No. 14-5291

IN THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY BOURKE, et al.,

Plaintiffs and Appellees,

v.

STEVE BESHEAR, in his official capacity as Governor of Kentucky, and JACK CONWAY, in his official capacity as Attorney General of Kentucky,

Defendants and Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF OF HISTORIANS OF MARRIAGE PETER W. BARDAGLIO, NORMA BASCH, STEPHANIE COONTZ, NANCY F. COTT, TOBY L. DITZ, 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 AND AFFIRMANCE

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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 the individual amici.

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[1] Assertions in this brief are supported by amici's full 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); 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, Making Families* (2001); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave*

Amici support Plaintiffs-Appellees' position that states' interests in supporting marriage extend beyond opposite-sex couples to include same-sex couples. In view of the history of marriage in the United States, amici cannot credit as sufficient Defendant-Appellants' arguments such as "Biology alone . . . provides a rational explanation for Tennessee's decision not to extend marriage to same-sex couples."[2] Brief of Defendants-Appellants in *Tanco v. Haslam* ("Tenn. Br.") at 25. Nor are states' "legitimate interests in procreation and in the raising of children" (Brief for Michigan Defendants-Appellants ("Mich. Br.") at 40) sufficient reason to exclude same-sex couples, since history shows that states have had multiple purposes for marriage, including establishing public order and economic benefit, in which same-sex couples share.[3]

Emancipation (1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (2010).

[2] This brief is being filed simultaneously in four distinct appeals brought by officials from the states of Kentucky, Tennessee, Michigan, and Ohio. This brief is filed with the written consent of all parties in *DeBoer v. Snyder*, No. 14-1341 (Dkt #44, 45), and *Henry v. Himes*, No. 14-3464 (Dkt #20). All parties have consented to the filing of this brief in *Tanco v. Haslam*, No. 14-5297, as have appellees in *Bourke v. Beshear*, No. 14-5291. Appellants in *Bourke* have declined to consent to the filing. For convenience, *amici* will refer to Defendants-Appellants collectively as the "Defendants" and to the four states they represent collectively as the "Defendant States."

[3] The a*mici* listed in the appendix appear in their individual capacities; institutional affiliations are listed for identification purposes only. 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.

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 only by acting as deputies of the civil authorities. While free to decide what qualifications they would consider valid by religious precept, they were never empowered to determine the qualifications for entering or leaving a marriage that would be valid at law.

Marriage is a capacious institution. It has political, social, economic, legal and personal components. It conveys meanings and consequences that operate in several arenas. Only a highly reductive interpretation would posit that the defining characteristic of marriage is procreation or care of biological children, since states' interests in marriage are more complex.

Marriage has served numerous purposes in American 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 states have seen marriage as advancing the public good whether or not minor children are present.

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 to probate rules. Federal law identifies more than 1,000 kinds of marital benefits, responsibilities and rights, as the General Accounting Office reported in 2004. 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 a mark of the free person in possession of basic civil rights. This is compellingly illustrated by the history of slavery in the United States. Lacking the ability to consent freely, slaves could not contract valid marriages. After emancipation, former slaves welcomed lawful marriage, which symbolized their new civil rights.

Over the centuries, legislative and judicial authorities in the states altered marriage rules in ways not envisioned at the founding of the United States. Three areas of fundamental change illustrate this pattern:

a) Marriage under Anglo-American common law treated men and women unequally and asymmetrically. The doctrine of coverture (marital unity) gave the husband and wife reciprocal responsibilities, while treating them as a single unit. A wife ceded her legal and economic identity to her husband and was "covered" by him. Seen as essential to marriage for centuries, this inequality was eliminated in response to changing values. Today, states still impose mutual responsibilities on spouses but treat them equally and in gender-neutral fashion. The U.S. Supreme Court has confirmed that gender-neutral treatment for marital partners is constitutionally required.

b) Centuries of racially-based restrictions on marriage choice, prohibiting and/or criminalizing marriages between whites and persons of color, began in the colonial Chesapeake region and then spread to most states, including the Defendant States. *Loving v. Virginia*, 388 U.S. 1 (1967), recognized the injustice of these restrictions, ending a nearly 300-year history of such laws.

c) Divorce grounds were few in early America. Divorce was an adversarial process requiring one spouse to sue on the basis of the other's marital fault. Over time, states greatly expanded grounds for divorce, eventually including "no-fault" provisions, thus altering the terms of the marital compact.

