UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

APRIL DEBOER, et al.,

Plaintiffs,

-vs- ED Mi #12-civ-10285
Hon. Bernard A. Friedman

RICHARD SNYDER, et al.,

Defendants.
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EXPERT WITNESS REPORT OF NANCY F. COTT, Ph.D.

I, Nancy F. Cott, Ph.D., hereby declare and state as follows:

I. EXPERT BACKGROUND AND QUALIFICATIONS

1. I have been retained as an expert witness by counsel for plaintiffs in this matter. This declaration is based on my personal specialized knowledge, informed by my education and experience as an historian, and by my familiarity with relevant scholarly work by other scholars on the topic of marriage and family. My background experience, and list of publications are summarized in my curriculum vitae, appended to this declaration as Exhibit A. I have actual knowledge of the matters stated in this declaration, and I could and would so testify if called as a witness.

2. In 1969, I received a master's degree in History of American Civilization from Brandeis University. In 1974, I received a Ph.D. in History of American Civilization from Brandeis University. Since that time, I have researched and taught United States history. I

taught for twenty-six years at Yale University, where I gained the highest honor of a Sterling Professorship, and in 2002 I joined the faculty at Harvard University.

3. I am presently the Jonathan Trumbull Professor of American History at Harvard University. I teach graduate students and undergraduates in the area of American social, cultural and political history, including history of marriage, the family and gender roles. I also am the Pforzheimer Family Foundation Director of the Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study.

4. In the past four years, I have testified as an expert – either at trial or through declaration – or been deposed as an expert in U.S. v. Windsor, 133 S. Ct. 2675 (2013), De Leon v. Perry, Case No. 5:13-cv-982 (W.D. Tex.), Cooper-Harris v. United States, 2013 U.S. Dist. LEXIS 125030 (C.D. Cal. Aug. 29, 2013), Dragovich v. U.S. Dep't of the Treasury, 872 F. Supp. 2d 944 (N.D. Cal. 2012), Golinski v. Office of Personnel Management, 824 F. Supp. 2d 968 (N.D. Cal. 2012), Pedersen v. Office of Personnel Management, 881 F. Supp. 2d 294 (D. Conn. 2012), Sevcik v. Sandoval, 911 F. Supp. 2d 996 (D. Nev. 2012), Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), Darby v. Orr, Lazaro v. Orr, Nos. 12 CH 19718 & 19719 (Circuit Ct., Cook Cty.), and Garden State Equality v. Dow, No. MER L-1729-11 (Sup. Ct., Mercer Cty. Div.).

5. I am being compensated for my participation in this matter as follows: For preparation of this declaration I am receiving the flat sum of $1,000.00; for my time spent in the matter in advance of trial I am being paid at the rate of $250.00 per hour; and for my time spent for travel, trial preparation and trial time I am being paid at the rate of $450.00 per hour. I will also be reimbursed for my travel and lodging expenses. My compensation does not depend on the outcome of this litigation, the opinions I express or the testimony I provide.

6. I am the author or editor of eight published books, including Public Vows: A History of Marriage and the Nation (Harvard Univ. Press, 2000), the subject of which is marriage as a public institution in the United States. I also have published over twenty scholarly articles, including several discussing the history of marriage in the United States. I have delivered scores of academic lectures and papers over the past thirty-five years on a variety of topics, including the history of marriage in the United States. I also have served on many advisory and editorial boards of academic journals.

7. I have received numerous fellowships, honors and grants, from a John Simon Guggenheim Memorial Foundation Fellowship in 1985 and National Endowment for the Humanities Fellowship in 1993, to a Fulbright Lectureship in Japan in 2001 and election to the American Academy of Arts & Sciences in 2008.

8. I spent over a decade researching the history of marriage in the United States, especially its legal attributes, obligations and social meaning, before and while writing Public Vows: A History of Marriage and the Nation. The claims and evidence in this declaration come principally from the research for that book and are more fully documented there and in an article based on that research, Marriage and Women's Citizenship, American Historical Review (1998). The numerous historical sources, legal cases and government documents that I studied and analyzed while researching and writing the book, as well as the other scholars' work that I consulted, are cited in the footnotes in the book and article. In addition, I have supplemented my past research with more recent reading and research on matters referenced in this declaration. In preparing to write this declaration and to testify in this matter, I reviewed Public Vows, Marriage and Women's Citizenship, and certain of the sources cited therein, as well as the materials listed in the attached Exhibit B. I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this declaration, as additional support of my opinions. The materials I have relied upon in preparing this declaration are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject. I have also relied on my years of research experience in this field, as set out in my curriculum vitae, and on the materials listed therein.

II. SUMMARY OF FACTS AND OPINION

9. The opinions expressed in this declaration are my opinions as an expert in the history of marriage. This declaration deals with the history of marriage as an institution created and authorized by law. In the United States, marriage has changed significantly over time to address changing social and ethical needs, while inheriting and retaining some essential characteristics – such as its basis in free consent of the two parties – from the English common law.

