IN THE COURT OF APPEALS OF MARYLAND

No. 44
September Term, 2006

FRANK CONAWAY, *et al.*,
Petitioners,

v.

GITANJALI DEANE & LISA POLYAK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF *AMICI CURIAE* ORGANIZATION OF AMERICAN HISTORIANS; BAR ASSOCIATION OF BALTIMORE CITY; MARYLAND LATINO COALITION FOR JUSTICE; MARYLAND NOW; NATIONAL LAWYER'S GUILD- MARYLAND; PUBLIC JUSTICE CENTER; JAMES & COLETTE ROBERTS; CITY OF TAKOMA PARK, THE WOMEN'S LAW CENTER OF MARYLAND, INC.; ASIAN AMERICAN JUSTICE CENTER; ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; FREEDOM TO MARRY; LEGAL MOMENTUM; NATIONAL ORGANIZATION OF WOMEN FOUNDATION; SOUTHERN POVERTY LAW CENTER; AND 34 INDIVIDUAL HISTORIANS & SCHOLARS

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SUMMARY OF ARGUMENT

The history of marriage laws in Maryland is comprised of individual examples of under-represented and disfavored groups overcoming discrimination and exclusion to create a more equal and accessible marriage relationship for all couples. A long-standing requirement that all marriages in Maryland be solemnized by a religious ceremony was gradually opened up to minority religions, and ultimately eliminated in 1963. Bans on interracial marriages in Maryland, which had their genesis in colonial times, finally were repealed in 1967. The passage of the Equal Rights Amendment in 1972 committed the state of Maryland to ensuring an equal status for women in marriage, rejecting a common law tradition of the legal subordination of wives and mothers. In each of these examples, progressive changes have prevailed over hundreds of years of discriminatory social and legal convention. These three historical evolutions in the marriage laws provide poignant examples of the struggles that different groups and individuals have overcome in order to achieve greater equality and inclusiveness in marriage in Maryland. Importantly, the Maryland courts have played a critical role in eliminating these historical vestiges of discrimination and exclusion, often expanding access to marriage even before courts had recognized that the classifications at issue triggered strict scrutiny.

In the instant case, Baltimore City Circuit Court Judge Brooke Murdock's order would end the exclusion of committed same-sex couples from marriage, simply representing the next logical step in the historical evolution of marriage laws in Maryland towards greater inclusion and equality. The growing trend in the United States, and around the globe, is toward marriage equality for same-sex couples. Guaranteeing the

right of gays and lesbians in Maryland to marry is consistent with this state's existing strong commitment to the adoption of laws and policies that guarantee equal treatment for gay men and lesbians in all aspects of their lives, from the workplace to child-rearing to other intimate personal decisions. Maryland laws and judicial decisions already prohibit discrimination against gay people in a myriad of areas, and protect their rights (and the best interests of their children) in their role as parents. The Maryland courts have played a vital role in these developments, issuing decisions that protect the rights of gay men and lesbians to equal treatment under the law. This Court should continue this strong commitment to equal rights, by affirming the decision below and holding that denying the right to marry to same-sex couples violates the fundamental right to marry and the Maryland Declaration of Rights' guarantee of equality of rights under the law.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici share an interest in correcting the historical record regarding the institution of marriage and promoting civil rights by ending the discriminatory exclusion of some couples. Opponents of same-sex marriage often claim that the current form of marriage is a bedrock institution that cannot change or evolve without irreparable consequences. An analysis of the history of marriage in this country demonstrates otherwise. Not only has the institution of marriage evolved to be more inclusive over time, but it has often done so through judicial intervention. *Amici* share in the belief and mission that the current exclusion of certain couples from marriage, on the basis of sex and sexual orientation, is a form of discrimination intolerable to a society founded on principles of equal rights and opportunities. *Amici* include local and national civil rights organizations

committed to promoting equal rights; 34 individual historians and other scholars along with a national organization of historians seeking to promote an accurate version of history; and a municipality, a city bar association, and individuals who represent members of the communities in Maryland impacted by discriminatory exclusion. Individual Statements of Interest are attached in Appendix A.

INTRODUCTION

Marriage has been and remains meaningful to Americans, but its history includes struggles to overcome many discriminatory and exclusionary laws that, at various periods, restricted access to, and equal status in, marriage. States[1] barred most African-Americans from marrying until after the Civil War, and forty of the fifty states at some point had laws restricting interracial marriages. *See* Am. Bar Ass'n, Section of Family Law Working Group on Same-Sex Marriages and Non-Marital Unions, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships* 11 (2004) (hereinafter "*ABA White Paper*"); Cott, *supra*, at 32-35, 40-45. Similarly, "a number of States have prohibited and continue to prohibit persons with disabilities from. . .marrying." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004); *see also* Jill Elaine Hasday, *The Canon of Family Law*, 57 Stan. L. Rev. 825, 865 (2004) (noting that at least nine states continue to impose special restrictions on the marriage of individuals with disabilities). Under the common law regime of coverture, followed by most states

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[1] In the United States, the regulation of marriage historically belongs to the states. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 4, 6, 28-29 (2000). The federal Defense of Marriage Act does not purport to tell a state how to regulate marriage within its own borders.

until the twentieth century, married women were subjected to systematic discrimination and subordination based on their gender, through the denial of the legal rights afforded to married men. *See generally* Cott, *supra*, at 11-12; Hendrik Hartog, *Man & Wife in America, A History* 115-22 (2000). Over time, many of these discriminatory measures have been declared unconstitutional in favor of greater inclusion and equality in the laws governing the marriage relationship.

Maryland shares in this regrettable past, with its own history of laws that imposed specific religious requirements on the marriage ceremony, barred interracial marriages, and denied equal rights to married women. Today this discrimination continues with a statute that limits legal recognition of marriages in Maryland to those entered into between a man and a woman, thus denying the right to marry to same-sex couples. *See* Md. Code Ann., Fam. Law § 2-201 (2004). Like other statutes that preceded it, this restriction denies access to and equal status in marriage to a disfavored and under-represented group, based on a single attribute. But Maryland also shares in the gradual progress toward greater inclusion and equality in the laws governing marriage—the religious ceremony requirement has been eliminated, miscegenation statutes have been repealed, and Maryland has made a constitutional commitment to equal rights for women, a commitment that its courts have repeatedly enforced where married women are concerned.

The Appellees in this case, same-sex couples in Maryland who wish to marry, ask this Court to affirm the judgment of the Circuit Court of Baltimore City that the Maryland statute denying same-sex couples the right to marry violates the Declaration of

Rights. The history of marriage laws in Maryland reveals two major themes relevant to the questions presented in this case. First, marriage laws in Maryland have evolved significantly over time, through a gradual but continuous progression toward greater inclusion and equality. Second, the courts have played a critical role in this historical progression, by ameliorating the effects of or, in some cases, invalidating discriminatory marriage laws based on constitutional principles. It was entirely appropriate for the Circuit Court to weigh the next question presented in this historical evolution, and to hold that excluding same-sex couples from the rights, benefits, and responsibilities of marriage violates the Maryland Declaration of Rights by discriminating against these couples on the basis of sex and sexual orientation and denying them the fundamental right to marry. Significantly, at least as to religious and race discrimination, the courts remedied discrimination in marriage before courts had held that statutes using religious or race-based classifications merited review under a heightened scrutiny standard.

Opponents of same-sex couples' freedom to marry argue that any ruling from this Court affirming the Circuit Court and invalidating existing marriage laws will have radical social consequences. As the history recounted below demonstrates, progressive changes to the laws governing marriage often have been presaged by naysayers warning that social disaster would follow. Not only are such arguments irrelevant in the face of contrary constitutional rights, these arguments in fact are belied by the actual history of marriage laws. Maryland has over a period of many years, and often at the behest of the courts, eliminated prior laws that restricted access to and equal status in marriage based on religion, race, and gender. Gradual but dramatic changes have transformed the legal

contours of marriage and who can marry, without altering its importance or continuing viability as a social institution. The same result can and should obtain in this case.

ARGUMENT

I. Marriage Laws in Maryland Have Evolved to Eliminate Past Discrimination and Inequalities Based on Religion, Race, and Gender.

A. Maryland Has Eliminated Laws That Imposed Religious Barriers of Entry to Marriage.

1. Maryland's historical limitation on marriage to couples willing and able to wed in a government sanctioned religious ceremony has been eliminated.

For most of this state's history a marriage was not valid under Maryland law unless the ceremony was officiated by a specified religious authority. The earliest marriage laws in Maryland limited the right to marry to couples willing and able to wed according to the dictates of the Church of England—excluding not only the non-religious and non-Christians, but also members of many Christian denominations. In 1702, the General Assembly decreed that "no justice or magistrate being a lay man" could perform a marriage ceremony in any parish where a minister was available, and prohibited any marriages that were barred by the Church of England's table of prohibited degrees of affinity. 24 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 26, 1700 – May 3, 1704* 265-66 (William Hand Browne, ed., 1904).[2] The General

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[2] These provisions were part of "An Act for the Establishment of Religious Worship in this Province According to the Church of England; and for the Maintenance of Ministers." 24 *Archives of Maryland*, *supra*, at 265. Interestingly, Maryland law initially allowed for marriages to be celebrated by a "priest minister Pastor *or Magistrate*." 2 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 1666-June 1676* 522 (William Hand Browne, ed., 1884) (emphasis supplied). The history of the

Assembly clarified the religious ceremony requirement in 1717, to provide that all persons wishing to marry had to publish their intent to marry "according to the Rubrick of the Church of England," and be married "according to the Liturgy of the Church of England." 33 *Archives of Maryland: Proceedings and Acts of the General Assembly, May 28, 1717-April 22, 1720* 114 (Clayton Colman Hall, ed., 1913).

The religious ceremony requirement eventually was expanded to allow for ceremonies by all Christian denominations, but the law continued to enshrine discrimination against most non-Christian marriage rites. In 1777, the category of qualifying officiators was broadened to "ministers of the church of England, ministers dissenting from that church, or Romish priests," and an exception was provided allowing Quakers to marry according to Quaker rites. 141 *Archives of Maryland: The General Public Statutory Law and Public Local Law of the State of Maryland* 131-32 (Clement Dorsey, ed., 1840). This phrasing had been replaced by 1860 to allow marriages to be performed by "some minister of the Gospel, ordained according to the rites and ceremonies of his or her church, or in such manner as is used and practiced by the society of people called Quakers." Md. Ann. Code art. 60, § 4 (1860). Although this revision apparently eliminated any exclusion of Christian denominations, the phrase "minister of the Gospel" continued to exclude any non-Christian religious officials.[3]

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religious ceremony requirement, however, originates in English common law. *See Henderson v. Henderson*, 199 Md. 449, 452-54, 87 A.2d 403, 405-06 (1952); *Denison v. Denison*, 35 Md. 361, 371-78 (1872).

[3] Quakers continued to enjoy a special exemption from the religious ceremony requirement, but also were burdened with an additional administrative requirement beginning in 1868, with the marriage laws requiring spouses wed in a Quaker ceremony

That the law continued to embody religious discrimination and to infringe on the religious freedom of thousands of Maryland citizens was recognized publicly at the 1864 Constitutional Convention in Maryland. Delegates debated several proposals to instruct the General Assembly either to allow for civil marriage ceremonies or to broaden the description of qualifying religious ceremonies. *See generally* 102 *Archives of Maryland: Proceedings of the State Convention of Maryland to Frame a New Constitution* 323-26, 328-32, 975-96 (Richard P. Bayly, ed., 1864). Supporters of an amendment argued that the current law discriminated against believers in non-Christian faiths, as well as non-believers, by denying these individuals the right to celebrate the marriage ceremony in a manner of their own choosing. *See id.* at 976, 978, 979-80, 981-82, 985, 987, 989, 993, 994. Supporters of the religious ceremony requirement responded in part by invoking the religious sanctity of marriage under Christian doctrines. *See id.* at 979, 982-83, 986-87. Some argued that it would be improper to adopt a law that would accommodate the interests of a small minority of the population, while offending "a large portion of the best religious sentiment of the State." *Id.* at 984; *see also id.* at 986, 991, 996.

The convention ultimately agreed to urge the General Assembly to adopt a new exception to the religious ceremony requirement for conscientious objectors:

> The General Assembly . . . shall pass laws providing for the celebration of marriage between any persons legally competent to contract marriage, and shall provide that any persons prevented by conscientious scruples from being married by any of the existing provisions of law, may be married by

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to "sign a certificate to the effect that they have agreed to take each other for husband and wife," and to find at least twelve witnesses to attest to the certificate. 1868 Md. Laws ch. 42, § 1. This remained part of the law until 1963. *See* 1963 Md. Laws ch. 406, §2.

> any Judge or Clerk of any Court of Record, or any Mayor of any incorporated city in this State.

Md. Const. art. III, § 49 (1864). Although this amendment was a compromise, it also represented recognition of the need for change.

The General Assembly initially responded to the recommendation from the convention by eliminating the religious ceremony requirement altogether. Unfortunately, the law was re-enacted in 1927, and the recommendation to allow for civil ceremonies for conscientious objectors was ignored. The revised statute allowed "any minister of the Gospel, or official of a religious order or body authorized by the rules and customs of said order or body" to perform marriage ceremonies, and continued the express exemption for Quakers. *See* 1927 Md. Laws ch. 380, § 4; *see also* Md. Ann. Code art. 62, § 4 (1924 & 1935 Supp.). This revision eliminated the prior exclusion of non-Christian religious rites, but continued to discriminate against couples that, for whatever reason, wished to celebrate their marriage outside the confines of an official religious body. It was not until 1963 that the General Assembly finally moved to eliminate this vestige of religious discrimination by enacting a law allowing clerks and deputy clerks of the circuit courts to perform civil marriage ceremonies. *See* 1963 Md. Laws ch. 406, § 2. The General Assembly responded further in 1984, by removing the explicit reference allowing for ceremonies performed by a "minister of the Gospel" without specifying any other religious rites—which had implicitly favored Christianity. *See* 1984 Md. Laws ch. 296, § 2.