Today marriage is both a fundamental right and a privileged status. The institution has endured because it has been flexible, open to adjustment by courts

and legislatures in accord with changing standards. Marriage has changed while retaining its basis in voluntary and mutual consent, love and support, and economic partnership. The changes observable over time have moved marriage toward equality between the partners, gender-neutrality in marital roles, and spousal rather than state stipulation of marital role-definition.

Exclusions of same sex couples from the right to marry stand at odds with the direction of historical change in marriage in the United States. Over time, courts and legislatures have moved to eliminate discriminatory restrictions on the freedom to marry chosen partners. 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, civil laws in every state have regulated the making and breaking of marriage. Marriage laws were among the first passed by states after declaring independence from Great Britain. The civil principle accommodated the new nation's diverse religions, and emphasized that marriage had much to do with property transmission. 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 the Defendant States and every American state is created by law. State laws have typically deputized religious authorities (and designated additional 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 determine which marriages are lawful. Throughout the history of the United States, whether a marriage was or was not recognized by a religion has not dictated its lawfulness.

Within constitutional limitations, states set the terms of marriage and divorce, including who can and cannot marry, who can officiate, what marital obligations and rights are, and terms for ending marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). State legislatures and courts through American history have repeatedly adjusted marriage rules, not hesitating to exercise their jurisdiction in this domain.

Being based on consent between two free individuals, marriage is understood to be a contract. Marriage is a unique contract, however, 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). To create or to terminate a valid marriage, the state must be a party to the couple's action.

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

Societies in different historical times and places have defined marriage variously: a legitimate marriage may be patrilineal or matrilineal, lifelong or temporary, monogamous or polygamous, for example. The form of marriage recognized in the United States is a particular and not a universal form.

In 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. The attempt to rank procreation or child-rearing as the core of marriage defies the complexity of the historical record. In licensing marriages, states affirm that a couple's marital vows produce economic benefit, residential stability, and social good whether or not biological children are present.

A. Marriage Developed in Relation to Governance.

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 control of marriage was a form of power over the population. These sovereigns, aiming to see their people organized into governable subgroups, used male household heads as, in effect, their delegates, each ruling his own household. 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).

When the American colonies formed a republic, understandings of political governance and marital governance remained linked. 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 a parallel between a married couple's voluntary consent to one another and new

American citizens' voluntary consent to permanent national allegiance. Cott, *supra* note 1, at 15-17.

Marital regulation, governance, and citizenship rights were deeply intertwined in early American history. Anglo-American legal doctrine made a married man the head of his household, legally obliged to control and support his wife and other dependents, whether they were biological children, dependent relatives, or others, including orphans, apprentices, servants and slaves. In return, he became their public representative. Married men's 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 marital subordination. Slaves' inability to marry or vote evidenced their complete lack of civil rights. Early state laws regulating marriage, and court decisions specifying the obligations and rights of spouses, formed important dimensions of states' authority.

Today, constitutional imperatives have eliminated sex and race inequalities from laws of marriage; and the male head of household's rule over his wife, children, servants, apprentices and slaves is archaic. Yet a legacy of the sustained relation between marriage and citizenship persists, in that states award to married couples many benefits and rights not available to other pairs or to single persons, and states allow marriage rights to certain couples and not others.

