MOVING FORWARD BY LOOKING BACK: THE RETROACTIVE APPLICATION OF *OBERGEFELL*

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The recent Supreme Court decision of *Obergefell v. Hodges* has forever altered American jurisprudence. Not only did this decision make same-sex marriage legal in all fifty states, but it also required states to recognize same-sex marriages from other states in accordance with the 14th Amendment. The Court's holding in *Obergefell* raises a fundamental question with serious legal and financial significance: when exactly do these once unrecognized marriages legally begin? And to what extent must courts apply *Obergefell* retroactively? The stakes are high and substantive financial effects are pending on the answer to this question—for, with marriage, comes wide-ranging rights and obligations. The decision will predominately impact the realm of real property law, property succession law, employment benefits, and family law. There currently are, and will continue to be, complicated lawsuits concerning the potential retroactive vestment of marital property rights for same-sex married couples, which may also impact third parties such as purchasers, mortgagees, and title insurers. Unfortunately, the *Obergefell* decision provided no guidance on its retroactive application. Therefore, this Article articulates and defends a rich positive and normative jurisprudential framework through which to analyze the rapidly growing number of real property, trusts and estates, and employment benefits disputes that continue to be initiated in the wake of the *Obergefell* decision. More importantly, this Article will proffer specific, effective, and tailored remedies to resolve subtle, but important, variances in these rapidly growing number of disputes. This Article is the first to examine the retroactivity of *Obergefell* as it applies to trusts and estates and property issues.

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INTRODUCTION

When does a same-sex marriage begin?[1] In *Obergefell v. Hodges*,[2] the United States Supreme Court held that state laws "exclud[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" were unconstitutional.[3] The Court's decision brought welcome clarity to a heavily debated question that has divided the nation for the better part of three decades. Following the Court's

1. The author has spoken about this question on many occasions since 2014. *See* Lee-ford Tritt, Professor of Law, Univ. of Fla. Coll. of Law, Address at the 48th Annual Philip E. Heckerling Institute on Estate Planning: Because it Wasn't Complicated Enough—Estate Planning Issues for Same-Sex Couples in the Wake of the Supreme Court's Recent Decisions (January 2014); *see also* Lee-ford Tritt & Patrick J. Duffey, Windsor's Wake*: Non-Traditional Estate Planning Issues for Non-Traditional Families*, 48 HECKERLING INST. ON EST. PLAN. ¶¶ 1100, 1101.2 (2014).

2. 135 S. Ct. 2584 (2015). *Obergefell* was a consolidation of six cases from Michigan, Kentucky, Ohio, and Tennessee involving fourteen same-sex couples and two widowers from same-sex marriages who were either denied marriage licenses or recognition of their out-of-state marriages. *Id.* at 2593.

3. *Id.* at 2604–05.

holding, same-sex marriage became legal in every state. Amidst the celebration and criticism that followed *Obergefell*, though, the Court's answer to a second question went largely unnoticed. *Obergefell*'s second question—"whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right"[4]—was also conclusively answered in the affirmative.[5] While there has been extensive and rigorous dialogue debating the doctrinal reasoning, jurisprudential soundness, and practical implications of *Obergefell*'s first question, *Obergefell*'s second question has been overwhelmingly ignored. Yet, the Court's holding raises a fundamental question with serious legal and financial significance: when *exactly* do these once unrecognized, but lawfully licensed, marriages legally begin?

The answer to that question has implications beyond mere academic inquiry, regardless of whether these marriages begin on the date of the *Obergefell* decision, retroactively on the date of the marriage ceremonies, or on prospective dates selected by state legislative bodies. The stakes are high and substantive financial effects hinge upon the answer to this question—for, with marriage, comes wide-ranging rights and obligations. Moreover, the practical relevance of many of these marital rights and obligations are inescapably intertwined with the length of the marriage. The effects of *Obergefell*'s second question will cascade into virtually every legal venue, from tax to contracts, from bankruptcy to divorce, and from parentage issues to spousal immunity concerns in criminal law. Though far-reaching, the decision will predominately impact the realm of state property laws—particularly real property and property succession.[6] There currently are, and will continue to be, complicated lawsuits concerning the potential retroactive vestment of marital property rights for same-sex married couples, which may also impact third parties such as purchasers, mortgagees, and title insurers. Unfortunately, the *Obergefell* decision provided no guidance on its retroactive application. In an effort to fill that jurisprudential chasm, this Article articulates and defends a rich positive and normative jurisprudential framework through which courts and legislatures might analyze the rapidly

4. *Id.* at 2593.

5. *Id.* at 2607–08 (holding that "there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character").

6. There will be serious implications concerning parentage issues as well. For purposes of this Article, though, parentage issues will be limited to their impact on property law. Accordingly, the family law implications will be outside the scope of this Article. For a discussion concerning *Obergefell* and its implications in the realm of real estate, see Andrea B. Carroll & Christopher K. Odinet, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847 (2016).

growing number of real property and property succession disputes that continue to be initiated in the wake of the *Obergefell* decision. More importantly, this Article proffers specific, effective, and tailored remedies to resolve subtle, but important, variances in the rapidly growing number of disputes.

A concrete example is a helpful tool to grasp the abstract intricacies of this subject in a meaningful way.[7] Towards that end, consider Louise and Thelma,[8] who have been in a committed same-sex relationship since the early nineties. In 1998, they had a commitment ceremony celebrating their relationship and thereafter registered as domestic partners under the applicable state law. They were both domiciled in Massachusetts in 2004 at the time of the Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*.[9] Shortly after the *Goodridge* decision, Louise and Thelma got married. The following year, they had a child whom they named "John David" or "J.D." for short. J.D. was conceived using artificial reproductive technology and Louise was artificially inseminated using donor sperm. Thelma did not adopt J.D., and instead relied on the marital presumption for parentage purposes.[10] In 2010, Thelma accepted a job in Texas and moved there with Louise and J.D. At the time, Texas was a non-recognition state[11] and a community property state.[12] In 2014, Thelma was killed by a drunk driver and died without a will. She was survived by her mother, Louise, and J.D. Probate began on Thelma's estate along with a wrongful death lawsuit against the drunk driver. Thelma's mother claimed to be Thelma's sole heir,[13] but Louise and J.D. also claimed to be Thelma's heirs. After Thelma's death, *Obergefell* held laws prohibiting the recognition of lawful same-sex

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7. *See generally* Tritt & Duffey, *supra* note 1, ¶ 1101.2.

8. Louise is pretty tired of her name always coming second.

9. 798 N.E.2d 941, 969 (Mass. 2003) (holding that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution").

10. Under American common law, a child born during a marriage is presumed to be the legitimate child of the husband. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 110 (9th ed. 2013).

11. A somewhat idiosyncratic vocabulary was adopted to describe the various state laws that concerned same-sex marriages. The terms "recognition state" and "non-recognition state" describe a given state's policy on respecting extra-jurisdictional same-sex marriages.

12. There are two basic marital property systems in the United States: community property and separate property. Under separate property systems, spouses own all earnings and acquisitions from earnings separately during marriage. Under community property systems, spouses own all earnings and acquisitions from earnings during marriage in equal and undivided shares. DUKEMINIER & SITKOFF, *supra* note 10, at 512.

13. Heirs are those persons designated under applicable state law to inherit an intestate share in the property of another following the latter's death. *Id.* at 544.

marriages from sister states to be unconstitutional. In order to resolve the multiple issues implicated in this example, a court must now determine when Texas should consider Louise and Thelma's once unrecognized marriage as legal—should recognition begin retroactively on the actual date of their commitment ceremony, the day they registered as domestic partners, the day of their Massachusetts marriage, or on the date of the *Obergefell* decision?[14]

In resolving the various retroactivity issues arising in the wake of *Obergefell*, two distinct questions must be considered. First, to what extent, and in which situations, should *Obergefell* be applied retroactivity as to choice-of-law considerations, if at all? Second, if *Obergefell* is to be applied retroactively, are there any limitations or judicial restraints in its application as a remedial principle? Unfortunately, the answers to these questions seem rife with contradiction and complexity. Therefore, an in-depth analysis of the deference to, and limitations of, the retroactivity doctrine is a predicate to its application to *Obergefell*.

First, the general rule when a federal or state statute is held unconstitutional is that the invalidated statute is thereby deemed *void ab initio*—or, "null from the beginning."[15] This, of course, makes sense in the context of a constitutional republic such as ours because legislative bodies lack the power to make such laws; an unconstitutional law is, by definition, an *ultra vires* (non-)exercise of legislative authority. Accordingly, the current stance held by federal courts is that these judicial rulings should be retrospective and should apply to events that predate those judgments.[16] Moreover, while many of these post-*Obergefell* disputes will concern the application of the retroactivity doctrine to the customary domain of state laws, the Supremacy Clause

14. The retroactive application of *Obergefell* to previously unrecognized, but lawfully married, same-sex spouses will have multiple lifetime and death-time issues on the spouses, children, and third parties. Lifetime issues may include community property (when did it arise and how to treat any lifetime transfers of community property), previously filed state income taxes, divorce, marital property and equitable distributions, alimony, child custody, and visitation rights. Note that some of these issues will also depend on how long the couple will be deemed married. Death-time issues may include who is entitled to any award from the wrongful death claim, who are the proper heirs under intestacy, who has standing in testate estates, when did community property begin to accrue, homestead, elective share, family property set-asides, insurance, pensions, employee benefits, previously filed estate and gift taxes, and if there are adequate remedies for property that may have already sold or distributed. Parentage issues may include whether J.D. was considered Thelma's child during her lifetime and her heir at her death. Finally, third parties, such as innocent bona fide purchasers of property and title insurers, may also be impacted by the above issues.

15. *Void ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014). For a discussion on *void ab initio*, see *infra* Part II.B.

16. *See infra* Part II.C.

of the United States Constitution[17] dictates that state courts retroactively apply a Supreme Court decision in the choice-of-law context.[18]

Second, the application of the doctrine of retroactivity to remedial considerations must also be considered—and this application is more complicated and may lead to inconsistent judicial limitations in fashioning adequate remedies to post-*Obergefell* state law disputes. In the application of retroactivity to remedial considerations, the Court has recognized concern for a need of finality in litigation, which may be achieved through such procedural rules as *res judicata*, statutes of limitation, and laws requiring parties aggrieved by a law to provide timely notice of their objection.[19] For instance, in post-*Obergefell* disputes, pertinent statutes of limitations may have run, or property may have been sold to innocent third-party bona fide purchasers who relied in good faith on the law as it stood at the time of the purchase. On the other hand, the Supreme Court has established a strong line of precedent to make whole the discrete groups who were victims of unconstitutionally discriminatory laws.[20] For those same-sex married couples who were denied marital property rights under now unconstitutional laws, retroactive application would be the only way to provide adequate relief. Therefore, a balancing test of the competing public policy concerns of the various parties, and their respective property interests, will surely be part of any judicial analysis concerning retroactive remedial considerations. Accordingly, even if *Obergefell* should be applied retroactively with respect to choice-of-law matters, adequate remedies may not be available for pre-*Obergefell* deprivations of marital property rights—whether accruing during the unrecognized portion of a same-sex marriage or upon the death of one of the same-sex spouses.

In order to provide the background necessary to understand the retroactive application of *Obergefell* to choice-of-law matters and to appreciate potential limitations associated with remedial considerations thereto, Part I of the this Article provides a very brief exploration of the history of same-sex marriage in the United States, culminating in an exploration of the *Obergefell* decision. Next, Part II offers a primer on the important doctrinal issues involved in the *Obergefell* retroactivity debate, including a detailed examination of the federal courts' existing retroactivity jurisprudence and limitations as a remedial measure; a

17. U.S. CONST. art. VI, cl. 2.

18. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754 (1995); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993); Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37, 50 (2014).

19. *See Reynoldsville Casket Co.*, 514 U.S. at 755–56.

20. *See infra* Part II.F.

review of insightful analogous precedents of *Trimble v. Gordon*[21] and *United States v. Windsor*;[22] and a brief survey of effective remedies provided under similar contexts of other discriminatory laws that were held unconstitutional. Then, Part III analyzes the scope of *Obergefell*'s retroactivity for choice-of-law considerations concerning outstanding state law issues and proffers tailored remedies for specific and distinct issues that might arise in post-*Obergefell* disputes. Finally, the Article concludes that, on balance, *Obergefell* should apply purely retroactively as to both choice-of-law matters and remedial considerations, to the extent that adequate remedies may be fashioned to protect innocent third parties while rectifying the property deprivations of unconstitutionally unrecognized marriages. Accordingly, this Article aims—through a vigorous intellectual discourse of the various competing theories, interests, and considerations—to be a guiding source on the practical implications that will stem from the retroactive application of *Obergefell* to choice-of-law matters and to remedial considerations.

I. THE EVOLUTION OF SAME-SEX MARRIAGE IN THE UNITED STATES

A. A (Brief) Timeline of Same-Sex Marriage in the United States

In order to better appreciate the impact of the *Obergefell* decision on the current legal landscape, it is instructive to briefly review the history of same-sex marriage in the United States.[23] Therefore, what follows are selected excerpts of the development of the law surrounding same-sex marriage in the United States.

The modern history of same-sex marriage in the United States is a relatively brief narrative, especially compared to other social and political movements that encompass evolving notions of equality. Perhaps surprisingly, many modern gay rights advocates did not always promote the notion of same-sex marriage.[24] During the early days of the modern gay rights movement, activists ignored or downplayed the same-sex marriage topic because they thought the topic was too controversial, unobtainable, and fostered the notion of gays and lesbians assimilating to a heteronormative family paradigm.[25] In fact,

21. 430 U.S. 762 (1977).

22. 133 S. Ct. 2675 (2013).

23. For a detailed account of the historical evolution of legal status of same-sex marriage in the United States, see Tritt & Duffey, *supra* note 1, ¶¶ 1101–02.

24. *See* Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays*, 38 PS: POL. SCI. & POL. 229, 229 (2005) (noting that same-sex marriage is a recent priority of gay advocates).

25. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1107 (2015).

the American narrative of the legal progression of same-sex marriage merely begins a little over two decades ago when the Hawaii Supreme Court decided *Baehr v. Lewin*.[26] Prior to 2004, same-sex marriage was not performed in any United States jurisdiction. Since that time, various legal elements concerning same-sex marriages have been tested, including the licensing of same-sex marriages, the recognition of the validity of these licenses, and the recognition of extra-jurisdictional same-sex marriages. During this very brief time period, though, all of these interconnected legal components have been resolved.

The relevant legal timeline of same-sex marriage in the United States begins in Hawaii in 1993. In *Baehr*, a lawsuit in which three same-sex couples argued that Hawaii's prohibition of same-sex marriage violated the state constitution, the Hawaii Supreme Court held that denying marriage licenses to same-sex couples violated the Equal Protection clause of the Hawaii State Constitution.[27] The Hawaii Supreme Court remanded the case back to the trial court for a determination of whether the state could show a compelling reason for the justification of the same-sex marriage ban;[28] and the trial court judge rejected the state's justifications for limiting marriage to opposite-sex couples.[29] One ramification of the *Baehr* decision was immediate: the Hawaii State Legislature promptly proposed a constitutional amendment that expressly reserved to the legislature the power to relegate marriage to opposite-sex couples only—and Hawaii voters passed the amendment in 1998.[30]

The *Baehr* decision had another direct, but more significant, repercussion: the so-called Defense of Marriage Act (DOMA).[31] DOMA was signed into law by President Clinton in 1996.[32] Notably, at the time DOMA was enacted, neither same-sex marriage nor

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26. 852 P.2d 44 (Haw. 1993).

27. *Id.* at 581–82.

28. *Id.* at 583.

29. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

30. H.R. REP. NO. 104-664, at 2–3 (1996). This amendment to the state's constitution differed from future state constitutional amendments in that it did not proscribe an absolute prohibition on same-sex marriages but rather allowed the state legislature to decide. HAW. CONST. art. I, § 23. In 2013, the state legislature legalized same-sex marriage under the Hawaii Marriage Equality Act. S.B. 1 27th Leg. (Haw. 2013).

31. The *Baehr* case was specifically cited in the House Judiciary Committee's report. H.R. Rep. No. 104-664, at 2–3 (1996). Concerned with both state and federal implications of the legalization of same-sex marriage, the stated purposes of the statute were (1) "to defend the institution of traditional heterosexual marriage" and (2) "to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions . . . ." *Id.* at 2.

32. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

polygamous marriage[33] was legal in any state, territory, or possession of the United States.[34] Section 2 of DOMA was an exercise of Congressional discretion granted under Article IV, Section 1 of the United States Constitution, which is commonly called the Full Faith and Credit Clause.[35] This section purported to grant states autonomy in choosing whether to recognize same-sex marriages performed in other United States jurisdictions[36] by providing an exception to the Full Faith and Credit Clause. Despite this protection, many states decided to seek additional protection under the judicially-created public policy exception to the Full Faith and Credit Clause.[37] Section 3 of DOMA restricted, for all federal purposes, the definitions of "marriage" and "spouse" to opposite-gender couples, even though at the time no states allowed or recognized same-sex marriage.[38] Moreover, the federal enactment of DOMA prompted state legislatures to enact reform measures that banned same-sex marriage and prohibited the recognition of legally married same-sex couples from sister states.[39]

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33. These two are the only two types of marriages that are facially restricted by the text of Section 3 of DOMA. The issue of polygamy has not been broadly addressed in the debate surrounding DOMA and, thus, will not be further addressed by this Article.

34. For a brief history of same-sex marriage over the past forty years, see Richard Wolf, *Timeline: Same-sex Marriage Through the Years*, USA TODAY (June 26, 2015), http://www.usatoday.com/story/news/politics/2015/06/24/same-sex-marriage-timeline/29173703/ [https://perma.cc/C7K2-375U].

35. U.S. CONST. art. IV, § 1. Specifically, the provision reads "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.*" *Id.* (emphasis added).

36. As previously noted in this section, at the time of enactment, there were no such jurisdictions. *See* Wolf, *supra* note 34.

37. *See, e.g.*, ARK. CODE ANN. § 9-11-208(a)(1)(A) (2011) ("It is the public policy of the State of Arkansas to recognize the marital union only of man and woman.").

38. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996). Section 3 became the subject of most of the controversy surrounding the Act, and the challenged provision in *United States v. Windsor*. As states began to permit same-sex marriages, DOMA had the effect of creating two tiers of marriages: those that were recognized by the federal government and those that were not.

39. In the immediate wake of DOMA's enactment, several states passed "Baby DOMA" statutes that substantially mimicked the provisions of the Defense of Marriage Act. The states that enacted Baby DOMAs in 1996 included Alaska, ALASKA STAT. § 25.05.011(a) (1996); Arizona, ARIZ. REV. STAT. ANN. § 25-101(C) (1996); Georgia, GA. CODE ANN. § 19-3-3.1 (1996); Idaho, IDAHO CODE ANN. § 32-201(1) (1996); Illinois, 750 ILL. COMP. STAT. 5/212(a)(5) (1996); Kansas, KAN. STAT. ANN. § 23-2508 (1996); Michigan, MICH. COMP. LAWS § 551.1 (1996); Missouri, MO. REV. STAT. § 451.022 (1996) (amended 2001); North Carolina, N.C. GEN. STAT. § 51-1.2 (1996); Pennsylvania, 23 PA. CONS. STAT. § 1102 (1997); South Carolina, S.C. CODE ANN. § 20-1-15 (1996); and Tennessee, TENN. CODE ANN. § 36-3-113 (1996). Until

The next major landmark in the evolution of same-sex marriage in the United States was *Baker v. State*,[40] where three same-sex couples sued the state of Vermont after being denied marriage licenses.[41] The Vermont Supreme Court held that the denial of a marriage license to a same-sex couple violated the "common benefits" clause of the state constitution and ordered the legislature to extend marriage or at least the benefits of marriage to same-sex couples.[42] The result was the nation's first "civil union" legislation, which gave same-sex couples the choice to enter into a civil union with all of the rights and responsibilities of marriage—denying their relationships only the word "marriage."[43]

The year 2003 marked another milestone for same-sex marriage with the Massachusetts Supreme Court's landmark decision in *Goodridge v. Department of Public Health*.[44] In *Goodridge*, Gay and Lesbian Advocates and Defenders (GLAD) sued the Massachusetts Department of Health in the Massachusetts Superior Court on behalf of seven same-sex couples who had been denied marriage licenses.[45] Under a rational basis review, the court held that the limitation of benefits—including marriage—to same-sex couples was a violation of the Constitution of the Commonwealth of Massachusetts' Equal Protection Clause.[46] On May 17, 2004, for the first time in American history, same-sex marriages were legally recognized in Massachusetts.[47]

2007, many other states followed suit by enacting legislative statutes and constitutional amendments in order to ban same-sex marriages and provide for the non-recognition of extra-judicial same-sex marriages performed in other states. In 2007, South Carolina would become the last state to enact a constitutional same-sex marriage ban, although it had already banned same sex marriage by statute in 1996. S.C. CONST. art. XVII, § 15 (2007). For a detailed timeline and an index of citations of all of the state legislative statutes and constitutional amendments banning same-sex marriage, see Tritt & Duffey, *supra* note 1, ¶¶ 1101.1, 1109.

