

# A Review of

## *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law*<sup>1</sup>

by Carlos A. Ball

Walter R. Schumm<sup>2</sup>

*Same-Sex Marriage and Children* is a history of how both the law and social science culminated in court cases that ultimately led to the success of marital equality in *Obergefell*. Professor Carlos A. Ball, Distinguished Professor of Law & Judge Frederick Lacey Scholar at Rutgers University Law School, has law degrees from both Cambridge University (UK, 1995) and the Columbia University School of Law (1990). He states that the purpose of his book was to “bring together historical, social science, and legal considerations and analyses to explore the role that procreative and child welfare claims have played in

policy and legal debates involving same-sex marriage” (p. 6). In chapter one, the book reviews conservative attempts to derail a number of past legal challenges to traditional assumptions about the nature and role of marriage and parenting. Chapters two and three delve into some of the false arguments about the alleged procreational function of marriage that would have (allegedly) been damaged by legal acceptance of same-sex marriage or other false arguments that marital status per se, parent’s gender, or a parent’s biological relationship to a child had material effects on child outcomes. Chapter four discusses social science results that “have

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<sup>1</sup> *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law*, by Carlos A. Ball. New York: Oxford University Press, 2014 (published in paperback by Oxford University Press in 2016).

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consistently and uniformly failed to find associations between parental sexual orientation and the psychological adjustment and social functioning of children” (p. 7). Consequently, it would not be tenable to object to same-sex marriage on false concerns about the quality of parenting by same-sex parents. While Ball does acknowledge the possibility of differences in sexual orientation and/or gender roles as a function of parental sexual orientation, he argues that the state does not have the right to promote particular forms of those factors. The book concludes with further discussion of the legal battles preceding *Obergefell* and implications for future policy development with respect to gender, child welfare, and responsible procreation. An epilogue in the 2016 paperback edition includes new material based on the *Obergefell* decision.

I would be nervous if readers were to presume I was an expert in family law, an area in which I have had virtually no formal education. I would hope that readers might also be careful before assuming that scholars trained in family law would be experts in social science or statistics. Nonetheless, Professor Ball has written extensively about LGBT rights and related social science issues, with dozens of published law reviews, articles, and presentations, along with several books. He edited a more recent book (2016) on needed advances in LGBT civil rights after *Obergefell*, which focuses on the future needs of persons who may be non-married, elderly, polyamorous, and others with multiple or complex gender and sexual identities. My assessment is that Professor Ball deserves to be commended for his treatment of social science issues, which is often more detailed and even-handed than that provided by other legal experts and by many highly trained social scientists. Even though there is a clear social science consensus that same-sex parents are not more likely to raise LGBT children, Ball diverges

from that consensus and suggests the possibility that the consensus might not be fully correct. Even so, he deems such an outcome as irrelevant from a legal perspective regarding the rights of LGBT parents. He shows the same, relatively balanced approach to the issue of gender roles and children’s outcomes as a function of parental sexual orientation.

Reading the book, my guess is that most readers would see few problems with his arguments other than perhaps leaning over backwards too much to present more than one side of some key issues, which some may see as a weakness in the book. What readers may not realize is that despite an abundance of literature reviews on same-sex parenting in the social sciences, nearly all of those reviews have omitted many studies whose results might not fit with the desired conclusions of the authors, regardless of their views on LGBT rights. Furthermore, most conservative and progressive scholars have given little attention to the rights or needs of other types of parents, such as heterosexual parents in same-sex relationships (who may still not be allowed the right to marry, as in the case of a mother and daughter raising foster children together), an LGBT parent in a different-sex relationship (mixed orientation marriage), or two (or three) LGBT parents in same-sex and different-sex relationships. In addition, my view (Schumm, 2015) is that both conservative and progressive legal teams overlooked important potential arguments about the nature of marriage in terms of equality based on relative risk and costs rather than legal status as an outcome. Furthermore, nearly all of the stakeholders minimized fertility outcomes as a function of the timing of when individual states approved of same-sex marriage (see chapter 12, Schumm, 2018). From a wider sociological perspective, the evolution of same-sex marriage was only one aspect of a broader spectrum of long-term trends known as the

Second Demographic Transition (Lesthaeghe, 2010, 2014); without awareness of those larger trends, discussions about same-sex marriage were often a case of missing a forest for the trees. Both sides have had a tendency, in my opinion, to minimize major methodological problems in studies they felt sided with their views about same-sex marriage. Small sample sizes? Low response rates? Omission of effect sizes? Incorrect statistical analyses? Weak measurement? Unannounced extreme outliers? Important uncorrected typographical errors? If the research was on “your” side, then such issues were “not a problem.” If the research was on the other side, then it might be (*if* you noticed them in the first place). If and when methodological shortcomings were noted, policy recommendations (whether conservative or progressive) were often made that seemed to wish away those shortcomings as practically speaking *irrelevant*. For readers who might like to see more details on such issues, a recent book is a possible consideration (Schumm, 2018). In sum, a social scientist like myself may be more concerned with being on the right side of the data rather than on the right side of history. That is, it can be argued that the first job of a social scientist is to get the science as correct as possible while perhaps one of the primary jobs of a legal scholar is to assess the legal relevance and policy implications of science. While Ball might have provided far more detail with respect to social science, his work is extraordinary in its treatment of the legal and policy implications of social science for LGBT rights.

From my perspective, then, Ball’s book is a “glass half full,” a great improvement over much of what has been published previously and a book that should be included in the library of every person and/or community or university concerned with LGBT rights and the history of their recognition by U.S.

courts. At the same time, the glass is yet “not full” and does not contain the whole story regarding social science research or even how some of the legal developments came about with respect to same-sex parenting. Even so, I think Professor Ball’s *Same-Sex Marriage and Children* will remain a classic in the field of law and social science, pertaining to recent legal developments with respect to LGBT rights, with important implications relevant to future developments of law and policy for human rights, although Ball (2016) should also be consulted by those interested in securing further human rights for all.

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