Nos. 10-2204, 10-2207, 10-2214

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLEE,
v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
DEFENDANTS-APPELLANTS.

DEAN HARA,
PLAINTIFF-APPELLEE/CROSS-APPELLANT,

NANCY GILL, et al.,
PLAINTIFFS-APPELLEES,
v.

OFFICE OF PERSONNEL MANAGEMENT, et al.,
DEFENDANTS-APPELLANTS/CROSS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICI CURIAE* HISTORIANS • PETER W. BARDAGLIO • NORMA BASCH • GEORGE CHAUNCEY • STEPHANIE COONTZ • NANCY F. COTT • TOBY L. DITZ • ARIELA DUBLER • LAURA F. EDWARDS • ESTELLE B. FREEDMAN • SARAH BARRINGER GORDON • MICHAEL GROSSBERG • HENDRIK HARTOG • ELLEN HERMAN • MARTHA HODES • LINDA K. KERBER • ALICE KESSLER-HARRIS • ELAINE TYLER MAY • STEVEN MINTZ • ELIZABETH H. PLECK • CAROLE SHAMMAS • MARY L. SHANLEY • AMY DRU STANLEY • BARBARA YOUNG WELKE • IN SUPPORT OF APPELLEES AND OF AFFIRMANCE OF THE JUDGMENT BELOW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ADMINISTRATIVE RULINGS

CONSTITUTIONAL PROVISIONS

Statement Pursuant to Federal Rule of Appellate Procedure 29(c)(4)

Amici are historians of American marriage, family and law, whose research documents how the institution of marriage has functioned, changed and been defined by law over time. Our brief aims to provide accurate historical perspective and context as the Court inquires into state and federal prerogatives in defining marriage. Amici support Appellees' position that the Defense of Marriage Act (DOMA) is historically unprecedented: over the whole history of the United States, until 1996 when DOMA was passed, the federal government consistently deferred to state determinations of marital status, even when the actions of state courts and legislatures created significant variations among states in marriage rules. Moreover, Amici disagree with Appellants' contention that the core governmental purpose of marriage is to foster procreation, since states have always had several key purposes in establishing and regulating marital unions.[1]

[1] This brief is based on amici's decades of study and research. Amici are the authors of the principal scholarly work in the relevant fields, including: PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); NORMA BASCH, FRAMING AMERICAN DIVORCE (1999); 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); MARRIAGE, A HISTORY (2006); TOBY L. DITZ, PROPERTY AND KINSHIP: INHERITANCE IN EARLY CONNECTICUT (1986); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); Ariela Dubler, *Governing Through Contract: Common Law Marriage in the 19th Century*, 107 YALE L. J. 1885 (1998); *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

All parties have consented to the filing of this Brief pursuant to and in accordance with Federal Rule of Appellate Procedure 29(a).

RECONSTRUCTION (1997); ESTELLE B. FREEDMAN AND JOHN D'EMILIO, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (2d ed. 1997); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); HENDRIK HARTOG, MAN & WIFE IN AMERICA, A HISTORY (2000); 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); ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (2008); BARREN IN THE PROMISED LAND (1996); STEVEN MINTZ, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988); ELIZABETH H. PLECK, CELEBRATING THE FAMILY: ETHNICITY, CONSUMER CULTURE, AND FAMILY RITUALS (2001); CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002); MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES (2001); 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). Assertions in the brief are supported by this body of historical scholarship, whether or not expressly cited; more limited citations typically occur at the ends of paragraphs.

Statement Pursuant to Federal Rule of Appellate Procedure 26(c)(5)

Amici and counsel for Amici authored this Brief in whole. No party or party's counsel contributed money intended to fund preparing or submitting this Brief. No person other than amici curiae or counsel contributed money intended to fund preparing or submitting the Brief.

Summary of the Argument

In the United States, marriage has always been a double-facing institution, both public and private. It is public in that it is constituted by the state; its form and requirements are created by public authority, and it operates as systematic public sanction, bringing rights and benefits along with duties. At the same time, marriage signifies a freely-chosen relationship between two individuals and founds a private realm of individual liberty and familial intimacy.

As discussed below, jurisdiction over marital status is reserved to the states in our federal system. The states have had a variety of purposes in authorizing marriage, since the institution has served as a basic unit of economic organization and social stability and it also has embodied free individuals' consensual choice of long-lasting intimate relations. The diversity in marriage rules among various states that resulted has, historically, been accommodated by the practice of comity among the states, and by federal reliance on states' determinations of who was validly married. While states' differing standards for marriages have often provoked alarm and contestation, until the 1996 passage of DOMA[2], Congress never assumed the power to override state definitions of marriage nor tried to impose a single definition of the married couple for all federal purposes. Past advocates for a uniform national standard of marriage and divorce have recognized

[2] PUB. L. NO. 104-99; 1 U.S.C. §7.

that an authorizing constitutional amendment would be required – and such efforts have always failed, because of much greater support for states retaining their reserved power over the creation and dissolution of marital status.

