COMMENTS

Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of *Obergefell* in Property Cases

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INTRODUCTION

On June 26, 2015, the Supreme Court held in *Obergefell v Hodges*[1] that "the right to marry is a fundamental right inherent in the liberty of the person [ ] under the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[2] The Court also held that states cannot withhold legal recognition of same-sex marriages.[3] The decision raises the following problem: Suppose that a couple was legally married before *Obergefell* in a state recognizing same-sex marriage (a former recognition state), either because they traveled to the recognition state for the sole purpose of getting married or resided there for a while before moving to a former nonrecognition state.[4] For property rights purposes, at which date is the couple deemed married in the former nonrecognition state after *Obergefell*? If *Obergefell* applies retroactively, it should be from the actual date of marriage. If not, it should be from the date of the *Obergefell* decision.

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1 135 S Ct 2584 (2015).

2 Id at 2604.

3 Id at 2607–08. The Court did not address the possibility that a state might refuse to recognize marriages valid in another state on grounds *other than* the gender of the couple, such as incest or violations of age requirements. See generally id.

4 At the time *Obergefell* was decided, there were still fourteen nonrecognition states: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. Niraj Chokshi and Jeff Guo, *Statements from Leaders in the 14 States That Previously Did Not Allow Gay Couples to Wed* (Wash Post, June 26, 2015), archived at http://perma.cc/TK5L-BBYE.

To illustrate what is at stake, consider the following scenarios: Amy and Margaret were Texas residents. In 2010, they moved to Massachusetts and were lawfully married there. Two years later, they moved back to Texas, a nonrecognition and community property state.[5] After arriving in Texas, Amy bought a piece of real property there with what would be considered community funds if they were an opposite-sex couple, and held it in her name. In 2014, Amy sold the property to Mark without Margaret's consent.[6] If the property were Amy and Margaret's home, the transaction would be governed by Texas's homestead law, which prohibits unilateral sales "without the joinder of the other spouse."[7] The validity of Mark's title depends on when the couple is deemed to have wed: if in 2010, his title is void, but if after *Obergefell*, it is valid.

The issue of third-party reliance is not limited to states that were, prior to *Obergefell*, both nonrecognition and community property states.[8] Imagine that a same-sex couple obtained property in a community property and former recognition state (for example, California).[9] They then moved to a separate-property[10] and former nonrecognition state (for example, Ohio).[11] Generally, the recognition rule holds that moving across state lines does not change the community or separate status of a married couple's property.[12] But because the couple was not a "married couple" under Ohio law when they moved to Ohio, the recognition rule did not apply. As a result, the property lost its community property status. But if *Obergefell* applies retroactively, the property would

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5 In a community property state, spouses co-own the property that they obtain during marriage (with certain exceptions). See *Black's Law Dictionary* 338 (West 10th ed 2014) (defining "community-property state" and "community property"). Currently there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See id.

6 The scenario is adapted from a short article written by Professor William P. LaPiana, who was among the first to flag the puzzle. See William P. LaPiana, Obergefell v. Hodges*: Legal Bases, Clashing Views, Open Questions*, 40 Tax Mgmt Estates, Gifts & Trusts J 206, 207 (2015).

7 Tex Fam Code Ann § 5.001.

8 Only two states were in both camps: Louisiana and Texas. Compare note 4 with note 5.

9 See notes 4–5.

10 These states are also called "common-law states," referring to "[a]ny state that has not adopted a community-property regime." *Black's Law Dictionary* at 335 (cited in note 5). "The chief difference [ ] between [the two regimes] is that in a common-law state, a spouse has no vested interest in property held by the other spouse until (1) the filing of a divorce action, or (2) the death of the other spouse." Id.

11 See notes 4–5.

12 See, for example, *In re Estate of Kessler*, 203 NE2d 221, 222–23 (Ohio 1964).

retain its community property status, with all of the restrictions and rights attached to that status.

Here is an example of how these hypothetical scenarios might play out in real cases.[13] Consider the facts of *Hard v Attorney General, Alabama*,[14] a case that recently came before the Eleventh Circuit: In 2006, Alabama passed a constitutional amendment that defined marriage as "a unique relationship between a man and a woman."[15] Paul Hard and David Fancher, a gay couple married in Massachusetts in May 2011, returned to Alabama after their nuptials. Less than three months after the marriage, David died in an accident. In June 2012, the administrator of David's estate filed a wrongful death action.[16] Under Alabama law, wrongful death damages "must be distributed according to the statute of distributions,"[17] with beneficiaries being determined at the time of death.[18] At the time of David's death, his only heir under Alabama law was his mother, Pat Fancher.[19] At issue was whether Paul was entitled to a spousal share of the sizable settlement.[20] A retroactive application of *Obergefell* would have entitled Paul to the spousal share. Otherwise, David's surviving mother, as his only heir, would receive the entire settlement.[21]

Welfare and tax benefits assigned to one's spouse may also be affected by the retroactivity of *Obergefell*.[22] After the Court, in

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13 For an attempt to get the Supreme Court to judge the validity of pre-*Obergefell* legal agreements signed by one member of a same-sex couple and attempting to bind the other, see Petition for Writ of Certiorari, *Guglielmelli v State Farm Insurance Co*, Docket No 15-884, *i, 5–7 (US filed Dec 31, 2015) (available on Westlaw at 2015 WL 9697873), cert denied, 136 S Ct 1659 (2016).

14 2016 WL 1579015 (11th Cir).

15 Ala Const Art I, § 36.03.

16 *Hard*, 2016 WL 1579015 at *1.

17 Ala Code § 6-5-410(c).

18 See, for example, *Lowe v Fulford*, 442 S2d 29, 31–32 (Ala 1983) ("Heirs are determined at the time of death.").

19 Principal Brief of Appellant - Patricia Fancher, *Hard v Fancher*, Case No 15-13836, *3–4 (11th Cir filed Oct 6, 2015) (available on Westlaw at 2015 WL 5915495) ("Fancher Brief").

20 *Hard*, 2016 WL 1579015 at *1.

21 The Eleventh Circuit did not end up addressing the issue of retroactive application because the particular controversy was held moot on unrelated grounds. See id at *2–3.

22 The question whether welfare and tax benefits are affected is a *temporal* choice-of-law question, because federal and state agencies have to decide whether a same-sex couple was married during a certain period before *Obergefell* in order to determine the allocation of certain benefits and duties. For a discussion of a similar choice-of-law issue across *geographic* lines, see generally William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan L Rev 1371 (2012) (arguing that, given the diverse state law definitions of "marriage," striking down the federal statutory definition of marriage as between one man and one woman in the Defense of Marriage Act (DOMA) would cause chaos unless Congress or the courts created a choice-of-law rule to replace it).

United States v Windsor,[23] struck down the Defense of Marriage Act's definition of "marriage" as between opposite sexes,[24] some federal agencies have chosen to apply *Windsor* retroactively, despite the possible additional administrative costs.[25] After *Obergefell*, similar voluntary retroactive efforts have materialized. For example, the Internal Revenue Service (IRS) issued guidance affirming the limited retroactive effects of *Obergefell* on various welfare plans.[26] But even if more federal agencies choose to apply *Obergefell* retroactively in the future, it remains unclear whether they are legally required to do so.[27]

This Comment attempts to solve a problem arising from *Obergefell*—the significant disruption of settled property interests due to the retroactive application of the decision. Part I of this Comment summarizes the development of the Supreme Court's jurisprudence on retroactivity, leading to a general rule of full retroactivity established in *Harper v Virginia Department of Taxation*.[28] Part II synthesizes the current rules of retroactivity in the context of the *Obergefell* problem and suggests three theories for limiting *Obergefell*'s retroactivity. Part III proposes a framework for limiting the retroactive effects of *Obergefell* through nonconstitutional remedial exceptions to the *Harper* rule based on *Reynoldsville Casket Co v Hyde*.[29] It then rebuts two theories that would provide stronger protection for reliance interests in property cases than the remedial exceptions framework, but are not viable under current Supreme Court jurisprudence.

I. FOUR RETROACTIVITY MODES: A SUMMARY OF CURRENT LAW

This Part summarizes both the development of the Supreme Court's retroactivity precedents and the current state of the law.

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23 133 S Ct 2675 (2013).

24 Id at 2682, 2695–96.

25 See, for example, LaPiana, 40 Tax Mgmt Estates, Gifts & Trusts J at 207 (cited in note 6) (explaining that the Social Security Administration uses the date that the couple was married, not the date that *Windsor* was decided, to ascertain their marriage date for purposes of Social Security benefits).

26 See generally IRS, *Application of* Obergefell *to Qualified Retirement Plans and Health and Welfare Plans*, Notice 2015–86, 2015-52 Int Reven Bull 887 (Dec 28, 2015).

27 For a challenge to Houston's retroactive application of *Obergefell*, see Petitioners' Reply, *Pidgeon v Parker*, No 15-0688, *5–9 (Tex filed Dec 11, 2015) (available on Westlaw at 2015 WL 9356986) ("The Court should grant the petition to declare that *Obergefell* is not (and cannot be) retroactive.").

28 509 US 86, 97 (1993).

29 514 US 749 (1995).

Part I.A begins with an introduction to the jurisprudential underpinnings of retroactivity and delineates four possible modes as reference points for a later discussion of actual cases. Part I.B then discusses the Court's retroactivity precedents in criminal law, foreshadowing a discussion of the development of retroactivity in civil litigation in Part I.C.

A. Jurisprudential Underpinnings and the Four Potential Modes of Retroactivity

There are two opposing jurisprudential theories of retroactivity. One is the Blackstonian or declaratory theory: A judge's role is to discover and not to make law. It is impossible for the law to change at the hands of a judge. If a judge "discovers" a new rule, it is understood to have been the law from time immemorial, and there is technically no retroactivity problem.[30] In line with this theory, the Supreme Court once announced—in the context of overruling unconstitutional precedents—that "[a]n 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 it had never been passed."[31] In effect, it is a complete retroactive application of the "new" constitutional rule to all underlying facts that happened before the announcement of the new rule.

The other jurisprudential theory is the Austinian or positive law theory: Judicial opinions, just like legislation, are the command of the sovereign.[32] When the court announces a rule that differs from a past rule, the law changes accordingly. Under this model, one must answer the "thorny" question whether the new rule is applicable to underlying facts occurring in the past.[33]

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[30] See Frederic Bloom, *The Law's Clock*, 104 Georgetown L J 1, 19–20 (2015) ("Judges are not 'delegated to pronounce a new law,' in Blackstone's famous adage, 'but [simply] to maintain and expound the old one.'") (brackets in original); Alison L. LaCroix, *Temporal Imperialism*, 158 U Pa L Rev 1329, 1349–53 (2010) ("The [Blackstonian] theory forms one of the central justifications for adjudicative retroactivity: if the Court is declaring what the law is and has always been, then that declaration must have been the case at all earlier times, even if contemporary case law suggests otherwise.").

