Nos. 12-15388 & 12-15409
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAREN GOLINSKI,
Plaintiff-Appellee,
v.
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
and JOHN BERRY, Director of the United States Office of
Personnel Management, in his official capacity,
Defendants-Appellants
and
BIPARTISAN LEGAL ADVISORY GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervenor-Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
CIVIL CASE NO. C 10-00257 JSW (HONORABLE JEFFREY S. WHITE)

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

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Amici are historians of American marriage, family and law, whose research documents how the institution of marriage has functioned and changed over time. Our brief aims to provide accurate historical perspective as the Court inquires into state and federal purposes for marriage and relative prerogatives in defining marital status. Amici support Appellees' position that the Defense of Marriage Act (DOMA) is historically unprecedented: until DOMA was passed, the federal government consistently deferred to state determinations of marital status, even while significant marriage policies differed in various states. Moreover, Amici disagree with Appellants' contention that the core governmental purpose of marriage is to foster procreation, since states have always had several key purposes in establishing and regulating marital unions.[1]

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[1] This brief is based on amici's decades of study and research. Amici are the authors of the principal scholarly work in the relevant fields, including: PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); NORMA BASCH, FRAMING AMERICAN DIVORCE (1999) 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); 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); ESTELLE B. FREEDMAN AND JOHN D'EMILIO, INTIMATE

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

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); ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES (2008); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH CENTURY SOUTH (1997); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001); ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (2008); BARREN IN THE PROMISED LAND (1996); STEVEN MINTZ, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988); ELIZABETH H. PLECK, CELEBRATING THE FAMILY: ETHNICITY, CONSUMER CULTURE, AND FAMILY RITUALS (2001); CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002); MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES (2001); FEMINISM, MARRIAGE AND THE LAW IN VICTORIAN ENGLAND (1989); AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010). Assertions in the brief are supported by this scholarship, whether or not expressly cited.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26(C)(5)

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

SUMMARY OF THE ARGUMENT

Control of marital status is reserved to the states in our federal system. The states have had a variety of purposes in authorizing and regulating marriage, in that the marriage contract embodies individuals' free consent to enter long-lasting intimate relations, while marital households also serve to protect individuals, ensure social order and advance economic welfare. States have valued maritally-based households as benefits to public good whether or not they include biologically-related parents and children.

A diversity in marriage rules resulted, and states' differing standards often provoked serious contestation in the past. Significant differences among state laws prescribing who was eligible to marry whom have existed throughout American history. Some states allowed two first cousins, or young teenagers, or couples where one party was white and one was not, for example, to marry, while others nullified or criminalized such marriages. The practice of comity among the states accommodated these differences, although not without tensions and alarms. Inter-state migration when such strong policy differences existed not infrequently produced civil lawsuits concerning marriage validity.

Despite state diversity throughout American history, before enactment of DOMA,[2] the federal government consistently relied on the different states'

[2] PUB. L. NO. 104-99; 1 U.S.C. § 7.

determinations. It did not seek a single definition for all federal purposes of any dimension of marital eligibility or status.[3] Before 1996, Congress never took a position on a contested marital status preemptively so as to discredit a policy choice that a state might make. Federal agencies distributing benefits assessed the validity of any marriage by looking to the relevant state law.

Since the 1880s certain reformers have advocated for a comprehensive uniform national standard for marriage and divorce, but always recognized that amending the U.S. Constitution would be required. Their efforts never succeeded, facing far stronger support for states retaining their power over marital status. In historical perspective, DOMA appears as an attempt by Congress to exercise a power it has always been understood not to have, and that the representatives of the states repeatedly refused to grant it by constitutional amendment.

