Nos. 75934-1, 75956-1

SUPREME COURT OF THE STATE OF WASHINGTON

HEATHER ANDERSEN, ET AL., *Plaintiffs-Appellees*,

v.

KING COUNTY, *Defendant-Appellant*,

Appeal from the Superior Court of King County,
The Honorable William L. Downing

CELIA CASTLE, ET AL., *Plaintiffs-Appellees,*

v.

STATE OF WASHINGTON, *Defendant-Appellant.*

Appeal from the Superior Court of Thurston County,
The Honorable Richard D. Hicks

BRIEF *AMICI CURIAE* OF HISTORY SCHOLARS

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I. INTRODUCTION

Marriage is, and always has been, an institution that evolves in response to social and cultural change. Where a rigidly defined institution might crack under the pressures of societal change, marriage has evolved along with society, and therefore endures as an important and relevant part of modern social life. Appellants and Intervenors, in their briefs, make a variety of arguments based upon what they call a "traditional" definition of marriage. As scholars specializing in the history of marriage, families, gender, and the law, the undersigned *amici* submit this brief to show that reference to a fixed "traditional definition" of marriage is an inaccurate political construct.

The *amici* agree with Appellant King County that "[t]he context for the legal issues in this case is best provided by a review of the history of the law regarding marriage in Washington and other jurisdictions." Brief of Appellant King County ("King Cty Br.") at 4. But because Appellants and Intervenors have mischaracterized that history, the *amici* submit this brief to provide the necessary—and accurate—historical context to the Court's consideration of this case. As the Court will read below, eliminating discrimination against same-sex couples in civil marriage would not be inconsistent with the evolving history of marriage in Washington.

II. IDENTITY AND INTEREST OF *AMICI*

The *amici* are history scholars at various colleges and universities who have studied and written extensively on the history of marriage, families, gender, and the law in the United States.[1] The research and scholarship of the *amici* thus go to the heart of the issues presented in this case—particularly in light of the Appellants' and Intervenors' arguments regarding what they mischaracterize as a "traditional" and "unchanged" institution of marriage. The *amici* have an interest in providing an accurate historical record against which the Court may measure those arguments.

III. SUMMARY OF ARGUMENTS

The briefs submitted by the Appellants and Intervenors describe marriage as static and unchanging, and use the term "traditional" to describe that supposedly rigid institution. That characterization is historically inaccurate. In truth, marriage has always been an evolving institution, the definition of which has changed in profound ways.

Through most of American history—and throughout Washington's history—marriage has been a civil institution. Because of its civil character, changes have repeatedly been made to the institution as required by evolving constitutional doctrine and

[1] The names, institutional affiliations, and brief biographies of the *amici* are set forth at Appendix A to this brief.

societal conditions. The requirements to enter into or dissolve marriage, as well as the rights and roles of the partners involved, all have changed in response to economic, political, and societal changes.

Although many of the changes to marriage examined in this brief seem, in retrospect, natural or minor, most were viewed at the time as extraordinary or fundamental. Most were likewise met with alarm and warnings about the destruction of the institution—warnings similar to those heard today in the debate over the right of same-sex couples to marry. As history has shown, however, it is precisely *because* marriage has been continuously refined that the institution has remained a vital part of American society. By historical standards, the extension of marriage to same sex couples, as a response to changing political, economic, and social realities, is not at all inconsistent with the evolving nature of the institution.

IV. ARGUMENT

An accurate understanding of the historical context of marriage requires recognition of three points: First, Appellants' and Intervenors' characterization of marriage as a rigid and static tradition is historically unfounded. Second, marriage in Washington is, and always has been, a civil institution that is bounded by state constitutional standards and guided by societal conditions. Third, marriage has always been an evolving institution, and the fundamental changes marriage has undergone have enabled it to

retain its relevance to modern society.

A. Appellants' Characterization Of Marriage As A Static Tradition Is Historically Inaccurate.

Appellants' arguments are explicitly and implicitly dependent upon the assumption that marriage is a static "traditional" institution, and that the relief sought by the same-sex couples in this case endangers that tradition. King County argues, for example, that the State has a legitimate interest in enforcing a "traditional definition of marriage." King Cty Br. at 1. The State of Washington ("the State"), begging the very question posed by this case, argues that marriage between a man and a woman is "the historic definition of marriage." Brief of Appellant State of Washington ("State Br.") at 39. Similarly, the Intervenors attempt to cast marriage as a static institution by arguing, for example, that "[i]t has existed in this state, virtually undisturbed, from the territorial days." Brief of Intervenors ("Intervenors' Br.") at 49.