40. 744 A.2d 864 (Vt. 1999).

41. *Id.* at 867–68.

42. *Id.* at 886.

43. *Id.*; VT. STAT. ANN. tit. 15, § 1201(2) (2016).

44. 798 N.E.2d 941 (Mass. 2003).

45. *Id.* at 949–50.

46. *Id.* at 961.

47. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html [https://perma.cc/56WX-XJ74]. It is worthy of reflection to note the first same-sex couples who were legally allowed to marry attained this right merely thirteen years ago and in only this one state. This restricted time period and limited numbers of affected same-sex married couples could have weighty legal repercussions in the *Obergerfell* retroactivity analysis.

In 2008, the California Supreme Court found California's statutory ban on same-sex marriage to be unconstitutional.[48] Soon after that decision, California voters passed Proposition 8, a state constitutional ban on same-sex marriage.[49] In 2010, the Northern District of California struck down Proposition 8, holding it to be unconstitutional.[50] The case would later be heard in the United States Court of Appeals for the Ninth Circuit as *Perry v. Brown*,[51] which upheld the holding, before *Hollingsworth v. Perry*[52] was finally argued in front of the United States Supreme Court.[53]

Following a similar judicial path, in 2008 the Connecticut Supreme Court found that statutes restricting marriage to opposite-sex couples violated the state constitution's Equal Protection Clause.[54] Later, in 2009, the Connecticut legislature legalized same-sex marriage by adopting marriage statutes with gender-neutral language.[55]

In 2013, the fight to legalize same-sex marriage challenged a federal law for the first time. The Second Circuit Court of Appeals affirmed[56] a decision by the Southern District of New York, which found Section 3 of DOMA to be unconstitutional.[57] A decision affirmed by the Supreme Court in *United States v. Windsor*, where the surviving spouse of a same-sex married couple sought to claim the federal estate tax marital deduction, the United States Supreme Court ultimately heard a challenge to Section 3 of DOMA, which defined "marriage" and "spouse" as excluding same-sex partners for purposes of federal law.[58] The Supreme Court ruled that Section 3 was an unconstitutional "deprivation of the liberty of the person protected by the Fifth Amendment," and that the Constitution prevents the federal government

48. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

49. CAL. CONST. art. I, § 7.5 (2008).

50. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

51. 671 F.3d 1052 (9th Cir. 2012), *aff'g*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

52. 133 S. Ct. 2652 (2013) (holding petitioners did not have standing to appeal the district court's ruling declaring Proposition 8 unconstitutional).

53. *Id.*

54. *Kerrigan v. Comm'r of Pub. Health*, 947 A.2d 407, 482 (Conn. 2008).

55. CONN. GEN. STAT. §§ 46b-20, -28a, -28b (2015). Also in 2009, the Iowa Supreme Court found the state's statutory ban to be unconstitutional in *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009), and Vermont passed a statute authorizing same-sex marriage. VT. STAT. ANN. tit. 15, § 8 (2009). Over the next six years, many states would authorize same-sex marriage through judicial decisions, legislative actions, and popular votes. For a detailed timeline and an index of citations of all of the state court decisions, legislative statutes, and popular votes allowing same-sex marriage, see Tritt & Duffey, *supra* note 1, ¶¶ 1101.1-.2.

56. *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012).

57. *Windsor v. United States*, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012).

58. 133 S. Ct. 2675, 2683 (2013) (citing Defense of Marriage Act § 3, 1 U.S.C. § 7 (2012)).

from treating same-sex marriages any differently from heterosexual marriages.[59] Such differentiation, the Court reasoned, would "demean[] the couple, whose moral and sexual choices the Constitution protects."[60] Although it left the District Court's holding undisturbed, the Supreme Court vacated the Ninth Circuit's holding in *Perry*.[61]

On June 27, 2013, the day after *Windsor*, same-sex marriage was allowed in thirteen states. Immediately following *Windsor*, federal and state courts were flooded with litigation related to the decision. Tellingly, Tom Watts writes that "[t]he marriage[] equality cases may represent the first time in American legal history that a single constitutional question has been so rapidly and broadly litigated."[62] There were constitutional challenges in twenty-six states.[63] In general, the challenges concerned either the inability of same-sex couples to obtain marriage licenses or a state refusing to recognize extra-jurisdictional same-sex marriages.[64] After the decision in *Windsor*, five federal circuit courts of appeal upheld district court decisions invalidating prohibitions on same-sex marriages,[65] and one decision by the Sixth Circuit Court of Appeals upheld a ban on same-sex marriage.[66] *Obergefell v. Hodges* resulted from the consolidation of these cases.[67] At the time of the *Obergefell* decision, thirty-seven states and the District of Columbia had legalized same-sex marriage.[68] Of

59. *Id.* at 2695–96.

60. *Id.* at 2694.

61. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

62. Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. 52, 53 (2015).

63. *State-by-State History of Banning and Legalizing Gay Marriage*, 1994-2015, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 [https://perma.cc/BK86-C5AX] (last updated Feb. 16, 2016).

64. Generally, provisions governing non-recognition of extra-jurisdictional same-sex marriages are fairly generic. Virtually all provide, in one way or another, that same-sex marriages performed outside the jurisdiction are void inside the jurisdiction and will not be recognized. However, some states went further—or are, at the very least, more express—in their non-recognition provisions. Georgia, uniquely, has a constitutional non-recognition provision that expressly bans divorce proceedings for same-sex couples. GA. CONST. art. I, § 4 para. I(b) (2004). *See also* ALA. CONST. art. I, § 36.03 (2006), ALA. CODE § 30-1-19 (1998); ARK. CONST. amend. 83, §§ 1–3 (2004), ARK. CODE ANN. § 9-11-109 (1997).

65. *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 286 (2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014).

66. *DeBoer v. Snyder*, 772 F.3d 388, 421 (6th Cir. 2014).

67. 135 S. Ct. 2584 (2015).

68. Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland,

these states, twenty-six allowed same-sex marriage by court decision, eight states by state legislative action, and three by popular vote.[69] At the same time, thirteen states banned same-sex marriages.[70] Of the remaining states, twelve banned same-sex marriage by constitutional amendments or state statutes or a combination of both.[71]

The idea of same-sex marriage gained a significant amount of support during a relatively short period of time. Spanning less than twenty-five years, the judicial system drastically changed the reality of same-sex relationships in the United States. It wasn't until *Obergefell*, however, that the right to a same-sex marriage became fundamental.

B. Obergefell v. Hodges

In *Obergefell*, the Supreme Court limited its consideration to only two questions: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex" and "whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right."[72] On June 26, 2015, the United States Supreme Court issued its opinion—exactly two years to the day from the Court's decision in *Windsor*. Regarding the first question, the Court held that the denial of marriage to same-sex couples violated the Due Process and Equal Protection Clauses of the Constitution.[73] In striking down state laws to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples, the Court bound marriage to an individual's dignity, liberty, and social status.[74] Regarding the second question, the Court held that:

> same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to

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Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *State-by-State History of Banning and Legalizing Gay Marriage, 1994-2015*, *supra* note 63. In addition, eight Native American tribal jurisdictions permitted same-sex marriages. Tritt & Duffey, *supra* note 1, ¶ 1101.2.

69. *State-by-State History of Banning and Legalizing Gay Marriage, 1994-2015*, *supra* note 63.

70. Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. *Id.*

71. *Id.*

72. *Obergefell*, 135 S. Ct. at 2593.

73. *Id.* at 2604.

74. *Id.* at 2596.

> refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character. [75]

It must be noted that the Court also addressed the long-standing debate over the applicability of *Baker v. Nelson*.[76] In *Obergefell*, the Supreme Court stated that "*Baker v. Nelson* must be and now is overruled."[77]

Although the Court was specific in answering the two limited questions before it, the Court unfortunately did not provide guidance concerning the retroactivity of its decision. In 2010, the United States Census Bureau estimated that there were 605,472 same-sex couples in the United States (less than one-half of one percent of all tax returns files), of which approximately 168,000 (27.8%) self-identified as married. [78] Of note, among the same-sex couples that identify as married, more than half (56% or approximately 94,000 couples) resided in states that did not recognize same-sex marriage.[79]

Following the legalization of same-sex marriage, previously unrecognized same-sex spouses must wait to see what remedies will be available concerning the marital rights, protections, and benefits that were denied prior to *Obergefell*. For same-sex married couples who lived in non-recognition states before the *Obergefell* decision, when must these former non-recognition states recognize the establishment of their marriages—on the date of their marriage ceremony, on the date of the *Obergefell* decision, or another prospective date enacted by state

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75. *Id.* at 2607–08.

76. 191 N.W.2d 185 (Minn. 1971). This was a case in which two gay men applied for a marriage license in Minnesota. *Id.* at 185. The Minnesota Supreme Court ruled that a state limiting marriage to persons of the opposite sex did not violate the United States Constitution. *Id.* at 187. On appeal, the United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *vacated*, 409 U.S. 810 (1972). Because the case came to the Supreme Court through mandatory appellate review, the dismissal constituted a decision on the merits and established *Baker v. Nelson* as precedent. The extent of the precedential effect has been subject to debate.

77. *Obergefell*, 135 S. Ct. at 2605. Overruling *Baker* may play into any analysis concerning whether *Obergefell* created a new law or merely explained existing law concerning a fundamental right.

78. *See American Community Survey Data on Same Sex Couples*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/data/acs.html [https://perma.cc/8SGL-86W2] (last visited Oct. 6, 2016) (It is not known whether all who self-identified as married were legally married in a jurisdiction recognizing same-sex marriages).

79. *See id.*; *see also* Martin O'Connell & Sarah Feliz, *Same-sex Couple Household Statistics From the 2010 Census* (U.S. Bureau of the Census, Working Paper No. 2011-26, 2011), www.census.gov/hhes/samesex/data/decennial.html [https://perma.cc/965G-YW4V].

legislative bodies?[80] In order to provide guidance to courts, state legislators, and legal practitioners, an exploration of the federal courts' existing retroactivity jurisprudence and an examination of the how this jurisprudence has been applied as precedent under similar contexts is greatly needed.

II. THE JURISPRUDENCE OF RETROACTIVITY IN THE UNITED STATES

An exploration of both the American retroactivity jurisprudence and analogous examples of its application and remedies are needed in order to develop an analytical framework for resolving retroactivity issues for post-*Obergefell* disputes. First, a cognitive analysis of *Obergefell*'s retroactive impact on choice-of-law matters and remedial considerations must begin with a comprehensive exploration of the applicable jurisprudence regarding the doctrine of retroactivity and any limitations thereto. Further, a review of *Trimble* and its progeny will provide insightful, pertinent, and analogous examples in order to tease out the nuances of potential remedial limitations concerning property transfers during life and at death. In addition, a review of *Windsor* and its retroactive application concerning federal marital rights and benefits to same-sex marriages will offer useful insights concerning post-*Obergefell* retroactivity issues. Finally, a review of judicial remedies crafted and implemented following other discriminatory laws that were declared unconstitutional on account of affecting a discrete group of victims will provide a springboard for analyzing retroactive remedial considerations for post-*Obergefell* disputes.

A. Judicial Decision-making

The issuance of any judicial decision that declares a law unconstitutional raises critical questions regarding what the retroactive effect of the court's holding should be,[81] if any.[82] Those questions are

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80. The language of the *Obergefell* decision notes "lawful same-sex marriages performed in other States." 135 S. Ct. at 2585. If the quoted language means a state need not recognize a valid same-sex marriage performed in another country, obviously then May 17, 2004 would be the earliest possible date of recognition. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

81. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 216 (3d ed. 2000) (judicial decisions are said to have retroactive (or "retrospective") effect where they govern claims rooted in facts antedating the decision).

82. *See* 20 AM. JUR. 2D *Courts* § 146 (2015) ("The United States Constitution neither requires nor prohibits retroactive or prospective application of a new decision, and the determination of whether a decision overruling a former decision should be applied retroactively or merely prospectively is generally a matter of judicial discretion to be applied on a case-by-case basis. In civil cases, the court may, in its equitable

particularly pronounced with respect to *Obergefell*. In efforts to anticipate how courts might handle some of these questions concerning post-*Obergefell* disputes, we must examine the possibilities in the context of the United States Supreme Court's retroactivity doctrine.

In general, a judicial decision can be applied to subsequent cases in a number of ways: (1) purely retroactively, whereby the rule of law announced by the decision is applied to *all* events which gave rise to the subsequent litigation; (2) partly retroactively, whereby the rule is applied to some, usually the primary, conduct which gave rise to the subsequent litigation; (3) selectively prospectively, whereby the rule may be applied retroactively to the parties before the court, but may be applied only prospectively to other parties in similar circumstances but whose cases are not pending; (4) purely prospectively, whereby the rule may only be applied to subsequent litigants whose cases arise from operative facts arising *after* the pronouncement of the rule; and, finally, (5) prospectively prospective, whereby a court chooses to delay the effect of the rule, applying it only to litigants after a certain period of time.[83]

This spectrum of possible approaches raises a number of interesting questions, some of which go to the very heart of legal jurisprudence.[84] For instance, Professor Laurence H. Tribe writes that the retroactivity doctrine is "a reflection of the applicable theory of lawmaking."[85] Justice Blackstone and Justice Scalia, for example, have opined that judicial decision-making should be the clarification of rules already in existence.[86] This notion is rooted in the generalization that while legislatures make new law, courts merely interpret the law (or, rather, declare the law as it already stood).

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discretion, prohibit or limit retroactive operation of its ruling, where the overruled law has been justifiably relied upon or where retroactive operation creates a burden.").

83. *See* Kay, *supra* note 18, at 43–44; *see also* 20 AM. JUR. 2D *Courts* § 146.

84. *See* TRIBE, *supra* note 81, at 233–35 ("The Court's retroactivity decisions . . . reflect much deeper divisions about the process of adjudication generally—and deeper issues about what it means to decide a question of law . . . . Different models of the judicial process provide different perspectives on the problem of whether a decision should be given retrospective effect.").

85. *Id.* at 216.

86. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."); 1 WILLIAM BLACKSTONE, COMMENTARIES 69, 69 (15th ed. 1809) (explaining that the duty of the court is not to "pronounce a new law, but to maintain and expound the old one"); *see also Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 907 (1962).

This theory of judicial decision-making, though, may be oversimplified, and presents some logical problems. For example, if courts are only declaring what the law already was, then any limited application—any application outside of pure retroactivity—would seem a deprivation of justice.[87] Under both Justices Blackstone and Scalia's view, all parties to litigation ought to be able to take full advantage of the rule of law as newly interpreted, and have it apply to every event that has given rise to their dispute.[88] Otherwise, the litigants are refused the benefits of the law simply because the courts struggled to timely arrive at their expression.

Giving all parties such benefit may prove impracticable, though, in practice. Parties must rely on prior expressions of courts, and it is important to remember that new interpretations of the law are not made in a single-party vacuum. Thus, the retroactive recognition of one party's right may be to the detriment of another party that had reasonably relied on a court's prior expression of law. Accordingly, under both Justices Blackstone and Scalia's view, retroactivity may be more of a normative view of the courts: a rule of thumb meant to combat judicial activism.

The view that judges actually make new law is more realistic,[89] and far more accepted today.[90] This view is often traced to Nineteenth

87. 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 1:9 (3d ed. 2011) ("The issue of retroactivity of constitutional decisions has been contentious for the Supreme Court Justices. It strikes at the heart of the way in which they define their role. If judges who interpret the Constitution only apply existing law—and never 'make' new law—then all of their decisions should be fully retroactive. If, however, the judicial role includes articulation of new rules, then restricting retroactivity makes good sense. It is unfair to those who reasonably relied upon existing law to subject them to rules and potential liability that they had no reason to anticipate.").

88. Justice Scalia has directly addressed the point in arguing that because the power of the judiciary is only to discern the law, and not to make new law, its decisions should always be applied retroactively, despite inevitable practical difficulties in certain circumstances. *James Beam*, 501 U.S. at 549 (Scalia, J., concurring). Justice Scalia explained that while automatic retroactivity may give rise to practical difficulties when courts overrule precedent, "those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches." *Id.*

89. Justice O'Connor, quoting Justice Frankfurter, has explained that "[w]e should not indulge in the fiction that the law now announced has always been the law . . . . It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective context to a new pronouncement of law." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 116–17 (1993) (O'Connor, J., dissenting) (quoting *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring)).

90. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991) ("It would be only a slight exaggeration to say that there are no more Blackstonians. The insistence that judges could simply find the true and timeless rule, uninfluenced by evolving moral

century legal positivist John Austin,[91] who maintained that "judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."[92] Indeed, this view is supported by language found across the Court's modern jurisprudence. For example, in *Lawrence v. Texas*,[93] Justice Kennedy, who also authored *Obergefell*, closed the opinion by opining the following:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[94]

Exactly twelve years later in *Obergefell*, Justice Kennedy cited *Lawrence*, writing:

> If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.[95]

The great debate regarding positivist versus declaratory judicial decision-making, along with questions regarding the proper role of the courts, the proper role of the legislature, and the nature of the law

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values and social policies, now seems anachronistic. Justice Harlan, for example, rejected Blackstone's jurisprudential claims even as he criticized the quasi-legislative approach to lawmaking that he detected in the Warren Court's non-retroactivity policy.") (citing *Mackey v. United States*, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in part and dissenting in part)).

91. *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), *in* THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 1, 191 (1954).

92. *Linkletter v. Walker*, 381 U.S. 618, 623–24 (1965) (comparing the views of Blackstone and Austin).

93. 539 U.S. 558 (2003).

94. *Id.* at 578–79.

95. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

itself, is ongoing. For now, though, we examine the doctrine of *void ab intio* and the interrelated retroactivity jurisprudence as it stands today, however disorganized.

B. Void ab initio

When a federal or state statute is declared unconstitutional, the general rule is that the statute is *void ab initio*,[96] meaning "null from the beginning."[97] In other words, the unconstitutional statute is wholly void and ineffective for any purpose. Since its unconstitutionality dates from the time of its enactment, and not from the date of the decision striking the statute, it is as if the statute had never been passed and had never existed. Once a statute is held to be *void ab initio*, private citizens and divisions of the state cannot take any further action pursuant to that statute's provisions.[98]

When such an act is held to be unconstitutional by a court and the general assembly fails to subsequently repeal, amend, or modify it, the act is no longer valid law.[99] The *void ab initio* rule only applies to statutes that are facially unconstitutional, or those unconstitutional in all of their applications, and not to statutes that are unconstitutional only when applied to a certain set of facts.[100]

The term was famously formulated in *Norton v. Shelby County,*[101] where the court held that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though

96. 16A AM. JUR. 2D *Constitutional Law* § 195. ("The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio.").

97. *Void ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

98. *Thomas v. N.C. Dep't of Human Res.*, 478 S.E.2d 816 (N.C. Ct. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997).

99. *People v. Taylor*, 448 N.E.2d 921 (Ill. App. Ct. 1983) (holding that the defendant's conviction could not stand when, at the time of the defendant's conviction, the statute under which he was convicted had not been amended to remedy a prior ruling that it was unconstitutional).