ARGUMENT

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

A. Civil Authorization

Marriage in all the states of the United 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,

[3] DOMA does not, in fact, create marital "uniformity" for federal purposes, because it leaves in place all state variations in marital eligibility and requirements besides the gender of the couple (Sec. IV, *infra*).

sentiment and custom enter individuals' understanding of marriage in important ways, but valid marriage is a creature of law in every state. The standard of civil authority over marriage derived from colonial New England and was important at the founding of the United States because of the new nation's diverse religions. Regulations for creating valid civil marriages were among the first laws established by the states after independence from Great Britain.[4]

As an institution based on voluntary mutual consent, marriage was and remains understood to be a contract. But it has always been a unique contract, because of the state's strong role in defining marriage and prescribing its obligations and rights.[5] Marriage may be joined by private consent, but its legal obligations cannot be modified or ended thereby. The state is a party to and guarantor of the couple's bond. Once marriage is entered, its "rights, duties and obligations" are "of law, not of contract." as the Maine Supreme Judicial Court said in 1866, and this rule remains.[6] For example, spouses cannot by private agreement abandon their obligation of mutual economic support.[7]

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[4] 1 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES (1904) 121-226 (colonial precedents), 388-497 (early state marriage laws); *see* COTT *supra* n. 1 at 2, 52-53.
[5] COTT, *supra* n. 1, at 10-11.
[6] *Maynard v. Hill*, 125 U.S. 190, 210-13 (1888) (quoting *Adams v. Palmer*, 51 Me. 481, 483 (1866)).
[7] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS 425-27 (2d ed. 1988, 2d prtg. 2002).

Until DOMA interrupted this practice, a couple validly married in a given state was always considered married at every level of government. Marital status (like citizen status) historically has changed an individual's legal *persona*, bearing legal meanings and consequences from the state to the national level. Wedding legally according to state-prescribed regulations transforms a couple's status, giving both individuals new legal standing and distinctive obligations and rights.

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

B. Exclusive State Control

During the writing of the U.S. Constitution, it was agreed that "domestic relations" would remain the domain of the states. This was practical not only because regulating family and household matters was understood to belong to the states' "police powers" but also because "domestic relations" included slavery. Slavery and the slave trade were among the most divisive issues at the constitutional convention, where it was essential to reach agreement. The premise of state jurisdiction over "domestic relations" enabled states whose populations differed in values and practices to control local matters while joining together

under federal government. This core feature of federalism underlay national unity as the U.S. Constitution was created.[8]

Subsequently, regional and cultural differences and state legislators' priorities resulted in a changing patchwork of marriage rules across the nation. Although married couples' movements between states with differing definitions of a valid marriage created some conflicts, the patchwork system worked because of a tradition of comity. There was strong incentive to accept couples who had married in one state as married in another: not doing so would throw property ownership and transmission into question and undo children's legitimacy. State and federal courts within the U.S. generally followed the law of nations principle that a marriage valid where it was celebrated was valid everywhere unless the receiving state's public policy directly opposed it.[9] That principle allowed the states that nullified marriage across the color line, for example, to refuse to credit couples

[8] *See* COTT, *supra* n. 1, at 77-104. No discussion of domestic relations other than slavery occurred during the constitutional convention, indicating that state jurisdiction was presumed.

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

thus married in another state – before the Supreme Court dismantled all racial restrictions as violations of the 14th Amendment.[10]

As will be discussed (Sec. IV *infra*), throughout U.S. history, federal government operations relied on states' definitions of marital status regardless of the extent of variance and resultant lack of uniformity on many counts.

II. The Federal Government's Exceptional Actions

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

A. Civil War and Reconstruction

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

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

disparagingly that no Confederate state honored "the relation of husband and wife among slaves, save only so far as the master may be pleased to regard it."[11]

As the Union Army marched south, Confederate states crumbled. In the spring of 1864, a Union military edict authorized the clergy in the U.S. army to perform marriages for slaves who had fled to freedom behind Union lines in U.S.-occupied areas where state authority did not exist. Ex-slave recruits welcomed the ability to marry; it was a civil right long denied them. An army chaplain in Mississippi remarked on the "very decided improvement in the social and domestic feelings of those married by the authority and protection of Law. It causes them to feel that they are beginning to be regarded and treated as human beings."[12]

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

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

there.[13] As soon as Southern state governments were reconstituted, the Freedmen's Bureau ceded its authority; states resumed their jurisdiction over marriage law, subject, however, to the authority of the 14th Amendment, ratified in 1868.

B. Polygamy in the Utah Territory

Another revealing example of federal action comes from the 19th-century campaign to eliminate polygamy as practiced by the Church of Jesus Christ of Latter-Day Saints ("LDS Church"). The Mormons had moved to the Utah Territory, and in 1862 Congress outlawed bigamy there and in all other federal territories.[14] Constitutionally, Congress had the same plenary powers over marriage in federal territories that states had in their domains. Federal anti-polygamy legislation applied only to federal territories.