None of those characterizations of marriage is historically accurate. The institution of marriage has undergone major changes throughout history. Appellants and Intervenors attempt to suggest that such changes to marriage, including changing legal conceptions of gender roles in marriage and the overturning of anti-miscegenation statutes, amounted to small changes in comparison with the change that Appellees now seek. *See* King Cty Br. at 6 (discussing the elimination of gender distinctions); Intervenors' Br.

at 20 (discussing the elimination of anti-miscegenation statutes). They argue, in circular fashion, that extending marriage to same sex partners is somehow *more* fundamental because it has never been done before. *See* King Cty Br. at 5.[2] Contrary to Appellants' and Intervenors' suggestion, many of these changes to the institution of civil marriage were considered fundamental, and were met with fierce resistance when they occurred. *See* discussion *infra* at 10-11.

As the *amici* explain below, marriage in Washington, and in the United States at large, has undergone many hotly contested shifts. The ability to evolve with changes in society has enabled marriage to remain relevant to the lives of the people it serves—even in a radically transformed modern society. "[W]ith the progress of society, marriage became a civil contract, regulated by laws, varying among nations, corresponding with different motives of public policy." Michael Grossberg, *Governing the Hearth: Law and Family in Nineteenth Century America* 66 (1985) (quotations omitted). It is noteworthy, therefore, that the State invokes definitions of marriage set forth in treatises from 1882 and 1911, ignoring the numerous fundamental changes that marriage has undergone through the years. *See* State Br. at 18-19, 39.

Inevitably, some of those changes have been perceived as

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[2] In a similar circular argument, the State argues that "[t]here is nothing irrational or arbitrary about defining marriage as the relationship between a man and a woman..." because "that is the definition of 'marriage.'" State Br. at 39.

more radical than others. But as Justice John Hoyt of the Washington Territorial Court observed in 1884, "the changes thus made in the law, though many of them were at the time considered radical, have so far as we are advised, universally tended to the elevation of the marriage relation and of society..." *Rosencrantz v. Territory*, 2 Wash. Terr. 267, 274, 5 P. 305 (1884). It is the continuing progress of society that brings this case to the Court.

B. Marriage In Washington Is, And Always Has Been, A Civil Institution

Throughout the history of the state of Washington, and in American history since the early days of the colonies, marriage has been governed by state-made, not religious, law.[3] For that reason, it historically has been the job of the state to ensure that marriage continues to reflect the public interest and serve public welfare. Further, the courts have been required, from time to time, to define the ways in which marriage is bounded and guided by statutory and Constitutional principles in service of the public interest.

In early American history, the institution of marriage remained influenced by an inherited English model that had been

[3] Thus, while religious sects have always had differing rules restricting who may marry whom in a religious ceremony—prohibiting, for example, marriages to someone of a different faith—those rules have never been an obstacle to legal marriage in the United States. *See* George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 80-81 (2004).

shaped by both religious traditions and secular common law. English marital law had developed in the context of a struggle for control of the institution between church and state. *See* Grossberg, *supra,* at 66 (contrasting Lord Hardwicke's Marriage Act of 1753 which made religious ceremonies a requirement with Blackstone's redefinition of matrimony in the 1760s as a civil contract). Reflecting that tension and the interests of the English propertied class, a system of mixed state and ecclesiastical control was designed in order to formalize nuptials. *See id.*

Conditions in the American colonies were different from England, however, and the colonists had different practical needs and political objectives, which required changing certain aspects of the inherited English system. The lack of a landed nobility, religious pluralism among the colonies, the uncertainties of colonial life, vast distances between communities, and remote outposts in which many colonists lived meant that formalities were often difficult for the state to oversee. *See id.* at 19, 65-68. Thus, in the early days of American history, the institution of marriage adapted to require fewer of the formalities that had formerly been integral to the English idea of marriage. *See id.* at 19-20; *see also* Nancy. F. Cott, *Public Vows: A History of Marriage and the Nations* 36 (2000).