B. Marriage Creates Public Order and Economic Benefit.

In early American history, legal marriages served public order by establishing governable and economically viable households. Marriage organized households and figured largely in property ownership and inheritance, matters of civil society important to public authorities. Households managed 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. States offer financial advantages to married couples on the premise that their households promise social stability and economic benefit to the public, and thus minimize public expense for indigents. 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).

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. States' willingness to include unrelated adopted children in the marital family then and now 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 and 292-93.

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 inside an intact marriage or not; states can thus limit the public's responsibility for 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.

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 prison inmate 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. 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 over transient ones, whether or not children will result. The Anglo-American common law and many early state statutes made impotence or other debility preventing sexual intimacy a reason for annulment or divorce, indicating that the inability to have sexual relations could invalidate a marriage; but sterility or infertility did not. Inability to procreate has not been a ground for divorce or annulment. Annulment for sexual incapacity depended upon a complaint by one of the marital partners, moreover, and if neither spouse objected, a non-sexual marriage remained valid in the eyes of the state. 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).

Thus, sexual intimacy in marriage has been presumed, but couples' ability or willingness to produce progeny has never been necessary for valid marriage in the Defendant States or elsewhere in the U.S. Post-menopausal women are not

barred from marrying, nor is divorce mandated after a certain age, for example. Men or women known to be sterile have not been prevented from marrying. 3 Howard, *supra*, at 3-160; Grossberg, *supra* note 1, at 108-110.

It could be said that 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).

Childbirth or 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 has historically been dedicated to the procreation and welfare of children rather than or more than focused on the adult couple presents a false dichotomy. Adults' intentions for themselves have been central to marriage in the history of the United States; romantic and sexual attachment, companionship and love, as well as economic partnership, were no less intrinsic to marriage 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). Not only today, but in the long past, couples married even 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. Marital sexual intimacy became increasingly separable from reproductive consequences in the 20th century. By the 1920s, contraception became readily available in influential sectors of American society. 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 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 "[w]e 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 at the time, 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 Kentucky, Tennessee, and other 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. It signified the 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).

Additionally, a widespread form of race-based discrimination in marriage laws used to exist in the nullification and/or criminalization of marriages of whites to persons of color. Originating in colonial Virginia and Maryland, such prohibitions spread to other colonies, including North Carolina, in 1741. Kentucky

relied on Virginia's ban. Ky. Const., art. VIII, § 6. Tennessee relied on that North Carolina ban until 1822, when it passed its own. Ch. 19, 1822 Tenn. Acts 22; see Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009) 343, n.43. States north and south adopted similar prohibitions, and many states added or strengthened such laws after slavery was eliminated. Tennessee amended its constitution in 1870 to include prohibition of marriage of "white persons with negroes, mullatoes [sic], or persons of mixed blood, descended from a negro to the third generation inclusive." Tenn. Const. Art. 11, § 14 (1870). The penalties were severe, and couples who were legally married in another state could be found guilty. *State v. Bell*, 66 Tenn. 9, 11 (1872); *Lonas v. State*, 50 Tenn. 287, 301 (1871). Kentucky enacted a statutory ban in 1893. Ky. Stat. 2097, Act. May 16, 1893. Tennessee's and Kentucky's prohibitions remained in effect until invalidated by the Supreme Court's ruling in *Loving*.

As many as 41 states and territories of the U.S. banned and/or criminalized marriage across the color line for some period,[4] including Michigan and Ohio, which both instituted bans early in the nineteenth century. *See, e.g.*, Mich. Rev. Stat. 1838; *State v. Bailey*, 1883 WL 6776 (Ohio Police 1883) (discussing Oh. Rev. Stat. § 6987). Michigan repealed its law in 1883 and Ohio did likewise in 1887.

[4] Indians, Chinese and "mongolians" were also prohibited from marrying whites in Western states, when Asian immigration there increased.