[31] *Norton v Shelby County*, 118 US 425, 442 (1886). But see Paul Bender, *The Retroactive Effect of an Overruling Constitutional Decision:* Mapp v. Ohio, 110 U Pa L Rev 650, 650–53 (1962) (documenting the Supreme Court's qualifications of the absolute rule of retroactivity from *Norton*).

[32] See LaCroix, 158 U Pa L Rev at 1349–53 (cited in note 30) ("The Austinian theory . . . posits . . . that when the Court changes its mind, the law changes with it.") (quotation marks omitted).

[33] Id.

On a less abstract level, there are four relevant temporal points in defining retroactivity: (1) when the events or facts giving rise to the legal claim occur ("Transaction Time"); (2) when a party files a lawsuit ("Filing Time"); (3) when a new constitutional rule is rendered, often by a Supreme Court decision ("New Rule Time"); and (4) when the lawsuit closes ("Closing Time"). As shown in Table 1, there are four possible sequences for these events, the only difference being the relative position of the New Rule Time.

TABLE 1

Timeline	→			
Mode 1	*New Rule*	Transaction	Filing	Closing
Mode 2	Transaction	*New Rule*	Filing	Closing
Mode 3	Transaction	Filing	*New Rule*	Closing
Mode 4	Transaction	Filing	Closing	*New Rule*

Mode 1 refers to a scenario in which the underlying facts happen after the New Rule Time. There is no retroactivity problem because, strictly speaking, there is no "new rule" for the litigants. Instead, there is simply an application of the rule that existed at the Transaction Time. A retroactivity rule that requires application of the new rule *only* to cases under Mode 1 is called "pure prospectivity."[34]

Mode 4 is another extreme scenario: the New Rule Time occurs after a case has reached finality, when res judicata and issue preclusion are applicable. Mode 4 also includes cases on collateral attack, such as federal habeas corpus cases.[35] A rule that requires

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[34] For a summary of courts' definitions of "pure retroactivity," "full retroactivity," "selective prospectivity," and "pure prospectivity," see Paul E. McGreal, *A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity*, 9 Alaska L Rev 305, 307 (1992).

[35] When this Comment refers to "closing" a case or a case reaching "finality," it refers to the end of the *direct review* proceedings. That is why it classifies habeas corpus proceedings under Mode 4, as habeas cases are *collateral attacks* that are usually not bound by issue preclusion and res judicata and are, in that sense, not "final." As shown below, for the purpose of this Comment, the Supreme Court's treatment of habeas cases and its treatment of cases reaching finality in the usual sense of the word are *not* in principle different—the governing rule of full retroactivity does not, in general, apply to either type of final cases. The same finality concern is present in both types of cases.

retroactivity even under Mode 4 is called "pure retroactivity."[36] In contrast, a rule that requires retroactivity for all cases except those under Mode 4 is called "full retroactivity."[37]

Modes 2 and 3 are the hard cases. Retroactivity under Mode 3 requires the new rule be applied either (1) to all cases pending before courts at the New Rule Time or (2) only to the case in which the new rule is announced, but not to any other case pending at the New Rule Time. This second possibility is called "selective prospectivity."[38] Mode 3 is the scenario of *Hard*, the wrongful death case recently decided by the Eleventh Circuit. Mode 2 differs from Mode 3 in only one respect: the litigant already knows about the new rule when she files the suit in Mode 2, but the transaction underlying the suit occurred when the old rule was still in effect in both modes. Mode 2, in the *Obergefell* context, refers to the scenario involving Amy, Margaret, and Mark—the marriage and property transaction happened before *Obergefell*, and Margaret has not yet filed her case. It is here that future litigation about the retroactivity of *Obergefell* will likely arise.

Table 2 provides a summary of the link between the different retroactivity rules and the four modes.

TABLE 2

	Pure Retroactivity	Full Retroactivity	Selective Prospectivity	Pure Prospectivity
Mode 1	R	R	R	R
Mode 2	R	R	NR	NR
Mode 3	R	R	R only for the case in which the new rule is announced, and NR for all other pending cases.	NR
Mode 4	R	NR	NR	NR

Note: "R" denotes that the new rule is retroactive, while "NR" denotes that the new rule is not retroactive.

[36] See McGreal, 9 Alaska L Rev at 307 (cited in note 34).

[37] See id.

[38] See id. Under "selective prospectivity," retroactivity may apply to "selected cases filed before" the New Rule Time, but it does not automatically apply. See id.

B. The Warren Court and Retroactivity in Criminal Law

The Supreme Court's retroactivity jurisprudence has experienced significant shifts beginning in the 1960s, when changes occurred against the backdrop of the Warren Court's expansion of criminal procedural rights through the overruling of constitutional precedents.[39] One scholar remarked that "[b]y 1959, the number of instances in which the Court had reversals involving constitutional issues had grown to sixty; in the two decades which followed, the Court overruled constitutional cases on no less than forty-seven occasions."[40]

The expansion of procedural rights might give prisoners an opportunity to challenge convictions that no longer appear constitutional. But motivated by the liberal justices' need to avoid a legal prison break (a retroactive application of the new rules that might acquit many prisoners) and the conservative justices' desire to engage in "damage control" for new rules they disliked,[41] the Court broke from the norm[42] of Blackstonian retroactivity.[43] In *Linkletter v Walker*,[44] the Court held that an exclusionary rule did not apply retroactively to a habeas petitioner who was convicted before the rule was announced.[45] The Court reasoned that "the Constitution neither prohibits nor requires retrospective effect,"[46] but reached in dictum a general rule of retroactivity for all cases on *direct review*.[47] As for habeas cases (Mode 4), the Court

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39 See generally A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich L Rev 249 (1968). See also *Mapp v Ohio*, 367 US 643, 655–57 (1961) (establishing that the exclusionary rule of the Fourth Amendment applies to the states via the Fourteenth Amendment); *Gideon v Wainwright*, 372 US 335, 343–45 (1963) (establishing the right to free counsel for indigent defendants in state criminal prosecutions); *Miranda v Arizona*, 384 US 436, 444–45 (1966) (establishing that individuals must be informed of their rights before they are put under "custodial interrogation").

40 Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis L Rev 467, 467 (citation omitted). See also *Harper*, 509 US at 109 (Scalia concurring) (listing as examples six constitutional cases the Supreme Court overruled between 1961 and 1967).

41 See Richard H. Fallon Jr and Daniel J. Meltzer, *New Law, Non-retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1739–40, 1745 (1991).

42 *Harper*, 509 US at 94 (quoting Justice Oliver Wendell Holmes's words that "'retrospective operation' [ ] has governed '[j]udicial decisions . . . for near a thousand years'") (brackets and ellipsis in original).

43 Fallon and Meltzer, 104 Harv L Rev at 1739–40 (cited in note 41).

44 381 US 618 (1965).

45 Id at 619–20, 639–40.

46 Id at 629 (quoting in addition Justice Benjamin Cardozo as stating that "[w]e think the federal constitution has no voice upon the subject").

47 See id at 627.

held that there was "no set principle of absolute retroactive invalidity."[48] The retroactivity of the new rule depended on the consideration of three factors: "the purpose of the [new] rule; the reliance placed upon the [old rule]; and the effect on the administration of justice."[49]

In the aftermath of *Linkletter*, some scholars severely criticized the factor-balancing approach to habeas cases. These scholars reasoned that the new rule should be retroactively applied in *all* cases to free prisoners whose convictions were contaminated by violations of the rule.[50] This argument was based on the fact that these "*constitutional* rights" reflected "fundamental norms"[51] and the idea that the unreasonable reliance of state governments on the old rule should not be protected.[52]

Two years after *Linkletter*, in *Stovall v Denno*,[53] the Court affirmed the three-factor discretionary approach in *Linkletter* but recognized that the different treatment of cases on direct and collateral review could not be justified.[54] It rejected retroactive application of any new rule in all cases on direct or collateral review, except in the case in which the new rule was announced to avoid transforming the rule into a "mere dictum."[55] This is a rule of selective prospectivity.[56] Justice John Marshall Harlan II criticized the selective prospectivity rule in several dissenting and concurring opinions[57] and characterized the rule as "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a

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48 *Linkletter*, 381 US at 627, citing *Chicot County Drainage District v Baxter State Bank*, 308 US 371, 374 (1940) (quotation marks omitted).

49 *Linkletter*, 381 US at 636.

50 See, for example, Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U Chi L Rev 719, 747–50 (1966) (arguing that the newly announced rules were really not new and that the unconstitutional nature of the violation did not change based on when the defendant was convicted).

51 Id at 747–48.

52 Id. For a critique of the Court's announcement of the judicial power to limit retroactivity, but not the result in *Linkletter*, see generally Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ and the Due Process of Time and Law*, 79 Harv L Rev 56 (1965).

53 388 US 293 (1967).

54 Id at 297, 300–01.

55 Id at 300–01.

56 See text accompanying note 38.

57 See, for example, *Desist v United States*, 394 US 244, 258–59 (1969) (Harlan dissenting); *Mackey v United States*, 401 US 667, 676–81 (1971) (Harlan concurring in the judgment in part and dissenting in part).

stream of similar cases subsequently to flow by unaffected by that new rule."[58]

Harlan lost the battle, but won the war. In *Griffith v Kentucky*,[59] a criminal case on direct review, the Court abandoned the discretionary approach to retroactivity and held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[60] In *Teague v Lane*,[61] a case almost identical to *Griffith* except for its habeas status, the Court clarified that the *Griffith* rule of general retroactivity does *not* apply to habeas cases.[62] With some refinement to the *Teague* rule,[63] the controlling rule in criminal law is full retroactivity: a new constitutional rule applies retroactively to all pending and future cases on direct review, but generally not to habeas cases (that is, Mode 4 cases). Although not directly relevant to the *Obergefell* problem, the development of the Supreme Court's retroactivity jurisprudence in criminal law foreshadows the development of the Court's retroactivity jurisprudence in the civil context.

C. Retroactivity in Civil Litigation: From *Chevron Oil* to *Reynoldsville Casket*

The Supreme Court's civil retroactivity precedents have gone through a similar retroactivity—prospectivity—retroactivity pendulum. But they also present three unique questions: (1) Do differences between civil and criminal cases suggest that a different treatment of retroactivity is necessary? (2) If so, is pure prospectivity still a possibility in the civil arena? (3) What is the difference between the issue of retroactivity and the issue of remedy?

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58 *Mackey*, 401 US at 679 (Harlan concurring in the judgment in part and dissenting in part).

59 479 US 314 (1987).

60 Id at 328.

61 489 US 288 (1989).

62 Id at 306–07, 309–10 (holding that "new constitutional rules of criminal procedure will not be applicable to [collateral attack] cases" unless (1) the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or (2) "it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty") (quotation marks omitted and ellipsis in original).

