No. 12-307

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR, In Her Capacity as Executor of the Estate of Thea Clara Spyer, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF ON THE MERITS FOR *AMICI CURIAE* HISTORIANS • AMERICAN HISTORICAL ASSOCIATION • 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 RESPONDENTS AND OF AFFIRMANCE OF THE JUDGMENT BELOW

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INTEREST OF *AMICI CURIAE*[1]

Amici are the American Historical Association ("AHA"), the largest historical society in the United States, along with historians of American marriage, family and law whose research documents how the institution of marriage has functioned and changed over time. The AHA is a nonprofit membership organization, founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies, which provides leadership for the profession, protects academic freedom, develops professional standards, and aids in scholarly pursuits. Our brief aims to provide accurate historical perspective as the Court considers state and federal purposes for marriage and the states' and the federal government's respective powers over marital status. *Amici* support Appellees' position that the Defense of Marriage Act ("DOMA")[2] is historically unprecedented: until DOMA was passed, the federal government consistently accepted each state's own determination of marital status, even while various states differed significantly in their definitions of valid marriage. Moreover, *Amici* cannot credit Appellants' contention that a single core governmental purpose of marriage (namely,

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[1] Written consent to the filing of this brief has been received from all parties and filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *Amici* and their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2006) and 1 U.S.C. § 7 (2006)).

procreation) can be isolated, since states have always had several key purposes in establishing, regulating and supporting marital unions.

SUMMARY OF THE ARGUMENT

Control of marital status is reserved to the states in our federal system. Marriage has always been understood as a civil contract embodying a couple's free consent to join in long-lasting intimate and economic union. In authorizing marriage, states turn a couple's vows into a legal status, thus protecting the couple's bond and aiming moreover to advance general social and economic welfare. Throughout U.S. history, states have valued marriage as a means to benefit society. Seeing multiple purposes in marriage, states have encouraged maritally-based households as advantages to public good, whether or not minor children are present, and without regard to biological relationships of descent.

Present-day state divergences on marriage for same-sex couples are not unique in U.S. history. States have often differed significantly in setting marriage rules, as our federal system allows. State legislatures and courts have reassessed and altered marriage criteria repeatedly over time. Major alterations such as the dismantling of *coverture* and the expansion of grounds for divorce may be taken for granted now, but were rancorously opposed as revolutionary when they began.

For two centuries before 1996, state marital diversity reigned, along with serious inter-state contestation, without Congress stepping in to create marital "uniformity" for federal purposes.[3] Congress never took a position on a marital eligibility question preemptively so as to discredit a policy choice that a state might make. Before DOMA, federal agencies assessed marriage validity by consulting the relevant state laws. In historical perspective, DOMA appears as an attempt by Congress to single out particular state-licensed marriages for disfavored treatment.

Past advocates for uniform national standards for marriage knew that Congress lacked suitable power to create them. Repeatedly pressing to amend the U.S. Constitution to gain uniform standards, advocates never succeeded,[4] because of states' insistence on retaining jurisdiction. In historical perspective, DOMA appears as an attempt by Congress to exercise a power it had previously been understood not to have, and that the representatives of the states repeatedly refused to grant it by constitutional amendment.

[3] DOMA does not, in fact, create full federal marital "uniformity," since it leaves in place all the state variations in marital definition other than the gender of the couple. *See infra* Sec. IV.

[4] *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q., 611, 625-41 (2004) (cataloguing past proposed Constitutional amendments).

ARGUMENT

I. Continuity And Change Characterize The History Of Marriage In The U.S.[5]

Freedom to marry and free choice of marriage partner stand as profound exercises of the individual

[5] 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) 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); 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 RECONSTRUCTION (1997); JOHN D'EMILIO AND ESTELLE B. FREEDMAN, 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); SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA (2002); 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

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liberty central to the American polity and way of life. Like many of our liberties, these are established and guarded by positive law. Over centuries of our nation's history, state legislatures and courts have reassessed and refined marriage criteria, moving toward increasing freedom in marital choice, spousal parity, and gender-neutrality in marital roles, among other adjustments. Resulting alterations may be taken for granted now, but they seemed revolutionary and were highly contested as they were taking place.[6]

Major modifications in marriage have responded to shifts in social and ethical standards accompanying the nation's move from a rural to an industrial and now a post-industrial economy and society. State legislatures and courts, responding to broad-scale

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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 (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 (2000); 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 scholarship, whether or not expressly cited.

[6] *See infra* Sec. III.

movements in social life and mores, have made state diversity in marriage rules a constant amidst change.

A. Valid Marriage Has Always Been an Integral Legal Status Created by Civil Authority.

Marriage in all the states has historically been a civil matter. Valid marriage relies on state authorization, distinct from religious rites performed according to the dictates of any religious community. Religion, sentiment and custom may color individuals' understanding of marriage, but valid marriage is created by law. This practice derived from colonial New England. To the Pilgrim colony's first governor, William Bradford, marriage was "a civill thing, upon which many questions about inheritances doe depende."[7] John Winthrop, the first governor of the Massachusetts Bay colony, agreed, affirming "we adhere to the strict Protestant principle that marriage is purely a civil right."[8] When the United States was founded,

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[7] RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 135 (1988) (quoting WILLIAM BRADFORD, BRADFORD'S HISTORY OF PLYMOUTH PLANTATION, 1606-1646 116 (William T. Davis ed., Barnes & Noble 1964)).