The religious ceremony requirement—even in its least discriminatory form—infringed on the free choices of a substantial number of couples. In 1964, the year after the religious ceremony requirement was eliminated, twenty-one percent of couples marrying in Maryland opted for a civil ceremony. *See* Div. of Statistical Research & Records, Md. State Dep't of Health, *Final Vital Statistics Tables, Maryland, 1964* 48 (1965). The percentage of couples choosing a civil ceremony has increased gradually but steadily over the years. *See, e.g.*, Div. of Health Statistics, Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 1995* 134 (1996); Div. of Health Statistics, Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 1985* 16 (1986). Today approximately forty percent of all marriages performed in Maryland are civil ceremonies. *See* Vital Statistics Admin., Md. Dep't of Health & Mental Hygiene, *Maryland Vital Statistics Annual Report 2002* 185 (2003). The reasons that a couple might choose a civil ceremony no doubt are complex and varied.[4] What is clear is that by eliminating this form of religious discrimination, Maryland has opened the way for a significant percentage of couples that marry to express their preference for a non-religious ceremony.

The history of the religious ceremony requirement illustrates a reluctance to depart from "traditional" notions of marriage in response to minority rights, and a desire to close

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[4] In a 1968 study, Maryland court clerks reported a range of reasons cited by couples choosing civil ceremonies: for example, neither person is formally affiliated with a church, their church will not sanction their marriage, each person is of a different religious faith and they compromise on a non-religious ceremony, or the couple desires a quick and quiet wedding. *See* Sidney M. Norton, Pub. Health Serv., U.S. Dep't of Health, Educ. & Welfare, *Interracial Marriages in Maryland*, 85 Pub. Health Reps. 739, 746-47 (1970).

off the institution to those perceived as outsiders, tensions evident in the 1864 constitutional debates. Yet this history also illustrates the resilience of marriage as an institution and its flexibility in the face of changing social and legal standards of fairness and inclusiveness. Speaking at the 1864 constitutional convention, Delegate Robert W. Todd predicted dire consequences should the religious ceremony requirement be repealed: "the foundations of human society would be undermined; all our social relations would become null and void; and general moral ruin and desolation would sweep over our land." 102 *Archives of Maryland, supra*, at 979. When the law eventually was repealed in 1963, there was little debate or fanfare, and today approximately two-fifths of all couples that marry in Maryland opt for a civil ceremony.

2. Maryland courts adopted doctrines that ameliorated the discriminatory effects of the religious ceremony requirement.

In tandem with the slow march toward legislative reform of the marriage religious ceremony requirement, the Maryland courts adopted several doctrines that ameliorated the law's harsh effects. On the surface, the courts invoked the religious ceremony requirement as a necessary formality for the marriage relationship. *See, e.g.*, *Henderson*, 199 Md. at 454, 87 A.2d at 406; *Behr v. Behr*, 181 Md. 422, 426, 30 A.2d 750, 752 (1943); *Knapp v. Knapp*, 149 Md. 263, 267, 131 A. 329, 331 (1925); *Denison*, 35 Md. at 379.[5] An analysis of the handful of published judicial opinions on the requirement, however, suggests reluctance by the courts to invalidate marriages based on nothing more

[5] At the same time, the Maryland courts rejected any suggestion that marriage was a religious sacrament—marriage was considered a civil contract with a "superadded" religious component. *See Denison*, 35 Md. at 380; *see also Behr*, 181 Md. at 426, 30 A.2d at 752; *Picarella v. Picarella*, 20 Md. App. 499, 504, 316 A.2d 826, 830 (1974).

than the apparent lack of a proper religious ceremony. These cases show the Maryland courts played an active role in ameliorating the potentially harsh effects of a discriminatory and inequitable marriage law, prior to the application of constitutional strict scrutiny to religious classifications.[6]

Several doctrines adopted by the Court of Appeals, beginning at the end of the nineteenth century, made clear that the religious ceremony requirement did not have to be met in all cases. Applying a general doctrine to this specific issue, the Court concluded that where a marriage is proven by general reputation, cohabitation and acknowledgement, "it will be inferred that a religious ceremony has taken place." *Richardson v. Smith*, 80 Md. 89, 93, 30 A. 568, 569 (1894); *see also Bauder v. Blackiston*, 149 Md. 322, 324-26, 131 A. 454, 455 (1925). Similarly, the Court recognized that a marriage performed outside of the state and valid where it was

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[6] The Supreme Court did not even recognize that the religious protections of the First Amendment applied to the States until the 1940s. *See e.g., Cantwell v. State of Conn*, 310 U.S. 296, 303, 60 S.Ct. 900, 903 (1940); *Everson v. Bd. of Ed. of Ewing Tp.,* 330 U.S. 1, 67 S. Ct. 504 (1947). Likewise, although the groundwork for strict scrutiny in constitutional equal protection analysis was laid in *United States v. Carolene Products*, 304 U.S. 144, fn.4 (1938) (suggesting "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."), the strict scrutiny test did not come to full fruition until the 1960's, initially in the context of classifications based on race. *See e.g., E.g., McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 288-89 (1964); *Loving v. Virginia,* 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967). The Court first began to use strict scrutiny analysis for cases involving discrimination on the basis of religion in the 1970's. *See e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972)("The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *McDaniel v. Paty*, 435 U.S. 618, 628-29, 98 S.Ct. 1322, 1328-29 (1978).

performed would be recognized in Maryland, even without any religious ceremony. *See Jackson v. Jackson*, 82 Md. 17, 30, 33 A. 317, 319 (1895) ("[A]t most, the statutory provisions relative to the methods of solemnizing marriages in Maryland relate to form and ceremony only."); *see also Henderson*, 199 Md. at 459, 87 A.2d at 409.

Other cases illustrate reluctance by the Court of Appeals to inquire into the specifics and validity of the religious ceremony itself. For example, the Court declined to invalidate a marriage based on one spouse's assertion that the religious ceremony was a "blessing" rather than a "marriage" ceremony. *See Feehley v. Feehley*, 129 Md. 565, 567-68, 99 A. 663, 664-65 (1916). Similarly, evidence that the official who presided over a religious marriage ceremony actually lacked authority within his own religious establishment to perform marriages was held to be irrelevant, as long as the parties to the marriage believed that the officiator was authorized to solemnize marriages. *See Knapp*, 149 Md. at 267-68, 131 A. at 331; *see also Schaffer v. Richardson's Estate*, 125 Md. 88, 92, 93 A. 391, 392 (1915) (allowing a presumption "that the person assuming to officiate at the ceremony was authorized to perform it"). Consistent with these decisions, the Court interpreted the religious ceremony requirement as "not prescrib[ing] the form, nor according to the rites of what church, the marriage shall be celebrated." *Feehley*, 129 Md. at 568, 99 A. at 664 (quoting *Denison*, 35 Md. at 380). All of these cases took place before marriage was considered to be a fundamental right under the Constitution[7] and without an explicit inquiry involving heightened scrutiny.

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[7]*Loving v. Virginia*, was the one of the first Supreme Court cases to hold that marriage is a fundamental right. 388 U.S. at 12; *see also, Skinner v Oklahoma*, 316 U.S. 535, 541

In spite of the apparent statutory strictures, these court decisions relegated the religious ceremony requirement to a position "incidental to the parties' own agreement to marry." John S. Strahorn, Jr., *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev. 211, 221-22 (1938).[8] The religious ceremony requirement thus was placed on par with other formal requirements such as obtaining a proper marriage license—necessary in theory, but its absence seldom considered an adequate basis for invalidating an otherwise valid marriage. *Cf. Feehley*, 129 Md. at 568-71, 99 A. at 665-66; *Picarella*, 20 Md. App. at 512-14, 316 A.2d at 834-35. Indeed, the only published decision in Maryland enforcing the religious ceremony requirement to invalidate a marriage involved two parties who had made no attempt to solemnize their marriage. *See Denison*, 35 Md. at 370 ("It is not pretended that there was ever any solemnization of marriage . . ."). In all other published decisions in which a party challenged the validity of a marriage based on an apparent failure to meet the religious ceremony requirement, the courts found a way around the requirement. *See Henderson*, 199 Md. at 459, 87 A.2d at 409; *Bauder*, 149 Md. at 324-26, 333-36, 131 A. at 455, 458-59; *Knapp*, 149 Md. at 268-71, 131 A. at 331-32; *Feehley*, 129 Md. at 567-68, 99 A. at 664-65; *Jackson*, 82 Md. at 31-34, 33 A. at 319-20. By adopting doctrines that ameliorated the potentially harsh effects of the religious ceremony requirement, the

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(1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

[8] Strahorn continues: "Thus the theory of the religious ceremony as a marriage requirement in Maryland is that the ceremony does not make the parties married, but that the parties marry themselves by their contractual offer and acceptance." Strahorn, *supra*, at 222.

courts elevated the parties' consent and desire to marry over a discriminatory and inequitable marriage law.

B. Historical Prohibitions on Interracial Marriages in Maryland Have Been Repealed.

1. Maryland has overcome its discriminatory history of denying equal access to marriage on the basis of race.

The miscegenation[9] laws of Maryland sadly became a model in the United States for enforcing social conventions of discrimination through legal regulation of the marriage relationship. Maryland bears the unfortunate distinction of having been the first state in the nation to prohibit interracial marriages by statute. *See* Cott, *supra*, at 44; Wallenstein, *supra*, at 22-25. In 1664, the General Assembly enacted a law providing that any freeborn woman who intermarried with a slave, making "shameful Matches" "to the disgrace of our Nation," would become a slave to her husband's master during the life of her husband. *See* 1 *Archives of Maryland: Proceedings and Acts of the General Assembly, January 1637/8-September 1664* 533-35 (William Hand Browne, ed., 1883). An even harsher fate befell any children born of such a marriage, who would become slaves for life, and whose children in turn would be born into slavery and remain slaves for life. *See id.*

The scope of Maryland's prohibition on interracial marriages was expanded by several amendments over the next two hundred years. In 1717, the law was rewritten to

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[9] "Miscegenation" literally means "mixing of species;" the phrase was first used in the U.S. to describe interracial marriages in 1863, by opponents of President Lincoln's reelection. *See* Cott, *supra*, at 98-99; Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law – An American History* 51-52 (2002).

punish all participants in all interracial marriages between whites and blacks. All marriages between a white and a black or "mulatto" were forbidden, regardless of whether the individuals involved were slave, servant, or free, and both the man and the woman were subject to punishment. *See* 33 *Archives of Maryland, supra*, at 112. White men or women who intermarried were condemned to a term of servitude of seven years, while free black men who intermarried were committed to slavery for life. *See id.*[10] Similar provisions remained in place through the 1860s. *See, e.g.*, Md. Ann. Code art. 30, § 128 (1860).[11]

The early ban on interracial marriages in Maryland was cited by the Supreme Court in the infamous decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1856), as evidence that African-Americans were regarded as property at the time of the American Revolution. Chief Justice Roger Taney, a Maryland native himself, described the Maryland law and a similar law from Massachusetts as "show[ing], too plainly to be misunderstood, the degraded condition of this unhappy race" at the time, namely:

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[10] "Mulattoes" born of a white woman were limited to a penalty of seven years of servitude. *See* 33 *Archives of Maryland, supra*, at 112.

[11] The legal prohibition on any mixing of the races was reinforced by parallel statutes that punished the conception of mixed-race children outside of marriage. Early laws provided that the parents of a mixed-race child born outside of marriage would have to serve terms of seven years of servitude, while the child would be a servant until reaching the age of thirty-one years. *See* 13 *Archives of Maryland: Proceedings and Acts of the General Assembly, April 1, 1684-June 9, 1692* 546-49 (William Hand Browne, ed., 1894); *see also* 141 *Archives of Maryland, supra*, at 29-30. By 1860, the law had been amended to condemn a white woman who became pregnant by a black or "mulatto" man to eighteen months to five years in the state penitentiary, while the father of the child, if a free man, would be transported out of the state and sold into slavery. *See* Md. Ann. Code art. 30, § 151-52 (1860).

> [T]hat a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

Id. at 408-09.

In the wake of the Civil War and the end of slavery, Maryland reaffirmed its policy of discrimination in marriage on the basis of race and punishment of any mixing of the races.[12] In 1884, the General Assembly enacted a law prohibiting all marriages "between a white person and a person of negro descent, to the third generation inclusive," and declaring such marriages void. 1884 Md. Laws ch. 264. Violators would be deemed guilty of an infamous crime and imprisoned for a term of eighteen months to ten years in the penitentiary. *Id.*; *see also* Md. Ann. Code art. 27, § 200 (1888); *id.* § 305 (1904); *id.* § 330 (1914); *id.* § 365 (1924). The law was amended in 1935 to add a prohibition on marriages between a white or black individual and "a member of the Malay race." *Id.* § 365 (1924 & 1935 Supp.); *see also id.* § 398 (1957).[13] The miscegenation statutes

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[12] With the end of the Civil War and the passage of the Thirteenth and Fourteenth amendments, Maryland did enact a statute in 1867 which retroactively validated all marriages "between colored people." 1867 Md. Laws. ch. 423, § 9.