63 See, for example, *Danforth v Minnesota*, 552 US 264, 266 (2008) (holding that *Teague* does not preclude state courts from giving "broader [retroactive] effect to new rules of criminal procedure than is required by [*Teague*]"); *Montgomery v Louisiana*, No 14-280, slip op at 8 (US Jan 25, 2016) (holding that the substantive rule exception of *Teague* "rest[s] upon constitutional premises" and is "binding on state courts").

The following distillation of Supreme Court precedents aims to answer those three questions.

Chevron Oil Co v Huson[64] is the civil counterpart of *Linkletter*. The plaintiff was injured "while working on [the defendant's] artificial island drilling rig," located off the Louisiana coast.[65] The plaintiff brought a suit that was timely under the laches doctrine that had historically been thought to govern such actions.[66] The Supreme Court, however, rendered a decision while the case was pending, holding that Louisiana's one-year statute of limitations, rather than the laches doctrine, governed actions for personal injuries occurring on artificial structures at sea.[67] The new rule would bar the plaintiff's claim if applied retroactively. In *Chevron Oil*, the Court proposed a three-factor discretionary approach: (1) whether the decision "establish[ed] a new principle of law"; (2) whether retroactive application would "further or retard [the new rule's] operation"; and (3) whether retroactive application would "produce substantial inequitable results."[68] After analyzing the three factors, especially considering the plaintiff's hardship in light of his justifiable reliance on the laches doctrine, the Court concluded that the new statute of limitations did not apply retroactively.[69]

The soundness of the *Chevron Oil* test was challenged in *American Trucking Associations, Inc v Smith*,[70] in which only a plurality of the justices applied *Chevron Oil*'s retroactivity test.[71] At issue was whether an intervening Supreme Court decision holding unconstitutional a state's flat tax scheme on highway trucks applied retroactively to a case involving a similar tax scheme.[72] The plurality insisted on applying the *Chevron Oil* test and held that the new constitutional decision did not apply retroactively, despite the fact that the litigants in the intervening decision obtained a tax refund as a remedy.[73] Justice Sandra Day O'Connor, writing for the plurality, emphasized the government's

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64 404 US 97 (1971).

65 Id at 98.

66 Id at 98–99. The laches doctrine provides a flexible statute of limitations for admiralty cases, under which the length of the statute of limitations is based on equitable factors. See Uisdean R. Vass and Xia Chen, *The Admiralty Doctrine of Laches*, 53 La L Rev 495, 495 (1992).

67 *Rodrigue v Aetna Casualty & Surety Co*, 395 US 352, 355 (1969).

68 *Chevron Oil*, 404 US at 106–07.

69 Id at 107–08.

70 496 US 167 (1990).

71 Id at 168, 179–86 (O'Connor) (plurality).

72 Id at 171–74 (O'Connor) (plurality).

73 Id at 182–83 (O'Connor) (plurality).

justifiable reliance on the old rule and the severe administrative burden if a refund was granted in the current case.[74]

The dissenting opinion, endorsed by four justices, explicitly rejected *Chevron Oil*'s discretionary framework, reasoning that unequal treatment of similarly situated litigants (such as those in the intervening decision and in the case at bar) was not acceptable.[75] The dissenters urged the Court to instead follow *Griffith*'s abandonment of selective prospectivity.[76] Interestingly, the dissenting opinion distinguished between "remedy" and "retroactivity," and reasoned that *Chevron Oil* was about the former, not the latter.[77] In the words of Justice John Paul Stevens:

> 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.[78]

While retroactivity is a question of federal law that is binding on state courts, remedy is "a mixed question of state and federal law" upon which state courts may exercise some discretion.[79] Essentially, the dissenters rejected selective prospectivity—if the new rule is retroactively applied in the intervening case, it must also be applied to all other pending cases. However, they also acknowledged that the *retroactive* application of the new rule may not be outcome determinative—some independent principle of law, such as statutes of limitations or res judicata, may bar relief or retroactive effect to the parties.[80]

Justice Antonin Scalia was the swing vote in *American Trucking*, yet his reasons for concurring in the judgment were very different from those of the plurality. He agreed with the dissenting opinion that prospective overruling was inconsistent with federal

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74 *American Trucking*, 496 US at 182–83 (O'Connor) (plurality) ("[I]t is clear that the invalidation of the State's [Highway Use Equalization] tax would have potentially disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans.").

75 Id at 212 (Stevens dissenting).

76 Id at 212–16 (Stevens dissenting).

77 Id at 221–24 (Stevens dissenting) ("[T]he problem of the appropriate scope of federal equitable remedies [at issue in *Chevron Oil*] is distinct from the choice-of-law issue [of retroactivity] implicated by this case.") (emphasis and quotation marks omitted).

78 *American Trucking*, 496 US at 209 (Stevens dissenting).

79 Id at 209–12 (Stevens dissenting).

80 See id at 212–18 (Stevens dissenting).

judges' Article III role.[81] But, because he dissented in the intervening decision, he thought it "necessary" for him, "at least where his vote is necessary to the disposition of the case," to resist the retroactive application of the new rule he had previously opposed.[82]

O'Connor fought against the dissent's demand to follow *Griffith* because of the differences she perceived in civil and criminal law. First, retroactive application of new procedural rules in criminal cases inevitably benefits defendants, while in civil cases both plaintiffs and defendants may be benefited or harmed. In civil cases, therefore, there is no special reason for retroactive application.[83] Second, a prospectivity rule does not preclude the relying party in civil cases from enjoying all of the new rule's benefits. In the context of a tax, for example, the plaintiff could at least expect a future tax exemption. But in criminal cases, the only relief the defendant cares about is acquittal, which can be obtained only by retroactive application of the new procedural rule.[84]

A year after *American Trucking*, the Court again tried to clarify the thorny issue of retroactivity in *James B. Beam Distilling Co v Georgia*,[85] producing five opinions, none controlling.[86] The plaintiff wanted to take advantage of a newly announced rule invalidating discriminatory excise taxes imposed on alcoholic beverages to obtain a tax refund under a similar tax scheme.[87] This time, a majority of the justices permitted retroactive application of the new rule, but remanded the case to state court to determine the remedy.[88] A majority of the justices rejected selective prospectivity (applying the new rule only to the case in which it is announced but not to any other pending case) because it treated litigants in similar situations unequally.[89] Yet only three of them

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81 Id at 201 (Scalia concurring in the judgment).

82 *American Trucking*, 496 US at 205 (Scalia concurring in the judgment).

83 Id at 197–99 (O'Connor) (plurality).

84 Id (O'Connor) (plurality).

85 501 US 529 (1991).

86 See id at 531.

87 Id at 532–34 (Souter, joined by Stevens).

88 See id at 544 (Souter).

89 *Beam*, 501 US at 540–44 (Souter); id at 545 (White concurring in the judgment); id at 548 (Blackmun concurring in the judgment, joined by Marshall and Scalia); id at 548 (Scalia concurring in the judgment, joined by Marshall and Blackmun). Scalia also rejected selective prospectivity because he believed it violated the Court's Article III powers. See id at 548–49 (Scalia concurring in the judgment).

explicitly overruled *Chevron Oil* and the possibility of pure prospectivity (applying the new rule only to future facts).[90] The other three either implicity[91] or explicitly[92] preserved pure prospectivity for future cases, as did the three dissenting justices.[93] Therefore, although a majority of justices rejected selective prospectivity, an equal number of justices preserved the possibility of pure prospectivity.

Importantly, Justice David Souter's opinion in *Beam*, which delivered the judgment of the Court, made a new point by emphasizing the importance of treating pending (Mode 3) and future (Mode 2) cases equally.[94] His opinion held that drawing a line between the two modes would only encourage duplicative filing "when this or any other appellate court created the possibility of a new rule by taking a case for review."[95] Souter also pointed out that nothing in the decision "deprive[d] respondents of their opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided."[96] Thus, Souter's opinion recognized the retroactivity-remedy distinction from the plurality opinion of *American Trucking*.

Harper is the most important case in the retroactivity jurisprudence, as it summarizes the previous cases and clarifies the current law.[97] *Harper* was again a tax refund case filed after a new rule invalidated a state tax scheme that discriminated against federal employees.[98] Justice Clarence Thomas delivered the opinion of the Court, holding that, based on *Griffith* and *Beam*,

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90 Id at 548 (Blackmun concurring in the judgment) ("Like Justice Scalia, I conclude that prospectivity, whether 'selective' or 'pure,' breaches our obligation to discharge our constitutional function.").

91 Id at 545 (White concurring in the judgment) ("Nothing in the above, however, is meant to suggest that I retreat from . . . recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court.").

92 Id at 544 (Souter) ("The grounds for our decision today are narrow. . . . We do not speculate as to the bounds or propriety of pure prospectivity.").

93 See *Beam*, 501 US at 550 (O'Connor dissenting, joined by Rehnquist and Kennedy) ("If the Court decides, in the context of a civil case or controversy, to change the law, it must make the subsequent determination whether the new law or the old is to apply to conduct occurring before the law-changing decision.").

94 Id at 542–43 (Souter).

95 Id (Souter).

96 Id at 544 (Souter).

97 See generally *Harper*, 509 US 86. See also *Landgraf v USI Film Products*, 511 US 244, 278 n 32 (1994) ("[*Harper* and *Griffith*] established a firm rule of retroactivity.").

98 *Harper*, 509 US at 89–91.

> [w]hen 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.[99]

The Court also held that "when [it] does not reserve the question whether its holding should be applied to the parties before it," the presumption is to apply the holding retroactively to them.[100] This rule "prevail[s] over any claim based on [ ] *Chevron Oil*,"[101] and the Supremacy Clause makes federal retroactivity doctrine supersede any "contrary approach to retroactivity under state law . . . [in the] interpretation[ ] of federal law."[102] This decision clearly abolished selective prospectivity for federal law.[103]

Scalia endorsed the Court's approach and observed that "[p]rospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*,"[104] while four other justices preserved the possibility of pure prospectivity.[105] As a result, even after *Harper*, it is not entirely clear whether a full retroactivity rule absolutely excludes the possibility of *pure* prospectivity.

Reynoldsville Casket, the most recent Supreme Court decision on civil retroactivity, explicitly limits the full retroactivity rule established in *Harper*.[106] At issue was the retroactivity of a new rule invalidating a state tolling provision that discriminated against out-of-state defendants in tort suits.[107] The Court applied *Harper* and held that the new rule barred the plaintiff's case,[108]

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99 Id at 89, 97.

100 Id at 97–98 (quotation marks omitted).

101 Id at 98 (brackets omitted).

102 *Harper*, 509 US at 100.

103 See id at 97–98. See also id at 115 (O'Connor dissenting, joined by Rehnquist) (using the phrase "selective prospectivity" to describe what the majority abolished).