Disagreement among the states on major issues in the making and breaking of marriages has ample precedents. Even when critics charged that one state or another's changes threatened the very foundations of the institution, Congress did not (prior to the enactment of DOMA) preemptively take a position on a contested issue so as to discredit a policy choice that a state might otherwise make. In the light of history, DOMA appears as an attempt by Congress to exercise a power it always has been understood not to have, and that the representatives of the states have repeatedly refused to grant it by constitutional amendment.

Argument

I. Valid Marriage Is a Legal Status Created by the States

A. Exclusive State Control

Marriage in the United States has historically been a civil matter, controlled and authorized by state officials in every state and distinct from religious rites performed according to the dictates of any religious community. While sentiment, custom and religion enter marriage in varying and important ways, valid marriage is a creature of law in the United States. State regulation of marriage derived from

colonial precedent in New England and was important at the time of the founding of the United States because of the new nation's diverse religions.[3]

Since the American Revolution, marriage has been seen as a basic mode of governing the population and keeping social order. Consequently, regulations for legal and valid civil marriage were among the first laws established by the several states acting under the Articles of Confederation.[4]

During debate over the writing and ratification of the U.S. Constitution, all parties agreed that "domestic relations" would remain the domain of the states. This was so not only because matters relating to husbands and wives, parents and children, were deemed to be within the states' "police powers," but also because the "domestic relations" included slavery. Slavery and the slave trade were among the most divisive issues at the constitutional convention, where it was essential to reach agreement. The premise of state jurisdiction over "domestic relations" enabled states whose populations differed in values and practices to control things "close to home" while joining together under federal government. This core feature of federalism underlay national unity as the U.S. Constitution was born.[5]

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[3] 1 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 121-226 (1904) (colonial precedents).

[4] *Id.* at 388-497 (early state marriage laws); *see* COTT *supra* note 1 at 2, 52-53.

[5] *See* COTT, *supra* note 1, at 77-104. Domestic relations other than slavery were absent from debate during the constitutional convention, indicating that state jurisdiction was presumed.

Subsequently, regional and cultural differences and state legislators' priorities resulted in a changing patchwork of marriage rules. Although married couples' movements between states created occasional conflicts between states' differing definitions of a valid marriage, the patchwork system worked because of a tradition of comity. There was great incentive to accept couples who had married in one state as married in another. Not doing so would cause social and legal disorder in property ownership, estates, and children's legitimacy. Also, a law of nations principle posited that a marriage valid where it was celebrated was valid everywhere, unless it directly opposed the receiving state's public policy.[6]

Throughout U.S. history, the national government accepted states' definitions of marital status regardless of the extent of variance among the states.[7] If and where federal government powers touched married couples (as in plenary powers over the military or citizenship and naturalization), the federal government accepted the states' determinations of marital status for purposes of federal law – until the Congress passed DOMA in 1996.

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[6] *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, §113 at 103-4, §113a at 104, §117 at 108, §121 at 113-14 (2d ed. 1841) (polygamous marriages, criminal in the American states, would not be honored even though valid where celebrated); Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 1985 AM. B. FOUND. RES. J. 799, 819-26 (1985).

[7] DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS, 343-416 (John W. Bixler, ed., United States Dept. of the Interior, vol. XIX, August 20, 1913 - June 22, 1914).

B. Consent as the Basis for Entering Marriage

Liberty of choice has been central to the American understanding of marriage since the Revolution, when it was bound into our political heritage as the model for the voluntary allegiance asked of citizens of the new nation. In contrast to the colonial population's involuntary status as British subjects, allegiance to the new United States would be voluntary: it depended on individual consent.[8] The analogy best suited to illustrate voluntary consent was a person's free choice of partner in monogamous marriage.[9]

As an institution based on mutual consent and voluntary choice of the partners, marriage was and remains understood to be a contract. But it has always been a unique contract, because of the state's strong role in defining marriage and prescribing its obligations and rights. Marriage thus embodies a paradox: it is both a contract and a status, even though the two are ordinarily seen as opposites.[10] Marriage may be joined by mutual private consent, but its legal obligations cannot be modified or ended thereby. The state is a party to and guarantor of the couple's

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[8] JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 3-9, 76-99 (1978).

