United States Court of Appeals

for the

Sixth Circuit

Case No. 14-5297

VALERIA TANCO AND SOPHIE JESTY; IJPE DEKOE AND THOMAS KOSTURA; JOHNO ESPEJO AND MATTHEW MANSELL,

Plaintiffs-Appellees,

– v. –

WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, in his official capacity; LARRY MARTIN, as Commissioner of the Department of Finance and Administration, in his official capacity; ROBERT COOPER, as Attorney General & Reporter of the State of Tennessee, in his official capacity,

Defendants-Appellants.

APPEAL FROM AN ORDER ENTERED IN THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE, CASE NO. 13-CV-01159
THE HONORABLE ALETA ARTHUR TRAUGER, U.S. DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* PROFESSOR CARLOS BALL IN SUPPORT OF PLAINTIFFS-APPELLEES

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Professor Carlos A. Ball respectfully submits this amicus brief in support of Appellees. Professor Ball, with input from his undersigned counsel, is the sole author of this brief. No party, nor any other individual or entity contributed money intended to fund preparing or submitting this brief. All parties have consented to the submission of this brief.

INTEREST OF AMICUS CURIAE

Carlos A. Ball is Distinguished Professor of Law and Judge Frederick Lacey Scholar at the Rutgers University School of Law–Newark. He is a nationally recognized scholar on issues of sexuality and the law. He is the author of four books, a co-editor of a leading casebook, and the author of over twenty academic articles on subjects related to sexuality and the law. A significant portion of his scholarship explores issues of relationship recognition and child welfare.

SUMMARY OF ARGUMENT

Exclusionary policies aimed at denying entire classes of individuals the opportunity to marry have been rare in American history. Most of these unusual efforts have involved deeply misguided attempts to rely on supposed "scientific" evidence to justify invidious discrimination by contending that the banned marriages were bad for society and for children. These highly problematic efforts

have included laws (1) prohibiting couples of different races from marrying; (2) restricting the ability of individuals with mental disabilities from marrying; and (3) denying rights and benefits to nonmarital children.

Proponents of these historical class-based marital exclusions defended the use of state authority to define marriage and its accompanying benefits in order to promote what they believed were socially optimal goals in matters related to procreation, family formation, and child welfare. More particularly, supporters of these laws frequently justified them by making pseudo-scientific claims about the well-being of society and children, which they claimed to be self-evidently true. For example, Georgia's antimiscegenation statute was supported by the Georgia Supreme Court based on its "daily observation" that children of mixed-race couples are "sickly and inferior." Connecticut's law banning marriage by disabled persons similarly was upheld by the Connecticut Supreme Court based on pseudo-scientific claims which it described as "common knowledge" subject to judicial notice. It is now clear that these earlier defenses of class-based marital exclusions, though they had a veneer of empiricism, were in fact grounded in deeply held prejudices and biases. The passage of time has shown these earlier justifications to be constitutionally impermissible, morally unacceptable, and empirically indefensible.

The history of past class-based marital exclusions has clear implications for the present appeal. The lesson of this history is that the empirical-sounding, pseudo-scientific assertions of jurists and counsel of one era may be revealed to be invidious and indefensible discrimination over time. Those who favor denying same-sex couples the opportunity to marry frequently describe households headed by married heterosexuals who are biologically related to their children as the "optimal" setting for the raising of children. As a result, they argue that other family structures—including ones led by same-sex couples—undermine the well-being of society and of children. The ways in which class-based marital exclusions were defended in the past—and the manner is which those justifications failed to withstand the test of time—should bear on this Court's assessment of the present assertions that denying same-sex couples the opportunity to marry promotes the well-being of society and of children.

ARGUMENT

I. ANTIMISCEGENATION LAWS HISTORICALLY WERE JUSTIFIED BY SPURIOUS PSEUDO-SCIENTIFIC AND PSEUDO-EMPIRICAL CLAIMS ABOUT THE PROMOTION OF SOCIAL AND CHILD WELFARE

The American colony that implemented the earliest and most comprehensive regulation of interracial relationships was Virginia. Initially, those efforts focused not on *marriage*, but on the legal status of interracial *children*.

Three decades before Virginia enacted a law banning marriages across color lines, it adopted a statute addressing the birth of a growing number of interracial children. That statute made the status of interracial children dependent on the status of their mothers. "Negro Womens Children to Serve According to the Condition of the Mother," *in* THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 170 (William Waller Hening ed., 1823) (vol. 2). The purpose of the statute was to make sure that the law considered the interracial children of female slaves to also be slaves. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1994 n.127 (1989).

