Nos. 13-4178, 14-5003, 14-5006

IN THE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, et al.,

Plaintiffs and Appellees,

v.

GARY R. HERBERT, in his capacity as Governor of Utah, et al.,

Defendants and Appellants.

MARY BISHOP, et al.,

Plaintiffs and Appellees,

and

SUSAN G. BARTON, et al.,

Plaintiffs, Appellees and Cross-Appellants,

v.

SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma,

Defendant, Appellant and Cross-Appellee.

CASE NO. 13-4178: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH (NO. 13-CV-00217-RJS); CASE NOS. 14-5003 AND 14-5006: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (NO. 04-CV-848-TCK-TLW)

BRIEF OF HISTORIANS OF MARRIAGE PETER W. BARDAGLIO, NORMA BASCH, STEPHANIE COONTZ, NANCY F. COTT, TOBY L. DITZ, ARIELA R. DUBLER, LAURA F. EDWARDS, MICHAEL GROSSBERG, HENDRIK HARTOG, ELLEN HERMAN, MARTHA HODES, LINDA K. KERBER, ALICE KESSLER-HARRIS, ELAINE TYLER MAY, SERENA MAYERI, STEVE MINTZ, ELIZABETH PLECK, CAROLE SHAMMAS, MARY L. SHANLEY, AMY DRU STANLEY, AND BARBARA WELKE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici are historians of American marriage, family, and law whose research documents how the institution of marriage has functioned and changed over time. This brief, based on decades of study and research by amici, aims to provide accurate historical perspective as the Court considers state purposes for marriage.[1] The appended List of Scholars identifies each of the individual amici.

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[1] Assertions in this brief are supported by amici's full body of scholarship, whether or not expressly cited, including: Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (1995); Norma Basch, *Framing American Divorce* (1999) and *In the Eyes of the Law: Women, Marriage, and Property in 19th Century New York* (1982); Stephanie Coontz, *The Social Origins of Private Life: A History of American Families, 1600-1900* (1988) and *Marriage, A History* (2006); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000); Toby L. Ditz, *Property and Kinship: Inheritance in Early Connecticut* (1986); Ariela Dubler, *Governing Through Contract: Common Law Marriage in the 19th Century*, 107 Yale L. J. 1885 (1998), and *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957 (2000); Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (1997); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985); Hendrik Hartog, *Man & Wife in America, A History* (2000) and *Someday All This Will Be Yours: A History of Inheritance and Old Age* (2012); Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* (2008); Martha Hodes, *White Women, Black Men: Illicit Sex in the 19th Century South* (1997); Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (2001); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (1988) and *Barren in the Promised Land* (1995); Steven Mintz, *Domestic Revolutions: A Social History of American Family Life* (1988); Elizabeth H. Pleck, *Celebrating the Family: Ethnicity, Consumer Culture, and Family Rituals* (2000) and *Not Just Roommates: Cohabitation after the Sexual Revolution* (2012); Carole Shammas, *A History of Household Government in America* (2002); Mary L. Shanley, *Making Babies,*

Amici support Plaintiffs-Appellees' position that allowing marriage licenses for same-sex couples is consistent with government purposes for marriage. Moreover, amici cannot credit Defendants-Appellants' contentions that child welfare is the core purpose of marriage, nor that a novel "adult-centric" version is now vying with an established "child-centric" model, since states' purposes in establishing and regulating marital unions have historically encompassed adults, children, and society at large.[2]

SUMMARY OF ARGUMENT

In the United States, marriage has changed significantly over time to address changing social and ethical needs, while inheriting and retaining some essential characteristics from English common law. Marriage in all the United States has always been under the control of civil rather than religious authorities. Religious authorities were permitted to solemnize marriages by acting as deputies of the civil authorities only. While free to decide what qualifications they would consider

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Making Families (2001), and *Feminism, Marriage and the Law in Victorian England* (1989); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation* (1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (2010).

[2] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to its preparation or submission.

valid by religious precept, they were never authorized to determine the qualifications for entering or leaving a marriage that would be valid at law.

Marriage is a capacious and complex institution. It has political, social, economic, legal and personal components, and conveys meanings and consequences that operate in more than one arena. The institution of marriage has served numerous purposes during this nation's history. It has been instrumental in facilitating governance; in creating stable households leading to public order and economic benefit; in assigning providers to care for dependents (including minors, the elderly and the disabled); in legitimating children; in facilitating property ownership and inheritance; and composing the body politic. Recognizing multiple purposes in marriage, the American states have seen marriage as advancing the public good whether or not minor children are present. Only a highly reductive interpretation would posit that the core purpose or defining characteristic of marriage is the married pair's procreation or care of biological children, since marriage has been important to states and society in numerous ways.