[9] Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 WM. & MARY Q. 689, 693-97 (1987). Following Montesquieu's *Spirit of the Laws*, Revolutionary leaders believed that a people's customary form of marriage corresponded to the form of government; they saw monogamous marriage as the foundation of any government based on consent of the governed. Montesquieu had said that only monogamy suited a government of laws formed by consent; polygamy was inescapably linked to despotism. COTT, *supra* note 1, at 21-23.

[10] COTT, *supra* note 1, at 10-11.

bond, giving the two individuals a new status as a married pair. Once marriage is entered, its "rights, duties and obligations" are "of law, not of contract," "the creation of the law itself," as the Maine Supreme Judicial Court said in 1866, and this is true today.[11] For example, spouses cannot by private agreement abandon their obligation of mutual economic support.[12]

Throughout U.S. history, the several states have shared a basic understanding of what the institution of marriage means: a voluntary bond between a couple who pledge to one another lifelong mutual economic support and sexual fidelity, and establish a common household. Marital status (like citizen status) is part of one's legal *persona* and has legal meanings and consequences. Wedding legally transforms the status of couples who follow state-prescribed marriage regulations, giving both individuals new legal standing and distinctive obligations and rights.

Over time, marriage has developed a unique social meaning, owing to the state placing its imprimatur of value on the couple's choice to join in marriage, to remain committed to one another, to form a household and to join in an economic partnership to support one another.

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[11] *Maynard v. Hill*, 125 U.S. 190, 210-13 (1888) (quoting *Adams v. Palmer*, 51 Me. 481, 483 (1866)).

[12] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS 425-27 (2d ed. 1988, 2d prtg. 2002).

C. States' Purposes for Marriage: Governance, Social Order, Economic Benefit

Throughout its history, marriage in the United States has served numerous complementary public purposes and functions. Among these purposes are: to create stable households; to create public order and economic benefit; to legitimate children; to assign providers to care for dependents (including the very young, the very old, and the disabled) and thus limit the public's liability to care for the vulnerable; to facilitate the ownership and inheritance of property; to shape the "people," or to compose the body politic; and to facilitate governance (state regulation of the population).[13]

Historically, marriage and governance of the population by the state have been closely intertwined. As secular sovereigns in Britain and Europe worked to wrest control over marriage from the church (circa 1500-1800), they did so because they understood marriage regulation as a means of governing the population. In the centuries of Anglo-American law underlying our contemporary practice, marriage was designed to foster regulation through households governed by male heads who acted as delegates of the sovereign and assumed economic responsibility for their wives and all other dependents. The American states from

[13] COTT, *supra* note 1, at 2, 11-12, 52-53, 190-194, 221-224; GROSSBERG, *supra* note 1, at 204-05 (legitimization of children).

their beginnings likewise saw their control over marriage as an important dimension of their authority over their populations.[14]

Marriage-based households were the fundamental economic units in early America. Men and women played different and equally crucial roles in organizing the production of food, clothing and shelter for individuals. Under the common law doctrine of coverture, the husband became the legal and economic representative of his wife; he owned and managed her property and she owed obedience to him. The husband as head of the marital household had economic and legal responsibility for his wife and all other dependents in the household, whether biologically related (children or relatives) or not (orphans, apprentices, servants and slaves).[15]

State governments encouraged marriage among the free white population because maritally-organized households governed by responsible male heads promised economic survival and stability. This governance function of marriage was crucial at the time of the American Revolution, when roughly 80% of the thirteen colonies' population were legal dependents of male heads of household.[16]

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[14] COTT, *supra* note 1, at 10-16; *see also* Mary L. Shanley, *Marriage Contract and Social Contract in 17th-Century English Political Thought, in* THE FAMILY IN POLITICAL THOUGHT (J.B. Elshtain ed., 1982).
[15] COTT, *supra* note 1, at 11-12, 79-81; GROSSBERG, *supra* note 1, at 24-27.
[16] Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 123 (1995) (the figure of 80% is from 1774).

Since the founding of the United States, state governments have bundled social approbation and economic advantage together with legal obligations in marriage, to encourage couples to create long-lasting intimate relations rather than transient ones, whether or not those relationships resulted in children. In the past, older adults – widows and widowers – remarried whenever a willing mate could be found. Although it was often clear that no children would result, marriage was desirable because a married couple had the wherewithal to form a stable household of their own with the expected division of labor. In our post-industrial economy, many divorced or widowed older adults marry when they are past childbearing age, usually for reasons of intimacy and stability. Since the 1920s (the first decade when adults in the know could obtain reliable contraception), sexual intimacy has been seen as separable from reproductive consequences even for fertile couples; and since the 1960s when more effective contraception became widely available, couples with no interest in childbearing frequently choose to marry.

