?”

This viewpoint is supported by other empirical research. DiMaggio and others conducted a study on changing attitudes about abortion. They selected this issue in particular because the perceived level of polarization regarding abortion makes it incredibly difficult to imagine the occurrence of “democratic compromise.” Therefore, this issue, in particular, threatens the viability of American political institutions.<sup>13</sup> In studying this issue, however, they discovered that, even though the parties themselves have become increasingly polarized on this issue, “no empirical evidence of increased attitudinal polarization is presented.”<sup>14</sup> In other words, the public's opinions about abortion have remained at steady levels of polarization through the years. No noticeable increase in civilian polarization was observed.

How, then, can one make the case that there is continued polarization in today's society?

First, this chapter has already discussed the way in which parties have contributed to this climate of polarization. They have altered their platforms to emphasize their deviation from the other party's. Their positions on the issues have moved further to the left and the right, respectively. There is more room in the middle for compromise than ever before, but both parties are unwilling to sacrifice their essential positions in order to achieve such compromise. The two-party system of government presents two opposing choices and demands that voters choose between them or else risk their votes not mattering in the grand scheme of politics. In a very real sense, then, the choice of the voters whether to align themselves with the existent polarized structure has been made

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

for them already.

Second, the two parties are not the only institutional structures that contribute to polarization. Rather than individuals holding polarized views themselves, politics is increasingly dominated by interest groups that exemplify these polarized viewpoints. The “anatomy of cultural conflict,” or polarization, is rooted in the formation of these interest groups that espouse incredibly different views on morality, truth, and authority, in the context of social and political issues.<sup>15</sup> All individuals are not necessarily polarized, but those individuals who choose to get involved and form interest groups contribute to the pervasive polarization within our society. When one interest group has a certain view on same-sex marriage, for instance, and another interest group has the exact opposite view, the resulting discourse contributes to an atmosphere of polarization. James Davison Hunter calls this clash a “culture war,” which is explored more in depth in the next section.

### **The “Culture War” Hypothesis**

#### *Support*

To describe his hypothesis of a “culture war,” James Davison Hunter begins by explicating the difference between private and public culture. Private culture, according to Hunter, consists of the signs and meanings that order personal experience. This form of culture encompasses people's understandings of themselves and their relationships with close friends, family, coworkers and acquaintances. It also informs their conception of their larger circumstances and surroundings.<sup>16</sup> Private culture is the way in which private

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<sup>15</sup> Hunter, James Davison. *Culture wars: The struggle to define America*. Basic Books, 1992.

<sup>16</sup> *Ibid.*, p. 54.

individuals make sense of their world and everything that exists within it. Without the formulation of this culture, individuals would have no way to make sense of the primary events of their life—birth, adolescence, marriage, procreation, vocation, even death. This kind of culture is essential in ordering the lives of individuals and, more importantly, proscribing meaning onto individual lives. It is precisely this kind of culture that gives individual lives their significance.<sup>17</sup>

Public culture, on the other hand, consists of the symbols and meanings that order the life of the community or a nation as a whole. This type of culture is the culmination of the numerous symbols of “national life and purpose” that exist within a particular society.<sup>18</sup> To put it in simple terms, public culture is the embodiment of the values of a particular society. Through public culture, citizens understood the history and mythos of their nation and recognize the values—such as equality, liberty, and diversity, among others—that should define the nation. Public culture is the context in which individuals, communities and governmental bodies “envision the mission yet to be fulfilled.”<sup>19</sup> Public culture informs the character of a nation—past, present, and future.

Conflict arises when private and public culture collide within public discourse, particularly when several different conceptions of the “right” private culture vie for their place within public culture. Public culture does not emerge out of the ether. Instead, it is informed and shaped by private culture. Public culture is characterized as “a sphere of activity in which individuals and communities can present and advocate their particular interests.” It is the area in which various private interests can push for the adoption of

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<sup>17</sup> *Ibid.*, p. 54.

<sup>18</sup> *Ibid.*, p. 54.

<sup>19</sup> *Ibid.*, p. 55.

their own particular claims and viewpoints as a staple of public culture.<sup>20</sup> When most individuals present the same conception of private culture, public culture alters to fit the dominant ideology. However, when a number of individuals present extremely different claims and attempt to change the culture, then conflict—and inevitably—polarization threaten the previously universally-approved public culture. In this way, “the arena of public culture” is the place “where the struggle for cultural hegemony or cultural domination takes place.”<sup>21</sup> The formation of hegemony is centered around the victory of one particular brand of private culture that becomes universal enough to be considered public culture.

Individuals have a certain degree of control in changing the public culture. For example, a woman who gets unexpectedly pregnant might protest to unfair treatment by her local reproductive health clinics and fight for change in the reproductive politics of her city. A gay couple who wishes to get married might seek a marriage license, acknowledging the loopholes that exist in the marriage laws of many states which do not specify gender. A mother might attend a town meeting to protest the way in which sex education is being taught. There are numerous ways for individuals, recognizing that their own private culture is being disrespected, to seek change within the larger public culture. However, when it comes to effecting real change, Hunter acknowledges that the elites of society—the academics, special interest lobbyists, public interest lawyers, writers, community organizers, and movement activists, among many others—have resources that mere citizens do not have. In this way, Hunter states that “public discourse ... is largely a

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<sup>20</sup> *Ibid*, p. 56.

<sup>21</sup> *Ibid*, p. 57.

discourse of elites.”<sup>22</sup>

Elites are often more capable of transforming public culture to fit their own ideals. The old adage that “there is safety in numbers” applies to the discussion of the methods of achieving this success. One elite, regardless of their influence and sway, would not be able to change the entirety of public culture to align with their private culture. If a group of individuals unite to form an interest group or organization, however, their efforts are instrumental in both forming and maintaining their preferred public culture.<sup>23</sup> The problem arises when elites from both sides of a divide attempt to change culture to fit their own conception. No two elites agree completely, and when interest groups made up of these disparate people attempt to effect change, conflict inevitably occurs. According to Hunter, these elite interest groups and movements have disagreements occurring along several fault lines: the elucidation of the ideals of public culture, the meaning of national identity, the interpretation of collective myths, and the use of law in the resolution of public grievances, to name a few.<sup>24</sup> These fundamental issues are only a segment of a larger ideological conflict about the meaning of America—specifically, its past, present, and future meaning.<sup>25</sup>

Hunter divides the conflict into those elites who espouse an “orthodox” worldview and those who espouse a “progressive” worldview. The orthodox vision tends to emphasize the fact that America has received a “divine call” to be a nation built upon Christian ideals.<sup>26</sup> In their estimation, the Constitution, the Declaration of Independence,

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<sup>22</sup> *Ibid*, p. 59.

<sup>23</sup> *Ibid*, p. 60.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, p. 63.

<sup>26</sup> *Ibid*, p. 109.

and other founding themselves reflect divine providence.<sup>27</sup> The responsibility of America is to consequently live according to biblical ideals in an attempt to honor and reflect God's divine favor. The orthodox view also emphasizes the importance of freedom and justice, where freedom is constructed as “the freedom enjoyed by a *society* to govern itself.”<sup>28</sup> Freedom, in this worldview, is also constructed as “economic self-determination,” which emphasizes the value of a free market and a capitalist world order. In addition, economic and spiritual freedoms go hand in glove with each other to the point where it is impossible to have one without the other.<sup>29</sup> In turn, justice is understood almost exclusively in the Judeo-Christian terms of moral righteousness. A society is only just if it upholds the standards of biblical morality.<sup>30</sup> Ultimately, this orthodox view is centered around the biblical conceptions of a free and just society: in other words, the popularized conception of a “city on the hill,” first coined by John Winthrop in 1630. America was chosen to be God's nation, in other words, and therefore the nation is under obligation to honor that blessing. The nation should not change from its original founding, and if, for some reason, change must occur, the change should “more perfectly fulfill” the Christian ideals that have served as the backbone of the nation from its very founding.<sup>31</sup>

The progressive view, however, argues that America has historically been a nation characterized by pragmatism, optimism and secularism, not “forces of religious or artistic irrationalism.”<sup>32</sup> Consequently, the Constitution is not viewed as an unchangeable, static

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<sup>27</sup> *Ibid*, p. 110.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*, p. 111.

<sup>30</sup> *Ibid*, p. 112.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*, p. 113.

document that must be given a strict interpretation based on the Founders' intentions. Instead, our founding document is “a living Constitution” that is free to grow and change as society evolves. Following these societal changes, various subsections of the Constitution can be interpreted differently to better fit with the demands of the time.<sup>33</sup> Freedom, according to the progressives, is characterized primarily in terms of individual social and political rights. The Constitution, and the efforts of the Founders themselves, are meant to protect and preserve pluralism and diversity. Therefore, the Constitution is inherently a document that provides for the rights of minorities within the system.<sup>34</sup> Justice is intimately related to freedom in this regard, because it presupposes equality and the fight to end oppression in the free world.<sup>35</sup> The responsibility and the calling of America, then, is to protect the rights of minorities, like African-Americans, women, refugees, and homosexuals, among many others. America is a nation built upon the conception of rights for all, along with the twin principles of equality and diversity. Therefore, the progressives view their mission as the implementation of social justice for all, using the Constitution as a tool to achieve this end.<sup>36</sup>

One of the most important distinctions to be made between the orthodox and progressive worldviews addresses conceptions of ultimate authority. The orthodox viewpoint holds that there is one source of authority: the Bible. Within this worldview, certain unbreakable truths emerge:

Among the most relevant for the present purposes are that the world, and all of the life within it, was created by God, and that human life begins at conception and, from that point on, it is sacred. Another “truth” is that the human species is differentiated

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33 *Ibid*, p. 114.

34 *Ibid*.

35 *Ibid*.

36 *Ibid*, p. 115.

into male and female not only according to genitalia, but also according to role, psyche, and spiritual calling. Related to this idea is the belief that the natural and divinely mandated sexual relationship among humans is between male and female and this relationship is legitimate only under one social arrangement, marriage between one male and one female. Homosexuality, therefore, is a perversion of the natural or created order. Building on this is the conviction that the nuclear family is the natural form of family structure and should remain inviolable from outside (state) interference. And this idea encompasses the belief in the inviolable rights of parents—their right to raise their children into their own religious and moral tradition, the implication being that this role should be encouraged and not hindered by a secular, liberal educational establishment.<sup>37</sup>

Note the construction of homosexuality under this worldview. The orthodoxy holds that homosexuality is inherently an aberration, a subversion of the divinely-sanctioned relationship between one man and one woman for life. As a result, marriage could only be an institution between a man and a woman. The primary purpose of marriage is to provide a stable environment for couples to raise their biological children, free from the interference of the state. Marriage is a sacred institution, created by God, that cannot be changed or redefined.

A certain set of conceptions about life—and, more relevant for the purposes of this study, homosexuality—emerge from the progressives as well. Hunter exemplifies the major differences in concise terms:

...personhood begins at or close to the moment of birth, at least until science can prove otherwise. Likewise, until science can prove otherwise, male and female are differentiated solely by biology; other differences are probably human constructions imposed through socialization and reinforced in human relationships by powerful and sometimes oppressive institutions. So too, human sexuality is based in biological need. The forms in which those needs are met are historically and culturally variable and completely legitimate as long as those forms reflect a positive and caring relationship. Homosexuality, then, does not represent an absolute and fundamental perversion of nature but simply one way in which nature can evolve and be expressed. ... In like fashion, marriage and family structures are historically and

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<sup>37</sup> *Ibid*, p. 122.

culturally varied. Their form, by and large, depends upon need and circumstance.<sup>38</sup>

The progressives view homosexuality in a different fashion. They argue that there is nothing morally wrong with homosexuality; it is simply another natural expression of human sexuality. If a relationship between two people of the same sex express the same level of love, commitment and stability as a relationship between two people of the opposite sex, there is no reason to view one as inferior to the other. They reject one monolithic view of the family, arguing that they come in many shapes and sizes, and all of them are equally valid. There is no legitimate reason to discriminate against homosexuals, which is an organic expression of human sexuality. One can extrapolate this argument out to mean that there is no legal basis for denying same-sex couples the right to marry, as long as their relationships reflect values of love and commitment.

Within the larger public culture, these two worldviews war for dominance. As expressed earlier in this chapter, this war does not take place predominantly between individuals. The essence of the culture war hypothesis is that a fundamental shift has occurred within American public culture between the orthodoxy and the progressives, and now both sides seek to influence public culture in their favor. This shift was, and is still, institutionalized through special interest groups, political organizations, and governmental entities, whose struggle is given meaning through the “ideals, interests and actions” of their elites.<sup>39</sup> As these interest groups and other organizations have developed, they have grown into an “autonomous” reality that is much larger than “the sum total of individuals and organizations that give expression to the conflict.” Even though

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<sup>38</sup> *Ibid*, p. 126.

<sup>39</sup> Hunter, James Davison, and Alan Wolfe. *Is there a culture war?: A dialogue on values and American public life*. Brookings Institution Press, 2006, p. 20-1.

individuals are the ones who give these organizations a voice, it becomes a reality in and of itself, contributing to the culture of polarization in a way that individual voices alone do not.<sup>40</sup> The war for the past, present and future of America, particularly its significance and its ongoing mission, is waged among these interest groups across numerous cultural fields and disciplines. Such is the nature of polarization: interest groups disputing essential questions with other interest groups to gain dominance and power within the larger public culture.

### *Criticism*

Over the years, many political scientists have criticized the culture war hypothesis for its failure to account for the middle ground occupied by many average citizens in the United States. The vast majority of Americans are “constantly seeking a balance between rights and obligations, between social concern and self-reliance.”<sup>41</sup> In an individual's public culture, they do not hold purely orthodox and progressive views. Instead, their views could best be classified as a consolidation of beliefs from both of these worldviews. Therefore, this whole idea of a “culture war” rests on the flawed premise that most people are polarized in their daily lives.

Alan Wolfe, a political scientist and professor at Boston College, offers a succinct criticism of the culture war hypothesis. He argues that the culture war does not originate in the minds of individuals. Instead, it exists primarily in the minds of the elites of society, particularly journalists and political activists. If there is such a thing as a culture war, it is between “partisans and ideologically inclined pundits.”<sup>42</sup> This polarization exists

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid*, p. 3.

<sup>42</sup> *Ibid*, p. 42.

between the elites of society, not the individuals, because politicians need to find ways to energize their base, and ideologically driven interest groups need to fund-raise and gain support for their cause.<sup>43</sup> There is no better way to draw people to one's cause than to differentiate itself from the rest, to say “this is what I stand for” and ask people if they will stand with them. Republicans and Democrats accomplish this feat by positioning themselves on the extremes of social and economic issues. Interest groups exist on both sides of any possible debate that exists within today's society, from prayer in schools to same-sex marriage. These political elites contribute to the culture war by formulating extreme positions on issues related to issues of fundamental moral values.<sup>44</sup> Regardless of whether these positions represent the viewpoint of the average American, extreme perspectives naturally generate conflict and contribute to the polarizing political dialogue surrounding certain issues. These viewpoints eventually become the fuel for electoral debate, legislative action, and even litigation efforts.

Wolfe expands this point by arguing that there is a fundamental gap between the representation of these issues by the political elites and the values and opinions held by real Americans over those same issues. If there is a “culture war” going on, it is within the hearts of individuals, not between individuals and groups of people. According to Wolfe, most Americans believe in both traditional religious values and personal freedom, and deciding between the two does not always come easily.<sup>45</sup> Americans are constantly torn between the orthodox and progressive viewpoints, in other words, and they would much prefer to find a compromise between them. However, in the most pressing “hot-

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<sup>43</sup> *Ibid*, p. 49.

<sup>44</sup> *Ibid*, p. 49.

<sup>45</sup> *Ibid*, p. 46.

button” issues today, the political elites end up forcing the hand of individuals and representing the conflict in polarizing terms. One must either choose to support the orthodox or the progressive view; they cannot in good conscience find merit in both perspectives.

Take the issue of same-sex marriage, for instance. At first glance, same-sex marriage appears to be “the great exception” to Wolfe's claims. There is still a significant gap between the Americans who believe in traditional marriage between a man and a woman and those who believe that marriage rights should be extended to same-sex couples. Wolfe disputes the claim that the culture war exists in the minds of everyday Americans, but on the issue of same-sex marriage, there is evidence that Americans are indeed deeply divided on this issue. He concluded that “a culture war very definitely did exist” in this area. Even though Americans tend to support the right of homosexuals to engage in private conduct, they do not necessarily agree that the state should be able to grant them access to the traditionally heterosexual institution of marriage. In other words, there is a difference between turning a blind eye to private conduct and placing the State's seal of approval on public conduct. Recent political conflict, such as the legalization of same-sex marriage in Massachusetts and other states, along with the most recent political elections, have brought this polarization more clearly into the light.<sup>46</sup>

However, the issue of same-sex marriage is not as clear cut in recent years. Public opinion regarding same-sex marriage has gradually become more tolerant and nuanced over the years. Many Americans, including many conservatives, believe that gay and lesbian couples would be better off with legal recognition and all of the benefits that

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<sup>46</sup> *Ibid*, p. 47.

come along with it, even if the states did stop short of marriage equality.<sup>47</sup> Before the recent Supreme Court case, *Obergefell v. Hodges*, 37 states had taken steps to legalize same-sex marriage, many of them through state referendums. The fact that the majority of voters in each state chose to legalize same-sex marriage indicates that public opinion has gradually been shifting to allow for this transformation of one of the country's most important institutions. The reason for this shift is, in part, the fact that most people recognize the tension between the sacred value of marriage—as commonly explored in Judeo-Christian thought—and the sacred value of the Constitution, which allows for equal rights for all. As more people attempt to reconcile these two disparate viewpoints—in the words of Hunter, the orthodox viewpoint and the progressive viewpoint—there exists some middle ground where same-sex marriage can exist within our society. Eventually, Wolfe posits, this issue will become less polarizing as society, more generally, turns in a more tolerant direction.<sup>48</sup>

Just because individuals within society will seek common ground, that does not mean political elites will seek the same. These elites find value in presenting two diametrically opposing perspectives on issues. Extremism begets extremism. By creating an atmosphere of “ideological passion, all-or-nothing extremism, and apocalyptic scenarios,” they fight for their own party to gain favor. The same goes for interest groups: the more they can raise the stakes on the outcome of a certain issue, the more they can rouse their most devout supporters into action. Politicians need to rouse their base. Single-issue groups, such as those who advocate for or against same-sex marriage, are

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<sup>47</sup> *Ibid*, p. 48.

<sup>48</sup> *Ibid*.

not willing to give up until their own position is adopted by the government.<sup>49</sup> In this way, the elites are the ones perpetuating the current culture war. To a degree, individual voters align with these perspectives, but a large number of Americans are conflicted about these issues. Thus, the culture war, in Wolfe's construction, exists, but only in the minds and actions of political elites. Most average Americans want nothing to do with it.

Wolfe's critique of the culture wars is by far the most well-known, but it is not the only one. Another criticism of the culture war hypothesis emerges from Morris Fiorina. In many ways, Fiorina contributes to Wolfe's discussion about the culture war. He, too, believes that it is primarily political elites who contribute to the culture war, not individuals, and in fact, these elites do not reflect popular preferences.<sup>50</sup> Political elites advocate for policy changes and express issue positions that do not align with the true beliefs of the American populace as a whole. Elites focus on “cultural battles” over issues like abortion, gay rights, and gun control, when the vast majority of Americans would prefer more discussion over topics like health care, jobs, education, and national security. In this way, voters are presented with extremes when they would prefer more moderation.<sup>51</sup> The political elites choose to push forward their own policy initiatives and change society to fit their own ideals, rather than address the problems that most concern the general public.