Although the colonies derived much of the substantive law of marriage from English common law—which was strongly influenced by the Anglican Church—marriage in America developed

as a civil institution, rather than a religiously-governed relationship. *See* Charles Kindregan, *Same Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 Fam. L.Q. 427, 430 (Summer 2004). Accordingly, early Americans endowed civil magistrates with powers to perform marriage and a religious ceremony was not required. *See* Grossberg, *supra,* at 67-68. When clergy officiated at marriage, they served as agents of the state and marriages had legal standing only as civil contracts. *See* Chauncey, *supra*, at 80.

From its earliest days, Washington's courts likewise treated marriage as a civil institution. *See In re Smith's Estate*, 4 Wash. 702, 705, 30 P. 1059 (1892) ("Section 2380 [of the Washington Code] declares that marriage is a civil contract…"); *see also* RCW 26.04.010 (stating that marriage is a civil contract). This Court has unequivocally recognized that "the purpose of [RCW 26.04.010] was to make it clear that marriage is governed by civil law rather than by ecclesiastical law." *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 569, 536 P.2d 1202 (1975).

Moreover, Washington territorial and state courts recognized early on that the civil institution of marriage must conform to constitutional standards. *See Maynard v. Valentine*, 2 Wash. Terr. 3, 15, 3 P. 195 (1880) ("[T]he people of the United States, at the date of the Organic Act, thought, and still think, individual marriages to be rightful subjects of legislation … *unless there be some express constitutional provision to the contrary*.") (emphasis added).

Therefore, as society's understanding of what the constitution requires has evolved, the State of Washington has from time to time adjusted the definition of civil marriage. As explained below, the changes were often viewed as major, even "radical," and often ahead of other states and federal law.

C. Marriage Is An Evolving Institution

Marriage, throughout the United States and in Washington, has always been a flexible institution, evolving over time to reflect changes in society at large. Examples of the fundamental changes that have occurred to the institution of marriage include: (1) the end of coverture and changes to the legal rights and status of married women; (2) the end of anti-miscegenation restrictions; and (3) evolving government control over dissolution and the conditions required for a couple to divorce. These changes are only a sampling of the ways in which marriage has changed over time. Yet, they exemplify the extent to which marriage has been resilient, absorbing change—even "radical" change—when necessary to reflect and embody societal conditions. Washington has often been at the forefront of those changes.

1. Marriage Has Changed As Gender Roles Have Changed

In English and early American history, marriage was the joining of husband and wife into a single civil entity for which the husband spoke and acted. Under this system—referred to broadly as

"coverture"—the wife gave up her own name, identity, domicile, and authority over her own body. *See* Cott, *supra*, at 11; *see also* Sandra VanBurkleo, *"Belonging To The World": Women's Rights and American Constitutional Culture* 10 (2001). A wife was not allowed to sue or make contracts, own assets, or execute legal documents without her husband. Nor was she fully responsible for herself in criminal or civil law. *See id.* at 11-12. A wife's assets, labor and earnings all became her husband's property. *Id.* Coverture was seen as part of the natural order, "as a simple and sincere expression of human natures," and "based on unchanging scriptural truth." Hendrik Hartog, *Man and Wife in America: A History* 102-03 (2000). The position of women under coverture "was understood as the general rule, as the first principle, as the distillation of an incontrovertible structure." *Id.* at 117. Like the Appellants and Intervenors today, many in the time of coverture viewed this feature of marriage as natural or fixed. *Id.*

While the colonies inherited the system of coverture through English common law, the colonists lived in a different society than the landed English system in which coverture had developed. *Id.* at 121. As revolution brewed, new ideas about moral philosophy were circulating in the colonies. Concepts of reciprocal rights and responsibilities between ruler and citizen influenced ideas about reciprocity between master and servant, parent and child, and husband and wife. *See* Cott, *supra*, at 15. The Revolutionary era

therefore brought increasing scrutiny of the hierarchy between husbands and wives, and increasing interest in symmetry between married partners. *See* Cott, *supra*, at 14-17.