[8] Frank Gaylord Cook, *The Marriage Celebration in the Colonies*, THE ATLANTIC MONTHLY, March 1888, at 350, 351. The Southern colonists initially professed allegiance to Anglicanism. As settlement proceeded, the colonies varied in their execution of marriage rites; all eventually assimilated to a common type in passing statutes differing from both the common law and Anglican requirements. As Cook concluded, "[T]he civil celebration of

(Continued on following page)

the civil principle was best suited to accommodate the new nation's diverse religions. Regulations for creating valid civil marriages were among the first laws established by the states after declaring independence.[9]

Being based on voluntary mutual consent, marriage is understood to be a contract—but it is a unique contract, because of the state's essential role in defining marital eligibility, obligations and rights.[10] Once marriage is entered, its "rights, duties and obligations" are "of law, not of contract," as the Maine Supreme Judicial Court said in 1863.[11] This is still so. For example, spouses cannot decide to abandon their

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marriage which in England obtained under Cromwell, in the time of Puritan supremacy . . . and then entirely disappeared, was from the first firmly established in America, and has here continued to exist to this day." *Id*. at 350.

[9] 2 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 121-51 (colonial precedents), 388-497 (early state marriage laws) (1904); GROSSBERG, *supra* note 5, at 17-21; *cf. Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 52 (Mass. 1810) (affirming that marriage is "unquestionably" a civil contract).

[10] *See generally Meister v. Moore*, 96 U.S. 76 (1877); *Maryland v. Baldwin*, 112 U.S. 490 (1884); *Maynard v. Hill,* 125 U.S. 190 (1888). *See also* Mary Lyndon Shanley, *Marriage Contract and Social Contract in Seventeenth-Century English Political Thought*, *in* THE FAMILY IN POLITICAL THOUGHT 80 (Jean Bethke Elshtain ed., 1982); COTT, *supra* note 5, at 10-11.

[11] *Maynard*, 125 U.S. at 211 (quoting *Adams v. Palmer*, 51 Me. 480, 483 (1863)).

obligation of mutual economic support.[12] The couple who agrees to join in mutual intimacy and obligation cannot themselves create a valid marriage; if they do marry, they cannot terminate their legal obligations by themselves, since the state is a party to their bond.

B. The States Have Exercised Exclusive Power to Create and Dissolve Marriages.

During the drafting of the U.S. Constitution, it was agreed that domestic relations, which included marriage, would remain the domain of the states. This was not only because family and household matters fell under the police powers of the states, but also because slavery was among the domestic relations. Slavery and the slave trade were among the most divisive issues at the Constitutional Convention. State jurisdiction over domestic relations enabled states with differing values to control local matters, while uniting under federal government. This core feature of federalism underlay national unity when the U.S. Constitution was created.[13]

As the nation developed, regional and cultural differences resulted in a changing patchwork of

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

[13] No discussion of domestic relations other than slavery occurred during the Constitutional Convention, indicating that state jurisdiction was presumed. *See generally* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995).

marriage rules. The federal government respected and relied on states' definitions of marital status. Congress did not step in.[14] The patchwork system worked because of a tradition of federalism within which states exercised comity. States, all favoring monogamy as a matter of public policy, had strong incentive to accept couples who had married in another state as married in their own, for not accepting other states' marriages would throw support responsibilities, inheritance, and legitimacy into question.[15]

State and federal courts within the U.S. generally followed the international principle that a marriage valid where it was celebrated was valid everywhere, unless the receiving state's public policy directly opposed it.[16] When married couples moved from one state to another, conflicts of law about marriage did arise. State courts carefully adjudicated matters, carefully examining the factual record and the conflicting states' regulations. On contentious

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[14] *See infra* Sec. III.B.

[15] Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 1985 AM. B. FOUND. RES. J. 799, 819-24 (1985); HARTOG, MAN & WIFE, *supra* note 5, at 258-72.

[16] *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 113 at 173-74, § 113a at 174, § 117 at 184, § 121 at 188-89 (London, A. Maxwell 2d ed. 1841); Grossberg, *Crossing Boundaries*, *supra* note 5, at 819-26.

issues, states invoked the public policy exception and refused to credit certain marriages.[17]

Marital status was historically a legal whole, not imagined to be divisible into state and federal dimensions of recognition before 1996. Becoming validly wed according to state-prescribed regulations meant a transformation of an individual's legal *persona*. Gaining marital status meant acquiring distinctive obligations and rights and assuming a new legal standing with meanings and consequences valid from the state to the national level.

In that regard, DOMA was a complete departure. Excluding potential same-sex spouses from recognition as married in federal statutes before there were any such marriages in the U.S., DOMA preemptively communicated to the states Congress's view that same-sex couples did not qualify for marital eligibility, and also signaled that, should a state act to qualify such couples, the federal government would void their marital status at the national level.

The unique meaning of marriage owes greatly to the fact that it is not only a voluntary contract but also an assumption of a new civil status deriving from public authorization. By granting a marriage license, a state places its imprimatur on a couple's choice. With regard to couples of the same sex who might wed if their states made them eligible, however,

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[17] *See infra* Sec. III.A.

DOMA unprecedentedly declared that their marital status would be treated as divided, limited to the state level only, different from that of any previous couples.

II. States Have Had Several Purposes For And Interests In Civil Marriage.

Throughout U.S. history, marriage has served numerous complementary public purposes. Among these purposes are: to facilitate the state's regulation of the population; to create stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents; to facilitate the ownership and transmission of property; and to compose the body politic.[18] These public purposes have long been recognized in American law, leading the Supreme Court of Washington, for example, to note that marriage was "closely and thoroughly related to the state."[19]

The assertion by the Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG") that "the institution of marriage was a direct response to the unique tendency of opposite-sex relationships to produce unplanned and unintended

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[18] COTT, *supra* note 5, at 2, 11-12, 52-53, 190-94, 221-24; GROSSBERG, *supra* note 5, at 204-05 (legitimization of children).