Congress acted not only because polygamy on the North American continent seemed loathsome, but because Utah's intent to apply for statehood loomed on the horizon. Alert to constitutional limits on federal power over domestic relations, Congress knew that it would have no power to define marriage in Utah once it obtained statehood. Federal authorities exerted extreme pressure on the LDS

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

[14] Morrill Act, ch.126, §§1-3, 12 Stat. 501, 501-02 (1862). In 1874, Congress addressed divorce within the territories. *See* Poland Act, ch. 469, § 3, 18 Stat. 253, 253-54 (1874); Edmunds-Tucker Act, ch. 397, 24 Stat. 635, 635-39 (1887) (codified 28 U.S.C. §§ 633, 660) (repealed in 1978); SARAH BARRINGER GORDON *supra* n. 1, at 81-83.

Church for decades to force abandonment of polygamy. Further, Congress required Utah's state constitution to stipulate that polygamy was "forever prohibited" before Utah could be admitted into the union.[15]

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

III. States' Several Purposes in Civil Marriage

Throughout U.S. history, marriage has served numerous complementary public purposes. Among these purposes are: to facilitate the state's governance of the population; to create stable households; to foster social order; to increase economic benefit to individuals and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents (including the very young, the very old, and the disabled); to facilitate the ownership and inheritance of property; and to compose the body politic.[16]

A. Governing through Marriage

Historically, marriage has been closely intertwined with sovereigns' aim to govern. When monarchs in Britain and Europe fought to wrest control over

[15] UTAH CONST. art III, §1; GORDON, *supra* n. 41, at 164-181; GROSSBERG, *supra* n. 1, at 120-29; COTT, *supra* n. 1, at 111-20.
[16] COTT, *supra* n. 1, at 2, 11-12, 52-53, 190-194, 221-224; GROSSBERG, *supra* n. 1, at 204-05 (legitimization of children).

marriage from ecclesiastical authorities (circa 1500-1800), they did so because they used marriage as a vehicle through which to govern the population. Anglo-American legal doctrine (continuing into the era of American independence) made married men into heads of their households. Husbands as household heads were regarded as delegates of the sovereign, obligated to govern and support their wives and all other dependents, and be their public representative. Therefore, laws concerning who could marry whom, in what way, and setting the specific duties of the relationship, formed important dimensions of states' authority over their populations.[17]

B. Economic Dimensions

Marriage-based households were the fundamental economic units in early America, requiring both men and women, who played differing but equally indispensable roles in the production of food, clothing and shelter. Under the Anglo-American common law of coverture (marital unity), the husband owned his wife's property and labor, and she had to obey him. The husband as head of household was responsible in all ways for his wife and all other household dependents, whether biologically related (children or relatives) or not (orphans,

[17] COTT, *supra* n. 1, at 10-16; *see also* Mary L. Shanley, *Marriage Contract and Social Contract in 17th-Century English Political Thought, in* THE FAMILY IN POLITICAL THOUGHT (J.B. Elshtain ed., 1982).

apprentices, servants and slaves).[18] Examination of historical evidence suggest how crucial was this governance function of marriage around the time of the American Revolution, since roughly 80% of the thirteen colonies' population were legal dependents of male heads of household.[19]

The coverture principle of the wife's subordination to her husband is now gone, as is the husband's function as a delegate of the sovereign – and modern household economies no longer dictate sex-differentiated work roles – but governments in all the states still obligate a married couple to take responsibility for each other's and their dependents' support and well-being. State governments minimize public expense by enforcing the economic obligations of marriage.[20] 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 build households upon them, whether or not those relationships resulted in children. States encourage marriage and offer financial advantages to married couples on the premise that maritally-organized households promise social stability and economic benefit to the public.

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[18] COTT, *supra* n. 1, at 11-12, 79-81; GROSSBERG, *supra* n. 1, at 24-27.
[19] Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 123 (1995) (the figure of 80% is from 1774).
[20] *Id.* at 221-223; GROSSBERG, *supra* n. 1, at 24-30; CLARK, *supra* n. 12, at 343-416.