In turn, the voters can either choose to accept this polarization and choose sides in the debate, or they can become disillusioned and disengage from the entire political process.

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<sup>49</sup> *Ibid*, p. 68.

<sup>50</sup> Fiorina, Morris P., Samuel J. Abrams, and Jeremy Pope. *Culture war?*. New York, NY: Pearson Longman 2005, as quoted in Hunter, James Davison, and Alan Wolfe. *Is there a culture war?: A dialogue on values and American public life*. Brookings Institution Press, 2006, p. 20-1.

<sup>51</sup> *Ibid*, 84.

Fiorina argues that disengagement is far more likely.<sup>52</sup> Americans have listened and watched as elites perpetuate the same kinds of racial, ethnic, and gender biases that these elites outwardly say they reject, all the while knowing their actions reveal another story. Regular Americans speak the “politically correct” language of diversity and talk in terms of polarization, but that does not necessarily mean that the people actually believe what they are saying. The people have just learned to speak the elite language.<sup>53</sup> Sooner or later, the people will turn their backs on the elites who are not talking about the issues that matter the most to them.<sup>54</sup>

Consequently, Fiorina argues that the culture war is in decline. The elites in charge of the war—the politicians, pundits, interest groups and activist organizations that disseminate their viewpoints throughout the society and attempt to garner widespread change through the government—are rapidly becoming “leaders without real followers.”<sup>55</sup> Elites naturally overestimate their own importance, and the people are beginning to turn to other news sources to get their information. The competition between the elites, their constant distribution of their own policy initiatives and ideologies, matters less when individuals can look to other non-biased sources to get information. As elites lose their influence in society, as individuals become more educated, Fiorina postulates that the culture war is “now showing signs of exhaustion.”<sup>56</sup> Soon, it will be outdated altogether.

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<sup>52</sup> *Ibid*, p. 85.

<sup>53</sup> *Ibid*, 86.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*, p. 87.

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Both of these criticisms of the culture war hypothesis are valid. However, there need not be any conflict between Hunter's explanation of the culture war and the criticisms levied against it. Both Wolfe and Fiorina acknowledge that the culture war is predominantly waged between the political elites, not the individuals. The war, to the extent that it does exist, is measured in the ways in which political elites dispute among each other about the most pressing issues within our society. Hunter admits this point within his book: "Without doubt, public discourse is more polarized than the American public itself."<sup>57</sup> The reason for this polarization, and the subsequent culture war, ultimately comes down to the discourse of the political elites within societies, not individuals.

For the purposes of this thesis, the main topic of the culture war is the legalization of same-sex marriage. As Wolfe admitted, the issue of same-sex marriage is precisely where the culture war seems to come into the clearest focus. In discussions about same-sex marriage, a "moral impasse" seems to have been reached between the political elites. Interestingly, both sides use similar forms of argumentation. They appeal to scientific evidence, social and legal precedents, and theology and biblical textual analysis, to name a few. The conflict occurs because each side has a fundamentally different interpretation of logic, science, history and theology. In this case, this difference has only enhanced and legitimated their divergent ideological interests. The two sides do not dialogue about their differences. Instead, each side of a polarizing issue only "talk past each other."<sup>58</sup>

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<sup>57</sup> Hunter, James Davison. "Culture Wars," p. 159.

<sup>58</sup> *Ibid*, p. 131.

Their central beliefs and interpretations of logic, science, history and theology thus become insurmountable stumbling blocks to a common understanding among opposing interests.

According to Hunter, cultural conflict becomes enshrined within various institutional structures: the family, education, the popular media, law, and electoral politics. Each of these areas are “instruments of cultural war,” or “a kind of symbolic field or territory for which opposing sides assert their interests through competing claims, seek to extract concessions, and endeavor to minimize their own losses.”<sup>59</sup> For the purposes of this study, the main institution to be studied is the law.

To be more specific, the courts have increasingly been the battlefield on which the war about same-sex marriage has waged between political elites. Hunter poses the question: “Is there any part of contemporary life in America that has not been engulfed in litigation?”<sup>60</sup> Interest groups sponsor litigation and/or provide amicus briefs in support of one party or another in order to shape the context of the debate around their topics of choice. Through the court system, discussing regarding fundamental issues to the maintenance of society—same-sex marriage, for example—are thrust into the public eye and couched in legal discourse. The courts are one of the primary battlegrounds where the fight over same-sex marriage has taken place.<sup>61</sup> The following chapter will explore the path of same-sex marriage through the courts and examine the ways in which various politicians and interest groups have attempted to win the courts to their position over the years.

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<sup>59</sup> *Ibid*, p. 173.

<sup>60</sup> *Ibid*, p. 250.

<sup>61</sup> *Ibid*.

## CHAPTER TWO

### History of Same-Sex Marriage Litigation

Thirty years ago, the idea of same-sex marriage would have seemed ludicrous to all but the most idealistic gay activists. For many years, same-sex marriage was not even on the agenda of the burgeoning LGBT rights movement, which burst onto the public scene following the Stonewall Riots on June 28, 1969. A year after the riots, a gay couple, Jack Baker and Michael McConnell, applied for a marriage license in Minnesota. Their case, *Baker v. Nelson*, eventually made it up to the Supreme Court. The justices eventually declined their appeal for a marriage license. When they were profiled in *Look* magazine in 1971, they revealed that, despite their activism, they did not expect that the government would grant them the right to marry. Their main goal was merely to give the LGBT movement some much-needed visibility.<sup>62</sup>

A number of other gay and lesbian couples went to the courts in the 1970s. In Kentucky, a lesbian couple applied for a marriage license and was denied. Their decision to appeal to the courts was ultimately unsuccessful. The Kentucky Court of Appeals, in this case, *Jones v. Hallahan*, did not challenge the preconception that marriage was meant to be heterosexual-only.<sup>63</sup> The Court stated their reasoning accordingly: “In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not marriage.”<sup>64</sup> A similar case, *Singer v. Hara*, between a gay couple in Washington was rejected. At the time, plaintiff John Barwick explicitly stated their motivation in filing the lawsuit: “[We] really believed we'd never be

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62 Pierceson, Jason. *Same-Sex Marriage in the United States: The Road to the Supreme Court and Beyond*. Rowman & Littlefield, 2014, p. 28.

63 *Ibid*, p. 29.

64 *Jones v. Hallahan*, 501 S.W. 2d 588 (Ky. 1973).

equal until we had the right to get married. Choosing your partner is the most personal basic right you have through life. You'll never be equal until you have that.”<sup>65</sup>

An interesting fact related to this case in particular was the submission of a forty-page amicus brief containing evidence from sociology, science, medicine, and theology to advocate for the naturalization of homosexuality and the legalization of same-sex marriage. The brief also mentioned the recent legal literature which indicated that there is legal precedent for the right they were seeking. The Court eventually dismissed the brief as irrelevant, but the submission itself has important consequences for the study of amicus briefs to follow later on in this thesis.<sup>66</sup> Even in the earliest years of same-sex marriage litigation, briefs were used to advocate for same-sex marriage in a way that had not been seen before, containing evidence from many different disciplines. This tradition would follow in the submission of amicus briefs by individuals and interest groups in *Obergefell v. Hodges*.

Following these defeats in same-sex marriage litigation, the LGBT movement split into two camps. There were still people who advocated for legal recognition of same-sex relationships, whether through marriage or domestic partnerships. Many advocates for this recognition at the time argued that the 14<sup>th</sup> amendment demanded marriage equality. They viewed the attainment of equal marital status “as a last legal and social step toward respectability for sexual minorities.”<sup>67</sup> This movement achieved some success through legislation, not litigation, as Washington, D.C. and other urban areas recognized same-sex

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65 Pierceson, *Same-Sex Marriage in the United States*, p. 30. See also: Monica Guzman, “Seattle Gay Rights Pioneer Reflects on Activism,” *Seattle's Big Blog*, November 3, 2009, <http://blog.seattlepi.com/thebigblog/2009/11/03/seattle-gay-rights-pioneer-reflects-on-activism/>.

66 Pierceson, *Same-Sex Marriage in the United States*, p. 30.

67 *Ibid*.

couples through municipal domestic partnership laws in the 1980s. These legislative acts represented the most significant attempt to enact same-sex marriage through the legislature until the 1990s. Even though this attempt was ultimately unsuccessful, it laid the groundwork for other future attempts.<sup>68</sup>

Through the 1970s and 1980s, the LGBT movement was characterized mostly by a shift away from marriage.<sup>69</sup> Many prominent activists throughout this time period expressed concerns about the marriage equality movement. These concerns coalesced into three separate, but interrelated, movements critical of the pursuit of marriage equality. The gay liberation movement advanced the perspective that relationships, particularly same-sex relationships, should not be shackled to the dominant expectations of society. Instead, the gay rights movement was an opportunity to promote more “egalitarian” forms of intimacy.<sup>70</sup> The LGBT movement could advocate for a more radical model for relationships, characterized by “fluidity in relationship form, a deprivileging of monogamy, equality between partners with an end to inflexible gender roles, and the development of a new set of values.”<sup>71</sup> Even though this movement was short-lived, echoes of its thought are seen in the other two critiques of marriage. The lesbian feminist movement argued that the traditional model of heterosexual marriage disadvantages and oppresses women. Consequently, the leaders of this movement question why same-sex couples would desire to enter into such an oppressive, patriarchal institution in the first place.<sup>72</sup> In a similar vein, the queer activist movement outlined a

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<sup>68</sup> *Ibid*, p. 32.

<sup>69</sup> *Ibid*.

<sup>70</sup> Bernstein, Mary, and Verta Taylor. “The Marrying Kind?” *Debating Same-Sex Marriage Within the Lesbian and Gay Movement*, 2013, p. 8.

<sup>71</sup> *Ibid*, p. 9.

<sup>72</sup> *Ibid*, p. 10-1.

number of fears about the focus on marriage equality. The essence of their argument was that same-sex marriage would “marginalize and stigmatize” those who chose not to get married, assimilate the LGBT community into “mainstream, patriarchal” culture, and ultimately contain expressions of queer sexuality within monogamous, state-sanctioned unions.<sup>73</sup>

As a result of these three distinct strains of thought, the early LGBT movement (1970s-1980s) was a fight for gay civil rights, not marriage equality. However, by the early 1990s, this focus had radically shifted. In 1987, the LGBT movement highlighted the quest for marriage equality at the third national March on Washington for Lesbian and Gay Rights. A Los Angeles-based organization, Couples, Inc., organized “The Wedding,” a ceremony which celebrated same-sex relationships and demanded the same rights as married heterosexual couples. This movement, despite the controversy at the time, energized the LGBT movement to fight for domestic partnership laws and recognition of same-sex couples by employers and local and state governments.<sup>74</sup> For the next twenty years, beginning with a landmark Hawaii Supreme Court case, the main focus of the LGBT movement would be the achievement of marriage equality across all fifty states.

In the early 1990s, three same-sex couples applied for marriage licenses in the state of Hawaii. They were denied the licenses and subsequently sued the state for the right to marry.<sup>75</sup> The case, *Baehr v. Lewin*, eventually made its way to the Hawaii Supreme Court, where the justices held that denying marriage licenses to same-sex couples violated the equal protection clause of the Hawaii state constitution. In its decision, the Court argued

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<sup>73</sup> *Ibid*, p. 13-4.

<sup>74</sup> *Ibid*, 3.

<sup>75</sup> *Ibid*, 3.

that denying same-sex couples the right to marry was a kind of sex discrimination and that the definition of marriage should not be biased on the basis of the sex of the partners.<sup>76</sup> The Court then remanded the case back to the trial court, which was charged with finding a “compelling state interest” to deny marriage rights to same-sex couples.<sup>77</sup> After this groundbreaking decision by the Hawaii Supreme Court, numerous interest groups, who had previously believed same-sex marriage to be out of reach for many years yet to come, joined the cause. The issue of same-sex marriage skyrocketed to national prominence.

In response to this case, the federal government took action. In 1996, the Senate and House of Representatives passed the federal Defense of Marriage Act, which reserved marriage as the union between a man and a woman “for the purposes of interpreting and implementing federal law.”<sup>78</sup> The federal government could not be forced to recognize same-sex marriages, even if they lawfully occurred in the states. This act effectively formed a protection for the traditional definition of marriage and barred the LGBT community from their efforts to achieve full marriage equality. Even if they managed to achieve same-sex marriage in certain states, they would be recognized as such by the federal government.

The pursuit of same-sex marriage rights through litigation has also historically been plagued by obstacles from the legislative branch and the state voters. For example, as part of the initial legislative reaction to the decision in *Baehr v. Lewin*, the Hawaii legislature

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76 Dupuis, Martin. *Same-sex marriage, legal mobilization, & the politics of rights*. New York: Peter Lang, 2002, p. 1.

77 Bernstein, *The Marrying Kind?*, p. 4.

78 Rimmerman, Craig A. and Clyde Wilcox. *The politics of same-sex marriage*. University of Chicago Press, 2007, p. 59.

proposed a constitutional amendment banning same-sex marriage and reaffirming the sanctity of marriage as an institution between a man and a woman.<sup>79</sup> This amendment was later ratified by 69 percent of the voters. Consequently, the landmark decision in *Baehr v. Lewin* was dismissed.<sup>80</sup> Many other states in the Union soon adopted their own “local DOMAs”—in other words, state legislation or constitutional amendments banning same-sex marriage. By 2005, over forty states had approved such barriers to same-sex marriage.<sup>81</sup>

Alaska was the first state to recognize that the right to choose one's spouse is a fundamental right and consequently affirm that same-sex couples had the right to choose whoever they wanted as a spouse, regardless of their gender. Other state courts, including Hawaii's, had previously represented the issue in terms of whether same-sex marriage itself was a fundamental right.<sup>82</sup> The case, *Brause v. Bureau of Vital Statistics*, dealt with a state law that was enacted in response to Hawaii's Supreme Court decision, which explicitly banned same-sex marriage and affirmed the definition of marriage as between one man and one woman. This ban, according to Alaska's Supreme Court, violated Article 1, Section 22 of the Alaska Constitution, which established the right to privacy.<sup>83</sup> The voters did not accept this reasoning, however. They later overturned this judicial decision by ratifying the constitutional amendment which banned same-sex marriage.<sup>84</sup>

The next major litigation battle over same-sex marriage occurred in Vermont. In the summer of 1997, three same-sex couples brought suit against the state of Vermont for

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<sup>79</sup> Pierceson, *Same-Sex Marriage in the United States*, p. 95.

<sup>80</sup> Pinello, Daniel R. *America's struggle for same-sex marriage*. Cambridge University Press, 2006, p. 27.

<sup>81</sup> *Ibid*, p. 29.

<sup>82</sup> Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights*, p. 63.

<sup>83</sup> *Ibid*.

<sup>84</sup> Pierceson, *Same-Sex Marriage in the United States*, p. 102.

refusing to grant them marriage licenses. The plaintiffs argued that a prior statute banning same-sex marriage violated the state's constitutional guarantee of equal protection.<sup>85</sup> In a unanimous decision, the Supreme Court decided that same-sex couples were entitled to equal protection under the constitution. The justices did not outright demand that same-sex couples be given the right to marry. Instead, the legislature, under court mandate to create laws granting equal protection to same-sex couples, enacted a civil union law that replicated the existing marriage laws. Even though same-sex couples were considered to have the same fundamental rights of marriage as opposite-sex couples, the legislature stopped shy of granting same-sex couples the right to marry itself.

In 2003, Massachusetts became the first state to legalize not just civil union legislation but same-sex marriage. Following the Hawaii decision, various interest groups, including GLBTQ Legal Advocates and Defenders (GLAD), thought about sponsoring same-sex marriage litigation, but they ultimately decided not to do so right away. The move to submit litigation was triggered by a proposed constitutional amendment banning same-sex marriage within the state. According to Mary Bonauto of GLAD, advocates of same-sex marriage did not want to be defined by their opposition to the amendment, but rather by their affirmation of marriage rights for all.<sup>86</sup> The trial court dismissed the claims of the plaintiff, arguing that the decision should be made by the legislatures and the Courts, but the case was expedited up to the Supreme Court.<sup>87</sup> In *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts overturned the decision of the trial court and affirmed the right of same-sex couples to

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<sup>85</sup> Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights*, p. 99.

<sup>86</sup> Pierceson, *Same-Sex Marriage in the United States*, p. 108.

<sup>87</sup> *Ibid*, p. 109.

marry.<sup>88</sup> Chief Justice Margaret Marshall argued that “the decision whether and whom to marry is among life's momentous acts of self-definition.”<sup>89</sup> The Court also rejected the procreation argument and redefined marriage to include same-sex couples.<sup>90</sup> In this case, marriage is defined as an “exclusive commitment of two individuals to each other [that] nurtures love and mutual support.”<sup>91</sup> In response to this case, thirteen states enacted constitutional amendments banning same-sex marriage, but the wheels had already been set in motion.<sup>92</sup>

Following the legalization of same-sex marriage in Massachusetts, litigation continued, with varying levels of success, in New Jersey, Connecticut, California, Iowa, Oregon, Washington, Maryland, and New York. The first four states legalized same-sex marriage; the latter four did not. One of the most high-profile cases on the national stage was the case filed in California, *In re Marriage Cases*, sparked quite a bit of controversy, much like the Hawaii decision in *Baehr v. Lewin*.

The issue of same-sex marriage devolved into controversy when Democratic San Francisco mayor Gavin Newsom ordered the city to grant marriage licenses to same-sex couples in 2004. Newsom's actions inspired litigation based on the state's prohibition of same-sex marriage.<sup>93</sup> In the trial court, Judge Richard Kramer ruled that the ban on same-sex marriage was unconstitutional. The appellate court reversed this ruling, and the case was heard in front of the California Supreme Court amid a maelstrom of controversy

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88 Pierceson, p. 100.

89 *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

90 Pierceson, p. 110.

91 *Goodridge*.

92 Pierceson, p. 108.

93 *Ibid*, p. 187.

between the conservatives and liberals of the state.<sup>94</sup> The case was avidly watched by the entire nation until a divided Supreme Court invalidated the state's prohibition of same-sex marriage and declared sexual orientation to be a suspect classification under California's law.<sup>95</sup>

It is through this California case and the subsequent backlash that the role of interest groups in determining the outcome of controversies is crystallized. After the Supreme Court decision, conservative interest groups mobilized in support of Proposition 8, an amendment to define marriage as exclusively between one man and one woman. The amendment passed, 52 to 48 percent, and therefore invalidated the Supreme Court's decision months before and called into question the thousands of marriages that had occurred during the previous months. One of the primary reasons why this amendment was so successful was because of the money and influence of religious organizations who mobilized in support of the amendment.<sup>96</sup>

However, the amendment's ratification was not the end of the line for California's fight over same-sex marriage. Proposition 8 was challenged in the California Supreme Court, but the effort to overturn the amendment ultimately failed. Certain same-sex marriage proponents turned to the federal court system to challenge the amendment. The logic was that, if the federal courts determined California's amendment to be a violation of equal protection, then all other state amendments banning same-sex marriage would also be considered unconstitutional. Many litigators were hesitant to take this route, given the conservative majority on the Supreme Court at the time. When other liberal activists,

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<sup>94</sup> *Ibid*, p. 188.

<sup>95</sup> *Ibid*, p. 189.

