Four Years After *Obergefell*, and Michigan's Laws Are Still in Disarray

By Tim Cordes

For more than 20 years, Americans struggled with the issue of whether same-sex couples should be afforded the right to marry and whether the rights and obligations flowing from those marriages would be secure and recognized throughout the country. Ballot initiatives, constitutional amendments, and statutory schemes percolated through several states, creating a rapidly changing landscape of conflicting rules as each jurisdiction grappled with the issue and the tide of public opinion swung from pole to pole. Some states, like California, oscillated back and forth—first banning, then allowing, and then once again banning through public referendum the right of gays and lesbians to form legal marriages. Other states waited until their courts issued rulings on the matter while some had their legislatures propose new laws to extend marriage to same-sex couples.

Attempts were made at the federal level to resolve the matter once and for all, notwithstanding the fact that the definition of marriage had always been a state issue.[1] As early as 2002, the U.S. House of Representatives sought to ban same-sex marriage by proposing an amendment to the United States

Constitution that would limit marriage nationwide to "the union of one man and one woman."[2] According to the Heritage Foundation, the push for a federal amendment was prompted by "[a] series of geographically dispersed judicial decisions, beginning with a trial court in Hawaii, followed by a Superior Court in Alaska, and then a Vermont Supreme Court ruling."[3] While the 2002 resolution failed, several other federal attempts were made in succeeding years to bring about uniformity.

Special-interest groups joined the fray, and expensive campaigns for and against same-sex marriage were mounted across the country. On November 2, 2004, 11 states passed constitutional amendments banning same-sex marriage: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah.[4] Nearly $2 million in contributions was spent campaigning for the passage of Michigan's constitutional amendment—more than twice the amount of money raised to oppose it.[5] This was the second-highest amount spent in any of the 22 states where same-sex marriage bans were proposed in 2004 and 2006.[6] Michigan's constitutional amendment banning same-sex marriage passed by a margin of 793,758 votes, with 59 percent voting in favor and 41 percent opposed.[7] The ballot initiative changed Michigan's Constitution to add Article I, Section 25, which reads:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

At a Glance

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On June 26, 2015, the United States Supreme Court issued its ruling in *Obergefell v Hodges*, which held that state laws prohibiting marriage between same-sex couples violated the equal protection and due process clauses of the Fourteenth Amendment to the U.S. Constitution.[8] By the time *Obergefell* was decided, 31 states had adopted constitutional amendments banning legal recognition of same-sex unions.[9] Michigan's constitutional amendment was one of the most restrictive, joining Nebraska, South Dakota, and Virginia in enacting bans on same-sex marriage, civil unions, and any marriage-like contract between unmarried persons.[10]

In addition to the state constitutional amendments, many states enacted statutes to limit marriage, and marriage recognition, to opposite-sex couples only. The Michigan legislature passed MCL 551.1, providing as follows:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

MCL 551.3 and MCL 551.4, two statutes that mirror each other, added same-sex prohibitions to the list of whom a person could legally marry. MCL 551.3 states:

> A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, *or another man*. (Emphasis added.)

When the legislature passed MCL 551.4, it similarly tacked on the phrase "or another woman" to the list of proscribed individuals whom women may not marry.

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In 2016, the Michigan Law Revision Commission produced a 68-page draft report identifying statutes and court rules affected by the *Obergefell* ruling.[11] The Commission was created by Act 412 of 1965 to "[e]xamine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms."[12] Its current duties include the obligation to "[r]ecommend changes in the law it considers necessary in order to modify or eliminate antiquated and inequitable rules of law, and bring the law of this state into harmony with modern conditions."[13] In its report, the Commission identified 131 separate statutes that should be changed

in light of *Obergefell*. While many of the statutory changes predictably concerned marriage, family, and divorce, the report also identified laws related to veterans' benefits, contracts, insurance, licensing, campaign issues, and criminal law. Most changes were warranted simply because of the use of the term "husband" or "wife," but some get to the heart of more fundamental aspects of our laws.

As an example, MCL 418.335(1) (under the Workers' Disability Compensation Act of 1969) currently states "[u]pon the remarriage of a *dependent wife* receiving compensation, such payments shall cease upon the payment to her of the balance of the compensation to which she would otherwise have been entitled…" (emphasis added). The statute currently makes no provision for a dependent *husband*, so using the word "spouse" would change the strict meaning of the law. But in a same-sex marriage between two men, there would be no "wife," and therefore no applicability of the statute to that situation without ignoring its actual language and making an assumption as to legislative intent.

A sharper distinction can be drawn by looking at MCL 552.391, which currently allows a wife to restore her former name in a judgment of divorce but does not allow for a husband to make a similar change. The statute's text currently says:

> The circuit courts of this state, whenever a decree of divorce is granted, may, at the instance of the woman, whether complainant or defendant, decree to restore to her birth name, or the surname she legally bore prior to her marriage to the husband in the divorce action, or allow her to adopt another surname if the change is not sought with any fraudulent or evil intent.