The economic dimensions of marriage have involved government benefits more extensively since the mid-twentieth century. The federal government began to take a more active role in citizens' economic security during the Great Depression; Congress greatly expanded programs dispensing federal benefits through spousal relationships. The pattern of federal reliance on marital relationships began much earlier, however, during the Revolutionary War, when the Continental Congress awarded "pensions" to the widows and orphans of officers who died serving the new nation. These pensions – and all military pensions and survivors' benefits to follow – intended to shore up the norm of the male head of household carrying out (even after death) his responsibility for his dependents. Federal benefits thus were premised on marital households being an economic unit basic to social welfare.[21]

Federal benefits channeled through spousal relationships became a persistent American norm, even as social change brought states to eliminate coverture and establish equalitarian and gender-neutral requirements in place of gender-based asymmetical marital roles.[22] (*See* Sec. V *infra*) Today, the federal government uses

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[21] Soon afterward, pensions were extended to servicemen. National Archives and Records Service, General Services Administration, REVOLUTIONARY WAR PENSION AND BOUNTY–LAND-WARRANT APPLICATION FILES, National Archives Microfilm Publications, Pamphlet Describing M804 (Washington, D.C., 1974), *available at* http://www.footnote.com/pdf/M804.pdf.

[22] Since the 1970's, the pensions have been gender neutral. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); ALICE KESSLER-HARRIS, *supra* n. 1 at 56-159

spousal relationships as the route to veterans' pensions, Social Security payments, and citizenship and naturalization advantages as well as other important benefits, where some other nations allot benefits to individuals regardless of marriage.[23]

This extensive channeling makes legal marriage all the more valuable to couples. Indeed, federal benefits added to state-level advantages provide strong incentives to marry rather than to cohabit. With DOMA in place, however, same-sex couples married validly in their states are deprived not only of federal married status, but also of extensive financial advantages available to other married couples.

Before DOMA existed, the federal government accepted states' determinations of who was validly married – no matter how far states' criteria for validity diverged from one other. Appellant Bipartisan Legal Advisory Group ("BLAG"), in arguing that Congress acted rationally in deciding to define marriage for federal purposes as between a man and a woman (when potential for a state to license marriage between two parties of the same sex appeared on the horizon), ignores two centuries of federal practice of accommodating states' diversity of criteria for entering marriage. (Sec. IV *infra.*)

(2001); COTT, *supra* n. 1, at 172-179; THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 103-151 (1992).

[23] *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").

C. Supporting Children

BLAG's brief also emphasizes a government interest in "responsible procreation." As the foregoing historical review of states' interest in the economic and social values of marriage indicates, however, states' intentions in regulating marriage have been far less focused on procreation (which was assumed to take place with or without legal marriage) than on securing responsible adults' support and protection for children born.[24] The ability or willingness of couples to 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.[25]

Claims that the main purpose of marriage and the state's main interest has "always" been to provide an optimal context for begetting and rearing biological

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[24] Thus BLAG's brief (44, at n. 12), in quoting Blackstone's *Commentaries* on "the duty of parents to provide for the maintenance of their children," and Montesquieu that "the main end of marriage" is "the protection of infants," misses both authors' explicit point that the government's interest in marriage, with regard to children, is the parent's duty to support and protect (rather than to procreate).

[25] 3 HOWARD, *supra* n. 3, at 3-160 (1904). While impotence, if unknown at the time of marriage, could be a ground for annulment, sterility was not. Thus state laws recognized a justifiable expectation of sexual intimacy, but not of progeny, in marriage. GROSSBERG, *supra* n. 1, at 108-110.

children are normative and not historically-based.[26] States in the past credited and encouraged marriages whether or not biological children would result from them, so long as the couple marrying met the state's criteria for entering marriage. In the longer past, marriages in which stepfathers and/or stepmothers took responsibility for non-biological children were quite common, because of early and unpredictable deaths of biological parents, and widows' and widowers' remarriages. Families frequently housed orphaned relatives.[27]

States today continue to see marriage serving economic and social purposes not tied to biological relationships. In 2010 only 21% of American households are composed of a married couple and their minor children.[28] In our post-industrial age, divorced or widowed adults often marry when they are past childbearing age, usually for reasons of intimacy and stability. As life spans have lengthened, more frequent divorce has replaced death as reason for "blended" families not based on biological relationships. Almost all couples voluntarily restrict the number of their progeny without giving up sexual intimacy, which can be separated from

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[26] COTT, *supra* n. 1, at 168-180, 206-210.