100. *See People v. Mosley*, 33 N.E.3d 137 (Ill. 2015); *Lummi Indian Nation v. State*, 241 P.3d 1220 (Wash. 2010). *But see Stavenjord v. Mont. St. Fund*, No. 2000-0207, 2004 WL 3093058 (Mont. Work. Comp. Ct. Aug. 27, 2004) (holding that the statute in question was only unconstitutional as applied, not on its face, and thus was not retroactive).

101. 118 U.S. 425 (1886) (applying a theory of *void ab initio*, following Blackstone's declaratory view of judicial decision-making).

it had never been passed."[102] Since this time, the doctrine has been used with respect to everything from contracts signed under duress, to statutes that were found unconstitutional.[103]

Generally, when a statute is held to be *void ab initio*, this decision should be applied retroactively.[104] Laws may change primarily by legislative or judicial action. Judicial action has proven more complicated than legislative action, as there is a distinction between judicial decisions that declare a statute unconstitutional and those that change established principles of common law.[105] This distinction in degrees of reliance is what dictates strict adherence to the *void ab initio* rule when a statute is declared unconstitutional, *especially when applied to fundamental rights*.[106] When a statute is declared unconstitutional by a judiciary, the decision should apply retroactively.[107] To do otherwise would violate due process under the United States Constitution and would prevent citizens who are guaranteed those rights under the Constitution from receiving a remedy for such a violation.[108] However, courts have wrestled with the idea that sometimes it is necessary to uphold the validity of certain transactions or events that occurred before a statute was declared *void ab initio*.[109] Therefore, a review of the

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102. *Id.* at 442.

103. *See* TRIBE, *supra* note 81 ("If an unconstitutional statute or practice effectively never existed as a lawful justification for state action, individuals convicted under the statute or in trials which tolerated the practice were convicted unlawfully even if their trials took place before the declaration of unconstitutionality; such a declaration should have a fully retroactive effect, and previously convicted individuals should be able to win their freedom through the writ of habeas corpus. Alternatively, if a judgment of unconstitutionality governs only the case at hand, the legality of the convictions of individuals previously tried is not affected.").

104. *Felzak v. Hruby*, 855 N.E.2d 202, 215 (Ill. App. Ct. 2006); *Trustees of Wofford Coll. v. Burnett*, 209 S.E.2d 155, 159 (S.C. 1946); *see also Atkinson v. S. Express Co.*, 78 S.E. 516, 519 (S.C. 1913) ("When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; . . . it constitutes a protection to no one who has acted under it . . . .") (internal quotation omitted) (citations omitted).

105. *People v. Gersch*, 553 N.E.2d 281, 286 (Ill. 1990) (holding that only judicial decisions which declare a statute unconstitutional should be given retroactive effect).

106. *Id.* at 287; *Yakubinis v. Yamaha Motor Corp., U.S.A.*, 847 N.E.2d 552, 558–59, 564 (Ill. App. Ct. 2006).

107. *Gersch*, 553 N.E.2d at 289.

108. *Id.*

109. *See Herndon v. Moore*, 18 S.C. 339, 352 (S.C. 1883) (applying the exceptional doctrine of *communis error facit jus*, or "common error makes right," to hold the vast number of sales involving thousands of acres of land during a ten-year period by probate courts were valid even though probate courts were later determined not to have subject matter jurisdiction to conduct such sales because the statute granting such jurisdiction was held unconstitutional).

jurisprudence concerning retroactive applications of judgments and remedies is in order.

C. The Retroactivity Doctrine

The modern retroactivity doctrine began to evolve in the latter half of the twentieth century, although the doctrine and its limitations have been inconsistently applied by courts.[110] Historically, the general rule has been that legislation is presumptively *prospective* in operation,[111] while judicial decisions are presumptively *retroactive* in operation.[112] Over time, though, the retroactivity doctrine has splintered into two separate jurisprudential avenues evolving around two distinct legal disciplines: criminal law and civil law. Because *Obergefell* is a civil case clearly addressing the denial of fundamental rights, this Article focuses on the prong of retroactivity surrounding civil law.[113]

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110. The first true modern retroactivity decision, *Linkletter v. Walker*, 381 U.S. 618 (1965), was decided on June 7, 1965. Criticism of the retroactivity doctrine has continued in the following decades. For a thorough overview of the history of the retroactive and prospective application of judicial decisions, see Bradly Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. L. & PUB. POL'Y 811 (2003). *See also, e.g.*, Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161, 166 (2005) ("For the past forty years, the Court has struggled with these concerns, producing a lineage of cases that have generated varying reactions as to their efficiency and fairness . . . ."); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1079 (1999) ("[Modern jurisprudence] has not freed itself from the difficulties that attended the Warren Court's jurisprudence, and the current law of retroactivity is widely regarded as intellectually unsatisfactory. This is terribly ironic, for what has happened is that the concept of retroactivity has assumed greater prominence as part of an attempt to solve a problem that was created by the introduction of that very concept.").

111. *See* 20 AM. JUR. 2D *Courts* § 146 (2015 & Supp. 2016). For an iteration of the Court's stance on retroactive effect of legislation, see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

112. *See* 20 AM. JUR. 2D *Courts* § 146. "Traditionally, 'both the common law and [the Court's] own decisions recognized a general rule of retrospective effect for the constitutional decisions of [the] Court . . . subject to [certain] limited exceptions . . . .'" TRIBE, *supra* note 81 (quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)); *see also Harper v. Va. Dep't of Taxation*, 509 U.S. 84, 106–07 (Scalia, J., concurring) (discussing the lengthy history of retroactivity of judicial decisions). *But see Bouie v. City of Columbia*, 378 U.S. 347, 353, 355 (1964) ("[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law . . . . [T]he effect is to deprive [the defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.").

113. The remainder of this Article will deal with retroactivity in the civil context. For a comparison of the criminal and civil retroactivity doctrines, see Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998); *see also* Harold J. Krent, *The Puzzling Boundary*

In this civil context, the modern test was established in 1971 in *Chevron Oil v. Huson*,[114] where the Court established a three-factor test to decide whether a judgment should deviate from the norm of retroactivity afforded to civil cases.[115] While pretrial discovery was underway in *Chevron Oil*,[116] the Court decided *Rodrigue v. Aetna Casualty & Surety Co.*[117] *Rodrigue* held that under the Outer Continental Shelf Lands Act (Lands Act),[118] federal law supplemented by a state's statutes of limitations applied to cases of personal injury that occurred on artificial island drilling rigs.[119] *Chevron Oil* arose from a personal injury suit under the Lands Act as well, and the Court had to decide whether the suit was barred because the case was brought *after* Louisiana's one-year statute of limitations expired, even though admiralty law was the governing precedent at the time of the case's filing, not the one year statute of limitations.[120]

The Court determined that retroactivity may be denied (1) to a "new principle of law . . . on which litigants may have relied," (2) if such limitation would avoid "injustice or hardship" and (3) it would not unduly undermine the "purpose and effect" of the new rule.[121] After an examination of these factors, the Court held that "[b]oth a devotion to the underlying purpose of the Land Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations here."[122]

The Court's three-factor *Chevron Oil* test governed for many years. However, in 1990, the Court's plurality opinion in *American Trucking v. Smith*[123] signaled a shift in the current civil retroactivity

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Between Criminal and Civil Retroactive Lawmkaing, 84 GEO. L.J. 2143, 2145 (1996); TRIBE, *supra* note 81.

114. 404 U.S. 97 (1971).

115. *Id.* at 106–07.

116. *Id.* at 99.

117. 395 U.S. 352 (1969).

118. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2012).

119. *Rodrigue*, 395 U.S. at 355.

120. *Chevron Oil*, 404 U.S. at 98–99.

121. *Id.* at 106–07. ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.'") (alteration in original) (citations omitted) (quotations omitted).

122. *Id.* at 109.

123. 496 U.S. 167 (1990).

doctrine.[124] In *American Trucking*, the Court framed the issue as whether the Court's previous decision in *American Trucking Associations, Inc. v. Scheiner*,[125] which held state application of flat highway use taxes unconstitutional,[126] would be "applie[d] retroactively to taxation of highway use prior to the date of that decision" that had occurred in Arkansas as a result of the state's Highway Use Equalization tax.[127] As Professor Jill E. Fisch noted, the Court decided that the "retroactive application of the earlier decision invalidating certain highway use taxes under the Commerce Clause would unfairly burden the state's current operations and future plans made in reliance on the tax revenues collected."[128]

Importantly, the plurality emphasized that "retroactivity of decisions in the civil context 'continue[d] to be governed by the standard announced in *Chevron Oil*.'"[129] The plurality continued:

> The principles underlying the Court's civil retroactivity doctrine can be distilled from both criminal and civil cases considering this issue. When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. Lower courts considering the applicability of the new decision to pending cases are then instructed as follows: If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct. If the operative conduct or events occurred after the decision, so that any reliance on old precedent would be unjustified, a court should apply the new law.[130]

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124. *Id.*; Stephens, *supra* note 113, at 1530.

125. 483 U.S. 266 (1987). Throughout the remainder of the article, "*American Trucking*" shall represent the *Smith* case, and this case shall be represented as "*Scheiner*."

126. *Id.* at 269.

127. *American Trucking*, 496 U.S. at 171.

128. Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1060–61 (1997); *see also American Trucking*, 496 U.S. at 182–83.

129. *American Trucking*, 496 U.S. at 178 (alternation in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 n.8 (1987)).

130. *Id.* at 191 (citations omitted).

The plurality applied the *Chevron Oil* three-factor test and held that each weighed in favor of non-retroactivity.[131] Justice O'Connor wrote that "[i]t is . . . a fundamental tenet of [the Court's] retroactivity doctrine that the prospective application of a new principle of law begins on the date of the decision announcing the principle."[132]

However, Justice Stevens, in his dissent in *American Trucking* in which Justices Brennan, Marshall, and Blackmun joined, "distinguish[ed] between retroactivity as a choice-of-law rule and retroactivity as a remedial principle."[133] Justice Stevens explained:

> A decision may be denied "retroactive effect" in the sense that conduct occurring prior to the date of decision is not judged under current law, or it may be denied "retroactive effect" in the sense that independent principles of law limit the relief that a court may provide under current law. . . . This case, which comes to us from state court, requires us for the first time to expressly distinguish between retroactivity as a choice-of-law rule and retroactivity as a remedial principle.[134]

As Professor Laurence H. Tribe explains, "Justice Stevens argued that the *Chevron Oil* factors are relevant *only* as equitable considerations in deciding what type of relief is appropriate, not in determining what law to apply in the first instance."[135] In the end, though, *American Trucking* "left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases."[136]

Doubts about *Chevron Oil* resurfaced in *James B. Beam Distilling Co. v. Georgia*.[137] *James Beam* dealt with the issue of selective prospectivity, i.e., the practice of applying a newly announced rule to particular litigants in front of the court but making the rule otherwise

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131. *See id.* at 179–83 (The plurality focused on factor three, "the equities of retroactive application of *Scheiner*," the most. They decided that it would be too large of a burden on the state of Arkansas to provide relief and that retroactive application "would be unjust").

132. *Id.* at 187.

133. TRIBE, *supra* note 81, at 220 (emphasis removed).

134. *American Trucking*, 496 U.S. at 209–10 (Stevens, J., dissenting).

135. TRIBE, *supra* note 81, at 220–21 (emphasis added) (footnote omitted). Justice O'Connor's plurality rejected this argument, writing: "While application of the principles of retroactivity may have remedial effects, they are not themselves remedial principles." *American Trucking*, 496 U.S. at 195–96 (Justice O'Connor explained that "*Chevron Oil* is better understood as part of the doctrine of stare decisis, rather than as part of the law of remedies").

136. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993).

137. 501 U.S. 529, 532, 536 (1991).

prospective for future litigants.[138] The case produced five separate opinions, none of which garnered more than three votes, but a majority (six) of the justices did rally around the idea of rejecting selective prospectivity and three of those six rejected the idea of prospectivity entirely.[139] Justice Souter, delivering the judgment of the Court, and joined in his opinion by Justice Stevens, concluded that once the Court has applied a rule of law to litigants in one case, it must do so with respect to all similarly situated litigants not barred by procedural requirements or *res judicata*.[140]

Also of note, Justice Souter appeared to draw the same distinction between choice-of-law and remedial considerations drawn by Justice Stevens in *American Trucking*.[141] Justice Souter opined that whether a new rule should apply retroactively is in the first instance a matter of choice of law. But, "[o]nce a rule is found to apply 'backward,'" he wrote, "there may then be a further issue of remedies, i.e., whether the

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138. *Id.* at 532, 536. *James Beam* involved the question of whether a 1984 holding by the court, *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984), declaring a Hawaiian excise tax on imported alcohol unconstitutional, should apply retroactively to a similar Georgia tax (even though it was repealed in 1985) and entitle those seeking relief to a refund for taxes paid pre-1984. *Id.*

139. Justices Blackmun, Marshal, and Scalia rejected prospectivity entirely. *See James Beam*, 501 U.S. at 547 (Blackmun, J., concurring); *id.* at 548 (Scalia, J., concurring); *id.* at 545–46 (White, J., concurring). Justice Souter, delivering the opinion of the Court, was joined by Justice Stevens, and rejected selective prospectivity stating: "*Griffith* cannot be confined to the criminal law." *Id.* at 540–41. Justice White also delivered a concurring opinion rejecting selective prospectivity, but differed from other concurring opinions in that he believed *Griffith* had been wrongly decided. *Id.* at 545–46 (White, J., concurring).

140. *Id.* at 540.

141. *Id.* at 543–44 (citations omitted) (rejecting selective prospectivity, Justice Souter argued that: "Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of 'new' rules. Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." Justice Souter expounded on this conclusion by adding: "The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a new rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity. Nor do we speculate about the remedy that may be appropriate in this case . . . .").

party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one."[142]

Finally, the Court again addressed the issue of retroactivity in *Harper v. Virginia Department of Taxation*.[143] *Harper* involved a Virginia statute that exempted retirement benefits paid by state and local governments from taxation, but did not exempt retirement benefits paid by the federal government.[144] A similar Michigan statute was held unconstitutional in *Davis v. Michigan Department of Treasury*.[145] The Virginia Supreme Court refused to apply the *Davis* decision to cases brought by persons who had paid tax on federal retirement benefits before *Davis* was decided.[146] On appeal, the high court decided that Virginia had to give effect to the holding in *Davis*, but that did not mean that the plaintiff taxpayers were entitled to refunds.[147] Rather, the state was obligated to "provide relief consistent with federal due process principles."[148] In the context of a decision where a state statute attempted to levy an unconstitutional tax, the due process requirement may be met by affording the taxpayer a "predeprivation hearing" allowing the taxpayer to challenge the tax before paying it. In the absence of such a remedy, the state must provide "backward-looking relief to rectify any unconstitutional deprivation."[149]

In the end, the Virginia Supreme Court decided that although Virginia law did allow taxpayers to bring a declaratory judgment action to review the constitutionality of laws imposing taxes, no taxpayer would think that such an action provided the only remedy because Virginia's statute required refunds of illegally collected taxes.[150] The declaratory judgment was not an adequate "predeprivation" remedy and the taxes paid under the void statute had to be refunded.[151]

In *Harper*, Justice Thomas, writing for the majority, recognized that "*Griffith* and *American Trucking* . . . left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases."[152] The Court then discussed

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142. *Id.* at 535.

143. 509 U.S. 86 (1993).

144. *Id.* at 90–91.

145. 489 U.S. 803 (1989).

146. *Harper*, 509 U.S. at 91.

147. *Id.* at 100.

148. *Id.* (quoting *American Trucking Ass'n v. Smith*, 496 U.S. 167, 181 (1990)).

149. *Id.* at 100 (quoting *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 31 (1990)).

150. *Harper v. Va. Dep't of Taxation*, 462 S.E.2d 892, 898 (1995).

151. *Id.* at 899.

152. *Harper*, 509 U.S. at 96.

James Beam, finding that, while *James Beam* had not produced a unified opinion, it had seen a majority of justices agree on a rule:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[153]

The Court, invoking Justice Stevens's *American Trucking* dissent and adopting a hard position reflecting a majority of the justices in *James Beam*,[154] elaborated:

> Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that "the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case" and that the federal law applicable to a particular case does not turn on "whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application" of a new one.[155]

The Court then continued: "In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule."[156]

As Professor Tribe explains, in *Harper*, "[t]he Court expressly endorsed the view of the dissent in *American Trucking* that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'"[157] Professor Tribe further explains, "[T]he Court did not hold that all decisions of federal law must necessarily be applied retroactively. . . . [T]he Court has not renounced the power to make its decisions entirely prospective . . . ."[158] Thus, while the Court appeared hostile to non-retroactivity generally, *Chevron Oil*, which dealt with pure prospectivity, was not in fact overruled.[159] Instead, "the majority

153. *Id.* at 97.

154. *Id.*

155. *Id.* at 95 n.9 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)).

156. *Id.* at 97 (quoting *James Beam*, 501 U.S. at 543).

157. TRIBE, *supra* note 81, at 226 (quoting *Harper*, 509 U.S. at 97).

158. TRIBE, *supra* note 81, at 226.

159. Kay, *supra* note 18, at 48.

opinion forbade only 'selective prospectivity,' in which a court applies the new rule to the parties before it but not to other conduct predating the court's judgment."[160]

Through *Harper*, the Court had essentially created a presumption of retroactivity.[161] "Left unclear," Professor Pam Stephens suggests, "are the circumstances under which such a presumption might be overturned—when might the Court reserve such a determination, how would the decision whether to afford retroactive application be made (by what standard) and is pure prospectivity therefore still an option."[162]

Justice Breyer shed some light on the meaning of *Harper* in the majority opinion of *Reynoldsville Casket Co. v. Hyde*,[163] a decision issued by the Court in 1995.[164] Hyde, an Ohio resident, was injured in an accident involving a truck owned by an out-of-state company.[165] Although she brought her action after the two-year Ohio statute of limitations had ran, the suit was still timely because under an Ohio statute the statute of limitations is tolled while a person against whom a cause of action accrues is out of the state.[166] While Hyde's action was pending, the Supreme Court of the United States held in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*[167] that the Ohio tolling provision violated the Commerce Clause and was unconstitutional.[168] After the Ohio trial court and intermediate appellate court dismissed her case, Hyde appealed to the Ohio Supreme Court which reinstated it, holding that *Bendix* could not be applied retroactively to claims in state courts that had "accrued" before the announcement of the *Bendix* decision.[169]

In a decision delivered by Justice Breyer, the Court unanimously held that the federal Constitution does not permit this tolling to occur to pre-*Bendix* torts.[170] Plaintiff Hyde attempted to frame the issue of the case not as one of retroactivity, but as one of remedy, when he tried to persuade the Court that the tolling of the statute of limitations should be

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160. *Id.*
161. Stephens, *supra* note 113, at 1559.
162. *Id.*
163. 514 U.S. 749 (1995).
164. *Id.*
165. *Id.* at 751.
166. *Id.*
167. 486 U.S. 888 (1988).
168. *Id.* at 889.
169. *Reynolds Casket Co.*, 514 U.S. at 751–52.
170. *Id.* at 750–51, 761 (Kennedy, J., concurring) (Joining Justice Breyer were Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Thomas, and Ginsburg. Justice Scalia filed a concurring opinion, in which Justice Thomas joined. Justice Kennedy filed an opinion concurring in the judgment, in which Justice O'Connor joined. There was no dissent filed.).

seen "as a state law 'equitable' device."[171] The Court rejected the notion that essentially prospective results could be achieved through remedial means and declared that "we do not see how . . . the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy."[172] The Court thus concluded that the rule in *Bendix* should be applied retroactively since the *Bendix* decision applied to the parties then before the Court, and, following the reasoning of the *Harper* decision, required that this rule also be applied to the *Reynoldsville Casket* plaintiff, Hyde.[173] Under the rule, when state courts apply a new judge-made rule of federal law, the Supremacy Clause of the federal Constitution requires that they apply such a rule retroactively.[174]

Justice Breyer also noted the "special circumstances" of tax cases in which remedies other than refunds of unconstitutionally collected taxes are possible.[175] For example in *Harper*, Virginia could have refunded taxes collected from federal pensioners or imposed back taxes on state and local pensioners.[176] Either would have satisfied the constitutional requirements of equal protection. Justice Breyer also noted that retroactivity can be defeated by another constitutionally adequate rule.[177] Justice Breyer posited that "a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity—a rule containing certain procedural requirements for any refund suit—nonetheless barred" the refund suit.[178]

Ultimately, the Court held that state courts must give retroactive effect to decisions of federal law unless special circumstances exist.[179] The Court noted, however, that even where a new rule is applied retroactively to pending cases, there may be "instances where that new rule, for well-established legal reasons, does not determine the outcome of the case."[180] Specifically, a court may find:

> (1) [A]n alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) . . .