Marriage has long been entwined with public governance. The relation between marriage and government is visible today in both federal policy and state laws, which channel many benefits and rights of citizens through marital status. Every state gives special recognition to marriage in areas ranging from tax policy to probate rules. The corpus of federal law, also, refers to more than 1,000 kinds

of benefits, responsibilities and rights connected with marriage, as the General Accounting Office has reported. U.S. Gen. Accounting Office, GAO-04-353R: *Defense of Marriage Act: Update to Prior Report* (2004); *see also United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

The individual's ability to consent to marriage is the mark of the free person in possession of basic civil rights. This is compellingly illustrated by the history of slavery and emancipation in the United States. Slaves could not contract valid marriages. They did not have the freedom to consent to marital duties. After emancipation, former slaves leapt at the chance to contract marriage, which symbolized their new civil rights.

In the past, marriage rules in several instances enforced inequalities among inhabitants of the United States. The most widespread examples were states' bans on marriages between whites and persons of color. These unequal applications of marriage rules were eventually judged discriminatory and were struck down.

Societal changes over the centuries have led legislative and judicial authorities to alter marriage rules in ways not envisioned at the founding of this country. Three areas of fundamental change illustrate this pattern:

a) Under Anglo-American common law, marriage treated men and women unequally and asymmetrically. Under the marital doctrine of coverture (marital unity), the husband and wife had mutual responsibilities but were considered to be

a single entity. A wife ceded her legal and economic identity to her husband and was "covered" by him. This inequality was considered essential to marriage for centuries but was eliminated in response to changing values and demands. Today, Utah and Oklahoma law, like other state and federal law, still impose mutual responsibilities but treat both spouses equally and in gender-neutral fashion with respect to marriage. The U.S. Supreme Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required.

b) Racially-based restrictions in a large majority of states for much of the nation's history prohibited and/or criminalized marriages between whites and persons of color. In 1967, *Loving v. Virginia*, 388 U.S. 1 (1967), ended a nearly 300-year American history of such laws.

c) Divorce grounds were few in early America, and divorce was always an adversarial process, requiring one spouse to sue on the basis of the other's marital fault. Over time, states saw the need to expand grounds for divorce, to include, for example, "no-fault" provisions.

Today marriage is both a fundamental right and a privileged status. While marriage has changed throughout the centuries, it retains its basis in voluntary consent, mutual love and support, and economic partnership. The institution has endured because it has been flexible, capable of being adjusted by courts and legislatures in accord with changing standards. The changes observable over time

have moved marriage toward equality between the partners, gender-neutrality in marital roles, and control of marital role-definition by the spouses themselves rather than by state prescription. Marriage restrictions meant to discriminate between and among groups of citizens in their freedom to marry partners of their choice have been eliminated.

The exclusion from marriage of same sex couples stands at odds with the direction of historical change in marriage in the United States. Contemporary public policy assumes that marriage is a public good. Excluding some citizens from the power to marry, or marking some as unfit on the basis of their marriage choices, does not accord with public policy regarding the benefit of marriage or the rights of citizens.

ARGUMENT

I. MARRIAGE IS A CIVIL INSTITUTION.

From the founding of the United States, the making and breaking of marriage in every state has been authorized and regulated by civil law. Regulations for creating valid marriages were among the first state laws passed after declaring independence from Great Britain. The civil principle was best suited to accommodate the new nation's diverse religions. 1 George Elliott Howard, *A History of Matrimonial Institutions Chiefly in England and the United*

States (1904), at 121-226 (colonial precedents), 388-497 (early state marriage laws).

Religion, sentiment and custom may color individuals' understanding of marriage, but valid marriage in Utah, Oklahoma, and every American state is created by law. State laws have typically deputized religious authorities (among other designated communal leaders) to conduct marriage ceremonies, which may take a religious form. Clerical authorities may decide which marriages their faith will recognize, but do not (and did not in the past) determine which marriages are lawful. Throughout the history of the United States (as today), whether a marriage was or was not recognized by a religion has not dictated its lawfulness.