10. Marriage in the United States has always been a civil matter, under the control of legislative and judicial authorities, rather than religious authorities. Religious authorities were

permitted to solemnize marriages by acting as deputies of the civil authorities only, in the history of the United States, and while free to determine what qualifications they would accept for religious validation, were never permitted to determine the qualifications for entering or leaving a marriage that would be valid at law.

11. The institution of marriage itself has served numerous purposes. No one outside a particular couple can describe their private, subjective experience of "being married," since this may vary as much as individuals vary. Historians can, however, document how the institution of marriage has been defined by law, how it has functioned and the purposes it has served. Marriage and its regulation by civil authorities during this nation's history have served to facilitate governance; to create public order and economic benefit; to create stable households; to legitimate children; to assign providers to care for dependents (including the very young, the very old, and the disabled); to facilitate property ownership and inheritance; and to shape the "people," or to compose the body politic. Seeing multiple purposes in marriage, the American states have encouraged maritally-based households as advantages to public good, whether or not minor children are present, and without regard to biological relationships of descent. Only a highly reductive interpretation can posit that marriage has a single core purpose or defining characteristic of procreation.

12. The individual's ability to consent to marriage is the mark of the free person in possession of basic civil rights. This is compellingly illustrated by the history of slavery and emancipation in the United States. Slaves could not contract valid marriages. They did not have the ability – the freedom – to consent to the obligations and duties that marriage entailed. After the Civil War, large numbers of former slaves leapt at the new chance to contract marriage.

13. Marriage rules in several other past instances enforced inequalities among inhabitants of the United States. The most widespread examples were states' bans on marriages between whites and persons of color, eventually struck down in *Loving v. Virginia*, 388 U.S. 1 (1967). Stringent policies directed against Chinese immigrants, combined with bans on white/Chinese marriages in numerous states, further resulted in uniquely harsh marriage constraints on Chinese and Chinese-American residents for many decades. Also, for a significant period of years, starkly unequal consequences followed for male and female American citizens who married foreign nationals. [See Pascoe, *What Comes Naturally: Miscegenation Law and the*

Making of Race in America (2009), 80-93; Candice Bredbenner, *A Nationality of Her Own: Women, Marriage and the Law of Citizenship* (1998)]. These unequal applications of marriage rules have since been judged discriminatory and have been eliminated.

14. Societal and consequent legal change over the centuries has produced new features in marriage that would have been unthinkable at the time of the founding of the United States. Three areas of fundamental change illustrate this pattern:

a) Under common law in the 18th century, men and women were treated unequally, and asymmetrically, in marriage. According to the marital doctrine of coverture (marital unity), the husband and wife were considered to be a single entity. Upon marriage, the wife ceded her legal and economic identity to her husband and was "covered" by him. This inequality, seen as essential to marriage for centuries, was eliminated in response to changing values and the demands of economic modernization. Today, Michigan and federal law treat both spouses equally and in gender-neutral fashion with respect to marriage, and the U.S. Supreme Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required.

b) Racially-based restrictions in a large majority of states for much of the nation's history prohibited, voided and/or criminalized marriages between whites and persons of color. Michigan enacted a ban of this sort early in statehood, but kept it in place for a relatively short duration, from 1838 to 1883. In 1967 *Loving v. Virginia* ended a nearly 300-year American history of such laws.

c) Divorce grounds were few in early America, and divorce was always an adversary process, requiring one spouse to sue on the basis of the other's marital fault. Over time, states saw the need to liberalize grounds for divorce, including the enactment of "no-fault" divorce laws.

15. My research has led me to conclude that marriage is a capacious and complex institution. It has political, social, economic, legal and personal components, and carries meanings and consequences that operate in more than one arena. The institution of marriage combines public and private, status and contract, governance and liberty. Today marriage is both a fundamental right and a privileged status.

16. Marriage has long been entwined with public governance. The relation between marriage and government is visible today in both federal policy and state laws, which channel many benefits and rights of citizens through marital status. Every state gives special recognition to marriage in areas ranging from tax policy to probate rules. For example, in Michigan, lawfully wedded spouses gain inheritance rights to an intestate spouse's estate, MCLA §700.2201*ff*; access to a spouse's workers' compensation death benefits and retirement benefits, MCLA §420.3; the right to make health decisions for a disabled spouse, In re Martin, 200 Mich. App. 703 (1993); and the right to a spouse's veterans' benefits, MCLA §206.506, among many other benefits. See also National Pride at Work v. Governor of Michigan, 481 Mich. 56 (2008). The General Accounting Office reported in 1996 that the corpus of federal law refers to more than 1,000 kinds of benefits, responsibilities and rights connected with marriage. See also United States v. Windsor, 133 S.Ct. 2675, 2683 (2013).