104 Id at 105 (Scalia concurring).

105 See id at 110 (Kennedy concurring in part and concurring in the judgment, joined by White) ("I remain of the view that it is sometimes appropriate in the civil context to give only prospective application to a judicial decision. Prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding.") (quotation marks and brackets omitted). O'Connor in her dissent cited the *American Trucking* plurality to support different treatments in civil and criminal cases and Souter's opinion in *Beam* to support a distinction between retroactivity and remedy. See id at 121, 131–32 (O'Connor dissenting). The combination of these propositions leaves open the possibility of at least prospective effect of a new constitutional rule.

106 *Reynoldsville Casket*, 514 US at 758–59.

107 Id at 750–51.

108 Id at 759.

in total contrast to the result in *Chevron Oil*. Importantly, the Court rejected a "remedial exception"[109] to the retroactive application in this case because the question of remedy was not a ground for the state supreme court's dismissal,[110] and because the reliance was the *Chevron Oil*-type "simple reliance."[111] Nevertheless, the Court recognized potential remedial exceptions, in instances in which retroactive application of the new rule might not determine the outcome of the case:

> [A] court may find (1) an 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) as in the law of qualified immunity, 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, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself.[112]

The Court acknowledged the existence of these remedial exceptions,[113] but Scalia and Thomas concurred separately to reject any "remedial discretion" in the application of full retroactivity.[114]

Since *Reynoldsville Casket*, various state supreme courts have tried to interpret the Supreme Court's new retroactivity jurisprudence. When interpreting the retroactivity of *state* laws, which is not controlled by *Harper* and *Reynoldsville Casket*, some state supreme courts have adopted the full retroactivity approach,[115] while others remain loyal to the *Chevron Oil* test.[116] When hearing federal constitutional cases, at least one state supreme court has followed the remedial exception rule articulated in *Reynoldsville Casket*.[117]

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109 Id at 754 (quotation marks omitted).

110 *Reynoldsville Casket*, 514 US at 753.

111 Id at 759.

112 Id.

113 Id at 758–59; id at 762 (Kennedy concurring in the judgment).

114 See *Reynoldsville Casket*, 514 US at 759–61 (Scalia concurring).

115 See, for example, *MacCormack v Boston Edison Co*, 672 NE2d 1, 5 (Mass 1996) ("A constitutional decision is not a legislative act but a determination of rights enacted by the Constitution, so that all persons with live claims are entitled to have those claims judged according to what we conclude the Constitution demands.").

116 See, for example, *DiCenzo v A–Best Products Co*, 897 NE2d 132, 140–43 (Ohio 2008) (applying the *Chevron Oil* test and holding that prospective application was required).

117 See *Quantum Resources Management, LLC v Pirate Lake Oil Corp*, 112 S3d 209, 216–18 (La 2013) (holding that a constitutional state statute of limitations barred recovery

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In sum, the Supreme Court's jurisprudence mandates a full retroactivity rule when overruling precedents on constitutional grounds in both the civil and criminal contexts. The Court, however, has preserved the possibility of pure prospectivity, as well as a number of remedial exceptions to the retroactive effect of new constitutional rules. The next Part discusses how these rules apply to the *Obergefell* problem.

II. PLACING *OBERGEFELL* WITHIN THE SUPREME COURT'S RETROACTIVITY JURISPRUDENCE

This Part applies the retroactivity rules to the *Obergefell* problem. It suggests that, as a general principle, *Obergefell* applies retroactively to all four modes of cases under *Harper*, but also acknowledges three theories for limiting the *Harper* rule in the *Obergefell* context.

A. An *Obergefell* Problem: Applying the Retroactivity Rules to the Four Modes

It is time to take a fresh look at the retroactivity jurisprudence in the context of same-sex marriage and property protection. What do *Harper* and *Reynoldsville Casket* mean for same-sex couples legally married in recognition states before *Obergefell*? In addition, what do these cases mean for third parties that transacted with one of the spouses before June 26, 2015, and might have relied on the old rule that they were not legally married? The answer is clear in some cases, but still muddy in others.

The answers are clear for Mode 1 and Mode 4 cases. First, if the underlying transaction happened after *Obergefell*, or if the couple asks for government welfare or tax benefits for the period after the decision has been rendered (Mode 1 cases), there is no doubt that *Obergefell* applies. Second, for all cases that have already reached finality (Mode 4 cases), there is no retroactive application of *Obergefell*. *Harper*'s rule is limited to "all cases still open on direct review."[118] For example, returning to the Amy and Margaret hypothetical from the Introduction, if, before *Obergefell*, Margaret challenges the transaction and loses after exhausting

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from an unconstitutional tax sale, despite the fact that a new rule rendering such a sale unconstitutional applied retroactively to the case).

[118] *Harper*, 509 US at 97.

all levels of direct review, courts will not reopen her case post-*Obergefell* and give back her share of the house. Here, pure retroactivity would be out of the question.

Next are the pending (Mode 3) and future (Mode 2) cases. The underlying facts of these cases occurred before the new rule was issued, but they differ in whether the suit is filed before (Mode 3 cases) or after (Mode 2 cases) the new rule is announced.[119] After *Harper*, selective prospectivity is no longer available, but pure prospectivity remains a possibility.[120]

To determine whether pure prospectivity is applicable here, it is important to determine whether the Court applied *Obergefell* to the parties in that case. In *Obergefell*, the Supreme Court held that same-sex couples have a "fundamental [constitutional] right to marry" and that each state must recognize same-sex marriages approved by other states.[121] Importantly, the Court reversed the Sixth Circuit's holding to the contrary and did not reserve the question whether its holding applied to the litigants before it.[122] Under these circumstances, the normal presumption is that the new rule applies retroactively to all pending cases.[123] *Harper* commands a full retroactive application to all cases pending and yet to be filed, "regardless of whether [the underlying] events predate or postdate [the Court's] announcement of the rule."[124] Pure prospectivity is thus not an option under the *Obergefell* regime.

Does that mean that Mark (the buyer of Amy and Margaret's home), Pat (David's mother and the beneficiary of his estate's wrongful death action), and all those similarly situated have no protection for their property interests? Specifically, is there any limit, constitutional or otherwise, to the general rule of full retroactivity? The next Section proposes three theories for limiting the retroactivity of *Obergefell* and protecting reliance interests.

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[119] Justice Souter's opinion in *Beam* declined to draw a line between pending cases and cases yet to be filed, rendering the treatment of both types of cases the same in terms of retroactivity. See text accompanying notes 94–96.

[120] See notes 99–105 and accompanying text.

[121] *Obergefell*, 135 S Ct at 2604–05, 2607–08.

[122] See id at 2608.

[123] See *Harper*, 509 US at 97–98.

[124] Id at 97.

B. Three Theories for Limiting the Retroactivity of *Obergefell*

It is worth emphasizing that the stakes are high and the disruptive effects great if there is no limitation to the full retroactivity rule. It would mean that (1) the otherwise-settled validity of numerous past transactions would be open to question (Mark's case), (2) the otherwise-clear property distribution by the operation of law would become uncertain (Pat's case), and (3) welfare and tax programs would expect extra burdens and costs that are not already allocated in government fiscal plans.

The issue of retroactivity requires a balancing of several policy considerations. Fairness requires, on the one hand, protecting good-faith reliance (counseling in favor of nonretroactivity) and, on the other, providing equal treatment of similarly situated individuals (suggesting the rejection of selective prospectivity).[125] Stare decisis demands, on the one hand, retroactivity to increase the cost of judicial activism and, on the other, nonretroactivity to protect reliance on precedents.[126] Finality and efficiency (administrative burden concerns) militate against opening closed cases, and thus suggest that pure retroactivity should be rejected.[127] The conflicting nature of these considerations makes it impossible to have a straightforward retroactivity or nonretroactivity rule without exception, as demonstrated by *Reynoldsville Casket*'s careful carving out of specific remedial exceptions. The difficult question is how to strike the balance.

There are three theories for limiting the *Harper* rule in the *Obergefell* context. First, *Reynoldsville Casket* itself provides four categories for limiting the retroactive effect of a constitutional overruling (the "Remedial Exceptions Theory"). Second, viewed against the backdrop of the Supreme Court's vacillating retroactivity jurisprudence, *Obergefell* can be distinguished from *Harper* and *Reynoldsville Casket* and analogized to *Linkletter* and the Warren Court's nonretroactivity norm, because *Obergefell* created (or discovered)[128] an implied fundamental right (the "Warren Court Theory"). Third, the constitutional protection of property

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[125] See Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 Syracuse L Rev 1515, 1560–61 (1998).

[126] See id at 1565–67.

[127] See id at 1567–68.

[128] Whether "created" or "discovered" is the appropriate term depends on whether one is an Austinian or a Blackstonian.

rights also provides some limits to the general rule of full retroactivity when vested property rights and legitimate third-party reliance interests are at risk (the "Constitutional Limits Theory").

The Warren Court Theory gives the strongest protection to third-party reliance because it argues that the *Harper* line of cases is not applicable at all to *Obergefell*'s implied-fundamental-rights context. The Constitutional Limits Theory recognizes the applicability of *Harper* to the *Obergefell* context in general, but would argue for refusing to apply the full retroactivity rule to *Obergefell* problems involving constitutionally protected property interests. The Remedial Exceptions Theory provides the weakest limit to the *Harper* rule, because it argues that there is no constitutional limit to full retroactivity and that the retroactive effects of *Obergefell* should be barred only in certain particularized situations.

This Comment argues that only the Remedial Exceptions Theory, which provides the narrowest protection for the reliance interests in property cases, is viable under current Supreme Court jurisprudence. Part III proposes a framework for limiting the retroactive effects of *Obergefell* in property cases based on the four nonconstitutional remedial exceptions in *Reynoldsville Casket*. It then rebuts the Warren Court Theory and the Constitutional Limits Theory.

The Comment concludes that *Obergefell* retroactively applies to all pending and future property cases, even if the relevant transaction took place before *Obergefell*, with three exceptions: (1) when government agencies refuse to give the requested benefits to all married couples, whether opposite-sex or same-sex, (2) when such application is barred by the operation of a preexisting, independent law that is itself constitutional and has nothing to do with retroactivity, and (3) when there is a disruption of important reliance interests coupled with significant policy justifications.