[27] Viz. the first "First Family": George Washington fathered no children and was assumed to be sterile; Martha Custis brought two children from her first marriage into their household and they also later reared the children of her son, who died in the Revolutionary War.

[28] Data from the 2010 Current Population Survey; see http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html

reproductive consequences. With access now to reliable contraception, fertile couples with no interest in childbearing also marry.

As they have throughout U.S. history, states today continue to offer the same rights and rewards, and place the same requirements, upon all couples validly married – including same-sex couples where allowed – whether or not they have children. DOMA, in contrast, singles out same-sex couples and robs them of their marital status at the federal level.

IV. States' Variation and Federal Acceptance

Since its founding, the American republic's commitment to state jurisdiction over marriage definition has meant variation among the states in marriage policies, limited only by constitutional boundaries. Nonetheless all the states have required that marriage is a voluntary bond between a couple – and a couple only, for every state prohibited bigamy[29] – who share sexual intimacy and mutual economic support for one another. Amici Senators, in asserting that "the term 'marriage' in federal law" is not "an empty vessel into which the states can pour any relationship they please," disregard the seriousness with which states have approached the

[29] Marital liberty of choice, as a model for the voluntary allegiance asked of citizens, was bound into American political theory during the American Revolution; likewise, following Montesquieu's *Spirit Of The Laws*, American political culture reprobated polygamy, maintaining that marriage and government mirrored one another: monogamous marriage matched a government of consent, polygamy was always matched by despotism. This thinking underlay the fierce campaign against polygamy in the LDS ChurchCOTT, *supra* note 1, at 21-23; *see supra* § IIB.

definition of marriage and the extensive state variation that resulted.[30] Before DOMA, states' varying definitions all were accepted for federal law purposes.

A. Multiplicity of State Variations and Inter-State Conflicts

States 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, whether certain health minima were met, how spousal roles were defined and enforced, whether specific ceremonies were required for validation and whether and how marriage might be dissolved. Even more variations could be described.[31] Individual states also changed their own marital regulations significantly over time.

The federal government accepted all these differences and changes, never seeking uniformity across the states in any element of marriage until the Congress passed DOMA in 1996. Although states continuously altered eligibility requirements – sometimes expanding and sometimes contracting the pool of couples who might be validly married – Congress did not interpose its authority. In dispensing federal benefits (such as military pensions), federal agencies examined the validity of marriages closely and, in questionable cases, referred to the couple's

[30] Brief of Amici Curiae United States Senators Orrin G. Hatch, Saxby Chambliss, Dan Coats, Thad Cochran, Mike Crapo, Charles Grassley, Lindsey Graham; Mitch McConnell, Richard Shelby and Roger Wicker in Support of Intervenor-Defendant-Appellant at 19.

[31] GROSSBERG, *supra* n. 1, at 70-74, 86-113, 144-45.

state's requirements. Far from stating a federal rule, federal authorities frequently restated state jurisdiction in the marital arena.[32]

Divergence began on common-law marriage, for example, when the eminent jurist Chancellor James Kent argued in 1809 that a couple's intent and consent created a valid marriage under common law, even without conformity to state-prescribed ceremonies. Such "irregular" marriages were very common in early America. State by state, jurists and legislators decided either to accept or reject Kent's model and terminology of "common law marriage." Most states – but not all - adopted Kent's view that while consent was always necessary for marriage, formal solemnization was not.[33]

Similarly, states varied on allowing marriage between first cousins. This was a common practice for centuries in Europe and was accepted in some of the states, being favored by certain elites. New England and much of the South accepted first-cousin marriage but it was prohibited in the Middle and Far West.[34]

Many differences – such as who might perform marriage ceremonies – caused little controversy. Some, however, created major conflicts. Even extremely