The focus on children is also reflected in Virginia's first statute banning marriages across color lines, enacted in 1691. That law, a descendant of which was struck down by the Supreme Court almost three hundred years later in *Loving v. Virginia*, 388 U.S. 1 (1967), disapproved of interracial relationships by noting that it was enacted to "prevent . . . that abominable mixture and spurious issue which hereafter may encrease in this dominion . . . ." "An Act for Suppressing Outlying Slaves," *in* THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 86–87 (William Waller Hening ed., 1823) (vol. 3). The language of the statute shows that what motivated the legislators to condemn marriages across color lines was an objection to the offspring that resulted from intimate relationships that crossed color lines.

Virginia, of course, was not alone in enacting antimiscegenation laws. Other colonies, both in the south and the north, did the same, with several using the statutory model adopted by Virginia. For example, Massachusetts' antimiscegenation law of 1705 called for the prevention of "a Spurious and Mixt Issue." THOMAS A. FOSTER, SEX AND THE EIGHTEENTH-CENTURY MAN: MASSACHUSETTS AND THE HISTORY OF SEXUALITY IN AMERICA 129 (2007).

The validity of these laws was not challenged in the courts until after the Civil War, the adoption of the Fourteenth Amendment, and the enactment of the Civil

Rights Act of 1866. Courts in the second half of the nineteenth century consistently upheld antimiscegenation laws by contending that marriage was a question of societal well-being rather than of individual rights implicating the U.S. Constitution. *See, e.g.*, *Dodson v. State*, 31 S.W. 977 (Ark. 1895); *State v. Gibson*, 36 Ind. 389 (1871); *State v. Hairston*, 63 N.C. 451 (1869). Some state high courts also held that the equality protections afforded by the Fourteenth Amendment and the Civil Rights Act of 1866 were not implicated by marriage restrictions that applied equally to whites and blacks. *See, e.g.*, *Ellis v. State*, 42 Ala. 525 (1868); *Green v. State*, 58 Ala. 190 (1877).

These rulings increasingly reflected a growing pseudo-scientific and eugenic understanding of antimiscegenation laws. The Kentucky Court of Appeals in 1867, for example, worried that the legalization of marriages by mixed couples would lead to the "deteriorat[ion of] the Caucasian blood." *Bowlin v. Commonwealth*, 65 Ky. 5, 9 (1867). Two years later, the Georgia Supreme Court, in upholding the criminal conviction of a black woman for marrying a white man, proclaimed that

> the amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observation shows us, *that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race*. It is sometimes urged that such marriages should be encouraged, for the purpose of elevating the inferior race. The reply is, that such connections never elevate the

> inferior race to the position of the superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good.

Scott v. Georgia, 39 Ga. 321, 324 (1869) (emphasis added). The Tennessee Attorney General expressed a similar view in 1871 when he analogized between antimiscegenation laws and ancient "Mosaic laws" that forbade Jews from intermixing different animals, such as the breeding of horses with donkeys to create mules. According to the state official, a law against "breeding mulattoes" was not any more problematic since it was also aimed at "prevent[ing] the production of [a] hybrid race." *Lonas v. State*, 50 Tenn. 287, 299 (1871).

For its part, the Missouri Supreme Court in 1883 was troubled by what it took to be the purported inability of biracial individuals to procreate, which was, in its view, a sufficient basis upon which to uphold the constitutionality of antimiscegenation laws. As the court explained, in an obvious misunderstanding of biology driven by raw prejudice, that "it is . . . a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites." *State v. Jackson*, 80 Mo. 175, 179 (1883).

Many Americans, since the colonial days, had understood interracial procreation to be unnatural. But the views expressed by these postbellum courts and officials reflected new concerns, ones related to supposed reproductive barrenness, purported hereditary deterioration, and the alleged physical and psychological weaknesses and deficiencies of interracial offspring. The arguments in favor of keeping marriage within color lines, in other words, grew to include deeply misguided sociobiological considerations grounded in supposedly empirical claims about procreation and the well-being of children. We now know, of course, that such claims had no bases in fact and were instead driven by racist views that rejected the notion that all Americans were entitled to equal treatment under the law.