<sup>96</sup> *Ibid*, p. 191.

like director Rob Reiner and Democratic consultant Chad Griffin (selected to lead the Human Rights Campaign, a leading LGBT political advocacy group, in 2012), decided to go ahead with a federal challenge, many prominent gay rights organizations (Lambda Legal, ACLU, Human Rights Campaign, National Center for Lesbian Rights) criticized the decision. Regardless of this criticism, the liberal activists continued with the present course of action.

The U.S. District Judge Vaughn Walker struck down Proposition 8, ruling that it was unconstitutional, and later, a three-judge panel of the US 9<sup>th</sup> Circuit Court of Appeals upheld the ruling. The supporters of Proposition 8 appealed to the US Supreme Court, which eventually granted the case a writ of certiorari. In a 5-4 decision, the Supreme Court ruled that the proponents of Prop 8 had no standing to bring the case before the Court. As a result, the Supreme Court cleared the path for same-sex marriage to be legalized within the state—and for other court cases dealing with same-sex marriage to eventually reach state and federal courts.<sup>97</sup>

The next major same-sex marriage case to make it up to the Supreme Court was *U.S. v. Windsor*. This case was brought by Edith “Edie” Windsor, a widower and later beneficiary of the estate of her late wife, Thea Spayer. Their marriage was recognized by Toronto law—the area in which they were married—and by New York law, but not federal law. As a result, the federal government imposed \$363,000 in taxes on Windsor. With the help of the American Civil Liberties Union (ACLU), Windsor sued to get her money back, arguing that DOMA violated her constitutional right to equal protection

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97 “Gay Marriage in the US Supreme Court, 2013 – Gay Marriage – ProCon.org.” *ProCon.org Headlines*. ProCon, 6 Oct. 2014. Web. 25 Apr. 2016.

under the law.<sup>98</sup> The Court ultimately held that DOMA goes against the “legislative and historical precedent” which gives states the authority to define and regulate marriage. More importantly to their later decision in *Obergefell v. Hodges*, they held that “the purpose and effect” of DOMA was to impose a disadvantage and, therefore, a stigma on same-sex couples, which violates the Fifth and Fourteenth Amendment guarantees of equal protection.<sup>99</sup>

This federal decision launched a new wave of political action across the United States in the fight about same-sex marriage. Many states, including Maine, had previously affirmed the right of same-sex couples to marry through a state referendum. Other states turned to litigation in order to win the fight. Four states—Ohio, Michigan, Kentucky, and Tennessee—had previous marriage bans on the books, and these were soon challenged by groups of same-sex couples. Each of the plaintiffs in these cases argued that the marriage bans unconstitutionally violated the equal protection clause and due process clause. In all of the cases, the trial court found in their favor, but then the U.S. Court of Appeals for the Sixth Circuit reversed the decision.<sup>100</sup> The case eventually made its way up to the Supreme Court under the name *Obergefell v. Hodges*.

Subsequent chapters will explore this decision—and its repercussions in more depth—but for the present, the Court's ruling in this case will be sufficient. In a 5-4 decision, the Supreme Court ruled that the due process clause of the 14<sup>th</sup> Amendment guarantees the right of same-sex couples to marry. In the majority opinion, the justices held that “the

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98 Pierceson, *Same-Sex Marriage in the United States*, p. 228.

99 Chicago-Kent College of Law at Illinois Tech. “United States v. Windsor.” Oyez.  
<https://www.oyez.org/cases/2012/12-307>. 25 Apr. 2016.

100 Chicago-Kent College of Law at Illinois Tech. “Obergefell v. Hodges.” Oyez.  
<https://www.oyez.org/cases/2014/14-556>. 25 Apr. 2016.

right to marry is a fundamental liberty because it is inherent to the concept of individual autonomy, it protects the intimate association between two people, it safeguards children and families by according legal recognition to building a home and raising children, and it has historically been recognized as the keystone of social order.”<sup>101</sup> Therefore, the Court squarely aligned itself with those who hold that the right to marry should be guaranteed to same-sex couples under the Constitutional protections of due process and equal protection. It appears, in this case, that whatever culture war existed, the proponents of same-sex marriage have won—but that is not the entire story, as will be discussed later on in the analysis.

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The courtroom, both state and federal, has been a battleground for the culture war regarding same-sex marriage since the 1970s, to varying degrees. It is within this arena that one is able to see the two sides fight for their own vision of the future, their own conception of rights, their own understanding of the Constitution and the institution of marriage. Here, interest groups and individuals can express their opinions on this issue, whether by sponsoring litigation or by submitting amicus briefs in the court itself. For the purposes of this study, amicus briefs present a way to zero in on some of the ways in which the two sides—in particular, the elites of the two sides—have framed the argument. First, however, a brief history of this document is needed.

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<sup>101</sup>*Ibid.*

### CHAPTER THREE

#### A Brief History of *Amici Curiae*

The role and function of the amicus brief has changed dramatically throughout its history. At first glance, it appears to be a “functionally unchanged document,” given its “delusive innocuousness, its seemingly static function and terminology .... [and] the offhand manner of its usual use in court.”<sup>102</sup> However, the amicus brief, despite its relatively unchanged appearance, has been transformed from a neutral document for the dispensation of relevant facts and figures to the court to an advocacy document designed to promulgate one's own views to the justices. The amicus brief is meant to persuade the Court that the group's proposed course of action should be adopted for the good of their own group and of society. In this way, amicus briefs prove to be a particularly salient method through which relevant interest groups aim to persuade governmental institutions to adopt their particular view. Most important to this study, however, is the way in which interest groups and individuals convincingly represent their arguments, using evidence from philosophy, legal tradition, social science, and many other disciplines, within the structure of the amicus brief. By considering the various ways in which different interest groups represent their arguments, it is possible to deduce which issues are the most important to both sides of an argument and consider some of the primary sources of concurrence and dissension that could result from their representation of the issues involved and the “facts” associated with the case. In the context of *Obergefell v. Hodges*, a study of a sample selection of amicus briefs can illuminate some of the key persuasive arguments commonly used by relevant interest groups on both sides of the issue. In

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102 Krislov, Samuel. “The amicus curiae brief: From friendship to advocacy.” *The Yale Law Journal* 72, no. 4 (1963), 695.

considering the briefs by petitioners and respondents in conjunction with each other, these arguments then illuminate some of the key points of polarization upon which the entire controversy—in this case, over same-sex marriage—hinges.

Amicus briefs, as traditionally understood within the United States judicial system, trace their roots back to English common law. English lawyers were well-acquainted with the intervention of the Attorney General or other counsel as “friends of the court” in litigation where the government does not have a formal role but still retains a “direct interest” in the decision.<sup>103</sup> These “friend of the court” briefs were meant to bring to the attention of the courts key information about facts and law, especially when the courts themselves might not be privy to such information on their own. Most often, an amicus brief was submitted by a bystander who, by his own initiative, made a suggestion to the court.<sup>104</sup> Occasionally, as in the case of Henry Clay in the U.S. court system, the Courts specifically asked individuals to contribute their own relevant counsel to the case at hand, but they were still considered disinterested bystanders.

As amicus briefs continued to proliferate in English common law cases, the courts avoided a precise definition of the perimeters and circumstances regarding the submission of an amicus brief, which increased “judicial discretion” and “maximized the flexibility of the device.”<sup>105</sup> Amicus briefs did not necessarily have a specific structure and format to which they should adhere. The presence of bystanders within the English adversarial judicial system allowed third parties to have a say in salient cases. There existed at that time very few limits regarding who could submit amicus briefs and the

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103 Angell, Ernest. “The Amicus Curiae American Development of English Institutions.” *International and Comparative Law Quarterly* 16, no. 04 (1967): 1017.

104 *Ibid.*

105 Krislov, p. 695.

content contained within such briefs. These relatively lax rules posed both benefits and challenges: for example, the courts could be privy to any number of relevant facts and information to the case at hand, but at the same time, there was no way to tell whether one was truly an impartial bystander or a “friend of the party” disguised as a friend of the court.

In the early years, amicus briefs were often written by lawyers (although not always) in order to offer information about the law, a court error, a death within a party, or the existence of any other proceedings.<sup>106</sup> One of the most important benefits of these amicus briefs is that they allowed other affected parties the ability to speak in a case, even if they were not one of the main two parties. The amicus brief became a way to rectify some of the shortcomings of the adversarial system.<sup>107</sup> For example, a friend of the court could bring attention to collusive suits and point out fraudulent proceedings in one of the principal parties.<sup>108</sup> Amicus briefs allowed all relevant parties to have a voice in the proceedings, even if they might not be directly related to one of the adversaries in the court case itself. In addition, many bystanders are able to understand more about the proceedings than the Courts and identify conflicts of interest that might not be readily available to the judges.

However, the lack of restrictions on amicus briefs—particularly the qualifications for the parties who wished to submit one—slowly made it possible for filers to shift their focus from the disclosure of relevant and neutral information to advocacy. For interested parties in certain litigation, the ability to submit an amicus brief was not a sign of

106 Anderson, Helen A. “Frenemies of the Court: The Many Faces of Amicus Curiae.” *University of Washington School of Law Research Paper* 2014-25 (2014): 367.

107 *Ibid.*

108 Krislov, p. 696.

detached interest but rather a symptom of their intense concern over the outcome of the proceedings: “While the courts continued to cling to the proposition that the amicus was a detached servant of the court ... the very notion of his acting for no one was belied by his rising to do just the opposite—in many instances to act directly and officially as counsel for one not formally a party to the case.”<sup>109</sup> Simply because the interest group submitting the brief was not directly involved in the case, that did not mean that they were objective. Many groups submit amicus briefs precisely because they are invested in the outcome of the case, and they wish to advocate for their preferred outcome.

In the early years of the United States, friends of the court gradually began to represent public or governmental interests in private disputes.<sup>110</sup> The Supreme Court ensured that state and federal governments could submit amicus briefs when the case involved their legitimate interests.<sup>111</sup> In a precedent set by Henry Clay in an 1821 case involving land holdings, the Supreme Court accepted the practice of federal and state governments to submit amicus briefs in certain cases—especially in cases involving grants of land or other governmental interests.<sup>112</sup>

As the Court continued to evolve, it expanded the right of private groups and individuals to participate in litigation.<sup>113</sup> The Court acknowledged the fact that there were far more interests involved in the outcome of a particular case than those of the two parties to the suit. Consequently, the Court allowed these third parties to participate in the proceedings as intervenors or amicus curiae, depending on the circumstances and the

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<sup>109</sup> *Ibid*, p. 697.

<sup>110</sup> Anderson, p. 368.

<sup>111</sup> *Ibid*.

<sup>112</sup> Krislov, p. 702.

<sup>113</sup> *Ibid*, p. 703.

requests of the litigants.<sup>114</sup> In the nineteenth century, third-party interests voiced their concerns to the Court far more frequently than ever before.<sup>115</sup> The problems of the adversary system created the kind of atmosphere where amicus briefs could flourish. Without these documents, third parties would not be able to reveal relevant facts to the court or otherwise have an impact in the case at all, even if the case had dealings far beyond the two parties. Most cases do not exist in a vacuum; they have distinct consequences that reverberate out to various other interested parties. Amicus briefs allow those interests to be heard in a way the adversarial system does not. These briefs function as “a catch-all device” for remedying many of the problems of an adversarial proceeding.<sup>116</sup> It is rare that court cases—especially cases that make it all the way up to the Supreme Court—only impact the two parties involved. It is therefore natural and expected that there should be some way for other parties to contribute to the case.

As interested individuals and groups began to contribute to the legal dialogue surrounding certain cases more frequently, the function of the amicus briefs drastically changed. Private organizations began to appear in amicus briefs, not as professionals giving unbiased and neutral information, but as advocates supporting the claims of one of the parties to the suit.<sup>117</sup> Throughout the 19<sup>th</sup> century, starting with Henry Clay's amicus brief in 1821, the amicus brief was increasingly used as a way for private interests to air out their concerns and provide relevant information to the courts in order to advocate for a particular outcome. By the 1930s, it became “commonplace” for an amicus brief to be

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114 *Ibid.*

115 Larsen, Allison Orr. “The Trouble with Amicus Facts.” *Virginia Law Review* (2014): 1766.

116 Krislov, p. 720.

117 Angell, p. 1018.

associated with an organization or individual.<sup>118</sup> When an interest group chooses to participate through an amicus brief, these documents are not “neutral, amorphous embodiment[s] of justice,” but rather an active tool used within the larger interest group struggle.<sup>119</sup> Filing an amicus brief then becomes another form of lobbying political institutions for their own preferred outcomes. The third parties most interested by the case would present information that would help clarify the stakes of the issue and provide context for the potential significance and consequences of a specific Court decision—all in the service of their own particular interests.

One of the most dramatic examples of this shift from neutrality to advocacy is the creation of the Brandeis brief, or an amicus brief that presented non-legal information to the Court in an effort to impact the Court's final decision.<sup>120</sup> The “pioneer brief” emerged as part of the proceedings within a Supreme Court case, *Muller v. Oregon*. This case dealt with a challenge to a state law restricting the number of hours women were allowed to work. Louis Brandeis, future Supreme Court justice from 1916 to 1939, submitted a brief containing only two pages of legal argument and 102 pages of evidence about the specific harms presented to women by working long hours.<sup>121</sup> Even though the science behind the brief was eventually debunked, the submission of this brief represented a dramatic shift from the logic-based legal proceedings to an approach that highlighted the importance of social science and other forms of knowledge. Many interested individuals and groups soon discovered that they did not have to rely on conventional legal methods to make their case. Instead, they could rely on science, philosophy, psychology and other

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118 Krislov, p. 703.

119 *Ibid.*

120 Larson, p. 1770.

121 *Ibid.*

disciplinary studies to make their case. Many interested parties—of most relevance to the present study are health organizations and other non-profit advocacy groups—were able to play to their strengths and submit information directly from their field of study, rather than fiddling with legal jargon. As this new precedent for briefs took root, the number of amicus briefs submitted in each case rapidly increased.

Many consequences emerged from this transformation of the amicus brief from a neutral document to an advocacy document. Perhaps the most salient consequence deals with “the change in tactics and structure of interest articulation in American politics” that occurred at the end of the 19<sup>th</sup> century.<sup>122</sup> Interest articulation originally occurred through face-to-face interaction with personal contacts. As amicus briefs proliferated and other forms of interest articulation emerged, interest groups shifted to a more bureaucratic style of activity.<sup>123</sup> “[B]ureaucratically sophisticated groups” are far more likely to advance their own viewpoints in the Court about many issues, including desegregation, female labor, civil rights, and same-sex marriage. Influential bureaucratic interest groups possess numerous advantages, including the ability to mobilize resources and respond quickly and flexibly to issues before policy is set.<sup>124</sup> In the context of any political decision, these qualities are essential. All three branches of the government—legislative, executive, and judicial—are responsive to the efforts of interest groups, especially when they are highly organized. The amicus brief is merely the means through which these interest groups can support their cause in front of the Supreme Court.

The continued use of the amicus brief has led to a restructuring of the traditional

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<sup>122</sup> Krislov, p. 704.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

structure of the courts.<sup>125</sup> Before the rise of the amicus brief, the system was primarily adversarial, with the two contesting parties warring for their own victory within the Court system.<sup>126</sup> The presence of amicus briefs represents the growing understanding that there are multiple parties who are able to supply information and provide arguments to the Court in support of a particular outcome.<sup>127</sup> Amicus briefs are fundamentally a kind of lobbying of the Supreme Court. More than that, the submission of a brief can be an effective way for interest groups to attempt influence within the Court system.<sup>128</sup> When interest groups are taking stock of their ability to impact the Court's decision, amicus briefs are easily accessible and affordable as a way for many interest groups to push their own agenda.

The shift of the amicus brief “from neutrality to partisanship, from friendship to advocacy” has consequently transformed not only the role of the amicus brief but the judicial system at large.<sup>129</sup> One of the most significant trends following this transformation has been the monumental rise in amicus curiae participation over the last several decades. In the 1980s, a study concluded that amicus briefs have been filed in more than half of all noncommercial cases.<sup>130</sup> No evidence has emerged to suggest that the number of amicus curiae participation has decreased.<sup>131</sup> In fact, *Obergefell v. Hodges*, with 169 briefs submitted, indicates that the trend has continued. One reason for this

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125 Barker, Lucius J. “Third parties in litigation: a systemic view of the judicial function.” *The Journal of Politics* 29, no. 1 (1967): 53.

126 *Ibid.*

127 *Ibid.*

128 Caldeira, Gregory A. and John R. Wright. “Organized interests and agenda setting in the US Supreme Court.” *American Political Science Review* 82, no. 04 (1988): 1111.

129 Krislov, p. 704.

130 O'Connor, Karen, and Lee Epstein. “Amicus Curiae Participation in US Supreme Court Litigation: An Appraisal of Hakman's Folklore.” *Law and Soc'y Rev.* 16 (1981): 317.

131 Caldeira, Gregory A., and John R. Wright. “Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?” *The Journal of Politics* 52, no. 03 (1990): 783.

trend is the fact that the Supreme Court imposes few restrictions on the participation of interest groups as *amicus curiae*. Provided that they get permission from the party and/or the Supreme Court, anyone can submit an amicus brief, including government agencies, law professors, interest groups, and high school students.<sup>132</sup>

Amicus briefs can be categorized according to the relationship between the court and the interested groups.<sup>133</sup> There are five major types of interested parties who submit amicus briefs: appointed lawyers; groups or individuals invited by the Court; advocates of a party; independents in support of neither party; and stakeholders who barely missed qualifying as direct intervenors.<sup>134</sup> These five types are colloquially known as “Court’s Lawyer,” the “Invited Friend,” the “Friend of the Party,” the “Independent Friend,” and the “Near Intervenor.”<sup>135</sup> The decision of these interest groups to participate as amicus brief can have many root causes, depending on one’s relationship to the Courts and to the parties at issue. Most of the groups mentioned above have a stake in the issue, even if they intend merely to maintain proper relationship with the Court by providing relevant information, as in the case of the “Court’s Lawyer.” Each of these participants construct their briefs differently, including different sets of facts and relevant information. As a result, their effectiveness in the ultimate decision of the Court varies significantly.

For example, governmental briefs are often submitted following the request of the Supreme Court. In the vast majority of cases, the attorney general or solicitor general represents the position of the government, but that role may occasionally be filled by the

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132 Anderson, p. 362.

133 *Ibid.*

134 *Ibid.*, p. 363.

135 *Ibid.*

corresponding chief executive.<sup>136</sup> These *amici curiae* were requested to participate by the court itself and therefore function as champions of the court's legal perspective in a particular issue.<sup>137</sup> The attorney general also occasionally submits a brief without the permission from either of the parties or the Supreme Court itself. As the government's premiere litigator before the Court, the solicitor general is one of the most successful—and frequent—filers of amicus briefs.<sup>138</sup> The Solicitor General informs the decision of the government to litigate, the outcome of the litigation, and the allocation of legal resources. This office possesses “a special relationship with the Supreme Court” as a “Tenth Justice.”<sup>139</sup> The office of Solicitor General generally holds all the advantages of being a “repeat player” to the court, including an unusually high percentage of wins as petitioners seeking certiorari and on the merits. Part of this success is due to the office's careful screening of viable cases and the refusal to bring nonviable cases.<sup>140</sup> More than any other interest group or organization submitting amicus briefs to the Supreme Court, the solicitor general, due to its special, repeat relationship to the Court, enjoys particular amounts of success.

The second role fulfilled by *amici curiae* is that of the court's lawyer, or the court's own advocate of a certain position.<sup>141</sup> Second only to the solicitor general, this office has the best relationship with the Court. Unlike the solicitor general, however, the lawyer is generally asked to represent a particular position, rendering said lawyer “highly partisan,”

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<sup>136</sup> *Ibid*, p. 375.