17. While marriage has changed throughout the centuries, it retains its basis in voluntary consent, mutual love and support, and economic partnership. The institution has lasted over centuries because it has been flexible, capable of being adjusted by courts and legislatures in accord with changing ethical and moral standards.

18. The changes observable over time have moved marriage toward equality between the partners, gender-neutrality in marital roles, and control of marital role-definition and satisfaction by the spouses themselves rather than by state prescription. Marriage restrictions meant to discriminate between and among groups of citizens in their freedom to marry partners of their choice have been eliminated.

19. The exclusion from marriage of same sex couples stands at odds with the direction of historical change in marriage in the United States. Contemporary public policy assumes that marriage is a public good. Excluding some citizens from the power to marry, or marking some as unfit on the basis of their marriage choices, does not accord with public policy regarding the benefit of marriage or the rights of citizens.

III. MARRIAGE IS A CIVIL INSTITUTION

20. From the founding of the United States, marriage has been authorized and regulated by civil law. Each colony, state, and territory included marriage laws and regulations in its

founding legislation. Michigan law specifically recognizes marriage as a "civil contract". M.C.L.A. §551.2.

21. The initial English colonists in North America came from a mother country where the established national church ruled marriages. The Puritan colonists were breaking away from the established Anglican Church, however, and would not accept its authority over marriage. Rather, they believed that marriage was a "civil thing," (in the words of the first governor of the Plymouth settlement) because it had so much to do with property and with two individuals' consent.

22. Colonial legislatures established secular authority over the making and breaking of lawful marriages, and that approach continued once the United States was founded,. State laws typically deputized religious authorities (and some other designated communal leaders) to perform marriage ceremonies. For many Americans then and now, marriage has religious significance. Marriage ceremonies may take a religious form, but it is the civil law that determines the validity of a marriage. Clerical authorities may decide which marriages their faith will recognize, but clerical authorities do not (and did not in the past) determine which marriages the state would validate as lawful. Throughout the history of the United States (as today), whether a marriage was or was not recognized by a religion has not dictated its lawfulness. Religious authorities have been authorized to act as deputies of the civil authorities in performing marriage ceremonies. They are not authorized to determine the qualifications for entering or leaving a legally valid marriage.

23. When the U.S. Constitution was written and ratified, the regulation of marriage was considered to lie within the power of the several states, included in their power over the "health, safety and welfare" of the population. That prerogative continues to lie with the states today, subject to the requirements and protections of the federal Constitution. Within constitutional limitations, states set the terms of marriage, e.g., who can and cannot marry, who can officiate, what obligations and rights the marital agreement involves, whether it can be ended and if so, why and how. State legislatures and courts through the nineteenth and twentieth centuries repeatedly adjusted marriage terms and rules, not hesitating to exercise their jurisdiction to alter the terms of marriage.

IV. MARRIAGE HAS SERVED VARIED PURPOSES IN UNITED STATES HISTORY AND TODAY.

24. Societies in different historical times and places have defined marriage in many ways. Marriage is an institution of human culture; it may vary as much as human cultures do. In a given society a legitimate marriage may, for instance, be polygamous or monogamous, matrifocal or patrifocal, patrilineal or matrilineal, lifelong or temporary, open or closed to concubinage, divorce-prone or divorce-averse, and so on.

A. Marriage Developed in Relation to Governance

25. Historically, marriage has been closely intertwined with sovereigns' aim to govern their people. When monarchs in Britain and Europe fought to wrest control over marriage from ecclesiastical authorities (circa 1500-1800), they did so because the authorization of marriage was a form of power, and they used marriage as a vehicle through which to govern the population.

26. Anglo-American legal doctrine, continuing into the era of American independence, made married men into heads of their households. The head of household was legally obliged to control and support his wife and all other household dependents, whether biologically related children or relatives or others including orphans, apprentices, servants and slaves. In return, he became their public representative. This allotment of household authority and privilege was a major feature of public order at the time of the American Revolution, when about 80% of the thirteen colonies' population were legal dependents of male household heads. (See Carole Shammas, *Anglo-American Household Government in Comparative Perspective*, 52 WM. & MARY Q. 104, 123 (1995).

27. Marital status and citizenship rights were thus deeply intertwined in early American history. Laws concerning who could marry whom, in what way, and setting the specific duties of husband and wife, formed important dimensions of states' authority over their populations. Married men's full citizenship and voting rights were seen as tied to their headship of and responsibilities for their families; correspondingly, wives' inferior citizenship and lack of voting rights were understood to be suited to their subordination to their husbands.