While this statute was undoubtedly enacted to reflect a common practice of heterosexual marriage—that of a wife taking her husband's last name—as currently written, the statute would require a man in a same-sex marriage who took his husband's name to file a standalone petition for name change in the circuit court. This is not merely an academic concern; this author has been contacted by judges who have faced this exact scenario in divorces pending before them in the years since *Obergefell*.

As of July 12, 2019, there is a pending House bill proposing changes to MCL 552.391 that would remove the masculine and feminine pronouns from the statute and provide for any party in a divorce action to change their name in a judgment of divorce.[14] However, an identical bill introduced in 2012 was similarly referred to the Committee on Judiciary and expired without further action.[15] Given the fact that the two bills propose the same changes to the language of the statute and the earlier bill was proposed three years before the *Obergefell* decision, it seems unlikely that the new bill was motivated by an interest in addressing the issue of same-sex marriage.

Since the 2012 bill was never even brought to a vote—even though it would have provided equity for heterosexual married couples—it seems unlikely that this year's bill will be enacted to offer relief to the unique challenges facing same-sex married couples.

Furthermore, since same-sex married couples will, by necessity, avail themselves more frequently of assisted reproductive technology (ART), those couples will be disproportionately affected by ART laws that presume parties to a marriage will be of the opposite sex. For example, MCL 700.2114(a) makes no provision for a woman in a same-sex marriage to be presumed to be a legal parent if her spouse seeks help through ART:

> If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession. A child conceived by a married woman *with the consent of her husband* following utilization of assisted reproductive technology is considered as their child for purposes of intestate succession. *Consent of the husband is presumed* unless the contrary is shown by clear and convincing evidence. If a *man and a woman participated in a marriage ceremony* in apparent compliance with the law before the birth of a child, even though the attempted marriage may be void, the child is presumed to be their child for purposes of intestate succession. (Emphasis added.)

It may be tempting to dismiss conflicts arising from these statutory problems as mere annoyances that a competent

jurist can easily overcome. Unconstitutional laws remain on the books in many jurisdictions, after all, and yet cases do not come to a screeching halt over every "antiquated and inequitable" provision that has not been eliminated or rectified. However, these laws are not as innocuous as the apocryphal law making it illegal to march your chickens down Main Street after dusk. Many of these laws are the product of a time when lobbying by special-interest groups actively sought to deny equal access to fundamental rights to marriage and family for lesbian and gay couples. The divisiveness that spawned these laws and the political nature of their impact are undeniable and deeply rooted. Evidence of resistance to changing unconstitutional laws can be seen in the recent act that was passed in Michigan's southern neighbor, Ohio.

Ohio amended its marriage statutes in April 2019 to "change the age at which persons may marry, to generally provide that only persons of the age of 18 years, not nearer of kin than second cousins, and not having a husband or wife living, may marry."[16] When the bill took effect, ORC 3101.01 was modified to eliminate five paragraphs, but notably, the amendment left alone the language barring same-sex marriage. The current text of ORC 3101.01 reads:

> (A) Except as provided in section 3101.02 of the Revised Code, only male persons of the age of eighteen years, and only female persons of the age of eighteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman.
>
> (B)
>
> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have *no legal force or effect* in this state and, if attempted to be entered into in this state, is *void ab initio and shall not be recognized* by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.
>
> (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to non-marital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to non-marital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (B)(3) of this section shall be construed to do either of the following:
>
> (a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to non-marital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code;
>
> (b) Affect the validity of private agreements that are otherwise valid under the laws of this state.
>
> (4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to non-marital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state. (Emphasis added.)

Since Ohio has made major revisions to its marriage statute, and yet specifically chose to retain existing language that would be flatly unconstitutional under *Obergefell*, a reasonable observer could presume that strong opposition to same-sex marriage is still present in that state—the very state in which *Obergefell* began.

Since Michigan has taken the first step by producing the Michigan Law Revision Commission report to identify where our laws need to be changed, our legislature must take the next step and propose bills to amend the "antiquated and inequitable" sections of the laws that conflict with the ruling in *Obergefell*. There are three compelling reasons to do this. First, trial court judges in our state need clear laws to follow when dealing with same-sex marriages and related family

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issues. As previously noted, some statutes need to be interpreted according to a presumed intent, and conflicts between the written text and *Obergefell* cannot be resolved by simply choosing gender-neutral terms. If different courts apply different interpretations, appellate panels could become clogged with issues that could easily have been avoided by clarifying amendments. Leaving these issues unresolved to be sorted out on a case-by-case basis by the family courts creates needless uncertainty for Michigan families and their children.