Political, economic, and social change continued to bring about movements for marriage reform after independence. Reformers in the middle of the 19th Century disputed the conception of husbands and wives as one person, *see* Hartog, *supra*, at 113, and introduced legislation attempting to make marriage more of a partnership. For example, between the 1830's and 1870's many states passed "married women's property laws," declaring that wives owned the property they brought into or were deeded during marriage. While these laws were in part designed to keep property in the wife's name free from her husband's creditors, they nonetheless marked an important shift in the institution of marriage, by enabling married women to hold their own separate property. *See* Cott, *supra*, at 52-53.

Similarly, courts rejected elements of coverture when justice and public policy required a wife to be recognized as an individual. For example, the United States Supreme Court rejected elements of coverture by holding in *Barber v. Barber*, 62 U.S. 582 (1858), that abandonment by a husband gave a wife a separate domicile. Not being automatically bound by her husband's domicile as required under laws of coverture, Mrs. Barber was eligible to sue her husband in federal court under diversity jurisdiction.

Of course, as elements of coverture were gradually eliminated from the laws of marriage, critics claimed that such changes would lead to domestic chaos and the destruction of the institution. *See, e.g.*, Cott, *supra*, at 109 (critics argued permitting a divorcée to remarry would endorse "free love"). The protests against same-sex marriage today echo those claims, and yet the institution of marriage not only survived the demise of coverture, few would dispute that it is more highly esteemed because of the change.

From its early days as a territory, Washington was more progressive in its views toward marriage and married women than many American jurisdictions. Washington Territory applied a flexible definition of marriage that was responsive to changing societal realities. Faced with the practical need to attract women to the West, the Territory took early steps toward gender equality. *See* Kelly Cannon, *Beyond The Black Hole--A Historical Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 Gonz. L. Rev. 7, 22-24 (2003-2004). For example, women were given the right to contract relatively early in the history of the Territory. *See, e.g., Phelps v. S.S. City of Panama*, 1 Wash. Terr. 518 (1877) (declaring that a contract made by a wife was valid under certain circumstances and that she should be allowed to sue alone). In 1884 the Territorial Court held that women were independent "householders" and were thus permitted to

serve on juries. *See Rosencrantz,* 2 Wash. Terr. at 275.[4]

Similarly, Washington took the lead in changing the property rights of married women early in its history. In 1869, the Territory formally enacted a community property system that had been reflected in earlier practice, *see Lemon v. Waterman*, 2 Wash. Terr. 485, 492, 7 P. 899 (1885), and in 1871 the Territory passed the Marital Partnership Act which allowed a wife the right to manage any separate property that she owned. *See* Cannon, *supra*, at 15. As this Court has explained, the community property system was established largely to protect the property interests of married women. *See Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 812, 459 P.2d 32 (1969).

Then, like today, conservative forces fought such changes. As Washington approached statehood, the law of marriage and the rights of women remained in flux. Many of the gains women had made were rescinded and then restored during the late 1800s and early 1900s. *See* VanBurkleo, *supra*, at 186-87. Women lost their status as independent "householders," and thus their right to serve on juries. *See Harland v. Territory,* 3 Wash. Terr. 131, 136-37, 13 P. 453 (1887). In 1873 the Marital Partnership Act was repealed and

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[4] Indeed, the Court held that Washington was not bound by English common law, which provided that women were not independent "householders." *Rosencrantz*, 2 Wash. Terr. at 273. Unlike former colonies and many other states, the law of the Territory was in fact a hybrid of common law and civil law elements. *See* VanBurkleo, *supra*, at 184-85

the management of all property, both community and separate, was once again controlled by the husband. *See* Cannon, *supra*, at 16.

In 1881, Washington's community property system was again changed to ensure that a wife had control of her separate property and monetary security. *See Board of Trade of City of Seattle v. Hayden*, 4 Wash. 263, 265-66, 30 P. 87 (1892) (interpreting an 1881 law giving married women, once again, the right to manage separate property and contract). And while many regressive restrictions on women's rights and roles lasted well into the early 20th Century, they too, were later abandoned. *See* VanBurkleo, *supra*, at 187 (noting that women regained independent "householder" status and the right to serve on juries in 1911). All of this change—which dominated Washington's early territorial and state history—contradicts the notion of a "fixed" definition of marriage in Washington law.