Act of Apr. 11, 1883, No. 23, sec. 1, §6, 1883 Mich. Pub. Acts 16, 16; An Act to Repeal Sections 4008, 6987 and 6988 of the Revised Statutes of Ohio, 84 Ohio Laws 34 (1887).

Legislators and judges often justified these laws by insisting that such marriages were against nature, or against the Divine plan (as some opponents argue today against same-sex marriage). They contended that permitting cross-racial couples to marry would fatally degrade the institution of marriage. Pascoe, *supra.* Yet as repeated legislative revisions showed, marriage was being structured by law, not nature.

The marriage bans served to deny public approval to 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 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 marriage requirements when necessary. Marriage has endured because it has not been static. Adjustments in key features of marital eligibility, roles, duties,

and obligations have kept marriage vigorous and appealing. These changes were not, however, readily welcomed by everyone. Some opponents at first fiercely resisted features of marriage that we now can take for granted, such as both spouses' ability to act as individuals, to marry across the color line, or to divorce for reasons of their own.

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 rested on the legal fiction that the married couple composed a single unit, which the husband represented legally, economically and politically. "The most important consequence of marriage is, that the husband and the wife become, in law, only one person." *The Works of James Wilson*, Vol. II, 602-03 (Robert J. McCloskey, ed., 1976).

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, or 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, *Someday*, *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 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 complimentary, to the two spouses.

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 property could keep a family solvent if a husband's creditors sought his assets. Employed married women 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 altered marriage

fundamentally, in order to take account of changing needs. Most states enabled wives to keep and control their own property and 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. The 1935 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. When plaintiffs challenged such spousal sex differentiation in the 1970s, the Supreme Court found discrimination between husband and wife in Social Security and veterans' entitlements unconstitutionally discriminatory. *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, including the Defendant States, eliminate a man's exemption from prosecution for rape of his wife. *See, e.g.*, 1985 H 475 (Oh.

1985); Mich. Comp. Laws Ann. § 750.520l (West 1988); Tenn.Code Ann. § 39-13-507 (Supp.1989); 1990 Kentucky Laws H.B. 38 (Ch. 448).[5] 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*, Cal. Law Review, 1375-1505 (Oct. 2000).

Over time, the states have moved to gender parity in marriage. Courts chipped away at the inequalities inhering in the status regime 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. Likewise, 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 understandings of gender equality and individual rights, courts have promoted the continuing vitality of marriage. For couples today, marriage has been transformed from an institution

[5] Tennessee's 1989 law defined spousal rape as requiring the attacking spouse to be "armed with a weapon or any article used or fashioned in a manner to lead the alleged victim to reasonably believe it to be a weapon" or "caused serious bodily injury to the alleged victim." Tenn.Code Ann. § 39-13-507 (Supp.1989). Not until 2005 were those requirements removed. Tenn. Stat. § 39-13-501(8). In Ohio, a spouse living with his victim must still employ "force" or the "threat of force" to be guilty of spousal rape; rape through coercion or the administration of a drug or intoxicant is not a crime if committed by a spouse. Ohio Rev. Code Ann. § 2907.02.

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 issuing 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. Slowly but unmistakably, however, social and legal opinion 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 put in place almost a century earlier. *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948).

In 1967, the U.S. Supreme Court struck down Virginia's racially-based marriage restrictions of three centuries' duration, declaring that marriage is a "fundamental freedom," and affirming that freedom of choice of partner is basic to the civil right to marry. *Loving*, 388 U.S. at 12. This prohibition, long embedded in Virginia's laws and concepts of marriage – and often defended as natural and in accord with God's plan (*see, e.g.*, *id.* at 3) – was entirely eliminated.