[19] GROSSBERG, *supra* note 5, at 85 (quoting *In re McLaughlin's Estate*, 30 P. 651, 658 (Wash. 1892)).

offspring"[20] is highly reductive. Certainly the American states have intended marriage to legitimize children, to assign names and known providers for them, but that cannot be isolated as the only "core purpose and defining characteristic"[21] of marriage. States' willingness to include unrelated adopted children in the marital family suggests a broader view. 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). Thus the states show little interest in promoting a favored status for biologically-based parenting among the public purposes of marriage. Adoption law suggests that states intended to recognize intentional and deliberate parenting as much as "accidental procreation."[22]

A. States Have Used Marriage to Aid in Governing Their Populations.

Historically, marriage has been closely intertwined with sovereigns' aim to govern their people. When monarchs in Britain and Europe fought to wrest control over marriage from ecclesiastical authorities (circa 1500-1800), they did so because the authorization of marriage was a form of power, and

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[20] BLAG Br. 11.

[21] *Id*. at 45.

[22] HERMAN, *supra* note 5, at 203-04 and 292-93.

they used marriage as a vehicle through which to govern the population.[23]

Anglo-American legal doctrine, continuing into the era of American independence, made married men into heads of their households. The head of household was legally obliged to control and support his wife and all other household dependents, whether biologically related children or relatives or others including orphans, apprentices, servants and slaves.[24] In return, he became their public representative. This allotment of household authority and privilege was a major feature of public order. About 80% of the thirteen colonies' population were legal dependents of male household heads in the decade of the American Revolution.[25]

Marital status and citizenship rights were thus deeply intertwined in early American history. Laws concerning who could marry whom, in what way, and setting the specific duties of husband and wife, formed important dimensions of states' authority over

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[23] 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*, 16 FRENCH HISTORICAL STUDIES 4, 6-15 (1989); SHANLEY, *supra* note 10, at 81.

[24] KERBER, *supra* note 5, at 11-15; COTT, *supra* note 5, at 11-12, 79-81; GROSSBERG, *supra* note 5, at 24-27.

[25] Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 123 (1995) (the figure of 80% is from 1774).

their populations. Married men's full citizenship and voting rights were seen as tied to their headship of and responsibilities for their families; correspondingly, wives' inferior citizenship and lack of voting rights were understood to be suited to their subordination to their husbands. Slaves' inability to marry was one major feature of their complete lack of civil rights.[26]

Today, when constitutional imperatives have eliminated sex and race inequalities from laws of marriage, the marital dimension of citizenship persists: in a legacy of the sustained relation between marriage and citizenship, states grant marriage rights to certain couples and not others, and award married couples benefits and rights not available to other pairs or to single persons. When Congress in 1996 refused federal recognition to potential marriages of same-sex couples, it interrupted a long history, by denying states' ability to confer on these couples the same integral status that other couples had historically received when their state allowed them to marry.

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[26] *See* Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187 (1987-1988); COTT, *supra* note 5, at 32-35.

B. States Have Broad Economic Interests in Supporting Marriage.

Marriage-based households were the fundamental economic units in early America and thus states saw economic reasons to regulate marriage. Unlike today, when occupations are open to men and women, the two sexes then were expected to play differing though equally indispensable roles in the production of food, clothing and shelter.[27] States initially adopted the doctrine of marital unity or *coverture* from the English common law. It subsumed a wife's legal and economic individuality under her husband's power and merged the couple into a single person legally. *Coverture* required a husband to support his wife and family, and a wife to obey her husband. He commanded her labor and property.[28]

Starting in the 1830s, state legislatures and courts responded to new economic pressures and women's complaints by beginning to dismantle this legal structure.[29] Such alterations were extremely divisive, to say the least. Opponents claimed that

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[27] *See generally* LAUREL ULRICH, GOOD WIVES: IMAGE AND REALITY IN THE LIVES OF WOMEN IN NORTHERN NEW ENGLAND, 1650-1750 (1982); MARY BETH NORTON, FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY (1996).

[28] COTT, *supra* note 5, at 11-12; KERBER, *supra* note 5, at 11-15.

[29] BASCH, IN THE EYES, *supra* note 5, at 113-61; Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1982-1983).

coverture was the essence of marriage. Anything else was blasphemous and unnatural; the marriage bargain was governed by laws of "Divine origin" and subordination was "the price which female wants and weakness must pay for their protection."[30] It was true that the marital unity doctrine had been central to what marriage meant, for many centuries. Nonetheless, state legislatures began to supersede the old doctrine with positive law. Acting at varying paces, with different approaches, states responded to local pressures with the result that their laws on the issue varied immensely for a century.[31]

Congress responded not at all, even while these changes revolutionized the economic relation between husband and wife in some states and not others.[32] BLAG defends the rightness of DOMA because "marriage as between a man and a woman is . . . 'deeply embedded in the history and tradition of this country' . . . [and] Congress rationally could have regarded any significant change in the definition of this bedrock institution as having potentially significant

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[30] BASCH, IN THE EYES, *supra* note 5, at 154 (quoting prominent New York opponent).

[31] 3 CHESTER VERNIER, AMERICAN FAMILY LAWS: HUSBAND AND WIFE 24-30 (1935) (showing the durability and variability across states in *coverture*'s persistence); HARTOG, MAN & WIFE, *supra* note 5, at 287-308 (same).

[32] Carole Shammas, *Re-Assessing the Married Women's Property Acts*, JOURNAL OF WOMEN'S HISTORY, Spring 1994, at 9 (measuring extent of shift in wealth from men to women).

consequences."[33] But Congress in the early 19th century did not consider it rational to act, although *coverture* was "deeply embedded in the history and tradition of this country"; its dissolution was unquestionably a "significant change" in the "bedrock institution" of marriage which boded extremely "significant consequences." Subsequent Congresses then let the states decide; each one proceeded to keep or dismantle *coverture* at its own pace. Federal policies implemented states' changing definitions without Congressional interposition to preserve federally the pre-existing meaning of this central feature of marriage.