As gender inequalities were increasingly brought to light in the late 20th Century, and as women won victories under the Equal Protection Clause of the federal Constitution, Washington again led the way in recognizing the changing roles of women. In 1972, Washington voters approved House Joint Resolution 61, the Equal Rights Amendment ("ERA"). Const. amend. 61, adding article 31. Since the state constitution was amended to adopt the ERA, in Washington "discrimination on account of sex is forbidden." *Darrin v. Gould*, 85 Wn.2d 859, 877, 540 P.2d 882 (1975).

In the face of these fundamental shifts in the legal rights and position of women, marriage as an institution was likewise compelled to change. Today the laws regulating marriage in Washington bear little relation to the system of coverture and the strict gender hierarchy that common law once enforced, or even to the more progressive system that existed in Washington prior to statehood. Husbands and wives have equal right to hold property, and to sue and be sued the same as any unmarried person. *See* RCW 26.16.150. Mothers are as fully entitled to the custody, control and earnings of the children as the father. *See* RCW 26.16.125. A wife has the right to sue her husband. *See* RCW 26.16.180. In fact, Washington has abolished all laws which impose or recognize civil disabilities upon a wife which are not recognized as to the husband. *See* RCW 26.16.160. Further, in 1972 the state amended the community property laws to establish gender equality in the management of community property. Today, either spouse, acting alone, may manage and control both real and personal community property. *See* RCW 26.16.030.

Although it was once thought this system of gender hierarchy was fundamental to the survival of marriage, and that eliminating that system would result in domestic chaos or "free love," it was only by changing in response to women's evolving rights and roles in society that marriage has been able to maintain its relevance to today's Americans.

2. Marriage Has Changed As Views Of Racial Equality And Individual Rights Have Changed

Marriage has further evolved with respect to state laws governing interracial marriage and marriage by racial minorities.[5] *See* Grossberg, *supra*, at 126. Those laws have likewise undergone fundamental changes throughout American history, reflecting changing views on racial equality and individual rights.

Washington was among the majority of American jurisdictions that passed such statutes, enacting race-based restrictions on marriage in 1855, then a second statute in 1866. *See* 1855 Wash. Laws 651; 1866 Wash. Laws 354; *see also Follansbee v. Wilbur*, 14 Wash. 242, 245-246, 44 P. 262 (1896) (declaring an 1867 marriage between a white man and an Indian woman void under the anti-miscegenation laws of Washington Territory). A large majority of American jurisdictions—some 30 states—had similar statutes in effect between 1880 and 1950. Washington eliminated its anti-miscegenation statute early in its history. 1868 Wash. Laws 431. Civil rights movements and increasing societal integration gradually brought an end to such bans in some other states as well, although court intervention was required in many states to protect the rights of interracial couples to marry each other.

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[5] The history of anti-miscegenation laws is more fully addressed in the separate Brief *Amici Curiae* of Loren Miller Bar Association, *et al.*, filed with the Court in this case.

See Perez v. Sharp, 198 P.2d 17, 29 (Cal. 1948) (becoming the first state court to declare anti-miscegenation statute unconstitutional in the 20th Century); *Loving v. Virginia,* 388 U.S. 1, 11-12, 87 S. Ct. 1817 (1967) (declaring marriage to be a fundamental right and finding anti-miscegenation statutes unconstitutional).

Like the Appellants and Intervenors here, supporters of anti-miscegenation laws once argued that interracial marriage was "unnatural." Cott, *supra*, at 41. Appellants attempt to distinguish this change to the institution of marriage on the ground that race-based restrictions were an American innovation and not a remnant of traditional English common law. *See* King Cty Br. at 20-21. But the very fact that there could be such a thing as an "American innovation," and that some courts could accept the prohibition on interracial marriage as "natural" or "fundamental" to the institution of marriage, empirically disproves the notion that there is a "traditional," unchanging definition of marriage independent of societal needs. *See, e.g., Kinney v. Commonwealth*, 71 Va. 858, 869 (1869) (declaring that interracial marriages are "so unnatural that God and nature seem to forbid them.").[6]

Few would dispute the propriety of ending anti-miscegenation laws today. Indeed, while expanding the freedom to choose one's

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[6] Moreover, Appellants' argument assumes that English common law is the measure of "traditional" marriage, and yet, Washington—unlike many other American jurisdictions—has never wholly followed English common law. *See* note 4, *supra*.

partner without regard to race was a fundamental change to the institution of marriage, the institution has not only remained intact in spite of that change, it has been strengthened by adapting to more closely match the reality of Americans' intimate relationships.