28. The rule of the male head of household over his wife, children, servants, apprentices and slaves is now quite archaic. Today, constitutional imperatives have eliminated sex and race inequalities from laws of marriage. Yet the marital dimension of citizenship persists: in a legacy of the sustained relation between marriage and citizenship, states grant marriage rights to certain couples and not others, and award married couples benefits and rights not available to other pairs or to single persons.

B. Marriage Creates Public Order and Economic Benefit.

29. Marriage was seen as serving public order in the Revolutionary era, and still is so today. Marriage has organized households and figured largely in property ownership and inheritance. These are matters of civil society in which public authorities are greatly interested. State governments have typically encouraged as well as regulated marriage, because of its importance in creating and serving public order.

30. State governments in the United States have encouraged people to marry for economic benefit to the public, as well as to themselves. The marriage bond creates economic obligations between the mutually consenting parties and obliges them to support their dependents. In early America, marital households were formed on presumptions about a "natural" sexual division of labor. That is, men and women were assumed to be prepared for and good at distinctive kinds of work, both kinds being equally necessary to human sustenance, and society. (Men plowed the fields to grow the grain, and women made the bread from it, for example.) Marriage set the arrangements to foster the continuation of this sexual division of labor, especially through the doctrine of coverture. See Section VI(A), below.

31. Households were the basic economic unit at the time Michigan became a state. Households organized the production of food, clothing and shelter for individuals. Early American families might include more than parents and children; grandparents or unmarried relatives might also be present, as well as unrelated apprentices or other adolescent helpers. The household served to establish a support system for all of these members, not only for biological offspring of the married couple. To a very great extent, "family" and "household" were used as synonyms. When statesmen or legislators at that time said that families were the foundation of society, they meant that households – those sub-units governed by male heads – were the political and economic building blocks of the state.

32. Today Michigan and all state governments retain strong economic interests in marriage, though household economies no longer dictate sex-differentiated work roles. Marriage obligates the spouses to support each other as well as any children born or adopted. State governments try to minimize public expenses for indigents by enforcing the economic obligations of marriage. States offer financial advantages to married couples on the premise that marriage-based households promise social stability and economic benefit to the public.

33. The economic dimension of the marriage-based family took on new scope when federal government benefits expanded during the twentieth century. State and federal governments now channel many economic benefits through marital relationships. Federal benefits such as immigration preferences and veterans' survivors' benefits are extended to legally married spouses, but not to unmarried partners, even those who have contracted a civil union where it is possible. Since the Supreme Court struck down Section 3 of the federal Defense of Marriage Act, these benefits can be extended to same-sex spouses validly married (United States v. Windsor, 133 S. Ct. 2675 (2013)), but same-sex couples in Michigan have no access to these benefits when the state does not allow them to marry.

C. Capacity to Marry Has Never Turned Upon Child-Bearing Ability.

34. While sexual intimacy has been expected in marriage, the ability or willingness of married couples to produce progeny has never been necessary for valid marriage in American law. For example, in no state are women past menopause barred from marrying, nor divorceable after a certain age. Men or women known to be sterile have not been prevented from marrying. Inability to procreate has never been a ground for divorce, nor could a marriage be annulled for failure to beget children.

35. The common law and many later state statutes made sexual incapacity (impotence or other debility preventing sexual intimacy) a reason for annulment. Thus sterility or infertility was never a basis for invalidating a marriage while the inability to have sexual relations was. See Chester G. Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States* vol. I (grounds for annulment), vol. II (grounds for divorce) (1931, 1932, 1935) An annulment for sexual incapacity depended upon a complaint by one of the

marital partners, however, and if neither spouse objected, a non-sexual marriage remained lawful.

36. Support for any child born or adopted into a family has, however, been parents' obligation, whether they are married or not and whether the children are biologically their progeny or not. States' intentions, historically, have focused on securing responsible adults' support and protection for their minor dependents whether these are adopted, or step-children, or biological progeny, and whether the children were born within an intact marriage or not This requirement acts as a critical limit on the public's responsibilities for dependent children.

37. Through marriage, state governments have bundled legal obligations together with social rewards, to encourage couples to choose committed relationships of sexual intimacy over transient relationships, whether or not these relationships will result in children.

38. Marriage rules in the United States have aimed more consistently at supporting children than producing them. Support for any child born or adopted into a family was in the past an obligation of the household head. Today, it is a responsibility shared by the couple who marry – whether their marriage remains intact or they divorce.

39. Not only today but in the long past, couples married when it was clear that no children would result. Widows and widowers remarried for love and companionship and because marriage enabled the division of labor expected to undergird a stable household. In our contemporary post-industrial economy, many divorced or widowed older adults marry when they are past childbearing age, usually for reasons of intimacy and stability.

40. Non-procreative marriages, joined by two parties in order to love and honor each other, to share sexual intimacy, companionship and economic partnership, have been acknowledged to exist in the United States since the 1920s, when contraception became a live option for an influential portion of the American population. Couples of reproductive age could now imagine sexual intimacy separate from reproductive consequences.