Today state governments retain strong economic interests in marriage, though household economies no longer dictate sex-differentiated work roles. Marriage obligates the spouses to support each other as well as any children born or adopted. Governments try to minimize public expenses for indigents by enforcing the economic obligations of marriage. State laws have purposely bundled social approbation and economic advantage into marriage, along with legal obligations, to encourage couples to create long-lasting rather than transient relationships and to build households upon them whether or not they produce children. States offer financial advantages to married couples on the premise that all marriage-based households

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[33] BLAG Br. 41-42 (quoting *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)).

promise social stability and economic benefit to the public.[34]

During the Great Depression of the 1930s, when federal programs such as Social Security were invented, new federal benefits were dispensed through spousal relationships.[35] Federal reliance on this model began much earlier, however, when the Continental Congress during the Revolutionary War awarded "pensions" to the widows and orphans of officers who died serving the new nation. These pensions—and all subsequent military pensions and survivors' benefits, until sex discrimination challenges in the 1970s—sustained the norm of the male head of household supporting (even posthumously) his dependents.[36]

Federal benefits channeled through spousal relationships became a persistent American practice, present today in veterans' pensions, Social Security payments, and immigration and naturalization

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[34] COTT, *supra* note 5, at 221-23; KESSLER-HARRIS, *supra* note 5, *passim*, and especially 3-18.

[35] KESSLER-HARRIS, *supra* note 5, at 132-41.

[36] Pensions were soon extended to servicemen. *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), http://www.footnote.com/pdf/M804.pdf; *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Social Security Act violates Fifth Amendment by providing survivor benefits to widows, but not widowers).

advantages, for example.[37] This linkage makes legal marriage all the more valuable to couples. With DOMA in place, however, same-sex couples validly married in nine states and the District of Columbia are stripped of federal married status and consequently of all federally-controlled economic and other advantages.

C. States' Purposes in Marriage Include the Support of All Children.

States' purposes in authorizing and regulating marriage have always related in part to children, but these purposes have never been limited to or focused only on children under the control of both biological father and mother. States' intentions, historically, have focused on securing responsible adults' support and protection for their minor dependents whether these are adopted, or step-children, or biological progeny. BLAG's emphasis on marriage being preeminently the structure for containing "unplanned and unintended" pregnancies[38] misses the larger point that government interest lies in ensuring that married

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[37] THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 103-51 (1992); KESSLER-HARRIS, *supra* note 5, at 56-159; COTT, *supra* note 5, at 172-79. *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").

[38] BLAG Br. 11.

(and unmarried) adults are supporting and protecting minor dependents who become their responsibility, whether or not through biological descent. BLAG's emphasis on marriage as an incentive for "responsible procreation"[39] ignores the fact that state laws also require unmarried parents to be "responsible" by supporting their children.[40]

Marriage and procreation historically have had a close but not a necessary relationship. The ability or willingness of couples to conceive or produce progeny has never been required or necessary to marry under the law of any American state. 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.[41]

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[39] *Id*.

[40] LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.07 (2d ed. 2013); Chart 3, 45 FAM. L.Q. 498, 498-99 (Winter 2012).

[41] 3 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 3-160 (1904) (reviewing states' divorce legislation through 1903); DEPT. OF LABOR, MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867-86 (1889), http://pds.lib.harvard.edu/pds/view/3895542?n=5&imagesize=1200&jp2Res=.25&printThumbnails=no (restating divorce legislation). While impotence, if unknown at the time of marriage, could render a marriage voidable by an aggrieved party, sterility did not. Thus state laws recognized a justifiable expectation of

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States in the past credited and encouraged marriages whether or not biological children would result, so long as the couple met the state's criteria for entering marriage. 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 adopted orphans.[42] Claims that the state's core purpose in marriage has "always" been to provide an optimal context for parents' begetting and rearing biological children are not historically-based. It could be said that the first "First Family" established a non-biological family as a sound model for the nation, since the "father of our country," George Washington was known to be sterile, while Martha Custis brought two children from her first marriage into their marriage and they also later reared the children of her son, who died in the Revolutionary War.[43]

In our post-industrial age, families have become ever more various. In 2010 only 21% of American

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sexual intimacy, but not of progeny, in marriage. GROSSBERG, *supra* note 5, at 108-10.

[42] *See generally* HARTOG, SOMEDAY, *supra* note 5, at 169-205.

[43] Washington's sterility was a political advantage because it erased fears of his making the presidency hereditary, like kingship. His inaugural address initially included the point (later deleted) that his name would not be "perpetuated by the endearing though sometimes seducing channel of personal offspring." PAUL F. BOLLER, JR., PRESIDENTIAL INAUGURATIONS 4 (2001).

households were composed of a married couple and their minor children.[44] More frequent divorce and remarriage have multiplied blended families in which children and parents are not biologically related. Likewise, new reproductive technologies are multiplying the ways of bringing wanted children into the world, with or without a biological link to the parents who intend to rear them.[45]

Just as important, the use of contraceptives has transformed the relation of marriage to parentage over the past century. Availability of contraception has made sexual satisfaction far more central to individuals' expectations in marriage, and has made enjoyment of marital sex possible with or without the intention to produce children.[46] Almost all couples

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[44] Press Release, U.S. Census Bureau, U.S. Census Bureau Reports Men and Women Wait Longer to Marry (Nov. 10, 2010), http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

[45] SHANLEY, MAKING BABIES, *supra* note 5, at 76-147.

