

A HISTORICAL GUIDE TO THE FUTURE OF MARRIAGE FOR SAME-SEX COUPLES

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History and tradition have emerged, together, as contemporary flagship arguments for limiting marriage to different-sex couples.¹ According to advocates of “traditional marriage,” same-sex couples can be excluded from marriage today because marriage *always* has been reserved to male-female couples.² Further, some contend, the restriction of marriage to different-sex couples has long been understood as necessary to provide channels to control naturally procreative (i.e., male-female) relationships.³

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¹ Arguments related to the well-being of children, which also feature prominently in litigation and the public debate, will be set aside here, as the brief that follows this introduction focuses on history and tradition. For amicus briefs related to children’s best interests claims, see, for example, Brief of *Amici Curiae* American Psychological Association et al. in Support of Plaintiffs-Respondents, *Hernandez v. Robles*, 2005 N.Y. Slip Op. 09436 (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (No. 103434/04); Brief *Amicus Curiae* of the Massachusetts Psychiatric Society et al., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJ-08860). Many of the amicus briefs cited in this essay can be found on the websites of the organizations litigating challenges to marriage laws on behalf of lesbian and gay couples. See, e.g., <http://www.aclu.org/lgbt/index.html>; http://glad.org/GLAD_Cases/#marriage_&_civil_unions; <http://www.lamdalegal.org>; <http://www.nclrights.org/>.

² See, e.g., Brief of Defendants-Respondents at 55, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-2244-03T5) (“Plaintiffs’ desire to enter into a same-sex marriage sets them apart from the historic understanding of the institution of marriage.”); see also *Hernandez v. Robles*, 2005 N.Y. Slip Op. 09436, at *9, (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (objecting to lower court’s validation of same-sex couples’ right to marry on grounds that it “redefin[ed] traditional marriage”); *Lewis*, 875 A.2d at 270 (describing the State’s opposition to same-sex marriage as “grounded on historical tradition”); *Shields v. Madigan*, 5 Misc. 3d 901, 903 (N.Y. Rockland Cty. 2004) (characterizing the State’s argument to be that New York’s marriage statute “embodies the well-recognized historical tradition of opposite-sex marriage in our culture”).

³ See, e.g., *Morrison v. Sadler*, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (“The differentiation between opposite-sex and same-sex couples in Indiana marriage law is based on inherent differences reasonably and rationally distinguishing the two classes: the ability to procreate ‘naturally.’”); Appellant’s Brief at 45-46, *Hernandez*, 2005 N.Y. Slip Op. 09436 (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (No. 103434/04) (arguing that “the State could

However popular these claims might be in op-ed pieces and on talk radio, when they are made in the litigation context, the question is not whether they have rhetorical appeal but rather whether they can explain the State's different marriage rules for gay and non-gay couples. For this purpose, broad-brush invocations of marriage's history will not suffice.

Yet, it is precisely these sorts of superficial references to tradition that have captivated courts deciding a variety of challenges to marriage restrictions. Pick a case that touches on marriage from federal or state court, from the nineteenth or twentieth century, and there is a reasonable chance that marriage will be described as a fixed, transhistorical institution that is foundational to civilization. Typical is the assertion of the Supreme Court in *Skinner v. Oklahoma*, the first case to identify marriage as a fundamental right: "Marriage and procreation are fundamental to the very existence and survival of the race."⁴

A cohort of more recent cases that specifically address marriage laws' exclusion of gay and lesbian couples follows this course. Courts in New York, New Jersey, and Arizona, among others, have rejected constitutional challenges brought by gay and lesbian couples on the grounds that the different-sex couple requirement has long been a part of the state's marriage law.⁵

determine that it is important to encourage opposite-sex couples to marry to establish long-term relationships given the financial and legal obligations parents bear for their children").

⁴ 316 U.S. 535, 541 (1942); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (describing marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress").

⁵ See, e.g., *Hernandez*, 2005 N.Y. Slip Op. 09436, at *10 (Catterson, J., concurring) ("The concept of marriage has traditionally been accepted by courts throughout the United States as the union of a man and a woman. Any change in that frequently articulated heterosexual construct would be a revolution in the law rather than evolution."); *Lewis*, 875 A.2d at 264 (concluding that "marriage between members of the same sex has no historical foundation or contemporary societal acceptance and therefore is not constitutionally mandated"); *Standhart v. Sup. Ct.*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003) ("The history of the law's treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process."); *Samuels v. N.Y. State Dep't of Health*, No. 1967-04, at 7 (N.Y. Albany Cty. Dec. 7, 2004) (validating New York's discriminatory marriage rule on its view of the "historical, legal, and cultural understanding of marriage"); *Shields*, 5 Misc. 3d at 907 ("[P]reserving the institution of marriage for opposite-sex couples serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman . . ."); see also *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) ("In all cases, . . . marriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman . . . is as old as the book of Genesis.").

This glib treatment of marriage as historically static and at risk of disintegration should same-sex couples be permitted to marry has caused considerable frustration among scholars of history and family law. There is, of course, the general point, which the Supreme Court has endorsed repeatedly, that history alone cannot justify retention of discriminatory rules.⁶ More significant, however, is the reliance on an inaccurate history of marriage. This history, it turns out, contradicts directly the argument that marriage has a set of fixed, unchangeable criteria that represent its essence, including the different-sex restriction at issue in the contemporary marriage litigation.

In fact, marriage has undergone near-constant evolution to the point that marriage today bears little resemblance to marriage in the past. One hundred fifty years ago, a woman lost virtually all of her independent legal identity upon marriage. Even fifty years ago, in numerous jurisdictions, access to divorce was extremely limited, rape within marriage was not a crime, and bans on interracial marriage remained in force. The *real* history of marriage is thus an extended and consistent account of change to elements of marriage once considered essential.⁷

Because misconceptions of marriage's history have played such an important part in justifying the male-female marriage eligibility requirement, history and family law scholars have become part of the fabric of the litigation over the rights of same-sex couples to marry. In most of the major marriage cases across the country, these scholars have filed briefs to make the basic, yet critical, point that history does not bear out the claim that rules of marriage that were considered fundamental in the past should survive challenge by virtue of their vintage.⁸

⁶ See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (“[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack”) (alteration in original) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees”); *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”).

⁷ See *Hernandez*, 7 Misc. 3d 459, 483 (N.Y. Cty. 2005) (observing that “the concept of marriage has steadily evolved beyond a rigid static ‘historical’ definition”), *rev’d*, 2005 N.Y. Slip Op. 09436, at *29 (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (Saxe, J., dissenting) (“The common understanding of the term marriage has not always been what it is today. The institution of marriage has changed remarkably over the centuries. . . . [The] long-accepted assumptions that once defined marriage have eroded.”).