Defenders of antimiscegenation laws attempted to legitimize that ideology by turning to the "science" of eugenics. PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 115–23 (2009). Many of those who called for "race regeneration" and the avoidance of "race suicide" came to see antimiscegenation laws as important tools in the promotion of what they understood to be procreative optimality. *See, e.g.*, MADISON GRANT, THE PASSING OF THE GREAT RACE: OR THE RACIAL BASIS OF EUROPEAN HISTORY 47, 60 (1916) (contending that marriages outside of color lines promoted "race suicide"

and insisting that "laws against miscegenation must be greatly extended if the higher races are to be maintained."); *see also* Gregory Michael Dorr, *Principled Expediency: Eugenics,* Naim v. Naim*, and the Supreme Court*, 42 AM. J. LEGAL HIST. 119, 124 (1998) ("American eugenicists generally . . . argued for the scientific defense of civilization through racial purity, using their theories about race mixing to shape public policy.").

Even after the eugenics movement was discredited for both its untenable moral positions and its unsupportable scientific claims, defenders of antimiscegenation laws continued to raise notions related to eugenics and procreative optimality when defending race-based marital bans in the courts. For example, in defending the constitutionality of its antimiscegenation law before the California Supreme Court in 1948, *see Perez v. Sharp*, 198 P.2d 17 (Ca. 1948), the State raised deeply problematic and misguided medical/eugenic and sociological arguments centered on issues of procreation and child welfare.

In *Perez*, the State first claimed that whites were superior to the other races, and consequently, that the progeny of racially mixed couples were inferior to the progeny of whites. According to the State, the marriage ban "prevents the Caucasian race from being contaminated by races whose members are by nature physically and mentally inferior to Caucasians." *Id.* at 23. California also

contended that the biological data showed that "the crossing of widely different races has undesirable biological results" and that "the parties who enter into miscegenetic [sic] marriages have proved generally to be the dregs of both races" making it likely "that the offspring of such marriages will turn out to be inferior to both of their parents." Respondent's Supplemental Brief in Opposition to Writ of Mandate, *Perez v. Sharp*, 198 P.2d 17 (Ca. 1948), 62, 78.

In addition to relying on racist eugenic claims, California sought to defend its antimiscegenation law on supposedly sociological grounds. The State contended that the marriages of individuals of different races led to greater social tension because most people disapproved of them. *Perez*, 198 P.2d at 25. Furthermore, the State claimed that blacks were "socially inferior," and that, as a result, "the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection by members of both races." *Id*. at 26 According to the State, in other words, antimiscegenation laws promoted child welfare because they aimed to protect children from the social inferiority and stigma that accompanied their parents' marriages.

The *Perez* court completely rejected the outlandish contention that the children of interracial unions were somehow defective or deficient. *Id*. at 23–24. The court also explained that whites' greater success in society was not the result of their

mental superiority, but of the social advantages attached to their skin color. *Id*. at 24. Furthermore, in rejecting the State's argument that the stigma suffered by racially mixed children justified the marriage ban, the California Supreme Court reasoned that "the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior." *Id*. at 26. The court further explained that "[t]he effect of race prejudice upon any community is unquestionably detrimental both to the minority that is singled out for discrimination and to the dominant group that would perpetuate the prejudice. It is no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension." *Id*. at 25.

Although the California Supreme Court's opinion, in striking down the antimiscegenation law as invalid under the federal Constitution, rejected the State's purported child-based justifications for that law, the state of Florida essentially relied on the same justifications fifteen year later in defending a statute that criminalized mixed-race cohabitation. *See McLaughlin v. Florida*, 379 U.S. 184 (1964).

In particular, the State claimed that the statute prevented the infliction of psychological and social harm on children born from interracial relationships. Brief

of Appellee, *McLaughlin v. Florida*, 379 U.S. 184 (1964), at 41–42. Florida argued that its interest in avoiding such harm was enough to justify the enactment of antimiscegenation laws and that, as a result, it was also enough to justify the interracial cohabitation ban. The State's brief explained that

> it is well known that both the white and the negro race tend to shun the offspring of interracial marriages. . . . The need of offspring to identify with others is a well understood psychological factor in present times. The interracial offspring are not fully accepted by either race. There is therefore a clear psychological handicap problem among interracial offspring.

Id. at 42. According to the State, the "psychological handicaps of children born of negro-white parentage" were enough to uphold the constitutionality of its statute. *Id*. at 44.