[46] *See* D'EMILIO & FREEDMAN, *supra* note 5, at 233-55, 265-74; CHRISTINA SIMMONS, MAKING MARRIAGE MODERN 113-34 (2009); REBECCA L. DAVIS, MORE PERFECT UNIONS: THE AMERICAN SEARCH FOR MARITAL BLISS 21-53 (2010). Although contraception as such was not legal in all of the states until 1965, after 1918 doctors could prescribe diaphragms to protect women's health, and condoms could be commercially sold for "hygienic" purposes. *See People v. Sanger*, 118 N.E. 637, 637-38 (N.Y. 1918) (physicians may prescribe contraception to married persons for the prevention of disease); ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 105-15 (2002); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (affirming married couples' liberty to use contraception).

voluntarily restrict the number of their progeny while continuing sexual intimacy.[47] Couples with no interest in childbearing marry, as do older adults past childbearing age. If DOMA was intended to privilege couples who can produce children accidentally,[48] it does not comport with the complex realities of states' histories with regard to marriage. States have valued marriage for purposes not necessarily tied to biological progeny in the past, and do so today.

III. Before DOMA, The Federal Government Accepted Variant State Definitions Of Marriage.

States have taken seriously their responsibility for marriage definition. In every state, marriage has been defined as a voluntary bond between a couple—and a couple only[49]—who share sexual intimacy and mutual economic support. States' additional requirements have varied, often significantly, sometimes in ways obnoxious to their sister states. More than once in U.S. history, the level of contention and division over marital policy rose alarmingly when one or more states innovated, and others disapproved.

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[47] *See* GUTTMACHER INSTITUTE, CONTRACEPTIVE USE IN THE UNITED STATES (July 2012) (79% of married women use contraception), http://www.guttmacher.org/pubs/fb_contr_use.html.

[48] BLAG Br. 11.

[49] Every state prohibited bigamy. *See* GROSSBERG, *supra* note 5, at 120-26. *See also infra* Sec. IV.B.

A. Inter-State Differences in Marital Eligibility and Validity Have Been Present Throughout U.S. History.

States have differed on the age a person might consent to marriage, what degree of consanguinity was allowed, whether a white and a person of color could marry, what health minima must be met, how spousal roles were defined and enforced, whether specific ceremonies were required for validation and whether and how marriage might be dissolved—and this is not an exhaustive list of the variations.[50] Individual states also changed their own marital regulations significantly over time.

Some inter-state differences caused little controversy. Others created major conflicts. The issue of first-cousin marriage, for example, may seem esoteric now, but it was a source of deep regional division in the past. First-cousin marriage was a way for elite families to consolidate wealth. Accepted in much of the South and New England, it was prohibited in the Middle and Far West, where it was rejected as incestuous.[51] Also, the American states inherited the English common-law prohibition on a widower marrying

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[50] GROSSBERG, *supra* note 5, at 70-74, 103-13, 144-45; 1 CHESTER VERNIER, AMERICAN FAMILY LAWS: INTRODUCTORY SURVEY AND MARRIAGE 183-209 (1931).

[51] *Id*. at 110-13; Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, PLOS BIOLOGY, Vol. 6, Issue 12, Dec. 2008, at 2627-28.

his deceased wife's sister, considering it brother-sister marriage, because *coverture* made the married couple into one person. When states moved to discard this rule, hold-outs considered them to be "countenancing incest."[52] The value placed on marital liberty eventually bested these prohibitions, but only after great disharmony prevailed for many decades.[53]

A prime example of intense inter-state discrepancy concerned marriages between whites and non-whites. Laws nullifying and/or criminalizing these marriages spread from the colonial Chesapeake to the large majority of the early states—but there was never unanimity or harmony on the issue.[54] In the late 1930s (when 30 of 48 states still maintained such laws), a huge and motley list of "racial" groups, including such categories as "half-breeds," "Malays," "Japanese," "Chinese," and "Octoroons" as well as "Negroes" (defined by various "blood mixtures"), were prohibited in one state or another from marrying "Whites."[55] States with such laws also differed in whether they would always void an interracial marriage celebrated

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[52] GROSSBERG, *supra* note 5, at 113.

[53] *Id*. at 110-13.

[54] *See* DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE 36-220, A-1 to A-104 (1987); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 118-19 and *passim* (2009).

[55] PASCOE, *supra* note 54, at 118-19; *see also* GROSSBERG, *supra* note 5, at 136-40.

in another state, some but not all of them taking evasive intent into account.[56]

Legislators and judges in the great majority of the United States where these laws prevailed regularly defended them as rooted in natural law and thus essential to marriage. The Supreme Court of Pennsylvania, for example, opined of blacks and whites: "The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures."[57] Thus the court bent natural law to match what it believed, while diminishing the instrumentality of positive law. Joel Prentiss Bishop's treatise on marriage justified *coverture* similarly, seeing the husband's "right to command" and the wife's "duty of obedience" rooted "in the law of nature, which gave strength to the man and feebleness and dependence to the woman."[58]

An active minority fervently opposed the color bans on marriages, naming them "an invasion of one of the inalienable rights of every man" or objecting that "[t]he right of every individual to consult his own taste and feeling in matrimony ought to be sacred"

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[56] CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 249-50 nn.81-83, 86, 90 (1940) (collecting authorities).

[57] *West Chester and Philadelphia R.R. Co. v. Miles*, 55 Pa. 209, 213 (1867).

[58] 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN § 45 at 26, § 47 at 27 (Philadelphia, Kay & Brother 1871).

and that "the government ought not to be invested with power to control the affections any more than the consciences of citizens."[59] States added, eliminated, and changed their laws of this sort repeatedly over time, until they were declared a violation of the Fourteenth Amendment.[60] While these changes in eligibility requirements sometimes expanded or contracted the pool of couples who might be validly married, Congress did not interpose its authority. The conflict was considered an inter-state rather than a federal matter.[61]

Varying state definitions in grounds for divorce also generated strong inter-state conflicts. States began legalizing divorce shortly after the Revolution. Over time, as some states expanded the allowable causes far more than others, even including "omnibus" clauses that allowed divorce for any cause a judge considered reasonable, reaction occurred.[62] A leading Connecticut clergyman inveighed against liberal

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[59] William Lloyd Garrison, *Legislative*, LIBERATOR, Jan 8, 1831, at 7; Anonymous, Letter to the Editor, *An Unjust Law*, LIBERATOR, Jan. 29, 1831, at 5; LYDIA MARIA FRANCIS CHILD, AN APPEAL IN FAVOR OF THAT CLASS OF AMERICANS CALLED AFRICANS 209 (Boston, Allen and Ticknor 1833).