<sup>137</sup> Krislov, p. 720.

<sup>138</sup> Simmons, Omari Scott. “Picking friends from the crowd: Amicus participation as political symbolism.” *Connecticut Law Review* 42, no. 1 (2009): 211.

<sup>139</sup> *Ibid*, p. 212.

<sup>140</sup> Caldeira and Wright, p. 1115.

<sup>141</sup> Anderson, p. 376.

not disinterested.<sup>142</sup> This *amici* role is problematic because it suggests that the court is stepping out of its role as “neutral arbiter” and actively promoting a particular position, when the court has historically been understood as “above” such partisanship.<sup>143</sup> On the other hand, the “court’s lawyer” can be a vehicle through which it is possible to express some arguments that the Court is considering as valid, but the parties are not making.<sup>144</sup> In this way, these types of briefs emphasize differing arguments that may or may not seem compelling to the Court; the Justices may simply want to hear more of one side of the argument or another. There is no conclusive evidence regarding the effectiveness (or lack thereof) of these types of briefs. However, these briefs potentially have some role to play in the Court’s ultimate decision, especially if they are asked to supply their opinion during the writ of certiorari stage.<sup>145</sup> The same could be said for the “invited friend,” an individual, group, or institutional actor invited to offer its own opinion on a case.<sup>146</sup> Since the “invited friend” is specifically asked to contribute its own perspective on an issue by the Court itself, those who fit into this role could potentially be more likely to provide relevant information and impact the Court’s final decision.<sup>147</sup>

Another role of *amicus curiae* is that of the “independent friend” who supports neither party.<sup>148</sup> These “independent friends” may or may not be truly independent; they might decide to contribute their opinion because the issue is important to them as individuals or influences their membership within a certain group. It is rare for an *amicus*

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*, p. 377.

<sup>144</sup> *Ibid.*

<sup>145</sup> Caldeira and Wright, p. 1109.

<sup>146</sup> Anderson, p. 378.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*, p. 380.

to file without somewhat supporting one party or another. For instance, in the case of *Sebelius v. Hobby Lobby*, there were only two neutral amicus briefs filed, compared to 84 total.<sup>149</sup> The rare presence of this kind of amicus brief only serves to highlight the fact that amicus briefs are most commonly used to advocate for one side or another.

The last two roles of *amici curiae*—the friend of a party, and the near intervenor—are fulfilled by interested groups, organizations and individuals who file their briefs independent of any invitation by the Court. Organized interests have many options for participation, including the creation of test cases and the sponsorship of other litigation.<sup>150</sup> By far, the most prevalent method of interest group involvement is the amicus brief—in particular, the brief submitted by a Friend of a Party.<sup>151</sup> These briefs are made on behalf of a certain interest group because the issue is related to its mission or purpose.<sup>152</sup> The use of amicus briefs to advocate for a particular party has become so ubiquitous that these Friend of the Party briefs are now considered “prototypical.”<sup>153</sup> The near intervenors are a step up from the Friend of the Party briefs. These near intervenors are far more likely to be affected by an outcome of a particular case than the Friend of the Party, but their interest still is not sufficient cause for direct intervention.”<sup>154</sup> In both cases, interest groups and organizations decide to file a brief because they recognize that the issue at stake poses unique consequences to their cause, whether positive or negative. Briefs are submitted in an attempt to sway the Court into seeing their point of view and deciding in

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<sup>149</sup> *Ibid.*

<sup>150</sup> Collins, Paul M. “Friends of the court: Examining the influence of amicus curiae participation in US Supreme Court litigation.” *Law & Society Review* 38, no. 4 (2004): 807.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, p. 380.

favor of their cause.

However, the effectiveness of these briefs in final Supreme Court decisions is inconclusive at best. The existing research indicates that amicus briefs are relatively successful at the certiorari stage, but significantly less so at the merits stage.<sup>155</sup> Amicus briefs have historically been a significant factor in the Court's decision to grant or deny writs of certiorari.<sup>156</sup> One reason for this substantial influence is that Supreme Court justices often attempt to select cases with the “greatest potential social, economic or political significance.”<sup>157</sup> When interested groups submit amicus briefs at the certiorari stage, justices gain a more nuanced understanding of the significance of a particular case.<sup>158</sup> In addition, organized interests communicate significant information about the number of parties at play in the organization, as well as potentially significant forces that would influence their decision.<sup>159</sup> By giving voice to these various concerns, and presenting them to the Court in a relatively cost-efficient way, these briefs provide a large-scale picture of the forces at work in a particular case. Regardless of the side supported most by the amicus briefs, the mere fact that the documents were submitted at the certiorari stage indicates that there are a wide range of issues and concerns involved in the case. Amicus briefs, in this respect, do the work in determining which cases are worthy of the Court's attention by their mere presence alone.

However, the influence of amicus briefs on the actual outcome of cases is far murkier. First, interest groups are highly selective in the cases in which they involve themselves.

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<sup>155</sup> Caldeira and Wright, p. 788.

<sup>156</sup> *Ibid*, p. 1110.

<sup>157</sup> *Ibid*, p. 1122.

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid*, p. 1123.

They pay close attention to the environment of the Supreme Court. In most cases, interest groups will only submit a brief if they believe that the Court has use of their own particular knowledge about a certain aspect of the case. Most interest groups follow a distinct set of criteria in deciding whether to submit a brief: 1) There are high stakes involved, 2) the Justices seem to have little information about the case, and 3) interest groups are unsure about the final outcome.<sup>160</sup> When these conditions are met, organized interests will more often than not submit a brief. By being so selective in the cases in which they submit a brief, then, interest groups might “stack” their chances of having an impact on the eventual outcome.

Second, even if these criteria are met, that does not mean that Supreme Court justices are so easily swayed by the opinions of non-legal sources. Some argue that the briefs can often be a source of background information that has not been supplied by the parties.<sup>161</sup> Since amicus briefs are frequently cited in the Justices' opinions, these briefs can occasionally be helpful. However, these citations present the classic chicken-and-egg situation: Is the amicus brief influencing the actual decision of the Justices, or are the Justices merely cherry-picking content from amicus briefs to support their preexisting opinions? No consensus has yet emerged on that question. Many also argue that amicus briefs are unhelpful to the justices because they exemplify nothing more than a chorus of “me too”s with arguments that do no little to change the justices' minds. At the same time, some evidence suggests that amicus briefs are a source of far more original information

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160 Salzman, Ryan, Christopher J. Williams, and Bryan T. Calvin. “The Determinants of the Number of Amicus Briefs Filed Before the US Supreme Court, 1953-2001.” *Justice System Journal* 32, no. 3 (2011): 296.

161 Kearney, Joseph D., and Thomas W. Merrill. “The influence of amicus curiae briefs on the Supreme Court.” *University of Pennsylvania Law Review* 148, no. 3 (2000): 745.

than the party briefs themselves.<sup>162</sup> If this evidence holds up, then amicus briefs could in fact provide relevant information to the Court that would lead to their preferred outcome. However, the evidence is far from conclusive and requires more investigation.

With this shift from neutrality to advocacy, not only is the effectiveness of these amicus briefs called into question but their accuracy as well. In cases dealing with social issues, such as abortion and gay marriage, it can be all too easy for advocacy groups to present their data in its most positive iteration. From the submission of the Brandeis brief to the present day, amicus briefs have presented social science evidence to the Courts. The use of social science in particular is not called into question, since many issues require the use of social science to adequately judge the impact of a particular decision. There are a number of ways in which social science research might influence court discussions: “At one end of the continuum, researchers take no active role in directly communicating their research results to the judiciary—research findings are published, usually in scientific journals, and may find their way into legal decisions if judges cite them as secondary sources for their opinions.”<sup>163</sup> Certain evidence from social science has so permeated our culture, in other words, that it is commonly accepted as fact without any major controversies. This type of information is so universally accepted in society that judges consider them as truth.<sup>164</sup> However, on the other end of the spectrum, judges first encounter certain research through briefs.<sup>165</sup> This kind of information requires individuals and organizations to actively participate in the dissemination of this

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162 Collins Jr, Paul M., Pamela C. Corley, and Jesse Hammer. “Me too: An Investigation of Repetition in US Supreme Court Amicus Curiae Briefs.” *Judicature* 97 (2013): 10.

163 Roesch, Ronald, Stephen L. Golding, Valerie P. Hans, and N. Dickon Reppucci. “Social science and the courts: The role of amicus curiae briefs.” *Law and Human Behavior* 15, no. 1 (1991): 2.

164 *Ibid.*

165 *Ibid.*

information. For judges, there is no simple way to know whether these “findings” are scientifically viable or whether the data is being represented properly.<sup>166</sup>

The Supreme Court requires a viable method to discern the accuracy of social science embedded within amicus briefs.<sup>167</sup> Given that social and scientific data is often presented in an effort to persuade, not inform the Court, amicus briefs can easily distort or omit any social science that does not perfectly fit with their viewpoints.<sup>168</sup> Especially within the context of “social” issues—same-sex marriage is a particularly salient example—many organized interests filing on behalf of petitioners and respondents could easily include social science that supports their viewpoint and omit any findings from organizations that do not share their perspective.<sup>169</sup> Prominent organizations often use studies funded by their organizations, which have a particular bias built into the process from the beginning.<sup>170</sup> Supreme Court justices—or their clerks, for that matter—will often not have the time to fact-check every single fact listed in an amicus brief, it is entirely too possible for the Supreme Court to be misled when it comes to questions of fact and social science. Such is only one major problem with this new form of advocacy amicus brief.

Last, and perhaps most important, the submission of an amicus brief, and the content contained therein, can provide important information about interest groups themselves. In a study of the amicus briefs submitted in *Webster v. Reproductive Health Services*, the content of the briefs reflected the nature of their constituencies, their legal strategies and

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<sup>166</sup> *Ibid.*

<sup>167</sup> Rustad, Michael, and Thomas Koenig. “Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs, The.” *NCL Rev.* 72 (1993).

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

core values.<sup>171</sup> Organized interests effectively use the amicus brief as a way to articulate their own interests, which adds stability to political systems.<sup>172</sup> Interest groups also submit amicus briefs not only to influence the Supreme Court, but to publicize their core and maintain their organization.<sup>173</sup> Ultimately, amicus briefs provide a wealth of information about the structure of interest groups, their motivations, and their larger influence within society.

In the present study of a sample of *Obergefell v. Hodges* amicus briefs, these documents become a window into the minds of certain interest groups, illuminating the ways in which they construct their arguments and advocate for a certain cause. Amicus briefs, in a general sense, are already polarized documents, because they are attempting to persuade the court to take a specific legal action. However, this present study will use the amicus briefs as a way to illuminate the underlying arguments that undergird this preexisting polarization. In this way, amicus briefs are not the cause, nor the sole contributor, to the polarization, but they are a symptom of the polarization. By exploring the content contained within these amicus briefs, this present study will attempt to reveal some of the hinges on which the controversy rests.

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171 Behuniak-Long, Susan. "Friendly Fire: Amici Curiae and Webster v. Reproductive Health Services." *Judicature* 74 (1990): 270.

172 Caldeira and Wright, p. 1123.

173 Songer, Donald R., and Reginald S. Sheehan. "Interest group success in the courts: Amicus participation in the Supreme Court." *Political Research Quarterly* 46, no. 2 (1993): 340.

## CHAPTER FOUR

### Methodology

A qualitative content analysis was conducted with a select sample of amicus briefs from the recent Supreme Court decision about same-sex marriage, *Obergefell v. Hodges*. The purpose of this study was to examine: 1) the manner in which both sides frame and discuss the issue of same-sex marriage; and 2) the points of commonality and polarization within this discussion. By pinpointing some of the major sources of commonality—the points at which both sides both present a common understanding—and contention—the points at which both sides fundamentally disagree—we can gain a better understanding of the underlying beliefs and values that underlie the cases made by interest groups and individuals on both sides of the issue. The content analysis was not meant to describe the causes of polarization, but rather to explore how that polarization is expressed within the briefs. In turn, this improved understanding of the arguments most commonly used by both sides can be used to speculate further about the history of this divisive issue within the country after *Obergefell*'s legalization of same-sex marriage.

In the field of social science, content analysis is “a research method that uses a set of procedures to make valid inferences about the text.”<sup>174</sup> The context of a particular text can reveal key facts about the producer of a text, the message of the text, or the audience of the text.<sup>175</sup> Content analysis can also summarize the behaviors of political actors and the relationships between them.<sup>176</sup> As long as the researcher has access to relevant information in the form of a physical record, such as books, magazines, newspapers,

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<sup>174</sup> Weber, Robert Phillip. *Basic content analysis*, No. 49. Sage, 1990: 9

<sup>175</sup> *Ibid.*

<sup>176</sup> Manheim, Jarol B., Richard C. Rich, Lars Willnat, and Craig Leonard Brians. *Empirical political analysis: quantitative and qualitative research methods*. Longman Pub Group, 2008: 161.

photographs, Web pages, or legal documents, among many others, the researcher can use the text itself to “answer research questions” and make “empirical observations.”<sup>177</sup> For example, in the context of the present study, the content to be analyzed is a select sample of amicus briefs from *Obergefell v. Hodges*, which can then be extrapolated out to reveal important facets of interest group politics and the larger social context surrounding the issue of same-sex marriage. These briefs can illuminate some of the key beliefs and arguments that divide both sides of the argument, and content analysis is merely the method through which those details are illuminated.

Content analyses are used for many purposes. Most relevant to this current study is this research method's ability to “reflect cultural patterns of groups, institutions or societies; reveal the focus of individual, group, institutional, or societal attention; and describe trends in communication content.”<sup>178</sup> A content analysis of amicus briefs, submitted by relevant interest groups, will be most likely to reveal certain patterns in thinking and argumentation used by both sides, whether in agreement or opposition to one another. These briefs provide an easily accessible way to see what matters to both sides of the issue. Both the petitioners and the respondents clearly have differing attitudes toward the issue of same-sex marriage, but the actual reasons, the legitimate arguments, supporting that polarization have not been explored adequately within the legal context. Given the stake interest groups have in the issue, and their decision to submit an amicus brief to support that perspective, these amicus briefs provide a way to see certain persuasive arguments used by both sides.

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177 Johnson, Janet Buttolph, Henry T. Reynolds, and Jason D. Mycoff. *Political science research methods*. Cq Press, 2015: 206.

178 Weber, p. 9.

Although there are some limitations to the study, given that amicus briefs are primarily a legal document, these texts still provide a way to “describe trends in communication content” and “reveal the focus of individual, group, institutional or societal attention.”<sup>179</sup> If certain arguments show up time and time again across briefs by one party, or if both sides mention the same issues in differing degrees with different rhetoric, then one can infer that these arguments are considered particularly relevant to the discussion over same-sex marriage or that they are considered particularly persuasive to the Court itself. In addition, if both sides present the same basic issue in a drastically different light, this division could elucidate the polarization existing in larger society. Not all of the arguments—for example, the ones made exclusively from legal principles like precedent—will be relevant to a study of the larger interest group politics, but other arguments, such as those from moral principle or future consequences, could help explain why the two sides have found it so difficult to agree on this issue.

The first step in performing any content analysis is to define the content to be studied.<sup>180</sup> In the present study, a sample of *Obergefell v. Hodges*' amicus briefs will be analyzed. In this Supreme Court decision, 149 amicus briefs were submitted, 77 in favor of Petitioners and 67 in favor of the Respondents. Five of the amicus briefs were filed in support of neither party. On the official Supreme Court website, a list of all amicus briefs was provided. The list was compiled in order of Petitioners, neutral briefs, and then Respondents. From this list, I selected every fifth brief for inclusion in my study. This selection process yielded 14 briefs from both the petitioners and the respondents, along

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<sup>179</sup> *Ibid*, p. 9.

<sup>180</sup> Mannheim, p. 162.

with one amicus brief in support of neither party. The sample size for this study was 29 briefs.

Once the sample size has been selected, the next step is to decide on a unit of analysis, or “the particular element or characteristic of a given communication that we shall examine, count or assess.”<sup>181</sup> In this study, the unit of analysis was the theme, “a particular combination of words or ideas, such as a phrase, a sentence, or even a paragraph.”<sup>182</sup> When coding for a theme within a content analysis, it is essentially a code for “recurring subjects in a text.”<sup>183</sup> Each amicus brief was coded according to the arguments used to either support or oppose the legalization of same-sex marriage. When a consistent theme of argumentation—for example, the right to same-sex marriage or the harms accrued to same-sex couples from denying them the freedom to marry—appears, it was highlighted in blue or green. Blue was used to designate arguments in favor of same-sex marriage, green for arguments against same-sex marriage. Once these arguments were coded, each of the briefs was read through once again to compile a list of the arguments used within the briefs.

This process was not straightforward, because numerous problems arise when coding for themes, not words or phrases, within a particular text. One of the major problems with coding for theme is that it makes the context of a particular statement clear, but there is a lack of a certain degree of complexity.<sup>184</sup> For example, if one was coding for the single word “rights” contained within a sample amicus brief, there are many contexts in which that word could appear that might not have any bearing on the issue of same-sex

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181 *Ibid*, p. 163.

182 *Ibid*, p. 164.

183 *Ibid*.

184 *Ibid*.

marriage. The same could go for the word “harm,” which could be used independent of any relevance to the current study. Searching for themes is a broad brush; it enables the discovery of certain arguments, but it does not explore the nuances of the arguments made within the amicus briefs. In order to supply more subtle differences, it is paramount to use a thinner brush.

However, for the purposes of providing a broad overview of the persuasive techniques and strategies used in representing certain arguments, this thicker brush is appropriate. In the context of this study, using the theme as the unit of analysis is meant to pinpoint some of the core arguments that both sides use to bolster their cause. Certain questions were asked over the course of the study, such as: What common lines of argument appear over and over again within the briefs? When people talk about the legalization of gay marriage, what do they consider the most important issues in deciding the question? How do they frame their arguments? By exploring themes, the answers to this questions hopefully become clearer. To illustrate, certain groups might phrase the issue of same-sex marriage as a fundamentally rights-based issue, which puts them in direct conflict with certain groups who might frame the issue in terms of a redefinition of marriage. Exploring the most common themes within each brief allows a larger picture of the conflict to develop, including which arguments and issues are most commonly raised by both sides.

Identifying the categories representing within the briefs posed challenges. Many sections within an amicus brief contained phrases and sentences that could be coded in different ways. One might refer to the right of same-sex couples to marry, but in the

context of the harms provided to same-sex couples if said right was denied. In that case, should the section be categorized as a rights-based argument or a harms-based argument? There are no clear answers to this question. Paragraphs and complete texts are naturally more difficult to code as a monolithic unit, because paragraphs typically contain far more information and a+9 greater diversity in topics.<sup>185</sup> When confronted with this challenge, it was sometimes necessary to break up paragraphs into sentences and even phrases and code them separately, even if they occurred in proximity with one another. In the case of the rights-based argument and the harms-based argument, for example, a sentence like “The right of same-sex couples should not be denied because such a denial would negatively impact the well-being of same-sex couples” would be coded as both a rights-based argument and a harms-based argument. If the sentence was to be broken up further, of course, the first part would be classified as a rights-based argument and the second part an argument from potential harms.