41. Many commentators in the 1920s feared that contraception had called into question the persistence of marriage. Sociologist Ernest Groves, who initiated college courses on marriage and the family, declared that "marriage faces a crisis and birth control is largely responsible."[1]

[1] Ernest Groves, *The Marriage Crisis* 46 (1927)

42. Rather than ending marriage, the advent of birth control modernized marriage. A new model of "companionate" marriage was recognized in the 1920s both by its champions and its detractors. Social scientist M. M. Knight, Ph.D. noted in the Journal of Social Hygiene in 1924 that "we may call the state of lawful wedlock, entered into solely for companionship, and not contributing children to society, the 'companionate.'" Dr. Knight declared this new term necessary "to make it clear that an actual and general condition is being dealt with," and to distinguish such a marriage from the "family" type of marriage that would produce children. He acknowledged that "We cannot reestablish the old family, founded on involuntary parenthood, any more than we can set the years back or turn bullfrogs into tadpoles."[2]

V. DISCRIMINATORY APPLICATIONS OF MARRIAGE RULES HAVE OCCURRED IN THE PAST.

43. Our country's history reveals a number of striking instances in which marriage laws were used to discriminate among actual or prospective members of the populace, creating hierarchies of value and benefit, declaring some persons more worthy than others to obtain the freedom and privacy inherent in marriage rights. These laws created and enforced inequalities declared by their enforcers to be obvious and right, and justified by their supposed naturalness, although to us today the laws seem patently unfair and discriminatory.

44. In slaveholding states, slaves were unable to marry lawfully. Because slaves lacked basic civil rights (i.e., the right to body, liberty and property), they were unable to give the free consent required for lawful marriage. Furthermore, a slave's overriding obligation of service to the master made carrying out the duties of marriage impossible.

45. Where slaveholders permitted, slave couples often wed informally, creating family units of great value to themselves. These informal unions were valued in the slave community, but they received no respect from white society. Slaveholders broke up slave unions with impunity when they sold or moved slaves. Enslaved couples' unions received no defense from state governments; the absence of public authority behind their weddings was the very essence of their invalidity.

[2] M. M. Knight, Ph.D, "The Companionate and the Family," *Journal of Social Hygiene*, vol. X no. 5 (May 1924), at 258, 267.

46. Slaves' inability to wed lawfully derived from their status as unfree persons (rather than their race or color). After emancipation, many African Americans welcomed the ability to marry as a civil right long denied to them. They saw marriage as an expression of their newly gained rights; being able to marry signified their ability to consent freely to marry a chosen partner.

47. Another form of race-based differentiation and discrimination in marriage laws was the criminalization, nullification and/or voiding of marriages of whites to persons of color. The first such laws were passed in the Chesapeake colonies (Virginia and Maryland), targeting white women who married "negroes, mulattoes, and Indians." Such prohibitions were subsequently strengthened, and they spread to other colonies. After the American Revolution, northern and southern states continued or adopted such laws.

48. Michigan passed a law of this type in 1838 almost immediately after achieving statehood, although very few persons of African descent lived in the territory. [Michigan Rev. Stat. 1838, part 2, title 7, ch. 1, sec. 5, p. 334]. As many as 41 states and territories of the U.S. banned, nullified or criminalized marriages across the color line for some period of their history.

49. In the 1860s and 1870s, fear and furor over immigration from China arose in the western United States, and this too was reflected in marriage laws. Soon many Western states added Indians, Chinese and "mongolians" to those (Negroes and mulattos) already prohibited from marrying whites.

50. Legislators often justified laws criminalizing marriage across the color line by saying that such marriages were against nature or against the Divine plan, much as opponents of same-sex marriage argue today. They contended that permitting cross-racial couples to marry would fatally degrade the institution of marriage. Only whites' marriages to other whites qualified as "natural" to the white legislators who passed these laws. Yet the repeated revisions of laws regarding marriage and race indicated the opposite – that the changes were the wishes of legislators aiming to regulate race relations.

51. Whatever the high-flown rhetoric surrounding bars to marriage, they served to deny public approval to intimate and familial relationships between whites and persons of color. By preventing such relationships from gaining the status of marriage, legislators sought to delegitimize that type of relationship altogether. In parallel fashion, denying lawful marriage to

same-sex couples' unions demotes and discredits their relationships. (For discussion of the abolition of racial restrictions on marriage, see Section VI(B), below.)

VI. MARRIAGE HAS CHANGED IN RESPONSE TO SOCIETAL CHANGES.

52. Marriage in the United States has proved to be a flexible institution. Legislators and judges have re-shaped the institution when necessary. Like other successful civil institutions, marriage has evolved to reflect changes in ethics and in society at large. Marriage has lasted as a major feature of our society because it has been flexible, not static. Adjustments in key features of marital roles, duties, obligations and rules of entry have preserved the appeal and value of marriage in our dynamic society.