The regulation of marriage is included in states' power, subject to the requirements and protections of the federal Constitution. Within constitutional limitations, states set the terms of marriage, e.g., who can and cannot marry, who can officiate, what obligations and rights the marital agreement involves, whether it can be ended and if so, why and how. *United States v. Windsor*, 133 S. Ct. 2765, 2692 (2013). State legislatures and courts through the nineteenth and twentieth centuries repeatedly adjusted marriage terms and rules, not hesitating to exercise their jurisdiction to alter the terms of marriage.

Being based on consent between two free individuals, marriage is understood to be a contract. The Revolutionary-era statesman and legal

philosopher James Wilson saw mutual consent as the essence of marriage, more basic even than cohabitation. "The agreement of the parties, the essence of every rational contract, is indispensably required," he noted in 1792. *The Works of James Wilson*, vol. II, 600-01 (Robert J. McCloskey, ed., 1976). Revolutionary-era statesmen, influenced by Baron de Montesquieu's The Spirit of the Laws, aligned consent-based marriage with the republic of laws they were creating. They modeled a citizen's voluntary national allegiance to the new United States on an individual's voluntary choice of a marriage partner.

Marriage is nonetheless a unique contract, because of the state's essential role in defining marital eligibility, obligations and rights. *Maynard v. Hill*, 125 U.S. 190, 210-13 (1888). For example, spouses cannot decide to abandon their obligation of mutual economic support. Homer H. Clark, Jr., *The Law of Domestic Relations* 425-27 (2d ed. 1988, 2d prtg. 2002). The couple who agrees to join in mutual intimacy and obligation cannot themselves create a valid marriage (unless their state specifically credits informal, common law marriage); once married, a couple cannot terminate their legal obligations by themselves, since the state is a party to their bond.

II. MARRIAGE HAS SERVED VARIED PURPOSES IN UNITED STATES HISTORY AND TODAY.

Societies in different historical times and places have defined marriage variously. In a given society a legitimate marriage may be matrifocal or patrifocal,

patrilineal or matrilineal, lifelong or temporary, monogamous or polygamous, open or closed to concubinage, and so on. The form of marriage we recognize in the United States is a particular and not a universal form.

Throughout U.S. history, marriage has served numerous complementary public purposes. Among these purposes are: to facilitate the state's regulation of the population; to create stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents; to facilitate the ownership and transmission of property; and to compose the body politic. Cott, *supra* note 1, at 2, 11-12, 52-53, 190-194, 221-224. Historical evidence does not support the claim that the "historic rationale" for marriage was "to establish a means of formally linking mothers and fathers with their offspring so as to maximize the welfare of children." Opening Brief of Appellants Gary R. Herbert and Sean D. Reyes ("UT Br.") at 52. The attempt to rank one purpose of marriage as its core defies the complexity of the historical record. More particularly, the notion that marriage historically is "child-centered" or "principally about children" and their welfare, *id.* at 99, is unsupported. In undergirding a couple's marital vows by licensing their marriage, states announce that a couple's marital vows to one another produce economic benefit, residential stability, and social good whether or not minor children are present.

A. Marriage Developed in Relation to Governance.

The assertion by the State of Utah that "marriage's most vital public purpose is to encourage the creation of stable, husband-wife unions for the benefit of their children," UT Br. at 56, is highly reductive in view of historical evidence. Historically, marriage in Western political culture has been closely intertwined with sovereigns' aim to govern their people. When monarchs in Britain and Europe fought to wrest control over marriage from ecclesiastical authorities (circa 1500-1800), they did so because the authorization of marriage was a form of power, and they used marriage as a vehicle through which to govern the population. Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 23-34 (1989); Sarah Hanley, *Engendering the State: Family Formation and State Building in Early Modern France*, in 16 *French Historical Studies* 4, 6-15 (1989); Mary L. Shanley, *Marriage Contract and Social Contract in 17th-Century English Political Thought*, in *The Family in Political Thought* 81 (J.B. Elshtain ed., 1982).

Anglo-American legal doctrine, continuing into the era of American independence, made married men into heads of their households. The head of household was legally obliged to control and support his wife and all other household dependents, whether biologically related children or relatives or others including orphans, apprentices, servants and slaves. In return, he became their

public representative. Marital regulation, governance, and citizenship rights were thus deeply intertwined in early American history.