171. *Id.* at 753.
172. *Id.* at 753–54.
173. *Id.*
174. *Id.* at 750–51, 754.
175. *Id.* at 755.
176. *See id.*
177. *See id.*
178. *Id.* at 756.
179. *Id.* at 759.
180. *Id.* at 758–59.

> a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications, or (4) a principle of law . . . that limits the principle of retroactivity itself.[181]

These limitations are not absolute in all civil litigation, however, as "[i]n rare cases parties may collaterally attack otherwise final judgments but only if the case is truly exceptional."[182] Both the Federal Rules of Civil Procedure and the Restatement (Second) of Judgments express such an exception.[183] The Court's retroactive application of its holdings has always been limited by both the preclusion doctrines of collateral estoppel and *res judicata* as well as by statutes of limitations.[184]

In *Southwestern Bell Telephone Co. v. Mitchell*,[185] a Texas case on retroactivity, Texas Supreme Court Chief Justice Jefferson, in his dissenting opinion (on unrelated grounds), says "the Supreme Court explicitly overruled [the *Chevron Oil* test] as it applies to constitutional decisions and suggested that prospective application was not only wrong as to constitutional decisions, but contrary to the role of the judiciary."[186] Chief Justice Jefferson went on to note the concurring opinion by Justice Scalia in *Harper* on the issue of retroactive versus prospective application of decisions in which Scalia summarized the Court's position succinctly as follows: "Prospective decision making is the handmaid of judicial activism, and the born enemy of stare decisis. . . . The true traditional view is that prospective decision making is quite incompatible with the judicial power, and that courts have no authority to engage in the practice."[187]

Although the retroactivity doctrine in civil cases might lack absolute clarity, in her article "The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis," Professor Pam Stephens cites four rationales which have underlined the retroactivity doctrine over the

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181. *Id.* at 759.

182. Kay, *supra* note 18, at 51.

183. *Id.* at 52. Rule 60(b) of the Federal Rules of Civil Procedure and Section 73(2) of the Restatement both suggest the availability of the option to alter the finality in civil litigation. *See* FED. R. CIV. P. 60(b); RESTATEMENT (SECOND) OF JUDGMENTS § 73(2) (AM. LAW. INST. 1980). This must be for "particularly compelling reasons" and "[a]t some point adjudication comes to an end and unsuccessful civil litigants are denied the solace of newer and friendlier law." Kay, *supra* note 18, at 52.

184. Stephens, *supra* note 113, at 1568.

185. 276 S.W.3d 443 (Tex. 2008).

186. *Id.* at 450.

187. *Id.* at 451 (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 105–06 (1993) (Scalia, J., concurring) (emphasis omitted)).

years.[188] Perhaps these rationales may provide us some guidance in analyzing the aftermath of *Obergefell*, as these considerations may be what ultimately sway the Court in the face of revising its own doctrine.[189]

First, Stephens explains that notions of fairness, and, more specifically, reliance largely supported *Chevron Oil*.[190] The same concerns underlay *American Trucking*.[191] It was in *Harper*, however, that fairness focused on reliance interest was superseded by fairness focused on interests in equal treatment.[192] Second, Stephens explains how the judiciary's Article III powers—to decide cases and controversies—have given way to constitutional objections to prospectivity.[193] Of course, we have seen Justice Scalia oppose prospectivity on these grounds,[194] but Stephens argues that "despite Scalia's arguments to the contrary, there is nothing in the text of Article III which defines the nature of the judicial role, nor the exact limits of the judicial power relative to the other branches."[195] Further, she points out, prospective decision-making has been traditionally used in this country; in fact, "the Court has suggested that such nonretroactive application of law might be constitutionally required in some instances."[196] Third, Stephens explains how stare decisis may provide a certain rationale for retroactivity.[197] While Scalia has argued that stare decisis and non-retroactivity are essentially incompatible, Stephens points out:

> Proponents of some measure of prospectivity argue that in fact the purposes of the doctrine of stare decisis are served by not requiring retroactive application of all new rules. This is so because underlying the doctrine of stare decisis is the principle of protecting justifiable reliance upon established law. To the extent that a party has justifiably relied upon established law, and has no reason to anticipate a change in that law, refusing to apply a new rule of law to that party is consistent with stare decisis.[198]

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188. Stephens, *supra* note 113, 1560–68.
189. *See generally id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1561. *See also* U.S. CONST. art. III, § 2, cl. 1.
194. Stephens, *supra* note 113, at 1563.
195. *Id.*
196. *Id.* at 1563–64.
197. *Id.* at 1565.
198. *Id.*

Stephens argues that it is indeed the "flexible application of the doctrine of stare decisis," or an application that allows for the sudden abandonment of old rules where necessary, that "has allowed the law to evolve gradually in this country, accommodating changes in modern society, unrestricted by archaic rules."[199] Finally, Stephens notes the rationale of finality:

> In the civil area, the Court has usually dealt with the issue of finality implicitly, although it has on occasion stated its view in more explicit terms. The Court seems to have assumed that any retroactive application of its rulings is always limited by both the preclusion doctrines and by statutes of limitations. To the extent that a litigant is barred by collateral estoppel or res judicata from raising a particular issue or mounting a claim or defense, the litigant cannot take advantage of any new rule announced by the courts. Similarly, should the court announce a new rule of law that provides a cause of action where one did not exist before, a litigant may not take advantage of that to bring a case barred by the relevant statute of limitations. Again, underlying both the preclusion doctrines and statutes of limitations is in large part the notion that there must be an endpoint to litigation or to the possibility of litigation. In both the criminal and civil areas then, finality acts to put an outside limit on the scope of the retroactivity doctrine.[200]

Stephens writes:

> [T]he new retroactivity doctrine is consistent with the Court's more conservative view of the narrow role of the judiciary and the limits on the judicial power. By requiring judicial decisions to have retroactive application, the assumption is that courts will be less likely to overturn precedent—not wanting to adversely affect those who relied upon the old rule. Therefore, stare decisis will be more forcefully adhered to and judicial activism diminished.[201]

In sum, when the Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate

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199. *Id.* at 1567.
200. *Id.* at 1568.
201. *Id.*

or postdate the announcement of the law. Therefore, in the aftermath of *Obergefell*, it is undeniable that any precedent banning the recognition of same-sex marriages has been overturned as an unconstitutional denial of a fundamental right, and *Obergefell* should be applied purely retroactively for choice-of-law purposes. Operating under this assumption, we next turn to *Trimble* to provide an illustrative guide to the issues that arise concerning remedial limitations when dealing with familial relations, property, and retroactivity.

D. Trimble v. Gordon *and Retroactive Inheritance Rights*[202]

As courts begin to address how *Obergefell* will affect surviving spouses, families, and third parties—such as purchasers, mortgagees, and title insurers—*Trimble v. Gordon*[203] and its progeny highlight the unique challenges of retroactive applications of remedial considerations to the state law legal disciplines of real property and property succession.[204] These cases flesh out some of the remedial limitations that will be of issue in post-*Obergefell* disputes, as seen as recently as 2004 in the case of *Kau Agribusiness Co. v. Ahulau*.[205] Although insightful in highlighting the unique nature of real property and property succession laws, it should be noted that *Trimble* was decided before the Supreme Court's recent development of a more robust concept of retroactivity. Nevertheless, *Trimble* may still serve in developing a framework for analyzing remedial issues concerning *Obergefell*. A pattern of particular remedial problems begins to develop

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202. Although *Loving v. Virginia*, 388 U.S. 1 (1967), and its lineage may seem like the obvious precedent for the retroactivity of civil marriage laws, *Loving* does not make for the strongest analogy because *Loving* dealt primarily with penal statutes. Retroactivity jurisprudence is bifurcated into two jurisprudential lines: criminal and civil. *See infra* Part II.C. Resolving retroactivity issues concerning the *Obergefell* decision will implicate the civil line of judicial retroactivity jurisprudence. While *Loving* is a penal law case, it was the impetus for retroactive inheritance rights in at least two cases. *See Dick v. Reaves*, 434 P.2d 295, 298 (Okla. 1967) (in the context of an inheritance dispute, declaring an Oklahoma penal statute unconstitutional and overruling all contrary prior decisions in accordance with *Loving,* thereby creating a retroactive new class of heirs); *Hibbert v. Mudd*, 272 So. 2d 697, 700, 706 (La. Ct. App. 1972) (Culpepper, J., dissenting) (noting that although the lower court relied on Loving to invalidate a civil statute that banned miscegenous heirs from receiving their inheritance, "the *Loving* case applied to a penal statute and there could be a question as to whether it extends to civil statutes"), *rev'd on other grounds*, 294 So. 2d 518 (La. 1974).

203. 430 U.S. 762 (1977).

204. *Id.*

205. 95 P.3d 613 (Haw. 2004). "After the application of *Trimble* to invalidate their own similar statutes, other state courts addressing the prospective/retroactive question have generally limited the retrospective reach of the statutory invalidation." *Id.* at 622–23 (quoting *Williamson v. Gane*, 345 S.E.2d 318, 320 (W. Va. 1986)).

upon reviewing these cases, including whether estates have closed, whether applicable statute of limitations have run, and whether property has been transferred to innocent bona fide purchasers.

In *Trimble*, the Supreme Court held unconstitutional state statutes that excluded a non-marital child from inheriting from the child's biological father.[206] Various states unsuccessfully defended these statutes by claiming an interest in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death. The Court held that although a state has a great deal of independence in determining how to govern the disposition of an estate, the state is still bound by constitutional limits.[207] For a federal court, "[t]he judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area."[208] For cases dealing with proof of paternity, the Court held that the difficulty in proving paternity was not so great as to justify unilaterally denying the inheritance rights of illegitimate children whose fathers died intestate.[209] As one court noted, "a statutory classification based on illegitimacy violates equal protection unless it is substantially related to an important governmental interest."[210] The Court's holding in *Trimble* gave rise to numerous claims by non-marital children and raised questions regarding *Trimble*'s retroactive effect on the intestacy laws of the states.

1. RETROACTIVITY OF *TRIMBLE*

Before the Supreme Court addressed the retroactivity of its decision in *Trimble*, probate courts in different states reached various conclusions concerning the extent, if any, of the retroactivity of *Trimble* to property succession law. The Supreme Court of Appeals for West Virginia applied *Trimble* retroactively in *Williamson v. Gane*,[211] an intestate probate action concerning whether the decedent's non-marital children were beneficiaries of the estate.[212] At the time of the decedent's death, West Virginia law allowed non-marital children to inherit only from their mother's estate, and therefore the decedent's

206. *Trimble*, 430 U.S. at 776.

207. *Trimble*, 430 U.S. at 771 (1977).

208. *Id.*

209. *Id.* at 772.

210. *Dickson v. Simpson*, 807 S.W.2d 726, 727 (Tex. 1991) (holding that the Fourteenth Amendment guaranteed Petitioner a fair opportunity to establish her kinship because the harsh discrimination against non-marital children did not sufficiently further the orderly administration of estates).

211. 345 S.E.2d 318 (W. Va. 1986).

212. *Id.* at 320.

children were not deemed heirs at law.[213] Over two years after the decedent's death, however, the United States Supreme Court decided *Trimble*. The sole question presented to the court in *Williamson* was the retroactive effect, if any, of *Trimble* upon the devolution of title to the intestate decedent's real estate.[214] The court noted that the "United States Supreme Court has not addressed the prospective/retroactive question as it applies to the *Trimble* decision."[215] Regardless, the court applied *Trimble* retroactively and acknowledged the non-marital children as lawful heirs, finding that (1) there has been no justifiable and detrimental reliance upon the law invalidated therein, (2) the subject property has not been transferred to an innocent purchaser for value, or (3) the estate is subject to further administration.[216] The Court's definition of the *Trimble* test is significant here because it establishes guidelines that are beyond the limitations of paternity;[217] these three criteria can be applied to any statute addressing the distribution of an estate and the retroactivity of a holding.

Other state probate courts, however, reached alternative conclusions to the retroactive/prospective question regarding *Trimble*. For instance, the Supreme Court of South Carolina utilized a very restrictive application in *Wilson v. Jones*.[218] In *Wilson*, the court settled upon a pure prospective application of *Trimble* by holding that only those non-marital children whose fathers die after the date of the *Trimble* decision may inherit.[219] The Tennessee Supreme Court, on the other hand, retroactively applied its own decision, holding that a non-marital child can inherit from the child's father so long as paternity is proved "by clear and convincing evidence" and the other claimants have not relied to their detriment on prior law (in this case the court describes those other claimants as "merely assert[ing] that they have passively acquired rights as the heirs at law of an intestate property

213. *Id.* at 319.

214. *Id.* at 320.

215. *Id.*

216. *Id.* at 322; *see also Marshall v. Marshall*, 670 S.W.2d 213, 215 (Tenn. 1984) ("[R]etroactive application of a decision overruling an earlier decision ordinarily is denied only if such an application would work a hardship upon those who have justifiably relied upon the old precedent.").

217. *Williamson*, 345 S.E.2d at 322.

218. 314 S.E.2d 341 (S.C. 1984). *See also Mitchell v. Hardwick*, 374 S.E.2d 681, 682 (S.C. 1988) The South Carolina Supreme Court held that Trimble should be given "limited retroactive application" where an innocent purchaser is not adversely affected by enforcing the new rule in the face of the purchaser's reliance on the law existing at the time of the purchase, where paternity is "conclusively established," and where the estate administration is subject to "further resolution." *Id.*

219. 314 S.E.2d at 343.

owner," not that they have relied on the prior law).[220] Still, other courts accorded limitations on the retroactive effect by applying *Trimble* to matters pending on the date of the *Trimble* decision.[221] Finally, the Supreme Courts of Kentucky[222] and Arkansas[223] refused to give *Trimble* any retroactive effect.

Adding to the retroactive/prospective chaos following *Trimble*, the United States Supreme Court deliberated the question in *Reed v. Campbell*,[224] a case concerning a decedent who died intestate when the Texas Probate Code prohibited non-marital children from inheriting from their biological father's estate.[225] Subsequent to the decedent's death, the Court decided *Trimble*, thereby holding the Texas statute *void ab initio*.[226] After *Trimble*, a non-marital child of the decedent filed a claim to a share in her father's estate, but a Texas trial court denied the claim.[227] The Texas Court of Appeals affirmed, holding that Trimble does *not* apply retroactively.[228] Despite this, the Supreme Court of the United States applied *Trimble* retroactively in *Reed* and held:

> The interest, protected by the Fourteenth Amendment, in avoiding unjustified discrimination against children born out of wedlock, requires that appellant's claim to a share in her father's estate be protected by the full applicability of *Trimble*. There is no justification for the State's rejection of the claim. At the time appellant filed her claim, *Trimble* had been decided, and her father's estate remained open. Neither the date of the father's death nor the date appellant's claim was filed should have prevented the applicability of *Trimble*. Those dates, either separately or in combination, had no

220. *See Marshall*, 670 S.W.2d at 215 (citing *Allen v. Harvey*, 568 S.W.2d 829 (1978)) The Tennessee statute governing inheritance by non-marital from their biological fathers was not as restrictive as the Illinois statute invalidated by *Trimble* and, arguably, was not overturned by *Trimble*. *Id.*

221. *See Frakes v. Hunt*, 583 S.W.2d 497 (Ark. 1979); *In re Estate of Rudder*, 397 N.E.2d 556 (Ill. App. Ct. 1979); *In re Estate of Sharp*, 377 A.2d 730 (N.J. Super. 1977), *aff'd as modified*, 394 A.2d 381 (N.J. 1978); *Winn v. Lackey*, 618 S.W.2d 910 (Tex. Civ. App. 1981).

222. *Pendleton v. Pendleton*, 560 S.W.2d 538, 539 (Ky. 1978).

223. *Frakes*, 583 S.W.2d at 499.

224. 476 U.S. 852 (1986).

225. *Id.* at 852–53.

226. *Id.* at 853.

227. *Id.*

228. *Id.*

impact on the State's interest in orderly administration of the estate.[229]

2. ESTATE ADMINISTRATION

Although a federal court's decision may be given full retroactive effect, remedial considerations may be affected by whether "cases [are] still open on direct review."[230] While this potential limit on the retroactivity of remedies provides a level of certainty to persons whose cases have reached a final point of adjudication, the limits also have practical considerations by preventing a case from being reopened with each subsequent change in the law.[231]

These rules may be overlooked in extraordinary cases where an injustice will continue to be implemented if the decision is not revisited. Section 73(2) of the Restatement (Second) of Judgments and the Federal Rules of Civil Procedure provides that a judgment "may be set aside or modified if . . . [t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust."[232] Despite the apparent wiggle room within the Restatement, the limitations of retroactivity seem best recognized as being barred by time: "retroactive effect of civil judgments reaches back only to controversies still open to judicial resolution."[233]

Although the Court's decision in *Reed* resolved at least some of the retroactivity issues raised by *Trimble*, the Court did emphasize that the decedent's estate had remained "open" at the time of the decision.[234] Therefore, "closed" estates may produce limitations concerning retroactive remedial considerations. Of course, discerning the differences between open and closed estates is not as easy as it might seem. Most estates are probably never formally closed, in the sense that the personal representative has accounted to the court, process has been issued to those interested, and the court has issued a decree approving the accounts and discharging the personal representative from further liability.

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229. *Id*. at 856.

230. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96–97 (1993).

231. *Quatnum Res. Mgm't, L.L.C. v. Pirate Lake Oil Corp.*, 112 So. 3d 209, 217 (La. 2013) (denying the re-opening of a 1925 case based on a 1983 United States Supreme Court decision, *Mennonite Bd. Of Missions v. Adams*, 462 U.S. 791 (1983)).

232. RESTATEMENT (SECOND) OF JUDGMENTS § 73(2) (1982).This standard was recognized as being an "unsound policy" in Comment (c), which perhaps can account for the rareness with which it is used and recognized. *Id.* § 73(2), cmt. c. *See also* FED. R. CIV. P. 60(b).

233. Kay, *supra* note 18, at 52. *See also* FED. R. CIV. P. 60(b).

234. *Reed*, 476 U.S. at 854.

3. STATUTES OF REPOSE

Another approach to dealing with the remedial retroactive application of *Trimble* concerns statutes of repose. On July 1, 1981, Mississippi amended its statute governing inheritance by non-marital children to conform to the *Trimble* holding.[235] The amendment gave non-marital children who claimed to be entitled to inherit from or through the child's birth father (and a birth father claiming to inherit from or through his non-marital child), where the decedent died before July 1, 1981, three years from that date to bring the claim.[236] In essence, it served as a statute of repose that gives those whose interests are affected by a change in the law a limited amount of time to bring claims related to events that occurred before the change was announced.

The Mississippi Supreme Court upheld the statute in *In re Estate of Kimble*,[237] holding that the statute affords non-marital children equal protection of the laws "while at the same time accomplish the legitimate state interest of (1) avoiding the litigation of stale or fraudulent claims, (2) the fair and just disposal of an intestate decedent's property; and (3) the repose of titles to real property."[238] In subsequent cases, the Mississippi Supreme Court reversed dismissals of suits brought within the three-year period of the statute by persons claiming to be the non-marital children of decedents who had died in 1958,[239] 1969,[240] and 1977.[241] It is important to note that this legislation gave three years to bring claims—the length of time allocated before rights are terminated and proper notice requirements could be outcome determinative in whether statutes of repose are constitutional.