53. Past changes in marriage were not, however, readily welcomed by all, and were often difficult for some in society to accept. Features of contemporary marriage that we take for granted – such as the ability of both spouses to act as individuals while married, to marry across the color line, or to divorce for reasons of their own – were fiercely resisted when first introduced and were viewed by opponents as threatening to destroy the institution of marriage itself.

54. The fact that the institution of marriage has been flexible has kept it vigorous and appealing. Modifications in civil marriage undertaken by courts and legislatures to adapt to societal changes can be illustrated in three areas: (a) spouses' respective roles and rights; (b) racial restrictions; and (c) divorce.

A. Spouses' Respective Roles and Rights

55. Marriage under the Anglo-American common law, as translated into American statutes, prescribed profound asymmetry in the respective roles and rights of husband and wife. Over time, all the states have moved to gender parity within the institution.

56. Marriage law at the time of the American Revolution was based on the legal fiction that a married couple was a single unit, of which the husband was the sole legal, economic and political representative. The wife's identity was absorbed into that of her husband. This doctrine of marital unity or coverture reflected society's views of the marital couple as a unit naturally headed by the husband.

57. Coverture required a husband to support his wife and family, and a wife to obey her husband. He commanded her labor and property. The coverture doctrine indicated how far marriage was understood as an economic arrangement. Marriage-based households were the fundamental economic units in early America. Unlike today, when occupations are open to men and women, the two sexes then were expected to play differing though equally indispensable roles in the production of food, clothing and shelter, and marriage sustained that relationship via coverture.

58. The static nature of the coverture doctrine, especially as it affected marital property, was ill-suited to a dynamic economy. Wives began to claim their rights to hold property and wages they owned or earned in their own names. Judges and legislators also saw advantages in keeping families supported on both spouses' assets rather than the husband's only: A wife's separate property could keep a family solvent if a husband's creditors sought his assets. Married women able to earn their own income could support their children if their husbands were profligate.

59. Although coverture was an ancient legal doctrine in place for hundreds of years and understood as absolutely essential to marriage, Michigan and all the other states eliminated it over an extended period of time. Courts and legislatures did not view marriage as immutable; they altered marriage fundamentally, in order to take account of societal needs and spouses' evolving relationships.

60. This was a protracted process, because it involved revising the gender asymmetry in the marital bargain. Most states during the late 19th century enabled wives to keep and control their separate property and also their earnings; by the 1930s, wives in many states could act as economic individuals, although other disabilities persisted. In Michigan, coverture was abolished very gradually, through a series of laws enacted between 1855 and 1963. The 1855 law granted a married woman the right to contract in relation to her sole and separate estate. These gains were extended in acts of 1911, which granted a married woman the right to contract in relation to her earnings for services rendered outside the home, and of 1917, which granted a married woman the right to contract jointly with her husband to the extent of their joint estate. While these statutes significantly undercut coverture, all of its features were not fully eliminated until adoption of the Michigan Constitution of 1963. Const. 1963, art. 10, §1. Finally, a 1981

statute repealed the Married Women's Property Acts of 1855, 1911 and 1917 and "abrogated the common law disabilities of married women." M.C.L.A. §557.21 - §557.29.

61. Historically, husbands' exemption from prosecution for rape of their wives was a central legal feature of marriage. Of all the legal features of marital unity, this feature – the husband's right of access to his wife's body – lasted longest. Not until the 1980s did most states eliminate husbands' exemption from prosecution for rape of their wives. When this changed, it signified a new norm of the wife's self-possession, and further reframed the roles of both marriage partners. In Michigan, this legal change occurred in 1988. M.C.L.A. §750.52*l*.

62. The long-enduring expectation that the husband was the provider in a marriage and the wife his dependent was reflected in government benefits schemes. During the New Deal of the 1930s, new federal entitlements built upon that longstanding marital patterning. Federal benefit programs such as the Social Security Act built in special advantages for married couples, and these programs strongly differentiated between husbands' and wives' entitlements. Legal challenges to such spousal sex differentiation were brought in the 1970s, with the result that the Supreme Court found discrimination between husband and wife in Social Security and veterans' entitlements unconstitutionally discriminatory. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Federal benefits channeled through marriage have been gender-neutral ever since then.

63. Over centuries of our nation's history, marriage criteria have been reassessed and have moved toward increasing freedom in marital choice, spousal parity, and gender-neutrality in marital roles. Courts have chipped away at the inequalities inhering in the status regime of reciprocal rights and duties that originated in coverture. The meaning and structure of marriage has been revised to keep current with the time. The duty of support, which once belonged to the husband only, is now reciprocal. Likewise, after a divorce, either spouse may seek alimony and both parties have a duty to support their children. In Michigan, for example, "Each parent shall be responsible for child support based on the needs of the child and the actual resources of each parent." M.C.L.A. §722.26a(6).