Once each brief had been coded for preliminary arguments, they were read through once again to provide a complete list of the most-commonly used arguments and themes. Each brief was given a designation—for example, A1 for the first petitioners' amicus brief, B2 for the first respondents' brief, and AB1 for the neutral party's brief—and then included in a table. This table included the brief designation, along with a list of the commonly-used arguments. Within the table, if an argument appeared, it was designated in the appropriate box with a X. After the creation of the graph, a list of the most commonly used arguments from both parties was compiled and then compared against each other to see what major sources of contention—the hinges of the argument—

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<sup>185</sup> Weber, p. 16.

emerged. In other words, if certain arguments appeared to be used by both sides, it was noted accordingly. Once this list of common arguments was created, another reading of the amicus briefs was conducted to outline the differing ways in which both sides framed their arguments. For instance, if both sides talked about the issue of redefining marriage, the briefs were reread to see how they talked about the issue and to identify the ways in which they either concur with each other or disagree across both the petitioner and respondent amicus briefs.

What this analysis of these arguments theoretically allows for is a study for *how* the two sides are polarized on this issue of same-sex marriage. The very existence of the amicus briefs is a symptom of the fact that this topic is incredibly divisive, with both sides contributing almost equal numbers of briefs to support their diametrically opposed views on the issue. However, what remains a mystery is how they are polarized. In performing the study, certain questions emerged: Are the two sides polarized because they are talking about two completely different things when they talk about same-sex marriage, or are they polarized because they are speaking about fundamentally the same issues but in oppositional ways? In essence, are the two sides talking past each other or are they butting heads about certain important philosophical, legal, and religious questions about religion, marriage, and among others? If there are certain areas on which they agree, why might they agree? What accounts for the major sources of concurrence or dissension within certain arguments, say, about the right to marry or the redefinition of marriage? This study hoped to be able to answer some of those questions, if only in a very preliminary way, by analyzing the common arguments used by both sides

## CHAPTER FIVE

### Findings

An initial analysis of the interest groups represented in the selected sample revealed several key characteristics of those interested groups and individuals who chose to submit said briefs on behalf of either party. On the side of the petitioners, 11 out of the 14 briefs were filed by interest groups. A vast number of interest groups were represented, from organizations of legal scholars (Bay Area Lawyers for Individual Freedom, Conflict of Laws and Family Laws Professors, Family Law Scholars) to medical and psychological organizations (American Psychological Association), along with general social justice groups (NAACP and The Alliance State Advocates for Women's Rights and Gender Equality) and LGBT advocacy groups (PFLAG, Equality Ohio, etc.). One brief was filed by an individual, Kenneth B. Mehlman; one by a group of individual plaintiffs from Alabama and other states with marriage bans, united only for the express purpose of filing from Alabama and other states with marriage bans; and the last by the state of Massachusetts. On the side of the respondents, however, a larger proportion of the briefs—about 6 out of 14—were filed by individuals. The remaining 8 were filed on behalf of organizations. Although the status of the interested parties in the sample might not be representative of the total number of amicus briefs filed in *Obergefell v. Hodges*, these differences should be taken into account when exploring the arguments contained within the briefs.

The status of the filers affects the structure of the briefs themselves. Each of the briefs, on their face, fit into the prototypical structure of an amicus brief, containing the following sections: interest of amici, statement and summary of argument, argument, and

a conclusion (possibly an appendix if deemed necessary). Looking deeper, there is far greater variation in the structural components of the amicus briefs. Most of the briefs support their arguments in a rather impartial and objective style. Their primary method of argumentation is legal rhetoric, relying on standards of precedent and understanding of the law to support their arguments. Other briefs deviate sharply from this norm, however, using personal experience, philosophy, social science, religion, and medicine to support their position on gay marriage.

One primary finding is that, while both sides contain briefs utilizing unconventional structures for their briefs and non-legal arguments, the respondents contain these unconventional structures and arguments to a greater extent. That does not mean that the petitioners do not have some obvious deviations as well. For example, one of the most obvious deviations from the traditional legal brief structure by the petitioners was PFLAG's amicus brief, which contained primarily personal stories from families and friends of LGBT couples. This brief explicitly stated that they “offer[s] personal stories” revealing that “there is no risk to marriages of opposite-sex couples merely because same-sex couples also commit to marriage, and that barring same-sex couples from the commitment of marriage humiliates the children of those couples” and that “prohibiting committed same-sex couples from marrying relegates their relationships to an inferior status.”<sup>186</sup> No other brief in support of the petitioners used personal experiences as the primary means of supporting their argument.

On the other hand, many of the briefs submitted by the petitioners displayed a sharper

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<sup>186</sup> Brief for PFLAG Inc. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

deviation from the existing legal norm regarding amicus briefs. These deviations occurred most often in the briefs of individual respondents, like the brief of Dawn Stefanowicz and Denise Shick. In this brief, Stefanowicz and Shick wrote that their “interest is due to [their] diverse personal, professional, or social experiences with our fathers, their same-sex sexual partners and associated gay, lesbian, bisexual and transsexual subcultures during the first 30 years of our lives.”<sup>187</sup> Another specified their own personal connection and investment in the case, which triggered concern for the larger implications of the legalization of same-sex marriage. The filer of this brief, Jon Simmons, identified his position as a member of a community concerned for the well-being of society after the legalization of same-sex marriage.<sup>188</sup> Another individual *amici* used their status as a pastor to present important information regarding the nature of marriage and its connection to religious doctrine.<sup>189</sup> Their personal experiences thus became an important underpinning to their decision to submit a brief and present their arguments to the Court, and the structure of the briefs represented this fact. Each of the briefs mentioned above integrated their own personal experience into the text itself in a way that was rare to be seen in the petitioners' briefs.

Setting aside these structural concerns, several discrete themes of argumentation emerged from the content analysis. Both the petitioners and the respondents used certain arguments to support their claims for or against same-sex marriage. The two tables, listed below, reveal the major arguments of the petitioners and the respondents.

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187 Brief for Dawn Stefanowicz and Denise Shick As Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

188 Brief for Jon Simmons as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

189 Brief for Rev. John T. Rankin as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

**Table 1: Petitioners' Arguments**

	A1	A2	A3	A4	A5	A6	A7	A8	A9	A10	A11	A12	A13	A14
Traditional conservative values	X													
Rights-based arguments	X	X		X	X	X		X			X	X	X	X
Harms to LGBT community	X	X	X	X	X	X	X	X	X	X		X	X	X
Harms to heterosexual community and society	X			X			X				X			
Harms to institution of marriage						X		X			X			
Benefits to institution of marriage	X			X		X								
Benefits to families, children and society	X		X	X		X				X	X	X		
Religious arguments	X			X							X			
“Who decides” - courts v. legislatures	X	X			X				X				X	X
Definition/value of marriage	X	X		X		X				X	X			
Role/interest of government (state/federal)	X			X		X		X		X	X		X	X
Tradition	X				X	X	X	X					X	
Domestic partnerships/civil unions		X										X		
Nature of homosexuality			X			X								
Procreation and parenting			X		X	X	X			X			X	
Use of precedent					X	X					X			
Sex-based discrimination					X				X	X				
Polygamy											X			
1st Amendment											X			

**Table 2: Respondents' Briefs\***

	B1	B2	B3	B4	B5	B6	B7	B8	B9	B10	B11	B12	B13	B14	AB1
Traditional conservative values		X													
Rights-based arguments	X		X	X	X	X		X	X		X	X	X	X	X
Harms to LGBT community	X		X		X	X	X		X	X	X			X	X
Harms to heterosexual community and society	X	X	X	X	X		X				X		X		
Harms to institution of marriage		X	X												
Benefits to institution of marriage															
Benefits to families, children and society		X		X	X		X				X				
Religious arguments				X		X			X		X		X		
"Who decides" - courts v. legislatures	X	X		X	X	X	X	X		X		X			
Definition/value of marriage	X	X	X	X	X	X	X	X	X	X	X	X	X	X	
Role/interest of government (state/federal)	X	X	X	X				X	X			X		X	X
Tradition	X	X	X	X		X	X			X	X	X	X		X
Domestic partnerships/civil unions			X												
Nature of homosexuality							X				X		X		
Procreation and parenting	X	X	X	X	X			X		X	X	X		X	X
Use of precedent			X			X		X				X		X	X
Sex-based discrimination	X														
Polygamy	X	X		X		X					X	X			
1st Amendment															

\*Included in this table is the neutral party's brief, designated by AB1.

These two tables reveal the major list of arguments that characterize each of the 28 briefs in the sample, along with the one neutral brief (which, for the purposes of this study, will be disregarded). Most of the arguments listed above occur in both the petitioners' and the respondents' briefs, which indicate that both sides talk about the same kinds of issues in the context of the larger issue of same-sex marriage. However, the two sides talk about the issues in different frequencies. For example, the petitioners talked most often about the harms to the LGBT community, whereas the respondents were primarily concerned with the definition and value of marriage. Some issues appeared with the same frequency across both sides. Occasionally, either the petitioner or the respondent mentioned an argument in passing that appeared more frequently in the other side's briefs. As I will discuss later in this chapter, even when the briefs are talking about the same topics, they are talking about it in very different terms.

Certain arguments appeared across briefs that were not anticipated. For example, one brief from each side used “traditional conservative values” to support their arguments for and against same-sex marriage. Given the role of conservative politics in the traditional marriage movement, these results were not necessarily expected. In addition, some arguments appeared on one side but did not appear on the other: for example, the benefits to the institution of marriage. This argument appeared only on the side of the petitioners, not the respondents. This fact alone reveals that, in many instances, the two sides can talk past each other, using arguments that the other side rarely, if ever, addresses outright. One would imagine that, if one side used a certain argument, the other would bring it up just to refute it, but that was not necessarily the case.

Note those times when certain themes and arguments appeared together. Within the petitioners' briefs, for example, it was incredibly difficult to separate the rights-based arguments from the harms of the LGBT community. Within the respondents' briefs, there was a great degree of overlap between the briefs that mentioned the definition/value of marriage and the tradition. The briefs did not present a series of disparate arguments. They created cohesive arguments that blended together many different themes and topics. It would be almost impossible to separate some of the arguments from each other, interconnected as they are. For example, where does one get the definition of marriage? As will be seen later on, the respondents get their definition of marriage from tradition. On the side of the petitioners, why is guaranteeing the rights of same-sex couples to marry so important? It is important precisely because of the harms that would accrue to the community if they were not allowed to marry, in particular the legitimization of discrimination and the prejudice.

For the purposes of this study, I was concerned primarily with the arguments that appeared most often among both the petitioners' and the respondents' briefs. The following table counts the number of briefs on either side that mention a particular argument. Prior to this analysis, it would have been entirely possible that both sides talked past each other, never addressing the other side's arguments. The petitioners could have talked only about the rights of same-sex couples to marry, while the respondents talked only about the redefinition of marriage, for instance. If they never addressed the arguments of the other side, then there would be little opportunity for clashing, merely talking over the heads of the other side. However, the data revealed that both sides tended

to talk the most about the same essential issues with roughly equal proportions. In this table, the arguments displayed in the neutral party's briefs were disregarded.

**Table 3: Dispersion of Arguments Across Petitioners and Respondents**

	Petitioners	Respondents
Traditional conservative values	1	1
Rights-based arguments	10	11
Harms to LGBT community	13	9
Harms to heterosexual community and society	4	8
Harms to institution of marriage	3	2
Benefits to institution of marriage	3	0
Benefits to families, children and society	7	5
Religious-based arguments	3	5
“Who decides” – courts v. legislatures	6	9
Definition/value of marriage	6	14
Role/interest of government (state v. federal)	8	8
Tradition	6	10
Domestic partnerships/civil unions	2	1
Nature of homosexuality	2	3
Procreation and parenting	6	10
Use of precedent	3	5
Sex-based discrimination	3	1
Polygamy	1	6
1 <sup>st</sup> Amendment	1	0

This table reveals key information about the nature of the legal debate over same-sex marriage. Certain arguments appeared over and over again across both the petitioners' and the respondents' briefs. Among the petitioners' briefs, the following list indicates the

most frequently-used arguments by the petitioners:

- Harms to LGBT community
- Rights-based arguments
- Role/interest of government (state/federal)
- Benefits to families, children, and society
- “Who decides” – courts v. legislatures
- Definition/value of marriage
- Tradition
- Procreation/parenting

All but one of the briefs mentioned that the LGBT community would be harmed if they were not allowed to marry the person of their choice. It is significant that 13 of the interest groups represented by this sample considered this argument of such significance that they could not help but to mention it; in many cases, it was the foreground of their argument. The same could be said of the rights-based argument: 10 out of 14 interest groups represented argued that there was a fundamental right to marry a person of the same sex that should not be abridged by the government. Eight of ten interest groups mentioned that it was the role of the federal government, not the states, to decide on this fundamental decision. Half of the interest groups—seven out of 14—argued that certain benefits would accrue to families, children, and society through the allowance of same-sex marriage.

Within the petitioners' briefs, certain arguments also occurred with the same frequency. The last four arguments—“who decides,” definition/value of marriage, tradition, and procreation/parenting—appeared in 6 out of the 14 briefs. A crucial distinction must be made here: all four of the arguments did not appear in the same six briefs (see table 1), but the arguments did occur with the same frequency among all 14 briefs. For example, 6 briefs specifically mentioned the “who decides” argument to

advocate that the courts should decide in favor of same-sex marriage. A different 6 briefs mentioned that they were not seeking to change the definition of marriage by including same-sex couples in the institution. These arguments merely appeared the same number of times across the briefs, but there need not necessarily be overlapping arguments within said briefs.

Similarly, the respondents talked about the same issues over and over again within their briefs. The following list of arguments indicates the most commonly-used topics:

- Definition/value of marriage
- Rights-based arguments
- Tradition
- Procreation/parenting
- Harms to LGBT community
- Role/interest of government (state/federal)
- “Who decides” – courts v. legislatures

Among the respondents' briefs, there was a smaller list of arguments, but they all occurred with much greater frequency. For example, every single one of the briefs mentioned that the question of same-sex marriage was fundamentally a question regarding the definition of marriage. In other words, the current controversy was centered around two opposing views about marriage's definition and value. Much like the petitioners, eleven of the respondents brought up the question of rights: Is there a fundamental right to marry? If there is, what constitutes that right? Should same-sex couples be given the same right to marry, and if not, why not? Certainly this issue was important enough to the petitioners and the respondents that they spent about equal time discussing it within their own briefs.

The respondents spent equal time discussing the issues of tradition and

procreation/parenting; 10 of the interest groups mentioned these issues within their briefs. Again, as in the case of the petitioners' arguments, not all of the 10 briefs mentioning the issue were the same, but there was a certain degree of overlap. The respondents mentioned harms to the LGBT community in 9 out of 14 briefs. They also mentioned the question of “who decides” in 9 out of 14 briefs, stating that the decision should ultimately rest in the hands of the legislatures. They mentioned the role/interest of government, namely the right of the states to decide issues of marriage, in 8 out of the 14 briefs. An equal number of briefs mentioned the harms that would result to heterosexual families, children, and society if same-sex couples were allowed to marry.

What is significant about the data is that the same themes and topics permeated both the petitioners' and the respondents' briefs. Out of the petitioners' briefs, the only argument that did not appear to be common in the respondents' briefs was the issue of the benefits that would accrue to families, children and society if same-sex couples were allowed to marry. Out of the respondents' briefs, the only discordant theme was the harms that would result to heterosexual families, children and society that would result if same-sex couples were to marry. Interestingly enough, this fact alone displays an essential difference about the perceived consequences of legal same-sex marriage. Both operate from a belief that families and children need to be strengthened in our society, but they dispute the proper way to achieve this result. The petitioners argue that allowing same-sex couples to marry will strengthen the family unit in our society, but the respondents refute that claim and argue that allowing same-sex couples to marry will achieve precisely the opposite result. This diametrically opposed view of the positive or negative

consequences of same-sex marriage create a certain degree of tension between the two parties that seemingly has no potential for a middle ground to develop.

Of note also are those themes that show up in a large proportion in one side's briefs but are hardly mentioned in the other side's. Excepting the two themes listed above, the only other argument of this type was the question of polygamy. Another term for this argument could be the "slippery slope": The respondents argue that allowing same-sex marriage would be the first step to allowing all kinds of other "deviant" behavior, like polygamy, bestiality, and incest to enter into our society. Same-sex marriage is conceptualized as the first step to the moral degradation of our society.

For the sake of space, the rest of this chapter will deal with the top three arguments used within the petitioners' and the respondents' amicus briefs. The five resulting arguments to be discussed are as follows: harms to LGBT community, rights-based arguments, role/interest of government (state v. federal), definition/value of marriage, and tradition. In particular, I examined the briefs for those points when they agree and/or disagree about the issue. For example, if the context of the rights-based argument, what animated the discussion about these issues among the briefs? What are the sources of agreement and disagreement when it comes to each of these issues? By asking these questions, I aimed to explore how the two sides talked about these common themes and discover the extent to which these discussions expressed and contributed to the current polarized environment surrounding same-sex marriage.

In addition, I will analyze those arguments with a lopsided distribution: the benefits v. harms to (heterosexual) families, children and society, and the polygamy, or slippery

slope, argument. For the purposes of this study, discussing the three most commonly used arguments among both of the briefs is sufficient to explore key aspects about the polarization that exists within our contemporary society regarding this issue.

I will take each of the arguments in turn, except for those times when two separate themes were so interconnected that it would have been disingenuous and misleading to separate them. Such occasions are noted in their corresponding sections.

### **Harms to LGBT community**

#### *Petitioners*

The petitioners' *amici* argue that many types of harm result from the denial of same-sex couples to the institution of marriage. This denial “discourage[s] responsibility, fidelity, and commitment” and refuses children access to essential legal protections that encourage stability and security.<sup>190</sup> Another brief argued that “[h]arm to children lies at the heart of the issue.”<sup>191</sup> Children of LGBT couples are “humiliate[d]” as the relationship of their parents is given a second-class status.<sup>192</sup> To support this position, many briefs cite the landmark decision of *United States v. Windsor*, which stated that denying same-sex couples (and their children) access to marriage makes it “even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>193</sup> Another

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190 Brief for Kenneth B. Mehlman as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

191 Brief for Bay Area Lawyers for Individual Freedom, et al. as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

192 Brief for PFLAG, Inc.

193 Brief for Ninety-Two Plaintiffs in Marriage Cases in Alabama, et al. as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015). See also Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015), Brief for PFLAG.

brief extends this argument: “They [the marriage bans] deprive children of benefits in order to influence the behavior of others,” namely, their parents. Marriage bans functionally punish children for the supposedly “deviant” behavior of their parents.<sup>194</sup> The harm to the LGBT community extends far beyond the specific couple seeking a marriage license.

Another key harm to the LGBT community is the imposition of unfair stigma and discrimination. Many of the petitioners' briefs argue that barring same-sex couples from marriage demeans the LGBT community by branding them as inferior, which leads to stigmatization and further discrimination.<sup>195</sup> Other briefs explain this harm in more depth: “In depriving gay men and lesbians of membership in an important social institution, these laws convey the States' judgments that committed intimate relationships between people of the same sex are inferior to heterosexual relationships. This is the essence of stigma.”<sup>196</sup> A crucial distinction is made within the briefs that marriage bans do not merely exclude same-sex couples from the rights of marriage, but rather, the bans signify a kind of state-sanctioned disapproval of same-sex couples.<sup>197</sup> This codified disapproval within the laws harm younger members of the LGBT community struggling with their self-identify. These bans imply that these individuals deserve less simply because they were born gay. <sup>198</sup> One of the unintended consequences of this ban is the perpetuation of the belief that same-sex couples are not capable of forming committed, long-term

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194 Brief for Family Law Scholars as Amicus Curiae in Support of Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

195 Brief for Bay Area Lawyers.

196 Brief for American Psychological Association as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

197 Brief for Bay Area Lawyers.

198 Brief for PFLAG.

relationships, which is increasingly damaging to the self-conception of many members of the LGBT community.<sup>199</sup>

Some of the briefs expand on this argument about stigma and discrimination. They state that these bans encourage society's hyper-focus on sexual orientation and therefore legitimize the ways in which regular citizens view members of the LGBT community as somehow not deserving of “the same respect and dignity” given to everyone else.<sup>200</sup> The fact that same-sex couples are denied access to this institution makes them inherently unequal to opposite-sex couples, and this “perceived 'differentness'” is enshrined within the law. This enshrined differentiation “tend[s] to legitimize prejudicial attitudes and individual acts against the disfavored group, including ostracism, harassment, discrimination, and violence.”<sup>201</sup> In other words, by barring same-sex couples from marriage, society is normalizing prejudice and discrimination against the LGBT community as a whole and contributing to acts of violence perpetuated against the group.