4. BONA FIDE PURCHASERS

The concerns of the Court in *Mitchell*, similarly to the concerns of the Court in *Trimble* and *Reed*, recognized that some illegitimate children of fathers who died intestate (here, analogous to the previously unrecognized spouses of same-sex couples) were entitled to inheritance rights when (1) the orderly settlement of estates, and (2) the dependability of titles to property passing under intestacy laws were not jeopardized. If these two standards were not met, then the state might

235. MISS. CODE ANN. § 91-1-15 (West 2016).
236. *Id.*
237. 447 So. 2d 1278 (Miss. 1984).
238. *Id.* at 1283.
239. *Berry v. Berry*, 463 So. 2d 1031 (Miss. 1984).
240. *Holloway v. Jones*, 492 So. 2d 573 (Miss. 1986).
241. *In re Estate of Smiley*, 530 So. 2d 18 (Miss. 1988).

have had a valid interest in not re-visiting estate distribution on the grounds that the accurate, effective, and just distribution of estates would be compromised.

In *Collier v. Shell Oil Co.*,[242] the Mississippi Supreme Court held that the rights of non-marital children in the estate of their fathers, who had died intestate in 1955, could not prevail over the rights of bona fide purchasers of mineral rights in land included in the intestate estate, acquired before the date of the decision in *Trimble*.[243] This is a completely defensible result and certainly seems to comport with the limits on retroactivity set out less than a decade later in Justice Breyer's *Reynoldsville Casket Co.* opinion: the bona fide purchaser principle is one of those principles which, in this particular context, can provide finality and which may also be appropriately described as "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications . . . ."[244]

Kau Agribusiness Co. v. Ahulau, was a case that examined the retroactive implications of an unconstitutional ban on non-marital children inheriting from the estates of their fathers pre-*Trimble*, against the rights of innocent bona fide purchasers.[245] The case involved a quiet title action brought by the successor in interest to the original purchasers of land that was part of a decedent's estate who died intestate in 1939.[246] The defendants in the quiet title action claimed through their father, the decedent's nephew.[247] The defendants were descendants of the non-marital children of the nephew.[248] The Hawaii Supreme Court discussed the issues involved at length. The court applied *Trimble* retroactively on the grounds that the affected parties would thus be able to receive proper compensation; however, the estate of the plaintiff's father was not yet closed.[249] The court decided that the heirs of the non-marital child cannot succeed in the quiet title action filed by the current property because the plaintiff is an "innocent purchaser" and the proof of paternity of the ancestor through whom the defendants claimed was "inconclusive."[250] The court defined an innocent purchaser as one who "by an honest contract or agreement, purchases property or acquires an interest therein, without knowledge,

242. 534 So. 2d 1015 (Miss. 1988).

243. *Id.* at 1019.

244. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995) (emphasis original).

245. 95 P.3d 613 (Haw. 2004).

246. *Id.* at 615.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 625.

or means of knowledge sufficient to charge him in law with knowledge, of any infirmity in the title of the seller."[251] The Hawaii Supreme Court stated that because the estate of the uncle of the claimant's father was never probated, his estate is still "subject to further resolution"—that is, it is still "open"—although he died in 1939.[252]

The Hawaii Supreme Court also discussed at length *Mitchell v. Hardwick*,[253] the South Carolina Supreme Court decision giving *Trimble* "limited retroactive application" where an innocent purchaser is not adversely affected by enforcing the new rule in the face of the purchaser's reliance on the law existing at the time of the purchase, where paternity is "conclusively established," and where the estate administration is subject to "further resolution."[254] The Hawaii Supreme Court ultimately adopted the *Mitchell* criteria.[255]

While *Trimble* and its lineage highlight remedial limitations of retroactivity to unique aspects of property and property succession laws, these cases predate *Harper*, a time when the retroactivity jurisprudence of the Supreme Court was less clear and less robust. It should be noted, though, that the principle reason cited for limiting the retrospective reach of *Trimble* was "to prevent chaotic conditions" arising regarding real property titles[256]—an argument that many feel real property bar members and title insurers are currently making in light of *Obergefell*. Therefore, although a more robust concept has developed in recent years, *Trimble* provides examples of problematic remedial issues that are sure to arise in post-*Obergefell* disputes, especially when property has been sold or transferred to bona fide purchasers.

E. U.S. v. Windsor *and Retroactive Federal Rights for Some Same-Sex Marriages*

The Supreme Court's invalidation of Section 3 of DOMA raised the issue of whether same-sex spouses were deemed "married" under federal law beginning on the date of the *Windsor* decision[257] or retroactively to the dates of their actual marriages. For same-sex

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251. *Id.* (quoting *Pelosi v. Wailea Ranch Estates*, 985 P.2d 1045, 1056 (Haw. 1999)).

252. *Id.* at 626.

253. 374 S.E.2d 681 (S.C. 1988).

254. *Id.* at 681–83.

255. *Kau Agribusiness*, 95 P.3d at 626.

256. *See, e.g.*, *Frakes v. Hunt*, 583 S.W.2d 497, 499 (Ark. 1979) The dissent in *Frakes* is an excellent exposition of the state of the law at the time and clearly shows the development of the trend that would culminate in *Harper*. *Id.*

257. 133 S. Ct. 2675, 2695 (2014) (holding that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution").

spouses, *Windsor* significantly changed the landscape of federal tax law, federal employee benefits law (including spousal protections under ERISA), and their respective related regulations. More important for this discussion, though, is that *Windsor* invoked retroactivity issues concerning same-sex marriage in cases where one of the spouses had a life event (such as a retirement, death, or divorce) prior to the *Windsor* decision. Not surprisingly, courts applied the retroactivity doctrine as espoused in *Harper* to post-*Windsor* disputes. Therefore, the recent application of *Windsor* provides an analogous example of examining the retroactivity of same-sex marriages post-*Obergefell*.

Post-*Windsor*, the IRS and Treasury Department were the first to issue an applicable statement regarding the retroactivity of same-sex marriage.[258] The IRS and the Treasury jointly issued Revenue Ruling 2013-17 (along with two sets of Frequently Asked Questions), which fleshed out some of the outstanding issues concerning same-sex marriages from a federal tax law perspective (FAQs 10–15 cover health benefits and 16–19 cover qualified plans).[259] First, the IRS held that gender-specific terminology (e.g. "husband," "wife," etc.) in the Internal Revenue Code should be interpreted in a gender neutral manner in light of *Windsor*.[260] While significant, this can be thought of as a holding of convenience, forestalling the necessity of sweeping

258. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. From a federal perspective, retroactivity would affect, in part, filing joint income tax returns; claiming the marital deduction for estate and gift tax purposes under Sections 2523 and 2056 of the Code; gift splitting under Section 2513 of the Code; electing portability under Section 2010(c)(4) of the Code; same-sex spouse being automatically assigned to the same generation of his or her spouse for GST purposes under Section 2651(c) of the Code; using the reverse QTIP election; taking advantage of step-up in income tax basis under Section 1014(b)(6) of the Code on both halves of the community property at the first spouse's death, including jointly owned property in the estate under Section 2040(b) of the Code; applying grantor trust rules that are triggered by a spouse's benefits or control over a trust; not recognizing gains and losses on sales between spouses; disclaiming certain interests in property while retaining other rights in the disclaimed property under Section 2518 of the Code; naming the spouse as the beneficiary under a qualified retirement account and allowing the spouse to roll over the benefits of a deceased spouse's IRA into the surviving spouses own IRA or into an inherited IRA which provides distributions over the surviving spouse' life expectancy; eliminating adverse tax consequences for the transfer of property pursuant to a marriage settlement agreement and taking advantage of non-inclusion in taxable income of the employer-paid health insurance premiums for coverage of the employee's same-sex spouse; and recognized for purposes of employee benefit plans governed by ERISA.

259. The Treasury Department recently issued final regulations that reflect the holdings of *Windsor*, *Obergefell*, and Revenue Ruling 2013-17. The regulations define terms in the Code describing the marital status of taxpayers for federal tax purposes. As in the earlier proposed regulations (NPRM REG-148998-13), the final regulations provide that the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife" means two individuals lawfully married to each other. T.D. 9785, 2016-38 C.B. 38, at 361.

260 *Id.*

changes to the Code to correct for gender-specific terminology. Second, (and the most publicized portion) the IRS issued a ruling that, for federal tax purposes, a couple would be considered married (or not) based on the state of celebration—not the state of residence.[261] Finally, the IRS ruled that civil unions and domestic partnerships—even those with rights concomitant to marriage—would not be considered marriages for purposes of federal tax law.[262] Because the Supreme Court held that DOMA section 3 was unconstitutional, the statute was *void ab initio* and, accordingly, Revenue Ruling 2014-19 mandated that the *Windsor* decision be applied retroactively for the purpose of filing original, amended, and adjusted tax returns, or claims for certain credits or refunds.[263] While the IRS and the Treasury Department applied *Windsor* retroactively for federal tax purposes, the retroactive application was limited to open tax years—basically same-sex spouses could (but were not required to) go back three years and file amended returns.[264]

On April 4, 2014, the IRS issued Notice 2014-19,[265] explaining the application of the *Windsor* decision and Revenue Ruling 2014-19 to qualified retirement plans. The Notice states that any retirement plan qualification rule that applies because a participant is married must be applied equally to same-sex spouses.[266] Qualified plans must reflect "the outcome of *Windsor* as of June 26, 2013" or risk losing tax qualification.[267] Through September 16, 2013, though, a plan would not lose its tax qualification for recognizing only same-sex participants domiciled in states that recognized same-sex marriages.[268] After that date, all plans must recognized same-sex marriages regardless of whether the spouse's state of domicile recognized same-sex marriages.[269] The Notice also provided that if a plan does not define "spouse" or "marriage" in a manner inconsistent with *Windsor*, an amendment is not required but the plan must be operated in accordance with the Notice.[270] It should be noted that the Notice did not provide relief from any claim that a same-sex spouse might bring asserting

261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* If protective elections had been made, of course, the time period might be longer.
265. Notice 2014-19, 2014-47 I.R.B. 979.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

rights to spousal benefits based on events that happened before June 2013.[271]

Although Notice 2014-19 did not address specific retroactive relief, a few courts raised retroactivity issues concerning employee benefits and required that benefits be provided on pre-*Windsor* events.

In *Cozen O' Conner, P.C. v. Tobits*,[272] a district court applied *Windsor* retroactively to allow the plaintiff to recover death benefits.[273] Ms. Tobits and Ms. Farley were married in Canada in 2006.[274] Farley participated in her employer's pension plan.[275] She died in 2010 (pre-*Windsor*) and her employer refused to grant Tobits any survivor benefits because the employer did not recognize Tobits as a surviving spouse.[276] The court determined that because the employee benefit plan was an ERISA-qualified plan,[277] and that the plan did not specifically exclude same-sex spouses, then the language of the plan should be construed in accordance with federal law.[278] The court held that, according to *Windsor*, "spouse" encompassed same-sex couples for federal purposes, and the court provided Todbits retroactive relief.[279] Therefore, if a participant or beneficiary has a claim for benefits under the terms of a plan, and the plan can be read to provide spousal benefits to same-sex spouses, that claim can still be brought even if it is based on events *prior* to *Windsor*.[280]

In the health plan context, a Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex partner in the federal employee's health plan prior to *Windsor*.[281] It should be noted, though, that the panel did not directly address retroactivity.[282]

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271. *See id.*

272. No. 11–0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013).

273. *Id.* at *4.

274. *Id.* at *1.

275. *Id.*

276. *Id.*

277. *Id.* at *3. The Internal Revenue Service Code and ERISA require benefit plans to meet certain requirements to be qualified for tax preferences. *Id.* Because the ERISA-eligible plan in *Tobits* was drafted in compliance with federal law and expressly required the plan to be construed in compliance with federal law, *Windsor* provided the federal interpretation of the term "spouse." *Id.*

278. *Id.* at *4.

279. *Id*. at *4–5.

280. Simply, although a plan did not have to recognize same-sex marriages prior to the dates announced in Notice 2014-19, participants and beneficiaries may still bring claims for spousal benefits and claims for violations of ERISA or the terms of a plan, even if the claims are based on events prior to *Windsor*.

281. *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013).

282. *Id.* A different case raising retroactivity issues involving the denial of federal health benefits to same-sex spouses was filed, but settled in September 2015.

A recent decision from California applied *Windsor* to an ERISA plan based on events that predate *Windsor*. In *Schuett v. FedEx Corp.*,[283] a surviving same-sex spouse, whose partner died before the *Windsor* decision, brought a claim against FedEx for survivor benefits.[284] FedEx filed a motion to dismiss and stated that at the time of the spouse's death FedEx's ERISA plan explicitly defined "spouse" to include only opposite-sex couples.[285] They argued that *Windsor* should not be applied retroactively because there were special circumstances that justified a departure from the retroactivity standard announced in *Harper*.[286] The court denied the motion to dismiss and stated that it was "not persuaded at this stage of the case and under the facts alleged in the complaint that there is any basis for denying retroactive application of *Windsor*."[287]

In addition, "the U.S. Office of Personnel Management (OPM) granted an administrative claim for retroactive survivor benefits brought by a surviving same-sex spouse of a federal employee who died in 2011."[288] The couple was married in 2008.[289] When the federal employee died in 2011, the surviving spouse was denied benefits by OPM based on DOMA.[290] The surviving spouse filed a timely claim for survivor benefits in 2014, arguing that OPM should not apply the unconstitutional law in evaluating her claim, but rather should apply *Windsor* retroactively.[291] OPM granted the claim, and the surviving spouse received death benefits and a monthly annuity retroactive to the death of the federal employee.[292] In June 2014, the United States Attorney General issued a memo stating that "OPM has begun the process of working with surviving spouses of federal employees and annuitants who died prior to the *Windsor* decision to ensure that these widows and widowers receive the benefits to which they would have

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See Complaint, *Hudson v. Office of Pers. Mgmt.*, No. 15-cv-01539 (N.D. Cal. filed Apr. 3, 2015).

283. 119 F. Supp. 3d 1155 (N.D. Cal. 2016).

284. *Id.* at 1157–58.

285. *Id.* at 1157.

286. *Id.* at 1163.

287. *Id.* at 1166.

288. Teresa S. Renaker et al., *Post-DOMA Employee Benefits Issues Affecting Employees in Same-Sex Marriages, Civil Unions, and Domestic Partnership*, AMERICANBAR.ORG (Oct. 14, 2016), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2014/9a_post-doma.authcheckdam.pdf [https://perma.cc/RW2C-RDBK].

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

otherwise been entitled had DOMA not prohibited OPM from recognizing their marriages."[293]

The retroactive application of *Windsor* to same-sex marriages will provide much needed guidance in analyzing the effects of *Obergefell*. It should be kept in mind, though, that the *Obergefell* opinion announced an extension of federal constitutional rights, which may be somewhat different from the retroactive application of a decision invalidating a statute such as that at issue in *Windsor*. Regardless, this would tend to make an argument for a retroactive application even stronger following *Obergefell*.

F. Precedents on Remedial Relief Concerning Unconstitutional Discriminatory Acts

In addition to the review of retroactivity jurisprudence in civil cases, a brief examination of remedial reliefs proffered by courts when statutes have been held unconstitutional based upon discriminatory acts provide insights to the issues raised in *Obergefell*. In the past, when the Supreme Court has invalidated laws that discriminate against discrete groups, such as African Americans and women, the Court has held remedial relief must be crafted in order to restore the victims of unconstitutional discrimination to the position that they would have occupied but for the discrimination.[294] Accordingly, these precedents are important to any discussion concerning remedies in post-*Obergefell* disputes.

For instance, in *United States v. Virginia*,[295] the Supreme Court applied this type of remedial relief to a class of persons that are subject to intermediate scrutiny, that being women.[296] In fact, this application was explicitly pointed out by Justice Scalia in his dissent.[297] In *United*

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293. Memorandum from Attorney General Eric Holder to The President of The United States, *Implementation of* United States v. Windsor (June 20, 2014), https://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf [https://perma.cc/PE7T-LX5S].

294. *See United States v. Virginia*, 518 U.S. 515, 547 (1996) (the Court held that remedies "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied . . .'") (quoting *Milliken*, 433 U.S. at 280); *Milliken v. Bradley*, 433 U.S. 267, 279–80 (1977) (noting that, in enforcing *Brown v. Board of Education*, courts were not limited to prospectively stopping the discriminatory actions, but could also fashion remedies to undue the effects of the prior discriminatory actions); *Louisiana v. United States*, 380 U.S. 145, 154 (1965) ("[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.").

295. 518 U.S. 515 (1996).

296. *Id.* at 568 (Scalia, J., dissenting).

297. *Id.* (Scalia, J., dissenting).

States v. Virginia, the Court struck down the Virginia Military Institute's male-only admission policy.[298]

In prophylactic response to the inequality, Virginia proposed a matching program exclusively for women called the Virginia Women's institute for Leadership.[299] The Court did not find this proposal remedial enough, as it would not restore the victims of the discrimination, women, to a place they would have occupied but for the unconstitutional discrimination.[300] Specifically, the proposal did not provide women with the same type and standard of military training or advancements that Virginia Military Institute provided for its male counterparts.[301] *United States v. Virginia* serves as a strong example of the Courts' eagerness to specifically strike down unconstitutional laws and provide for restorative measures despite the facts of the case lacking a heightened or strict scrutiny foundation. In fact, that eagerness to strike absent a strict scrutiny basis is latently pointed out in the dissenting opinion written by Justice Scalia.[302]

After the opinion, the Virginia Military Institute contemplated bypassing the ruling by making the school private.[303] Had this hypothetical materialized, the Department of the Defense would have removed all ROTC programs.[304] This threat from the Department of Defense caused Congress' knee-jerk reaction to prevent the military, through legislative amendment, from removing any ROTC programs from a military college.[305] The political crossfire was for naught, however, as the Virginia Military Institute's Board voted to admit women to the school.[306]

Although the application of this type of remedial relief traditionally applies to classes that receive heightened scrutiny, the application of remedial relief may apply even to classes that do not traditionally receive heightened scrutiny.[307] Furthermore, courts have become increasingly more likely to apply a heightened scrutiny to same-sex couples and grant them broad remedial relief.[308] As the Court stated in its opinion in *Lawrence v. Texas*, "class-based legislation directed at

298. *Id.* at 519.

299. *Id.* at 526.

300. *Id.* at 547.

301. *Id.* at 548–49.

302. *Id.* at 570–73 (Scalia, J., dissenting).

303. Katharine T. Bartlett, *Unconstitutionally Male?: The Story of* United States v. Virginia 32–34 (Duke Law Working Papers, Paper No. 12, 2010), http://scholarship.law.duke.edu/working_papers/12/ [https://perma.cc/NKC6-EH3F].

304. *Id.* at 34.

305. *See* 10 U.S.C. § 2111a(3)(d) (2012).

306. Bartlett, *supra* note 303, at 33.

307. *Varnum v. Brien*, 763 N.W.2d 862, 889–90 (Iowa 2009).

308. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

homosexuals [is] a violation of the Equal Protection Clause."[309] Indeed, the *Lawrence* Court noted that the Texas statute in question directly targeted homosexual individuals and had the effect of making homosexuality a crime.[310] The Court used the exclusivity of the law to homosexual individuals to distinguish it from *Bowers v. Hardwick*,[311] where the law in question applied equally to all groups and therefore avoided Equal Protection analysis.[312] Therefore, the Court asked a different question than was asked in *Bowers*: "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not."[313] Thus, the Court concluded that, "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[314] In addition, in *Varnum v. Brien*,[315] the Supreme Court of Iowa held that sexual orientation was a quasi-suspect class and applied heightened scrutiny in analyzing it.[316] The court found that the Iowa civil marriage statute failed to provide equal protection of the law and granted the plaintiffs the remedy they requested.[317] In *Griego v. Oliver*,[318] the Supreme Court of New Mexico applied intermediate scrutiny to a same-sex couple because the legislation at issue "affect[ed] a sensitive class" rather than a suspect class.[319] In *Love v. Beshear*,[320] a Kentucky district court found that "homosexual persons constitute a quasi-suspect class," and applied heightened scrutiny.[321]

While the aforementioned cases are distinct in that they do not apply retroactive relief, they do serve as guiding precedents and display courts' growing propensity to apply heightened scrutiny and afford broad relief to same-sex couples. In the wake of *Obergefell*, we can expect courts to place a much higher value on affording broad relief to same sex couples, and that broad relief is likely to include the remedial relief commonly afforded to discrete classes.