III. A FRAMEWORK FOR LIMITING THE RETROACTIVE EFFECTS OF *OBERGEFELL* IN PROPERTY CASES: NONCONSTITUTIONAL REMEDIAL EXCEPTIONS

The Remedial Exceptions Theory is based on the four exceptions in *Reynoldsville Casket*. These exceptions provide a framework to balance the interests protected by the full retroactivity rule and the reliance interests of numerous third parties, public and private. To reiterate, *Reynoldsville Casket*'s four explicit exceptions to the full retroactive effect of a new rule are as follows:

(1) when the cure for unconstitutionality does not require retroactive application of the new rule; (2) when there is "a previously existing, independent legal basis" for denying retroactive effect that is not itself unconstitutional; (3) when there is a "well-established general legal rule that trumps the new rule of law, . . . reflect[ing] both reliance interests and other significant policy justifications"; or (4) when "a principle of law, such as that of 'finality' present in the *Teague* context, [ ] limits the principle of retroactivity itself."[129]

This Part focuses on the difficult pending and future cases (Mode 2 and 3 cases, respectively). The fourth exception is concerned only with closed cases (Mode 4 cases), which are clearly barred from being reopened by the retroactive application of *Obergefell*. As such, the rest of Part III establishes a framework based on the first three exceptions under the Remedial Exceptions Theory, and then rejects the Warren Court Theory and the Constitutional Limits Theory.

A. Alternative Cures for Unconstitutionality

One remedial exception to the full retroactivity rule applies when there is an alternative way to remedy the unconstitutionality of the old rule. This exception might save government agencies from the unexpected extra fiscal burdens caused by the retroactive application of *Obergefell*. In *Reynoldsville Casket*, the plaintiff pointed out some "tax cases in which the Court applied retroactively new rules holding certain state tax laws unconstitutional, but nonetheless permitted the state courts a degree of leeway in designing a remedy," including remedies that would deny refunds.[130] The majority distinguished *Reynoldsville Casket* from the previous tax cases: the cited cases involved "a particular kind of constitutional violation" that "depends, in critical part, upon differential treatment of two similar classes of individuals."[131] Under such circumstances, the court "might cure the problem either by similarly burdening, or by similarly unburdening, both groups."[132] In *Reynoldsville Casket*, however, the Ohio

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[129] *Reynoldsville Casket*, 514 US at 759 (emphasis omitted).

[130] Id at 755, citing generally *Harper*, 509 US 86, and *Beam*, 501 US 529.

[131] *Reynoldsville Casket*, 514 US at 755.

[132] Id.

Supreme Court's remedy under review did not cure the constitutional problem by equalizing the treatment of in-state and out-of-state defendants and thus did not fall under this exception.[133]

In *Swisher International, Inc v United States*,[134] the United States Court of International Trade[135] used the flexibility of the remedy for unconstitutional tax statutes recognized in *Reynoldsville Casket* to find that "an unconstitutional tax is [not] an *ipso facto* taking."[136] The Court of International Trade reasoned that if it were, "the remedy would be limited to just compensation, and [the problem] could not . . . be cured by the levy of additional taxes."[137] This attests to the point that retroactive application of a new rule does not necessarily result in a single type of remedy.

The flexibility of the remedy even in the presence of retroactivity is not limited to tax cases. In *Reynoldsville Casket*, the Court extended the principle to the statute of limitations context. Suppose a state statute of limitations discriminates against out-of-state defendants by allowing a longer period for plaintiffs to bring a tort suit against them. The unequal treatment can be cured either by requiring the same longer period for both out-of-state and in-state defendants or by requiring the same shorter period for both groups.[138]

Applying the alternative-cures exception to the *Obergefell* scenarios, there is an argument for curing the unconstitutionality of same-sex marriage bans and nonrecognition without applying *Obergefell* retroactively. The alternative-cures exception is especially applicable to cases concerning property interests related to marital status (rather than the right to marry itself). It is true that the bulk of the *Obergefell* majority opinion relied on the implied fundamental rights of individuals under the Fourteenth Amendment's Due Process Clause,[139] but the opinion also rested on the Equal Protection Clause.[140] Violating one does not necessarily violate the other. Imagine that a state recognizes the right

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133 See id at 756.

134 178 F Supp 2d 1354 (Intl Trade 2001).

135 The Court of International Trade is an Article III court that primarily hears cases on imports and federal transactions that impact international trade. The court's decisions can be appealed to the Federal Circuit. See *About the Court* (United States Court of International Trade, Dec 4, 2015), archived at http://perma.cc/3CGE-5JEP.

136 *Swisher International*, 178 F Supp 2d at 1363.

137 Id.

138 See *Reynoldsville Casket*, 514 US at 756.

139 See *Obergefell*, 135 S Ct at 2604–05.

140 Id at 2604 ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and

of same-sex couples to marry, while also discriminating against same-sex married couples by refusing to grant them certain tax exemptions available to opposite-sex married couples. The state action does not violate the implied fundamental right to marry, but may very well be unconstitutional under the Equal Protection Clause.[141]

In cases in which property interests alone (and not the right to marry) are involved, the retroactive application of *Obergefell* does not necessarily mean that same-sex couples who are now in court or intend to file cases will obtain their desired remedy, namely, the benefits that opposite-sex couples currently enjoy. Applying the alternative-cures exception to the *Obergefell* context, one can argue that the unconstitutionality of any discriminatory statute or state action can be cured by equalizing the treatment given to same-sex couples and opposite-sex ones. For example, the IRS could decide that married couples, of the opposite or same sex, cannot get certain benefits anymore, even for the period that has already started, or Congress could pass a statute to the same effect.[142] Given the Court's permissive attitude toward *legislative* retroactivity over economic matters,[143] rectification of rights will probably come through the democratic process and not through the judiciary. In other words, there is probably no constitutional or legal duty for welfare or benefits agencies to give full retroactive effect to *Obergefell* to the satisfaction of same-sex couples legally married in recognition states prior to *Obergefell*.

Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

[141] See *Allegheny Pittsburgh Coal Co v County Commission of Webster County, West Virginia*, 488 US 336, 345–46 (1989) (noting that the Equal Protection Clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

[142] In this hypothetical, there are no exit options for opposite-sex couples if they are denied benefits just as same-sex couples; there is no de facto segregation in treatment because the deprivation of benefits would be uniform across the nation. This situation is distinguishable from *Griffin v County School Board of Prince Edward County*, 377 US 218 (1964). In *Griffin*, the Court held that it was unconstitutional under the Equal Protection Clause for one county in a state to close all public schools, depriving both white and black students of the opportunity to attend the schools. Id at 225. The Court acknowledged that, as a matter of state law, the county could close all public schools, but found that there was still a violation of the Equal Protection Clause. This was because the de facto private school segregation in the county would force children there to choose between segregated private school or no school at all, while children in other counties did not have to face such a choice. Id at 229–31.

[143] See Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 Nev L J 63, 66–78 (2013).

The cases of Mark and Pat may be different from welfare or benefits cases. The property interests of Mark and Pat rest directly on whether the same-sex couple in each case was married at the time of the relevant event (Mark's purchase of Amy's house or David's death), that is, whether *Obergefell* is retroactively applied or not. There seems to be no cure other than acknowledging their marital status at the time of the relevant transaction. In other words, there is no alternative cure for unconstitutionality in situations that involve only private parties and no state actors.

The asymmetry here is worrisome. For one thing, nonexpert individuals may be less capable of anticipating judicial changes than government agencies are and may have fewer obligations to do so. It is thus more reasonable for private parties to rely on old rules. The analysis above, however, shows that it is possible for the government to avoid the retroactive effect of *Obergefell*, but the same is not true of private third parties. The result is ironic: the exception helps the types of parties who are best able to anticipate changes in law, and burdens those who are not.

It is also worrisome for another reason: if a government agency decides not to give certain benefits to same-sex married couples based on their past marital status, it must deny opposite-sex couples' past benefits as well. Withdrawing previously given benefits may create great political pressure, making it a less likely outcome. In contrast, if the agency decides to give benefits in the future to all married couples, including those married before *Obergefell*, the previously married same-sex couples can still enjoy the benefits as a result of their now-recognized marital status. In other words, same-sex couples face very few realistic possibilities of harm whichever way the government agency tries to cure the unconstitutionality. By contrast, private third parties may be unfairly deprived of otherwise vested property interests simply because of reasonable reliance on the old rule of nonrecognition, and may have no remedy whatsoever, if *Obergefell* applies with retroactive *effect*.[144]

In sum, the alternative-cures remedial exception is available only to relieve government agencies' fiscal burden when there is a prior violation of the Equal Protection Clause, and only at the cost of great political pressure. It cannot be used to protect private

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[144] For Justice O'Connor's analogous reasoning in *American Trucking*, see text accompanying notes 83–84 (arguing for a rule of retroactivity only for criminal cases, because criminal convictions can be remedied only through retroactivity, while civil defendants can obtain *some* remedy even under a prospective rule).

third parties who relied on the old nonrecognition rule. The asymmetry is troublesome because the reliance of private third parties is more reasonable than the reliance of government agencies and because, unlike the same-sex couples, the private third parties will inevitably be hurt.

B. Preexisting and Independent State Law Grounds

There is a second exception to the general rule of full retroactivity established in *Reynoldsville Casket*. If there is "a [constitutional,] previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief," that independent legal rule deprives the new rule of retroactive *effect*.[145] For example, the DC Court of Appeals held that a new rule for Title VII equal pay cases established by the Supreme Court was effectively not retroactively applicable (that is, it was not outcome determinative) because the statute of limitations barred the claim.[146]

In a case concerning the retroactive effect of *Windsor* on Employee Retirement Income Security Act of 1974[147] (ERISA) claims, the defendant-employer tried to avoid the retroactive application of *Windsor*.[148] The employer argued that "a previously existing independent legal basis for denying relief" existed because the same-sex couple's marriage was not legally valid in any jurisdiction at the time of the plaintiff's wife's death.[149] The district court found that, although California did not recognize same-sex marriages at the time the couple married, the couple was legally married under California law as it existed at the time the case came before the court.[150] The district court still found the marriage valid because, while it would have been impossible for them to acquire a marriage license, the couple had "complied with every other requirement imposed by California law."[151] The court simply noted that an inability to obtain a marriage license was a "curable defect" given the development of California law regarding same-sex marriage.[152] In other words, the court left open the possibility that if the defect was not "curable" under a nonrecognition state law

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145 *Reynoldsville Casket*, 514 US at 756–57, 759.

146 *George Washington University v Violand*, 932 A2d 1109, 1118–19 (DC 2007), citing *Reynoldsville Casket*, 514 US at 752, 758–59.

147 Pub L No 93-406, 88 Stat 829, codified at 29 USC § 1001 et seq.

148 *Schuett v FedEx Corp*, 119 F Supp 3d 1155, 1163–64 (ND Cal 2016).