⁸ See, e.g., Brief of Professors of History and Family Law as *Amici Curiae* in Support of Plaintiffs-Respondents, *Hernandez*, 2005 N.Y. Slip Op. 09436 (N.Y. App. Div. 1st Dep’t Dec. 8, 2005) (No. 103434/04); Brief of the Professors of the History of Marriage, Families, and the Law as *Amici Curiae* in Support of Plaintiffs-Appellants, *Lewis v. Harris*, No. A-2244-03T5 (N.J. Oct. 6, 2005); Brief *Amici Curiae* of History Scholars, *Andersen v.*

The brief that follows this essay, which was filed in New York's appellate court, does this work by demythologizing the history of marriage in New York. It shows that the elements of marriage in New York—including those once thought essential, such as husbands' control over their wives in myriad respects—always have been subject to change. Further, the *amici* argue, these changes, over time, have rendered the exclusion of same-sex couples from legal marriage an anachronism.

In addition to charting the changes in the legal independence of women within marriage, the historians provide important context for thinking about—and rebutting—the received wisdom that marriage and procreation always have been and always will be linked. As case law and the relevant statutory framework make clear, while sexual intercourse has sometimes been deemed essential to marriage,⁹ procreation has not. The cases with the strongest dicta suggesting a historically grounded link between the two turn out not to concern procreation at all.¹⁰ Moreover, many courts explicitly have rejected petitions to annul a marriage because of a spouse's inability or unwillingness to procreate.¹¹

A review of the history of marriage also reveals the exclusion of same-sex couples to be an outgrowth of an earlier, since-abandoned view that the State had a legitimate interest in policing gender roles in marriage. The shift away from sex-based regulation of marriage can be seen not only in the demise of coverture but also in the judicial and legislative invalidation of many more recent rules that reinforced different roles for husbands and wives. These rules, which once were considered fundamental but since have been rejected, provide for, *inter alia*, imposition of greater liability for marital household expenses on husbands than wives,¹² availability of loss of consortium claims to husbands but not wives,¹³ and favoritism for mothers (or fathers) for child custody.¹⁴ With the sex-based

King County, No. 75934-1 (Wash. Feb. 7, 2005); *Amici Curiae Brief of the Professors of the History of Marriage, Families, and the Law*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

⁹ See, e.g., *Diemer v. Diemer*, 8 N.Y.2d 206, 210 (1960) (stating that "a refusal to have marital sexual relations undermines the essential structure of marriage"); *T. v. M.*, 242 A.2d 670, 674 (N.J. Super. Ct. Ch. Div. 1968) (holding that impotence is a ground for annulling a marriage); see also Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV 1089 (2002).

¹⁰ See *infra* text accompanying notes 79-86.

¹¹ See *infra* text accompanying notes 87-92.

¹² See *infra* Part III.A.2.c.

¹³ See *infra* Part III.A.2.b.

¹⁴ See *infra* Part III.B.2.

distinctions now gone, there is nothing left in marriage law that distinguishes between the roles of male and female spouses. From a historical standpoint, then, invalidation—rather than retention—of the different-sex marriage eligibility rule would be more consistent with the trajectory of history.¹⁵

Ultimately, an accurate telling of marriage's history directly addresses the fear fanned by adversaries of marriage equality: that marriage—and civilization—will crumble if gay and lesbian couples are permitted to marry. By providing a longer and broader context for understanding the evolution of marriage in New York, the historical account offered in the brief shows that invalidation of the different-sex marriage eligibility rule, while considered transformative by some, will do little to change the essence of marriage. After all, at its core, marriage in New York (and elsewhere) always has been concerned primarily with the marital partners' interdependence. This focus on interdependence has remained even as conceptions of spouses' mutually supportive roles have evolved and traditional marriage rules related to those roles have been invalidated. If history is any guide, marriage also will survive the change sought now by same-sex couples, should it occur, just as it has survived so many changes over time.

¹⁵ In this light, the State's insistence on maintaining a different-sex rule for marriage eligibility can be seen as a last-ditch effort to maintain a gendered distinction in the roles of spouses within marriage. This instinct to preserve sex roles has not been articulated explicitly, presumably because much constitutional doctrine makes clear that sex stereotypes may not be the basis for government action. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 549-50 (1996) (rejecting the State's judgment of what is appropriate for "most women" as unconstitutional sex stereotyping); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (rejecting sex stereotyping as unconstitutional in exercise of jury peremptory challenges).

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

**DANIEL HERNANDEZ AND NEVIN COHEN,
LAUREN ABRAMS AND DONNA FREEMAN-
TWEED, MICHAEL ELSASSER AND DOUGLAS
ROBINSON, MARY JO KENNEDY AND JO-ANN
SHAIN, AND DANIEL REYES AND CURTIS
WOOLBRIGHT,**

PLAINTIFFS-RESPONDENTS

-AGAINST-

**VICTOR L. ROBLES, IN HIS OFFICIAL CAPACITY
AS CITY CLERK OF THE CITY OF NEW YORK,**

DEFENDANT-APPELLANT

**Brief of Professors of History and Family Law as *Amici*
Curiae in Support of Plaintiffs-Respondents[†]**

[†] In publishing this brief, the *Columbia Journal of Gender & Law* has made no editorial changes other than adjusting the format and citations to conform with THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

I. INTEREST OF AMICI CURIAE

We are professors of history and family law specializing in the history of marriage, families, and the law, at universities throughout the United States. We have written leading books and articles analyzing the history of marriage and marriage law in the United States. This brief is submitted to assist the Court's deliberations by offering an analysis of the history of marriage law and practice based on our scholarship. Our names, institutional affiliations, and brief biographies are set out in Exhibit E to Affirmation of Suzanne B. Goldberg in Support of Permission to File a Brief as Amici Curiae (July 28, 2005).

We adopt the Statement of the Case and Statement of Facts in the brief of Plaintiffs-Respondents.

II. SUMMARY OF ARGUMENT

The history of marriage in New York is a history of change. Since the State's earliest days, marriage has undergone continuous reexamination and revision. Indeed, marriage today—a partnership between two adults who are equal in the eyes of the law—bears little resemblance to marriage as it existed at the State's founding or even a few decades ago.

The relevant history demonstrates that all marriage rules remain subject to meaningful judicial review and that a rule's vintage is not, by itself, sufficient justification for its retention. Indeed, the historical record specifically documents the transformation or invalidation of many traditional features of marriage.

The historical record shows, as well, that New York has invalidated rules requiring different treatment of men and women in marriage, and that the State has never treated procreation as essential to marriage. Moreover, throughout its statehood, New York has not maintained uniformity between its marriage rules and those of other states.