3. Marriage Has Changed As Divorce Laws Have Changed

A third major change to the institution of marriage was the emergence of no-fault divorce laws. Although marriage has long been recognized as being based in contract principles and consent of the parties, this analogy often faltered when comparing the rules governing contract dissolution and divorce. States have always treated marriages as a separate, special kind of contract to which the state is a party. Because religious marriage is based on the theological premise of the permanence and indissolubility of marriage, some churches and religious leaders have opposed the enactment or liberalization of civil divorce laws as being destructive of marriage. *See* Kindregan, *supra*, at 437. And yet, because marriage in the United States is a civil institution, responsive to the realities of society, that religious opposition was an insufficient basis to halt the evolution of civil marriage to a no-fault divorce system.

Through most of American history, divorces were only granted under tightly controlled circumstances. *See, e.g. Nordlund v. Nordlund*, 97 Wash. 475, 478, 166 P. 795 (1917) (granting divorce based on denial of sexual intercourse for twelve years). As noted by

the Washington Supreme Court, "the interest of the public in all actions for divorce is such that a policy has grown up in accord with enlightened sentiment to discourage and deny divorces unless claimed upon proper grounds ..." *Jarrard v. Jarrard*, 116 Wash. 70, 73, 198 P. 741 (1921). At the time, control of divorce was believed to be integral to maintaining the structure of family and the state. *See id.* at 74.

While states had attempted to control the terms of divorce quite closely in the 19th and early 20th Centuries, this began to appear unrealistic in the late 20th Century due to greater freedom in the norms of spousal conduct, and a growing consensus that husband and wife were themselves best situated to determine the viability of marriage. *See* Cott, *supra*, at 48-52, 196, 205-06. As Americans increasingly developed expectations of freedom of action and individual rights, "[t]he lifting of a 'life sentence' in an impossible marriage had to have made the institution feel more equitable and more voluntary, more truly chosen." Cott, *supra*, at 55. Despite warnings about the imminent destruction of marriage, in 1969 California became the first state to allow no-fault divorce. *See* Cott, *supra*, at 205. Washington followed suit and enacted a no-fault divorce law in 1973 that required a spouse to allege only that the marriage was irretrievably broken. *See* RCW 26.09.030.

Accordingly, just as freedom to choose one's partner expanded in response to vastly changing societal conditions,

conditions for marriage dissolution also evolved. Embracing the change has only increased marriage's relevance to a society that values individual choice and freedom.

V. CONCLUSION

Far from a fixed "tradition," civil marriage has always been an evolving institution. It has been refined to eliminate many restrictions once thought to be "incontrovertible" or "natural" elements of the institution. But as Justice Hoyt wrote for the Washington Territorial Court more than 120 years ago, "the changes thus made in the law, though many of them were at the time considered radical, have so far as we are advised, universally tended to the elevation of the marriage relation and of society…" *Rosencrantz*, 2 Wash. Terr. at 274. Ending discrimination against same-sex couples in civil marriage would not be inconsistent with the evolutionary character of marriage. Indeed, such change elevates the institution and ensures its continuing relevance to our society.

Dated: February 7, 2005

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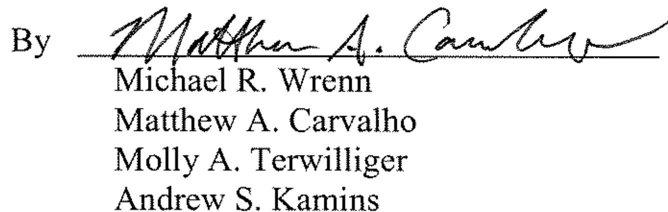
By 

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APPENDIX A

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Norma Basch is a professor of history at Rutgers University. She has written extensively on marriage and domestic relations in 19th Century American law, including *Framing American Divorce: From the Revolutionary Generation to the Victorians* (University of California Press 1999). She teaches courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

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