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[32] E.g. *In re Tidewater Marine Towing, Inc.*, 785 F. 2d 1317 (5th Cir. 1986); *Slessinger v. Sec. of HHS*, 835 F. 2d 937 (1st Cir. 1987).
[33] *Fenton v. Reed*, 4 Johns. 52 (NY 1809); GROSSBERG, *supra* n. 1, at 64-83; HOWARD, *supra* n. 4, at 170-185 (frequency of informal marriage). In *Meister v. Moore*, 96 U.S. 76 (1877) and *Maryland v. Baldwin*, 112 U.S. 490 (1884), the U.S. Supreme Court validated common-law marriage unless a state specifically prohibited it, thus bowing to state jurisdiction.
[34] GROSSBERG, *supra* n. 1, at 110-113.

divisive differences did not prompt the federal government to adopt one rather than another state's policy on a particular matter as its own rule.

A prime example of strong inter-state discrepancy and conflict concerned marriages between whites and nonwhites. Laws nullifying and/or criminalizing these marriages originated in the colonial Chesapeake and spread eventually to most of the early states (but not all).[35] After slavery was abolished, twenty states strengthened or added laws of this sort, and many specified new prohibitions on marriages of whites to Asians or Native Americans. Individual states added, eliminated, and changed their laws of this sort repeatedly over time. In the late 1930s (when thirty states still maintained such laws), laws in one state or another prohibited "Negroes, Mulattoes, Quadroons, Octoroons, Blacks, Persons of African Descent, Ethiopians, Persons of Color, Indians, Mestizos, Half-Breeds, Mongolians, Chinese, Japanese, Malays, Kanakas, Coreans, Asiatic Indians, West Indians, and Hindus" from validly marrying "Whites."[36]

Despite this welter of changing classifications, Congress raised no objection. Federal agents dispensing benefits such as military pensions for Civil War widows simply examined potential recipients' marriage validity by reference to relevant

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[35] *See* DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE 217-220 & app. (1987).

[36] PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA at 119 (2009); *see* GROSSBERG, *supra* n. 1, at 138.

state laws.[37] When individual states put their own public policy regarding racial restriction above comity (as they regularly did), that was considered an inter-state conflict rather than a federal matter.[38]

Variability in divorce grounds also generated strong inter-state and grass-roots conflicts.[39] States began establishing legal procedures for divorce shortly after the Revolution. Marriages at that time were most frequently broken by one spouse's desertion. Such breaches of marital economic responsibilities defied states' aims to create social and economic order via marriage. In prescribing limited grounds for marital dissolution and overseeing post-divorce support settlements, states underlined their interest in marriage as a means toward social stability.[40]

Over time, state legislatures expanded grounds for divorce. Some did so far more than others. The extent of variation by the mid-19th century horrified divorce

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[37] GROSSBERG, *supra* n. 1, at 133-40; *see Ex Parte Kinney,* 14 F. Cas. 602, 605-06 (C.C.E.D. Va. 1879) (no federal jurisdiction to grant *habeas corpus* relief to white citizen of Virginia – where marriage of "a white person to a negro" was void and punishable by two to five years' imprisonment – imprisoned for living with the woman whom he wed legally in the District of Columbia.). *Cf.* SSR 67-56, 1967 WL 2993 (after *Loving*, 388 U.S. 1, agency could not respect state's racially-based voiding of a marriage when determining marriage validity for "wife's insurance benefits").

[38] *See* STORY, COMMENTARIES, *supra*, §§ 113-1Ba, at 174-75 n. 9; *cf.* Justice Frankfurter (in dissent) learnedly discussing state conflicts, *Sherrer v. Sherrer*, 334 U.S. 343, 356-77 (1948).

[39] HARTOG, *supra* n. 1, at 269-86.