Virginia raised the same concerns about procreation and child welfare in defending its antimiscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967). Its brief to the Supreme Court in *Loving* quoted extensively from a then recently published book by Albert I. Gordon, a rabbi who was trained as a sociologist. ALBERT I. GORDON, INTER-MARRIAGE: INTERFAITH, INTERRACIAL, INTERETHNIC (1964). Claiming that the marriages of mixed-race couples were more likely to end

in divorce than same-race ones, Gordon argued that interracial unions should be avoided because they harmed children. Gordon explained that

> [p]ersons anticipating cross-marriages, however much in love they may be, have an important obligation to unborn children. It is not enough to say that such children will have to solve their own problems 'when the time comes.' Intermarriage frequently produces major psychological problems that are not readily solvable for the children of the intermarried . . . . [I]t is not likely that the child will come through the maze of road blocks without doing some damage to himself.

Id. at 354 (quoted in Brief of Appellee, *Loving v. Virginia*, U.S. Supreme Court, 388 U.S. 1 (1967), at Appendix B). Gordon added that the children of marriages that crossed racial lines were often "disturbed, frustrated and unable to believe that they can live normal, happy lives." *Id.* at 370 (quoted in Brief of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), at Appendix B).

The state of Virginia, in a deeply ironic move, also defended its antimiscegenation law by analogizing between the psychological harm to children that it contended was caused by the social stigma that followed whenever marriages crossed color lines and the ways in which segregated schools harmed black children as recognized by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Virginia took the position, rather implausibly, that

the goal of promoting (what it believed) was in children's best interests allowed it to rely on the Court's landmark racial equality ruling to defend a law grounded in the perceived racial inferiority of blacks. Brief of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967), at 35.

Finally, Virginia also raised medical/eugenic justifications for its antimiscegenation law. Its brief in *Loving*, quoting from a 1959 opinion by the Louisiana Supreme Court, claimed that "a state statute which prohibits intermarriage or cohabitation between members of different races . . . falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children." *Id*. (quoting *State v. Brown*, 108 So.2d 233, 234 (La. 1959)).

In sum, the history of antimiscegenation laws in this country is littered with repeated efforts to defend them on the ground that they were beneficial to society because they purportedly advanced the well-being of children. Those efforts were frequently supported by pseudo-scientific claims that tried to give the policies a veneer of empiricism.

For purposes of assessing the justifications advanced to support the class-based marital exclusion at issue on this appeal, this Court may note that those

earlier efforts to defend antimiscegenation laws have not withstood the test of time. The Supreme Court in *Loving* saw right through such efforts. Antimiscegenation laws, the Court concluded, were patently unconstitutional because—rather than promoting the welfare of society or of children—they were "measures designed to maintain White Supremacy." *Loving*, 388 U.S. at 11 (footnote omitted).

II. LAWS PROHIBITING DISABLED INDIVIDUALS FROM MARRYING HISTORICALLY WERE JUSTIFIED BY SPURIOUS PSEUDO-SCIENTIFIC AND PSEUDO-EMPIRICAL CLAIMS ABOUT THE PROMOTION OF SOCIAL AND CHILD WELFARE

Supporters of statutes prohibiting cognitively disabled individuals from marrying, which were first enacted at the end of the nineteenth century, also defended them on the grounds that they optimized human reproduction and minimized the chances that children would develop physical and psychological deficiencies.

During the first half of the nineteenth century, there was a prevailing understanding that mentally disabled individuals, through treatment and care in specialized institutions (i.e., asylums), could lead happy and productive lives. Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. JR. LEGAL HIST. 197, 219 (1982). But in

the second half of the nineteenth century, in particular after the eugenic notion of improving the human race by discouraging procreation among certain classes of individuals began to take hold among a growing number of policymakers and experts, there was a shift from treating mental illness to preventing the birth of individuals with cognitive and other disabilities. *Id*.

One way of achieving this goal was through the forced sterilization of those who were deemed to be "feebleminded." *See generally* PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008). Those who embraced the view that eugenics made for a better and more productive society also came to see marriage bans as a way of avoiding the social costs associated with the birth of mentally disabled individuals. Michael Grossberg, *Guarding the Altar*, at 219 ("Stringent and well-enforced marriage standards for conjugal fitness became one widely advocated method of intervening in the reproductive process to prevent the birth of feebleminded children."). As one constitutional scholar starkly put it in 1886, "if the blood of either of the parties to a marriage is tainted with insanity there is imminent danger of its transmission to the offspring, and through the procreation of imbecile children the welfare of the state is more or less threatened." *Id*. (quoting CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES 536 (1886)).