149 Id at 1164–65.

150 Id at 1160–61, 1166.

151 Id at 1161.

152 *Schuett*, 119 F Supp 3d at 1161.

that was still constitutional at the time of the case, this could be "a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief."[153]

The private third parties who have no remedies under the alternative-cures remedial exception might have an argument under the preexisting and independent law remedial exception. For example, Pat could argue that, at the time of her son's death, he and Paul were not legally married under Alabama law and that the Alabama nonrecognition rule fits the independent state law exception. As a result, *Obergefell* cannot be effectively applied retroactively. Mark could advance a similar argument: at the time of the sale of the house, Amy and Margaret were not legally married under Texas law, and that operates as a preexisting, independent state law ground barring the retroactive effect of *Obergefell*. The problem for both Pat and Mark is that the independent state law itself has to be constitutional, and the nonrecognition rule is not—the plaintiff in *Reynoldsville Casket* was denied relief because her claim to an exception was based on a statute of limitations that was itself unconstitutional.[154]

In her brief, Pat emphasized the Alabama early vesting rule: "There exists a profound demonstration of precedent from Alabama courts illistrating [sic] the principle that the law in effect at the time of decedent's death controls the distribution of his property in Alabama."[155] This rule, she argued, "serve[s] as 'a previously existing, independent legal basis . . . for denying relief.'"[156] Paul's appellate brief emphasized instead the aspect of Alabama intestacy law (which governed distribution in the case) that defined David's heirs as including both the surviving spouse and the mother, without further definition of either term.[157] The retroactive application of *Obergefell* clarified only that David had a surviving spouse when he died, without disturbing the state intestacy rule effective at his death.[158] According to Paul, then, the

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153 *Reynoldsville Casket*, 514 US at 759.

154 See id at 757 ("[T]he Ohio Supreme Court did not rest its holding upon a preexisting, separate rule of state law. . . . Rather, the maintenance of [the] action critically depends upon the continued application of the Ohio statute's 'tolling' principle—a principle that this Court has held unconstitutional.").

155 Fancher Brief at *24 (cited in note 19).

156 Id at *27–28, citing *Reynoldsville Casket*, 514 US at 759.

157 Brief of Appellee, *Hard v Fancher*, No 15-13836, *30, 33 (11th Cir filed Nov 5, 2015) (available on Westlaw at 2015 WL 6854333) ("Hard Brief").

158 Id at *30–32.

state intestacy rule did not operate as a previously existing, independent legal basis for denying relief.[159] The briefs' arguments seemed to suggest that the outcome of the case would eventually rest on the interpretation of the relevant Alabama state law, over which the Supreme Court of Alabama has the ultimate authority.[160]

There was a possibility, however, that even if Pat's interpretation was correct, the Alabama early vesting rule would not have qualified under this exception. The early vesting rule essentially dictates a temporal choice of law and, therefore, is *not* a rule "having nothing to do with retroactivity."[161] In other words, even if the Eleventh Circuit had decided the case on retroactivity grounds, rather than on mootness grounds,[162] Pat might still have lost. In terms of protecting reliance interests and reasonable expectations, this might not have been an entirely unfair result. After all, David's death was a sudden and tragic accident, and Pat had little reliance interest in the proceeds of the wrongful death action.[163]

Arguably, Mark, the buyer of a same-sex couple's homestead, would have a more significant reliance interest than Pat had. Yet it is unclear that the preexisting state legal ground exception would fare any better for him than for Pat. The Court hinted in *Reynoldsville Casket* that a qualified rule under this exception could be "a rule containing certain *procedural* requirements for any [similar] suit."[164] As illustrated above, a potential rule also has to be constitutional, and therefore cannot be the marriage nonrecognition rule. And it has to be independent, that is, "having nothing to do with retroactivity,"[165] and therefore cannot be any rule that freezes parties' property rights under state law at a particular moment. Apart from a statute of limitations, which is explicitly listed as a qualified rule under this exception in *Reynoldsville Casket*,[166] it is difficult to imagine another rule that would be generally applicable to a typical property transaction like Mark's.

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159 Id at *33, citing *Reynoldsville Casket*, 514 US at 759.

160 See *Pacific Gas & Electric Co v Police Court of City of Sacramento, California*, 251 US 22, 24–25 (1919) ("[This] is a question of purely state law which we may not review.").

161 *Reynoldsville Casket*, 514 US at 757.

162 *Hard*, 2016 WL 1579015 at *3–4.

163 See Hard Brief at *32–33 (cited in note 157).

164 See *Reynoldsville Casket*, 514 US at 756 (emphasis added).

165 Id at 757.

166 Id at 756–57.

In sum, although the preexisting legal ground exception looks promising at first as a means of protecting private parties' varying degrees of reliance interests,[167] its scope turns out to be extremely narrow. It only clearly embraces statutes of limitations and other generally applicable procedural barriers to bringing a suit. Besides, a qualified rule under this exception must be both constitutional and independent in the sense that it does not implicate retroactivity, therefore disqualifying any nonrecognition rule for same-sex marriages and any temporal choice-of-law rules in state law. Lastly, even when such a rule exists, the ultimate success of an argument relying on the rule will likely depend on the state supreme court's interpretation of state law.

C. Well-Established General Legal Rules Reflecting Reliance Interests and Significant Policy Justifications

In an oft-quoted[168] paragraph from his concurring opinion in *Reynoldsville Casket*, Justice Anthony Kennedy noted that he and Justice O'Connor "[did] not read [*Reynoldsville Casket*] to surrender in advance [the] authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions."[169] The Second Circuit,[170] a dissenting opinion in the Ninth Circuit,[171] the Supreme Court of Alabama,[172] and the DC Court of Appeals[173] have all suggested that *Reynoldsville Casket* leaves open this possibility.

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167 Compare Mark's case (a private transaction) with Pat's (a property distribution resulting from the operation of state law).

168 See, for example, Meir Katz, Note, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 Cardozo L Rev 1979, 1993 n 79 (2004); Brooke J. Egan, Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*: Title VII Punitive Damages after the Retroactivity Doctrine*, 74 Tulane L Rev 1557, 1559 (2000); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harv L Rev 1055, 1094 n 225 (1997).

169 *Reynoldsville Casket*, 514 US at 761 (Kennedy concurring in the judgment).

170 *Margo v Weiss*, 213 F3d 55, 60 n 2 (2d Cir 2000).

171 *United States v City of Tacoma, Washington*, 332 F3d 574, 583 (9th Cir 2003) (Ferguson dissenting) ("In particular, I believe that the presence of the following factors prohibits full retroactive application . . . in this case: (1) the presence of a novel decision regarding the statute, such that the City of Tacoma can claim 'justifiable reliance' on its earlier interpretation of the statute . . . .").

172 *South Central Bell Telephone Co v State*, 789 S2d 147, 151 n 10 (Ala 2000).

173 *Davis v Moore*, 772 A2d 204, 232 (DC 2001) ("Appellants are correct that the Supreme Court has left the door open to the possibility that it might declare a new rule of law to be purely prospective in effect even if it is not required by the Constitution to do so.").

On the other hand, *Reynoldsville Casket* itself emphasized that the *Chevron Oil* type of "simple reliance" is never enough.[174] A later Supreme Court case additionally affirmed that only "grave disruption or inequity" can justify invoking the reliance exception.[175] One example of a well-established general legal rule that qualifies under the reliance and policy justification exception is the qualified immunity rule.[176] In civil suits against government officials, the qualified immunity rule bars the retroactive application of a new rule holding a type of police action unconstitutional when "the new rule of law was not clearly established at the time of the [action]."[177] It does so to protect the police from civil liability for violating individuals' constitutional rights. The qualified immunity rule is justified on two significant policy grounds. First, it is necessary "lest threat of liability dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[178] Second, "it reflects the concern that *society as a whole*, without that immunity, would have to bear the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[179]

It is clear that the kind of reliance sufficient for qualified immunity is not the same kind of reliance sufficient for invoking the *Reynoldsville Casket* reliance exception. The reliance sufficient for qualified immunity is simpler than the *Chevron Oil* type, in the sense that proving the former is much easier than proving the latter: the former does not require more than a circuit split on a particular legal issue in a § 1983 action,[180] while the latter involves reliance on a well-established rule.[181] The example of qualified immunity instead indicates that in order to qualify for the

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174 *Reynoldsville Casket*, 514 US at 759.

175 *Ryder v United States*, 515 US 177, 184–85 (1995).

176 *Reynoldsville Casket*, 514 US at 757–58. For a general discussion of qualified immunity in the context of gun control and § 1983 claims against municipalities and state officials, see Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of* District of Columbia v. Heller *and* McDonald v. City of Chicago, 19 Va J Soc Pol & L 1, 48–55 (2011).

177 *Reynoldsville Casket*, 514 US at 757 (quotation marks omitted).

178 Id at 757–58 (quotation marks omitted and brackets in original).

179 Id at 758 (quotation marks omitted and emphasis added). See also *South Central Bell Telephone*, 789 S2d at 151 (noting *Reynoldsville Casket*'s requirement of "'significant policy justifications' . . . where burdens would fall on 'society as a whole' if the rule were otherwise").

180 *Wilson v Layne*, 526 US 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

181 In *Chevron Oil*, the plaintiff relied on the well-established admiralty laches doctrine, and did not invoke any significant policy justification beyond that. See note 66 and

Reynoldsville Casket exception, there must be some "significant policy justifications" *beyond* "reliance interests" (meaning the *Chevron Oil* type of "simple reliance").[182] Additionally, those justifications must affect the "society as a whole" in important aspects, such as by affecting the incentives to become responsible public officials.[183]

Apart from qualified immunity doctrine, the Supreme Court in *Reynoldsville Casket* did not give another example under this exception,[184] leaving one to wonder what else qualifies as "a well-established general legal rule that . . . reflects both reliance interests and other significant policy justifications."[185] In a closely analogous area, retroactive zoning regulation, there is one such candidate, the vested rights doctrine.[186] "In its most general form, the vested rights doctrine defines when, and under what circumstances, an incomplete project can count as an existing use."[187] The doctrine "assumes that if a right has vested . . . it is entitled to protection from the subsequently enacted land use regulations."[188] The majority rule in the states is a late vesting rule, whereby courts use a multifactor test to determine whether "the owner has made substantial expenditures in good faith reliance on the issuance of a building permit or other approval."[189] Some states use a minority "per se rule"[190] that "the [development] right vests when the party . . . applies for [a] building permit, if that permit is thereafter issued."[191]

Whichever vesting rule states have chosen in their common law, the same significant policy consideration underlies them: protecting reasonable expectations backed by some degree of quantifiable investment. Obviously, such a rule will protect the incentives for land and property development and transactions,

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accompanying text. This is the kind of "simple reliance" to which *Reynoldsville Casket* referred.

182 *Reynoldsville Casket*, 514 US at 759.

183 Id at 758.

184 See id at 757–58.

185 Id at 759 (emphasis omitted).

186 For a comparison of the vested rights doctrine and the estoppel doctrine in zoning, see Simon J. Elkharrat, Note, *But It Wasn't My Fault! The Scope of the Zoning Estoppel Doctrine*, 34 Cardozo L Rev 1999, 2004–16 (2013).

187 Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 NYU L Rev 1222, 1238 (2009).