Further, the ongoing evolution of marriage throughout New York's history renders implausible the suggestion that marriage, which has survived so many changes, is too frail to endure the constitutionally compelled revision of the anachronistic different-sex eligibility rule. To the contrary, the State continues to recognize a substantial set of rights and responsibilities of couples as "marriage," even as that set has shed elements that were considered fundamental to marriage earlier in our history. Nor have the changes to marriage deterred New Yorkers, who continue to embrace marriage overwhelmingly as the mechanism for achieving state recognition of their relationships. Even in the wake of significant transformation, marriage has survived, all the while remaining true to its core purpose of recognizing committed, interdependent partnerships between consenting adults.

III. ARGUMENT

A. The Legal Definition of Marriage in New York Has Never Been Static; Features of Marriage Once Thought Essential Have Been Revisited and Rejected Consistently Over Time.

In finding that marriage “is not a stagnant institution” and that many longstanding and once-fundamental marriage rules have been invalidated, the court below recognized correctly that the history of the exclusion of same-sex couples from marriage describes but does not *explain* or *justify* the continuation of that rule.¹ As legal developments throughout New York’s history demonstrate, the State’s courts and legislature have continuously adjusted and abandoned elements once thought to represent the foundations of marriage.

1. The Shift Away From the Common Law Coverture Regime Transformed the Meaning of Marriage in New York in the Nineteenth and Early Twentieth Centuries.

Until well into the nineteenth century, marriage in New York meant the complete merger of a woman’s legal identity into that of her husband. Indeed, for most people, marriage was unimaginable in any other way.² As

¹ See *Hernandez v. Robles*, 7 Misc. 3d 459, 488, 489-90 (N.Y. Cty. 2005). Several courts in New York have missed this important distinction between history as descriptive and history as a justification for discrimination. See, e.g., *Samuels v. N.Y. State Dep’t of Health*, No. 1967-04, at 7 (Albany Cty. Dec. 7, 2004) (resting its validation of the discriminatory marriage rule on its view of the “historical, legal, and cultural understanding of marriage”); *Shields v. Madigan*, 5 Misc. 3d 901, 907 (Rockland Cty. 2004) (holding that the exclusion of same-sex couples from marriage “serves the valid public purpose of preserving the historic institution of marriage as a union of man and woman”).

The City likewise mistakenly equates the historical exclusion of same-sex couples with the essence of marriage. See, e.g., Appellant’s Br. at 30 (maintaining that history does not “confer[] the status of ‘fundamental right’ on same-sex marriage”).

² Religious tradition and civil law both shaped early models of marriage. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 65-66 (1985) (observing shifts in the treatment of marriage as a sacrament). However, New York’s government, since colonial times, has overseen marriage as a civil institution rather than a religious contract. See *Maynard v. Hill*, 125 U.S. 190, 212 (1888), citing *Wade v. Kalbfleisch*, 58 N.Y. 282 (1874) (“The general statute . . . declares [marriage] a civil contract, as distinguished from a religious sacrament.”).

the Court for Correction of Errors put it in 1830,³ “the wife . . . and her husband constitute but one person.”⁴

For both men and women, negating a married woman’s independent legal capacity, including her capacity to own property in her own right, was understood as one of marriage’s indispensable elements. As the Supreme Court of Judicature wrote in 1824, “a husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife.”⁵

The collapse of women’s legal identity upon marriage extended to wives’ ability to contract as well. As the Supreme Court of Judicature observed in 1819, “[i]t is a settled principle of the common law, that coverture disqualifies a *feme* from entering into a contract or covenant, personally binding upon her.”⁶ Husbands’ control over their wives meant, too, that women had limited recourse in response to “restraint” by their husbands.⁷

This gendered concept of marriage reflected in coverture emerged from the view that the colonial family was a “little commonwealth” whose members were bound together by a well-defined set of reciprocal duties and the shared aims of domestic tranquility.⁸ The husband was, by legal entitlement and informal social code, the “governor” of this colonial

³ As this Court is aware, from early statehood through 1847, the State had two high courts: the Court for the Correction of Errors (N.Y.) and the Court of Chancery (N.Y. Ch.). WILLIAM H. MANZ, GIBSON’S NEW YORK LEGAL RESEARCH GUIDE 116-17 (3d ed. 2004). The Supreme Court of Judicature (N.Y. Sup. Ct.) functioned as an intermediate appellate court from 1821-1847. *Id.*

⁴ *Martin v. Dwelly*, 6 Wend. 9 (N.Y. 1830); see also *People ex rel. Barry v. Mercein*, 3 Hill 399, 407 (N.Y. Sup. Ct. 1842) (“The very being or legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband.”) (citation omitted); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11-12 (2000) (describing the sudden change in a woman’s rights upon marriage under the coverture regime).

⁵ *Udall v. Kenney*, 3 Cow. 590 (N.Y. Sup. Ct. 1824); see also *Barber v. Harris*, 15 Wend. 615 (N.Y. Sup. Ct. 1836) (“[D]uring the life of the husband, he undoubtedly has the absolute control of the estate of the wife, and can convey or mortgage it for that period.”).

⁶ *Jackson ex dem. Clowes v. Vanderheyden*, 17 Johns. 167, 169 (N.Y. Sup. Ct. 1819); see also *Wood v. Genet*, 8 Paige Ch. 137 (N.Y. Ch. 1840) (“[I]t is perfectly well settled that a *feme covert* cannot bind herself, personally, by any contract or agreement . . .”).

⁷ *Mercein*, 3 Hill at 408 (“[T]he courts of law will still permit the husband to restrain the wife of her liberty in case of any gross misbehavior.”); see also Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2123 (1996) (explaining the common law view that since a husband was legally liable for his wife’s misbehavior, he also possessed the power to “restrain” her).

⁸ GROSSBERG, *supra* note 2, at 5 (citation omitted).

household.⁹ The wife and children, in turn, were dependents within the husband's domain.¹⁰

Against this background, a woman's "civil death" upon marriage was seen as both natural and essential to the healthy continuation of marriage and the broader society.¹¹ As the Supreme Court of Judicature explained in 1820, "no man of wisdom and reflection can doubt the propriety of the rule, which gives to the husband the control and custody of the wife."¹² "[T]his socially constructed rule [of unity] was identified as part of 'the natural order of things.'"¹³ Consequently, coverture was also seen as necessary "to preserve the harmony of the marriage relationship."¹⁴

But by the middle nineteenth century, the institution of marriage had changed considerably. Marriage no longer meant the absolute legal subordination of women to their husbands. In 1848, New York became one of the first states in the country to authorize married women to own property as independent individuals.¹⁵ The Act provided in part:

The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents issues and profits thereof shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.¹⁶

⁹ *Id.*

¹⁰ See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6-14 (1994) (discussing colonial parents' rights and responsibilities).