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

opponents, who were aghast at liberalized grounds. Opponents were sure that "venue-shopping" among states would prevail, to the detriment of marriages everywhere. Indiana's loose standards, for example, prompted complaints that Indianapolis in 1858 was "overrun by a flock of ill-used, and ill-using, petulant, libidinous, extravagant, ill-fitting husbands and wives as a sink is overrun with the foul water of the whole house."[41] Violent controversies over "migratory divorce" swirled for decades, without Congress stepping in to legislate a single standard.[42]

Greater panic followed publication of cumulative national divorce statistics in the 1890s. Pressure for tighter regulation of entry into marriage produced new restrictions, state by state, in response: longer waiting periods and higher required age, mandatory marriage licenses, eugenic-inspired disease tests, more specific or fewer grounds for divorce. Common-law marriage fell into disrepute: more and more states made prescribed ceremonies mandatory for marriage validity.[43]

Even in the midst of frequent state alterations in marriage entry requirements, Congress did not enter the realm of state jurisdiction to define a federal standard for any marital feature. In marital diversity the states functioned as

[41] GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 65 (1991) (quoting INDIANAPOLIS DAILY JOURNAL); COTT, *supra* n. 1, at 50-52.
[42] BASCH, FRAMING, *supra* n. 1, at 90-92, 100-102; COTT, *supra* n. 1, at 105-111.
[43] GROSSBERG, *supra* n. 1, at 83-102, 140-52.

"laboratories of change," in the metaphor of Justice Louis Brandeis.[44] So long as they observed prevailing U.S. public policy and constitutional bounds, the states experimented without federal interference.

B. Federal deference to state determinations

Historical evidence shows that the federal government always dealt with inter-state conflicts by assessing the relevant state laws and deciding which pertained; it deferred to state law definitions overall. With regard to the divisive issue of cross-racial marriage, federal courts demurred, *e.g.* in 1879 in *Ex Parte Kinney*: "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 …."[45] On the long-continuing, repeated issue of spouses' eligibility for federal pensions, 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."[46] Soon after the Social

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

[45] 14 F. Cas. at 605-06.

[46] DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY-LAND CLAIMS, John W. Bixler, ed., U.S. Dept. of the Interior, vol. XIX (1887-1930), Washington : G.P.O. , 331-32, viewed at

Security Act promised old-age pensions to surviving spouses, a legal scholar alighted on the need to examine common-law marriage claims carefully, clarifying that "the [Social Security] board must make two findings, *both dependent on state law*, before certification [of valid marriage] can be made."[47] The U.S. Supreme Court in 1940, in noting "the necessity for an examination of local law to determine the marital status" in regard to federal tax obligations, saw no conflict between "a uniform construction of national application" in the federal income tax and Congress making it "dependent on state law."[48]

In every operation of every federal policy touching married couples before DOMA, the relevant agency looked to state law.[49] State marital diversity reigned, and conflicts were resolved within American federalism. Differences among states

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http://www.llmcdigital.org.ezp-prod1.hul.harvard.edu/docdisplay.aspx?textid=17388175

[47] That is, the state in question had to validate common-law marriage, and the applicant had to meet its conditions. James P. Lynch, *Social Security Encounters Common-Law Marriage in North Carolina*, 16 N.C. L REV. 255, 257 (1937-38) (italics in original). *Cf. Cunningham v. Appel*, 12 Fed. Appx 361 (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 C.B. Federal regulations now 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. Federal creation of this category and phrase "deemed valid marriage" acknowledged that federal authority cannot *create* a valid marriage. 20 C.F.R. § 404.346.

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

[49] The Senator Amici, at 18, ignore history in seeing no basis to assume that same-sex couples validly married in their own state would be entitled to federal spousal benefits absent DOMA.

became structural features of American law and practice, always accepted if not fully welcomed. To the extent that national convergence upon similar norms emerged, it did so gradually, from the varied enactments and experiences of the states. Prior to DOMA, where states disagreed, Congress did not pre-empt states' policies in the name of federal uniformity.

V. Change and Continuity into the Present

Marriage has not remained static. Over centuries of our nation's history, state legislatures and courts have continuously reviewed and refined marriage criteria, in order to keep marriage a vital institution aligned with changing standards. Significant shifts in social and sexual mores as well as in the economy have compelled states to revisit and adjust earlier marriage rules.