[13] A parallel statute in existence throughout this same period provided that a white woman who became pregnant by a black or "mulatto" man could be sentenced to between eighteen months and five years in the state penitentiary. *See* Md. Ann. Code art. 72, § 113 (1879); *id.* art. 27, § 218 (1888); *id.* § 337 (1904); *id.* § 370 (1914); *id.* § 415 (1924); *id.* § 493 (1939); *id.* § 416 (1957).

remained on the books in Maryland until 1967, when litigation attacking the constitutional validity of these statutes finally forced Maryland and other states to retreat.

2. Courts ultimately forced the rescission of miscegenation statutes, by holding the laws unconstitutional.

The constitutional revolution against miscegenation statutes started with a decision from the Supreme Court of California in 1948.[14] Citing the equal protection and due process clauses of the Fourteenth Amendment,[15] the Court held that a California state law that prohibited any white person from marrying "a Negro, mulatto, Mongolian or member of the Malay race" was unconstitutional and invalid. *Perez v. Sharp*, 32 Cal. 2d 711, 715-18, 198 P.2d 17, 19-21 (1948). In response to an argument that the miscegenation statute reduced race tension and social problems, the Court noted that the law in fact "perpetuat[ed]. . .the prejudices that give rise to the tension" and that concerns about public peace could not overcome an individual's constitutional rights. *Id.* at 725, 198 P.2d at 25-26. The court further recognized the fundamental importance of marriage, and specifically the role of personal choice in marriage, ruling that "[since] the essence of the right to marry is freedom to join in marriage with the person of one's choice, a

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[14] An earlier round of cases had been filed in a variety of states in the late 1800s to challenge miscegenation statutes, based on the newly-enacted Fourteenth Amendment and Civil Rights Act of 1866. *See* Cott, *supra*, at 101 & n.72. All of these efforts failed, except for a decision in Alabama, which was overturned three years later, and a decision in Louisiana, which was mooted by a subsequent legislative reenactment. *See id.*

[15] Interestingly, the couple seeking to marry had argued that the statute prohibited their free exercise of religion, in violation of the First and Fourteenth Amendments, because the law denied them the right to celebrate the sacrament of marriage in their Catholic church, which itself had no rule prohibiting interracial marriages. *Perez*, 32 Cal. 2d at 713, 198 P.2d at 18.

segregation statute for marriage necessarily impairs the right to marry." *Id.* at 717 (emphasis added). The court went on, "[a] member of any of these races may find himself barred by law from marrying the person of his choice and *that person to him may be irreplaceable*. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Id.* at 725 (emphasis added).

At the time of the *Perez* decision, thirty states had statutes prohibiting interracial marriages. *See* Wallenstein, *supra*, at 253-54. During the next eighteen years, from 1948 through 1966, twelve states joined California by repealing their laws. *See id.* The United States Supreme Court finally finished what *Perez* had started, with the Court's holding in 1967 in the case of *Loving v. Virginia* that state laws restricting the freedom to marry based on race violate the equal protection and due process clauses of the Fourteenth Amendment. *See* 388 U.S. 1, 11-12 (1967). At the time of the *Loving* decision, sixteen states still had statutes prohibiting or punishing interracial marriages. *Id.* at 6. The persistence of these statutes apparently reflected public opinion in the United States at the time—in 1967, approximately three-quarters of Americans disapproved of interracial marriages. *See* E.J. Graff, *What Is Marriage For*? 156 (1999). Almost forty years later, those figures are reversed, with three-quarters of Americans today approving of interracial marriages. *See* The Gallup Organization for AARP, *Civil Rights and Race Relations* 70-75 (Jan. 2004).[16] The lasting effects of the *Loving* decision also can be seen in Census estimates showing that the percentage of interracial married couples in the United States has increased tenfold since 1960. *See* U.S. Census Bureau, *MS-3:*

[16] *Available at* http://assets.aarp.org/rgcenter/general/civil_rights.pdf.

Interracial Married Couples: 1980 to 2002 (Sept. 15, 2004);[17] U.S. Census Bureau, *MS-3: Interracial Married Couples: 1960 to Present* (Jan. 7, 1999).[18]

Loving was written during the evolution of the doctrine of heightened scrutiny and before the doctrine had been formalized in its current form.[19] In fact, while *Loving* emphasizes the importance of paying particular attention to categorizations based on race, the standard the Court applied to invalidate the statute is actually similar to that used in rational basis review. The *Loving* Court notes "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." *Loving*, 388 U.S. at 11. The Court has subsequently made clear that classifications based on invidious discrimination fail even a rational basis review. *See e.g., City of Cleburne, Texas v. Cleburne Living*

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[17] *At* http://www.census.gov/population/socdemo/hh-fam/tabMS-3.pdf.

[18] *At* http://www.census.gov/population/socdemo/ms-la/tabms-3.txt.

[19] The first case enunciating a higher level of scrutiny for racial classifications was *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and must pass the test of "rigid scrutiny"). The standard had been foreshadowed by *United States v. Carolene Products*, 304 U.S. 144, fn.4 (1938) (suggesting "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). *Korematsu* remains one of the very rare Supreme Court cases in which a racial classification which was not designed to remedy past race discrimination, survived strict scrutiny. Gerald Gunther & Kathleen Sullivan, *Constitutional Law,* p. 664 (13th ed. 1997). It was not until the 1960's that the Court explicitly applied a form of strict scrutiny to invalidate racial classifications. *E.g., McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 288-89 (1964); *Loving v. Virginia,* 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967).

Center, Inc., 473 U.S. 432 (1985)(requiring special use permit for a home for disabled persons unconstitutional because it "rests on an irrational prejudice against the mentally retarded");[20] *Romer v. Evans*, 517 U.S. 620 (1996) (finding a constitutional amendment prohibiting gay men and lesbians from petitioning the legislature unconstitutional because "the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests").

Furthermore, *Loving* emphasizes the fundamental right to marriage, reminding courts that racial classifications are not the only constitutionally-relevant problem for laws that discriminatorily exclude some couples from marriage. The Court notes, "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12 (*citing Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Maynard v. Hill*, 125 U.S. 190 (1888)). In these ways, *Loving*'s analysis of marriage discrimination is not confined to miscegenation statutes or other laws of marriage exclusion that require a heightened scrutiny.

Maryland remained one of the holdout states until the very end, not repealing its miscegenation statutes until 1967, while *Loving v. Virginia* was pending before the Supreme Court. *See* 1967 Md. Laws ch. 6, § 1. During the 1966 legislative session, Verda Welcome, the only African-American member of the Maryland Senate, had sponsored a bill to repeal the laws, which had passed the Senate but failed in the House of

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[20]In *Cleburne* the Court emphasized that a community's prejudice is never even a rational basis for government discrimination. *Cleburne*, 473 U.S. at 448 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.")(quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Delegates by a vote of 66 to 50. *See* Wallenstein, *supra*, at 208. The measure was reintroduced in the next legislative session, and passed both the Senate and the House in March 1967. *See id.* To its credit, Maryland was the only southern state to repeal its miscegenation statutes before the *Loving* decision. *See id.* at 253-54. The state's repeal earned Maryland a specific mention in the *Loving* decision, *see Loving*, 388 U.S. at 6 n.5, in some sense completing the circle from the *Dred Scott* opinion.

While the Maryland courts were not at the forefront in the legal battles over race discrimination in marriage, there are several historical examples of cases in which the Maryland courts acted in limited respects to soften the impact of the miscegenation statutes. As noted above, Maryland's original miscegenation statute from 1664 contained a harsh provision that condemned the children of interracial marriages to slavery for life, an effect that carried over to condemn all proceeding generations to slavery as well. This provision of the law was repealed in 1681, only seventeen years later. *See* 7 *Archives of Maryland: Proceedings and Acts of the General Assembly, October 1678-November 1683* 204-05 (William Hand Browne, ed., 1889); *see also* Wallenstein, *supra*, at 23. In the interim, a number of families descended from white women who had married African-Americans were enslaved. *See* Wallenstein, *supra*, at 23. Around the time of the Revolutionary War, several of the descendants of these white women—descendants born into slavery on the basis of interracial marriages a hundred years earlier—succeeded in petitioning the Maryland courts for their freedom. *See id.* at 24. In several published decisions, the General Court of Maryland accepted the argument that the petitioner should be adjudged free, based on the petitioner's descent many generations ago from a

white woman, even though that same white woman had violated the 1664 law by marrying an African-American man. *See Shorter v. Rozier*, 3 H. & McH. 238 (1794); *Butler v. Craig*, 2 H. & McH. 214 (1787); *Toogood v. Scott*, 2 H. & McH. 26 (1782). These decisions ameliorated some of the effects of one of the harshest laws in Maryland's long history of denying equal marriage rights to non-whites, but only for litigants with some claim to white female blood.

Many years later, in 1964, Judge W. Albert Menchine on the Circuit Court for Baltimore County reached a similar result by interpreting the miscegenation statutes to allow an interracial marriage for two litigants with claims to white lineage. Elizabeth Medaglia, a white woman, wished to marry Benjamin A. deGuzman, a Filipino man with a white grandmother. *See* Wallenstein, *supra*, at 207. The Maryland miscegenation statute in place at the time prohibited marriages between whites and "members of the Malay race." After they were denied a marriage license by the clerk of the courts in Baltimore County, Ms. Medaglia filed suit in Circuit Court arguing that the miscegenation statute was unconstitutional under the Fourteenth Amendment because it deprived her of due process of law. *See id.* Judge Menchine avoided the constitutional question but assured the party's right to marry by holding that, even assuming that in general Filipinos would be considered "Malay," Dr. deGuzman was not "Malay" because of his white heritage. *See id.* Again, this decision was only helpful for litigants with some claim to white blood.

There is only one known decision in which a Maryland court addressed the constitutionality of the miscegenation statutes. In 1957, a criminal charge was filed in the

Circuit Court for Baltimore City against a white woman who had become pregnant by an African-American man, exposing the mother to a potential sentence of eighteen months to five years in the state penitentiary under one of the state's miscegenation statutes. *See State of Maryland v. Shirley Ann Howard*, The Daily Record, April 22, 1957, at 3; *see also* Md. Ann. Code art. 27 § 416 (1957). This case apparently was the only known prosecution in the City under this statute. *See id.* Chief Judge Emory Hamilton Niles held that the statute was unconstitutional and void, because it violated the principles of equal protection under the Fourteenth Amendment, by subjecting a white woman to punishment for certain conduct without subjecting women of other races to the same punishment for engaging in the same conduct. *See id.*[21] Although this decision was progressive for its time, it still did not challenge the ban on interracial marriages. That constitutional question had to await the *Loving* decision.

It is hard to overstate the sea change wrought by the rescission of miscegenation statutes across the United States. In those thirty states that still had such statutes on the books at the time of the *Perez* decision in 1948, the statutory bans on interracial marriages codified a time-honored social convention.[22] As the Court of Appeals of Maryland reaffirmed in a 1952 decision, interracial marriages were "condemned by the State of Maryland as contrary to its public policy" and considered "absolutely void in

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[21] The ACLU of Maryland supported the mother in an *amicus curiae* brief filed by Francis D. Murnaghan, Jr. *See State of Maryland v. Shirley Ann Howard, supra.*

[22] It is worth noting that *Perez* was decided at a time when the doctrine of "separate but equal," pronounced by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), still governed race relations in the United States.

Maryland." *Henderson*, 199 Md. at 459, 87 A.2d at 409. Such marriages always had been "denounced by [Maryland's] own positive state policy as affecting the morals or good order of society." *Jackson*, 82 Md. at 30, 33 A. at 319. Adherence to the policy that any interracial marriage would be considered absolutely void in Maryland was significant—although marriages were "voidable" under Maryland law for any number of reasons, there were few defects that would render a marriage absolutely void, meaning that the marriage is without legal effect and subject to collateral attack at any time. *See generally* Strahorn, *supra*.[23]

The repeal of the miscegenation statutes in Maryland thus was a significant social reform. The effects were immediate. Maryland's repeal became effective June 1, 1967; within the first eighteen months, over five hundred interracial couples across Maryland were able to marry lawfully. *See* Norton, *supra*, at 740. The repeal ended hundreds of years of past discrimination against couples like them, and finally opened the way for many thousands of Maryland couples to exercise their right to marry in the coming years.

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[23] Other examples of impediments that would render a marriage absolutely void include bigamy, a spouse under the age of seven, certain blood relationships (e.g., brother-sister), and limited types of fraud or mental incapacity. *See* Strahorn, *supra*, at 225-35, 236-38. By contrast, failure to follow the religious ceremony or marriage license requirements, blood relationships such as uncle and niece, an underage spouse over seven, impotence, mistake, intoxication, certain types of fraud, and duress all could render a marriage voidable but not absolutely void. *See id.* at 220-24, 228-31, 233-38.