¹¹ See PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 19 (1980) (discussing married women's legal status in New York prior to 1848).

¹² *Jaques v. Methodist Episcopal Church*, 17 Johns. 548, 584 (N.Y. Sup. Ct. 1820).

¹³ Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 392 (1988) (citation omitted); see also HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 102-03 (2000) (describing the nineteenth century's perception of coverture "as a simple and sincere expression of human natures," and "based on unchanging scriptural truth").

¹⁴ Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 996 (2002).

¹⁵ Doris Jonas Freed et al., *Married Women's Rights*, N.Y.L.J., Feb. 26, 1991, at 3.

¹⁶ Act of April 7, 1848, ch. 200 § 1, 1848 N.Y. Laws 307.

The following year, the Act was amended to provide married women with the power to contract as well.¹⁷

Not surprisingly, the opponents of these changes proclaimed that removing the husband from his role as the “ultimate locus of power within the home” would lead to domestic chaos and the destruction of the nation.¹⁸ In 1844, for example, a New York State legislative committee observed “that allowing married women to control their own property would lead ‘to infidelity in the marriage bed, a high rate of divorce, and increased female criminality,’ while turning marriage from ‘its high and holy purposes’ into something arranged for ‘convenience and sensuality.’”¹⁹ A prominent New York lawyer opposed the Act out of similar fears that women’s independent property ownership would lead “husband and wife [to] become armed against each other to the utter destruction of the sentiments which they should entertain towards each other, and to the utter subversion of true felicity in married life.”²⁰

Despite these concerns, the element of legal unity of spouses, which had been thought of as essential to marriage since statehood, continued to change throughout the 1850s and 1860s through a stream of legislative acts and judicial decisions. These changes included statutes protecting married women’s savings deposits,²¹ ensuring married women the right to vote as stockholders in elections,²² and protecting a woman’s right to sue and be sued²³ and to keep her earnings during marriage (the “Earnings Act”).²⁴ Reflecting New York’s leadership role in altering the meaning of marriage,

¹⁷ Act of April 11, 1849, ch. 375 §§ 3–4, 1849 N.Y. Laws 528 (authorizing a married woman “to convey and devise real and personal property . . . as if she were unmarried”).

¹⁸ GROSSBERG, *supra* note 2, at 282.

¹⁹ E.J. GRAFF, *WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION* 30–31 (1999).

²⁰ RABKIN, *supra* note 11, at 95 (quoting G. BISHOP & W. ATTREE, *REPORT OF THE DEBATES AND PROCEDURES OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1846 1057* (1846)).

²¹ Act of March 25, 1850, ch. 91, 1850 N.Y. Laws 142.

²² Law of June 30, 1851, ch. 321, 1851 N.Y. Laws 616.

²³ The provisions of the Earnings Act allowing women to sue and be sued were repealed in 1880 and then reinstated a decade later. Joseph A. Ranney, *Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women’s Rights in Virginia, New York, and Wisconsin*, 6 WM. & MARY J. WOMEN & L. 493, 528–29 (2000).

²⁴ Act of March 20, 1860, ch. 90, 1860 N.Y. Laws 157.

the Earnings Act has been described as arguably the nation's "boldest" legislation on behalf of married women's legal rights.²⁵

Courts played a significant role in determining the elements of marriage. At first, for example, they adhered to the previously settled view that married women were limited in their ability to contract.²⁶ By 1908, however, the Court of Appeals rejected that position: "Courts of law now recognize the separate existence of a husband and his wife the same as courts of equity and give to each the same rights and remedies."²⁷

New York's courts likewise eroded earlier rules limiting wives' ability to sue in tort. Traditional requirements that a husband be joined to any tort action against a married woman were rejected.²⁸ Similarly, the State's high court recognized a married woman's right to sue third parties for personal torts.²⁹

By 1923, New York courts not only had rejected the traditional understanding of marriage as coverture but also had characterized as "archaic" the common law understanding that a husband "had a property interest in [his wife's] body and a right to the personal enjoyment of his wife."³⁰ In setting aside the different rules for husbands and wives regarding claims of criminal conversation, the Court pointedly observed that the only objection to the wife's claim had been "the plea that the ancient law did not give it to her."³¹ "Reverence for antiquity," however, "demands no such denial," the Court wrote.³² Instead, "[c]ourts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights."³³

²⁵ NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 28 (1982).

²⁶ See, e.g., *Bertles v. Nunan*, 92 N.Y. 152, 160 (1883) (holding that "[t]he ability of the wife to make contracts is limited").

²⁷ *Winter v. Winter*, 191 N.Y. 462, 475 (1908).

²⁸ Compare *Bertles*, 92 N.Y. at 161 (stating that "the common-law rule as to the liability of the husband for the torts and crimes of his wife are still substantially in force"), with *Quilty v. Battie*, 135 N.Y. 201, 209 (1892) (finding that a husband was "not a proper party defendant" in a case against the wife for "a trespass committed by her in the care and management of her separate estate").

²⁹ See *Bennett v. Bennett*, 116 N.Y. 584, 590 (1889) (holding that a married woman had the same legal capacity as her husband to bring suit at common law for alienation of affections).

³⁰ *Oppenheim v. Kridel*, 236 N.Y. 156, 161 (1923).

³¹ *Id.* at 165.

³² *Id.*

³³ *Id.*

2. *Since the Mid-Twentieth Century, New York Has Continued To Change Elements of Marriage Once Considered Unalterable.*

Having endured the transformations just described, marriage neither collapsed as a legal or social entity nor became so immutably fixed as to ward off further evolution. To the contrary, changes to what once had been thought of as “core” elements of marriage continued. These changes reshaped, *inter alia*, rules regarding interspousal immunity, spousal testimonial privilege, the doctrine of necessities, loss of consortium, and sexual relations between spouses. Both individually and together, these shifts demonstrate, again, that the law governing marriage has been and continues to be in a constant state of change, reflecting the imperatives of a changing social order.³⁴

a. Interspousal Immunity and Spousal Testimonial Privilege

The doctrine of interspousal immunity was long understood as fundamental to marriage. Traditionally, “neither spouse could sue the other civilly for personal injuries wrongfully inflicted upon the other.”³⁵ Conferring such a right, it was feared, would be “destructive of that

³⁴ See *Hernandez v. Robles*, 7 Misc. 3d 459, 488 (N.Y. Cty. 2005) (footnote and internal citations omitted):

Marriage is no more limited by the historical exclusion of same-sex marriage than it was limited by the exclusion of interracial marriage, the legal doctrine of coverture, the pre-1967 restrictions on remarriage following divorce in New York, longstanding restrictions on divorce, or the “marital exemption” to the crime of rape.