[60] *See Loving v. Virginia*, 388 U.S. 1 (1967).

[61] *See* STORY, *supra* note 16, §§ 113-13a, at 173-74; *cf. Sherrer v. Sherrer*, 334 U.S. 343, 356-77 (1948) (Frankfurter, J., dissenting) (learnedly discussing state conflicts). *See generally* ANDREW KOPPLEMAN, SAME SEX, DIFFERENT STATES 39-46 (2006).

[62] *See* HARTOG, MAN & WIFE, *supra* note 5, at 269-86; BASCH, FRAMING, *supra* note 5, at 19-42; COTT, *supra* note 5, at 46-55.

grounds turning society into "one vast brothel."[63] The extent of variance by the latter half of the 19th century horrified divorce opponents, who felt that the increase in divorces—obvious when national statistics were published in 1890—endangered all marriages. Aghast at numerous grounds for divorce in some states, they contended that "venue-shopping" would prevail and damage marriage everywhere. Violent controversies over "migratory divorce" swirled for decades.[64]

Pressures from aroused reformers led to reevaluation and reduction of several states' grounds for divorce. Also, on the assumption that marriages made too easily were more likely to dissolve, many states placed new restrictions on entering marriage, such as higher minimum ages, mandatory marriage licenses, and eugenic-inspired disease tests.[65]

The divorce panic fueled a new level of opposition to unceremonialized marriage, another issue on which the states had always differed. Such informal marriages were very common in early America, and were first credited in law when the eminent jurist Chancellor James Kent argued in 1809 that a couple's

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[63] BASCH, FRAMING, *supra* note 5, at 45.

[64] BASCH, FRAMING, *supra* note 5, at 72-93; HARTOG, MAN & WIFE, *supra* note 5, at 258-62; COTT, *supra* note 5, at 105-11. *See also* GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 108-29 (1991).

[65] GROSSBERG, *supra* note 5, at 140-52.

intent and consent created a valid marriage, even without conformity to state-prescribed ceremonies. He called this "common law marriage."[66] Most states, although not all, came to adopt Kent's view that while consent was always necessary for marriage, formal solemnization was not.[67]

The countervailing view, that unsolemnized marriage was intolerable, sprang back to life in the late 19th-century alarms over divorce. What had been widely (although not uniformly) accepted in most states came to be seen as a problem, "contrary to public policy and public morals, and revolting to the senses of enlightened society," as the Supreme Court of Washington put it.[68] Influential marriage reformers wrote of its "manifold evils," called it evidence of "individualism absolutely unrestrained!," associated it—negatively—with canon law, and found its conflict with statutory legality "demoralizing."[69] Consequently,

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[66] *Fenton v. Reed*, 4 Johns. 52 (N.Y. Sup. Ct. 1809) ("No formal solemnization of marriage was requisite."); GROSSBERG, *supra* note 5, at 69-78. *See also* COTT, *supra* note 5, at 29-33 (concerning frequency of informal marriage).

[67] *See Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. at 55-56 ("When . . . the statute [requires a specific ceremony] . . . the parties are themselves prohibited from solemnizing their own marriages . . . . "). In *Meister,* 96 U.S. 76, and *Maryland*, 112 U.S. 490, the Court validated common-law marriage *unless* a state specifically prohibited it, thus bowing to state jurisdiction.

[68] *McLaughlin's Estate*, 30 P. at 658.

[69] 3 HOWARD, *supra* note 9, at 182-85.

states moved to eliminate common-law marriage, but again, not all fell into line.[70]

In seeking to minimize the salience of innovations and variations in state marriage laws in the past, and contrasting the "enormous importance"[71] of allowing same-sex couples to marry, BLAG makes too great a distinction. Divergent state laws regarding interracial marriage, divorce, and common-law marriage aroused passionate and heated debate. They were of enormous importance in their own time. Indeed, the variations on divorce and common-law marriage so troubled some citizens that they formed a political movement to push for uniform national standards for marriage and divorce. At their behest, scores of proposals went through Congress aiming to amend the U.S. Constitution to permit federal creation of uniformity. Not one ever passed.[72] States too jealously guarded their own prerogatives to accept a uniform federal code. Even the alternative approach of the uniform statute movement, drafting model statutes for states to consider adopting voluntarily,

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[70] GROSSBERG, *supra* note 5, at 83-102.

[71] BLAG Br. 10 (quotations omitted).

[72] *See Sherrer*, 334 U.S. at 364 n.13 (Frankfurter, J., dissenting) (noting over seventy such amendments proposed and rejected since the 1880s); Stein, *supra* note 4, at 625-41 (cataloguing past proposed Constitutional amendments).

has never made headway with marriage and divorce.[73]

B. Federal Authorities Accepted State Determinations of Marital Status Until 1996.

Despite the variation and tumult, the federal government looked to state laws to determine whether a couple was married. Federal agencies and courts frequently restated exclusive state jurisdiction over marital status before 1996.[74] Even amidst the many mutations in racial limitations on marrying, Congress did not step in. The states took initiatives and as long as they stayed within constitutional bounds the federal government accepted their results.[75] "It is one

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[73] MARY E. RICHMOND & FRED S. HALL, MARRIAGE AND THE STATE 192-97 (1929); Grossberg, *supra* note 15, at 824-32; RILEY, *supra* note 64, at 118-21.