When the American colonies rejected monarchy and formed a republic, the continuum between understandings of political governance and marital governance remained. Sovereignty in the new United States was justified as being based on voluntary consent of the governed, rather than on subjection to a ruler. Revolutionary spokesmen often invoked the parallel between the voluntary consent pledged by a couple who formed a permanent marital bond and the consent to permanent national allegiance being asked of Americans. Cott, *supra* note 1, at 15-17. In the nation's early decades, states' laws concerning who could marry whom in what manner and courts' decisions specifying the obligations and rights of spouses formed important dimensions of states' authority over their populations. Married men's full citizenship and voting rights were seen as tied to their headship of and responsibilities for their families; wives' inferior citizenship and inability to vote were understood to be suited to their subordination to their husbands. Slaves' inability to marry or vote were features of their complete lack of civil rights.

The rule of the male head of household over his wife, children, servants, apprentices and slaves is now quite archaic. Today, constitutional imperatives have eliminated sex and race inequalities from laws of marriage. Yet a legacy of the sustained relation between marriage and citizenship persists, in that states grant

marriage rights to certain couples and not others, and award married couples benefits and rights not available to other pairs or to single persons.

B. Marriage Creates Public Order and Economic Benefit.

Since the era of the American Revolution, states intended legal marriage to serve public order and society by establishing governable and economically viable households which might hold biologically related and unrelated members. Marriage in early America organized households and figured largely in property ownership and inheritance, matters of civil society in which public authorities were greatly interested then, and continue so today.

When the English colonies in America were founded, many families included more members than parents and their children; more than one married pair might co-reside; grandparents or unmarried relatives might also be present, as well as unrelated apprentices or other adolescent helpers. Co-residence and subjection to the same household head were the defining features of a family. Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* 17 (1996). Early American households organized food, clothing and shelter for all members, not only for biological offspring of the married couple.

Today, state governments retain strong economic interests in marriage, since the economic obligations that marriage places on the couple help to minimize

public expenses for indigents. States offer financial advantages to married couples on the premise that marriage-based households promise social stability and economic benefit to the public. The marriage bond obliges the mutually consenting couple to support one another, which is not the case for unmarried couples – while parents' obligation to support their children is enforced alike on unmarried and married parents. Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* § 1.07 (2d ed. 2013); *Chart 3: Child Support Guidelines*, 45 Fam. L.Q. 498, 498-99 (Winter 2012).

States' willingness to include unrelated adopted children in the marital family suggests little interest in promoting a favored status for biologically-based parenting among the public purposes of marriage. The historical trend in states' laws has been to equalize the rights of legally adopted children with those of biological children (with no consequent distinction in inheritance and related rights). Adoption law suggests that states intended to recognize intentional and deliberate parenting as much as "accidental" procreation. Herman, *supra* note 1, at 203-04, 292-93.

The economic dimension of the marriage-based family took on new scope when federal government benefits expanded during the twentieth century. State and federal governments now channel many economic benefits through marital relationships. *Cf. Turner v. Safley*, 482 U.S. 78, 96 (1987) (voiding restriction on

prisoner marriages in part because "marital status often is a precondition to the receipt of government benefits"). Federal benefits such as immigration preferences and veterans' survivors' benefits are extended to legally married spouses, but not to unmarried partners, even those united in civil union. Same-sex spouses who have married lawfully enjoy these benefits, while those in states lacking marriage rights are disadvantaged. *Windsor*, 133 S. Ct. at 2694-95.

C. Marital Eligibility Has Never Turned upon Child-Bearing or Child-Rearing Ability.

In licensing marriage, state governments have bundled legal obligations together with social rewards to encourage couples to choose committed relationships of sexual intimacy over transient relationships, whether or not children will result. While sexual intimacy has been expected in marriage, the ability or willingness of married couples to produce progeny has never been necessary for valid marriage. For example, in no state are women past menopause barred from marrying, nor divorceable after a certain age. Men or women known to be sterile have not been prevented from marrying. Inability to procreate has never been a ground for divorce, nor could a marriage be annulled for failure to beget children. 3 Howard, *supra*, at 3-160; Grossberg, *supra* note 1, at 108-110.

The common law and many later state statutes made sexual incapacity (impotence or other debility preventing sexual intimacy) a reason for annulment or divorce. Thus the inability to have sexual relations was a basis for invalidating a

marriage while sterility or infertility was not. Chester G. Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States* I (grounds for annulment), II (grounds for divorce) (1931, 1932, 1935). An annulment for sexual incapacity depended upon a complaint by one of the marital partners, however, and if neither spouse objected, a non-sexual marriage remained valid.

States' intentions, historically, have focused on securing responsible adults' support for their minor dependents whether these are adopted, or step-children, or biological progeny, and whether the children were born within an intact marriage or not; states can thus limit the public's responsibilities for dependent children. Support for any child born or adopted into a family was in the past an obligation of the household head. Today, it is a responsibility shared by the couple who marry – whether their marriage remains intact or they divorce.