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309. *Id.* at 574.
310. *Id.* at 582.
311. 478 U.S. 186 (1986).
312. *Lawrence*, 539 U.S. at 582.
313. *Id.*
314. *Id.* at 582–83.
315. 763 N.W.2d 862 (Iowa 2009).
316. *Id.* at 889–90.
317. *Id.*
318. 316 P.3d 865 (N.M. 2013).
319. *Id*. at 879.
320. 989 F. Supp. 2d 539 (W.D. Ky. 2014).
321. *Id.* at 547.

III. RETROACTIVE APPLICATION OF *OBERGEFELL*[322]

By building upon the prior discussion concerning the applicable jurisprudence of the doctrine of retroactivity in regards to unconstitutional civil statutes, this Article introduces a normative analysis of the retroactive application of *Obergefell* to pertinent state law issues concerning real property and property succession laws.[323] Although the Supreme Court provides no guidance concerning the retroactive nature (or limitations) of its decision in *Obergefell*, the Supreme Court's current retroactivity jurisprudence and the analogous precedents discussed above will provide a predictive analysis of how *Obergefell* will be applied retroactively.

A. Obergefell*'s Retroactive Application as a Choice-of-Law Rule*

Returning to the Article's opening question of when do previously unrecognized, but otherwise lawful, same-sex marriages begin: they

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322. Although I originally spoke on these issues in January 2014 during a speech at Heckerling, many ideas and thoughts in this section of the Article evolved over many discussions, emails, and presentations with Assoc, Dean William P. LaPiana. *See generally* Tritt, Because it Wasn't Complicated Enough, *supra* note 1. Over the past few years, Dean LaPiana and I together have made numerous presentations concerning real-world issues arising from *Windsor* and *Obergefell*. Dean LaPiana has also written on some of these issues and some of these issues are reflected in this section. For further reading, see William P. LaPiana, *Married Same-Sex Couples Living in Non-Recognition States: A Primer*, 7 EST. PLAN. & COMMUNITY PROP. L.J. 417–73 (Summer 2015).

323. From a federal perspective, *Windsor* already leveled the playing field for same-sex spouses. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Therefore this Article will focus on states' real property and property succession issues. It should be noted, though, that *Obergefell* has helped simplify plan administration by providing nationally uniform marriage access and recognition. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). In addition, the Social Security Administration (SSA) has evolved their position on retroactivity in the wake of *Obergefell*. On August 20, 2015, the Department of Justice announced that, for purposes of Social Security Benefits, the SSA would recognize the marriage of surviving spouses of valid same-sex marriages. Jonathan Adams, *SSA Tells Court it Will Apply* Obergefell *Retroactively to Grant Spousal Benefits in Lambda Legal Case*, LAMBDA LEGAL (Aug. 20, 2015), http://www.lambdalegal.org/news/us_20150820_ssa-apply-obergefell-retroactively-spousal-benefits [https://perma.cc/7R9Q-A7PN]. The SSA stipulated that it would only recognize the marriages retroactively if the claim was already pending, and if the same-sex couple resided in a state where their marriage was not recognized at the time of the deceased spouse's death. *Id.* This decision, which to date has not been reflected in the SSA's official publications, applies the *Obergefell* holding retroactively in the sense that claims will now be accepted so long as they were pending on the date of the *Obergefell* decision. Moreover, since the *Windsor* decision, the SSA has encouraged surviving spouses of same-sex marriages to apply for benefits "right away." *Important Information for Same-Sex Couples*, SOCIALSECURITY.GOV, http://www.socialsecurity.gov/people/same-sexcouples/ [https://perma.cc/W4TH-QRXA] (last visited Sept. 29, 2016).

definitely began on the date of their marriage, not on the date of the *Obergefell* decision. It is clear that the Court's judicial pronouncements are retroactive in nature "to all events, regardless of whether such events predate or postdate [the] announcement of the rule,"[324] especially concerning disputes involving fundamental rights. Moreover, fairness focused on reliance interests should not supersede fairness focused on interests of equal treatment of fundamental rights. As Justice Thomas wrote in *Harper*, "the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one."[325] Therefore, substantive law should not shift according to claims of reliance on an old rule that deprived people of a fundamental right. *Obergefell,* then, should be applied purely retroactively in the sense that it applies to all cases still pending on direct review, and also to conduct occurring prior to the date of the *Obergefell* decision. This follows the application of the retroactivity doctrine as expressed, developed, and applied in *Harper* and later related cases.

In addition, although many of these post-*Obergefell* disputes will involve state law issues, it is clear that federal retroactivity jurisprudence is applicable to these disputes. In general, state law governs property and property succession laws. Therefore, many of the post-*Obergefell* disputes may be litigated in state courts—and the high courts of various states may have developed their own retroactivity jurisprudence applicable to their decisions. The Supremacy Clause of the United States Constitution, however, dictates that state courts should apply the property implications of the Supreme Court's decision in *Obergefell* retroactively.[326] Simply, the effect of *Obergefell* is a matter of federal constitutional law, and any particular views held by state courts regarding the retroactive application of state decisions becomes irrelevant. Although state courts have begun litigating many of the retroactive issues concerning property in the wake *Obergefell*, the Supreme Court's jurisprudence on the retroactivity of its decision is germane and appropriate for our exploration.

It is clear that *Obergefell* should be applied retroactively for choice-of-law considerations. The retroactive effect of *Obergefell* may be limited, however, in the sense that independent principles of law may restrict the relief that a court may provide. Therefore, an analysis of *Obergefell*'s application for remedial considerations is in order.

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324. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993).

325. *Id.* at 95 n.9 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)).

326. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995) (noting that the Supremacy Clause of the federal Constitution requires states to apply such rules retroactively); *see also Harper*, 509 U.S. at 100; Kay, *supra* note 18, at 50.

B. Obergefell*'s Retroactive Applications as a Remedial Principle*

Obergefell should be applied retroactively for remedial considerations as well. The retroactive application of judicial decisions concerning remedial matters, however, is complicated. First, the Court acknowledged in *Reynoldsville Casket Co*. that there could be multiple ways in which to fashion remedies while satisfying the constitutional requirements of equal protection.[327] Second, the Court has recognized potential limitations concerning the retroactive application of remedial matters, and that the *Chevron Oil* factors could apply in determining the limitations of remedial principles limitations (not choice-of-law matters).[328] The Court has also expressed concerns that retroactive application of remedial principles might implicate notions of fairness concerning the finality of litigation and harm arising from transfers of property to innocent bona fide purchasers.[329] Adequate remedies may be fashioned, though, that protect both the victims of the now unconstitutional discriminatory acts and the innocent third parties.

First, issues may arise if the estate's property was distributed prior to *Obergefell*. This should not pose a substantial problem, however, because probate courts in certain states can "claw back" and redistribute the property to the rightful heirs. This isn't a novel concept. Probate courts have a history of "clawing-back" improper distributions.[330] Further, the Uniform Probate Code authorizes the redistribution of improperly distributed property. Uniform Probate Code section 3-909 states that an individual who receives improperly distributed property "is liable to return the property improperly received . . . ."[331] Even if the distribution was authorized at the time it was made, the distribution may still be considered improper under states that have adopted the Uniform Probate Code.[332] Jurisdictions that have not adopted the Uniform Probate Code may have different rules governing the recovery of improperly distributed property.[333] For

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327. 514 U.S. at 758–59.

328. *Id.* at 758–59.

329. *Id.* at 757–58.

330. *See, e.g.*, *In re Estate of Zaritsky*, 12 P.3d 1203, 1205 (Ariz. Ct. App. 2000) (holding that the probate court had the authority to order the creditor to relinquish improperly distributed property to the estate); *Keul v. Hodges Blvd. Presbyterian Church*, 180 So. 3d 1074, 1074 (Fla. Dist. Ct. App. 2015) (holding that the trial court had the authority to order the testator's former caregiver to return funds obtained through undue influence); *In re Estate of Vernon*, 637 So. 2d 365, 367 (Fla. Dist. Ct. App. 1994) (stating that improperly distributed property may be returned to the state as long as the limitations period has not expired).

331. UNIF. PROBATE CODE § 3-909 (amended 2010).

332. *Id.* at cmt.

333. *See, e.g.*, FLA. STAT. § 733.812 (2016) ("A distributee or a claimant who was paid improperly must return the assets or funds received, and the income from

example, Washington, D.C. allows for the recovery and redistribution of improperly distributed property within one year of the initial distribution, while Arizona and Wisconsin permit recovery of improperly distributed property within three years after the decedent's death or one year after the time the property was distributed.[334] Regardless of the jurisdictional nuances, the ability to "claw back" and redistribute improperly distributed property is a tool available to many probate courts.

Second, should the administrative convenience of finality trump the concerns of those denied a fundamental right? The Supreme Court has expressed concern over the seemingly unlimited retroactive liability for actions taken in reliance on laws that were subsequently deemed to be unconstitutional.[335] To this effect, the Court has been careful to explain the need for finality in certain circumstances, and has recognized possible limitations regarding remedial considerations in cases involving *res judicata*, statutes of limitation, and laws requiring parties aggrieved by law to provide timely notice of their objection.[336]

The desire for finality, though, must be balanced against harm caused by the deprivation of fundamental rights under unconstitutional discriminatory statutes. As discussed earlier, where the Supreme Court has invalidated laws that discriminate against discrete groups of

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those assets or interest on the funds since distribution or payment, unless the distribution or payment cannot be questioned because of adjudication, estoppel, or limitations. If the distributee or claimant does not have the property, its value at the date of disposition, income thereon, and gain received by the distributee or claimant must be returned."); *see also In re Estate of Vernon*, 608 So. 2d 510, 511 (Fla. Dist. Ct. App. 1992) ("Defendants in estate administrator's suit seeking to establish that stock in defendant's name was in reality decedent's were not 'distributees' of property of estate under probate code section addressing improper distribution and liability of distributees, so as to subject them to less restrictive method of service of process provided in code; to use section in question would assume very fact sought to be litigated as jurisdictional base for probate court."); *Keul*, 180 So. 3d at 1074 (Trial court had authority to order testator's former caregiver to return funds former caregiver had obtained through her payable-on-death designation on testator's credit union accounts, which designation had been obtained through undue influence and was invalid, to testator's estate); *In re Estate of Vernon*, 637 So. 2d at 366 (If, as alleged, check for additional stock was written on date of decedent's death and check was negotiated and stock was received after decedent's death by secured creditor which held previous shares of the same stock as collateral for a loan, stock would be estate asset, subject to suit by administrator for return of improper distribution. "Statute of limitations on action by administrator to recover alleged improper distribution did not begin to run until discovery of deficiency of assets to pay debts, even though suit concerned payment to a creditor rather than a beneficiary").

334. D.C. CODE ANN. § 20-1303 (2016) (effective Mar. 24, 1998); ARIZ. REV. STAT. ANN. § 14-3936 (2016) (effective Jan. 1, 1974); WIS. STAT. § 865.14 (2013–14).

335. *Reynolds Casket Co. v. Hyde*, 514 U.S. 749, 749 (1995).

336. *Id.* at 756.

victims, the Court has fashioned relief to make the victims whole.[337] As has been noted, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[338] Therefore, remedial measures should be applied in a manner that places formally unrecognized same-sex spouses in the same position that they would have been but for the unconstitutional discriminatory act.

In addition, a state's interest in finality may be less applicable in post-*Obergefell* disputes. The earliest possible same-sex marriage dates back merely to 2004.[339] Because of this extremely limited time period, the number of affected people is too small to cause an undue administrative burden for states.

Also, statutes of limitation may not have been implicated because many property transfers in post-*Obergefell* disputes will have passed by matter of law (such as community property or homestead), and will have been outside the realm of probate or the laws of decent and distribution.[340] Therefore, many of the parties would not have been given proper notice and statutes of limitation would not have run because the property would not have been transferred by judicial decisions or actions that would begin the tolling of statutes of limitation.

Third, should remedial applications of *Obergefell* impede a third party bona fide purchaser's reliance on then law? There are serious concerns involving notions of fairness concerning transfers of property to innocent bona fide purchasers.

Therefore, a more critical analysis of remedial considerations needs to be taken in these areas. Accordingly, this Article will now proceed to examine retroactive remedies in the context of two areas of state law: real property and property succession law. Both of these state-law-governed areas require an examination of estate administration, homestead, community property, and tenancy-by-the-entirety rights to determine equitable remedies for affected parties.[341]

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337. *See supra*, Part II.F.

338. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

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

340. *E.g.*, UNIF. PROBATE CODE §§ 2-201A–3-101A (amended 2010).

341. Although parentage issues are beyond the scope of this Article, it is worth mentioning that parentage issues are heavily implicated in the context of *Obergefell's* retroactivity. For example, assume that a woman married to another woman conceives through artificial insemination using anonymously donated sperm and gives birth. The couple resides in a state that does not recognize their marriage. If second parent adoption is available in the state, one would hope that the other spouse has adopted the child, although that is likely not an option. If they are in a jurisdiction where the child is considered a child of both spouses due to the existence of the marriage, has the child

1. ESTATE ADMINISTRATION[342]

One lesson to be drawn from the aftermath of *Trimble* is that the status of a surviving same-sex spouse as heir of a decedent who died before *Obergefell* is greatly dependent upon whether the decedent's estate was still "open" on the date of the *Obergefell* decision. The Court's decision in *Reed* seems to provide some precedent regarding the resolution of at least some of the issues that would be raised by retroactively applying *Obergefell* to the estates of decedents who lived in non-recognition states at the time of their deaths.[343] Surviving spouses of decedents who died before June 26, 2015 should be able to claim the status of heir to the decedent's estate if the decedent's estate is still "open."

In our prior example from the introduction, it is easy to determine which survivors should claim the status of heirs to Thelma's estate. The estate is still open, therefore, Louise and J.D. are Thelma's lawful heirs. The mother has no standing because she is not an heir.

Unfortunately, the term "open" estate isn't as definitive as it sounds. In fact, most estates are probably never formally closed in the sense that the personal representative has accounted to the court, process has been issued to those interested, and the court has issued a decree approving the accounts and discharging the personal

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been the child of both spouses from birth or only from the date of judicial decision that invalidated the state's ban on same-sex marriage? In this case, retroactive application of *Obergefell* is not difficult. The child will benefit from having two parents from birth and the case may very well be decided by the classic "best interests of the child" standard. However, what if the couple has separated before the date of *Obergefell*, or even divorced, and the spouse who did not give birth was held not to be a parent? Does that result now change? Answers will come through legislation, or more likely, litigation. In the wake of *Obergefell*, courts need to recognize the marital presumption (in states where it exists) in the context of same-sex marriage. A retroactive recognition of the marital presumption should be implicit in the constitutional rights recognized and codified by *Obergefell* and should take precedent over any estate issues that might arise.

342. The purpose of the law of succession is that, in a private property system, there must be a procedure to facilitate the transfer of an individual's private property. American society has long recognized the value in protecting an individual's ability to acquire and transfer property. The principle of donative freedom, the governing principle underlying American succession law, provides that individuals have the freedom to control the disposition of their property at death. Effectuating donative intent is the hallmark of property succession law. Any succession law disputes that arise from *Obergefell* should be viewed through this lens. For a discussion concerning the importance of the principle, see Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 374–79 (2009). *See also* Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 752–54 (2014); Lee-ford Tritt, *The Limitations of An Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2587–88, 2598–2601 (2011).

343. *Reed v. Campbell*, 476 U.S. 852 (1986).

representative from further liability. An estate may be considered "closed" when the final assets of the estate are distributed, which normally means that the Executor has no further work to perform.[344] An estate may be considered "open" as long as the applicable statutes of repose have not run, or if there is no final resolution of the issues involved in the distribution of the decedent's estate. Further complications arise because proper notice may not have been given to same-sex spouses during probate in violation of due process jurisprudence.

However, even if Thelma's estate had been "closed," that would not be the end of the road for Louise and J.D. Estates can be re-opened under special circumstances. Though these special circumstances vary by state, there are some commonalities throughout the country, such as fraud, procedural irregularities, bad faith, manifest error, and equity.[345]

Of course, whether or not an estate is subject to further administration clearly affects the "orderly and just distribution of a decedent's property at death."[346] Although courts traditionally give weight to the argument that a state needs to be able to efficiently distribute and close a decedent's estate, this is not necessarily conclusive in and of itself. As noted in *Trimble*, "inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[347] In *Trimble* and its lineage, the issue was whether or not the question of paternity could be accurately satisfied (necessary to determine whether the Contestant was in fact entitled to a share of the estate). In the population of same-sex marriages, the question of marriage is much

344. In California, the closing of an estate will be considered once all debts have been paid or adequately provided for and the personal representative has filed an account and petition for the final distribution of the estate with the relevant probate court. CAL. CIV. PRAC. PROBATE & TR. PROCEEDINGS § 21:41 (2016). Final distribution and closing of an estate in California is governed by the California Probate Code. *See* CAL. PROB. CODE §§ 12200–12202 (West 2015-16). In Florida, an estate may be closed once the personal representative has completed the administration and distribution of an estate. *See also* FLA. STAT. §§ 733.801–.901(1) (2016). The soonest an estate may be closed in Massachusetts is six months. MASS. GEN. LAWS ANN. ch. 190B, § 3-1003(a) (2016). A personal representative must ensure that (1) the time in which creditors may bring a claim against decedent's estate has expired; (2) the estate has been fully administered and the assets distributed; and (3) a copy of the personal representative's statement to close the estate has been sent to all distributes or creditors of the estate. *Id.*

345. Florida case law only permits the reopening of an estate after the discharge of the personal representative where there were procedural irregularities or facts constituting fraud or bad faith. *See Liechty v. Hall*, 687 So. 2d 64 (Fla. Dist. Ct. App. 1997). Similarly, if an estate in Massachusetts was closed and involved "fraud or manifest error," then the estate will be reopened. MASS. GEN. LAWS ANN. ch. 190B, § 3-1003(b) (2016).

346. *Reed*, 476 U.S. at 855.

347. *Trimble v. Gordon*, 430 U.S. 762, 771 (1997).

more conclusive, and easily resolved, than the requirement of proof of paternity. "After an estate has finally been distributed, the interest in finality may provide an additional, valid justification for barring belated assertion of claims" from newly recognized beneficiaries.[348] Thus, justice for a same-sex spouse that was denied marital property rights must be weighed against the state's interest in the finality of distributions of estate.

Unlike in *Trimble*, though, the fact that *Obergefell* announced an extension of federal constitutional rights (not merely invalidating a state statute) could play heavily in weighing competing policy issues, including whether to reopen estates for those same-sex surviving spouses who were deprived of property rights, proper notice, and due process.[349] The double injustice to these surviving spouses—first, being unconstitutionally unrecognized, and second, being denied their rights under property succession law—is an extremely unjust outcome. Though some states will argue reliance upon existing law or undue administrative burden, these arguments have become weaker at some temporal point over the last decade and a half. DOMA and the first Baby DOMAs[350] began in 1996—not a very long period of reliance to overcome the unjust nature of the deprivation of property rights. Moreover, the first state to recognize same-marriage did so in 2004,[351] and as more states began to recognize same-sex marriage, the reliance argument becomes weaker. As for the undue burden argument, it should be noted that the pertinent time period is relatively short (from 2004 until the *Obergefell* decision in 2015) and only a small number of lawfully married same-sex couples moved to non-recognition states during that time period.[352] Therefore, it is unlikely that the burden would be overwhelming.

a. Testacy Estates

If the estate is deemed "open," the status of the surviving same-sex spouse as heir must be recognized. There are two retroactive issues in regards to the testate estate of a deceased spouse of a same-sex marriage who might have died in a non-recognition state before *Obergefell*.[353] First, the surviving spouse should be entitled to his or her elective share if in a separate property state or his or her community

348. *Reed*, 476 U.S. at 855.

349. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

350. *See supra* note 39.

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

352. *See American Community Survey Data on Same Sex Couples*, *supra* note 78.

353. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

property share if in a community property state.[354] Second, if the decedent was not survived by any descendants, then the surviving spouse is most likely the sole heir.[355] Such a situation precludes collateral relatives from claiming rights in the estate and negates their standing to challenge the will.