By the late 1800s, Maryland began to enact legislative changes to the common law regime. The 1867 revision of the Maryland Constitution included a provision protecting the property of the wife from the debts of the husband. Md. Const. art. III, § 43 (1867). This was followed in 1892 and 1898 by the passage of several "Married Women's Acts" in Maryland, which attempted to place a wife "on the same footing as her husband with respect to her property and personal rights." *Sezzin v. Stark*, 187 Md. 241, 258, 49 A.2d 742, 750 (1946). The 1892 Act implemented the 1867 constitutional revision, by providing that property belonging to a woman upon her marriage, or acquired by the woman after her marriage, would be protected from the debts of her husband. *See* 1892 Md. Laws ch. 267. The 1898 Act was much more expansive, guaranteeing married women the same rights as unmarried women to hold and dispose of their property independently; to appoint a trustee for that purpose if desired; and to engage in business, make contracts, and bring suit on contract, property, or tort claims. *See* 1898 Md. Laws ch. 457.

Maryland actually was behind the times in its enactment of the Married Women's Acts. Other states had enacted married women's property laws beginning in the 1830s, although many of the early laws, like Maryland's 1867 constitutional amendment and 1892 Act, focused on the right to hold property without including provisions for entering into contracts or other economic rights. *See* Cott, *supra*, at 52-53; Graff, *supra*, at 30-31. Beginning in the 1850s and 1860s, a number of these states passed updated statutes that provided fuller economic rights for married women. *See* Cott, *supra*, at 53-54; Graff, *supra*, at 30-31.

Although the Married Women's Acts equalized a number of the rights and duties of spouses in the marriage relationship, the Maryland courts continued to follow various common law doctrines that treated husbands and wives and fathers and mothers differently.[24] A full guarantee of equal rights for women did not come until the adoption of Maryland's Equal Rights Amendment (ERA) in 1972. Article 46 of the Declaration of Rights provides: "Equality of rights under the law shall not be abridged or denied because of sex." With the passage of the ERA, Maryland, finally, formally committed itself to full equality for women, including female spouses in the marriage relationship. The amendment "was intended to, and did, drastically alter traditional views of the validity of sex-based classifications." *Rand v. Rand*, 280 Md. 508, 516, 374 A.2d 900, 905 (1977). The realization of the expansive guarantee of the ERA has come only gradually, however, through judicial decision-making removing remaining vestiges of discrimination that had been part and parcel of the coverture regime. The march toward gender equality in marriage provides perhaps the best historical example of the role played by the Maryland courts in guaranteeing greater inclusion and equality in the marriage relationship.

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[24] A prime example is the survival of the common law doctrine of interspousal immunity, which prevented a wife from suing her husband for damages caused by him. The Court of Appeals initially held that the doctrine had not been altered by the Married Women's Acts, *see Furstenburg v. Furstenburg*, 152 Md. 247, 252-53, 136 A. 534, 536 (1927), a narrow and somewhat inexplicable reading of the Acts. It was only after the passage of the Equal Rights Amendment that the Court of Appeals gradually abrogated the doctrine, through a series of decisions stretching over twenty-five years. *See Lusby v. Lusby*, 283 Md. 334, 357-58, 390 A.2d 77, 88-89 (1978); *Boblitz v. Boblitz*, 296 Md. 242, 273-75, 462 A.2d 506, 521-22 (1983); *Bozman v. Bozman*, 376 Md. 461, 467-68, 830 A.2d 450, 454 (2003).

2. *Maryland courts have played a vital role in enforcing the equal rights of women in the marriage relationship.*

Ensuring greater equality for women in the marriage relationship inevitably creates conflicts with common law and statutory principles that have been enshrined in the law for generations. Since the passage of the ERA in Maryland in 1972, the Maryland courts have played a vital role in sorting out these conflicts. Many of these decisions have required the courts to impose upon women in a marriage various obligations that historically have been imposed primarily on men. In one of the earliest decisions to consider the effect of the ERA, this Court held that the obligation to provide child support must be shared equally by both parents. *See Rand*, 280 Md. at 516, 371 A.2d at 905. The holding invalidated the common law doctrine that the father was primarily responsible for financially supporting his minor children. *See id.* at 510-11, 371 A.2d at 902; *see also Kemp v. Kemp*, 287 Md. 165, 172 n.3, 411 A.2d 1028, 1032 n.3 (1980) (recognizing that after the passage of the ERA, the obligation to provide necessaries for support of minor children applies equally to mothers and fathers). Other decisions have elevated the rights of men in certain areas, for example holding that it would be error for a court to assume that a mother would be a better custodial parent based on her gender. *See Giffin v. Crane*, 351 Md. 133, 154-55, 716 A.2d 1029, 1040 (1998).

In other cases, the courts have invalidated common law doctrines or statutory enactments that treated men and women unequally as spouses. The Court of Special Appeals ruled that the traditional legal presumption that a husband is the dominant figure

in a marriage is invalid after the ERA. *Eckstein v. Eckstein*, 38 Md. App. 506, 379 A.2d 757 (1978). The court reviewed the post-ERA cases in Maryland that considered such a presumption, all of which found that the ERA invalidated such a presumption. *Id.* The court then used that information to conclude that when the wife was only permitted advice from her husband and her husband's counsel before signing a custodial agreement and when she was furthermore threatened by them, her signature was made under duress. *Id.*

In *Blount v. Boston*, 351 Md. 360, 385 n.5, 718 A.2d 1111, 1124 n.5 (1998), this Court used the same reasoning to invalidate the legal presumption that a wife's domicile is the same as that of her husband. In *Schroeder v. Broadfoot*, 142 Md. App. 569, 585-86, 790 A.2d 773, 783 (2002), the court similarly held when a court determines the proper surname for a child, it may not employ any presumption that adopting the father's surname rather than the mother's is in the child's best interests. The court considered the history of surnames back to the eleventh century and found that the custom of giving a child of unmarried parents her mother's maiden name while giving a child of married parents her father's name derived from the system of coverture and of "women's secondary status in the legal and social systems." *Id.* at 579/ 779. There was a time at which a child born of unmarried parents had no property and thus no name, and only could establish one by reputation. *Id.* The Court found that relying on surname customs to create a legal presumption that children should have their father's name was not within the broad discretion given trial courts to determine the best interests of the child. *Id.* at 582, 781.

These are but some of the examples of the cases in which the Maryland courts have intervened to enforce gender equality in marriage. *See also, e.g., Coleman v. State*, 37 Md. App. 322, 327-29, 377 A.2d 553, 556-57 (1977) (finding that the ERA was violated by a state law that criminalized the actions of a husband who failed to support or who deserted his wife, but which did not create any reciprocal crime for women); *Kline*, 287 Md. at 592-93, 414 A.2d at 933 (using the same reasoning to find the common law cause of action for criminal conversation-- a tort action for adultery, allowing a husband to sue another man, with whom his wife had sexual relations, for damages-- was unconstitutional and no longer valid in Maryland); *Condore*, 289 Md. at 530, 425 A.2d at 1018 (holding that the ERA abrogated the common law doctrine of necessaries, which required a man but not a woman to provide for necessaries for his spouse. In these, and other, cases, the Maryland courts invalidated state laws that made distinctions solely on sex and abrogated common law doctrines or statutory provisions that provided unequal rights or imposed unequal duties on men and women in the marriage relationship.

In each of these decisions, the Maryland courts have acted to fulfill the broad mandate of the ERA and the changed social policies that it represents, even when this requires the abrogation of common law doctrines and statutory provisions. The lengthy history of discrimination and the "traditional" subordination of women in the marriage relationship have yielded to the dictates of the Maryland Declaration of Rights. This case presents the Maryland courts with the same type of challenge—to fulfill the constitutional rights of the individual plaintiffs, even in the face of a contrary statutory provision and a lengthy history of discriminatory treatment and contrary social convention.

II. The History of Marriage Laws in Maryland Provides a Path to Marriage Equality for Gays and Lesbians.

A. Some States and Nations Are Moving Toward Marriage Equality for Gays and Lesbians.

The laws of most states, including Maryland, continue to deny the rights, benefits, and responsibilities of marriage to same-sex couples. *See, e.g.*, Md. Code Ann., Fam. Law § 2-201. Nonetheless, in recent years several states have moved toward ending the exclusion of same-sex couples from marriage, some compelled by decisions from their state courts declaring existing restrictions unconstitutional. Courts in Hawaii held that a state law limiting marriage to opposite-sex couples violated the equal protection clause of the state constitution, *see Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *18-22 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd,* 87 Haw. 34, 950 P.2d 1234 (1997); *Baehr v. Lewin*, 74 Haw. 530, 579-80, 852 P.2d 44, 67 (1993), only to be mooted by the adoption of a state constitutional amendment shielding the discriminatory exclusion from constitutional review. *See* Haw. Const. art. I, § 23 (1993 & 2004 Supp.).[25] In 1999, the Supreme Court of Vermont held that excluding same-sex couples from the rights, benefits, and responsibilities of marriage under state law violated the "common benefits" provision in the state constitution. *See Baker v. State*, 170 Vt. 194, 224, 744 A.2d 864, 886 (1999). The Vermont legislature responded by allowing same-sex couples to join together in "civil unions," under which couples "may receive the benefits and protections and be

[25] Alaska likewise enacted a constitutional amendment mooting a lower court decision which had cast significant doubt on whether a state policy directive barring same-sex couples from marriage violated the equal protection clause of the state constitution. *See* Alaska Const. art. I, § 25 (2004); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

subject to the responsibilities of spouses." Vt. Stat. Ann. tit. 15, § 1201(2) (2004); *see id.* §§ 1201-07. Connecticut also has adopted a statutory scheme for civil unions, which seeks to provide at the state level most of the "same benefits, protections and responsibilities" currently provided to spouses in marriage, while short of the intangible and tangible equality that comes only with marriage itself. Conn. Gen. Stat. § 46b-38nn (2006 Supp.); *see Kerrigan v. State,* 2006 WL 2089468 (Conn. Super. Ct. Jul. 12. 2006) (*see infra* note 29).

In 2003, Massachusetts became the first state in the nation to end the exclusion of same-sex couples from marriage when the Supreme Judicial Court held equal access mandated by the equal protection provision of the Massachusetts Constitution. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 341-42, 798 N.E.2d 941, 968 (2003). Anti-gay opponents noisily (and characteristically) predicted that this decision would "spell the end of marriage." Stanley Kurtz, *Deathblow to Marriage: Gay Marriage Has Real Implications*, NationalReviewOnline, Feb. 05, 2004, *available at* http://www.nationalreview.com/kurtz/kurtz200402050842.asp. As with those instances in the past when restrictions on the right to marry were removed, however, the institution of marriage once again proved its continuing resilience and flexibility, as demonstrated by the subsequent health of marriage in Massachusetts. Specifically, the number of marriages performed in Massachusetts both in 2005 (39,074) and 2004 (41,549) exceeded the number of marriages performed in 2003 (36,225). Nat'l Ctr. for Health Statistics, U.S. Dep't of Health and Human Services, Vol. 54, No. 20, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2005*, at 6 (2006). Perhaps even more telling, the

number of divorces performed in Massachusetts in both 2005 (14,308) and 2004 (14,148) was significantly less than that in 2003 (15,903). *Id.* By either measure, the overall health of marriage in Massachusetts has only improved following the state's equal treatment of same-sex couples.[26]

In the wake of the *Goodridge* decision, lower courts in California, New York, Washington, and Oregon likewise held that laws in their states barring same-sex couples from marriage violate provisions in their state constitutions, though these decisions have been reversed or mooted. A split panel of an intermediate appellate court in California reversed the trial court, after applying rational basis review, holding that the state's interests in preserving the status quo and "in carrying out the will of its citizens" are

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[26] The marriage and divorce rates seen in Massachusetts are similar to the marriage and divorce rates seen in Scandinavian countries after they enacted registered partnership laws. Yet the rates in Scandinavian countries are all the more telling because same sex unions are not included in their marriage and divorce statistics. In Denmark, for instance, the marriage rate increased after the Registered Partnership Law took effect in 1989 – the country experienced a 14 percent increase in the marriage rate in the period between 2000 and 2004 compared with the rate in the period between 1985 and 1989. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR WORSE?: WHAT WE HAVE LEARNED FROM THE EVIDENCE 173-74 (2006). Similarly, the divorce rate in Denmark in the period between 2000 and 2004 was "slightly lower" than the rate in the period between 1985 and 1989 (i.e., 285.5 per one hundred thousand people between 1985 and 1989, compared with 282.56 per one hundred thousand people between 2000 and 2004). *Id.* at 173-74, 271-72. Norway experienced similar results, after its Registered Partnership Act took effect in 1993. In the period between 1989 and 1993, the average marriage rate per one hundred thousand people was 457.32, while the average divorce rate was 235.74. *Id.* at 175-76, 275-76. In the period between 2000 and 2004, the average marriage rate per one hundred thousand people was 516.1, while the average divorce rate was 230.46. *Id.* Sweden's Registered Partnership law took effect in 1995. In the period between 1991 and 1995, the average marriage rate per one hundred thousand people was 402.24, while the average divorce rate was 248. *Id.* at 278-79. In the period between 2000 and 2004, the average marriage rate per one hundred thousand people was 437.8, while the average divorce rate was 235.02. *Id.*

legitimate interests. *In re Marriage Cases,* ___Cal.Rptr.3d___, 2006 WL 2838121 at *34-39 (Cal. App. 1st Dist. Oct. 5, 2006). This decision is on appeal to the California Supreme Court. The New York decision was reversed on the grounds that New York does not recognize a fundamental right to marry a same-sex partner and that, under the most minimal level of review and absent a state Equal Rights Amendment guaranteeing sex equality, the exclusion could stand. *Hernandez v. Robles*, 2006 WL 1835429 (N.Y. Jul. 6, 2006). The Washington decision was also reversed following extreme "deferential" review and minimal scrutiny of the exclusion and its purported justifications. *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006) (*en banc*). The Oregon decision was mooted based on a subsequent state constitutional amendment. *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *6-7 (Or. Cir. Ct. Apr. 20, 2004), *rev'd,* 338 Or. 376, 390, 398, 110 P.3d 91, 98, 102 (2005).[27] Challenges to the constitutionality of denying marriage licenses to same-sex couples are pending in Connecticut, Iowa, and New Jersey under those state constitutions. *Kerrigan v. State*, 2006 WL 2089468 (Conn. Super. Ct. Jul 12. 2006)[28]; *Varnum v. Brien*, No. CV-5965 (Iowa District Ct. filed Dec.