Recent international developments show, too, that marriage continues to evolve without harm to the institution. Belgium, the Netherlands, Spain, and Canada now recognize marriages of same-sex couples on the same basis as marriages of different-sex couples. See ABA SECTION OF FAMILY LAW, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L. Q. 339, 407-08 (2004) [hereinafter WHITE PAPER]; Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 33, 42 (Can.) (finding marriage rights for same-sex couples to be consistent with Canadian Charter and noting decisions from provincial courts mandating recognition of same-sex couples’ marriages); Civil Marriage and the Legal Recognition of Same-Sex Unions, <http://canada.justice.gc.ca/en/fs/ssm/> (last updated July 21, 2005); Spain Makes Gay Marriages Legal, CNN, June 30, 2005, <http://www.cnn.com/2005/WORLD/europe/06/30/spain.gay.vote.ap/index.html>.

Also, in 2004, the Supreme Court of Appeal of South Africa found that exclusion of same-sex couples from common law marriage rights violated South Africa’s Constitution. *Fourie v. Minister of Home Affairs*, 2005 (3) BCLR 241 (SCA) (S. Afr.). Nearly ten years earlier, Hungary’s Constitutional Court recognized common-law marriages of same-sex couples. See WHITE PAPER, *supra*, at 410 (discussing 1995 ruling by Hungary’s Constitutional Court recognizing common-law marriages of same-sex couples).

³⁵ *People v. Morton*, 284 A.D. 413, 416 (2d Dep’t), *aff’d*, 308 N.Y. 96 (1954).

conjugal union and tranquility.”³⁶ This immunity had widespread repercussions. For example, married women could not sue their husbands for assault and battery,³⁷ trespass upon their person,³⁸ malicious prosecution,³⁹ or slander.⁴⁰

Eventually, however, this element of marriage that was once thought unalterable was written out of existence.⁴¹ In 1954, the Court of Appeals went further, extending the abrogation of interspousal immunity to include criminal cases so that a husband could be convicted of larceny for theft of his wife’s property.⁴² In the Second Department’s ruling in the same case, the Court observed that “[i]t would not be consonant with our present social concepts of husband and wife to say that one is not a person separate from the other.”⁴³

New York courts similarly cast aside the longstanding rule that spouses could not be compelled to testify against each other in court.⁴⁴

b. Loss of Consortium

As recently as 1958, the Court of Appeals sustained the deeply rooted traditional rule that husbands, but not wives, could recover for loss

³⁶ Longendyke v. Longendyke, 44 Barb. 366, 366 (N.Y. Cty. 1863).

³⁷ See *id.*; Schultz v. Schultz, 89 N.Y. 644, *rev’g* 63 How. Pr. 181 (N.Y. Cty. 1882); Abbe v. Abbe, 22 A.D. 483 (2d Dep’t 1897).

³⁸ Caplan v. Caplan, 268 N.Y. 445 (1935).

³⁹ Allen v. Allen, 246 N.Y. 571 (1927).

⁴⁰ Freethy v. Freethy, 42 Barb. 641 (N.Y. Cty. 1865).

⁴¹ See Laws of 1937, ch. 669 § 1 (providing that spouses could sue each other for wrongful personal injuries); see also State Farm Mut. Auto. Ins. Co. v. Westlake, 35 N.Y.2d 587, 591 (1974) (“No longer is it considered contrary to public policy for one spouse to sue another for damages for personal injuries.”).

⁴² See People v. Morton, 308 N.Y. 96, 99 (1954) (“We are not fearful, as was the court in 1863 . . . that this will ‘involve the husband and wife in perpetual controversy and litigation’ or ‘sow the seeds of perpetual discord and broil[.]’”).

⁴³ Morton, 284 A.D. at 418.

⁴⁴ See, e.g., People v. Watkins, 63 A.D.2d 1033, 1034 (2d Dep’t 1978) (holding that the traditional privilege protecting spouses from testifying against each other “does not extend to communications between spouses” in connection with a criminal conspiracy) (internal quotations omitted); People v. Smythe, 210 A.D.2d 887, 888 (4th Dep’t 1994) (limiting spousal privilege).

of consortium.⁴⁵ “The reason for this rule is that the wife at law is supposed to render services in and about the home and in caring for the children.”⁴⁶

But ten years later, in *Millington v. Southeastern Elevator Co.*,⁴⁷ the Court of Appeals rejected this traditional element of marriage, holding that “we . . . remove the discrimination in the existing law by acknowledging the equal right of the wife to damages as a result of her loss of consortium.”⁴⁸ Explaining its elimination of this once “venerable” element of marriage, the Court wrote that “[t]he gist of the matter is that in today’s society the wife’s position is analogous to that of a partner, neither kitchen slattern nor upstairs maid.”⁴⁹

c. Doctrine of Necessaries

An additional, striking example of the fundamental changes to sex-based distinctions in marriage arises in connection with the doctrine of necessities, once viewed as “one of the most primary and absolute principles in New York law.”⁵⁰ Under the traditional rule, husbands, but not wives, were obligated to support the family.⁵¹

In 1989, the Third Department recognized the outmoded nature of this common law rule, holding that spouses had reciprocal, rather than sex-based, duties to pay for each other’s necessities.⁵² In 1992, the Second Department agreed, holding that the gendered doctrine of necessities violated the State’s equal protection guarantee.⁵³

⁴⁵ *Kronenbitter v. Washburn Wire Co.*, 4 N.Y.2d 524, 527 (1958).

⁴⁶ *Oppenheim v. Kridel*, 236 N.Y. 156, 168 (1923).

⁴⁷ 22 N.Y.2d 498 (1968).

⁴⁸ *Id.* at 504.

⁴⁹ *Id.* at 503, 508 (citation omitted); *see also id.* at 508-09 (stating that the old rule “no longer expresses a standard of care which accords with the mores of our society”) (citation omitted).

⁵⁰ *Med. Bus. Assoc., Inc. v. Steiner*, 183 A.D.2d 86, 91 (2d Dep’t 1992) (citations omitted).

⁵¹ *See Garlock v. Garlock*, 279 N.Y. 337, 340 (1939) (“[T]he duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life.”); *cf. Med. Bus. Assoc., Inc.*, 183 A.D.2d at 91 (describing “[t]he obligation of a husband to support his wife” as “comport[ing] with the traditional family structure of the husband as sole breadwinner and the wife as full-time homemaker”).

⁵² *Our Lady of Lourdes Mem. Hosp., Inc. v. Frey*, 152 A.D.2d 73 (3d Dep’t 1989).