The first law specifically aimed at excluding the so-called feebleminded from marriage was a criminal statute enacted by the Connecticut legislature in 1896. That law prohibited the marriages of epileptics, "imbeciles," and the "feebleminded." Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental* Values, 81 COLUM. L. REV. 1418, 1432 (1981). The legislation only applied if the female partner was under the age of forty-five, making it clear that it was driven by procreative concerns. *See id*. In the years that followed, several states, including Kansas, Michigan, New Jersey, and Ohio, adopted similar statutes. Grossberg, *Guarding the Altar*, at 221. Two states, South Dakota and Nebraska, were even more draconian: they required all mentally disabled individuals to register with the State and prohibited them from marrying unless one of the wedding partners was infertile. EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 22 (1995).

As with race-based marital restrictions, supporters of the disability marriage bans attempted to legitimize them by pointing to "scientific" claims that were in reality nothing more than barely hidden expressions of invidious prejudice against individuals with disabilities. For example, a supporter of the disability marriage bans wrote in the *ABA Journal* in 1923 that they were "based not on historical rules . . . but on scientific facts. [They are] directed against two evils, the bringing into

the world of children with hereditary taints and the protection of the public health by preventing the spread of disease through marriage." J.P. Chamberlain, *Eugenics and Limitations of Marriage*, 9 A.B.A. J. 429, 429 (1923).

Many legal commentators in the first decades of the twentieth century agreed that the state possessed an expansive authority to impose marital restrictions in order to promote the safety and health of the public. As one author explained in the *Yale Law Journal* in 1915, marriage is "a matter of general or common right, [and as such] is so firmly bound up with the very life of the state and with its social, moral and economic welfare as to be distinctively and preëminently within the police power." Edward W. Spencer, *Some Phases of Marriage Law and Legislation from a Sanitary and Eugenic Standpoint*, 25 YALE L. JR. 58, 64 (1915). The author added that that power unquestionably permitted the government to legislate for "the protection of the public or posterity through the prevention of diseased or degenerate offspring." *Id*.

Unfortunately, some courts in the early twentieth century accepted the deeply misguided and prejudiced claims made by supporters of disability marriage bans. For example, the Connecticut Supreme Court, in a 1905 case involving the application of the ban to an epileptic man who attempted to marry, explained "that epilepsy is a disease of a peculiarly serious and revolting character, tending to

weaken mental force, and often descending from parent to child, or entailing upon the offspring of the sufferer some other grave form of nervous malady, is a matter of common knowledge, of which courts will take judicial notice." *Gould v. Gould*, 61 A. 604, 604–05 (Conn. 1905). The court concluded that the statute's objectives were reasonable since the law applied to "a class [of individuals] capable of endangering the health of families and adding greatly to the sum of human suffering." *Id*. at 605.

This kind of reasoning has been entirely repudiated today. Not only does the forced sterilization of individuals raise serious constitutional issues, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), but the Supreme Court has made clear that individuals with disabilities have constitutional and statutory rights that protect them from invidious discrimination. *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (holding that the unjustified segregation of mentally disabled individuals in government facilities violates the American with Disabilities Act); *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–49 (1985) (holding that treating disabled individuals on the basis of prejudice and fear violates the Equal Protection Clause). It goes without saying, therefore, that courts would today completely reject the pseudo-scientific arguments about promoting

the well-being of society and children that were used in the past by defenders of disability marriage bans.

The disability marriage bans are another example of the rare, but nonetheless deeply troubling, efforts in American history to deny an entire class of individuals the opportunity to marry based on pseudo-scientific claims about how best to promote family optimality, child welfare, and the social good.

This history has clear implications for the Court's assessment of the arguments advanced in support of the class-based marital exclusion at issue on this appeal. As with race-based marital restrictions, the passage of time has allowed us to see what should have been clear when the disability marital bans were enacted: that the effort to prevent cognitively disabled individuals from marrying was a reflection of invidious prejudices and a failure to accept the equal dignity of a class of citizens.