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[27] Effective December 6, 2004, Oregon adopted a constitutional amendment that expressly limits marriage to opposite sex couples. *See Li*, 338 Or. at 387-88, 110 P.3d at 97.

[28] In *Kerrigan*, several same-sex couples challenged the distinction between civil unions and marriage that Connecticut introduced in its civil union statute. The trial court granted summary judgment for the state, asserting that the couples had comparable state-level rights to married couples and that the state constitution required "that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process." *Kerrigan v. State*, 2006 WL 2089468, *11 (Conn. Super. Ct. Jul 12. 2006). This decision has since been appealed. *See* Press Release, Gay & Lesbian Advocates & Defenders (GLAD), *GLAD to Appeal Connecticut Marriage Decision* (July 13, 2006), *available at* http://www.glad.org/News_Room/press118-07-13-06.html.

13, 2005); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super. Ct. Nov. 5, 2003), *aff'd*, 875 A.2d 259, 274 (N.J. Super. Ct. App. Div. 2005).

In tandem with these developments, state and local governments and private employers across the United States have extended legal recognition and protection to unmarried same-sex couples. As recounted above, Vermont and Connecticut have enacted civil union statutes. Vt. Stat. Ann. tit. 15, § 1201(2) (2004); *see id.* §§ 1201-07; Conn. Gen. Stat. § 46b-38nn (2006 Supp.). Four states—California, Hawaii, Maine, and New Jersey—have established statewide procedures for same-sex couples to register formally as "partners," entitling the couples to some or virtually all of the same rights, benefits, and responsibilities available to married spouses. *See* Cal. Fam. Code § 297 (1982 & 2005 Supp.); *id.* § 297.5; Haw. Rev. Stat. §§ 572C-1 to -7 (1993 & 2004 Supp.); Me. Rev. Stat. Ann. tit. 22, § 2710 (2004); N.J. Stat. Ann. §§ 26:8A-1 to -12 (1996 & 2005 Supp.). Alaska,[29] Arizona, and New York provide limited legal protections to domestic partners. *See, e.g.*, Alaska Stat. § 47.24.016(a)(2) (2004); Ariz. Rev. Stat. §§ 36-843(A)(6), 36-3231(A)(4) (2003); N.Y. Exec. Law § 354-b(2)(b)(i) (2001 & 2005 Supp.); N.Y. Pub. Health Law § 2805-q (2002 & 2005 Supp.); N.Y. Workers' Comp.

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[29] In *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 793-94 (Alaska 2005), the Supreme Court of Alaska held that the state had violated the equal protection provisions of the Alaska Constitution by denying the same-sex domestic partners of state employees the same benefits that it provided to the spouses of married employees, suggesting that Alaska may soon expand the benefits provided to the same-sex domestic partners of state employees. Similarly in New Hampshire, a state trial court found a violation of that state's statute prohibiting employment discrimination on the basis of sexual orientation when a same-sex domestic partner was not permitted to use her dependent care leave benefits to care for her partner's biological child. *Bedford v. New Hampshire Community Technical College*, 2006 WL 1217283 (N.H. Super. Ct. May 3, 2006).

Law § 4 (2005). In at least nine other states—Connecticut, Delaware, Iowa, Illinois, New Mexico, Oregon, Pennsylvania, Rhode Island, and Washington—state employees with domestic partners are entitled to related employment benefits. *See, e.g.*, R.I. Gen. Laws § 36-12-1(3) (1997 & 2004 Supp.); Wash. Admin. Code § 182-12-119(1) (2004); *ABA White Paper*, *supra*, at 22-29; Press Release, Governor Rod R. Blagojevich, *Governor Blagojevich Extends Health Benefits to State Employee Domestic Partners* (May 8, 2006).[30] The District of Columbia and a number of local governments have adopted similar policies. *See, e.g.*, D.C. Code Ann. §§ 32-701 to -710 (2001); *see also ABA White Paper*, *supra*, at 29. Finally, thousands of private employers across the nation offer benefits to domestic partners of their employees, and this figure continues to rise. *See ABA White Paper*, *supra*, at 34.[31]

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[30] *Available at* http://www.illinois.gov/news/.

[31] In 1982, only one U.S. employer (the *Village Voice*, a New York City weekly) offered health insurance benefits to same-sex partners. Human Rights Campaign, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans 2005-2006*, at 3 (2006), *available at* http://www.hrc.org/Template.cfm?Section=Work_Life. As of 2005, however, over fifty percent of the Fortune 500 provided "equal benefits to same-sex couples." *Id.* at 1. Since 2002, moreover, Human Rights Campaign (HRC) has graded the performance of participating private companies with 500 or more employees against a set of gay, lesbian, bisexual and transgender rights (such as "prohibits discrimination based on sexual orientation" and "offers at least one domestic partner health benefit"). Human Rights Campaign, *Corporate Equality Index 2006: A Report Card on Gay, Lesbian, Bisexual and Transgender Equality in Corporate America* 7, 12 (2006), *available at* http://www.hrc.org/Template.cfm?Section=Work_Life. For each right, HRC deducted points from individual companies if that company had "engaged in action that would undermine the goal of equal rights," resulting in an overall Corporate Equity Index (CEI) score for each company. *Id.* at 12. In 2006, 138 companies received perfect CEI scores from HRC, representing a "tenfold increase from the number that scored 100 percent" in 2002. *Id.* at 5.

The State mentions in its brief that a number of states have passed constitutional amendments restricting marriage to different-sex couples. (Appellant Brief at 6-7.) What the State's brief fails to mention, however, is that just as many states have considered and rejected constitutional amendments to ban same-sex marriage. The Maryland legislature, for example, has rejected amendments in each of the last three years.[32] In fact, same-sex marriage ban amendments have been defeated at least 38 times by 22 different states in the last three years.[33] In Florida and California, proposed ballot initiatives did not even receive enough votes to make it onto the ballot. *Id.* (Appendix B).

Similar trends are occurring around the world, as other nations move toward eliminating legal restrictions on same-sex couples seeking marriage and family protections. A recent decision from the Constitutional Court of South Africa held that, pursuant to the South African Constitution's equality guarantee expressly prohibiting discrimination based on sexual orientation, the common law and statutory access to marriage must include same-sex couples. *See Minister of Home Affairs and Another v. Fourie and Another*, (2005) Case CCT 60/04, S. Afr. Const. Ct.[34] Appellate courts in Canada likewise held that excluding same-sex couples from marriage and its the rights,

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[32] *See e.g.*, Equality Maryland, Key Legislation in the 2006 Maryland General Assembly, http://equalitymaryland.org/legislative.htm#erights (last visited October 16, 2006) (reviewing various proposals that were defeated or stalled in 2006).

[33] *See* Human Rights Campaign, 2004-2006 Legislatively Defeated State Constitutional Amendments Limiting Marriage or other Legal Relationships for Same-Sex Couples, Appendix B. Note that the map in Appendix B includes defeats in Alabama, Arkansas, Kansas, Michigan and Oklahoma, all of which now have same-sex marriage bans and therefore were not included in the statistics in this paper. Furthermore, of the eight states facing ballot referendums on the question this year, three (Arizona, Colorado, and Idaho) are on the map because all prior attempts were defeated.

[34] *Available at* http://www.constitutionalcourt.org.za/Archimages/5257.PDF.

benefits, and responsibilities violates the equality of rights provision of Canada's Charter of Rights and Freedoms. *See Halpern v. Attorney General*, (2003) 65 O.R. (4th) 161;[35] *EGALE Canada Inc. v. Canada (Attorney General)*, (2003), 225 D.L.R. (4th) 472; *Hendricks c. Quebec*, (2002) R.J.Q. 2506 (Que. Sup. Ct.).[36] Spain, Belgium, and the Netherlands allow same-sex couples to marry. *See ABA White Paper*, *supra*, at 36-38; Jennifer Green, *Spain Legalizes Same-Sex Marriage*, The Washington Post, July 1, 2005, at A14. Denmark, Norway, Sweden, Hungary, Portugal, Iceland, France, Croatia, Germany, and Finland all provide for formal legal recognition of unmarried couples, including same-sex couples, and extend most of the legal rights, benefits, and responsibilities of marriage to these couples. *See ABA White Paper*, *supra*, at 36-38; Human Rights Watch, *US: Full Marriage Rights for Same-Sex Partners* (September 4, 2003);[37] Int'l Gay and Lesbian Human Rights Comm'n, *Where You Can Marry: Global Survey of Registered Partnership, Domestic Partnership, and Marriage Laws* (November 2003)[38] Eight other nations have laws providing limited legal recognition and protection to unmarried same-sex couples. *See ABA White Paper*, *supra*, at 36-38.[39] The growing

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[35] *Available at* http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.pdf.

[36] In December 2004, the Supreme Court of Canada issued an advisory opinion approving the constitutionality of a federal proposal to extend civil marriage to same-sex couples. *See Reference re Same-sex Marriage*, 3 S.C.R. 698 (Can. 2004). That proposal became law in July 2005. *See* The Civil Marriage Act, S.C. 2005, c. 33.

[37] *Available at* http://hrw.org/english/docs/2003/09/04/usdom6352.htm.

[38] *Available at* http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91#AZCountry.

[39] These countries are Argentina, Brazil, Croatia, the Czech Republic, New Zealand, Spain, Switzerland, and the United Kingdom. *ABA White Paper*, *supra*, at 36-38.

trend around the globe, including in the United States, is toward marriage equality for same-sex couples.[40]

B. Guaranteeing Equal Rights For Gays and Lesbians Is the Next Step In The Continuing Evolution of Marriage Laws in Maryland.

The history of marriage laws in Maryland is a history of progressive changes that have guaranteed greater inclusion and equality in the marriage relationship for all couples. The courts have played a powerful role in shaping this history. Judicial intervention itself has been shaped by different forces—at times the equities at stake for families and at times the constitutional rights of the parties. In the case of the religious ceremony requirement, this Court may have recognized that strict enforcement of the law would have led to inequitable results. *Cf. Feehley*, 129 Md. at 570, 99 A. at 665 (rejecting strict enforcement of technical statutory requirements for marriage, which would have the "radical [effect] of rendering void and immoral a matrimonial union

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[40] Not only has recognition of same-sex unions in Scandinavian countries benefited the institution of marriage, *supra* note 27, it has been correlated with a slightly reduced incidence of out-of-wedlock births, and significantly reduced incidence of sexually transmitted diseases. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR WORSE?: WHAT WE HAVE LEARNED FROM THE EVIDENCE 191 (2006). The percentage of nonmarital births (births born outside of marriage) decreased in Scandinavia following the enactment of registered partnership laws. *Id.* In Denmark, after "twenty years of steady and significant" increases in the rate of nonmarital births, the rate declined modestly in 1994 and has remained below historical highs every since. Norway and Sweden experienced similar results following the enactment of their own registered partnership laws – the rate of nonmarital births, which had been increasing for over a decade, improved slightly and then held steady. *Id.* at 192-93. Empirical studies show that those European countries with registered partnership laws had a "statistically significant" lower rate of syphilis than those European countries that did not. *Id.* at 145-47. Similarly, Denmark, Norway, and Sweden have experienced significant declines in the rate of HIV infection among gay men following the enactment of registered partner laws. *Id.* at 164.

otherwise validly contracted and solemnized"). The courts' decisions in the areas of racial and gender equality also have been based on equitable considerations, but ultimately the results were compelled by the constitutional rights of the individuals involved—the right to equal treatment under the law and the fundamental right to marry. Ending the denial of gay people's freedom to marry likewise is compelled by these same constitutional guarantees.

Pushing against these evolutions of the marriage laws have been the naysayers and opponents of equality, always claiming that each progressive change would have dire social consequences. *See generally* Graff, *supra*, at 30-33, 107-09, 157-58, 220-22, 251-52. Supporters of Maryland's religious ceremony requirement warned at the 1864 constitutional convention that repealing the law would serve only minority interests and would result in "general moral ruin and desolation." *See* 102 *Archives of Maryland*, *supra*, at 979, 982-83, 986-87. Supporters of Maryland's miscegenation statutes warned during a 1966 debate in the General Assembly that lifting the laws would "make this country a brown race." Wallenstein, *supra*, at 208. Similar arguments of moral and social ruin are raised today in response to the demands of gays and lesbians for their constitutional rights to marry.

History belies the naysayers' warnings. Even as the legal character of marriage has changed in this continuing march towards greater equality and inclusiveness, marriage has remained an enduring social institution. Contemporary experience in Massachusetts confirms this truth.