Second, gay and lesbian citizens of Michigan deserve the dignity of having unconstitutional laws that denigrate their rights removed from our law books. Living under a statutory structure that denies one's status as a legally married couple is a constant reminder of the lack of societal acceptance and reinforces the notion that same-sex couples are second-class citizens. It creates an aura reminiscent of the "separate but equal" period before *Brown v Board of Education*,[17] which should not be tolerated in a state that values the civil rights of all its citizens. Further, the failure to clarify statutes related to legitimacy, ART, and child-rearing could unfairly impose unequal cost burdens uniquely on gay and lesbian parents, who may feel the need to engage additional legal services to draft customized agreements or initiate adoption proceedings in an attempt to protect their parental rights. While heterosexual couples can rely on clear laws and years of court precedent to protect their families, gay and lesbian mothers and fathers must live with the risk that a poor interpretation of an unconstitutional statute may deny them the fundamental right to parent their children.

Finally, failure to amend unconstitutional statutes can allow bigotry and discrimination against same-sex married couples to fester in the shadows. In Alabama, a ballot initiative in 2000 proposed an amendment to repeal Article 1V, Section 102 of its state constitution, which prohibited interracial marriages—more than 30 years after the United States Supreme Court had ruled such prohibitions unconstitutional in *Loving v Virginia*.[18] The amendment passed by a margin of 59 percent in favor to 41 percent opposed.[19] For 31 years, Alabama's constitution has contained a provision ruled unconstitutional nationwide, yet nearly half of the state's voters still opposed its repeal. Some Michiganders may find solace in knowing that unenforceable laws against same-sex marriage remain on the books, but to the extent that they promote continued discrimination against gays and lesbians, such solace is toxic to the future of many Michigan families and children. The clearest way to move forward from the divisive political upheaval that preceded the *Obergefell* ruling is to clean up our antiquated and inequitable laws in accordance with the Michigan Law Revision Commission report. ■

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ENDNOTES

1. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *United States v Windsor*, 570 US 744, 767; 133 S Ct 2675; 186 L Ed 2d 808 (2013) (citing *In re Burrus*, 136 US 586; 10 S Ct 850; 34 L Ed 500 (1890)).
2. HRJ 93, 107th Cong (2002).
3. Spalding, *One Man, One Woman: The Constitutional Amendment*, The Heritage Foundation (March 14, 2004) <https://www.heritage.org/marriage-and-family/commentary/one-man-one-woman-the-constitutional-amendment> [https://perma.cc/7JFA-JHX6]. All websites cited in this article were accessed October 16, 2019.
4. O'Connell, *The Money Behind the 2004 Marriage Amendments*, The Institute on Money in State Politics (January 27, 2006), pp 6–7, available at <https://web.archive.org/web/20120207142253/http://www.followthemoney.org/press/Reports/200601271.pdf> [https://perma.cc/67TG-4SQM].
5. *Id.* at 5.
6. Moore, *The Money Behind the 2006 Marriage Amendments*, The Institute on Money in State Politics (July 23, 2007), pp 4–5 <https://web.archive.org/web/20120307202414/http://www.followthemoney.org/press/Reports/200707231.pdf> [https://perma.cc/JK2V-SBPW].
7. Election Results: Ballot Measures, "Michigan Proposal 04-2, Same-Sex Marriage," CNN (2004) <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> [https://perma.cc/MFN6-YPU2].
8. *Obergefell v Hodges*, 576 US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015).
9. *Same-Sex Marriage Laws*, NCSL (June 26, 2015) <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> [https://perma.cc/6NJP-MMQT] and *US state constitutional amendments banning same-sex unions*, Wikipedia (September 17, 2017) <https://en.wikipedia.org/wiki/U.S._state_constitutional_amendments_banning_same-sex_unions> [https://perma.cc/4F9H-343L].
10. Const 1963, art I, § 25 (Michigan); Const 1875, art I, § 29 (Nebraska); Const 1889, art XXI, § 9 (South Dakota); and Const 1971, art I, § 15-A (Virginia).
11. McLellan et al, *Same Sex Marriage: A Review of Michigan's Constitutional Provisions and Statutes*, Michigan Law Revision Comm (2016), draft available at <https://council.legislature.mi.gov/Content/Files/DRAFT_MLRC%20-%20Same%20Sex%20Marriage%20Report.pdf> [https://perma.cc/3L4F-G7BC].
12. *Id.* at 5.
13. MCL 4.1403(1)(d).
14. 2019 HB 4704 (an act to provide for changing and determining the names of divorced women, referred to the Committee on Judiciary on June 26, 2019).
15. 2012 HB 5779.
16. HB 511, Ohio 132nd General Assembly (introduced February 14, 2018).
17. *Brown v Bd of Ed*, 347 US 483; 74 S Ct 686; 98 L Ed 873 (1954).
18. *Loving v Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967).
19. *Alabama Interracial Marriage, Amendment 2 (2000)*, Ballotpedia <https://ballotpedia.org/Alabama_Interracial_Marriage,_Amendment_2_(2000)> [https://perma.cc/NXB3-FQL5].