188 Id.

189 Robert C. Ellickson, et al, *Land Use Controls: Cases and Materials* 216 (Aspen 4th ed 2013) (citations omitted).

190 Id at 216–17.

191 *Hull v Hunt*, 331 P2d 856, 859 (Wash 1958) (en banc).

which have a significant impact on the "society as a whole."[192] Even in an area such as zoning, in which balancing "the need for certainty [and] the need for change" is essential,[193] "[t]here is . . . a strong background rule running throughout the law of property that existing uses are entitled to protection from the government."[194] In the context of pre-*Obergefell* property transactions, the policy argument is even stronger. After all, a title to land based on a covenant valid at the time of transaction is the archetypal vested right; there are simply no further application steps or "substantial expenditures" to engage in.[195] Besides, the need for flexibility in land planning is nonexistent in the *Obergefell* context. The vested rights doctrine qualifies as "a well-established general legal rule that . . . reflects both reliance interests and other significant policy justifications."[196]

Given the inapplicability of the former two remedial exceptions to the typical property transaction scenario, this final remedial exception seems to be Mark's last hope for protecting his reliance interest.[197] Granted, if Mark's argument is only that he relied on the then-valid state law of nonrecognition when entering the purchase contract and, as a result, did not ask for consent from Margaret, he will not succeed. This is so even if he will be evicted from his home! Reasonable reliance on existing law plus grave *individual* suffering without resort to any remedy is exactly the kind of simple reliance *Reynoldsville Casket* rejected.

The vested rights doctrine, however, strongly supports protecting Mark's vested title. Apart from the reasons illustrated above, the vested rights doctrine applies even more forcefully here

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192 *Reynoldsville Casket*, 514 US at 758. See also, for example, Gershon Feder and David Feeny, *Land Tenure and Property Rights: Theory and Implications for Development Policy*, 5 World Bank Econ Rev 135, 135–36 (1991) (arguing that "land rights systems [have great impact] on incentives, uncertainty, and the operation of credit markets" and "property rights in land affect resource allocation in agriculture in developing countries").

193 Ellickson, et al, *Land Use Controls* at 216 (cited in note 189).

194 Serkin, 84 NYU L Rev at 1224 (cited in note 187) (observing that there is such a rule in current law, but arguing that there is no constitutional support for the rule and that existing uses in the land regulation context are overprotected). For an argument supporting the position that there is no *constitutional* protection for existing property rights in the context of retroactive application of *Obergefell*, see Part III.D.2.

195 Ellickson, et al, *Land Use Controls* at 216 (cited in note 189).

196 *Reynoldsville Casket*, 514 US at 759 (emphasis omitted).

197 The reliance and policy justification exception seems inapplicable to Pat's case, because she had barely any reliance interest. See text accompanying note 163. But it is possible that in other intestacy cases, in which property distributions result from the automatic operation of well-established state laws, there are sufficient reliance interests and significant policy justifications to qualify under this exception.

than in the land use context because of two other strong policy arguments beyond simple reliance. These policy arguments further justify applying the reliance exception to good-faith third parties like Mark in private property transactions before *Obergefell*. For one thing, depriving Mark of his title may increase transaction costs in real estate deals, especially those involving same-sex couples. That is, interested buyers may need to research the gender and marital status of the past owners. Arguably, the bona fide real-estate purchaser rule in force in some states[198] may accelerate the title-cleansing process, but there still may be more transaction costs. It is simply incorrect to argue that *Obergefell* settles the same-sex marriage issue once and for all and that future buyers will no longer have to exert more caution when dealing with same-sex couples living together.

Perhaps an even more significant policy concern in the long run is that transacting parties will constantly remain alert that the deal may be subject to voidance in the future by a new Supreme Court opinion. Disturbing past reliance interests in real property through retroactive application of a new rule will forever put society as a whole on alert. The creation or discovery of implied fundamental rights is still ongoing,[199] and the risk of future forfeiture of acquired property is greater given the lack of *constitutional* protection against retroactive judicial lawmaking affecting property interests.[200]

In conclusion, the third parties in pre-*Obergefell* property transactions who relied on the old nonrecognition rule should not

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[198] See, for example, 765 ILCS 5/30:

> All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record.

[199] For examples of two opposite views of the possible future development of "fundamental rights" in marriage, compare William Baude, *Is Polygamy Next?* (NY Times, July 21, 2015), online at http://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html (visited Jan 15, 2016) (Perma archive unavailable) (arguing that the logic of *Obergefell* suggests that there may be a fundamental right to polygamy, just like same-sex marriage), with Michael Cobb, *The Supreme Court's Lonely Hearts Club* (NY Times, June 30, 2015), online at http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html (visited May 2, 2016) (Perma archive unavailable) (questioning why single people's "dignity" does not justify their enjoyment of the same benefits—in health care, taxes, and estate planning—that married people enjoy).

[200] For further discussion of this point, see Part III.D.2.

be subject to the retroactive effect of *Obergefell*. They are protected by the vested rights doctrine under the reliance and policy justification remedial exception.

D. The Unavailability of Greater Protection: Refuting Two Theories

The analysis above shows that while the Remedial Exceptions Theory succeeds in providing a framework for limiting the retroactive effects of *Obergefell* in each of the three types of property cases, the limitation provided is quite narrow. The implied-fundamental-rights nature of *Obergefell* and the perceived notion of property protection at a constitutional level may naturally lead one instead toward the Warren Court Theory and the Constitutional Limits Theory. These two theories both provide greater protection for reliance interests than the Remedial Exceptions Theory. The rest of this Section shows that neither is viable under current Supreme Court jurisprudence, making the Remedial Exceptions Theory the only option for limiting the retroactive effect of *Obergefell* in property cases.

1. Implied fundamental rights and the Warren Court Theory.

The development of the retroactivity doctrine from *Linkletter* to *Reynoldsville Casket* tempts one to hypothesize that, in eras of explicit judicial activism and progressive expansion of rights, judges may be more willing to acknowledge that they are actually making laws.[201] During these periods, the technique of nonretroactivity is useful to protect reliance interests and to avoid administrative costs that may prove to be overwhelmingly burdensome. Once the dust settles, however, courts may revert to the tradition of retroactivity, which promotes fairness and consistency, especially in constitutional law. After all, if a previous violation is of a constitutional nature, it seems unfair and inconsistent to deny relief to some of those harmed by the violation, while vindicating others.

Obergefell can be distinguished from the Court's retroactivity jurisprudence of the past five decades in one important respect: it

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[201] See, for example, *Obergefell*, 135 S Ct at 2595–98 (documenting the changing definition of marriage in society and arguing that the law should keep up with social and cultural change).

is a case based primarily on implied fundamental rights of individuals under the Fourteenth Amendment's Due Process Clause,[202] while the previous civil cases concerned either statutes of limitations (*Chevron Oil* and *Reynoldsville Casket*) or tax refunds (*American Trucking*, *Beam*, and *Harper*).[203] Marriage is a status to which a great variety of rights and obligations are attached,[204] and the examples in the Introduction showcase several of the "myriad circumstances in which the question [of retroactivity] might arise."[205]

As O'Connor observed in *Beam*, "the broader the potential reach of a new rule, the greater the potential disruption of settled expectations."[206] While retroactive application to tax refund and statute of limitations cases may have a defined scope of disruptive effects (generally limited to the parties in the cases), retroactive application of *Obergefell* may disturb justified expectations of countless third parties. Such a great disruption caused by announcing new individual rights is familiar—the Warren Court era of expansion of criminal procedural rights, with the ensuing anxiety over the possibility of numerous legal prison breaks, is quite similar.[207] The Court in *Linkletter* resorted to nonretroactivity techniques to avoid such a significant disruption.

From the perspective of legal realism, it is not unfathomable that the justices today would repeat their predecessors' choices. Liberal justices have an incentive to keep a low-key attitude toward the application of such a groundbreaking decision to avoid strengthening its divisive effect, while conservative justices desire to do damage control for a decision that they do not like.[208] If one looks at the voting split in the previous retroactivity cases and the composition of the Court today, this possibility may seem even more plausible: at least three justices (Kennedy, Justice Stephen Breyer, and Justice Ruth Bader Ginsburg) would likely be in favor of some leeway in the full retroactivity rule, as shown in the majority opinion of *Reynoldsville Casket*.[209] The situation is

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202 See id at 2604–05.

203 See Part I.C.

204 See, for example, *Windsor*, 133 S Ct at 2683 (observing that the marriage definition in DOMA "control[led] over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law").

205 *Reynoldsville Casket*, 514 US at 761 (Kennedy concurring in the judgment).

206 *Beam*, 501 US at 552 (O'Connor dissenting).

207 See Part I.B.

208 See text accompanying note 41.

209 See text accompanying notes 106–12.

complicated in the wake of Justice Scalia's death, but arguably with one or two more votes, the silent return of *Linkletter* and *Chevron Oil* may be possible, even if the return is limited to *Obergefell* and future cases that involve the announcement of an implied fundamental right.

The analogy to the Warren Court era, however, is ultimately not viable. First of all, in *Loving v Virginia*,[210] a scenario very similar to the *Obergefell* problem, the new rule of allowing interracial marriage was applied retroactively to set aside convictions under miscegenation laws even on collateral attack.[211] This is significant given that this case was decided in the Warren Court era and after *Linkletter* was newly minted—in other words, when the Court was embracing the possibility of nonretroactivity. As Justice Harlan argued in his *Mackey v United States*[212] opinion, it is precisely because a new rule announces substantive due process rights that it should be given full retroactive effect to redress previous grave deprivations of fundamental constitutional rights.[213]

Second, analogizing the current situation to the Warren Court era blurs the line between criminal and civil cases and may in fact support retroactivity. *Griffith* reversed *Linkletter* because the policy considerations leaned toward individual liberty and away from governmental reliance interests.[214] A similar respect for fundamental individual liberty should therefore favor retroactive application of *Obergefell*. Moreover, in many cases, the remedy that the same-sex spouse seeks (such as being listed on the deceased partner's death certificate, like in *Obergefell* itself) can be fulfilled only by retroactive acknowledgement of the same-sex marriage. It is analogous to the criminal context, in which the

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210 388 US 1 (1967). This Comment's discussion of *Loving* is limited to the context of retroactivity of newly created implied fundamental rights in general. It does not touch on *Loving*'s reliance interest scenario, which is closely analogous to the *Obergefell* problem discussed in this Comment, for lack of relevant documented case law.

211 See *Loving*, 388 US at 12 (vacating the Lovings' convictions); *Mackey v United States*, 401 US 667, 692 & n 7 (1971) (Harlan concurring in the judgment in part and dissenting in part).

212 401 US 667 (1971).

213 See id at 692 (Harlan concurring in the judgment in part and dissenting in part) ("New 'substantive due process' rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing.") (citation omitted).