⁵³ *See Med. Bus. Assoc., Inc.*, 183 A.D.2d at 91 (describing the traditional rule as “an anachronism that no longer fits contemporary society”) (citations omitted).

d. Sexual Relations

Finally, the treatment of sexual relations between spouses as an element of marriage has also undergone significant change. For over 150 years, the law was clear: a man could have sexual relations with his wife any time he so chose.⁵⁴ Indeed, a wife's presumptive consent to sexual relations with her husband had long been considered fundamental to the marriage right.⁵⁵ Yet in 1984, the Court of Appeals rejected this deep-rooted understanding of marriage. The traditional rationales for the marital rape exemption, it held, no longer withstood rational basis review.⁵⁶

As the history of marriage demonstrates, fears that the institution of marriage would be endangered accompanied each change to elements once thought of as essential to marriage. The Massachusetts Supreme Judicial Court observed, for example, that "[a]larms about the imminent erosion of the 'natural' order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of 'no-fault divorce.'"⁵⁷ Yet, that court added, "[m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution."⁵⁸ The court below recognized this as well, noting the "*steady evolution* in the institution of marriage throughout history."⁵⁹

The Court of Appeals made this same point regarding unfounded predictions of harm flowing from legal changes to familial relationships when it recognized tort liability between siblings in 1939.⁶⁰ The Court observed that "[t]he modern family . . . is far different in structure, status and internal social and legal relationship than the family of ancient times."⁶¹ It added: "Notwithstanding such changes from tradition [to the rules governing family relations], predictions of dire results to the continued peace and amity of the family relationship have not been sustained."⁶²

⁵⁴ *People v. Liberta*, 64 N.Y.2d 152, 162 (1984) (citing an 1852 New York treatise on this point).

⁵⁵ *Id.*

⁵⁶ *Id.* at 163; *see also* *People v. De Stefano*, 121 Misc. 2d 113 (Suffolk Cty. 1983).

⁵⁷ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).

⁵⁸ *Id.*

⁵⁹ *Hernandez v. Robles*, 7 Misc. 3d 459, 489 (N.Y. Cty. 2005) (emphasis supplied).

⁶⁰ *Rozell v. Rozell*, 281 N.Y. 106 (1939).

⁶¹ *Id.* at 109.

⁶² *Id.* at 111.

The historical record demonstrates, in short, that marriage has remained both viable and desirable as the State's most comprehensive formal mechanism for recognizing adult partnerships, even as its familiar, longstanding rules have been rejected over time.

B. Spousal Interdependence Comprises the Essential Element of Marriage Today in New York; Alleged State Interests in the Sex of the Marriage Partners and Procreation Do Not Justify the Exclusion of Same-Sex Couples from Marriage.

1. New York's Jurisprudence and Statutes Identify Interdependence as the Essence of Civil Marriage.

On numerous occasions, New York's courts have identified the essence of marriage today not in the separate, gendered roles of husbands and wives nor in the function of procreation, but instead in the interdependence of the marital partners. This interdependence is, in large part, economic.⁶³

Beyond economics, New York's courts have also recognized emotional interdependency and sexual intimacy as important to marriage. In addressing the concept of loss of consortium, for example, the Court of Appeals explained that the loss comprised not only "support or services" but also "such elements as love, companionship, affection, society, sexual relations, solace and more."⁶⁴

The statutes governing marriage implicitly have recognized this concern with mutual care through their focus on insuring the consent of the parties to the marriage and on promoting the partners' commitment to each other.⁶⁵

⁶³ See *Holterman v. Holterman*, 781 3 N.Y.3d 1, 7 (2004) (stating that the Domestic Relations Law "recognize[s] marriage as an economic partnership"); *DeLuca v. DeLuca*, 97 N.Y.2d 139, 144 (2001) (describing the "contemporary view of marriage as an economic partnership") (citations omitted); *Koehler v. Koehler*, 182 Misc. 2d 436, 442 (Suffolk Cty. 1999) ("The underlying rationale of the reforms [to the Domestic Relations Law] of 1980 was the assumption that marriage was purely an economic partnership and should be treated as such.").

⁶⁴ *Millington v. Se. Elevator Co.*, 22 N.Y.2d 498, 502 (1968); see also *Hernandez*, 7 Misc. 3d at 497 ("Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children.").

⁶⁵ See, e.g., N.Y. Dom. Rel. Law § 7(1)-(5) (McKinney 2004) (providing for nullification when a party to the marriage was incapable of consent or consent arose from force, duress, or fraud); N.Y. Dom. Rel. Law § 236(B)(6)(a)(5), (8) (McKinney 2004) (setting out conditions for maintenance awards based on one party having foregone opportunities or provided homemaking or other services for the other).

Likewise, the jurisprudence and statutory framework regarding divorce reinforce that interpersonal commitment is the linchpin of civil marriage. While divorce was once viewed as risking “the stability of our government,”⁶⁶ and “preced[ing] the downfall of a nation,”⁶⁷ contemporary law holds that society is better off when couples lacking interpersonal commitment do not remain married. As the Court of Appeals observed, New York divorce law today rests on a

recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that *the best interests* not only of the parties but of *society itself will be furthered by enabling them “to extricate themselves from a perpetual state of marital limbo.”*⁶⁸

2. The Rule Limiting Marriage to Men and Women Reflected an Earlier Era of Gendered Roles for Husbands and Wives; Current Law Does Not Treat the Sex Difference Between Marital Partners as Important or Relevant.

The evolution of standards regarding care of children upon dissolution of a marriage reinforces that the sex of the marital partners has become legally irrelevant. The changes in this area—from a preference for fathers to a preference for mothers to a sex-neutral position—reveal the rule limiting marriage to male-female couples to be an outgrowth of an earlier view, since rejected, that marriage involved naturally and legally distinct roles for men and women.

Early on in custody disputes, New York courts embraced the common law rule that the father, not the mother, was entitled to custody of their children. “That the father has, by the common law, the paramount right to the custody and control of his minor children, and to superintend their education and nurture, is too well settled to admit of doubt.”⁶⁹ Even after statutory changes in 1860 explicitly granted married women joint custody of their children,⁷⁰ courts continued to find that “the recognized

⁶⁶ *In re Estate of Lindgren*, 181 Misc. 166, 169 (Kings Cty. 1943).

⁶⁷ *Id.* at 170.

⁶⁸ *Gleason v. Gleason*, 26 N.Y.2d 28, 35 (1970) (citation omitted) (emphasis supplied); *see also Halsey v. Halsey*, 296 A.D.2d 28, 30 (2d Dep’t 2002).

⁶⁹ *People ex rel. Olmstead v. Olmstead*, 27 Barb. 9, 9 (N.Y. Cty. 1857); *see also Linda R. v. Richard E.*, 162 A.D.2d 48, 54 n.3 (2d Dep’t 1990) (“Gender had long been the primary factor in awarding custody, beginning with ancient and common-law doctrine of absolute patriarchal control . . .”).