States' intentions in setting marriage rules have been less focused on producing children than on seeing that they are supported by responsible adults. The ability or willingness of couples to produce progeny has never been required or necessary to marry under the law of any American state. For example, no state ever barred women past menopause from marrying, or allowed a husband to divorce his wife because she was past childbearing age. Men or women known to

be sterile have not been prevented from marrying. Nor could a marriage be annulled for an inability to bear or beget children.[17] Claims that the main purpose of marriage and state marital regulations has "always" been to provide an optimal context for begetting biological children are normative and not historically-based.[18]

State governments today continue to seek public benefit through the economic obligations of marriage. The *coverture* principle of the wife's subordination to her husband is gone (as are categories of adult dependents) and the archaic practice of the husband's headship has been transmuted into gender-neutral terms. Where the male head of household in the past was responsible for his wife, today both spouses have legal responsibility for each other and for their dependents. State governments minimize public expense for indigents by enforcing the economic obligations of marriage.[19]

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[17] 3 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 3-160 (1904). While impotence, if unknown at the time of marriage, could be a ground for annulment, sterility was not. Thus state laws recognized a justifiable expectation of sexual intimacy in marriage, but not a justifiable expectation of progeny. GROSSBERG, *supra* note 1, at 108-110.

[18] COTT, *supra* note 1, at 168-180, 206-210.

[19] *Id.* at 221-223; GROSSBERG, *supra* note 1, at 24-30; CLARK, *supra* note 12, at 343-416.

D. Channeling of Government Benefits Through Marital Families

The economic dimension of marriage expanded during the New Deal when the federal government began to take seriously its role in the economic security of citizens. The national government's use of marriage as a vehicle to convey benefits had begun even before the U.S. Constitution was written. Men's Revolutionary War service prompted the Continental Congress in 1780 to award "pensions" to the widows and orphans of officers who died serving the new nation.[20]

Revolutionary War pensions established a durable pattern of federal dispensation of benefits through legally married families.[21] Today, U.S. public policy channels many government economic benefits through spousal relationships (where some other nations allot benefits to individuals regardless of marriage). An important feature of a couple's marital status is entitlement to the federal as well as state government benefits that accompany marriage and bring significant financial

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[20] Not long after, pensions were extended to servicemen beyond officers. *See* National Archives and Records Service, General Services Administration, REVOLUTIONARY WAR PENSION AND BOUNTY–LAND-WARRANT APPLICATION FILES, National Archives Microfilm Publications, Pamphlet Describing M804 (Washington, D.C., 1974), *available at* http://www.footnote.com/pdf/M804.pdf.

[21] Since the 1970's, the pensions have been gender neutral. *Weinberger v. Wiesenfeld*, 470 U.S. 636 (1975); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 56-159 (2001); COTT, *supra* note 1, at 172-179; THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 103-151 (1992).

advantages that are unavailable to cohabiting couples. These benefits compose an important incentive to marry legally.[22]

Capacious as the extent of federal laws touching upon families may be, before 1996 no federal law nullified a state's power to create and sustain marriages among its inhabitants that would extend validly to the federal level. Rather, the federal government accepted marital statuses created by the states, until DOMA broke with that tradition.[23] DOMA operates unequally in eliminating the marital status of same-sex couples with respect to federal law, thereby depriving them of federal entitlements gained by other married pairs.

E. Variation in States' Marriage Policies

From its founding, the American republic's commitment to state jurisdiction over marriage definition meant that states' marital policies would vary. A brief

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[22] *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").

[23] *See, e.g.*, DECISIONS OF THE DEPARTMENT OF THE INTERIOR, *supra* note 7, at 327, 331 (validity of marriage for "pensionable status" determined by "law of the place where the parties resided … or when the right to pension accrued"); Rev. Rul. 58-66, 1958-1 C.B. 60 (ruling that marital status "as determined by state laws is recognized in the administration of Federal income tax laws;" common law marriages valid); *Helvering v. Fuller*, 310 U.S. 69, 74-75 (1940) (necessity of "examination of local law to determine the marital status" in federal income tax provision); James P. Lynch, *Social Security Encounters Common-Law Marriage in North Carolina*, 16 N.C. L. REV. 225, 257 (1937-38) (death benefit paid to surviving spouse in common law marriage requires Social Security Board to find "the law of the particular state" recognizes the marriage and that the applicant has complied with "the law of the state" for establishing a common law marriage).