In our example, if Thelma had a duly executed will that left everything to Louise but Thelma's mother challenged the will before the *Obergefell* decision, Thelma's mother would have standing in a non-recognition state because the mother would be deemed the heir at law (J.D. might have standing, though, as the next lawful heir). If the will has not yet been admitted, and litigation or preparation for litigation has only begun, then *Obergefell* must be given retroactive effect. Louise will be recognized as the surviving spouse on the date of the decedent's death even though it occurred before June 26, 2015, and the litigation must conclude because Thelma's mother no longer has standing as heir. If the litigation had already been decided but the time for appeal has not run, Louise should prevail as well.[356] But what if the will had already been admitted through a settlement of the parties prior to *Obergefell*? Can the settlement be undone if recognition means that Thelma's mother now does *not* have standing? Assuming the court has approved the settlement, it may be impossible to undo. If the will was denied probate because the mother prevailed, it may be equally impossible to undue that decree, although a court in equity probably could rule on the loss of standing even after the action has been resolved. If the time for appeals had not lapsed, Louise may have a stronger argument. This result may not be easy to accept if the will was denied probate, mainly because the mother objecting to probate should not have had standing to do so. Unfortunately, if there are any remedies at all for the surviving same-sex spouse, they may be very limited if the litigation process was completed before *Obergefell*.

354. *Id.*

355. *Id.*

356. If the challenge is coming from people who would be heirs even if the marriage were recognized, most likely descendants of the decedent, the case would continue, but with the surviving spouse in a much better position, not only as heir, but also entitled to community property or the elective share.

b. Intestacy Estates[357]

The meaning of "open" is even murkier in intestate estates than in testate estates. For instance, in the Mississippi cases discussed above, the court seemed to imply that property (at least real property) passed automatically in intestacy without formal probate proceedings.[358] The courts discussed the lack of "probate" in the estates of the long-ago deceased alleged paternal ancestors.[359] The courts in *Marshall* and *Kau Agribusiness* contrasted "passive" reliance on the intestacy statute with reliance on a court proceeding in determining the alleged paternal ancestor's heirs.[360] The courts' holdings, though, seem understandable in that, traditionally at least, real estate passes from the deceased titleholder to that person's heirs "automatically" without any need for administration of the estate. But, there is another reason: land can always be found. Personal property may have been sold and its proceeds difficult to trace. Presumably, the now recognized surviving spouse could assert a claim to real estate that was part of the intestate estate of the deceased spouse even if no formal probate proceedings were held relating to the decedent's estate.

2. REAL ESTATE TRANSACTIONS, COMMUNITY PROPERTY, AND HOMESTEAD ISSUES

One conclusion that certainly seems indisputable is that the rights of the retroactively recognized spouse will not trump the rights of bona fide purchasers of property. This is a completely defensible result and certainly seems to comport with the limits that the bona fide purchaser principle placed on retroactivity in *Reynoldsville Casket Co*. The bona fide purchaser principle, which may be appropriately described as "a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications,"[361] is one of those principles which can provide finality in this particular context. The application of the bona fide

357. Given the interplay between the law of intestacy and the law of wills, it would seem evident that the purpose, the principle, and the policy behind the creation of rules governing intestacy should theoretically coincide with the policy goals of the law of wills: each represent a different side of the same coin—the law of succession. Some scholars disagree on this point. For a discussion concerning this dialogue on the jurisprudence of laws of wills and laws of intestacy, see Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280–86 (2010).

358. *See supra* Part II.D.3–4.

359. *See supra* Part II.D.3–4.

360. *Marshall v. Marshall*, 670 S.W.2d 213 (Tenn. 1984); *Kau Agribusiness Co. v. Heirs of Assigns of Ahulau*, 95 P.3d 613 (Haw. 2004).

361. *Id.* at 759.

purchaser principle will probably resolve most claims involving real property in situations where now-recognized spouses have spousal rights in property that would have normally been conveyed to bona fide purchasers or has already been conveyed to such purchasers. At least to the extent real estate is involved,[362] situations like this are most likely resolved by leaving the bona fide purchaser in possession of the property. However, proceeds of the sale of the property to the bona fide purchaser should be handled differently. The proceeds of sale should be traced through the estate (or the transferor) in order to satisfy any community property rights, homestead rights, or other marital property rights to which the previously unrecognized same-sex spouse now has legal right.

a. Homestead Rights

In many states, homestead rights are granted to a surviving spouse (and, in some states like Florida, to minor children as well).[363] The homestead is not devisable—the surviving spouse has a vested property interest. In states where homestead property has a robust protection from creditor claims, does the spouse who held title before state recognition of the marriage still have legal rights to the home even though the state must now recognize the other spouse's rights in the homestead?[364]

Let's change our example: Louise, Thelma, and J.D. moved to Florida instead of Texas. When they moved to Florida, Thelma bought a home with her own proceeds and then died without a will. After Thelma's death, Louise wants to sell the home but Louise's mother wants the home under Florida's intestacy statutes. Pre-*Obergefell*, Louise will not be deemed a spouse under Florida law. J.D. may not be deemed to be Louise's child because Louise never adopted him and

362. And probably with regard to all property.

363. In Florida, if a decedent is survived by a spouse and minor children, no devise of homestead is permitted; rather, the surviving spouse receives a life estate and the children receive a vested remainder interest. If all of the children are adults, the only permissible devise is a fee simple interest to the surviving spouse. *See* FLA. CONST. art. X, § 4(c).

364. The problem in Florida is particularly acute. The Florida constitution allows the alienation of "homestead real estate by mortgage, sale or gift" only with the consent of the owner's spouse, if the owner is married. *Id.* Nor is the homestead devisable. FLA. STAT. § 732.4015(1) (West 2010). The homestead cannot be devised if the person is survived by a spouse or a minor child or children, except if there are no minor children it may be devised to the spouse. *Id.* In every other case, the surviving spouse has a life estate in the homestead real property with a vested remainder in the decedent's descendants per stirpes or, at the surviving spouse's election within six months of the decedent's death, an undivided one-half interest as tenant-in-common with the decedent's descendants. FLA. STAT. § 732.401 (West 2012).

relied instead on the marital presumption (which Florida probably would not recognize). If the house is distributed to the mother under Florida's intestacy laws before the *Obergefell* decision, the court may be able to claw-back the property after the decision because the mother is not a bona fide purchaser. (At times, persons who receive distributions from estates have to return them.) If the mother (or the estate) subsequently sold the home to a bona fide purchaser, the problems presented by Florida homestead may be similarly simple to solve. Simply put, the bona fide purchaser of the homestead should be protected.

Of course, the circumstances of the sale will probably be closely examined in any litigation to see if the purchaser is a good faith purchaser. For instance, one can easily imagine that some sales, even for full consideration, might be questioned if they occurred on the eve of the *Obergefell* decision or even on the eve of the legalization of same-sex marriage in Florida. Of course, based on the state cases following *Trimble*, property that passes in intestacy (including Florida homestead) may be subject to claims by Louise if the estate is still "open."[365] These transferred homestead issues could also include cases where no formal administration was ever had, and perhaps situations where the other heirs did not rely on existing law but somehow simply passively accepted the property. After *Obergefell*, J.D. may be deemed to be the child of Louise by the marital presumption. If J.D. was deemed to be a child of Louise, the home would have passed to J.D. but still would not pass to Louise. As the edits to our example show, determining homestead rights post-*Obergefell* is a fact-intensive process. While the example highlights broad generalizations of retroactively granting homestead rights, it would be impossible to determine how courts may generally return or deny the homestead rights of surviving, previously unrecognized same-sex spouses.

b. Community Property

Community property states have similar issues. Community property laws are given different operational effect in life than they are in death. In community property states, any property generated during marriage is considered community property and is subject to an equal division between the married spouses.[366] The retroactive application of *Obergefell* presents many questions in the context of community property. For example, when did the same-sex married couples begin to accumulate community property in a non-recognition community

365. *See Trimble v. Gordon*, 430 U.S. 762 (1977).

366. *See, e.g.*, WIS. STAT. § 766.31 (2015); *see also* DUKEMINIER & SITKOFF, *supra* note 10, at 512.

property state? What is the current status of property that has been sold or conveyed when that property would have been considered community property had the marriage been recognized? It seems highly likely that a route similar to the homestead example is the path to resolving community property claims in this context. Tracing is the ultimate solution and will allow the now-recognized spouse to vindicate the rights afforded by marriage starting at the time the marriage was validly celebrated. Accordingly, the bona fide purchaser should keep possession of the property, while the proceeds of sale should be deemed community property and traced in the hands of the spouse or estate who disposed of the property. The proceeds of the sale of what should have been community property had the marriage been recognized at the time the property was acquired will remain community property and will have to be traced. However, that is a common occurrence in a community property system and will therefore not be a significant burden on any state.

c. Tenancies-by-the-Entirety

There are a number of factors that are implicated in states that have tenancy-by-the-entirety presumption—both lifetime and estate issues.[367] For instance, the presumption of a tenancy-by-the entirety directs how the property is transferred at the death of the first spouse. Lifetime issues include creditor issues against one of the spouses. Whether property is held as tenancy-by-the-entirety is pertinent to the creditors of one of the spouses because creditors' rights in tenancies-by-the-entirety property are usually limited, if not completely eliminated.

Let's say in our example, Louise and Thelma move to Florida and Thelma purchases their home in 2014, prior to the *Obergefell* decision. Under Florida law, if they were an opposite-sex couple the home would have been presumed to be held as a tenancy-by-the-entirety.[368] As a same-sex couple, however, Louise and Thelma were deemed to be joint tenants with rights of survivorship.[369] Later in 2014, let's further assume that Thelma is sued by a third party, loses the lawsuit, and a judgment is rendered against her. Thelma does not have enough assets in her own name to satisfy the judgment. Accordingly, a third party tries to attach the home as part of the judgment, thus trying to force a severance of the property. Thelma dies in early 2015, and a few months

367. *See, e.g.*, NEW YORK ESTATES, POWERS & TRUSTS LAW § 6-2.2 (McKinney 2016) (stating that a conveyance to "persons not legally married to one another but who are described . . . as husband and wife creates a joint tenancy [with right of survivorship], unless expressly stated to be a tenancy in common"); *see also* FLA. STAT. § 689.15 (West 2016).

368. FLA. STAT. § 689.15 (West 2016).

369. *See id.*

later *Obergefell* is decided. If Florida's prohibition on recognizing same-sex couples from other states "never existed," the house should be deemed to be a tenancy-by-the-entirety and the judgment could not be attached to the house. If the judgment has not been enforced, the house should be protected. If the judgment has been enforced, does Louise have any remedy? Could Louise try to reclaim the property or the proceeds of the property? Would Louise have any action against title insurers? It is unclear. Whether the attempted levy on the property came before or after state law recognition of the marriage is probably significant. Real estate and recorded titles, however, may be important as well.

d. Potential Solution

The issues concerning "open" and "closed" estates, homestead, community property, and tenancy-by-the-entirety rights may be resolved by a state passing a statute of repose. Following *Trimble*, Mississippi adopted a statute granting non-marital children three years to bring claims against their fathers' estates.[370] In essence, this statute of repose gave those whose interests were affected by a change in the law a limited, but satisfactory, amount of time to bring claims related to events that occurred before the change of law was announced.[371] Giving surviving same-sex spouses an adequate fixed period of time to adjudicate any claims after the date of *Obergefell* would probably be fair to everyone involved, especially because the time period between the first valid same-sex marriages in the United States and the date of *Obergefell* is not long. In order to avoid due process issues, though, the statute of repose would have to be crafted to give the unrecognized same-sex spouses enough time to respond and provide some type of notice requirement. Of course, statutes like this may be too controversial in formally non-recognition states to pass. If passed, there could still be protracted litigation challenging the constitutionality of these statutes considering the potential losses incurred by same-sex surviving spouses. In the absence of such legislation, litigation will continue, but with less certainty in the outcomes.

C. Retroactive Application of Obergefell *to Current Cases*

The *Obergefell* decision had an immediate litigious effect. To date, recent cases have largely concerned retroactive death certificates, wrongful death actions, and retroactive common law marriage. It should be noted that these cases will implicate life insurance, social

370. MISS. CODE ANN. § 91-1-15.
371. *Id.*

security, pensions, employee benefits, inheritance, and wrongful death judgments, among many other benefits and rights.

For example, *De Leon v. Abbot*[372] was filed prior to *Obergefell* and asked whether it was unconstitutional for Texas law to prohibit same-sex marriages and prohibit the recognition of same-sex marriages from other states.[373] The plaintiffs received a favorable ruling, and the district court issued a preliminary injunction prohibiting the state from enforcing those laws.[374] The state appealed and the court stayed the injunction.[375] *Obergefell* was decided while the appeal was under submission, and the Fifth Circuit Court of Appeals affirmed the district court's ruling in accordance with *Obergefell*.[376] After failed attempts to alter his spouse's death certificate to include his name as surviving spouse, John Stone-Hoskins intervened in *De Leon* to enforce the injunction and have his late husband's death certificate amended.[377] In response to a court order granting Stone-Hoskin's motion,[378] Texas Attorney General Ken Paxton and Governor Greg Abbott (Defendants) filed motions for reconsideration of the order and to quash the motion for contempt.[379] Defendants argued that the *De Leon* court's order allowing the injunction was improper because "Stone-Hoskins seeks to raise a wholly separate claim based upon a legal question not at issue in *DeLeon*: whether the Vital Statistics Unit must go back to amend death certificates pre-dating the Supreme Court's *Obergefell* decision and the implementing order."[380]

Stone-Hoskins' replied in a motion that likened the facts in *Obergefell* to the case at hand.[381] The *De Leon* court upheld the order in

372. 791 F.3d 619 (5th Cir. 2015).

373. *Id.* at 624.

374. *Id.* at 625.

375. *Id.*

376. *Id.* at 624–25.

377. John Allen Stone-Hoskins' Emergency Motion to Intervene and for Contempt, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 5:13-cv-982-OLG), 2015 WL 5905859.

378. Robert Wilonsky, *Ken Paxton Could Be Held in Contempt for Refusing to Grant Same-Sex Death Certificate*, DALLAS NEWS: THE SCOOP BLOG (Aug. 5, 2015, 11:59 AM), http://thescoopblog.dallasnews.com/2015/08/till-death-do-them-part-except-in-texas-where-dying-man-sues-for-same-sex-death-certificate.html/ [https://perma.cc/7GEE-QPRF].

379. John Allen Stone-Hoskins' Emergency Motion, *supra* note 377.

380. State Defendants' Motion for Reconsideration of the Order Dated August 5, 2015 at 3, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 5:13-cv-982-OLG), 2015 WL 5905841.

381. John Allen Stone-Hoskins' Response to State Defendants' Motion for Reconsideration and Emergency Motion to Rescind or Quash, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (No. 5:13-cv-982-OLG), 2015 WL 5905814.

favor of Stone-Hoskins,[382] allowing him to be recognized as surviving-spouse and heir.[383]

In another example, an Alabama court recently applied *Obergefell* retroactively to allow a surviving same-sex spouse to obtain the proceeds of a wrongful death action. In *Hard v. Bentley*,[384] the plaintiff sought the proceeds of a wrongful death action through the laws of intestate succession as a surviving spouse.[385] The plaintiff's lawful same-sex spouse was killed in a car crash in 2011, four years before the *Obergefell* decision.[386] The court applied *Obergefell* retroactively and effectively ruled that the plaintiff could receive spousal rights from the estate.[387] The plaintiff's mother-in-law intervened as a defendant, and argued that the plaintiff was not a surviving spouse entitled to proceeds because *Obergefell* did not apply retroactively.[388] In this case, Pat Fancher, the decedent's mother, appealed the decision to the Eleventh Circuit Court of Appeals.[389] Defendant argued that *Obergefell* cannot be applied retroactively and that Alabama law should apply to prevent the plaintiff from taking a share intestate.[390] Defendant further pointed out that the Court's opinion did not mention whether *Obergefell* had any sort of retroactive effect.[391] Fancher contended that it was more likely that the Court intended *Obergefell* to be applied prospectively, arguing in part that:

> *Obergefell* cannot take retroactive effect because two cases, *United States v. Windsor* and *Alabama Policy Institute v. King*, stand in the way of retroactively reaching the events of 2011 which created this case. Moreover, even if the *Obergefell* opinion were given retroactive as to some aspects of a marriage, Social Security benefits, insurance, etc., under

382. Wilonsky, *supra* note 378.

383. *De Leon*, 975 F. Supp. 2d 632. *See* Jake Whittenberg, *Gay Military Widower Claims Victory After Landmark Decision*, KING 5 NEWS (Nov. 4, 2015, 7:53 AM), http://www.king5.com/story/news/local/2015/11/04/gay-widower-victory-va-benefit/75147680/ [https://perma.cc/FFP2-TQ2J] (In Washington State, the state issued an amended death certificate listing a man who passed away in 2008 as married).

384. No. 2:13 CV-922-WKW-SRW (M.D. Ala. 2013).

385. *See* Complaint for Declaratory and Injunctive Relief at 2–3, *Hard v. Bentley*, No. 2:13 CV-922-WKW-SRW (M.D. Ala. 2013).

386. *Id.* at 1.

387. *See* Intervening Defendant's Motion to Set Aside Order of Dismissal and Her Renewed Prayer for Relief at 10, *Hard v. Bentley*, No. 2:13-CV-922-WKW-SRW (M.D. Ala. 2015).

388. *Id.* at 3–4.

389. *See* Principal Brief of Appellant Patricia Fancher, *Hard v. Fancher*, 648 F. App'x 853 (11th Cir. 2015) (No. 15-13836).

390. *Id.*

391. *Id.* at 14–17.

> well-established legal principles in Alabama it cannot have retroactive effect as it relates to the subject matter of this dispute- wrongful death proceeds- because the Alabama Supreme Court has strictly held that those awards vest according to the laws in effect at the time of one's death, with no regard for whether or not the taker deserves the award, and with no regard given to the decedent's possible desires.[392]

The court denied Fancher's motion in full and stood by its decision to apply *Obergefell* retroactively.[393] *Hard v. Bentley* makes a bold statement about the retroactive application of *Obergefell*, but only time will tell if states follow this court's lead in recognizing the marital rights of same-sex couples and retroactively enforcing them following *Obergefell*.

A few high profile Florida cases have redefined the state's historically anti-gay jurisprudence. The recent Florida case of *Doussett v. Florida Atlantic University*[394] applied *Obergefell* to recognize a same-sex marriage for in-state tuition purposes.[395] In *Doussett*, Florida Atlantic University (FAU) refused to recognize the student plaintiff's same-sex marriage and denied him in-state tuition.[396] The plaintiff sued FAU and challenged a Florida statute that banned state agencies from recognizing same-sex marriages.[397] The Fourth District Court of Appeals held that *Obergefell* mandated recognition of the plaintiff's same sex marriage.[398] However, it is unclear whether the court intended the remedy to apply retroactively or proactively. Regardless, what can be seen here is a growing trend towards same-sex friendly jurisprudence, even in states that have traditionally been against the recognition of same-sex marriages.

The continued influx of cases relating to same-sex marriage are forcing courts to consider whether they should retroactively recognize same-sex common law marriages in the wake of *Obergefell*. One such case, *In re Underwood*,[399] occurred in Bucks County, Pennsylvania.[400] In *Underwood*, the court recognized the common-law marriage of two women as valid when one of the women passed away in 2013 prior to

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392. *Id.* at 6 (footnotes omitted).

393. *Hard v. Attorney Gen., Ala.*, 648 Fed. App'x 853, 855 (11th Cir. 2016).

394. 184 So. 3d 1133 (Fla. Dist. Ct. App. 2015).

395. *Id.*

396. Initial Brief of Appellant Gildas Dousset at 5–6, *Dousset v. Fla. Atl. Uinv.*, 184 So. 3d 1133 (Fla. Dist. Ct. App. 2015) (No. 4D14-480).

397. *Id.* at 6–7.

398. *Dousset*, 184 So. 3d 1133.