Guaranteeing the equal freedom to marry of Maryland's gay and lesbian couples is consistent with Maryland's strong commitment to the adoption of laws and policies that guarantee equal treatment on the basis of sexual orientation. Maryland statutes already prohibit discrimination based on sexual orientation in public accommodations, employment, housing, and real estate services. Md. Ann. Code art. 49B, §§ 5, 8, 16, 22, 23 (2003).[41] Maryland is one of sixteen states nationwide that have adopted statewide bans on discrimination against gays and lesbians in one or more of these areas. *See, e.g.*, Human Rights Campaign, *Statewide Anti-Discrimination Laws & Policies* (April 2005);[42] Michael C. Falk, Note, *Lost in the Language: The Conflict Between the Congressional Purpose and Statutory Language of Federal Employment Discrimination Legislation* 35 Rutgers L.J. 1179, 1180 n.8 (2004).[43] In addition, Maryland regulations prohibit sexual orientation discrimination in a variety of state-regulated programs. *See e.g.,* Md. Regs. Code tit. 5, § 04.11.18A (Special Housing Opportunities Program); *id.* § 05.02.14A (Multi-Family Housing Revenue Bond Financing Program); *id.* § 17.01.10A (Community Legacy Program); *id.* tit. 10, § 18.06.03A(6) (Aids Drug Assistance Program); *id.* tit. 11,

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[41] The General Assembly added these statutory protections in 2001. *See* 2001 Md. Laws ch. 340. Governor Parris Glendening, by executive order, prohibited sexual orientation discrimination in state employment in 1995. *See* Md. Regs. Code tit. 1, § 01.1995.19A(11) (2004).

[42] *Available at* http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=14821.

[43] The fifteen other states are California, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. Human Rights Campaign, *supra*; Falk, *supra*, at 1180 n.8 (citing statutory provisions). The District of Columbia also prohibits discrimination based on sexual orientation. *Id.*

§ 07.06.13 (Department of Transportation Public-Private Partnership Program); *id.* tit. 14, § 29.04.09C(1) (Heritage Areas Authority Loan Program). These statutes and regulations, although not directly dispositive in this case, reflect a public policy commitment in Maryland to full legal and social equality for gay and lesbian people in this state.

Significantly, Maryland law also recognizes and validates the critical role that gay men and lesbians play as parents. This Court has held that a biological parent's visitation rights cannot be restricted based on the presence of a same-sex partner in the parent's home, unless there is a specific showing of harm to the child's health or welfare resulting from contact with the partner. *See Boswell v. Boswell*, 352 Md. 204, 236-38, 721 A.2d 662, 678 (1998); *see also North v. North*, 102 Md. App. 1, 15-17, 648 A.2d 1025, 1032-33 (1994). Maryland law also protects the rights of gay and lesbian non-biological parents, whose familial ties to their children often grow out of a committed relationship with the child's biological or adoptive parent. Trial courts in Maryland have recognized "second-parent adoptions," in which a non-biological parent in a same-sex couple legally adopts the couple's child. *See ABA White Paper*, *supra*, at 14 & n.78.[44] The Court of Special Appeals has recognized a same-sex partner who is neither a biological nor adoptive parent of the same-sex couple's child as a "de facto parent," who has standing to seek custody or visitation. *See S.F. v. M.D.*, 132 Md. App. 99, 110-12, 751 A.2d 9, 15

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[44] According to one recent survey, second-parent adoptions are recognized by statute or appellate court decisions in nine states and the District of Columbia, and have been allowed by lower courts in at least fifteen other states, including Maryland. *See ABA White Paper*, *supra*, at 14.

(2000); *see also Gestl v. Frederick*, 133 Md. App. 216, 237, 241, 244-45, 754 A.2d 1087, 1098, 1100-01, 1102 (2000).[45] Maryland regulations also bar discrimination in private adoption services based on an adoptive parent's sexual orientation. Md. Regs. Code tit. 7, §§ 05.03.09A(2), 05.03.15C(2).

Same-sex couples in Maryland thus face a cruel dilemma—while their role as parents has been legally validated, they cannot complete the family circle by legally wedding. This denial of the legal rights, benefits, and responsibilities of marriage affects not only the two partners, but also their children, who are denied various statutory protections that apply to the children of opposite-sex couples who legally wed. *See, e.g.*, Equality Maryland, Marriage Inequality in the State of Maryland, http://equalitymaryland.org./marriage/marriage_inequality_in_maryland.pdf, (Feb. 2006) (last visited Oct. 17, 2006) (identifying 425 Maryland laws in which marital status is a factor in determining benefits, rights, or privileges).

Maryland recently attempted to join those states that have established statewide procedures for couples to register as domestic partners, entitling them to certain legal rights and protections similar to those enjoyed by married spouses. The Medical Decision-making Act of 2005 passed with strong support in the House of Delegates (32-15) and the Senate (82-46), but was vetoed by Governor Robert Ehrlich on May 20, 2005.

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[45] In *S.F.* the court held that a de facto parent is not required to show unfitness of the biological parent or exceptional circumstances in order to be entitled to visitation, even though other third parties might have to make such a showing. *See* 132 Md. App. at 111-12, 751 A.2d at 15. The court thus placed de facto parents in "a somewhat privileged subcategory of 'third party.'" Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 Rutgers L.J. 825, 841 (2001).

The Act would have allowed two adults of either the same or opposite sexes to register with the Secretary of the Department of Health and Mental Hygiene as "life partners." S.B. 796, 2005 Leg., 419th Sess. (Md. 2005). Registered life partners would have been placed on the same footing as spouses under various Maryland statutes which grant authority to make decisions about an individual's medical care and, in case of death, organ donation and burial. *Id.* A number of county and city governments in Maryland already had adopted measures recognizing domestic partnerships, including Baltimore City, City of Mount Ranier, College Park, Greenbelt, Howard County, Hyattsville, Montgomery County, Rockville, and Takoma Park. *See* Equality Maryland, "The Issues: Domestic Partner Benefits."[46] Despite Governor Ehrlich's veto of the Act, the successful passage of the bill by strong majorities in both the Senate and the House of Delegates reflects the sentiments of a majority of Marylanders in support of ensuring fairness and equal dignity and protection for gay men and lesbians in this state.[47]

Enforcing the constitutional rights of same-sex couples in this case also would continue the vital role played by the Maryland courts in ensuring that gay men and lesbians receive equal treatment under state law. In *Williams v. Glendening*, No. 98036031, 1998 WL 965992 (Md. Cir. Ct. 1998), the Circuit Court for Baltimore City extended a prior ruling protecting private, consensual, non-commercial heterosexual

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[46] *At* http://www.equalitymaryland.org/domesticpartner.htm. In *Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002), the Court of Appeals confirmed that home rule counties have the authority to adopt ordinances extending employment benefits to the domestic partners of county employees. *See id.* at 518, 801 A.2d at 160.

[47] *See* Maryland General Assembly, BILL INFO – 2006 Regular Session – HB 319, http://mlis.state.md.us/2006rs/billfile/hb0319.htm, (last visited Oct. 17, 2006) (reporting the outcomes of each vote).

activity between adults from criminal prosecution to similar same-sex activity, noting "[i]t cannot be doubted. . .that there would be an equal protection violation if acts, considered not criminal when committed by a heterosexual couple, could be prosecuted when practiced by a homosexual couple." *Id.* at *7.[48] In *Boswell*, this Court emphasized that the standard for restricting a parent's visitation rights based on the presence of a non-marital partner must be the same for same-sex and different-sex relationships. *See* 352 Md. at 237-38, 721 A.2d at 678.[49] In *Gestl*, the Court of Special Appeals held that a custody case involving a non-biological parent from a former same-sex relationship should remain in Maryland rather than be transferred to Tennessee, because the parent was entitled to greater legal protections under Maryland law. *See* 133 Md. App. at 241, 244-45, 754 A.2d at 1100-01, 1102-03. In each of these cases, Maryland courts acted to ensure that gay and lesbian couples and parents would receive the same legal protections and recognition enjoyed by heterosexuals. This case simply asks the courts to extend this protection of equal rights to the sphere of marriage.

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[48] In *Schochet v. State*, 320 Md. 714, 580 A.2d 176 (1990), this Court had construed a criminal statute narrowly in order to avoid the serious constitutional questions that would arise under the state constitutional right to privacy if the law reached private, consensual, non-commercial *heterosexual* activity between adults. *See id.* at 725-30, 580 A.2d at 181-84. Since the *Williams* decision, the Supreme Court has held that state laws criminalizing private, consensual homosexual activity between adults violate the individual right to liberty under the Fourteenth Amendment due process clause. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986).

[49] The *Boswell* court noted that restrictions on visitation based on the trial court's "personal bias or stereotypical beliefs" could be clearly erroneous and subject to reversal. 352 Md. at 237, 721 A.2d at 678.

Finally, eliminating the exclusion of same-sex couples from marriage addresses a demographic reality–the small but significant number of committed same-sex couples already living, working, and raising their children in communities across Maryland, and their desire for legal recognition and protection. According to the 2000 Census estimates, there are at least 11,000 same-sex couples living together in Maryland who identify themselves as "unmarried partners." *See* Tavia Simmons & Martin O'Connell, U.S. Census Bureau, *Married Couple and Unmarried-Partner Households: 2000* 4 (Feb. 2003).[50] About one quarter of the male partners in Maryland and one third of the female partners are raising children under the age of eighteen years. *See id.* at 9. Unmarried same-sex partners living together can be found in every county in Maryland. *See* U.S. Census Bureau, *Census 2000 Summary File 1 (SF-1) 100-Percent Data*, "Maryland: All Counties: PCT14: Unmarried-Partner Households by Sex of Partners."[51] As long as these same-sex couples are barred from accessing the legal rights, benefits, and responsibilities accorded to married couples, they will be forced to rely, where they can, on novel legal strategies such as domestic partnership agreements or adoptions to ensure legal recognition and protection of their relationships. *See generally* E. Todd Bennett & James D. Milko, *Gay and Lesbian Rights in Family Law: A Demographic Inevitability* 35 Md.

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[50] *Available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. Other survey results indicate that the Census figures understate the actual number of unmarried same-sex partners. *See generally, e.g.*, M.V. Lee Badgett & Marc A. Rogers, Institute for Gay & Lesbian Strategic Studies, *Left Out of the Count: Missing Same-sex Couples in Census 2000* (2003) (estimating that the Census 2000 figures undercounted same-sex couples by 16 to 19 percent), *available at* http://www.iglss.org/media/files/c2k_leftout.pdf.

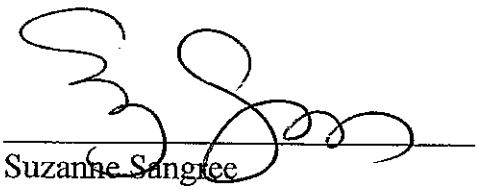
[51] *At* http://factfinder.census.gov.

Bar J. 24 (2002). These cumbersome legal options, where they are available, are simply inadequate to cover the thousands of legal rights, privileges, and benefits to which married couples become entitled with one fell swoop-- the act of marrying. *See, e.g.*, Shah, *supra*. Equally important, denying the right to marry robs same-sex couples of a fundamental, personal choice guaranteed to all other couples: to make a private commitment that will be accorded public recognition and respect as a matter of law.

CONCLUSION

The relief requested by the Plaintiffs in the instant case, an end to the exclusion of same-sex couples from marriage, simply represents a fair and logical step in making marriage laws consistent with history and reflective of Maryland's constitutional commitment to inclusion and equality. Marriage equality for same-sex couples also fulfills Maryland's strong commitment to ensuring equal treatment for this state's gay men and lesbians, their children and loved ones. This Court can and should resolve the questions presented in this case by affirming the Circuit Court's ruling and holding that, pursuant to the Maryland Declaration of Rights, same-sex couples cannot be denied the freedom to marry and the legal rights, benefits, and responsibilities of marriage under Maryland law.

Respectfully submitted,



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RULE 8-112 (c) STATEMENT

This Brief was prepared using 13 point Times New Roman for text and 13 point Times New Roman for footnotes with double spacing in the text and one line spacing in footnotes. Md. Rules 8-112(c) and 8-504(a)(8).

RULE 8-511 (b)(4) DISCLOSURE STATEMENT

Apart from *Amici* and their counsel, no other individual or entity has made a monetary or other contribution to the preparation or submission of this amicus brief.

APPENDIX A: Statements of Interest

The **Asian American Justice Center** (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its Affiliates the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over 50 years of experience in providing legal, public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

The **Asian American Legal Defense and Education Fund** (AADLEF), founded in 1974, is a non-profit organization that works to defend the civil rights of Asian Americans nationwide. AALDEF does so through the prosecution of lawsuits, legal advocacy, and dissemination of public information. AALDEF has throughout its long history supported equal rights for all people including the rights of gay and lesbian couples.

The **Bar Association of Baltimore City** ("the City Bar") is the first bar association formed in Maryland and one of the oldest in the nation. Incorporated on January 15, 1880, its mission is "to aid in maintaining the honor and dignity of the profession, to promote legal science, and further the administration of justice." To these ends, the City Bar maintains numerous standing and special committees including Continuing Legal Education, Judicial Administration, Judicial Selections, Legislation, Professional Ethics, and Pro Bono and Access to Legal Services. As a public service the

City Bar operates The Lawyer Referral and Information Service to assist the public in obtaining qualified legal counsel, to provide general legal information to the public, and to inform the public of other resources that may be able to provide assistance. This is the first lawyer referral service in Maryland to be certified by the American Bar Association. In 1970 the City Bar created a sister charitable organization, the Baltimore Bar Foundation, to provide financial support to non-profit programs and organizations in furtherance of the greater City Bar mission. Because of the City Bar's dedication to the fair administration of Maryland laws, it urges this Court to affirm the trial court ruling ending the exclusion of same sex couples from access to the benefits of legal matrimony.