and merely illustrative list of issues on which states varied includes: whether specific ceremonies are required for validation, how spousal roles are defined and enforced, at what age a person may consent to marriage, what degree of kin marriage is forbidden, and whether and how marriage may be dissolved.[24]

In none of these instances did the federal government step in to adopt the policies of one state to the detriment of others or to mandate a uniform policy. Many differences – such as who might perform marriage ceremonies – caused little controversy. Some, however, created major conflicts. Nevertheless the federal government never set a uniform rule. Quite the opposite: Congress and the Supreme Court frequently restated state jurisdiction in the marital arena. State marital diversity reigned, and conflicts were resolved within American federalism.[25]

The development of common-law marriage illustrates the point. The eminent jurist Chancellor James Kent was innovating when he argued in an 1809 New York case that a couple's intent and consent, under common law rules, created a valid marriage, even in the absence of conformity to ceremonies prescribed by state law. Such non-ceremonial marriage was very common in early America. State by state, jurists and legislators began either to accept or reject

[24] GROSSBERG, *supra* note 1, at 70-74, 86-113, 144-45.
[25] *E.g.*, in *Meister v. Moore*, 96 U.S. 76 (1877) and *Maryland v. Baldwin*, 112 U.S. 490 (1884), the Supreme Court validated common law marriage unless a state specifically prohibited it, thus leaving ultimate determination to the state.

Kent's model of "common law marriage." Most states – but not all - adopted Kent's view that while consent was the essence of and always necessary for marriage, formal solemnization was not required.[26]

The same varied pattern occurred with other marital regulations. Thus, for example, diversity emerged on permissible degrees of consanguinity. Marriage between first cousins was a common and approved practice for centuries in Europe and was accepted in some of the states, favored among certain elites as a means of concentrating family wealth. New England and much of the South accepted first-cousin marriage but it was prohibited in the Middle and Far West.[27]

Nor did far more controversial questions prompt the federal government to adopt one rather than another state's policies. Strong inter-state divergence and hence intense controversy circled around laws banning and/or criminalizing marriages between whites and blacks or mulattos. These laws originated in the colonial Chesapeake, and spread from there to most – but not all – of the early states for some part of their history.[28] With the end of slavery and ex-slaves' attainment of at least nominal civil rights, many states multiplied the laws banning and/or criminalizing and nullifying interracial marriages, as well as adding new

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[26] GROSSBERG, *supra* note 1, at 64-83; HOWARD, *supra* note 3, at 170-185 (discussing frequency of informal marriage).
[27] GROSSBERG, *supra* note 1, at 110-113.
[28] *See* DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE 217-220 & app. (1987).

prohibitions on marriage between a white and a person of Asian or native American descent. Thirty states maintained such laws as late as 1939, while the other states had eliminated their bans (or in a handful of cases, never had them).[29]

Prior to 1967 and the Supreme Court's invalidation of racial restrictions in marriages, when a state relied on its own laws to refuse to recognize the marital status of a mixed couple validly married elsewhere, the issue was considered a conflict between the states and not a federal matter.[30] This was the signature instance of the public policy exception to the jurisprudential comity rule that marriages valid where celebrated were valid everywhere in the United States.[31]

Recognition of out-of-state divorces generated similarly strong conflicts and variable results.[32] States began to establish legal divorce shortly after the

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[29] PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 115-123 (2009).

[30] *See Ex Parte Kinney*, 14 F. Cas. 602, 605-06 (C.C.E.D. Va. 1879) (no federal jurisdiction to grant habeas corpus relief to Virginia resident imprisoned for cohabiting with his wife of a different race, despite their lawful marriage in the District of Columbia: "Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. . . . [M]arriage is not one of the 'privileges' in regard to which the national constitution and congress can restrict the power of the states."); GROSSBERG, *supra* note 1, at 133-40. For current practice see *Loving v. Virginia*, 388 U.S. 1 (1967) and SSR 67-56, 1967 WL 2993 (post-*Loving*; agency could no longer give effect to a state anti-miscegenation law when determining validity of marriage in application for "wife's insurance benefits").

[31] JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAW 96, 117, 232-33 (1834).

[32] HARTOG, *supra* note 1, at 269-86.