[74] *See Ex parte Kinney*, 14 F. Cas. 602, 606 (C.C.E.D. Va. 1879) ("Congress has made no law relating to marriage. It has . . . no constitutional power to make laws affecting the domestic relations . . . . If it were to make such a law for the states, that law would be unconstitutional. . . ."); *Tidewater Marine Towing, Inc. v. Curran-Houston, Inc.*, 785 F.2d 1317, 1319 (CA5 1986) (state law "furnishes the rule for decision of the [marital] status issue underlying the question"); *Slessinger v. Sec'y of Health & Human Servs.*, 835 F.2d 937 (CA1 1987) (looking to state law to determine validity of divorce).

[75] GROSSBERG, *supra* note 5, at 133-40; *see Kinney,* 14 F. Cas. 602 (no federal jurisdiction to grant *habeas corpus* relief to white citizen of Virginia—where marriage between "a white person and a negro" was void and punishable by two to five years'

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of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments," Justice Louis Brandeis affirmed.[76] Congress did not prevent experiments in marriage law from registering in federal law, before DOMA. BLAG's claim that DOMA protects this state role while also "ensuring that no one state's experiment would be imposed on other states or on the federal government"[77] ignores the previous history in which states' innovations, whether or not liked by sister states, were implemented in federal policies where they pertained, rather than being rendered null.

Until 1996, federal agencies dealing with or dispensing benefits to married couples were not stymied by inter-state differences in eligibility for marriage, or differing standards on divorce. They addressed marriage validity by assessing the relevant state laws and deciding which state law controlled. Federal agencies controlling such areas as military law or taxation conducted a choice of law analysis, conferring or denying benefits depending on whether applicable state law recognized the applicant's marriage. Far from seeking to impose federal uniformity, federal

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imprisonment—imprisoned for living with the woman whom he wed legally in the District of Columbia).

[76] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[77] BLAG Br. 32.

agencies sought and accepted state law definitions, before DOMA.[78] On the issue of spouses' eligibility for federal pensions, for example, the rule was set in 1882 and continued: "The question for us is, Does the law of the place of domicil concede that they are married?. . . . Each case must rest entirely upon the law of the place in which it arises. . . . Because a marriage is lawful in one State it by no means follows that . . . it is lawful in another State."[79] Later, when the Social Security Act promised old-age pensions to surviving spouses, a legal scholar specified the need to examine common-law marriage claims carefully, because "the [Social Security] board must make two findings, *both dependent on state law*, before certification [of valid marriage] can be made"; the state in question had to allow common-law marriage, and the applicant had to meet its conditions.[80]

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[78] *See, e.g.*, *In re Bridget Butler*, 13 P.D. 234 (March 9, 1903) (applying common law of the District of Columbia to determine claimant could prove a common-law marriage existed); *see generally* 19 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS 331 (John W. Bixler ed., 1914).

[79] Charles Edward Wright, *Marriage and Divorce*, in 19 DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS 327, 331-32 (John W. Bixler ed., 1914).

[80] James P. Lynch, *Social Security Encounters Common-Law Marriage in North Carolina*, 16 N.C. L. REV. 255, 257 (1937-1938) (italics in original). *Cf. Cunningham v. Apfel*, 12 F. App'x 361, 362 (CA6 2001) (validity of common law marriage for Social Security benefit "is governed by the laws of the state where the decedent had a permanent home when he died"); Rev. Rul. 58-66, 1958-1

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The Court in 1940 noted "the necessity for an examination of local law to determine the marital status" in regard to federal tax obligations, and saw no conflict between "a uniform construction of national application" in the federal income tax and Congress making it "dependent on state law."[81] In implementing federal policies touching married couples before DOMA, the relevant agency looked to state law. Differences among states became structural features of American law and practice, always accepted whether or not welcomed by all. Prior to DOMA, where states disagreed, Congress did not preemptively disallow certain marital policies for federal purposes in the name of federal uniformity, fiscal austerity, or other cause. BLAG maintains that DOMA was a cautious act, but in view of the long history of state differentiation preceding 1996, DOMA was a radical departure from settled federal practice.

C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."). Current federal regulations allow that when a marriage's validity is imperfect under state law because of a legal impediment not known to an applicant for Social Security benefits acting in good faith, the federal agency may "deem" the marriage valid—a refinement for individual applicants not at all comparable to the action of DOMA on a class of marriages for all federal purposes. SSA Relationship Based Upon Deemed Valid Marriage Rule, 20 C.F.R. § 404.346.

[81] *Helvering v. Fuller*, 310 U.S. 69, 74-75 (1967).

IV. The Federal Government Has Taken Action Over Marriage Only Where State Authority Is Absent.

In the past, Congress involved itself directly in marriage only in situations where no state had jurisdiction. The exceptional character of these episodes contrasts sharply with Congress's action in DOMA, which ruled on the federal meaning of marriage in every state. No previous congressional action is comparable to Congress's refusal to recognize, for all federal purposes, the marital status of a whole class of persons, and thus to dissolve the prospective integrity of their marital status.

A. Federal Control of Marriage Among Ex-Slaves Occurred When Southern State Governments Had Collapsed.

Deprived of all civil rights, slaves could not freely consent, as was required for marriage, and could not fulfill marital duties because their masters could always overrule them. A slave wedding meant nothing to state government; that absence of public authorization was the essence of the union's legal invalidity. To critics of Southern slaveholding, the system's "complete *abrogation of marriage*" composed one of its vilest horrors.[82]

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[82] CONG. GLOBE 36th Cong., 1st Sess., 2590, 2591 (1860) (Sen. Sumner) (italics in original).