Freedom to Marry is the gay and non-gay partnership working for marriage equality nationwide. Founded in 2003 and based in New York, Freedom to Marry brings together organizations – national and local, non-gay and gay, secular and religious – doing their part to end discrimination in marriage and assure equal protections and responsibilities for committed same-sex couples and their loved ones. Freedom to Marry has participated as *amicus curiae* in several cases brought by couples challenging their unfair exclusion from marriage.

Legal Momentum, formerly known as the NOW Legal Defense and Education Fund, uses the power of the law and innovative public policy to advance the rights of women and girls. Legal Momentum is dedicated to the rights of all women and men to live and work free of government-enforced gender stereotypes. Legal Momentum has consistently supported the right of lesbians and gay men to be free from discrimination based on, among other things, gender stereotyping.

The **Maryland Latino Coalition for Justice** (MLCFJ) is a coalition of organizations working to advance the interests of the Latino community in Maryland. The mission of the MLCFJ is to promote and advocate for the human rights, civic participation, and well-being of members of the Latino community in Maryland. Since its founding in 2000, the MLCFJ has achieved its mission principally through legislative advocacy before Maryland's General Assembly. The MLCFJ has an interest in this case because it touches on the rights of gay and lesbian Marylanders, including Latinos, to enjoy full and equal access to marriage.

Maryland National Organization for Women (Maryland NOW) is the statewide organization for the National Organization for Women (NOW), a national network of feminist activists which has over 500,000 contributing members and 550 chapters in all fifty states and the District of Columbia. Since its founding in 1966, NOW's mission has been to promote equality for women—all women. NOW has been a leader in the struggle for lesbian rights since 1971, when it issued a policy statement recognizing that a woman's right to independence and self-determination includes the right to define and express her own sexuality and to choose her own lifestyle. In 1995, NOW made official its support for same-sex marriage, stating that the choice of marriage is a fundamental constitutional right, protected under the equal protection clause of the Fourteenth Amendment, and should not be denied because of a person's sexual orientation. The struggle for equal marriage rights is a feminist issue, because women will not be equal until they can pursue their dreams free from discrimination. Maryland NOW has an

interest in this case because it is committed to making these rights a reality, especially for the thousands of lesbian women throughout Maryland.

The **National Lawyers Guild-Maryland** (NLG-Maryland) represents the Maryland chapter of the National Lawyers Guild, a national non-profit legal and political organization of lawyers, law students, legal workers, and jailhouse lawyers. The National Lawyers Guild was founded in 1937 as an alternative to the American Bar Association, which was racially segregated at the time. Since its inception, the National Lawyers Guild has provided legal support for (and conducted legal advocacy on behalf of) underrepresented communities who are targets of institutionalized discrimination. NLG-Maryland works at the Maryland level through public education and legal advocacy to promote issues of social, economic, and racial justice. NLG-Maryland has a strong interest in this case, because NLG-Maryland advocates for protection of the civil rights and liberties of LGBT individuals, and advocates for ending institutionalized discrimination against the LGBT community, represented through discriminatory marriage laws.

The **National Organization for Women Foundation** (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 550,000 contributing members in more than 450 chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included achieving lesbian rights, indeed achieving full equality for everyone in the lesbian, gay, bisexual and

transgender community. To that end, we advocate fully equal marriage rights for same-sex couples as human and civil rights.

The **Organization of American Historians** is the largest learned society devoted to the study of American history. Since its founding in 1907 as the Mississippi Valley Historical Association, the OAH has worked to advance the study and teaching of the American past, while encouraging the broadest possible access to historical resources and the most inclusive discussion of history. The OAH promotes excellence in the scholarship, teaching, and presentation of American history, and encourages wide discussion of historical questions and equitable treatment of all practitioners of history. Through participation in national coalitions and the use of electronic and other direct contact with its members, OAH serves as a voice at the national and state levels for historians. To assist the Court in the resolution of the important issues of this case, the OAH is interested that this Court obtain an accurate understanding of the history of marriage in the State of Maryland.

The **Public Justice Center**, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to combating discrimination, including discrimination against gays and lesbians. PJC's programs include its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. PJC previously joined an *amicus curiae* brief urging the Maryland Court of Appeals to uphold the constitutionality of the Montgomery County domestic partner benefits program. *See Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002).

PJC has an interest in ending discrimination against gay and lesbian couples in Maryland seeking to marry.

James and Colette Roberts are an interracial couple who have been married for forty-six years, and have lived in Maryland for the past twenty years. The Roberts were married in New York in 1959, at a time when their marriage would have been illegal in Maryland and many other states. They have four children and seven grandchildren, and are active in PFLAG-Howard County. Two of the Roberts' grown daughters and one son are happily married. The Roberts believe that their lesbian daughter also should have legal recognition for her own family unit, and that marriage should be available to all couples, regardless of race, ethnicity, religion, sexual orientation, or other such designations.

Founded in 1971, **the Southern Poverty Law Center** ("The Center") is a nationally recognized leader in the area of civil rights litigation. The Center has litigated numerous pioneering civil rights cases on behalf of women, minorities, factory workers, poor people in need of health care, mentally ill persons, children in foster care, prisoners facing barbaric conditions of confinement and many other victims of injustice.

The **City of Takoma Park, Maryland**, founded in 1896, is a municipal cooperation and Maryland sub-division. Typical of other local governments throughout the state of Maryland, Takoma Park has lesbian and gay families among its constituents. Since as far back as the 1980's, Takoma Park has consistently attempted to bestow certain civil rights on lesbian and gay couples by legislating equal treatment in local legislation and by recognizing domestic partners. However, the City is aware of the limits of its

local governmental authority to protect its citizens without statewide recognition of equality in marriage. Takoma Park supports equality of marriage for lesbian and gay couples because marriage provides family stability and personal happiness to the couples, their children, and their extended families. Takoma Park understands that marriage develops from a couple's desire for love, security and family and that such desires are not confined to its heterosexual constituents. Takoma Park believes that same-sex couples are entitled to full equality under Maryland family law.

The **Women's Law Center of Maryland, Inc.** is a nonprofit, public interest, membership organization of attorneys and community members with a mission of improving and protecting the legal rights of women. Established in 1971, the Women's Law Center achieves its mission through direct legal services through representation and hotlines, research, policy analysis, legislative initiatives, education, and implementation of innovative legal services programs to pave the way to systematic change. The Women's Law Center has dedicated substantial advocacy efforts to reform family law through its Kaufman Center for Family Law. The Women's Law Center supports the right of same-sex couples to marry, because this is a necessary and appropriate expansion of family law which will make the rights, benefits, and responsibilities of marriage available to all women, including lesbians who wish to marry.

Thirty-Four Individual Scholars and Historians: BIOGRAPHIES OF *AMICI*

Peter W. Bardaglio, Ph.D., is Professor of History at Ithaca College. He is the author of Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (University of North Carolina Press, 1995), which won the 1996 James Rawley Prize from the Organization of American Historians for best book published on the history of race relations in the United States. He has also published numerous articles and essays on race and gender in the nineteenth-century South as well as on families and public policy in the United States.

Norma Basch is Professor Emerita at Rutgers University. She has written extensively on marriage and domestic relations in nineteenth-century American law, including a recent book on the history of divorce published by the University of California Press. She taught courses on gender history, women's history, and American legal history in both the undergraduate and doctoral programs at Rutgers.

Barbara R. Bergmann, Professor Emerita of Economics at the University of Maryland, has specialized in policy relating to discrimination and poverty. She has published books on women's changing status, child poverty, child care, Social Security, and affirmative action. Dr. Bergmann served as a senior staff member of the President's Council of Economic Advisers during the Kennedy Administration. Other government experience includes service as Senior Economic Adviser with the Agency for International Development, and as an economist with the Bureau of Labor Statistics. She has served on advisory committees to the Congressional Budget Office and the Bureau of

the Census. In the early 1980s, she wrote a monthly column on economic affairs for the *New York Times* Sunday Business Section. She has served as President of the Eastern Economic Association, the Society for the Advancement of Socio-Economics, the American Association of University Professors and the International Association for Feminist Economics. She is a Fellow of the American Academy of Political and Social Science.

George Chauncey is Professor of History at Yale University. He is the author of Why Marriage? The History Shaping Today's Debate Over Gay Equality (Basic Books, 2004) and Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (Basic Books, 1994), which won the Organization of American Historians' Merle Curti Award for the best book in social history and the Frederick Jackson Turner Award for the best first book in any field of history. He is also the author of numerous articles and the coeditor of three books and special journal issues on the history of gender and sexuality in the United States.

Richard H. Chused is Professor of Law at Georgetown University, where he teaches, among other subjects, Family Law and Gender and Law in American History. He has published Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law (University of Pennsylvania Press, 1994), and numerous articles on the history of women's property law and other aspects of legal history.

Stephanie Coontz teaches history and family studies at The Evergreen State College in Olympia, Washington, and is the Director of Research and Public Education

for the Counsel on Contemporary Families. She is the author of Marriage, A History: From Obedience to Intimacy, or How Love Conquered Marriage (Viking, 2005), The Way We Never Were: American Families and the Nostalgia Trap (Basic Books, 2000), The Way We Really Are: Coming to Terms with America's Changing Families (Basic Books, 1997), and The Social Origins of Private Life: A History of American Families (Verso, 1988). She also edited American Families: A Multicultural Reader (Routledge, 1999), and has contributed to numerous anthologies and journals.

Nancy F. Cott is the Jonathan Trumbull Professor of American History at Harvard University and the Pforzheimer Foundation Director of the Schlesinger Library on the History of Women in America at the Radcliffe Institute for Advanced Study. Her research and teaching concentrate on the history of women and of gender relations in the United States. Her interests have ranged from family structures, women's rights, and feminism, to the role of gender in political institutions and citizenship. She is the author or editor of seven books, the most recent of which is Public Vows: A History of Marriage and the Nation (Harvard University Press, 2000).

Peggy Cooper Davis is the John S.R. Shad Professor of Lawyering and Ethics at New York University School of Law. She is a former family court judge and has published widely on family and child welfare issues. Her book, Neglected Stories: The Constitution and Family Values (Hill and Wang, 1997), was a pathbreaking analysis of the constitutional position of the family.

John D'Emilio, Ph.D., is Professor of History and Gender and Women's Studies at the University of Illinois at Chicago. A Guggenheim and National Endowment for the

Humanities fellow, he has authored several books and articles on the history of sexuality, civil rights, and gay and lesbian history, including The World Turned: Essays on Gay History, Politics, and Culture (Duke University Press, 2002), Intimate Matters: A History of Sexuality in America (2d expanded edition, University of Chicago Press, 1997) (co-authored with Estelle Freedman), and Sexual Politics, Sexual Communities (2d edition, University of Chicago Press, 1998).

Toby Ditz is a Professor of History at Johns Hopkins University and an associate of Johns Hopkins' interdisciplinary Program for the Study of Women, Gender, and Sexuality. She is primarily an historian of early America, with a special interest in cultural history and the history of women, and gender, and masculinity. She has published Property and Kinship: Inheritance in Early Connecticut 1750-1820, a social history of inheritance practices, household authority relations, and the commercialization of agriculture. She is currently researching the culture of commerce and the history of masculinity in the eighteenth century.

Nancy E. Dowd is Chesterfield Smith Professor of Law at the University of Florida, Levin College of Law, where she teaches in the areas of family law, constitutional law, and gender and the law. She is the author of many articles in the area of family law and two books, Redefining Fatherhood (New York University Press, 2001) and In Defense of Single Parent Families (New York University Press, 1997). She is also Co-Director of the Center for Children and Families, Levin College of Law, University of Florida.

Ariela Dubler is Associate Professor of Law at Columbia University, where she teaches legal history and family law. She holds a JD and Ph.D. in history from Yale University. Her research and writing focus on the history of marriage and nonmarital relations.

Estelle Freedman, Ph.D., is Edgar E. Robinson Professor of United States History at Stanford University, specializing in women's history and feminist studies. Freedman has authored several books and articles including "The History of Family and the History of Sexuality," in The New American History (Temple University Press, 1997) and Intimate Matters: A History of Sexuality in America (2d expanded edition, University of Chicago Press, 1997) (co-authored with John D'Emilio).

Sally F. Goldfarb is Associate Professor at Rutgers University School of Law - Camden, where she teaches Family Law. She has also taught at the Harvard, New York University and University of Pennsylvania law schools. A graduate of Yale College and Yale Law School, she writes and lectures on the law of marriage, domestic violence, and sex discrimination.

Linda Gordon is Professor of History at New York University and Vilas Distinguished Research Professor Emeritus at the University of Wisconsin. She is the author of three books and the editor of two books on the history of social policies regarding work, family, and gender. In addition, her most recent book, The Great Arizona Orphan Abduction (Harvard University Press, 1999), won the Bancroft prize for best book in U.S. history and the Beveridge prize for best book on the history of the Americas.

Michael Grossberg is Professor of History and Law at Indiana University, Bloomington and Editor of the American Historical Review. His research focuses on the relationship between law and social change, particularly the intersection of law and the family. He has written a number of books and articles on legal and social history. His 1985 book, Governing the Hearth: Law and the Family in Nineteenth-Century America (University of North Carolina Press, 1983), won the Littleton-Griswold Prize in the History of Law and Society in America given by the American Historical Association. He also served as a consultant on Studies in Scarlet: Marriage and Sexuality in the United States and the United Kingdom, 1815-1914, a digital collection of legal materials produced by the Research Libraries Group.