Revolution to maintain oversight of marital dissolution. Marriages at that time were most frequently broken by desertion of one spouse. Such unmonitored breaches of marital economic responsibilities defied states' aims for marriage to create social order and economic stability. By prescribing grounds for divorce and overseeing post-divorce property and support settlements, states intended to perfect their use of marriage to advance these aims.[33]

Over time, state legislatures expanded grounds for divorce, some far more than others. By the mid-nineteenth century the extent of variation horrified opponents of divorce, who were aghast at liberalized grounds. They were sure that "venue-shopping" among states would prevail, to the detriment of marriages everywhere in the nation. Indiana's loose standards, for example, prompted the Indianapolis *Daily Journal* to complain in 1858 that the city was "overrun by a flock of ill-used, and ill-using, petulant, libidinous, extravagant, ill-fitting husbands and wives as a sink is overrun with the foul water of the whole house." The divorce question brought to the fore "dangerous doctrines . . . which tend to undermine the social fabric and the sacred ties of marriage," the *New York Herald*

[33] BASCH, FRAMING, *supra* note 1, at 19-42; COTT, *supra* note 1, at 46-55.

in 1870 not untypically opined.[34] Violent controversy swirled for decades, without Congress stepping in to legislate a single standard.[35]

The publication of cumulative national statistics of divorce in the 1890s created a panic and increased pressure for tighter regulation of entry into marriage. In response, new restrictions on marrying emerged, state by state: longer waiting periods and higher required age to wed, mandatory marriage licenses, eugenic-inspired disease tests, more specific or fewer grounds for divorce. The tide turned against common-law marriage: more and more states banned it, making prescribed ceremonies mandatory for a marriage to be valid.[36]

Even in the midst of this perceived crisis and highly charged debate, Congress did not enter the realm of state jurisdiction over marriage definition. Despite the extent of states' variation, prior to 1996 the federal government always relied upon states' determinations. In marital diversity the states functioned as 'laboratories of change,' in the metaphor of Justice Louis Brandeis.[37] So far as they observed prevailing bounds set by the U.S. Constitution, the states experimented without federal interference.

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[34] GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 65 (1991) (quoting INDIANAPOLIS DAILY JOURNAL); *The End of the Macfarland Trial and the Moral of It*, N.Y. HERALD, May 11, 1870.
[35] BASCH, FRAMING, *supra* note 1, at 90-92, 100-102; COTT, *supra* note 1, at 48-52, 109-110.
[36] GROSSBERG, *supra* note 1, at 83-102, 140-52.
[37] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Differences among states in marriage policy became structural features of American law and practice, always accepted if not fully welcomed. To the extent that national convergence upon similar norms emerged, it did so gradually, from the varied enactments and experiences of the states. Prior to DOMA, where states disagreed, Congress did not take sides to impose its own national definition.

II. Exceptional Federal Actions in the 19th Century

Congress has involved itself directly in making or breaking marriages only in exceptional situations where there was no state with jurisdiction to regulate marriage. These illustrate by their uniqueness the historical commitment to state jurisdiction over these matters.

A. Civil War and Reconstruction

A signal mark of slaves' lack of freedom was their exclusion from legal marriage. Deprived of all civil rights, slaves lacked the ability to consent to marriage; they lacked the power to fulfill marital responsibilities since their masters could always supervene. A slave wedding meant nothing to the state government where the couple resided; that absence of public authority was the very essence of the marriage's legal invalidity. During Congressional debate on the proposed 13th amendment to eliminate slavery, more than one Northern speaker

noted disparagingly that no Confederate state honored "the relation of husband and wife among slaves, save only so far as the master may be pleased to regard it."[38]

As the Union Army marched south, Confederate states crumbled. In the spring of 1864, a Union military edict authorized the clergy in the U.S. army to perform marriages for slaves who had fled to freedom behind Union lines in U.S. occupied areas where state-level authority did not exist. Ex-slave recruits welcomed the ability to marry; it was a civil right long denied them. An army chaplain in Mississippi remarked on the "very decided improvement in the social and domestic feelings of those married by the authority and protection of Law. It causes them to feel that they are beginning to be regarded and treated as human beings."[39]

Direct federal involvement in creating marriages among ex-slaves was the exceptional result of a devastating Civil War that left no state governments in the occupied South. In the Union Army's 'contraband camps' where ex-slaves fled, the Secretary of War announced that couples who wished to cohabit would have to be legally married. During Reconstruction, the newly formed and temporary U.S. Freedmen's Bureau took power in the occupied South and regulated marriage

[38] CONG. GLOBE 38th Cong., 1st Sess. 1324, 1369, 1479 (1864).
[39] COTT, *supra* note 1, at 82-84; Laura F. Edwards, *The Marriage Covenant Is at the Foundation of All Our Rights*, 14 LAW & HIST. REV. 90 (1996).

there.[40] When state governments were reconstituted, the Freedmen's Bureau ceded its authority. Southern states resumed their jurisdiction over marriage law, subject however to the authority of the 14th amendment, ratified in 1868.