III. UNEQUAL TREATMENT UNDER THE LAW OF NONMARITAL CHILDREN HISTORICALLY WAS JUSTIFIED BY SPURIOUS PSEUDO-SCIENTIFIC AND PSEUDO-EMPIRICAL CLAIMS ABOUT THE PROMOTION OF SOCIAL AND CHILD WELFARE

Marital laws that have purportedly sought to promote the social good by accounting for procreative and child welfare considerations have not been limited

to outright bans. Those considerations also played crucial roles in defending laws disadvantaging children born outside of marriage.

The American colonies followed English law in distinguishing between children born in wedlock, who were "legitimate" and could inherit property from their parents, and children born outside of marriage, who were "illegitimate" and could not inherit from anyone. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 197–98 (1988). Children born out of wedlock were considered to be "*filius nullius*," that is, the child and the heir of no one. *Id*. In colonial America, as in England, the parents of "illegitimate" children (in particular mothers) were subject to punishment, including fines, imprisonment, and even public whippings, for what society deemed to be their sexual sins. JOHN WITTE, JR., THE SINS OF THE FATHERS: THE LAW AND THEOLOGY OF ILLEGITIMACY RECONSIDERED 139 (2009).

The dawn of the nineteenth century saw the introduction of legal reforms aimed at reducing the number of so-called illegitimate (hereafter "nonmarital") children and at mitigating some of their legal disabilities. Although English law did not allow for the legitimization of children through the parents' subsequent marriage or the fathers' acknowledgment of paternity, some American states beginning in the early 1800s enacted laws providing for one or both of these

avenues to legitimization. GROSSBERG, GOVERNING THE HEARTH 200–07. The advent of common law marriages and the judicial application of a strong presumption that the children of married women were also the children of their husbands contributed to further reducing the number of nonmarital children. *Id*. In addition, some states began allowing nonmarital children to inherit from their mothers (but not their fathers). *Id*.

The push to reform laws affecting nonmarital children, however, stalled during the second half of the nineteenth century. As the legal historian Michael Grossberg explains, "the post-1850 American obsession with improving family life reinvigorated the use of the law to separate illegitimate from legitimate offspring . . . . The belief that discriminatory laws reinforced legitimate families and deterred spurious birth inhibited [additional] reform efforts." *Id*. at 228–29.]

By the turn of the twentieth century, eugenic ideas began to be reflected in prevailing understandings of "illegitimacy," in particular the notion that the phenomenon was largely caused by the mental "defective[ness]" and "feeblemindedness" of single mothers. *See, e.g.*, PERCY GAMBLE KAMMERER, THE UNMARRIED MOTHER: A STUDY OF FIVE HUNDRED CASES (1918); EMMA O. LUNDBERG, CHILDREN'S BUREAU, U.S. DEP'T OF LABOR, BUREAU PUBLICATION

NO. 166, CHILDREN OF ILLEGITIMATE BIRTH AND MEASURES FOR THEIR PROTECTION (1926).

Many supporters of the differential treatment of nonmarital children also claimed that the discrimination was necessary in order to promote social welfare and family optimality. The prominent sociologist Kingsley Davis articulated this view in 1939 when he wrote that:

> [T]he function of reproduction can be carried out in a socially useful manner only if it is performed in conformity with institutional patterns, because only by means of an institutional system can individuals be organized and taught to co-operate in the performance of this long-range function, and the function be integrated with other social functions. The reproductive or familial institutions constitute the social machinery in terms of which the creation of new members is supposed to take place. The birth of children in ways that do not fit into this machinery must necessarily receive the disapproval of society, else the institutional system itself, which depends upon favorable attitudes in individuals, would not be approved or sustained.

Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. JR. SOCIOLOGY 215, 219 (1939). Davis and many others defended the unequal treatment of nonmarital children under the law as a necessary means to promote what they considered to be best for society and for children.

Although some states, around the middle of the twentieth century, enacted additional reforms aimed at reducing the number and impact of legal disabilities on nonmarital children (by, for example, permitting them to inherit from both their mothers and fathers), there were still, by the 1960s, many laws on the books that denied benefits to children born outside of marriage. *See generally* Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). In 1967, the Supreme Court agreed to hear a challenge to one of those laws: Louisiana's refusal to allow nonmarital children the opportunity to sue in tort for the wrongful deaths of their mothers, a right the State made available to marital children. *Levy v. Louisiana*, 391 U.S. 68 (1968).