64. The result has made marriage into a new status relationship, with spouses assigned gender-neutral rights and responsibilities. Marriage has been kept relevant not by adhering to concepts from another era but by molding the institution to fit the times.

65. Twentieth-century courts have made clear that marriage is not an infinitely elastic contract between two people, but rather a status relationship, with rights and responsibilities corresponding to contemporary realities. By updating the terms of marriage to reflect modern notions of gender equality and individual rights, the courts have promoted the continuing vitality and relevance of marriage. In Michigan, see e.g. North Ottawa Community Hospital v. Kieft, 457 Mich. 394, 407-408 (1998) ("the contemporary reality of women owning property, working outside the home, and otherwise contributing to their own economic support calls for abrogation of this sex-discrimination doctrine from early common law.")

66. For couples who consent to marry today, marriage has been transformed from an institution rooted in gender inequality and gender-based prescribed roles to one in which the contracting parties decide on appropriate behavior toward one another, and the sex of the spouses is immaterial to their legal obligations and benefits. The two partners in a marriage are still economically and in other ways bound to one another by law. But the law no longer assigns asymmetrical roles to the two spouses. [3] No state requires applicants for a marriage license to disclose how they will divide the responsibilities and chores of marriage between them as a condition of issuing a license.

67. The gender equality of marriage today would profoundly shock any American from the era of the American Revolution, or the Civil War. But they would recognize in contemporary marriage the institution's foundation in two consenting parties freely choosing one another.

68. Today the institution of marriage is defined in law as an equal, gender- neutral partnership, with each party having the same rights and obligations to each other and to society. That evolution, along with the Supreme Court's legal recognition of the liberty of same-sex couples to be sexually intimate, Lawrence v. Texas, 539 U.S. 558 (2003), clears the way for equal marriage rights for same-sex couples who have freely chosen to enter long-term, committed, intimate relationships.

B. Racial Restrictions

69. Despite the principle of freedom of choice intrinsic to consent-based marriage, racially-described legal restrictions on the right to marry were common in the United States for decades, as discussed above (Section V).

[3] Michigan has, however, retained the right of a wife to elect dower. M.C.L.A. Sec. 558.1.

70. Slowly but unmistakably, however, social and legal views in parts of the United States changed. An increasing minority of Americans began to see these laws to be inconsistent with principles of equal rights and damaging to society as a whole. Michigan showed its recognition of a fundamental right to marry by abrogating its ban on whites marrying persons of color in 1883. [See 1883 Mich. Pub. Acts 16, An Act to Amend Sec. 1 and to repeal Sec. 31 of ch. 170 of the Compiled Laws of 1871, no. 24.]

71. The U.S. Supreme Court first articulated the point that the right to marry was fundamental in 1923, yet racially-based marriage bans continued to be sustained in numerous states for more than four decades. The eventual elimination of these laws was consistent with increasing emphasis on marriage as a fundamental right. The Supreme Court's decision in Loving stated very clearly that marriage was a "fundamental freedom."

72. Since Loving, the Supreme Court has rejected as unconstitutional various state restrictions on the right to marry, including those denying the right to marry to parents who are in arrears on their child support obligations, and to incarcerated felons. See, e.g., Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374, 387 (1978) at n.12 (firmly restricting statutory classifications that would "attempt to interfere with the individual's freedom to make a decision as important as marriage.")

73. Today virtually no one in the United States questions the legal right of individuals to choose a marriage partner without government interference based on race. A prohibition long embedded in our laws and concepts of marriage – and often defended as natural and in accord with God's plan – has been entirely eliminated. The Loving court strengthened and validated the institution of marriage within society, affirming that freedom of choice of one's partner is basic to each person's civil right to marry.

C. Divorce

74. Legal and judicial views of divorce likewise have evolved to reflect society's view of marriage as an embodiment of choice and consent, in which the marriage partners themselves decide what is an appropriate enactment of their marital roles.

75. Divorce was possible in a few of the English colonies in America. Within several decades after the American Revolution, most states and territories allowed divorce, albeit under

extremely limited circumstances. Divorce grounds initially involved only such breaches of the marriage as adultery, desertion or conviction of certain crimes. Grounds such as cruelty were later added. Michigan's early divorce law provided for both absolute divorce and for separation along fairly standard lines. Revised Statutes of the State of Michigan 1846, Title XX Ch. 84 Sec. 5 & 6.

76. Like other early rules concerning marriage, early divorce laws presupposed different and asymmetrical marital roles for husband and wife. For instance, desertion by either spouse was a ground for divorce, but failure to provide was a breach that only the husband could commit. In order to succeed in her petition court, a wife seeking divorce had to show that she had been a model of obedience and service to her husband.