B. Polygamy in the Utah Territory

Another important and revealing example of federal action comes from the 19th-century campaign to eliminate polygamy as practiced by the Church of Jesus Christ of Latter-Day Saints ("LDS Church"). The Mormons had moved to the Utah Territory, and in 1862 Congress outlawed bigamy there and in all the territories under its jurisdiction.[41] Constitutionally, Congress had the same plenary powers over marriage in federal territories that states had in their domains. Federal anti-polygamy legislation applied only to federal territories. Congress acted not only because polygamy on the North American continent seemed loathsome, but because Utah's intent to apply for statehood loomed on the horizon. Federal legislators knew that they would have no power to define marriage in Utah once it obtained statehood. Under extreme federal pressure for decades, the LDS Church

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[40] In 1865 the Bureau issued "Marriage Rules" intended "to correct, as far as possible, one of the most cruel wrongs inflicted by slavery." COTT, *supra* note 1, at 80-95.

[41] Morrill Act, ch.126, §§1-3, 12 Stat. 501, 501-02 (1862). In 1874, Congress addressed divorce within the territories. *See* Poland Act, ch. 469, § 3, 18 Stat. 253, 253-54 (1874); Edmunds-Tucker Act, ch. 397, 24 Stat. 635, 635-39 (1887) (codified 28 U.S.C. §§633, 660) (repealed in 1978); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 81-83 (2002).

abjured polygamy. Still, Congress required Utah's state constitution to stipulate that polygamy was "forever prohibited" before Utah could be admitted into the union.[42]

The 19th-century anti-polygamy laws in federal territory, like federal authorization of ex-slave marriages in the occupied South during Reconstruction, were unique and limited actions that showed Congress's respect for states' constitutional authority over marriage.

III. Change and Continuity into the Present

The history of marriage in the United States includes both change and continuity. Changes have occurred because legislatures and courts in the several states control marriage definitions, and have responded to social and economic changes among the populace by reinterpreting marriage laws to reflect contemporary values. Since the 1780s, vast changes in the way marriage laws regulate gender roles and racial hierarchies have taken place. Other state-level actions significantly diminished the extent to which states prescribe how a married couple enacts their spousal roles and responsibilities, as well as whether and how they can divorce. Throughout this changing history, the federal government continued to respect state determinations of marital status, until DOMA.

[42] UTAH CONST. art III, §1; GORDON, *supra* note 41, at 164-181; GROSSBERG, *supra* note 1, at 120-29; COTT, *supra* note 1, at 111-20.

A. Changes in Gender and Racial Equality

In the past, marriage laws helped shape racial hierarchy (through race-based marriage proscriptions) and to enforce asymmetrical gender roles (through the different marital duties placed on husbands and wives), in ways inconsistent with current standards of equality. On both issues, changes began in the states, and led toward reinterpretations of the 14th Amendment's applicability by the U.S. Supreme Court. New emphasis on cultural pluralism in the mid-20th century began to erode the acceptability of laws banning cross-racial marriages. California's Supreme Court led the way in 1948 in overturning that state's ban (in place since 1851). Fifteen more states followed in the next two decades. In 1967 the U.S. Supreme Court newly interpreted the meaning of such state proscriptions, calling them props for white supremacy, and thus unconstitutional as a denial of equal protection.[43]

State legislatures and courts through the 19th century chipped away at coverture – the marital unity in which a wife's legal and economic individuality was subsumed under her husband's power. Coverture had been in place for centuries, in Great Britain and the United States, and was legally and socially understood to be essential to marriage. Yet, far from viewing marriage as immutable, state authorities – responding to economic pressures and to women's

[43] *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948); COTT, *supra* note 1, at 198; GROSSBERG, *supra* note 1, at 24-30, 126-140.

rights complaints – changed this seemingly essential feature. Over decades, each state in its own fashion lifted the constraints of coverture and associated gender asymmetries in marriage.[44] Still, residues of coverture hung on until feminist pressure in the 1960s and 1970s forced a thorough re-examination and elimination of sex discriminations throughout state and federal laws.[45]

B. Changes in Regulation of Divorce

States' rapid move to no-fault divorce converged with the demise of coverture to re-emphasize the centrality of individual choice and consent in marriage. California was the first state to adopt no-fault divorce, in 1969. Within fifteen years, almost every other state adopted something similar. No-fault divorce meant that states gave spouses the liberty to decide for themselves whether their marriage had irretrievably broken down. Yet the states retained jurisdiction over ending marriages; state governments continue to have important economic interest in controlling marriage and divorce, and thus post-divorce terms of support must have court approval to be valid. Both spouses' abilities to contribute economic

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[44] BASCH, IN THE EYES OF THE LAW, *supra* note 1; Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983); Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994).