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. Ex-slaves welcomed the ability to marry as a civil right long denied them. An army chaplain in Mississippi remarked that "those married by the authority and protection of Law. . . . feel that they are beginning to be regarded and treated as human beings."[83]

Direct federal involvement in marriages among ex-slaves resulted from martial law holding sway in the occupied Confederacy, where no state governments existed—a temporary phenomenon.[84] After Union victory, the short-lived U.S. Bureau of Freedmen, Refugees, and Abandoned Lands briefly regulated marriages of freed people in the occupied South. Southern state governments were quickly reconstituted, however, and the Freedmen's Bureau ceded its authority; states resumed their jurisdiction over

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[83] COTT, *supra* note 5, at 83-84. *See also* EDWARDS, *supra* note 5, at 24-65.

[84] Examples of congressional action regarding marriages of "colored soldiers" in 1864 and 1865 fail to recognize the historical context. *See* Brief for *Amici Curiae* Law Professors 25-26. Congress concerned itself with these soldiers' marriages in 1864-65 because the Confederate states had collapsed (and if functioning, would not have authorized marriage for these men because their masters, rather than state government, ruled them). *See generally* THE DESTRUCTION OF SLAVERY (Ira Berlin et al. eds., 1985); THE BLACK MILITARY EXPERIENCE (Ira Berlin et al. eds., 1982).

marriage, subject to the authority of the Fourteenth Amendment, from 1868 on.[85]

B. The Federal Government Exercised its Plenary Power Over Marriage in Federal Territories to Eliminate Polygamy.

Constitutionally, Congress has plenary powers over marriage in federal territories, as states do in their domains. The federal campaign to eliminate polygamy as practiced by the Church of Jesus Christ of Latter-Day Saints ("LDS Church") in the Utah Territory offers a unique example of federal action, highlighting Americans' complete rejection of polygamy while showing also that Congress respected state jurisdiction over marital status.

Congress outlawed bigamy in all federal territories in 1862, bringing them into conformity with the settled doctrine of all the states, and aiming particularly at "plural marriage" in the LDS Church.[86] The Republican Party platform of 1856 had pronounced polygamy and slavery to be "twin relics of barbarism,"

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[85] *See* COTT, *supra* note 5, 83-94 (concerning marriage policies of the federal Bureau of Freedmen, Refugees and Abandoned Lands, and its cession of authority to the reconstituted Southern states). *See generally* FAMILIES AND FREEDOM (Ira Berlin et al. eds., 1997).

[86] Morrill Act, ch. 126, 12 Stat. 501, 501-02 (1862); GORDON, *supra* note 5, at 81-83.

anathema to the progress of American civilization.[87] More generally, polygamy was associated with unfreedom in American minds. Antipolygamists called plural wives "white slaves"; the sponsor of the Morrill Act believed "bondage" to be intrinsic to polygamy.[88] Refusing the Mormons' claim of religious freedom for plural marriage, Chief Justice Waite found polygamy "odious" and intolerable in the United States because its "patriarchal principle . . . fetters the people in stationary despotism."[89] Following Baron de Montesquieu, Waite posited that "according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests."[90]

Both the Congress and the federal courts used extreme and punitive measures in Utah, eventually expropriating the LDS Church. Their methods illustrated the strong connection understood to exist

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[87] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 129-30 (2d ed. 1995).

[88] GORDON, *supra* note 5, at 47-48, 63-64.

[89] *Reynolds v. United States*, 98 U.S. 145, 164-66 (1879).

[90] *Id*. at 165. American political thinking has consistently reprobated polygamy. Influenced by Montesquieu's THE SPIRIT OF THE LAWS, Revolutionary-era statesmen aligned consent-based monogamy with their republican form of government, and saw the voluntary bond of marriage as a model for the voluntary allegiance asked of American citizens. *See* COTT, *supra* note 5, at 21-23; *see generally* ANNE M. COHLER, MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM (1988).

between marriage and citizenship. Finding that outlawing bigamy was not effective (because Utah did not register marriages), Congress passed an act criminalizing bigamous cohabitation, and depriving anyone practicing it of the right to vote or hold office.[91] When a case protesting this made its way to the Court, the justices unanimously denied the claim, finding it appropriate for Congress to make marital status "a condition of the elective franchise," and also commenting that a sovereign power could legitimately "declare that no one but a married person shall be entitled to vote."[92]

The campaign was so extraordinarily intense because Utah had applied for statehood. Understanding the constitutional limits on its own powers, Congress knew that it would have no role in defining marriage in Utah once the territory became a state. Only after the LDS Church had disavowed polygamy was statehood for Utah possible. Also, before Utah was admitted to the Union, Congress further required its state constitution to stipulate that polygamy was "forever prohibited."[93]

[91] Edmunds Act § 3, ch. 47, 22 Stat. 30, 30-31 (1882).

[92] *Murphy v. Ramsay*, 114 U.S. 15, 43 (1885).

[93] UTAH CONST. art. III, § 1. See GORDON, *supra* note 5, at 164-81, GROSSBERG, *supra* note 5, at 120-26, and COTT, *supra* note 5, at 111-20 on the anti-Mormon campaign.

CONCLUSION

Throughout American history, the states have instituted many innovations in the legal lineaments of marriage—including changes in features once seen as essential and indispensable. These innovations have kept the institution vital, capable of serving the public good and protecting the couple who decide to marry. Popular reverence for marriage has endured in great part because marriage has been adjusted by state courts and legislatures in accord with changing ethical standards and social mores. It has been the job of state courts and legislatures to ensure that marriage continues to reflect public values and serve the public interest.

For sound reasons fundamental to our federal system, marital status definition has been left to the states, operating within constitutional bounds. Significant state diversity has resulted and been accommodated within our federal system. *Amici* support the position of Respondents that DOMA breaks with historical understanding of the state and federal roles with respect to marriage. The decision of the

Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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