⁷⁰ *See* 1860 N.Y. Laws ch. 90 § 9.

paramount right of the father must prevail over the otherwise equal claims of the mother.”⁷¹

By the late 1800s, the absolute, seemingly “natural” rule favoring fathers gave way to a maternal presumption in child custody disputes, particularly when young children were involved.⁷² This maternal preference remained in force for much of the twentieth century.⁷³

More recently, though, the State’s courts revisited this once-“normal” preference for maternal care and concluded that sex-based parenting rules are outdated and not essential to marriage (or marital dissolution) after all. As the Second Department observed, “[w]hile the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law.”⁷⁴

New York’s custody and child support statutes reflect the same gender-neutral position regarding the treatment of children upon marital dissolution.⁷⁵ As a result, courts now regularly award custody to fathers, even when both parents are found to be fit.⁷⁶

These shifts in custody rules and in the doctrine and law that constitute marriage underscore that conventional understandings, while not to be denigrated, cannot alone justify the continued enforcement of an otherwise discriminatory law or doctrine. As Justice Holmes remarked, dissenting in *Lochner v. New York*,⁷⁷ “the accident of our finding certain opinions natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the

⁷¹ *People ex rel. Brooks v. Brooks*, 35 Barb. 85, 92 (N.Y. Cty. 1861).

⁷² *See Osterhoudt v. Osterhoudt*, 28 Misc. 285, 285 (N.Y. Cty. 1899) (explaining that “the tender guidance of a mother is of incalculable advantage, and should only be lost to [young children] by her death or misconduct”).

⁷³ *See, e.g., People ex rel. Himber v. Himber*, 136 N.Y.S.2d 456, 458 (N.Y. Cty. 1954) (“[W]hen it becomes necessary to make a choice between mother and father it is to the child’s best interest and welfare to be brought up and reared by his mother . . .”).

⁷⁴ *Linda R.*, 162 A.D.2d at 53-54; *see also Fountain v. Fountain*, 83 A.D.2d 694, 694 (3d Dep’t 1981) (“A presumption of ‘maternal superiority’ is now considered to be outdated.”); *cf. Hernandez v. Robles*, 7 Misc. 3d 459, 492-93 (N.Y. Cty. 2005) (citing cases showing recognition by New York courts that “gay or lesbian sexual orientation does not bear on fitness to parent children”).

⁷⁵ *See* N.Y. Dom. Rel. Law § 70 (McKinney 2004) (“[i]n all cases there shall be no prima facie right to the custody of the child in either parent”); N.Y. Dom. Rel. Law § 240(1) (McKinney 2004).

⁷⁶ *See, e.g., Bryant v. Nazario*, 306 A.D.2d 529 (2d Dep’t 2003).

⁷⁷ 198 U.S. 45 (1905).

Constitution of the United States.”⁷⁸ That is certainly the case here, where the different-sex eligibility requirement reflects the view of marriage as a gendered status that has long been rejected by both the courts and legislature. *The present focus of both the courts and the legislature is now trained instead on the spouses’ commitment to each other, a factor that has no legitimate connection to the sex of the marital partners.*

3. The Capacity to Procreate Has Never Been Treated as Essential to Marriage in New York.

The history of marriage in New York as well as contemporary state law demonstrates that procreation has never been treated as an essential element of marriage. While references to the importance of procreation appear occasionally in dicta, it is the spouses’ sexual relationship, and not their capacity or intent to procreate, that courts (and statutes) treat as fundamental to marriage. Indeed, the City’s sole citation to support the proposition that marriage is “‘for the purpose of begetting offspring,’”⁷⁹ did not concern procreation at all.⁸⁰ Instead, at issue in *Mirizio v. Mirizio* was whether a wife was entitled to support when she refused to be sexually intimate with her husband after the husband failed to keep his promise to undergo a Catholic wedding ceremony.⁸¹ The court rejected her claim—not because procreation was essential to marriage, as the City suggests based on its acontextual excerpt from the case, but because the refusal of sexual intimacy constituted a violation of “the fundamental obligation of the marriage contract.”⁸²

In 1960, the Court of Appeals made the same point: that sexual intimacy, not procreation, is essential to marriage.⁸³ In *Diemer v. Diemer*, the wife “unequivocally declared that she would not have any sexual

⁷⁸ *Id.* at 76 (Holmes, J., dissenting). The U.S. Supreme Court has taken this point to heart, affirming in numerous cases that while history is a useful starting point for analysis, the past alone cannot justify retention of a discriminatory, exclusionary rule. *See, e.g.,* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (“[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .”) (alteration in original) (citation omitted); *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”).

⁷⁹ *Mirizio v. Mirizio*, 242 N.Y. 74, 81 (1926) (cited in Appellant’s Br. at 45).

⁸⁰ Notably, the City’s only argument on appeal concerns procreation; it appears to have abandoned its defense based on history, tradition, and uniformity made below.

⁸¹ *Mirizio*, 242 N.Y. at 77, 84.

⁸² *Id.* at 81.

⁸³ *Diemer v. Diemer*, 8 N.Y.2d 206 (1960).

relations with her husband until they were remarried before a Roman Catholic priest.”⁸⁴ Characterizing the refusal as “striking at the civil institution of marriage,”⁸⁵ the Court granted the husband a decree of separation. In doing so, the Court reinforced that *Mirizio* concerned sexual intimacy rather than procreation: “That a refusal to have marital sexual relations undermines the essential structure of marriage is a proposition basic to this court’s decision in the *Mirizio* case and as obvious as it is authoritative.”⁸⁶

The State’s annulment statutes and jurisprudence confirm that procreation has been neither necessary nor sufficient to marriage. Over a century ago, the Second Department distinguished sexual relations from procreation, finding that the inability to “become a mother” did not make it “impossible for the defendant . . . to enter into the marriage state.”⁸⁷ “[I]t cannot be held, as a matter of law, that the possession of the organs necessary to conception are essential to entrance to the marriage state, so long as there is no impediment to the indulgence of the passions incident to this state.”⁸⁸ Simply put, sexual relations, not procreation, was a foundation of marriage.

In *Zagarow v. Zagarow*,⁸⁹ the court likewise held that a wife’s refusal to procreate was not a ground for divorce. “Unlike marital sexual relations, which are, per se, part of the essential structure of marriage, the parties are free to decide when and if and how often they will have children,” the court wrote.⁹⁰

Even the Domestic Relations Law provision that “physical cause” can render a marriage voidable⁹¹ relates not to procreation but rather to the capacity for sexual intimacy. The Court of Appeals made this clear in 1930, when it distinguished the ability to bear children from the ability to “perform[] the functions of a wife or a husband.”⁹²

⁸⁴ *Id.* at 209.

⁸⁵ *Id.* at 210.

⁸⁶ *Id.*

⁸⁷ *Wendel v. Wendel*, 30 A.D. 447, 448-49 (2d Dep’t 1898) (citations omitted).