Throughout American history, marriages in which step-parents took responsibility for non-biological children were common, because of early deaths of biological parents, and widows' and widowers' remarriages. Families often took in orphans. Hartog, *Someday*, *supra* note 5, at 169-205. Arguably, the "Father of our Country," George Washington, established a non-biological family as a sound model for the nation: he was assumed to be sterile while his wife Martha Custis brought two children from her first marriage into their marital household. The

couple also reared her grandchildren after her son died in the Revolutionary War. Washington's inaugural address initially included a reference (later deleted) to his lack of offspring. Paul F. Boller, Jr., *Presidential Inaugurations* 4 (2001).

In the history of marriage in the U.S., adults' intentions for their own lives have been central to marriage whether or not children arrived. Not only today but in the long past, couples married when it was clear that no children would result. Widows and widowers remarried for love and companionship and because marriage enabled the division of labor expected to undergird a stable household. Child welfare cannot be isolated as the principal or core function of marriage in American history either in the eyes of the state or society. The notion that marriage as an institution has historically been dedicated to the welfare of children rather than, or more than, to the welfare of the adult couple presents a false dichotomy. Romantic and sexual attachment, companionship, and love as well as economic partnership between two adults were no less intrinsic to marriage historically than the possibility of children. Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 The William and Mary Quarterly 3d ser. 689, 695-99, 706-710 (1987).

In the twentieth century, sexual intimacy became increasingly separable from reproductive consequences. By the 1920s contraception was becoming readily available to an influential portion of the American population. John

D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 239-74 (1988); Andrea Tone, *Devices and Desires: A History of Contraceptives in America* (2001). Intentionally non-procreative marriages became prevalent enough that social scientists first coined the term "companionate marriage" to refer to them (though the term is used more generally now). Dr. M.M. Knight, for example, declared in the Journal of Social Hygiene in 1924 that this new term acknowledged that "We cannot reestablish the old family, founded on involuntary parenthood, any more than we can set the years back or turn bullfrogs into tadpoles." M.M. Knight, *The Companionate and the Family*, Journal of Social Hygiene, 258, 267 (May 1924).

Contraception has made sexual satisfaction more central to individuals' expectations in marriage, whether or not they aim to have children; it has transformed the relation of marriage to parentage. Christina Simmons, *Making Marriage Modern* 113-34 (2009); Rebecca L. Davis, *More Perfect Unions: The American Search for Marital Bliss* 21-53 (2010). In the late 1930s, the American Medical Association embraced contraception as a medical service and by that time or soon thereafter most states legalized physicians' dispensing of birth control to married couples. The Supreme Court struck down Connecticut's ban on married couples' use of birth control in 1965. *Griswold v. Connecticut*, 381 U.S. 479 (1965). More recently, reproductive technologies have multiplied methods to

bring wanted children into being, with or without biological links to the parents who intend to rear them. Shanley, *Making Babies*, *supra* note 1, at 76-147.

III. DISCRIMINATORY APPLICATIONS OF MARRIAGE RULES HAVE OCCURRED IN THE PAST AND HAVE SINCE BEEN REJECTED.

States have differed as to the required age for consent to marriage, the degree of consanguinity allowed, the ceremonies prescribed, the definition and enforcement of marital roles, the required health minima and "race" criteria, and the possibility and grounds for marital dissolution – and this list of variations is not exhaustive. In a number of striking instances, states created discriminatory marriage laws, establishing hierarchies of value, declaring some persons more worthy than others to obtain equal marriage rights. These laws created and enforced inequalities that were declared obvious, "natural" and right, although today the laws seem patently unfair and discriminatory. Grossberg, *supra* note 1, at 70-74, 86-113, 144-45; Vernier, *supra*, at 183-209.

In slaveholding states, slaves were unable to marry because they lacked basic civil rights and thus were unable to give the free consent required for lawful marriage. Furthermore, a slave's obligatory service to the master made it impossible to fulfill the legal obligations of marriage. Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 Law & Ineq. 187 (1987-1988). Where slaveholders permitted, slave couples wed informally, creating

families of great value to themselves and to the slave community. These unions received no respect from slaveholders, who broke up families with impunity when they sold or moved slaves. Enslaved couples' unions received no defense from state governments; the absence of public authority undergirding their vows was the very essence of their invalidity. After emancipation, many African Americans welcomed the ability to marry as a civil right long denied to them. They saw marriage as an expression of their newly gained rights; being able to marry signified their ability to consent freely to marry a chosen partner. Laura Edwards, *The Marriage Covenant is the Foundation of All our Rights*, 14 Law and History Review 81 (1996).