This normalization can have unintended health consequences as well, according to one of the briefs.<sup>202</sup> The stigma and stress imposed by such state-sanctioned discrimination does not merely lead to feelings of inferiority and the relegation of their relationship to a second-class status; this discrimination can negatively impact the mental and physical health of LGBT individuals.<sup>203</sup> These discriminatory laws that inflict real mental and physical harm, therefore, cannot be countenanced.

Lastly, certain briefs mentioned the opposing sides' arguments: “Opponents of same-

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<sup>199</sup>*Ibid.*

<sup>200</sup>Brief for Bay Area Lawyers.

<sup>201</sup>Brief for American Psychological Association.

<sup>202</sup>Brief for American Public Health Association, et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>203</sup>*Ibid.*

sex marriage often gild their arguments with the patina of tolerance, for example, by framing the issue in 'definitional' terms, but stigma and scorn lie just beneath the surface.”<sup>204</sup> These “definitional” arguments—discussed later on in this chapter—are therefore rendered illegitimate. Many briefs argue that the sole purpose of the marriage bans is “animus” against the LGBT community, which is not a legitimate reason to continually relegate them to a second-class status.<sup>205</sup> The essence of their arguments is that “anything short of full and equal marriage rights would perpetuate the stigma and second-tier status that gay and lesbian couples currently experience.”<sup>206,207</sup>

### *Respondents*

Of the briefs that mentioned harms to the LGBT community, one only mentioned the argument to refute the petitioners' claims: “opposition to 'same-sex marriage' does not reflect an animus against same-sex partners.”<sup>208</sup> Indirectly, in conjunction with a rights-based argument (discussed later on in this chapter), one other brief acknowledged the petitioners' argument: “Petitioners cite substantial hardship as to the loss of certain

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204 Brief for NAACP Legal Defense and Educational Fund, Inc., et al. as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

205 Brief for Equality Ohio as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015). See also Brief for Conflict of Laws and Family Law Professors as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

206 Brief for Massachusetts, et al. as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

207 The vast majority of the briefs presented their arguments in the way I have laid out above. However, of note is the brief submitted by The Alliance State Advocates for Women's Rights and Gender Equality. This brief argued that these marriage bans perpetuate a kind of sex-based discrimination that is incredibly harmful to the LGBT community: “Bans on marriage of same-sex couples are state-backed legal regimes that are based on and reinforce gender stereotypes that harm everyone, including LBT people and heterosexual and non-transgender women and men oppressed by imposition of those stereotypes. Such bans cannot stand.” Although this argument was not common among the petitioners' briefs, it points to a different kind of harm that might result from these marriage bans and therefore it is worth mentioning in passing.

208 Brief for American Freedom Law Center as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

marital benefits, but no abridgment of liberty.”<sup>209</sup> Nothing further was done to either support or refute the petitioners' arguments.

The remaining briefs that explicitly brought up the harms argument stand in direct contrast to the petitioners' briefs. For example, several briefs brought up the issue of harms to children. One stated that “a child of a same-sex couple may be stigmatized more by the unusual appearance of having 'two fathers' or 'two mothers' than by whatever their legal status happens to be.”<sup>210</sup> In this case, there is some degree of concurrence between the petitioners' and the respondents' briefs: They both acknowledge that the potential harms to children of LGBT couples should be taken into account, and these children may experience stigma based on their parents' sexual orientation, but the respondent disputes what would cause the greater harm: recognizing or not recognizing the relationship as legitimate. Essentially, the respondent argues that recognizing same-sex marriages would not eliminate the stigma present for a child with two same-sex parents.

One of the briefs speaks directly from the perspective of children who grew up in an LGBT household. Dawn Stefanowicz and Denise Shick argue from their own personal experience: “It is difficult to be a child of same-sex parents, for reasons including sexual or gender confusion; forced approval of certain sexual lifestyles; and commodification of children.”<sup>211</sup> Both of these women grew up in an abusive LGBT household and therefore they are committed to making sure that such children have a voice. The harm to children, in their view, is far greater if they grow up in a LGBT household than if they grow up

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209 Brief for Liberty Scholars and the Thomas More Society of Dallas as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

210 Brief for Lary S. Larson as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

211 Brief for Dawn Stefanowicz and Denise Shick.

with their biological parents. They directly contradict the claims of the petitioners: “various studies have shown that children of same-sex parents end up worse off than children of traditional, diverse-gender parents.”<sup>212</sup> Another brief substantiated this claim: “children brought up in homosexual families are much more likely to face serious mental, physical, and emotional challenges.”<sup>213</sup> To protect children, then, it is paramount that same-sex marriage is *not* allowed.

The remaining briefs argued that homosexuality is inherently harmful to adults as well. Allowing same-sex marriage would lead to widespread harms within the LGBT community. *Amici* express this argument in several interconnected ways. Citing a certain Cameron study, the Foundation for Moral Law states that “the homosexual lifestyle is unhealthy and not conducive to longevity.”<sup>214</sup> Another brief pointed out that there is a strong link between same-sex marriage and early mortality.<sup>215</sup> Since empirical science does not support the claim that homosexuality is immutable, but does indicate that homosexuality is associated with significant health risks, same-sex marriage should not be legalized.<sup>216</sup> Unlike the petitioners' arguments that same-sex marriage bans express animus against same-sex couples, this brief argues that “it would be neither compassionate nor kind to normalize and encourage a known and significant public health risk such as homosexuality.”<sup>217</sup> Banning same-sex marriage is considered to be an act of kindness to the LGBT community. Jon Simmons agrees in his brief: “If

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<sup>212</sup> *Ibid.*

<sup>213</sup> Brief for Foundation for Moral Law as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>214</sup> *Ibid.*

<sup>215</sup> Brief for Mike Huckabee Policy Solutions and Family Research Institute as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

homosexuality is, as its opponents say empirical evidence demonstrates, not normal or natural but rather predominantly a manifestation of developmental trauma or dysfunction then institutionalizing it is a supreme disservice to those many who have successfully abandoned the lifestyle.”<sup>218</sup> In this way, homosexuality is coded as a deviant, and ultimately destructive, lifestyle choice that should not be institutionalized in the form of same-sex marriage. For the sake of the health of adults and children, the government must ensure that same-sex marriage will not be legalized. The harm to families, children and society would be far too great if the Courts were to decide in favor of same-sex marriage.

### **Rights-based arguments**

#### *Petitioners*

Ten out of fourteen amicus briefs operated from the almost-unstated premise that marriage was a fundamental right guaranteed by the Constitution. They argued that marriage bans violated the 14<sup>th</sup> amendment's guarantees of equal protection and due process.<sup>219</sup> The right of same-sex couples to marry the person of their choosing “indisputably falls within the narrow band of specially protected liberties that this Court ensures are protected from unwarranted curtailment.”<sup>220</sup> These briefs espouse the idea that nothing but full marriage rights fulfills the equal protection clause.<sup>221</sup> Same-sex relationships, since they are just the same as any other relationship, should be fully recognized by the law.<sup>222</sup>

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218 Brief for Jon Simmons.

219 Brief for Kenneth B. Mehlman.

220 *Ibid.*

221 Brief for Bay Area Lawyers.

222 Brief for PFLAG, Inc.

The petitioners base this conception of the right to marry on earlier Court decisions. The Court has consistently upheld marriage as a fundamental right, protected the freedom to marry the spouse of one's choice and supported the dignity of all marriages.<sup>223</sup> The Court case most appealed to as precedent is *Loving v. Virginia* (1967). This decision argued that the liberty to marry has long been considered a personal right essential to the pursuit of happiness.<sup>224</sup> The precedent set by *Loving* should therefore dictate the decision of the Court. Contrary to the position of the respondents, these briefs argue that “the decision to deny same-sex couples the right to marry ... is nothing more than an effort to defend the indefensible.”<sup>225</sup> There is no legitimate reason under the law to deny same-sex couples this right. By legalizing same-sex marriage, the Court were merely be giving “their lawful conduct a lawful status.”<sup>226</sup>

Each of the petitioners' amicus briefs made essentially the same argument that “civil marriage is a civil right that all Americans are entitled to enjoy, whatever their religious identity or sexual orientation.”<sup>227</sup> The right to marry is guaranteed to all Americans, including same-sex couples. In these briefs, this right to marry is not even disputed; to that end, if the Court is dedicated to protecting the rights of all Americans, they have no other option but to allow for same-sex marriage. One brief states it the best: “Under the Fourteenth Amendment, the majority cannot treat the members of a minority group as disfavored persons. The Fourteenth Amendment guarantees to all people—regardless of race, sexual orientation, or other group characteristics—equality of rights, including the

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223 Brief for Massachusetts, et al. See also Brief for Ninety-Two Plaintiffs.

224 Brief for PFLAG, Inc.

225 Brief for Equality Ohio, et al.

226 Brief for American Public Health Association.

227 Brief for the California Council of Churches, et al. as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

fundamental right to marry. These protections are the 'supreme Law of the Land,' overriding laws enacted through the democratic process, whether adopted by state legislatures or by the voters. For that reason, it is constitutionally irrelevant that popular or legislative minorities may wish to consign same-sex couples to a second-class status.”<sup>228</sup> In these briefs' construction of the rights associated with marriage, it matters not if the state wishes to bar same-sex couples from marrying. To defer to the states' authority in this matter is to misunderstand the Fourteenth Amendment's guarantee of equal protection, “which protects all persons from state-sponsored discrimination, including the petitioners in these cases and all other gay men and lesbians who wish to exercise their right to marry” and to disregard “vital principles of constitutional supremacy.”<sup>229</sup> The equal protection and due process clauses of the Constitution demand no other outcome than the legalization of marriage for all, regardless of sexual orientation.<sup>230</sup>

### *Respondents*

Each of the respondents' amicus briefs disputed the petitioners' claims in various ways. One argued that there is not an unlimited right to marry, i.e., a blanket statement than anyone can marry anyone else they wish. One brief differentiated between the

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228 Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

229 *Ibid.*

230 One of the briefs did not specifically address the topic of legalizing same-sex marriage, but rather the second question of the case: Do states have to recognize same-sex marriages performed out of state? This brief argued from a position of the fundamental right attached to marriage. They stated that “[t]he right to make personal decisions with respect to marital relationships is rendered meaningless if states can refuse to recognize disfavored classes of marriages without a constitutionally permissible basis” (Brief for Conflict of Laws and Family Law Professors as Amicus Curiae in Support of Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015)). This brief expanded the argument of the other briefs by stating that states did not have the constitutional right to deny recognition of same-sex marriages. In fact, they posited that this fundamental right to marry means little if states are not required to recognize same-sex marriages from other states.

“rights of marriage” and the “right to marry.” The rights of marriage include the “legal and economic incidents of marriage,” the “many related but separable rights, privileges and benefits” that accrue to married couples. However, these rights of marriage are very different from the right to marry, which demands “the adoption of a public policy placing the state's imprimatur of approval on the couple's relationship, conduct or lifestyle.”<sup>231</sup> This respondent argued that same-sex couples have the rights of marriage, but not the right *to* marry. The rights of marriage—the legal and economic benefits—are guaranteed to same-sex couples under the Constitution, but the right *to* marry, to be recognized by law as a married couple, is *not* a fundamental right because it requires the government to place its stamp of approval on a relationship. Such conferral of the “reputational” value of marriage is not required by law to be given to same-sex couples.<sup>232</sup>

Another brief argued that marriage is a fundamental right, but only in relation to procreation.<sup>233</sup> Separate the right to marry from marriage's natural procreative capacity, and it is no longer a fundamental right. This brief called out the petitioners' argument that “the fundamental right to marry is based on the freedom to choose one's spouse.” Said argument “disregard[s] the procreative significance of marriage.”<sup>234</sup> Instead, this respondent argued that the fundamental right to marry is based on the procreative capability of a man and a woman within marriage. By untethering marriage from its procreative significance, the fundamental right to marry disappears.

A related argument in a couple of the briefs deals with the right of children to know

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231 Brief for Lary S. Larson.

232 *Ibid.*

233 Brief for Michigan Catholic Conference as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

234 *Ibid.*

their biological mother and father. Dawn Stefanowicz and Denise Shick's brief argues that "[t]he most basic need—the fundamental right—of any child is to have a real father and a real mother, committed to one another in marriage, and committed unreservedly to the well-being of their children."<sup>235</sup> Allowing same-sex couples access to the institution of marriage would deprive children of that fundamental right and disregard their needs.<sup>236</sup> Another brief argued that issuing same-sex marriage licenses would "impair or destroy the child's presumptive, constitutional right to her mother and father."<sup>237</sup> Under this construction, the right to marry the person of one's choosing and the right of children to know their biological mother and father are pitted against each other, and the child's right should necessarily win out over the same-sex couples' right.

Others agree with the petitioners about the fact that there is a fundamental right to marry, but the question lies in the definition of marriage being used. The respondents argue that marriage is solely defined between a man and a woman, and attempting to say there is a fundamental right for same-sex couples to marry is in fact a nonsensical claim. A further section will deal with the definitional argument in more depth, but certain points may be made here. One brief succinctly laid out the logic behind this position: "The Court recognized that marriage is a fundamental right. The Court then redefined marriage to include same-sex unions. The Court then announced that the right to enter into same-sex unions is a fundamental right to be accorded strict scrutiny. But calling a same-sex union a marriage does not make it a marriage, any more than calling a tail a leg means a dog has five legs."<sup>238</sup> In other words, marriage connotes a certain definition for

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235 Brief for Dawn Stefanowicz and Denise Shick.

236 *Ibid.*

237 Brief for Liberty Scholars and the Thomas More Society of Dallas.

238 Brief for Foundation for Moral Law.

respondents—namely, a commitment between one man and one woman for life—and therefore, the right to marry is the right to enter into such a union. It does not, nor will it ever, involve a right for same-sex couples to enter into the union, unless a redefinition of terms occurs. Supporting a same-sex right to marry “assumes the conclusion of the matter, i.e., that marriage as newly defined is a fundamental right, in the premise of the question without acknowledging that a change in terms has occurred.”<sup>239</sup> The Court would have to “establish a new constitutional right to homosexual marriage”—which, according to many other briefs, is a contradiction in terms—in order for the petitioners’ claims to hold water.<sup>240</sup> Marriage has its own particular definition, and “redefining marriage as a civil right based on our sexual desires is ill advised.”<sup>241</sup> More discussion about the definitional value of marriage will occur later in this chapter.

Two other briefs argued that there is no historical basis for a right to same-sex marriage: “There is no historical foundation for a liberty interest in marrying a person of the same sex. It follows that the Fourteenth Amendment guarantee of ‘due process of law’ does not include such a right”<sup>242</sup>; “This Court has never held that there is a fundamental right to same sex marriage.”<sup>243</sup> One expanded on this point by stating the following: “It is self-evident that the concept of same-sex marriage is universally novel as of the late 20<sup>th</sup> century, and is wholly devoid of any prior historical traction with the language and nature

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239 Brief for Richard A. Lawrence as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

240 Brief for Texas Eagle Forum and Steven F. Hotze, M.D. as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

241 Brief for Jon Simmons.

242 Brief for Earl M. Maltz, et al. as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

243 Brief for Judicial Watch as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

of fundamental or unalienable rights.” The brief goes on to state that the source of unalienable rights is the Bible. Consequently, since there is no support for same-sex marriage within the Bible, same-sex marriage cannot be a fundamental right.<sup>244</sup>

Each of the respondents' briefs present different reasons for rejecting a fundamental right to same-sex marriage. Note that they do not dispute the fact that there is a fundamental right to marry, just the claim that there is no fundamental right to marry someone of the same sex. They present their arguments in various terms, citing tradition, other rights, and definitions, among others, but they come to the same conclusion: The Court does not require same-sex marriage because there is no fundamental right for people to marry someone of the same sex. This argument stands in sharp contrast with the petitioners' briefs, who argue that there is a fundamental right to marry a person of one's own choosing—including someone of the same sex.

### **Role/interest of government (state/federal)**

#### *Petitioners*

Eight briefs mentioned that it was well within the “appropriately narrow and modest role of government” to allow same-sex marriage.<sup>245</sup> There are many governmental interests that are served by marriage, such as the reinforcement of stable family bonds, economic interdependence and security, and increased well-being for both parents and children. By refusing same-sex marriage, the government works against these interests.<sup>246</sup> The brief pointed out that legalizing same-sex marriage would not weaken the States' ability to impose reasonable restrictions of marriage, as long as those restrictions are in

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244 Brief for Rev. John T. Rankin.

245 Brief for Kenneth B. Mehlman.

246 Brief for Massachusetts, et al.

service of legitimate governmental interests. The States are free to place “reasonable regulations” on marriage, just like they were before, but the only difference is that they are not free to impose discriminatory policies based merely on gender or sexual orientation.<sup>247</sup> If the State is truly committed to promoting the well-being of families and increasing economic interdependence, thereby increasing the prosperity of the nation as a whole, they should legalize same-sex marriage.

By refusing same-sex marriage, the state is essentially stating that same-sex households are not recognized “as a true ‘family’—a designation that is uniquely conferred in our society by the institution of marriage.”<sup>248</sup> One justification for this ban is the so-called “optimal parenting” model, wherein a household with both a married mother and father is considered the prime environment for raising children. Under this model, same-sex marriage should not be legalized merely because they are considered to be a “suboptimal setting for raising children.” The only problem is that if that were a justifiable state interest, far more couples would be barred from marrying and raising children. Instead, these bans serve only to discriminate against same-sex couples in particular, and “[a] desire to mark the relationships and parenting abilities of same-sex couples as less worthy of respect is an impermissible interest, under any standard of constitutional review.”<sup>249</sup> Such a plainly discriminatory ban cannot be justified under the law by any state or federal government. Thus, there is no legitimate state interest served by disallowing same-sex marriage; instead, these laws are only meant to degrade and demean same-sex couples. These relationship should be protected from such unwarranted

<sup>247</sup> *Ibid.*, see also Brief for Conflict of Law and Family Law Professors.

<sup>248</sup> Brief for Kenneth B. Mehlman.

<sup>249</sup> Brief for The Alliance State Advocates for Women's Rights and Gender Equality as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

treatment by reaffirming the Fourteenth Amendment guarantees of due process and equal protection.<sup>250</sup>

### *Respondents*

The eight *amicus curiae* in support of the respondents argue that the State only has a legitimate interest in preserving the 'traditional' definition of marriage between a man and a woman. As a result, the state will not sanction and validate same-sex marriages, and it should be required to do so by a federal court.<sup>251</sup> The briefs provide a couple of different justifications for this perspective.