⁸⁸ *Id.* at 449.

⁸⁹ 105 Misc. 2d 1054 (Suffolk Cty. 1980).

⁹⁰ *Id.* at 1057; *see also id.* at 1059 (“It would be futile to rule that a woman must submit to a pregnancy and then hold that she may legally abort it.”); *People v. De Stefano*, 121 Misc. 2d 113, 123 (Suffolk Cty. 1983).

⁹¹ N.Y. Dom. Rel. Law § 7(3) (McKinney 1909).

⁹² *Lapides v. Lapides*, 254 N.Y. 73, 80 (1930) (observing that “[t]he inability to bear children is not such a physical incapacity as justifies an annulment”); *see also Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“While it is certainly

As the history and current law regarding the elements of marriage demonstrate, neither procreation nor gendered roles for the marital partners is essential to marriage today. Instead, taken together, they reveal the different-sex eligibility rule to be inconsistent with the standards of marriage as they have evolved.

C. New York Historically Has Not Maintained Uniformity With Other States in Its Definition of Marriage.

Throughout history, New York has always followed its own course in defining and transforming the elements of marriage in the ways discussed above. Indeed, the State has not sought uniformity with other states' marriage laws either through its marriage statutes or through the liberal comity principles by which it has traditionally and voluntarily recognized other states' marriages. The State's history thus contradicts the City's claim, as made to the trial court,⁹³ that the status of marriage in other states should govern New York law.

New York's comity law, which reflects the State's autonomous decision to recognize virtually all marriages that are valid where they are celebrated, has led to recognition of marriages that the State's own law does not permit.⁹⁴ For example, New York's courts have recognized common law marriages, marriages between an uncle and a niece, and remarriage by an adulterer, among others.⁹⁵

true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”); William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1512 (1994) (“[L]aws governing domestic relations do not treat the ability to procreate as a precondition of marriage. The marital relationship is valued in its own right as a legal commitment between two intimately related adults, not because it is sometimes connected with procreation.”); cf. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (stating that “encouragement of procreation” could not justify excluding same-sex couples from marriage).

⁹³ See *Hernandez v. Robles*, 7 Misc. 3d 459, 483-86 (N.Y. Cty. 2005) (analyzing and rejecting the City's argument regarding “consistency with Federal Law and Other States”).

⁹⁴ See *In re May's Estate*, 305 N.Y. 486, 490 (1953) (stating that “the legality of a marriage between persons . . . is to be determined by the law of the place where it is celebrated”).

⁹⁵ See, e.g., *Mott v. Duncan Petroleum Transp.*, 51 N.Y.2d 289, 292 (1980) (“[I]t has long been settled law that although New York does not itself recognize common-law marriages . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted.”); *In re May's Estate*, 305 N.Y. at 492-93 (recognizing the out-of-state marriage of an uncle and a niece, despite the State's prohibition of such marriages); *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881) (recognizing remarriage of man who traveled out of state to evade New York's prohibition against remarriage).

The State's generous comity doctrine also has led New York to recognize same-sex couples' marriages and partnerships celebrated out of state.⁹⁶ New York City itself has acknowledged that it will accord full legal respect to marriages of same-sex couples entered out of state.⁹⁷

The only exceptions that New York courts have suggested could prevent the recognition of a valid out-of-state marriage are "cases, first of incest or polygamy coming within the prohibitions of natural law . . . ; second, of prohibition by positive law."⁹⁸ The Court of Appeals has stressed, further, that foreign-based rights should be enforced unless the transaction "is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."⁹⁹

Just as New York's liberal treatment of out-of-state marriages illustrates the State's willingness to maintain marriage law that is not uniform with other states, so too New York's relatively conservative divorce law shows the State's lack of commitment to uniformity. In the nineteenth century, the State's divorce laws were "notorious for their rigidity and inflexibility."¹⁰⁰ As "the last state to move toward liberalizing its divorce laws,"¹⁰¹ New York banned remarriage by the party liable for the divorce during much of the nineteenth century¹⁰² and until 1966 had adultery as its only ground for divorce.¹⁰³ Even today, New York remains differently situated from other states with respect to divorce. It is now the

⁹⁶ See, e.g., *Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc. 2d 440 (Nassau Cty. 2003) (treating gay couple with Vermont civil union as spouses for purposes of wrongful death statute); 2004 N.Y. Op. Atty. Gen. No. 1 (2004) (stating that state comity law would require recognition of same-sex couples' out-of-state marriages).

⁹⁷ Letter from Anthony Crowell, Special Counsel to the Mayor, City of New York, to Alan Van Capelle, Executive Director, Empire State Pride Agenda (Apr. 6, 2005), [http://www.prideagenda.org/pdfs/NYC Letter Recognizing Same-Sex Marriage.pdf](http://www.prideagenda.org/pdfs/NYC%20Letter%20Recognizing%20Same-Sex%20Marriage.pdf).

⁹⁸ *Van Voorhis*, 86 N.Y. at 26. With respect to consanguinity, New York remains in the minority of states that continue to recognize marriages between first cousins. See JUDITH C. AREEN, *FAMILY LAW: CASES AND MATERIALS* 13 (4th ed. 1999).

⁹⁹ *Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, 15 N.Y.2d 9, 13 (1964).

¹⁰⁰ Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 116 (1991).

¹⁰¹ Marcus, *supra* note 13, at 417 n.159.

¹⁰² Laws of 1879, ch. 321 § 49.

¹⁰³ N.Y. Dom. Rel. Law § 170 (McKinney 1966) (amending state law to provide six grounds for divorce, including, *inter alia*, abandonment and separation pursuant to court order or written agreement).

only state in the country to “require[] the finding of fault or living apart pursuant to a legal document as a basis for divorce.”¹⁰⁴

Thus, neither historically nor today can New York’s marriage law be characterized fairly as conforming with that of other states.

IV. CONCLUSION

As illustrated above, the history of marriage has been one of evolution, not of static immutability, with marriage surviving innumerable changes to its core rules over the last two centuries. These changes to the institution of marriage over time have rendered the current rule excluding same-sex couples from marriage inconsistent with New York law, which has both repudiated gendered marriage rules as unconstitutional and, historically as well as contemporarily, *not* held procreation to be an essential element of marriage. The City’s gender- and procreation-related defenses thus lack any legitimate relationship to the concerns of equality and interdependence that are marriage’s now-settled underpinnings. Likewise, the historical and ongoing absence of uniformity between marriage rules of New York and other states demonstrates that claims about uniformity cannot support the rule challenged here.

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¹⁰⁴ S.C. v. A.C., 4 Misc. 3d 1014(A), Slip Copy (Queens Cty. 2004) (unpublished opinion).

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SEXUAL EXPRESSION