The criminalization, nullification and/or voiding of marriages of whites to persons of color was a widespread form of race-based discrimination in marriage laws. First instituted in colonial Virginia and Maryland, such prohibitions spread to other British colonies and were continued or adopted in several northern and southern states upon American independence. After the Civil War, even more states adopted or strengthened such laws. As furor over immigration from China arose in western states, many of them added Indians, Chinese and "mongolians" to the list of those (usually "Negroes" and "mulattos") already prohibited from marrying whites. As many as 41 states and territories of the U.S. banned, nullified or criminalized marriages across the color line for some period of their history.

Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009).

Legislators and judges often justified these laws by insisting that such marriages were against nature, or against the Divine plan, much as opponents argue today against same-sex marriage. They contended that permitting cross-racial couples to marry would fatally degrade the institution of marriage. The Supreme Court of Pennsylvania in 1867, for example, opined of blacks and whites: "The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures." *West Chester and Philadelphia R.R. Co. v. Miles*, 55 Pa. 209, 213 (1867).

Yet as repeated revisions and reinterpretations of such laws showed, the structuring of marriage resided in the realm of law, not nature. These bars to marriage served to deny public approval to intimate and familial relationships between whites and persons of color. By preventing such relationships from gaining the status of marriage, legislators and courts sought to delegitimize them altogether. In parallel fashion, denying lawful marriage to same-sex couples' unions demotes and discredits their relationships. (On the abolition of racial restrictions on marriage, see Section VI(B), below.)

IV. MARRIAGE HAS CHANGED IN RESPONSE TO SOCIETAL CHANGES.

Like other successful civil institutions, marriage has evolved to reflect changes in ethics and in society at large. Legislators and judges in the U.S. have revised the requirements of marriage when necessary, and marriage has endured because it has been flexible, not static. Adjustments in key features of marital roles, duties, obligations and rules of entry have kept marriage vigorous and appealing – although these changes were not readily welcomed by everyone. Features of marriage that we can take for granted, such as both spouses' ability to act as individuals, to marry across the color line, or to divorce for their own reasons, were fiercely resisted at first and were viewed by opponents as threatening to destroy marriage itself.

Three areas of change are illustrative: (a) spouses' respective roles and rights; (b) racial restrictions; and (c) divorce.

A. Spouses' Respective Roles and Rights

Marriage under the Anglo-American common law, as translated into American statutes, prescribed profound asymmetry in the respective roles and rights of husband and wife. Marriage law at the time of the American Revolution rested on the legal fiction that the married couple composed a single unit represented by the husband legally, economically and politically. The wife's identity was "covered." "The most important consequence of marriage is, that the

husband and the wife become, in law, only one person," James Wilson affirmed. 2 Wilson, *supra*, at 602-03.

This doctrine of marital unity or coverture required a husband to support his wife and family, and a wife to obey her husband. A married woman could not own or dispose of property, earn money, have a debt, make a valid contract, sue or be sued under her own name, because her husband had to represent her in these acts. Neither spouse could testify for or against the other in court – nor commit a tort against the other – because the two were considered one person. Kerber, *supra* note 1, at 11-15; Hartog, *supra* note 1, at 105-09.

Coverture reflected the degree to which marriage was understood to be an economic arrangement. Marriage-based households were fundamental economic units in early America. Unlike today, when occupations are open to either sex, the two sexes then were expected to fill different though equally indispensable roles in the production of food, clothing and shelter. Marriage sustained these differences via coverture, which assigned opposite economic roles, understood as complementary, to each: a husband had to support and protect his wife; a wife owed obedience and service to her husband.

By the mid-1800s, the notion that married women lacked economic individuality began to clash with societal realities. A dynamic market economy began to replace the static rural economy in which coverture doctrine had

originated. Wives began to claim rights to their own property and wages. Judges and legislators saw advantages in distinguishing spouses' assets individually: a wife's separate property could keep a family solvent if a husband's creditors sought his assets. Married women able to earn wages could support their children if their husbands were profligate. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359 (1982-1983).