77. Divorce began as and long remained an adversary proceeding, meaning that the petitioning spouse had to show that the accused spouse had broken the social and legal contract embodied in marriage as set by the state (e.g., the husband had failed in his obligation to provide for his wife). When divorce was granted, the guilty party's fault was a fault against the state as well as against the spouse. Many states' divorce laws prohibited remarriage for the guilty party in a divorce.

78. Over time, divorce became more easily obtainable as state legislation expanded the grounds for it. This evolution was hotly contested, however, with many critics aghast at the notion of liberalized grounds for divorce, sure that such developments would undermine the marital compact entirely. The adversary form prevailed even while grounds were liberalized, leading, by the twentieth century, to cursory fact-finding hearings and even fraud upon the court by colluding spouses who both saw the marriage as having broken down.

79. No-fault divorce was a California innovation of 1969. Michigan followed in 1971 with a law effective January 1, 1972, to enable a spouse to petition for a "no-fault" divorce on the ground that "the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." M.C.L.A. §552.6; 1971 P.A. 75.

80. By 1977, all but three U.S. states had adopted some form of no-fault divorce. Not all states used the "no-fault" rubric, but all made it possible for a couple who found themselves incompatible to end their marriage. This movement has underlined the notion that consent and choice as to one's spouse is the essential principle underlying marriage.

81. The liberalization of grounds for divorce that took place in the twentieth century vastly changed the institution of marriage as it had been known and experienced in earlier centuries. The move to no-fault divorce has reflected a major shift toward enabling the partners to a marriage to set their own marriage goals and to determine whether and how well those goals are being met. This sweeping change reflects contemporary views that continuing consent to marriage is essential.

82. In divorce as in other aspects of family law today, gender neutrality in roles and decision-making is the premise. In the past, the obligations of the two spouses after marital dissolution were gender-assigned and asymmetrical: the husband was responsible for the economic support of any dependent children, while courts gave the mother a strong preference for custody. Under current divorce laws, in contrast, both parents of dependent children have responsibility for economic support and for child-rearing; gender neutrality is the judicial starting point for post-divorce arrangements. So too in alimony, as a result of a U.S. Supreme Court decision of 1979, Orr v. Orr, 440 U.S. 268 (1979), with respect to government entitlements, welfare reforms placed responsibility for children's support on both parents by 1988.

VII. MARRIAGE TODAY

83. Marriage has evolved into a civil institution through which the state formally recognizes and ennobles individuals' choices to enter into long-term, committed, intimate relationships. In Michigan, as elsewhere, marital relationships are founded on the free choice of the parties and their continuing mutual consent to stay together.

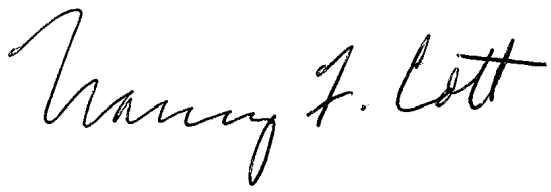
84. Marriage rules have changed over the centuries, to the extent that features of marriage that once seemed essential and indispensable – including coverture, racial barriers to choice of partner, and state-delimited restrictions on divorce – have been eliminated. Marriage today remains a vigorous institution. It has been strengthened, not diminished, by these changes. Marriage persists as a public institution closely tied to the public good and simultaneously a private relationship that serves and protects the two people who enter into it.

85. The institution of marriage has proved to be resilient rather than static during the course of American history. Some alterations in it have resulted from statutory responses to economic and social change, while other important changes in marriage have resulted from

judicial recognition that state strictures must not infringe the fundamental right to marry. In the past half-century, U.S. Supreme Court decisions have confirmed that this basic civil right cannot be constrained by restrictions on marriage partner (Loving v. Virginia), by level of compliance with child support orders (Zablocki v. Redhail) or even by imprisonment (Turner v. Safley), and that marriage partners have a constitutional right to be treated equally regardless of gender within, or at the ending of, their marriage (Orr v. Orr).

86. Michigan, along with other states, has eliminated gender-based rules and distinctions relating to marriage, in order to reflect contemporary views of gender equality and to provide fundamental fairness to both marriage partners. Michigan marriage law treats men and women without regard to sex and sex-role stereotypes – except in the statutory requirement that men may marry only women and women may marry only men. This gender-based requirement is out of step with the gender-neutral approach of contemporary marriage law.

87. The right to marry and the free choice of marriage partner are profound exercises of the individual liberty central to the American polity and way of life. Legal allowance for couples of the same sex to marry extends this tradition, and carries on the long history of adjustments in marriage rules intended to sustain the vitality and contemporaneity of the institution. Enabling couples of the same sex to enjoy marriage equality is consistent with the ongoing historical trend.



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