Hendrik Hartog is the Class of 1921 Bicentennial Professor of the History of American Law and Liberty at Princeton University. He is the author of Man and Wife in America: A History (Harvard University Press, 2000) and other works on the legal history of marriage and the family.

Martha Hodes, Ph.D., is Associate Professor of History at New York University. She is the author of White Women, Black Men: Illicit Sex in the Nineteenth-Century South (Yale University Press, 1997) and the editor of Sex, Love, Race: Crossing Boundaries in North American History (New York University Press, 1999). She has served several terms as the Director of the Program in the History of Women and Gender at New York University. She won the Berkshire Conference on the History of Women article prize for "The Mercurial Nature and Abiding Power of Race: A Transnational

Family Story," American Historical Review (Feb. 2003). The book-length version of this article is forthcoming from W.W. Norton.

Nancy Isenberg, Ph.D., is Associate Professor of History and Co-holder of the Mary Frances Barnard Chair in Nineteenth-Century American History at the University of Tulsa. She has written and edited books and published many articles on legal and gender issues. Her book Sex and Citizenship in Antebellum America (University of North Carolina, 1998) was awarded the 1999 book prize from the Society for Historians of the Early Republic.

Linda K. Kerber is May Brodbeck Professor in the Liberal Arts and Professor of History at the University of Iowa. She also holds an appointment as Lecturer in Law at the University of Iowa College of Law. Her most recent book, No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship (Hill and Wang, 1998), won the Littleton-Griswold Prize of the American Historical Association for the best book in U.S. Legal History. She serves as President of the American Historical Association, is a fellow of the American Academy of Arts and Sciences, and is an elected member of the American Philosophical Society. She is also a past president of the American Studies Association and of the Organization of American Historians.

Clare Lyons is Associate Professor of History at the University of Maryland, College Park. She researches gender and sexuality from a historical perspective. Her publications include Sex Among the 'Rabble': An Intimate History of Gender and Power in the Age of Revolution, in Philadelphia, (Chapel Hill: University of North Carolina Press, for the Omohundro Institute of Early American History and Culture, February

2006); "Mapping an Atlantic Sexual Culture: Homoeroticism in Eighteenth Century Philadelphia," William and Mary Quarterly Special edition on Sexuality in Early America, vol, 60 no, 1, January 2003 (awarded best article published in the William and Mary Quarterly for 2003), and "Single in the Quaker City," review essay on Not All Wives: Women of Colonial Philadelphia by Karin Wulf for Reviews in American History, vol, 29 no, 1, March 2001, p. 15-22.

Elaine Tyler May is Professor of American Studies and History at the University of Minnesota. She has served recently as President of the American Studies Association and as the Distinguished Fulbright Chair in American History at University College, Dublin, Ireland. She has published several books and articles on marriage and divorce, the Cold War era, women and the family in the United States, the history of sexuality and reproduction, and the relationship between private life, politics and public policy.

Sonya Michel is Professor of History at University of Maryland, College Park. She is a founding Co-Editor of *Social Politics: International Studies in Gender, State & Society*, a journal published by Oxford University Press. Her publications include: Children's Interests/ Mothers' Rights: The Shaping of America's Child Care Policy (Yale UP, 1996); Mothers of a New World: Maternalist Politics and the Origins of Welfare States (Routledge, 1993) (Co-Editor); Behind the Lines: Gender and the Two World Wars (Yale UP, 1988) (Co-Editor); and Child Care Policy at the Crossroads: Gender and Welfare State Restucturing (Routledge 2002) (Co-Editor). Dr. Michel has taught at Brown University, Harvard University, Princeton University, Brandeis University, University of Illinois at Urbana-Champaign, and University of Illinois at Chicago; and

has received fellowships from Spencer, Bunting (of Radcliffe College), National Endowment for the Humanities, Fulbright, Davis Center of Princeton University, and the Woodrow Wilson Center. Her research is currently focused on discrimination in pension policies, including the ways in which traditional pensions as well as Social Security, discriminates against same-sex couples.

Martha Minow is Professor of Law at Harvard University, where she teaches family law and other courses. She is the co-editor of a casebook on women and the law, the author of numerous articles and book chapters on the history of family law, and a supervisor of numerous doctoral and masters degree students working on family law and its history in the United States and elsewhere.

Steven Mintz is John and Rebecca Moores Professor of History at the University of Houston and National Co-Chair of the Council on Contemporary Families, a nonprofit group of leading academics and clinicians dedicated to enhancing public conversation about American families and how their needs can best be met. His books include Domestic Revolutions: A Social History of American Family Life (Free Press, 1989) and Huck's Raft: A History of American Childhood (Harvard University Press, 2004).

Peggy Pascoe is Associate Professor and Beekman Chair of Northwest and Pacific History at the University of Oregon, where she is completing a book on the history of miscegenation law in the United States from 1860 to 1967. Among the articles she has written on the topic of marriage law is "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America" (Journal of American History, June 1996).

Elizabeth H. Pleck, Ph.D., is Professor of History and Human Development and Family Studies at the University of Illinois at Urbana-Champaign. She teaches undergraduate and gradate courses in U.S. family history. She is the author of four scholarly monographs on American family history.

Dorothy Ross is the Arthur O. Lovejoy Professor of History at Johns Hopkins University. Her work has focused on the history of American social and political thought, particularly the history of the social and behavioral sciences and of historical consciousness. Her publications include The Origins of American Social Science; Modernist Impulses in the Human Sciences, 1870-1930 (ed.); and The Modern Social Sciences (ed.), vol.7 in The Cambridge History of Science. Dr. Ross is on the editorial board of Modern Intellectual History, and has been on the editorial boards of Journal of the History of Ideas and Cambridge University Press series, Ideas in Context. She was also on the executive board of the Organization of American Historians and has received numerous fellowships and awards.

Mary Ryan is the John Martin Vincent Professor of History at Johns Hopkins University. She is currently completing a synthetic work on the way women's and gender analysis has changed the big picture of United States history. She is also focusing more on space and place in history-- such spaces as public squares and plazas, and such places as Los Angeles and Baltimore. Her publications include Womanhood in America, New Viewpoints; Empire of the Mother: American Writing about Domesticity, 1830-1860; The Doubled Vision: Sex and Class in Women's History (ed.); Women in Public:

Between Banners and Ballots, 1825-1880; and Civic Wars: Democracy and Public Life in the City during the Nineteenth Century. She is a member of the American Historical Association, Organization of American Historians; American Studies Association, and Berkshire Conference of Women Historians.

Carole Shammas is the John R. Hubbard Chair of History at the University of Southern California. She has published numerous articles in history and legal history journals concerning family law. Her new book, A History of Household Government in America (University of Virginia Press, 2002), discusses the changes in marriage law in the United States.

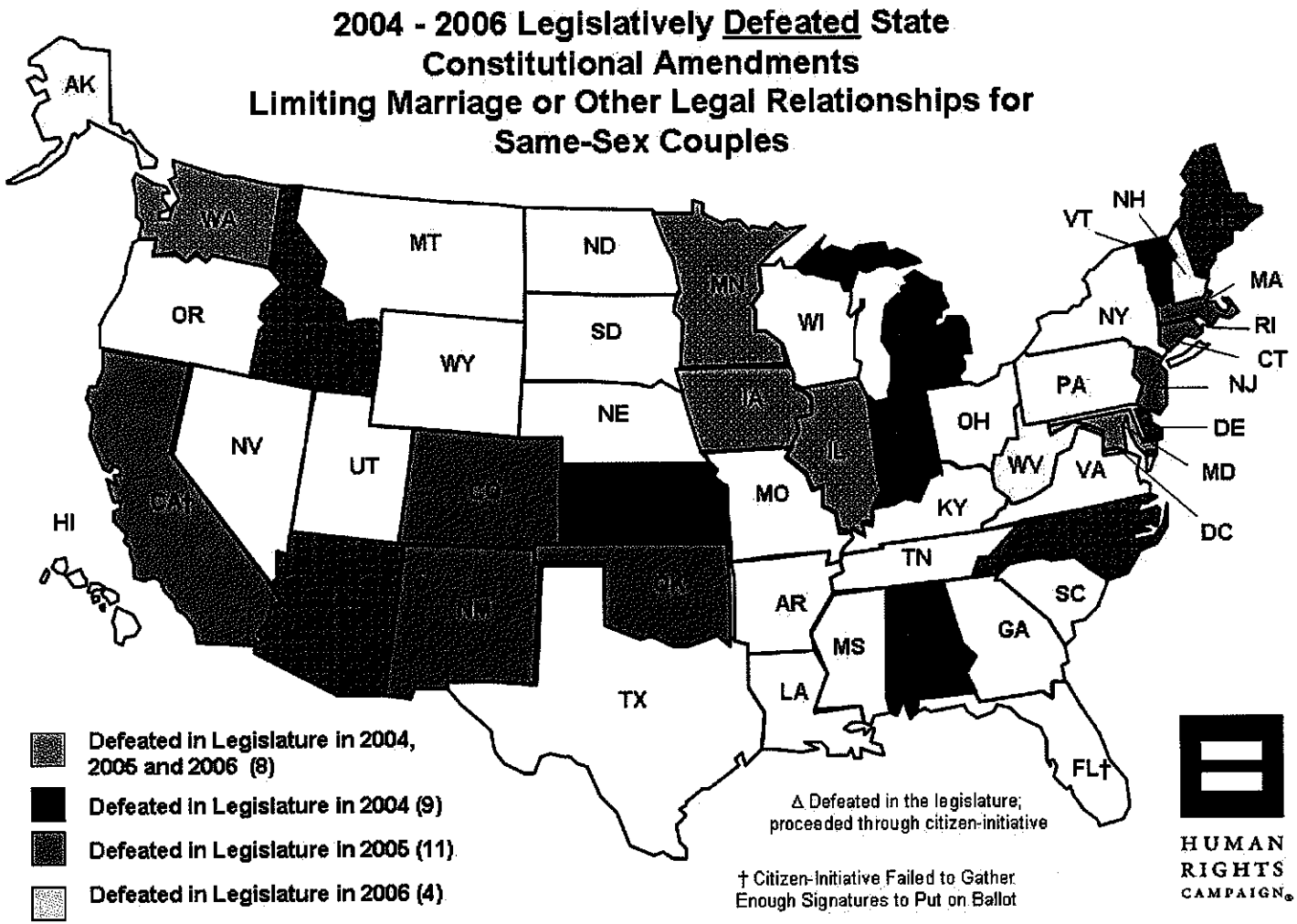
Mary Lyndon (Molly) Shanley is Professor of Political Science and the Margaret Stiles Halleck Chair at Vassar College, Poughkeepsie, New York. She is the author of Feminism, Marriage and the Law in Victorian England (Princeton University Press, 1989); Making Babies, Making Families (Beacon Press, 2001), which concerns ethical issues in contemporary family law; Just Marriage (Oxford University Press, 2004); and two anthologies on political theory. She teaches courses in the history of political philosophy and contemporary political and feminist theory. She served as Chair of the American Political Science Association's Committee on the Status of Women and as President of the Women's Caucus for Political Science.

Reva Siegel is Nicholas deB. Katzenbach Professor of Law at the Yale Law School. Professor Siegel writes in the fields of constitutional law, antidiscrimination law, and legal history, with special focus on questions of gender and the institution of marriage.

Amy Dru Stanley, Ph.D., is Associate Professor of History at the University of Chicago. A historian of nineteenth-century American history, she has written extensively on law, marriage, gender, and the household. She is the author of From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Slave Emancipation (Cambridge University Press, 1998), which won several academic awards, including the Frederick Jackson Turner Award for the best first book in American History.

Sandra F. VanBurkleo, Ph.D., is Associate Professor of History and Adjunct Professor of Law at Wayne State University. She specializes in constitutional and legal history, and early American history. She has authored several articles on the history of women's rights; her books include Belonging to the World: Women's Rights and American Constitutional Culture (Oxford University Press, 2001). VanBurkleo also authored several sections for the upcoming Encyclopedia of the United States in the Nineteenth Century (Scribners, forthcoming), including "Gender and the Law" (sole authorship) and "Republican Motherhood" (with Erika Hansinger). In December of 2003, she presented "Marital Contracts, Constitutional Limitations, and the Transition from Legislative to Judicial Divorce in 19th Century America" as part of the 2003-04 Ohio Legal History Seminar series. She is also the senior editor for the prize-winning anthology, Constitutionalism and American Culture: Writing the New Constitutional History (U. Kansas Press, 2002).

APPENDIX B: Map of States that have Rejected Amendments


2004 - 2006 Legislatively Defeated State Constitutional Amendments Limiting Marriage or Other Legal Relationships for Same-Sex Couples
AK
HI
WA
OR
CA
NV
ID
MT
WY
UT
AZ
CO
ND
SD
NE
KS
OK
NM
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
GA
FL†
SC
OH
WV
VA
PA
NY
VT
NH
MA
RI
CT
NJ
DE
MD
DC
Defeated in Legislature in 2004, 2005 and 2006 (8)
Defeated in Legislature in 2004 (9)
Defeated in Legislature in 2005 (11)
Defeated in Legislature in 2006 (4)
Δ Defeated in the legislature; proceeded through citizen-initiative
† Citizen-Initiative Failed to Gather Enough Signatures to Put on Ballot
HUMAN RIGHTS CAMPAIGN

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2006, I mailed first class, postage prepaid, a copy of the foregoing Brief to:

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