Although coverture had been understood as absolutely essential to marriage, states gradually eliminated it. Courts and legislatures did not view marriage as unchangeable; they altered marriage fundamentally, in order to take account of societal needs and spouses' evolving relationships. Most states enabled wives to keep and control their separate property and also their earnings by 1900; by the 1930s, wives in many states could act as economic individuals, although other disabilities persisted. 3 Vernier, *supra*, at 24-30; Hartog, *Man & Wife*, *supra* note 1, at 110-135, 287-308.

Government benefit programs in the 1930s nonetheless adopted the expectation that the husband was the economic provider and the wife his dependent. During the New Deal, the Social Security Act gave special advantages to married couples and strongly differentiated between husbands' and wives' entitlements. Kessler-Harris, *supra* note 1, at 132-41. After Plaintiffs challenged such spousal sex differentiation in court, the Supreme Court in the 1970s found

discrimination between husband and wife in Social Security and veterans' entitlements unconstitutionally discriminatory. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Since then, federal benefits channeled through marriage have been gender-neutral.

The unraveling of coverture was a protracted process because it involved revising the gender asymmetry in marriage. Of all the legal features of marital unity, the husband's right of access to his wife's body lasted longest. Not until the 1980s did most states eliminate husbands' exemption from prosecution for rape of their wives. That shift signified a new norm for a wife's self-possession, and further reframed the roles of both spouses. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, California Law Review, 1375-1505 (Oct. 2000).

Over time, all the states moved to gender parity in marriage. Courts chipped away at the inequalities inhering in the status regime of reciprocal rights and duties originating in coverture. Marriage criteria moved toward spousal parity, gender-neutrality in marital roles, and increased freedom in marital choice. The duty of support, which once belonged to the husband only, is now reciprocal. After divorce either spouse may seek alimony and both parties are required to support their children.

By updating the terms of marriage to reflect current understanding of gender equality and individual rights, courts have promoted the continuing vitality of marriage. For couples today, marriage has been transformed from an institution rooted in gender inequality and prescribed gender-based roles to one in which consenting parties choose their marital behavior. The sex of the spouses does not dictate their legal obligations or benefits. They are still economically and in other ways bound to one another by law, but the law no longer assigns them asymmetrical roles. No state requires applicants for a marriage license to disclose how they will divide the responsibilities of marriage between them as a condition of obtaining a license.

Twentieth-century courts have made clear that marriage is not an infinitely elastic contract, but rather a status relationship between two people with gender-neutral rights and responsibilities corresponding to contemporary realities. That evolution in marriage, along with the Supreme Court's legal recognition of the liberty of same-sex couples to be sexually intimate, *Lawrence v. Texas*, 539 U.S. 558 (2003), clears the way for equal marriage rights for same-sex couples who have freely chosen to enter long-term, committed, intimate relationships.

B. Racial Restrictions

The U.S. Supreme Court first named the right to marry a fundamental right in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Skinner v. Oklahoma ex*

rel. Williamson, 316 U.S. 535, 541 (1942). Yet racially-based marriage restrictions remained in force in numerous states for more than four decades. Slowly but unmistakably, however, social and legal opinion in parts of the U.S. began to see these laws as inconsistent with principles of equal rights and damaging to society as a whole. The California Supreme Court led the way by striking down the state's prohibitory law enacted almost a century earlier. *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948). Finally, the U.S. Supreme Court in *Loving v. Virginia*, declaring that marriage is a "fundamental freedom," eliminated racially-based marriage restrictions of three centuries' duration. 388 U.S. at 12.

The *Loving* ruling strengthened the institution of marriage within American society, affirming that freedom of choice of one's partner is basic to the civil right to marry. Today virtually no one in the U.S. questions the legal right of individuals to choose a marriage partner without government interference based on race. A prohibition long embedded in American laws and concepts of marriage – and often defended as natural and in accord with God's plan – has been entirely eliminated.

C. Divorce

Legal and judicial views of divorce likewise have evolved to reflect society's emphasis on consent and choice in marriage, including spouses' own determination of their satisfaction and marital roles. Divorce was possible in a few

of the British colonies in America. Within several decades after the American Revolution, most states and territories allowed divorce, albeit under extremely limited circumstances. Divorce grounds initially were limited to such breaches as adultery, desertion or conviction of certain crimes. Grounds such as cruelty were later added. Basch, *supra* note 1; Glenda Riley, *Divorce: An American Tradition* 108-29 (1991).

Early divorce laws presupposed different and asymmetrical marital roles for husband and wife. For instance, desertion by either spouse was a ground for divorce, but failure to provide was a breach that only the husband could commit. A wife seeking divorce had to show, in order to succeed, that she had been a model of obedience and service to her husband.