399. No. 2014-E0681-29, 2015 WL 5052382 (Pa. C.P. Orphans' Ct. July 29, 2015).

400. *Id.*

Pennsylvania's recognition of same-sex marriages.[401] The decedent, Underwood, and her female spouse had held a religious ceremony, combined their wills, and named each other as beneficiaries.[402] The case arose when Underwood's surviving spouse "sued United of Omaha, which had refused to pay her a spousal beneficiary payment, and Dearborn National Insurance Co., which had denied her a survivor's benefit on disability payments Underwood had received."[403] According to the court, Underwood and her spouse "entered into a valid and enforceable marriage, under Pennsylvania common law" that remained in effect until Underwood's passing.[404] "Their marriage is valid and enforceable," the court ruled, "and they are entitled to all rights and privileged of validly licensed married spouses in all respects under the laws of the Commonwealth of Pennsylvania."[405]

Similarly, in *In re Estate of Stella Marie Powell*,[406] a Texas Probate Judge decided an inheritance dispute between Stella Powell's siblings and her same-sex domestic partner.[407] In 2008, Stella Powell and Sonemaly Phrasavath celebrated their marriage in Texas.[408] Stella Powell passed away six years later in 2014.[409] After failing to settle with Phrasavath, Stella's three siblings filed suit and claimed heirship over Phrasavath.[410] Phrasavath responded with a countersuit for heirship and challenged Texas laws that banned the recognition of her marriage with Stella.[411]

The decedent's sibling's argued that Phrasavath could not inherit because her common-law marriage was not valid under Texas law and she was free to legally marry anyone else.[412] The siblings contended

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401. *Id.*

402. Zach Ford, *Same-Sex Couples Are Securing Retroactive Recognition of Their Marriages*, THINK PROGRESS (July 30, 2015), https://thinkprogress.org/same-sex-couples-are-securing-retroactive-recognition-of-their-marriages-2270677a18f1#.nr3ygt4wd [https://perma.cc/WZ5Q-VV4V].

403. *Id.*

404. *Underwood*, 2015 WL 5052382.

405. *Id.*

406. No. C-1-PB-14-001695 (Travis Cnty. Prob. Ct. No. 1 Nov. 6, 2014).

407. *Id.*

408. Sonemaly Phrasavath's Response to Special Exceptions and Motion to Dismiss and Motion for Continuance at 2, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Nov. 6, 2014).

409. *Id.* at 1.

410. Application for Determination of Heirship and Issuance of Letters of Independent Administration at 1, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Nov. 6, 2014).

411. *See* Sonemaly Phrasavath's Response to Special Exceptions and Motion to Dismiss and Motion for Continuance, *supra* note 408.

412. *See* Applicants James Powell and Alice Huseman's Special Exceptions to, and Motion to Dismiss, Sonemaly Phrasavath's (1) Contest to Applicants' Application for Determination of Heirship and Issuance of Letters of Independent Administration

that the couple could not establish the requirement for common law marriage, despite the fact that they held themselves out as being married because "[a] couple cannot have a reputation in the community as being married when, at that time, that public status is not legally available to them or acknowledged."[413] The siblings also argued that allowing a common law marriage would undermine the decedent's intent because "retroactively recognized common law marriage which was legally impossible while the decedent was alive does not look to the decedent's intent."[414] Thus, they argued that to retroactively recognize the same-sex marriage would amount to overriding the intent of the decedent.[415] In support of recognizing her marriage, Pharasavath argued that her relationship should qualify because it met all of the standards of a common law marriage.[416] Parasavath argued that she and the decedent had an intimate relationship, joint financial status, both signed declaration of domestic partnership in 2008, and represented to others that they were married.[417]

After considering all of the facts at hand, on February 17th, 2015, the Probate Judge denied the siblings' attempt to block Parasavath as an heir.[418] The state of Texas petitioned for a Writ of Mandamus to challenge the Probate Judge's order as an abuse of discretion.[419] The State of Texas argued that the Probate Judge's decision was overly broad and violated the laws of Texas.[420] However, the *Obergefell* decision was decided soon after the State of Texas appealed. After the Supreme Court decided *Obergefell*, the Powell court approved a settlement between the parties that recognized Phrasavath as Powell's spouse and effectively granted her rights as an intestate heir.[421]

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and (2) Counterapplication to Determine Heirship, for Appointment of Dependent Administrator and Issuance of Letters of Administration, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Oct. 15, 2014).

413. James Powell and Alice Huseman's No Evidence Motion and Motion on the Pleadings for Summary Judgment at 6, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Aug. 25, 2015).

414. *Id.* at 15.

415. *Id.* at 16.

416. *See* Sonemaly Phrasavath's Response to Special Exceptions and Motion to Dismiss and Motion for Continuance, *supra* note 408.

417. *Id.* at 2.

418. *See* Order on Special Exceptions and Motion to Dismiss, *In re Estate of Stella Marie Powell*, Case No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Feb. 17, 2015).

419. Petition for Writ of Mandamus at 4–6, *In re State of Tex., Relator*, No. 15-0135 (Tex. Feb. 17, 2015).

420. *Id.* at 6, 9.

421. *See* Joint Motion to Approve Settlement Agreement, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Sept. 11, 2015); *see also* Order on Joint Motion to Approve Settlement Agreement, *In re Estate of Stella Marie Powell*, No. C-1-PB-14-001695 (Travis Cty. Prob. Ct. No. 1 Sept. 17, 2015).

In 2015, a Washington, D.C. court was asked to retroactively recognize a common law same-sex marriage.[422] In this case, the plaintiff and his same-sex partner were not legally married when the partner passed away.[423] The plaintiff claimed that a common law marriage existed between him and the decedent, therefore the court should retroactively recognize the common law marriage and grant him spousal rights in estate.[424] The defendant filed a motion to dismiss, but the court denied the motion.[425] Even though the case settled out of court soon after,[426] the fact that the court denied the defendant's motion to dismiss is a telling sign that state courts are beginning to see merit in these types of claims. Although the court here did not directly rely on *Obergefell* as a precedent, such rulings are indicative of a shift in state court jurisprudence regarding same-sex marriage following *Obergefell*.[427]

D. The Beginning of a New Trend in Same-Sex Marriage Retroactivity?

A similar issue that is becoming apparent in the wake of *Obergefell* is whether courts can retroactively "create" a marriage. Courts may find themselves tasked with determining whether they can, or should, retroactively declare a couple married to insure their entitlement to the benefits of marriage, when the couple was never legally married at the critical time period, and common law marriage was not recognized in

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422. *See* Lou Chibbaro Jr., *Gay Man in Estate Dispute with Partner's Family*, WASHINGTON BLADE (June 25, 2015, 1:11 PM), http://www.washingtonblade.com/2015/06/25/gay-man-in-estate-dispute-with-partners-family/ [https://perma.cc/ETL3-NE9T]; Lou Chibbaro Jr., *Motion to Dismiss Gay Common Law Marriage Denied*, WASHINGTON BLADE (Aug. 28, 2015, 3:46 PM), http://www.washingtonblade.com/2015/08/28/motion-to-dismiss-gay-common-law-marriage-case-denied/ [https://perma.cc/JU7G-H9CK].

423. *See* Chibbaro Jr., *Gay Man in Estate Dispute*, *supra* note 422.

424. *Id.*; Chibbaro Jr., *Motion to Dismiss Gay Common Law Marriage Denied*, *supra* note 422.

425. Chibbaro Jr., *Motion to Dismiss Gay Common Law Marriage Denied*, *supra* note 422.

426. Lou Chibbaro Jr., *Settlement in D.C. Common Law Marriage Case*, WASHINGTON BLADE (Dec. 1, 2015, 11:00 AM), http://www.washingtonblade.com/2015/12/01/settlement-in-d-c-common-law-marriage-case/ [https://perma.cc/DC8Y-AKBB].

427. There are other examples of same-sex "marriage" being applied retroactively. For example, see Troy Masters, *United States Government Says L.A. Couple's 1975 Marriage is Valid*, PRIDELA (June 7, 2016), https://thepridela.com/2016/06/united-states-government-says-gay-couples-1975-marriage-is-valid/ [https://perma.cc/6VR3-ZFAP]. For another interesting retroactive judicial decision concerning the sweeping changes brought about by the *Obergefell* decision, see *Henderson v. Adams*, No. 1:15-cv-00220-TWP-MJD, 2016 WL 3548645 (S.D. Ind. June 30, 2016).

the couple's state of residence. Such a dilemma arises in cases where a same-sex couple *would* have married had it been legal, and later sought benefits of marriage only to be denied treatment as a married couple.

Mueller v. Tepler[428] is perhaps the most compelling and relevant case regarding the issue of same-sex marriage and access to benefits.[429] In *Mueller*, Plaintiffs Margaret Mueller and Charlotte Stacey brought a medical malpractice action against defendants Iris Wertheim and Iris Wertheim, M.D., LLC, seeking damages for personal injuries that Mueller suffered as a result of defendants' negligence, and for Stacey's resulting loss of consortium.[430] Mueller spent several years under Wertheim's care after Wertheim mistakenly diagnosed her with the wrong type of cancer in 2001.[431] By the time the error was discovered in 2005, Mueller's cancer had progressed to a stage where some of the tumors could no longer be surgically removed.[432] Mueller commenced her action against Wertheim in 2006, and filed a third amended complaint twenty-three months later alleging, in relevant part, that defendants were also liable to Stacey for loss of consortium.[433]

The complication in the case was that Mueller and Stacey, although they had been domestic partners and resided together since 1985, were not married or joined in a civil union at the time Wertheim's error was made.[434] In fact, it wasn't until November 2005 that Mueller and Stacey were joined in a civil union under Connecticut law.[435] Based on these facts, the trial court granted defendants' motion to strike Stacey's loss of consortium claims on the grounds that "a consortium claim is not sustainable by people who are not either in a legal marriage or in a legal civil union at the time of the wrong."[436]

By the time plaintiffs filed their main brief in the appellate court, the Supreme Court of Connecticut decided that Connecticut's state marriage laws were unconstitutional to the extent that they barred same-sex couples from marrying in *Kerrigan v. Commissioner of Public Health*.[437] In light of this decision, the plaintiffs' contention was that same-sex spouses who would have been married had same-sex marriage been legal should be permitted to claim loss of consortium "when the sole reason that they were not legally married at the time of the

428. 95 A.3d 1011 (Conn. 2014).
429. *Id.*
430. *Id.* at 1014.
431. *Id.* at 1015.
432. *Id.*
433. *Id.*
434. *Id.* at 1015–16.
435. *Id.* at 1015.
436. *Id.* at 1016 (citing *Mueller v. Tepler*, 33 A.3d 814, 816 (Conn. App. Ct. 2011)).
437. 957 A.2d 407 (Conn. 2008).

underlying tortious conduct was a now repudiated public policy against legal recognition of lifelong same-sex relationships."[438] The appellate court, however, affirmed the trial court's decision, concluding that the plaintiffs' situation was no different than that of an opposite-sex couple who were not married at the time that the underlying tort occurred, and thus a cause of action for loss of consortium was not available.[439]

The case made its way to the Supreme Court of Connecticut, where it was reversed.[440] The court held that the "intangible elements" of the relationship of a same-sex couple who would have been married when the underlying tort occurred, had such a union been legal, are the same "intangible elements" of a relationship in marriage.[441] Additionally, the court noted that where marriage is not an option, it cannot logically serve as a proxy for the existence of the commitment that "gives rise to the existence of consortium . . . in the first instance . . . ."[442] Perhaps most importantly, the court concluded that:

> [I]f a member of a same sex couple can prove that the couple would have been married when the underlying tort occurred if not for the fact that they were barred from doing so, it would be illogical and unfair to characterize a marriage after the tort occurred as a marriage to "a cause of action" . . . instead of the formalization of a relationship that already had given rise to "the existence of consortium" . . . and already had all of the hallmarks of a marriage.[443]

Ultimately, the court agreed with the plaintiffs that the common-law claim for loss of consortium should be expanded "to couples who were not married when the tortious act occurred, but who would have been married if the marriage had not been barred by state law."[444]

Similarly, in *Conover v. Conover*,[445] the Maryland Court of Appeals recently reversed the Maryland Court of Special Appeals' refusal to give any weight to the argument that the court should consider that a couple could not legally marry at the time of the events causing the dispute.[446] *Conover* involved a child custody dispute between Michelle and Brittany Conover, who were in the midst of a

438. *Mueller*, 95 A.3d at 1018.
439. *Id.* at 1016.
440. *Id.* at 1014.
441. *Id.* at 1025–26.
442. *Id.* at 1026.
443. *Id.* (citations omitted).
444. *Id.* at 1023.
445. 120 A.3d 874 (Md. Ct. Spec. App. 2015).
446. *Conover v. Conover*, No. 79, Sept. Term, 2015, 2016 WL 3633062 (Md. Ct. App. 2016 July 7, 2016).

divorce following their 2010 marriage and subsequent separation.[447] Before the parties were wed, they discussed having a child together, and agreed that Brittany would be artificially inseminated from an anonymous donor.[448] In 2009, the child was conceived.[449] In March of 2010, the District of Columbia, where the couple resided at the time, began issuing marriage licenses to same-sex couples.[450] That April, Brittany gave birth to a son.[451] The birth certificate listed Brittany as the mother, but identified no one as the father.[452] Brittany and Michelle were married in the District of Columbia on September 28, 2010.[453]

The couple separated one year later in September 2011.[454] Brittany filed a Complaint for Absolute Divorce in June of 2013, which did not mention the child.[455] The custody dispute arose when Michelle subsequently filed both an answer and a Counter-Complaint for Absolute Divorce, in which she requested visitation rights with respect to the child.[456] The circuit court issued an opinion in June of 2013, in which the court found that Michelle was not the child's "father" and therefore could not establish parental standing.[457] The court noted that a child born during the marriage was presumed to be the child of both parties, but concluded that this presumption was not applicable in this case because the child was conceived and born before the marriage.[458] No credence was given to the argument that the parents could not be legally married in Washington, D.C. at the time of conception, but the court did note that the couple could have married before the child's birth, as Washington, D.C. began issuing marriage licenses to same-sex couples one month before the child was born.[459] The trial court held that in order for Michelle to overcome the biological mother's constitutionally protected interest in the care, custody, and control of her child, she would have to show that Brittany was unfit or that there existed exceptional circumstances since the court viewed Michelle as a "third party."[460] The court concluded that Michelle "is in fact a female, had not adopted the child, and in no way was related to the child, thus

447. *Conover*, 120 A.3d at 876–77.
448. *Id.*
449. *Id.* at 877.
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.* at 878.
458. *Id.*
459. *Id.*
460. *Id.* at 878–79.

not sufficiently establishing that she could be the 'father' of the child."[461]

The Maryland Court of Special Appeals affirmed the decision of the circuit court, holding that Michelle did not have parental standing to challenge the denial of visitation or custody of the child.[462] Several factors played into the court's decision. First, the court dispelled with Michelle's argument that she was "denied" the benefit of the presumption that a child born or conceived during a marriage is the legitimate child of both spouses, because there was no evidence as to why the couple chose 2009 for the conception of the child.[463] Second, although the change in Washington, D.C.'s marriage law did not take effect until March 2010, at least three states (Connecticut, Iowa, and Massachusetts) permitted same-sex marriage in 2009, and the couple could have married before the birth of the child, but chose not to.[464] Finally, the court rejected Michelle's argument that she relied on Brittany's representations that Michelle was a parent to the child, because Michelle had several years to pursue the adoption of the child and formalize the parental relationship.[465]

While the court noted that the case was a sad one, it concluded that Maryland law left them no choice, and that the question was better considered by the state legislature than by the courts.[466] Ultimately, the deciding factor may have been that the couple waited until after the child's birth to consummate their marriage.[467] Had the couple been married before the child's conception or birth, the case likely would have been decided differently.[468]

The Maryland Court of Appeals, however, reversed the Court of Special Appeals' decision. The court held that *de facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis.[469]

A unanimous appellate court in New York held similarly in *In re Estate of Leyton*.[470] In *Leyton*, the issue of retroactivity arose when relatives of the decedent sought to revoke a will that decedent executed

461. *Id.* at 879.
462. *Id.* at 880.
463. *Id.* at 883.
464. *Id.*
465. *Id.* at 885.
466. *Id.* at 886.
467. *Id.* at 883.
468. *Id.*
469. *Id.* at 886.
470. *In re Estate of Leyton*, 135 A.D. 3d 418 (N.Y. App. Div. 2016).

in 2001.[471] The will named the decedent's same-sex partner as executor of the estate and granted him significant bequests.[472] In 2002, the couple had a commitment ceremony in New York, which at the time was without legal effect because same-sex marriage did not exist in New York until the 2011 enactment of the Marriage Equality Act.[473] The couple later separated in 2010 and the decedent died in 2013 without executing a new will.[474] The decedent's relatives sought to have the former partner disqualified as executor and the bequests to him revoked on the theory that the former partner should be treated as a former spouse whose nomination as executor and gifts under the will are revoked by statute upon "divorce" or legal separation.[475] The Surrogate's Court of New York County ordered, and the appellate court later affirmed, that "according the union between decedent and [his partner] retroactive legal effect would be inconsistent with their understanding that they had never been legally married."[476]

The appellate court even went so far as to declare that the "Supreme Court's recognition of same-sex couples' fundamental right to marry in *Obergefell v. Hodges* does not compel a retroactive declaration that the commitment ceremony entered into by decedent and [his partner] in 2002, when same-sex marriage was not recognized under New York law, was a legally valid marriage."[477]

Issues similar to these are appearing frequently in a variety of practice areas.[478]

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471. *In re Estate of Leyton*, No. 2013-4842, 2015 WL 3882524, at *1 (N.Y. Sur. Ct. June 16, 2015).

472. *Id.*

473. *Id.*

474. *In re Estate of Leyton*, 2015 WL 3882524, at *1.

475. *Id.*

476. *In re Estate of Leyton*, 135 A.D.3d 418, 418 (N.Y. App. Div. 2016).

477. *Id.*

478. *See, e.g.*, *In re Villaverde*, 540 B.R. 431 (Bankr. C.D. Cal. 2015) (holding that a same-sex couple who entered civil union but did not marry cannot file joint petition in bankruptcy); *Celec v. Edinboro Univ.*, 132 F. Supp. 3d 651 (W.D. Pa. 2015) (surviving same-sex partner denied life insurance benefits); *Bone v. St. Charles Cty. Ambulance Dist.*, No. 4:15CV912 RLW, 2015 U.S. Dist. LEXIS 123207 (E.D. Mo. Sept. 16, 2015) (spouse denied health insurance benefits before *Obergefell*); *Marie v. Mosier*, 122 F. Supp. 3d 1085 (D. Kan. 2015) (tax filings by same-sex couples must be permitted); *Taylor v. Brasuell*, No. 1:14-CV-00273-REB, 2015 WL 4139470 (D. Idaho July 9, 2015) (holding that a same-sex spouse would be permitted to be buried with her deceased spouse in veterans' cemetery where previous permission had been denied). Courts have even gone so far as to look back to the original date of co-habitation when determining an equitable distribution formula upon divorce of a same-sex couple who were denied marriage by the laws of their estate. *See In the Matter of Munson & Coralee Beal*, No. 2015-0253, 2016 WL 4411308 (N.H. Aug. 19, 2016).

CONCLUSION

The implications of *Obergefell* concerning the unconstitutionality of state laws that prohibited the recognition of otherwise valid same-sex marriages from sister states has been largely ignored. Yet, the potential application of the Court's holding to choice-of-law matters and to remedial considerations concerning previously unrecognized same-sex spouses will have substantive financial effects across the entire spectrum of legal fields—for, with marriage, comes wide-ranging rights and obligations. Moreover, the practical relevance of many of these marital rights and obligations are inescapably intertwined with the length of the marriage. Though far reaching, the decision will predominately impact the realm of state property laws. Unfortunately—and perhaps intentionally—the *Obergefell* decision provided no guidance on its retroactive application. In an effort to fill that jurisprudential chasm, this Article articulates and defends a rich positive and normative jurisprudential framework through which courts and legislatures might analyze the rapidly growing number of real property and property succession disputes that continue to be initiated in the wake of the *Obergefell* decision. In the end, this Article concludes that, on balance, *Obergefell* should be applied purely retroactively as to both choice-of-law matters and remedial considerations, to the extent that adequate remedies may be fashioned to protect innocent third parties while rectifying the property deprivations of unconstitutionally unrecognized marriages. Accordingly, this Article provides a guiding source on the practical implications that will stem from *Obergefell*'s retroactive application.