Several briefs argue that restricting marriage to opposite-sex couples promotes legitimate state interests.<sup>252</sup> These legitimate state interests most often involve the well-being of children. Other briefs expand on this point by linking marriage, and all of its attendant benefits, with the naturally procreative capacity of the union. The State does not have a “legitimate—much less compelling—interest in the romantic lives of citizens as such,” but they do have a legitimate interest in the children that might result from such a union.<sup>253</sup> The State is able to make the decision to “recognize, benefit, and burden only the naturally procreative union,” which contributes to increased stability and independence within the family unit.<sup>254</sup> The State may be required to “sanction homosexual conduct,” as they did in *Lawrence v. Texas* by decriminalizing such behavior, but they are not required to grant same-sex couples recognition in the form of a marriage license. The State has logical and compelling interests in preserving heterosexual

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250 Brief for Constitutional Accountability Center.

251 Brief for American Freedom Law Center.

252 *Ibid.*

253 Brief for Ryan T. Anderson as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

254 Brief for Michigan Catholic Conference.

marriage: “In limiting marriage to a man and a woman, a state may give support to the biological fact that the physical human anatomy is intended for sexual relations between a man and a woman with the possibility of conception and birth, regardless of what other constitutionally protected conduct may be done in private.”<sup>255</sup> In this way, “the States’ interest in maintaining the traditional definition of marriage” is related to the way in which “it furthers the government interest in child-rearing.”<sup>256</sup> The state should not be allowed to criminalize “alternative personal relationships,” like same-sex relationships, but they also do not have to grant them the rights of marriage.<sup>257</sup>

Another brief argues that the State has a “legitimate state interest” in “the promotion of moral values in society.” Consequently, “allowing same-sex couples to marry would lessen the effectiveness of marriage as a means of promoting moral values.”<sup>258</sup> The State has a vested interest in promoting “traditional marriage and sexual morality,” which would ultimately be tarnished if they were to give their stamp of approval to same-sex marriage. As a result, “[e]ach state should have the opportunity to evaluate whether, in its own communities, the growing spirit of tolerance and equality justifies an evolution in their societal views of morality.”<sup>259</sup> In this construction, the State’s role is to promote traditional moral values through the continued adherence to the heterosexual model of marriage.

These eight briefs argue that there is a legitimate state interest in preserving the traditional marriage between one man and a woman. The primary reason for states to

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255 Brief of Richard A. Lawrence.

256 Brief for Judicial Watch.

257 Brief for Liberty Scholars and Thomas More Society of Dallas.

258 Brief for Lary S. Larson.

259 *Ibid.*

preserve this model is the continued well-being of the children that might occur as a result of those unions. By preserving traditional marriage, the States are also preserving traditional values—in their eyes, a worthy enough feat in and of itself.

### **Definition/value of marriage**

#### *Petitioners*

The six petitioners' amicus briefs that mentioned this argument specifically referred to marriage as a unique institution in human society. Each of the briefs present interconnected definitions and values of marriage. They acknowledge that marriage is a privileged institution within the United States. Marriage is also far more than a guarantor of certain legal and economic benefits.<sup>260</sup> Instead, it is the single strongest sign of commitment and love that can be made between two people.<sup>261</sup>

Marriage is considered for both its legal and personal ramifications. The brief from the state of Massachusetts highlights this dual nature of marriage: “Marriage is a central organizing feature of our society, conferring exclusive rights, protections, and obligations on married couples and their families. States promote marriage to ensure long-lasting bonds between spouses and to provide a solid foundation for the families they form together. Marriage is also an immensely personal commitment involving the most intimate and private aspects of life.” The brief particularly highlights the legal aspects of marriage: “[marriage] creates economic and health benefits, stabilizes households, forms legal bonds between parents and children, assigns providers to care for dependents, and facilitates property ownership and inheritance. Marriage thus provides stability for

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<sup>260</sup> Brief for Bay Area Lawyers.

<sup>261</sup> Brief for PFLAG, Inc.

individuals, families, and the broader community.”<sup>262</sup> Marriage is viewed in the terms of the benefits and advantages that accrue to those who have access to the institution. This argument ties into the “harms to LGBT community” argument: same-sex couples are harmed through their exclusion from the legal and economic rights of marriage—which is not justifiable, due to the 14<sup>th</sup> Amendment's equal protection and due process clauses.

However, marriage is far more than its associated legal rights. Marriage is fundamentally “a time-honored demonstration to family, friends, and the community of a loving commitment and mutual responsibility between two people, and implies a return promise by society to respect that commitment.”<sup>263</sup> Marriage is portrayed as a way to recognize the commitment of two loving individuals to one another. Marriage enables two people to take care of one another, as well as their vulnerable relatives and family members.<sup>264</sup> Marriage is primarily about the recognition of a commitment between two loving individuals, and the legal and economic benefits are secondary to that recognition.

One brief, in particular, is worth noting because it explicitly mentions the religious aspects of marriage. All of the briefs mention that there are legal and personal aspects to marriage, but only one acknowledges that there has long been a religious connotation to marriage. The brief by the California Council of Churches acknowledges that marriage has had an important place in the religious lives of most faith communities, who must each be free to celebrate marriage on its own terms.<sup>265</sup> At the same time, they acknowledge the fact that marriage has also traditionally been a secular institution, free

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262 Brief for Massachusetts, et al.

263 Brief for Bay Area Lawyers.

264 Brief for Kenneth B. Mehlman.

265 Brief for California Council of Churches.

from religious limitations.<sup>266</sup> Ultimately, the brief argues that marriage—both secular and religious marriage—should be recognized between any two individuals, regardless of their gender, and it is the right of churches to be able to issue marriage licenses to whomever they wish. Such a brief does not fit into the prevailing pattern, but it does provide a glimpse into the way religious interest groups frame the argument in favor of same-sex marriage and at the same time contextualizes the wide variety of opinions within religious organizations about the definition and value of marriage.

### *Respondents*

All of the respondents' amicus briefs mentioned the definition and/or value of marriage. Much like the petitioners, they began by emphasizing the fact that marriage is a unique institution. They argue that marriage has its own nature, properties, and purpose.<sup>267</sup> Every amicus brief upheld the characterization of marriage as between a man and a woman who join together for their own mutual betterment and procreation.<sup>268</sup>

Any deviation from this heterosexual norm requires a kind of redefinition of marriage. The respondents' amicus briefs argue that the petitioners are trying to redefine an institution that has stood for thousands upon thousands of years—which they have no right to do. One brief, submitted by Ryan T. Anderson, articulated clearly the differences between these two perspectives on marriage: the conjugal view and the revisionist view. Under the conjugal view, marriage is a “comprehensive union,” characterized by its ability to “join[ing] spouses in body as well as in mind.” This union “is begun by consent and sealed by sexual intercourse.” Since sexual intercourse is “the act by which new life

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<sup>266</sup> *Ibid.*

<sup>267</sup> Brief for American Freedom Law Center.

<sup>268</sup> *Ibid.*

is made, it is especially apt for—and deepened by procreation.” In addition, since marriage is a comprehensive union—joining together a man and a woman in an all-encompassing way—it is “permanent and exclusive,” not given to annulment or divorce on a whim. However, on the flip side, this brief argues that proponents of same-sex marriage are advocating for a “revisionist view” of marriage, defined as an emotional union, deepened by any consensual sexual activity and yet valuable as long as “love,” considered as a feeling, lasts. Same-sex marriage would replace the conjugal view of marriage with the revisionist view, where marriage is only distinguishable from other forms of companionship by its romantic element.<sup>269</sup> According to this definition, there would be no way to allow same-sex couples to marry without radically changing the face of marriage itself, and that, according to Anderson and the rest of the respondents' *amici*, would be incredibly dangerous to the institution of marriage and society in general.

Other briefs argue that there is unique value in heterosexual marriages that benefit children and society in a way that same-sex marriages cannot.<sup>270</sup> The core purpose of marriage is the establishment of a stable institution for the protection of children, which would be threatened by same-sex marriage.<sup>271</sup> In the minds of the petitioners, redefining marriage to include any loving, committed relationship between two people would be dangerous, in that it would primarily “assign[s] legal import to same-sex role-playing, only imitating what is attained by natural heterosexual pairing.”<sup>272</sup> Not all of the briefs present the argument in such loaded terminology, but many agree that giving same-sex couples the status of marriage would be a dangerous redefinition of terms that would

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269 Brief for Ryan T. Anderson.

270 Brief for Dawn Stefanowicz and Denise Shick.

271 Brief for Earl M. Maltz, et al.

272 Brief for Jon Simmons.

ultimately construct marriage as a “romantic-emotional union” based mostly on love, and not the “natural” complementarity of men and women and their ability to procreate.<sup>273</sup>

One final argument, based primarily on the assumption that petitioners are seeking a redefinition of marriage, is that “[t]he role of defining marriage and implementing laws in regard to it has always been primarily the province of the States.”<sup>274</sup> Thus, even if there was a basis for redefining marriage, it would be the responsibility of the citizens to engage in that process, not the Courts. Note how this is the flip side of the argument that the States have a right to uphold the “traditional” definition of marriage against the perceived dangers it faces due to same-sex marriage.

Although each of the briefs express their ideas in slightly different terms, they all support the “essential” nature of marriage as between a man and a woman and argue that there is no legitimate governmental interest that would justify a redefinition of marriage. If the Court does approve same-sex marriage, they would not have given these couples access to an institution previously barred to them, but rather, they would redefined marriage itself.<sup>275</sup> For the sake of the institution of marriage itself, and for the children that naturally emerge from such a union, there is no credible basis for “redefining” marriage to include same-sex couples.

## **Tradition**

### *Petitioners*

The petitioners' amici argue predominantly that tradition is not itself a “permissible justification” for the discriminatory marriage bans.<sup>276</sup> They commonly cite *Loving v.*

273 Brief for Ryan T. Anderson. See also Brief for Rev. John T. Rankin.

274 Brief for Judicial Watch.

275 Brief for Richard A. Lawrence.

276 Brief for Kenneth B. Mehlman.

*Virginia* as evidence for the fact that the Court itself does not consider tradition a “rational justification” for the violation of the Fourteenth Amendment. If tradition was a justifiable reason, then the decision in *Loving v. Virginia* would have upheld the right of states to ban inter-racial marriages.<sup>277</sup> Both the lower and the upper courts have denied the respondents' idea of tradition as a compelling justification for these marriage bans.<sup>278</sup>

Part of the reason why tradition is not compelling justification is tied into the role and interest of government. In order for the bans to survive constitutional scrutiny, they must be tied to a “legitimate governmental interest that is independent of the disadvantage imposed on a particular group.” The bans are not tethered to any legitimate governmental interest of this kind. The fact that “they may continue a long tradition of exclusion is not enough” for the continued maintenance of these marriage bans<sup>279</sup> Denying same-sex marriage enforces the idea that LGBT citizens deserve to be treated as second-class. Tradition cannot be a “rationale” for “discrimination by multiple states” against same-sex couples. Tradition is outright rejected in all but one of the petitioners' briefs.<sup>280</sup>

In this singular brief, the filer prevailed upon a different conception. Legalizing same-sex marriage in fact serves the traditional values of “responsibility, fidelity, commitment and stability” previously exemplified by the heterosexual family unit. These values would be much better served by ending the governmental ban on same-sex marriage.<sup>281</sup>

### *Respondents*

For the respondents, the tradition argument is intimately tied up in the

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<sup>277</sup> Brief for Equality Ohio, et al.

<sup>278</sup> Brief for NAACP Legal Defense and Educational Fund Inc., et al.

<sup>279</sup> Brief for Massachusetts, et al.

<sup>280</sup> Brief for Ninety-Two Plaintiffs in Marriage Cases in Alabama, et al.

<sup>281</sup> Brief for Kenneth B. Mehlman.

definition/value of marriage argument. These briefs argue that marriage, from its earliest conception, has a universal symbolism independent of its legal and economic rights. Granting a marriage license is more than a piece of paper; it is a honor conferring many reputational benefits. Marriage recognizes that a couple can establish a home and bring children into the world. It also confers society's approval onto their relationship and their conduct.<sup>282</sup> By upholding the marriage bans states are doing nothing more than adhering to the “longstanding tradition affirming conjugal marriage.”<sup>283</sup>

The respondents point directly to the fact that traditional marriage between a man and a woman “arose independently of any claimed discrimination” against same-sex couples. The continued adherence to the traditional model of same-sex marriage does not express an animus against same-sex couples, but rather a respect for the definition of marriage as the union of one man and one woman for the purposes of procreation that has been shared by generations and generations.<sup>284</sup> Such a unit ensures stability and increases the chances that children will be raised by their biological mother and father within the bonds of marriage, which traditionally has been understood as the optimal environment for raising children.<sup>285</sup> Regardless of society's opinion about homosexuality or same-sex marriage, heterosexual marriage has historically been considered essential for promoting the public welfare.<sup>286</sup>

The flip side of this argument is that homosexual marriage is *not* rooted in historical tradition. The idea of same-sex marriage was “universally novel” until the late 20<sup>th</sup>

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282 Brief for Lary S. Larson.

283 Brief for Earl M. Maltz, et al.

284 Brief for Michigan Catholic Conference.

285 Brief for Ryan T. Anderson, Ph.D.

286 Brief for Lary S. Larson.

century. This relatively recent concept is inconsistent with the language of unalienable rights. In other words, since there is no historical basis for same-sex marriage within the Anglo-American tradition, and there was not at the time of the Founders, it cannot be legalized under the 14<sup>th</sup> Amendment. Tradition matters, and both arguments—the traditional notion of marriage between a man and a woman, and the lack of historical precedent for same-sex marriage—support the continued ban on same-sex marriage.<sup>287</sup> The respondents ultimately uphold the sanctity of tradition in this case.

### **Benefits to families, children and society**

#### *Petitioners*

The petitioners' *amici* argue that allowing same-sex marriage would lead to numerous benefits to families, children and society. Marriage, as the foundation of secure families, reinforces important societal values like commitment, fidelity, and responsibility.<sup>288</sup> Permitting civil marriage for same-sex couples would ultimately lead to increased stability and commitment, as well as greater levels of happiness, mental health, and physical well-being.<sup>289</sup> It almost goes without saying in these briefs that allowing same-sex marriage offers access to the economic benefits, but the recognition of same-sex marriage would also lead to numerous “intangible benefits,” like stability.<sup>290</sup>

One of the most important benefits offered to families and children is related to the conferral of state approval on the relationship. Even though same-sex couples can receive many of the same economic benefits associated with marriage from domestic

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287 Brief for Rev. John T. Rankin.

288 Brief for Kenneth B. Mehlman.

289 Brief for American Psychological Association. See also Brief for American Public Health Association, Brief for The Alliance State Advocates for Women's Rights and Gender Equality.

290 *Ibid.*

partnerships or civil unions, there is a reputation attached to marriage, a sense of society's approval, that cannot be achieved by any other institution. In PFLAG's brief, they quoted a woman who put it the best: "Having that wedding ring on my finger has made a tremendous difference in my day-to-day life. It tells everyone that I am in a committed relationship that is worthy of the greatest recognition that civil society can offer. Critically, it also tells our daughter that the State recognizes us as a family, and that there is nothing second-class about her parents' commitment."<sup>291</sup> Marriage is far more than economic benefits; there are intrinsic psychological and emotional benefits that are necessary if same-sex couples are going to be granted an equal status with opposite-sex couples.

One brief in particular touches upon the unique benefits given to children of same-sex couples. Just like same-sex marriage would improve the well-being of same-sex couples, the legalization of same-sex marriage improves the well-being of children by conferring equal value on their relationships and consequently strengthening their families.<sup>292</sup> These benefits can be economic in nature, giving families increased access to health insurance and job benefits, for example. Yet they can also indicate to these children that their families are just as dignified and worthy of respect as any heterosexual family. These children grow up knowing that they are on an equal footing with every other child. The equality of their family in the eyes of the law can only be a benefit, not a hindrance to these children of same-sex couples.

The petitioners ultimately argue that same-sex marriage would be incredibly

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<sup>291</sup> Brief for PFLAG, Inc.

<sup>292</sup> Brief for Massachusetts, et al.

beneficial to same-sex couples and their families. Equality under the law leads to increased stability and commitment, along with innumerable economic benefits. Since one of the key concerns of the State is the well-being of its people, and allowing same-sex marriage would ensure the increased well-being of a significant subset of its population, the State only has one logical choice: to legalize same-sex marriage and grant these families and children their rightful benefits under the law.

### *Respondents*

Only four out of the 14 briefs mentioned the benefits to families, children and society. In their estimation, traditional marriage supports the common good.<sup>293</sup> These briefs explicitly point out that traditional marriage confers unique benefits on children and argue that such a definition of marriage must be enforced at all costs: “[m]arriage needs to remain a societal foundation that constitutes, represents, and defends the inherently procreative relationship between the husband and the wife for the welfare of their biological children and society.”<sup>294</sup> Under this construction, only the union of a man and a woman in civil marriage confers any intangible benefits, like stability and commitment, and general health and well-being to families and society. The rejection of same-sex marriage would lead to increased stability and serve the “greater good.”<sup>295</sup>

One brief flat-out exhorts the Court to reject the Petitioners' arguments. They argue that this action would be an expression of “true compassion and kindness for the benefit of millions of American young people, who, as a function of behavioral and lifestyle choices encouraged by unwise or uncaring public policy decrees, would otherwise die

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293 Brief for Michigan Catholic Conference.

294 Brief for Dawn Stefanowicz and Denise Shick.

295 Brief for Jon Simmons.

early.”<sup>296</sup> The brief constructs homosexuality as a health risk that cannot be condoned by a government focused on the good of its people. After all, no legitimate Court would sanction a public health risk like homosexuality, which, according to the brief, leads to an increased risk of mortality due to disease and other biological factors.<sup>297</sup> The Court, if it were truly compassionate, truly looking out for the benefits of families and children, would not legalize same-sex marriage.

### **Harms to (heterosexual) families, children and society**

#### *Petitioners*

The petitioners' *amici* present unambiguous answers to the question of whether same-sex marriage would cause harm to heterosexual couples and their families. They state that there is “no evidence that marriage between individuals of the same sex affects opposite-sex couples' decisions about procreation, marriage, divorce, or parenting whatsoever.”<sup>298</sup> Precisely because same-sex couples also commit to the institution of marriage, there is no risk posed to heterosexual couples by legalization of same-sex marriage.<sup>299</sup>

#### *Respondents*

The respondents' *amici* construct same-sex marriage as an existential threat to the institution of traditional marriage. Legalizing same-sex marriage would be done at the peril of society and the greater good.<sup>300</sup> Including same-sex couples in the institution of marriage would change its “social meaning” in ways that would “undermine the public goods historically served by laws defining marriage as the conjugal husband-wife

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296 Brief for Mike Huckabee Policy Solutions and Family Research Institute.

297 *Ibid.*

298 Brief for Kenneth B. Mehlman. See also Brief for California Council of Churches.

299 Brief for PFLAG, Inc.

300 Brief for American Freedom Law Center.

union.”<sup>301</sup> By redefining marriage, the government would be actively harming spouses, children, and the larger community.<sup>302</sup>

The briefs offer several reasons for this perceived harm. One brief mentions that redefining same-sex marriage would teach that there is no difference between mothers and fathers, and therefore, the “optimal model” for raising children would be undermined.<sup>303</sup> They also argue that same-sex marriage would “contribute to an atmosphere or culture of general sexual freedom and promiscuity” and increase the occurrences of out-of-wedlock pregnancy.<sup>304</sup> Same-sex marriage will also prevent children from establishing bonds with both biological parents.<sup>305</sup> The respondents universally acknowledge that children have the right to know their biological parents, and there will be long-term consequences when children are not allowed this access. A child who does not know their biological mother and father is being taught, according to Dawn Stefanowicz and Denise Shick, that what they need does not matter.<sup>306</sup>

Other briefs touch upon the fact that homosexuality has historically been associated with public health risks, like HIV/AIDS. They point to studies that have shown that homosexuality is a “known and significant public health risk.” Therefore legalizing same-sex marriage would be “self-injurious,” putting unwanted financial, emotional and health burdens on survivors, including children, and society as a whole.<sup>307</sup> Couples will contract dangerous diseases, children will be left without their mother and father, and wider

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301 Brief for Ryan T. Anderson, Ph.D.