214 See text accompanying notes 83–84.

only remedies the defendant or petitioner seeks are release from prison and retroactive nullification of the conviction.[215]

Finally, even from the perspective of legal realism, this situation is not entirely analogous to the Warren Court dynamic. The current Court is not looking forward to creating a series of fundamental rights in the same area,[216] and thus the incentive either to remain low-key or to control damage may not be as strong as in the Warren Court era. The Warren Court Theory, which may provide the most limits to the retroactivity of *Obergefell*, is not viable.

2. The Constitutional Limits Theory: Constitutional limits to retroactive judicial deprivation of property interests.

Even if the *Harper* rule applies to implied-fundamental-rights cases in general, there may still be constitutional barriers to its application in cases that disturb established property rights. The Constitution, as interpreted by the Supreme Court, makes it almost impossible to strike down retroactive civil, economic legislation using rational basis review.[217] It is not entirely clear whether the usual constitutional weapons to protect property interests, such as the Contract Clause,[218] the Due Process Clause,[219] and the Takings Clause,[220] may operate to withhold *adjudicative* retroactivity in property cases. These provisions are perhaps not very effective.

First of all, the Contract Clause "received a near-fatal blow" in *Home Building & Loan Association v Blaisdell*,[221] "a controversial decision which upheld a temporary moratorium on the foreclosure of mortgages."[222] One scholar described that case as having

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215 See text accompanying notes 83–84.

216 Arguably, the next step might be the right to marry, for example, between first cousins or among more than two people. See, for example, Baude, *Is Polygamy Next?* (cited in note 199). But it is certainly different from the Warren Court's expansion of a series of rights that were of parallel importance and controversy. The barrier to expansion here is obviously much higher: gay marriage is perceived as considerably more different from polygamy than the right to free counsel is relative to the right to be informed of rights before custodial interrogation.

217 See generally Usman, 14 Nev L J at 63 (cited in note 143) (examining and rejecting the federal constitutional clauses as a possible restriction on retroactive civil legislation and proposing restrictions based on state constitutions).

218 US Const Art I, § 10, cl 1.

219 US Const Amend V; US Const Amend XIV, § 1.

220 US Const Amend V.

221 290 US 398 (1934).

222 James W. Ely Jr, *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 NYU J L & Liberty 370, 381 (2005).

"the effect of virtually gutting the Contract Clause."[223] The Clause has not been revived since, against the background of "the triumph of New Deal constitutionalism and the emergence of the regulatory state," which symbolized the Supreme Court's retreat from being a rigid guardian of private property against government regulation.[224] In any event, "[t]he Supreme Court has . . . consistently refus[ed] to [read the Clause to] constrain *judicial* decisions undermining contractual expectations."[225]

The Takings Clause of the Fifth Amendment seems a bit more promising. In *Stop the Beach Renourishment, Inc v Florida Department of Environmental Protection*,[226] Scalia, writing the plurality opinion, recognized the possibility of a judicial taking (that is, "a judicial decision that eliminates or substantially changes established property rights"[227]): "[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking."[228] Chief Justice John Roberts, Justice Thomas, and Justice Samuel Alito joined the part of the opinion recognizing a judicial taking.[229] Justice Stevens took no part in the decision, and the other four justices would have held that it was not necessary to decide the viability of judicial takings in this case,[230] with Kennedy, joined by Justice Sonia Sotomayor, strongly objecting to the possibility.[231] The legal status of judicial takings is thus unclear. At least one academic, cited by Kennedy in his concurring opinion,[232] observes that "courts [ ] view themselves as radically different from the other branches of government," and that "the Supreme Court is unlikely to apply the takings protections eagerly to judicial changes in property law."[233]

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223 Id at 382.

224 Id.

225 Barton H. Thompson Jr, *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 Stan L Rev 1373, 1375 (1992) (emphasis added).

226 560 US 702 (2010).

227 Id at 737 (Kennedy concurring in part and concurring in the judgment).

228 Id at 715 (Scalia) (plurality).

229 Id at 707 (Scalia) (plurality).

230 *Stop the Beach*, 560 US at 742 (Breyer concurring in part and concurring in the judgment) ("[T]he plurality unnecessarily addresses questions of constitutional law that are better left for another day.").

231 Id at 733–34 (Kennedy concurring in part and concurring in the judgment).

232 Id at 740 (Kennedy concurring in part and concurring in the judgment), citing Barton H. Thompson Jr, *Judicial Takings*, 76 Va L Rev 1449, 1515 (1990).

233 Thompson, 76 Va L Rev at 1541–42 (cited in note 232).

Even if judicial takings are possible, it is unclear what remedy can be rendered in the *Obergefell* context. In response to Kennedy's view that the only remedy in a takings case, judicial or otherwise, is "just compensation,"[234] Scalia replied that "[i]f [the Court] were to hold that the [lower court decision] had effected an uncompensated taking in the present case, . . . [the Court] would simply reverse the . . . judgment."[235] It seems unlikely that the Court would repeal either *Obergefell* or *Harper* to render a remedy for judicial takings, and it is unclear what judgment is left to be reversed.

The difficulty lies in an important distinction between the *Obergefell-Harper* regime and the judicial takings discussed in both Scalia's plurality and Kennedy's concurrence: neither *Obergefell* nor *Harper* is a direct change of property law, while the cases discussed in the *Stop the Beach* opinions are. Disturbing third-party property interests is a side effect, rather than a direct result, of the *Obergefell-Harper* regime.[236]

The distinction is vital. For instance, a prerequisite for applying the Takings Clause is that the complainant lawfully owns the property in the first place, which is also a prerequisite for the application of the Due Process Clause.[237] In the Amy and Margaret scenario described in the Introduction, if the retroactivity rule applies (which is not itself a change in the property rule), the transaction is invalid under previously existing state property law, and Mark never lawfully owned the house in the first place—there is no taking, and, for that matter, no due process violation.

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[234] *Stop the Beach*, 560 US at 740–41 (Kennedy concurring in part and concurring in the judgment).

[235] Id at 723 (Scalia) (plurality).

[236] *Stop the Beach* itself involved a state supreme court's decision to recharacterize certain littoral rights. See id at 712. Kennedy also highlighted the importance of "incremental modification under state [property] law":

> Consider the instance of litigation between two property owners to determine which one bears the liability and costs when a tree that stands on one property extends its roots in a way that damages adjacent property. If a court deems that, in light of increasing urbanization, the former rule for allocation of these costs should be changed, thus shifting the rights of the owners, it may well increase the value of one property and decrease the value of the other.

Id at 738 (Kennedy concurring in part and concurring in the judgment) (citation omitted).

[237] See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L Rev 885, 886–87 (2000) ("Starting in 1972 with its landmark decision in *Board of Regents v. Roth*, [ ] the Court has become increasingly insistent that persons seeking protection for economic interests under either the Due Process or Takings Clauses must establish they have 'property' if they are to avoid dismissal of their lawsuit.") (citation omitted).

Kennedy suggested in *Stop the Beach* that the Due Process Clause is a sufficient safeguard against judicial change of property law greater than the "the type of incremental modification under state common law that does not violate due process."[238] He pointed out that "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."[239] As illustrated above, however, the distinction between the *Obergefell-Harper* regime and the cases cited in *Stop the Beach*—and the difficulty that distinction creates—is equally applicable to the Due Process Clause argument.

Scalia pointed out that it is not clear whether, according to Kennedy, the procedural or the substantive facet of the Due Process Clause functions as a replacement for the Takings Clause.[240] If it is substantive due process, after *Lochner v New York*,[241] the Court has long held that "the 'liberties' protected by substantive due process do not include economic liberties."[242] The procedural due process case may be stronger, and may indeed be quite obvious. The difficulty here, however, is that the Court has never identified a due process limitation on *adjudicative* retroactivity, even when it could have in the *Chevron Oil* era of nonretroactivity.[243] In fact, as one scholar points out, "[t]hose Justices who defended adjudicative nonretroactivity based on considerations of fairness, notice, and reliance never argued that these factors were of constitutional magnitude."[244]

Besides, as discussed in Part III.D.1, the role of implied fundamental rights in *Obergefell*, a role which *is* of constitutional magnitude, actually supports a strong retroactivity rule. This, in turn, affects property interests. It is unclear that the procedural due process argument necessarily preempts the retroactivity rule in the *Obergefell* context, even if it does preempt the rule in other

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238 *Stop the Beach*, 560 US at 738 (Kennedy concurring in part and concurring in the judgment).

239 Id at 737 (Kennedy concurring in part and concurring in the judgment).

240 Id at 719 (Scalia) (plurality).

241 198 US 45 (1905).

242 *Stop the Beach*, 560 US at 721 (Scalia) (plurality).

243 Fisch, 110 Harv L Rev at 1075 (cited in note 168) ("Even when the experiment with prospective adjudication under the *Chevron Oil* test presented the opportunity for the Justices to use due process arguments in support of nonretroactivity, none did so.").

244 Id.

contexts in which a property interest would be deprived without prior notice.

It seems that the Constitution does not provide any clear limit to retroactive applications of *Obergefell* that might lead to property deprivation. In fact, according to several Supreme Court justices, a failure to apply the new rule retroactively contravenes the Constitution, specifically Article III.[245] The Constitutional Limits Theory thus does not provide a satisfactory basis for limiting the retroactivity of *Obergefell*.

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In sum, the only limitation to the retroactive effect of *Obergefell* is provided by the Remedial Exceptions Theory under certain particularized situations. It offers the most restricted legal protection of reliance and property interests of the three theories, and does not reach the level of constitutional protection. There is neither any viable constitutional limit to the retroactivity of *Obergefell* nor the possibility of a general revival of the Warren Court technique of nonretroactivity.

CONCLUSION

The release of the groundbreaking *Obergefell* decision calls for a reexamination of the Supreme Court's long-dormant retroactivity jurisprudence. The creation or declaration of an implied fundamental right to marry may have significant disruptive effects on third parties' reliance interests. This Comment concludes that *Obergefell* retroactively applies to all pending and future property cases even if the relevant transaction took place before *Obergefell*, except (1) when government agencies refuse to give the claimed benefits to both same-sex and opposite-sex married couples, (2) when such application is barred by the operation of a preexisting, independent state law that is itself constitutional and has nothing to do with retroactivity, or (3) when there is a disruption of important reliance interests coupled with significant policy justifications.

The first exception is available only to governments and inapplicable to situations involving private parties' reliance. The second is extremely narrow and most likely includes only general procedural bars to bringing suit, such as statutes of limitations.

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[245] See, for example, text accompanying notes 81–82 (discussing Scalia's opinion in *American Trucking*).

The third is available to protect private parties who entered into pre-*Obergefell* property transactions with a same-sex spouse, in reliance on the nonrecognition rule. None of the protections, however, is of constitutional magnitude, and they afford only narrow restrictions to the general rule of retroactivity under current Supreme Court jurisprudence.