[45] KESSLER-HARRIS, *supra* note 21, at 117-129.

support are considered, and if dependents are involved, both spouses are held responsible for their support and nurture.[46]

C. Continuous Commitment to State Authority

Until DOMA, states' jurisdiction over marriage status continued undisturbed, even as the complications of modernity roiled the marriage landscape. As states responded to socio-economic change by updating and reinterpreting marriage laws, the resulting variations troubled some citizens, who desired a uniform national standard for marriage and divorce. From the 1880s to the 1930s, scores of proposals were made to amend the federal Constitution to allow enactment of uniform marriage laws. Not one ever passed Congress.[47] The repeated failure of efforts to set national marriage standards demonstrates an abiding determination to leave the constitutional allocation of power in this area undisturbed.

The uniform statute movement, which began in the 1880s, promulgated an alternative approach to achieve national uniformity in marriage and divorce. The National Conference of Commissioners on Uniform State Laws drafted model

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[46] *Orr v. Orr*, 440 U.S. 268 (1979) (Alabama statute authorizing courts to impose alimony obligations on husbands, but not on wives held unconstitutional).

[47] *See*, *e.g.*, *Sherrer v. Sherrer*, 334 U.S. 343, 364 n.13 (1948) (Frankfurter, J., dissenting) (noting over seventy such amendments proposed and rejected since the 1880s); RILEY, *supra* note 34, at 111, 117; Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q., 611, 625-26 (2004); WILLIAM O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 248 (1967).

statutes to be sent to the states for consideration. The Commissioners, whose efforts made headway elsewhere, lamented in 1916 their lack of success with "the subject of marriage and divorce" because states regarded the area as "a local question." That remains so today. The most recent effort, the Uniform Marriage and Divorce Act drafted in 1970 and revised in 1973, has been adopted by very few states.[48]

D. The Current Landscape

Throughout our nation's history, significant shifts in social and sexual mores as well as in the economy have compelled state legislators and courts to revisit earlier marriage rules. To keep marriage a vital institution in tune with contemporary standards, state marriage policies have embraced gender equality and parity of both spouses, while no-fault divorce is premised on the couple rather than the state deciding what constitutes satisfactory marital behavior. Over the long history of the United States, marriage has been strengthened, not diminished, by eliminating certain features that once seemed essential and indispensable, including coverture, racial barriers to choice of partner, and state-specific grounds for divorce. As the institution changed, same-sex couples were inspired to seek

[48] O'NEILL, *supra* note 47, at 248 (quoting commissioners); *See* NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 130-51 (1962); RILEY, *supra* note 34, at 108-29. Proposed uniform statutes concerning children, like the Uniform Child Custody Jurisdiction and Enforcement Act (1997) and the Uniform Child Abduction Prevention Act (2006), have found wider acceptance.

equal marriage rights as early as the 1970s.[49] When it appeared in the 1990s that Hawaii might allow couples to obtain marriage licenses without regard to their sex, Congress passed DOMA, preemptively intervening in unprecedented fashion in the usual process of state experimentation with re-writing marriage rules serially.[50]

Since 2004, Massachusetts and a small but growing number of other states have extended the equalitarian direction of change to authorize equal marriage rights to couples of the same sex, while most states still exclude these couples. States' ability to grant *fully* equal marriage rights has been blocked, however, by DOMA's nullification for all federal purposes of a marital status validly created under state law.

CONCLUSION

Amici support the position of Appellees because DOMA is inconsistent with historical understanding of the state and federal roles in defining marital status. For sound reasons, fundamental to our federal system, marital status has been left to the states (operating within constitutional boundaries). History offers no precedent for a federal nullification for all federal purposes of a marital status validly created under state law. The decision of the District Court striking DOMA down should be affirmed.

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[49] *See, e.g.*, *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 291 Minn. 310 (1971), *appeal dismissed* 409 U.S. 810 (1972).

[50] COTT, *supra* note 1, at 200-227.

November 3, 2011

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The type-volume limitation of Fed. R. App. P. 32(a)(7)(B) imposes a 14,000 word limitation on a party's principal brief. Pursuant to Fed. R. App. P. 29(d), an amicus brief may be no more than one-half the length authorized for a party's principal brief. This brief complies with Rules 29(d) and 32(a)(7)(B) because it contains 6,800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that the within brief has been electronically filed with the Clerk of the Court on November 3, 2011. 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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