In its brief to the Court in *Levy*, the State made clear that it believed it was entirely appropriate to impose unequal burdens on nonmarital children in order to achieve its understanding of what constituted family optimality. As its brief explained, "superior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring." Brief of Attorney General, State of Louisiana, *Levy v. Louisiana*, 391 U.S. 68 (1968), at 4–5.

The Court in *Levy* refused to accept the State's reasoning by concluding simply that treating nonmarital children differently because of the circumstances of

their birth was a form of invidious discrimination. *Levy*, 391 U.S. at 71–72. The Court pointed out that those children, when they became adults, were subject to the same legal obligations as everyone else, and yet the State denied them rights and benefits enjoyed by their fellow citizens. Such differential treatment was prohibited by the constitutional mandate requiring equal protection for all. *Id*.

Three years after *Levy*, the constitutionality of another Louisiana statute, one that precluded nonmarital children from inheriting from their fathers if "legitimate" children also claimed an inheritance, reached the Court in *Labine v. Vincent*, 401 U.S. 532 (1971). The state of Louisiana once again argued that the differential treatment of nonmarital children was a necessary means to achieve the end of promoting marriage and the nuclear family. Brief of Attorney General for the State of Louisiana, *Labine v. Vincent*, 401 U.S. 532 (1971), at 3 (claiming that laws which "favor legitimate children over illegitimate children . . . strengthen the idea of a family unit to discourage the promiscuous bearing of children out of wedlock. Whether this is good or bad it seems is a sociological question and not a legal one."). Laws that denied benefits to nonmarital children, the State explained, "are based on the proposition that the family is a critical unit of society." *Id*. at 4. The government added that the statutes in question "encourage marriage and family ties." *Id.*

The year after *Labine*, the Supreme Court in *Weber v. Aetna Casualty & Surety Company* addressed the constitutionality of a statute that denied workmen compensation benefits to the nonmarital children of employees. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). The *Weber* Court held that whatever interests the government might have in promoting marriage and discouraging the birth of nonmarital children, they were not advanced by denying workmen compensation benefits to those children. This was because, as the Court explained, it was irrational to believe that individuals would "shun illicit relations" simply because their children might someday be denied access to particular benefits. *Id*. at 173.

After *Weber*, governments ceased defending the differential treatment of nonmarital children based on the need to encourage procreation within marital families and to discourage other family forms. Instead, government defendants focused on narrower justifications for the differential treatment, including the administrative difficulties of establishing paternity in the absence of marriage and the need to discourage spurious claims for government benefits. *See e.g., Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (noting that the State has a considerable interest arising from the "peculiar problems of proof" in paternal inheritance cases involving nonmarital children); *Jimenez v. Weinberger*, 417 U.S. 628, 633–34

(1974) (government defended provision denying benefits to nonmarital children of disabled parents born after onset of disability on the ground that it prevented spurious claims). Government defendants had to narrow significantly their justifications for the differential treatment of nonmarital children because the Supreme Court grew increasingly skeptical of efforts to deny individuals benefits because of the circumstances of their birth. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456 (1988); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973).

In both the case of race-based marital restrictions and of the differential treatment of nonmarital children, the Supreme Court rejected the effort to defend discriminatory marriage laws and policies based on the need to maximize social welfare and family optimality. Although those efforts were frequently grounded in purported "scientific" facts relating to the well-being of society and children, the Court ultimately saw them for what they were: unconstitutionally impermissible ways of privileging the rights and interests of some over those of others.

CONCLUSION

Although class-based marital exclusions have been relatively rare in American history, they have usually shared one characteristic: Proponents of those laws have

attempted to justify them by making pseudo-scientific claims about how best to maximize social welfare and child well-being. The courts, as well as the broader society, eventually came to understand that such efforts were constitutionally impermissible, morally unacceptable, and empirically indefensible. The deeply troubling ways in which class-based marital policies and restrictions have been defended in the past should lead this Court to be highly skeptical of the effort to deny same-sex couples the opportunity to marry in order to purportedly promote the well-being of society and of children. The decisions below should be affirmed.

Dated: June 16, 2014

Respectfully submitted,

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-and-

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C) the undersigned hereby certifies that:

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,888 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than one half of the 14,000 word limit for the principle briefs.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: June 16, 2014

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CERTIFICATE OF SERVICE

I certify that the within Brief of *Amicus Curiae* Professor Carlos Ball in Support of Plaintiffs-Appellees has been electronically filed with the Clerk of the Court on June 16, 2014. All attorneys of record are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing.

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