From the 18th through the mid-20th century, state marriage laws enforced asymmetrical and unequal gender roles (through differing marital requirements for husbands and wives) and racial hierarchy (through race-based marriage proscriptions). Every state established its own varying details on these matters, without federal interposition. These features – now, of course, so easily censurable – began to be altered by various states. Evolving views of gender and race equality,

moving some state legislatures and courts toward change, led eventually to reinterpretation of the 14th Amendment's applicability by the Supreme Court.[50]

From today's perspective, this evolution toward symmetrical marital roles and cross-race freedom to marry may seem obvious or inevitable. Nonetheless, alterations in these directions were extremely divisive when they were initially introduced; opponents called them blasphemous and unnatural, and, more important, claimed they utterly defied and undid the essential meaning of marriage. Yet state legislators and courts used their power over marriage definition to enable change.

State authorities responded to economic pressures and women's rights complaints by eliminating coverture (in stages), even though opponents strenuously objected that this marital unity doctrine, subsuming a wife's legal and economic individuality under her husband's power, had centrally defined marriage for many centuries.[51] The demise of coverture was not complete until feminist suits in the 1970s brought state and federal court reinterpretation of sex discrimination.[52] States' rapid adoption of no-fault divorce (beginning with California's move in

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[50] *Viz. Loving*, 388 U.S. 1 (1967); *Weinberger*, 420 U.S. 636; *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Orr v. Orr*, 440 U.S. 268 (1979).

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

[52] KESSLER-HARRIS, *supra* n. 21, at 117-129.

1969) then converged to re-emphasize the centrality of individual liberty in marriage, as states gave spouses freedom to make their own judgments of marriage satisfaction or breakdown. Yet because states retained their economic interest in marriage, they did not let up on their control over the legalities of divorce and post-divorce settlements.[53]

In analogous fashion, bans on marriage across the color line, which had for centuries been loudly endorsed as natural, God's plan, not discriminatory on any race, and required for U.S. national integrity, fell out of favor. California's Supreme Court led the way in 1948 in overturning that state's ban (established in 1851).[54] Fifteen more states followed in the next two decades.[55] In 1967 the U.S. Supreme Court newly interpreted such state proscriptions, calling them props for white supremacy and an unconstitutional denial of equal protection.[56]

In altering what were seen as essential criteria for marriage, states varied in pattern and pace. Substantial differences among them resulted at every step. Nonetheless, all along, subject only to constitutional limitations every state's stipulations were respected for federal purposes – until DOMA. The variations troubled some citizens, however. A movement formed in the 1880s to push for

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[53] COTT, *supra* n. 1, at 195-196, 205-210; STEPHEN D. SUGARMAN AND HERMA HILL KAY, ED. DIVORCE REFORM AT THE CROSSROADS (1990); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987), 66-67.
[54] *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).
[55] GROSSBERG, *supra* n. 1, at 126-140; PASCOE, *supra* n. 33 at 205-284.
[56] *Loving*, 388 U.S. 1.

uniform national standards for marriage and divorce. Scores of proposals went through Congress aiming to amend the U.S. Constitution to permit federal creation of uniformity. Not one ever passed.[57] The repeated failures showed strong majority support for retaining the existing constitutional allocation of powers.[58]

CONCLUSION

Amici support the position of Appellees, because DOMA breaks with historical understanding of the state and federal roles with respect to marriage. For sound reasons fundamental to our federal system, marital status definition has been left to the states (operating within constitutional bounds). Despite the significant diversity resulting, history shows no precedent for Congressional pre-emption of marital definition for all federal purposes, on grounds of requisite uniformity or any other ground. The decision of the District Court striking down DOMA should be affirmed.

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[57] *See Sherrer*, 334 U.S. at 364 n.13 (Frankfurter, J., dissenting) (noting over seventy such amendments proposed and rejected since the 1880s); RILEY, *supra* n. 41, at 111, 117; Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q., 611, 625-26 (2004).

[58] Even the alternative approach of the uniform statute movement, which drafted model statutes for states to consider adopting voluntarily, has never made headway with marriage and divorce. *See* NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 130-51 (1962); RILEY, *supra* n. 41, at 108-29.

July 10, 2012

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURES 29(d) AND 32(a)

The type-volume limitation of Fed. R. App. P. 32(a)(7)(B) imposes a 14,000 word limitation on a party's principal brief. Pursuant to Fed. R. App. P. 29(d), an amicus brief may be no more than one-half the length authorized for a party's principal brief. This brief complies with Rules 29(d) and 32(a)(7)(B) because it contains 6,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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