Divorce began as and long remained an adversarial proceeding, meaning that the petitioning spouse had to show that the accused spouse had broken the social and legal contract embodied in marriage as set by the state: for instance, the husband had failed to provide for his wife. Divorce was granted because the guilty party's fault was a fault against the state as well as against the spouse. Many states' divorce laws prohibited remarriage for the guilty party in a divorce.

Over time, state legislation expanded divorce grounds. This evolution was hotly contested, however, with many critics deeply opposed, sure that greater freedom in divorce would undermine the marital compact entirely. Basch, *supra*

note 1, at 72-93. The adversarial form prevailed even while divorce grounds multiplied, leading, by the twentieth century, to cursory fact-finding and fraud upon the court by colluding spouses who agreed their marriage had broken down. In response, California in 1969 was the first state to adopt no-fault divorce. By 1980, almost all states made it possible for a couple who found themselves incompatible to end their marriage without the adversarial process. This quick movement indicated states' acceptance of marital partners' defining their own marriage goals and marital satisfaction, and it reflected contemporary views that continuing consent to marriage is essential. Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (1988).

Divorce law today presumes gender neutrality in couples' roles and decision-making. In the past, spouses' obligations regarding children after divorce were gender-assigned and asymmetrical: the husband was responsible for the economic support of any dependent children, while courts by the late 19th century gave the mother a strong preference for custody. Currently, in contrast, both parents of dependent children are held responsible for economic support and for child-rearing. Gender neutrality is the judicial starting point for all post-divorce arrangements, including alimony. The Supreme Court has said that marriage partners have a constitutional right to be treated equally regardless of gender within, or at the ending of, their marriage. *Orr v. Orr*, 440 U.S. 268 (1979). With

respect to government entitlements, welfare reforms placed responsibility for children's support on both parents by 1988. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

V. MARRIAGE TODAY.

Marriage has evolved into a civil institution through which the state formally recognizes and ennobles individuals' choices to enter into long-term, committed, intimate relationships. Marital relationships are founded on the free choice of the parties and their continuing mutual consent.

The institution of marriage has proved to be resilient rather than static during the course of U.S. history. Some alterations in marriage have resulted from statutory responses to economic and social change, while other important changes have emerged from judicial recognition that state strictures must not infringe the fundamental right to marry. Supreme Court decisions have affirmed that the basic civil right to marry cannot be constrained by ability to comply with child support orders, *Zablocki v. Redhail*, 434 U.S. 374, 387 & n.12 (1978) (firmly restricting statutory classifications that "attempt to interfere with the individual's freedom to make a decision as important as marriage"), or by imprisonment, *Turner v. Safley*, 482 U.S. 78 (1987).

Marriage rules have changed over time. Features of marriage that once seemed essential and indispensable – including coverture, racial restrictions, and

state-delimited grounds for divorce – have been eliminated. Marriage has been strengthened, not diminished, by these changes. Marriage persists as a public institution closely tied to the public good while it is simultaneously a private relationship honoring and protecting the couple who consent to it.

Today the contemporary pattern of internal equality within marriage commands majority support, although not all Americans embrace the long-term movement in that direction. There has always been a vocal minority of Americans who considered equalitarian families offensive and dangerous, and wished to restore the patriarchal features of a previous day. Spokespersons today who give priority to preserving the institution's perpetuation of gender difference implicitly rely on conceptions of male and female roles that can be traced to a time of profound de jure and de facto sexual inequality. But contemporary policy, respect for the equality of all individuals, economic realities and concomitant developments in marriage law have left that thinking behind.

Utah and Oklahoma, along with other states, have eliminated gender-based rules and distinctions relating to marriage, in order to reflect contemporary views of gender equality and to provide fundamental fairness to both spouses. Marriage law in both states treats men and women without regard to sex and sex-role stereotypes – except in the statutory requirement that men may marry only women

and women may marry only men. This gender-based requirement is out of step with the gender-neutral approach of contemporary marriage law.

The right to marry, and free choice in marriage partner, are profound exercises of the individual liberty central to the American polity and way of life. The past century has seen legal and constitutional emphasis on liberty in choice of marital partner and definition of marital roles. Legal allowance for couples of the same sex to marry is consistent with this ongoing trend, and continues a succession of adjustments to marriage rules to sustain the vitality and contemporaneity of the institution.

CONCLUSION

On the foregoing reasoning, amici respectfully request that the judgments below be affirmed.

Dated: March 4, 2014

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March 4, 2014

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