At that time, the state of Virginia defended its "Racial Integrity" law with arguments similar to those raised by the Defendant States, declaring that regulating marriage was the exclusive province of the states and rooted in historical tradition, citing evidence that the Fourteenth Amendment was not intended to prohibit anti-miscegenation laws and numerous cases that had approved them. *See* Brief on Behalf of Appellee, *Loving v. Virginia* (No. 395), 1967 WL 93641, at *4-7, 31-38. In parallel to the Defendant States' arguments in the instant appeals, Virginia then argued that anti-miscegenation laws served strong governmental interests and were supported by biological differences between the races, avoided social tension "which in turn reacts upon the peace and unity of the marriage bond," and protected children from being raised in unstable families. *Id*. at *40-49. And like

the Defendant States, Virginia argued that its law did not deny equal protection. *Id.* at *43-45.

Thus, for instance, the Michigan Defendants-Appellants (Mich.Br. at 59) misread the historical record in denying a parallel between the long history and tradition of denying marriage to whites who would choose "Negro" partners, and denying marriage to individuals who would choose partners of their own sex. To supporters of anti-miscegenation laws, the freedom for a white and black to marry one another seemed as much a "new right" in the 1960s as the freedom of two persons of the same sex to marry may seem now; yet both freedoms are more exactly removals of state restrictions to the long-standing right of free choice in marriage partner.

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. Soon after the American Revolution, most states and territories allowed divorce, albeit for extremely limited causes: adultery, desertion, or conviction of certain crimes. Grounds such as cruelty were later added. Basch, *Framing American Divorce*, *supra* note 1; Glenda Riley, *Divorce: An American Tradition* 108-29 (1991).

Early divorce laws presupposed differing, 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 to her husband.

Divorce was an adversarial proceeding. The petitioning spouse had to show that the accused spouse had defaulted on marital requirements set by the state, *e.g.*, the husband had not provided for his wife. A guilty party's fault was a fault against the state as well as the spouse. Many states prohibited remarriage for the guilty party in a divorce.

Over time, state legislation expanded divorce grounds. This evolution was hotly contested, however. Many critics were vociferously opposed, sure that greater freedom in divorce would undermine marriage entirely. Basch, *Framing American Divorce*, *supra* note 1, at 72-93. The "fault" form prevailed even while divorce grounds multiplied, leading, by the twentieth century, to cursory fact-finding and fraud by colluding spouses who agreed that their marriage had broken down. In response, California in 1969 adopted no-fault divorce. By 1980, almost all the states followed in allowing an incompatible couple to end their marriage without the adversarial process. Michigan, for instance, in 1972 provided that a couple could be divorced if an irretrievable breakdown and/or irreconcilable

differences and/or incompatibility arose, in effect creating no-fault divorce. MCLA 552.6; MSA 25.86 (1972). Kentucky similarly passed legislation in 1972 to permit divorce if "the marriage is irretrievably broken." Ky. Rev. Stat. Ann. § 403.140; 1972 c 182, § 4. *See also* Tenn. Code Ann. § 36-4-101 (1984) (irreconcilable differences or three years separation); Ohio Rev. Code Ann. § 3105.01 (1989) (one year separation or incompatibility).

This speedy convergence showed acceptance of the idea that marriage partners should define their own standards of marital satisfaction. It likewise 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, the two 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 (starting in the late nineteenth century) gave the mother a strong preference for custody. Currently, in contrast, both parents are held responsible for economic support of dependent children 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 marriage or at its ending. *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.

Marriage rules have changed over time, and the institution of marriage has proved to be resilient rather than static. Features of marriage that once seemed essential and indispensable – including coverture, racial restrictions, and state-delimited grounds for divorce – have been eliminated. 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 would "attempt to

interfere with the individual's freedom to make a decision as important as marriage"), or by imprisonment, *Turner*, 482 U.S. 78.

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 every American embraces the long-term movement in that direction. Spokespersons today who give priority to preserving the institution's perpetuation of gender difference by preventing same-sex couples from marrying 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.

The Defendant States, 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 laws treat 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 judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,983 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman style font.

Dated: June 16, 2014

s/ *Jessica M. Weisel*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 16, 2014.

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s/ *Jessica M. Weisel*
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