302 *Ibid.*

303 *Ibid.*

304 Brief for Lary S. Larson.

305 Brief for Michigan Catholic Conference.

306 Brief for Dawn Stefanowicz and Denise Shick.

307 Brief for Mike Huckabee Policy Solutions and Family Research Institute.

society will suffer if same-sex marriage is allowed.

Other briefs emphasize the moral degradation that would occur as the result of same-sex marriage. Jon Simmons argues that the norms of his society would be eroded if the judiciary redefines marriage. Marriage is “the central pillar for the traditional family, his community's primary forum for training and modeling of values, respect, and tolerance.”<sup>308</sup> If marriage is redefined, these positive benefits would be degraded and possibly eliminated altogether. This kind of moral degradation should be avoided at all costs.

Two other briefs emphasize the fact that same-sex marriage is inherently “an entirely novel and untried idea” that poses unique dangers to the United States.<sup>309</sup> In essence, these briefs argue that there is no way to tell what the ultimate consequences of this decision will be. By legalizing same-sex marriage, the Supreme Court would essentially be “jettisoning” the right of the people to decide whether to legalize same-sex marriage on their own and deciding that the courts alone have the right to decide.<sup>310</sup> Such an idea is inherently dangerous. Another brief states that a ruling in favor of the petitioners would “create a new constitutional right to homosexual marriage” that would be “extraordinarily divisive to our Nation, mostly along regional lines.” The United States would eventually fracture—much like it did in the 1860s over the issue of slavery—if “the Court attempts, at it did in *Dred Scott*, to impose its own provincial view of a fundamental social issue on the entire country.”<sup>311</sup> This brief in particular poses a harrowing image of our future as a country if the Court tells local voters they are wrong, their (conservative) political leaders

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308 Brief for Jon Simmons.

309 Brief for Liberty Scholars and the Thomas More Society of Dallas.

310 *Ibid.*

311 Brief for Texas Eagle Forum and Steven F. Hotze, M.D.

are wrong, and the Bible is wrong about marriage. The nation would in essence split into two over this issue of same-sex marriage and lead to regional conflict similar to the Civil War.<sup>312</sup>

Not all of the briefs speak about the harms posed by same-sex marriage in quite these terms, but they undeniably believe that our society—in particular our family structure—would be irreparably damaged if same-sex marriage is legalized. There is also no way of knowing what the ultimate consequences of the decision would be. In this case, it would be far better to stick to the status quo and protect the heterosexual family unit—specifically, the right of children to know their biological parents. The risk far outweighs any possible benefits which, incidentally, are not mentioned within these briefs.

## **Polygamy**

### *Petitioners*

Only one of the petitioners' amicus briefs mentioned the issue of polygamy. In response to the respondents' argument that same-sex marriage would be the first step to legalizing polygamy (see below), the California Council of Churches disputes that claim. They argue that Mormon polygamy, in particular, which was criminalized in prior Supreme Court discussions, was rooted in patriarchal structures of inequality which led to the subjugation of women. Same-sex marriage, on the other hand, is rooted in the recognition of the full humanity and equality of all citizens.<sup>313</sup> Polygamy is rooted in equality that could never receive due standing under the Fourteenth Amendment, but same-sex marriage poses none of the same threats to democratic institutions.<sup>314</sup> same-sex

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<sup>312</sup> *Ibid.*

<sup>313</sup> Brief for California Council of Churches.

<sup>314</sup> *Ibid.*

marriage could instead be seen as a way to enforce the sanctity of our democratic institutions by ensuring full equality for all citizens.

### *Respondents*

Six of the respondents advanced the exact opposite argument. If the Court is going to legalize same-sex marriage, there is no way to limit that holding.<sup>315</sup> The argument goes like this: If the Supreme Court denies the sexual complementarity of men and women, if they hold that laws defining marriage as between one man and one woman discriminates against same-sex couples because these couples can also have loving and committed relationships, then there is no way to confine the holding to same-sex couples alone.<sup>316</sup> The “concerns about personal autonomy,” the constitutional “right” to confer approval upon same-sex rights, would naturally lead to bigamous or plural marriages, along with the social sanction of incest and other societal ills.<sup>317</sup> One brief goes on to say that if it is constitutionally unsound to stand by the man-woman definition of marriage, it must also be constitutionally unsound to advocate for monogamy within marriage, quoting *DeBoer v. Snyder*.<sup>318</sup>

Ultimately, the respondents put forth a kind of “slippery” slope argument. Once same-sex couples are allowed to marry, all other non-traditional couples have precedent to bring their own cases before the courts.<sup>319</sup> Given the logic of stability and commitment espoused by the petitioners, a ban on polygamy would therefore be difficult to defend.<sup>320</sup>

Chaos would be the “only foreseeable end” if same-sex marriage is legalized and every

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315 Brief for American Freedom Law Center.

316 Brief for Ryan T. Anderson, Ph.D.

317 Brief for Lary S. Larson.

318 Brief for Liberty Scholars and Thomas More Society of Dallas.

319 Brief for Rev. John T. Rankin.

320 Brief for Foundation for Moral Law.

other non-traditional group finds fit to bring their case before the Supreme Court.<sup>321</sup> To avoid this chaos, the Supreme Court must hold that same-sex marriage is not legal.

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From these 28 briefs emerges several key themes of argumentation: harms to the LGBT community; rights-based arguments; the role/interest of government; the definition/value of marriage; tradition; benefits to families, children, and society; harms to (heterosexual) families, children and society; and polygamy. These topics can be divided into four separate categories: arguments from consequences, principle, definition, and process. Arguments from consequence explore the harms versus the benefits that would occur as a result of same-sex marriage. Arguments from principle examine what it means for an individual to have rights: What are the rights guaranteed to all? How are these rights protected by the government? In addition, they examine the role of tradition: How should tradition be considered when making new laws? Should tradition rule, or should the government seek a more progressive path? Arguments from definition explore the meaning of marriage in general. Marriage is considered to be an important societal institution for both the petitioners and respondents, but what makes marriage so important? What is the essence, or the purpose, of marriage? Lastly, arguments from process attempt to discern who should make the decision regarding same-sex marriage. Should the states have the right to decide who gets to marry whom? Should the federal government have the responsibility? What about the courts versus the legislatures? These major points of argumentation characterize most, if not all, of the briefs in the sample.

In the following section, I will explore precisely what the substance of their

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321 Brief for Rev. John T. Rankin.

arguments means in the broader context of polarization. Both sides address the same topics—for example, harms to the LGBT community and the right of same-sex couples to marry—but it remains to be seen whether they are truly talking in tandem with each other or if they are talking past each other. The next chapter will take a closer look at some of these arguments to understand the points of agreement and contention between the petitioners and the respondents. In order to truly understand where the other sides are coming from, a closer look at some of their major claims will yield a better understanding of the existing polarization.

This analysis is particularly pertinent since the Supreme Court eventually ruled in favor of the petitioners. In this case, does that mean that the respondents' arguments are no longer valid in the larger context of the same-sex marriage debate? Is the debate essentially over? The answer to that question is no, the debate over same-sex marriage continues to rage over some of the same issues raised in the amicus briefs. The next chapter will examine the ways in which the larger culture of polarization has been expressed within this briefs and then will look ahead to the future, to see the ways in which these briefs can predict, or shed some light on, the potential trajectory of future polarization within the United States over this issue of same-sex marriage.

## CHAPTER SIX

### Discussion and Conclusions

The 29 amicus briefs—and in particular, the 28 briefs from the petitioners and the respondents—displayed a wide range of arguments. Before discussing the way in which both sides diverge in their expression of these arguments, however, it is pertinent to discuss those commonalities, those points in which the two sides do come to some type of common understanding. Both sides, on a fundamental level, seem to agree what's at stake: the sanctity of marriage, the well-being and protection of adults and children, and the inviolability of the Constitution. However, they disagree on *how* they are to preserve the sanctity of marriage, the well-being and protection of adults and children, and the inviolability of the Constitution. How are they to do so without sacrificing their essential values, their solid beliefs on what they believe America is all about? They both have different ideas about what it means to do so. It is this common understanding of the stakes, and their disparate ideas on the proper way to retain the essential character of our nation, that leads to—or at least contributes to—polarization.

First, both sides agree that there is a sacred quality to the institution of marriage. The six petitioners' amici who explicitly mentioned the definition and value of marriage argued that marriage is an incredibly privileged institution, more than any other in human society. Marriage is more than economic or legal benefits; it is the deepest expression of commitment that can be made between two people. In certain cases, both briefs even agreed that there is a religious component to marriage that must be protected. On the central question of the value of marriage, both sides have a fundamental commonality. They both believe that marriage is important. However, what does it take to protect the

institution from those who would wish to harm it? The answer to that question is precisely what the petitioners and the respondents are laying out within their briefs, but neither side has the same answer.

Both the petitioners' and the respondents' amici also held that the government should have a role in protecting the well-being of its citizens, adults and children alike. Marriage plays an integral role in securing the well-being of citizens, which both sides agree upon. The problem lies in figuring out what it means to truly protect the citizens. The petitioners' amici argue that the only way to protect families and children is by opening up the institution of marriage to all, but the respondents' amici argue that legalizing same-sex marriage would cause irreparable harm to families, children and society. The two sides thus have the same motivation, at the core, to make sure that every citizen is protected and therefore society is preserved. However, the essential conflict seems to arise when neither side can come to the same conclusion on what would truly secure this well-being.

In addition, both sides believe in the inviolability of the Constitution. They both consistently look to the Constitution to make their arguments. The petitioners, for example, argue that the due process and equal protection clauses of the 14<sup>th</sup> amendment protect the rights of same-sex couples to marry. It is therefore a violation of their constitutional rights to deny them this access. The respondents also look to the Constitution and, in many cases, they agree that the Constitution does grant a fundamental right to marry. However, they argue that allowing same-sex couples to marry would be an intrusion into the sanctity of marriage. It is a contradiction in terms to say that

there is a right to same-sex marriage, because marriage has never been defined as anything other than a male-female partnership. Yet this disagreement does not negate the fact that both sides have a deep and enduring respect for the Constitution as the founding document of the nation.

In this way, both sides appear to operate from the same basic set of assumptions: marriage is an important institution with both civic and religious connotations; the government has a vested interest in protecting the well-being of adults and children; and the Constitution is inviolable. In addition, as mentioned in the previous chapter, the two sides make the same kinds of arguments from principle, consequence, definition and process. This similar focus implies that the petitioners and the respondents are thinking in roughly the same terms. The principles supporting the decision, the consequences resulting from the decision, the definition of marriage, the process used to determine the outcome—all of these topics matter to the petitioners and the respondents alike. Where they diverge, however, is their understanding of the “right” answer to those fundamental questions of principle, consequence, definition, and process. They agree on what matters, but they do not have the same conception of what it takes to secure what matters for future generations. It is on this fundamental disagreement that polarization seems to hinge, and the amicus briefs give expression to that fact.

On one level, the findings of this study seem to contradict Hunter's assertion that both sides of the culture war fundamentally disagree on important issues and merely “talk past one another.”<sup>322</sup> In Hunter's conception of the culture wars, disagreement springs from differing conceptions of the sacred, or the principles that orient the life of individuals and

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<sup>322</sup> Hunter, James Davison. “Culture Wars,” p. 131.

the larger community. When divergent interest groups come into contact with each other, these different opinions on the sacred is seen not as a mere disagreement, but an actual desecration of the group's most cherished values. However, the results of this study indicate that the interest groups involved in the same-sex marriage have similar conceptions of the sacred. The petitioners' and respondents' amici agree on the importance of marriage, the protection of children, and the inviolability of the Constitution. The interest groups at issue do not have dissimilar ideas about what institutions are sacred. Instead, they have a fundamental disagreement that certain institutions, like marriage and the Constitution, are essentially the backbone of the nation. It is from this point of fundamental agreement that disagreements emerge.

Merely because both sides agree on what is important, that does not mean they agree on everything else. They place the same level of importance on marriage, family, and the Constitution, but their conclusions about these three diverge. For example, the petitioners argued across their briefs that marriage's definition has two essential aspects: 1) its legal and economic benefits, and 2) its nature as a symbol of commitment and love in the eyes of the government and the community at large. In their minds, nothing characterizes marriage more than those two facts. Its value arises from its ability to grant stability to children, regardless of their biological heritage. On the other hand, respondents firmly believe, as rooted and grounded in tradition, that marriage has only been understood as an institution between a man and a woman. Some point to the religious underpinning of marriage. Marriage also serves as an impetus for a couple to stay together to raise their biological children, allowing both parents and children to know their biological families.

Both sides know that marriage is important, but what makes marriage important? The two cannot agree, and if they cannot agree on that one fact, then polarization on anything else resulted to the institution is bound to result.

From these differing definitions of marriage emerges numerous other sources of contention. Take the issue of rights. The petitioners, arguing from a position that marriage is valuable because of its legal/economic benefits and its reflection of commitment of a loving couple, argue that same-sex couples should be given the right to marry. This right is not dependent on the sex of the people involved, and it is in fact guaranteed by the due process and equal protection clauses of the 14<sup>th</sup> amendment. On the other hand, the respondents argue that only heterosexuals can marry, under the traditional definition, and therefore there is no fundamental right for same-sex couples to marry. Such a right is inherently contradictory, a paradox in terms, equivalent to calling the tail of a dog a leg.<sup>323</sup> What constitutes the right to marry? Why is marriage a fundamental right in the first place? Different amici give different answers to these enduring, all-important questions.

Even if both sides agreed that there is a fundamental right to marry, however, another conflict arises when people attempt to figure out the role of government in granting that right. The petitioners argue that the federal government—and more specifically, the Supreme Court—has the ability to determine whether same-sex couples are allowed to marry, since it is a question that cuts right to the heart of the Constitutional guarantees of equal protection and due process. The respondents, on the other hand, argue that the decision should be left up to the states, which also has its rooting in the legal precedent of state regulation of marriage. This argument from process was resolved, for the most part,

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323 Brief for Rev. T. Rankin as Amicus Curiae in Support of Respondents, 576 U.S. \_\_\_\_ (2015).

when the Supreme Court ruled in favor of the petitioners in *Obergefell v. Hodges*. The federal government, and specifically the Supreme Court, has the ability to decide whether same-sex marriage is a fundamental right. As far as law is concerned, this argument is closed.

However, that does not mean that the polarization regarding same-sex marriage has dissipated. Indeed, the arguments from principle, consequence and definition still exist within our contemporary society. Such arguments can help shed light on the expression of polarization on the current political scene and become a springboard for speculations about the future of polarization within the U.S. Just because the Court decided in favor of the petitioners, that does not mean that the debate is over—far from it, in fact.

One chief reason for this continued polarization is exemplified in the arguments from consequence. To put it simply, no one *knows* what will happen now that same-sex marriage is legal. The petitioners argued that same-sex marriage would help to protect same-sex couples and rectify many of the harms to which the LGBT community has been subject. Same-sex marriage will protect families and children by providing them with stability and security not provided by domestic partnerships or civil unions. On the other hand, the respondents stated exactly the opposite: same-sex marriage would harm families, children, and society. One brief went so far as to say that same-sex marriage would lead to widespread regional unrest and potentially trigger a civil war.<sup>324</sup> While this last claim may or may not be exaggerated, there is still a tremendous degree of uncertainty related to same-sex marriage and its effects on society. For this reason alone,

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<sup>324</sup> Brief for Texas Eagle Forum and Steven F. Hotze, M.D. As Amicus Curiae in Support of Respondents, 576 U.S. \_\_\_\_ (2015).

the expressions of polarization within these briefs are not likely to dissipate in the near future.

These briefs highlight key areas of controversy between same-sex marriage supporters and opponents that will continue to be relevant to the continued debate about same-sex marriage. The issue hits the heart of fundamental beliefs about marriage, family, and the Constitution that will continue to reverberate throughout society. Our definition of marriage, our protection of families, and our understanding of the Constitution will impact the future of our nation in myriad ways. The petitioners may have “won” the judicial battle, but there is still a battle to be fought for the execution of the law. The petitioners still have to win over the hearts and minds of those people who truly believe that marriage should be reserved to a man and a woman. In return, the respondents have to fight against the ever-shifting tide. In many ways, now that the Court has legalized same-sex marriage, they are fighting an uphill battle, but they are not going to go down without giving it all they have. After all, they are fighting for nothing more or less than the definition of the most important institution within our society. Under those circumstances, it would be near-impossible to imagine a situation where one side would simply give up.

The amicus briefs are only one medium through which the battle has been fought. This advocacy document, so seemingly irrelevant in the grand scheme of things, has allowed interest groups to have a voice in a way that was unprecedented even fifty years ago. These documents have provided a road map to explore many of the key points of polarization within the modern same-sex marriage debate, to distinguish the ways in

which both sides construct their argument. It has allowed us to see what matters to both sides, the fundamental beliefs they hold in common and the core issues that divide them irreparably. The amicus briefs provide a context for understanding some of the key differences in thought between both of the parties and gain an understanding of exactly why they cannot agree. The interested groups on both sides of the issue have fought to influence the Supreme Court, but the battle is over something far more important: the future of our nation. Hunter had it right: interest groups and elites are not fighting for policy, but rather, they are fighting for the culture—past, present, and future—of our nation. In the issue of same-sex marriage, regardless of what side wins out in the end, the face of marriage will be forever altered. Indeed, it already is, and the onus is on these interest groups to decide how to respond now. The stakes have perhaps never been higher.

### **Future Research**

Many avenues of future research emerge from these findings. The logical question after being presented with these findings is whether these results can be extrapolated out to the broader public discourse surrounding same-sex marriage. Elites often construct their arguments in a different form than regular citizens. In the case of amicus briefs in particular, the language was highly geared toward influencing the Supreme Court. As a result, they often used legal jargon that might not necessarily be present in society at large. One major outlying question following this research is whether individual citizens, if given the chance, would use the same general themes and construct their arguments in a similar fashion. To that end, future research could be done to analyze the content of major newspaper articles to see whether the same arguments presented in the briefs occur

in a similar fashion in broader society. One could also analyze the mission statements, press releases and other documentation from the interest groups represented in the sample to see if they use the same arguments in appealing to the general population. In any research project, it is important not only to come to a conclusion but to see if the conclusions are generalizable to society at large. Further research should be geared toward arriving at an answer to that question.

In addition, understanding the face of the culture war after this monumental decision by the Court is essential. How are the two sides now relating to one another? What are the main points of controversy, the hot-button issues, that support the oppositional nature of the parties now that same-sex marriage is illegal? As the state and federal governments aim to create laws honoring the judicial decision, new arguments will emerge and old ones will be reshaped. Interest groups are now fighting a different battle than they were a year ago. Future researchers could seek a more nuanced understanding of how these two sides now relate to each other now that the battlefield has fundamentally changed. The character of the debate and the consequences of this polarization have only begun to be explored; a much greater understanding is needed. In the future, research will be fundamental in the creation of this understanding.

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